

FRANCISCO REYES, PETITIONER, VS. MAJOR JUAN CRISOLOGO, PROVOST MARSHAL, MILITARY POLICE, PHILIPPINE ARMY, RESPONDENT.*G.R. No. L-54. September 27, 1945*

Ponente: PARAS, J.

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Francisco Reyes has instituted this original petition, praying for the issuance of the writ of habeas corpus on the alleged ground that, without having been charged with or convicted of any offense whatsoever, the said Francisco Reyes, who is a civilian and, therefore, beyond military jurisdiction, has been detained and imprisoned by the Provost Marshal of the Military Police, Philippine Army, at Camp Murphy, since August 30, 1945, and that the said Provost Marshal, notwithstanding the representations properly made by or on behalf of the said Francisco Reyes, has refused and still refuses to release the latter from such detention and imprisonment.

The respondent Provost Marshal, in his return, alleges that since August 31, 1945, or thereabouts, the petitioner, a first sergeant of the Philippine Army, has been committed to his custody upon a charge of desertion, in that the "said Francisco Reyes, while assigned to 'K' Company, 3rd Bn, 41st Infantry, 41st Division, deserted the service of the Philippine Army at Matabang, Abucay, Bataan, on or about the 31st day of December, 1941, and remained absent in desertion until he was apprehended on or about August 31, 1945."

On the other hand, the petitioner alleges that "he was properly discharged by his Commanding Officer on or about December 10, 1941, by virtue of an order to that effect dated about the 2nd of November, 1941, from Philippine Army Headquarters in Manila."

The decisive question that presents itself under the averments of the parties, is whether the petitioner had been discharged, as claimed by him, or is still a member of the Philippine Army, as contended by the respondent. We are of the opinion that said question, which is one of fact, should be raised before, and can better be determined by, the proper military court which, under the Articles of War (Commonwealth Act No. 408), has unquestionable jurisdiction over the serious military offense of desertion. Indeed, we cannot decide said factual issue without necessarily, touching the merits of the case for desertion, the claim that the petitioner had been discharged being a matter of defense. Even so, we shall presently make reference to certain details just to demonstrate that no prima facie case—which the petitioner is bound to show—has been established so as to even suggest that the military court has no jurisdiction or that petitioner's confinement is illegal for lack of due process. It is admitted that, notwithstanding the alleged discharge, the petitioner had remained with the Philippine forces in Bataan twenty-one days thereafter. According to Article of War 109, no enlisted man shall be discharged from the military service before his term has expired, except by order of the President, the Chief of Staff, or by sentence of a general court martial; and there is absolutely no documentary evidence in the record indicating that this requirement had been complied with. Upon the other hand, it is noteworthy that Article of War 71 provides, among other things, that "no charge will be referred for trial until after a thorough and impartial investigation

thereof shall have been made," and we have every reason to believe that the investigation had been convinced as to the sufficiency of the facts warranting at least the formulation and reference of the charge of desertion.

In this connection, it is likewise noteworthy that the military authorities had in this case strictly complied with the provisions of said Article of War 71 by taking the following steps: On July 26, 1945, an investigation was ordered. This was followed by the corresponding report submitted on August 11, 1945. On August 24, 1945, the Judge Advocate recommended that charges be filed. On August 31, 1945, the petitioner was apprehended. Soon thereafter, or on September 2, 1945, the Adjutant General ordered the filing of formal charges. A report was submitted to the Chief of Staff on September 8, 1945. The next day, September 9, 1945, formal charges were signed under oath by Lt. A. de la Cruz.

In view whereof, it cannot be seriously contended that the arrest and confinement of the petitioner are without any due process of law. But it is insisted on behalf of the petitioner that the presentation of the charge of desertion against him has been or is being unreasonably delayed to the detriment of his legal and constitutional rights. It is true that, under Article of War 71, charges against a person held for a trial by a general court martial should be forwarded within eight days, if practicable, after his arrest or confinement; but considering the explanation given by the respondent at the hearing of this case, we are not prepared to rule that there was such a delay as to make the detention and confinement of the petitioner illegal, specially in view of the uncontradicted circumstance that many officers or persons having knowledge of the charge are stationed in different parts of the Islands and that there are actually numerous cases pending investigation by the Army authorities. While this Court will not hesitate to grant without fear or favor, in clear cases of illegal confinement, the writ of habeas corpus, it will be cautious and slow in interfering with the official acts of another agency of the government in the absence of a showing that they are patently violative of the law or the Constitution. It is undoubtedly to forestall unavoidable situations that the requirement in said Article of War 71 is not absolute, and should be fulfilled only "if practicable." Moreover, if any one is in fact guilty of negligence or omission resulting in the alleged delay, he may be held accountable therefor also under Article of War 71.

Upon the whole, we are constrained to hold that the petition is without merit. The same will therefore be, as it is hereby, denied without special pronouncement as to costs. So ordered.

Moran, C. J., Jaranilla, De Joya, Pablo, and Hilado, JJ., concur.

CONCURRING

OZAETA, J.,

The facts are few and the issue is simple. We think the case does not furnish ample ground for the exuberance of the dissenting opinion, which consists of 42 pages; states repeatedly that "this Court decided to be lenient with respondent and harsh with the petitioner"; insinuates that the Court has sanctioned a continuous, flagrant violation of the Constitution by the Philippine Army; indirectly charges the undersigned and the writer of the majority opinion with consistency in voting to grant the writ in the Raquiza and Labrador cases and to deny it in the present case, claiming that "the only difference consists in the fact that in the Raquiza and Labrador cases the officers responsible of the wrongful deprivation of the liberty of the petitioners are Americans, while in the present case, they are Filipinos" insinuates that the Philippine Army was guilty of gross negligence and

inefficiency in not filing a formal complaint for desertion against the petitioner more promptly; quotes extensively from the cases of *Ex Parte Milligan* (18 Law. ed., 281), and *Johnson vs. Jones* (44 111., 142), in each of which a civilian accused of aiding the rebellion and convicted by a military commission was released on habeas corpus for lack of jurisdiction; and waxes eloquent on "Liberty or Death!" and on the tragic execution of Chief Justice Jose Abad Santos "in the field of a southern island, in the middle of towering columns and feathery palms of coconut groves, under the panoply of entrancing beauty of the Philippine sky." On the other hand the majority opinion of four pages is, we think, too laconic under the circumstances. To restore the sense of proportion and correct erroneous impressions, we are constrained to deliver this separate, modest opinion.

The petitioner Francisco Reyes was a reservist who was called to active duty as first sergeant of the Philippine Army in or before November, 1941. He admits that on December 31, 1941, he left his post of duty in Bataan and came to Manila together with his brother Lt. Fidel Reyes, and was unable to return there because the way was blocked by the enemy. On or about August 31, 1945, he and his said brother were arrested by the Provost Marshal of the Philippine Army and confined at Camp Murphy "pending final disposition of the charges against them for desertion." The order of confinement, dated August 31, 1945, was signed by Major Lope Quial, Assistant Adjutant General, by command of Major General Valdez. The legality of the arrest and detention of Lt. Fidel Reyes is not challenged by him or on his behalf before this Court.

His brother Francisco Reyes, however, challenges the jurisdiction of the military authorities over his person and the subject matter by alleging that before he left his post in Bataan on December 31, 1941, and since the 10th of the same month he had been discharged by his commanding officer by virtue of an order to that effect dated about the end of November, 1941, as shown by the affidavit of his brother Fidel Reyes, dated September 5, 1945, and annexed to his petition herein as Exhibit A. Said affidavit certifies that on or about December 10, 1941, as commanding officer of Company K, 41st Infantry Regiment, 41st Division, then stationed at Balayan, Batangas, the affiant discharged from the service First Sergeant Francisco Reyes of the said company as per order dated about the end of November, 1941 from Philippine Army headquarters in Manila. During and subsequent to the hearing the petitioner filed in this case the affidavit of Melchor de Leon, a member of the Philippine Army, to the effect that sometime during the year 1941 he remembered having come across some communications relating to the discharge of former First Sergeant Francisco Reyes; the affidavit of Graciano de la Cerna, another member of the Philippine Army, to the effect that "our former First Sgt. Francisco Reyes and other enlisted men were called at the Regimental Command Post at Balayan, Batangas, sometime between December 9 and 15, 1941, where they were informed of their discharge from the Army"; and the affidavit of Salvador Santos, another member of the Philippine Army, stating: "I remember that First Sgt. Francisco Reyes together with other enlisted men were discharged as per orders from the Headquarters in Manila. I came to learn of this at Balayan, Batangas, on or about 18th of December, 1941."

The return of the respondent Major Juan Crisologo, Provost Marshal of the Military Police, Camp Murphy, alleges among other things "that the said Francisco Reyes has never been discharged from the service of the Philippine Army from the date he was called into such service up to the present time by any competent authority." The record of the investigation conducted by the military authorities was presented to this Court during the hearing to enable the Court to determine whether or not the petitioner is being detained and deprived of his liberty without due process of law.

That question hinges on the factual and jurisdictional issue of whether or not the petitioner had been discharged from the Army before he left Bataan on December 31, 1941. If he had been discharged, he was no longer subject to military law and his detention should be declared illegal. If he had not been discharged, he was and still is a member of the Philippine Army amenable to the Articles of War (Commonwealth Act No. 408) and his detention

pending final disposition of the charge against him for desertion is lawful.

Almost immediately after his arrest, that is to say, on August 31, 1945, Francisco Reyes was informed of the nature of the charge against him; namely, desertion, and he then and there testified under oath before Lt. Francisco Gomez of the Investigation Division. In answer to the question whether he had reported to any processing camp, he stated: "I purposely do not report because of the fact that I was already discharged officially at Balayan, Batangas, about one day after our arrival where I was called in the Regtl CP accompanied by Regtl messenger or courier where I was explained of my discharge. The officers present were Col. Gallardo, Capt. Lutherback, Capt. Cruz and Dr. Dimayuga who explained the matter before the above officials referring to me." Interrogated as to how many were discharged on that particular date, he answered: "I do not remember how many of us but we were lined up single file when we were told we were discharged. The statement of the physician, Dr. Dimayuga, was this, 'Well, boys, I am very sorry that we received your order of discharge but you must remember that the transportation now is difficult and not only that also your food, you may not have anything to eat in your place when you go home so you might as well voluntarily help me in the Medical Unit as boy.' " Towards the end of his testimony he was asked whether he desired to have additional witnesses called in his behalf, to which he replied: "I do not know of any witness except Col. Gallardo, Capt. Salacop, Gen. Valdez, Capt. Lutherback, Capt. Cruz, Lt. Bayhon, and Lt. Dimayuga."

Thereafter and on the same day Lt. Wenceslao D. Bayhon, Lt. Alfredo M. Dimayuga, and Lt. Ramon Diaz were successively called by and testified before the same investigator. Lieutenant Bayhon testified under oath among other things as follows:

"Q. At the outbreak of the war on 8 December 1941, were you already in the service of the PA?—A. Yes, sir.

"Q. Where were you assigned during the outbreak of the war?—A. I was Adjutant, 41st Inf., then stationed at Tres Cruces, Cavite, but was transferred to Balayan, Batangas, on 8 December 1941.

"Q. How long were you adjutant of the 41st Inf.?—A. I was Adjutant from 2 September 1941 to about 29 December 1941.

"Q. As an Adjutant have you come across any discharge papers of first Sgt. Francisco Reyes?—A. No, sir.

"Q. In all your time as Adjutant of the 41st Inf. Regt., upon receipt of order from higher Headquarter, do you transmit it to lower echelon verbally or in writing?—A. In writing¹.

"Q. In other words, in case of discharge of any soldier, officers or EM, do you transmit it to the lower echelon always in writing?— A. My practice has been to send such orders or communications to the lower echelon by indorsement."

Lieutenant Dimayuga testified under oath among other things as follows:

"Q. Where were you assigned at the outbreak of the war and what position did you occupy ?—A. From 8 December 1941 up to 24th midnight December 1941, I was at Balayan and Tuy sector; then from the midnight of 24 December 1941 we left the place and proceeded to Bataan. I was then acting as Bn. Surgeon of the 3rd Bn., 41st Inf. Regt., 41st Div.

* * * * *

"Q. Have you ever acted upon the discharge papers of first Sgt. Francisco Reyes of 'K' Co., 3rd Bn.} 41st Inf. Regiment?—A. No."

Lieutenant Diaz testified under oath among other things as follows:

"Q. As Battalion Adjutant, have you come across any discharge papers particularly that of first Sgt. Francisco

Reyes of 'K' Co., 3rd Bn.—A. Ever since September 1941, I remember that first Sgt. Francisco Reyes of our 'K.' Co., had been applying for discharge due to hernia or something like that but we never received any orders approving or ordering his discharge."

Thus it will be seen that the officers of the Army whose duties placed them in a position to know whether the petitioner was discharged or not, and who were mentioned by the petitioner himself in his testimony among the witnesses who could testify as to his alleged discharge, all disproved the petitioner's assertion. However, the Army's investigation has not been completed; some of the witnesses mentioned by the petitioner have not been heard.

Upon the evidence before it this Court cannot see its way clear to sustain the petitioner's pretension and to find that the military tribunal before whom he is due for trial on the charge of desertion has no jurisdiction over his person and the subject matter. We make no definite finding that the petitioner was not discharged from the Army as claimed by Mm. That has to be determined by the military tribunal after hearing all the witnesses for both parties. We limit ourselves to the pronouncement that the petitioner has not discharged the burden on him of proving that he is no longer a person subject to military law.

Even dissenting opinion does not find that the petitioner has been discharged. It is based solely on the assumption that the petitioner is being detained without due process of law. But "what is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process." (12 Am. Jur., Const. Law, sec. 578.) The law governing this case is Commonwealth Act No. 408, known as the Articles of War. Under article 2 all reservists, from the dates of their call to active duty, are subject to military law. That law provides for courts martial to try and sentence persons subject to military law. It defines and penalizes military offenses and provides the procedure for their punishment. Article 59 provides that any person subject to military law who deserts or attempts to desert the service of the Philippine Army shall, if the offense be committed in war time, suffer death or such other punishment as a court martial may direct, and, if the offense be committed at any other time, any punishment excepting death that a court martial may direct. Article 70 provides that any person subject to military law charged with a crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require, and that any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. It is under this article, in relation to article 59, that the herein petitioner is placed in arrest.

The dissent is laboring under the misapprehension that the failure of the Army authorities to file promptly a formal charge against the petitioner after his arrest constitutes a violation of the Constitution regarding due process. But due process does not mean haste, nor is it synonymous with speedy disposition of the case. It means process within and according to law. It requires that the accused be given an opportunity to be heard and present witnesses in his defense before he is sentenced. That has been and is being done by the Army authorities in this case in accordance with articles 70 and 71 of the Articles of War. The exuberant dissent does not undertake to show in what way the Constitution has been "continuously and flagrantly violated." Instead, it barks up the wrong tree by discoursing upon other matters outside the issue of the case, including, for instance, the atomic bomb.

In believing that the Court has been lenient to the respondent and harsh to the petitioner, the dissent mentions a first, a second, and a third hearing in this case, intimating that the last two were unnecessary but were held to favor the respondent. There was no such thing. There was only one hearing which was continued from day to day to arrive at the truth by giving both parties ample opportunity to be heard. As a matter of fact, even after the hearing was closed on September 12, 1945 the petitioner asked and was allowed twice to present two additional affidavits on September 14 and 19, respectively. Was that harsh to him?

The difference of race noted by the dissent between the Raquiza case and the present case is impertinent and unworthy of notice. What is pertinent and decisive but which the dissent fails to notice is that in the Raquiza case there was, in the opinion of the dissenters, want of due process of law, which is not wanting in the present case.

The criticism of the dissent against the efficiency of the Philippine Army is, in our opinion, not warranted by the facts and circumstances of the case. The records before us disclose that the delay in the filing of a formal charge against the petitioner was not due to negligence or inefficiency but to the desire of the Army authorities to investigate all available witnesses, including those mentioned by the accused in his favor, before he should be court-martialed. The delay was not to his prejudice but rather to his benefit, for he was thereby given ample opportunity to be heard before sentence could be passed on him—all in consonance with the requirements of due process of law.

Lastly, let us observe here that even granting for the sake of argument that the delay in the filing of a formal charge against the petitioner constituted an infringement of his constitutional right to due process of law, as the dissenting opinion seems to hold, and that because of such delay alone the writ should be granted and the petitioner discharged from custody, still he could be rearrested the next day, the next hour, or even the next minute by order of the General Court Martial for the military crime of desertion. Section 17 of Rule 102 of the Rules of Court provides that a person who is set at liberty upon a writ of habeas corpus shall not be again imprisoned for the same offense unless by the lawful order or process of a court having jurisdiction of the cause or offenses. The dissenting opinion itself admits that the question of whether or not the petitioner is guilty of desertion "must be considered and decided by the proper tribunal in the proper case." There is no question that the proper tribunal is the general court martial and that the proper case is the very one by reason of which the petitioner is placed in arrest. So after all, of what avail would the issuance of the writ have been to the petitioner, if the minute after he were released he could be rearrested?

Feria, J., I concur in the foregoing opinion.

DISSENTING

PERFECTO, J.,

Petitioner Francisco Reyes is praying that he be restored to his liberty.

He alleges that since August 30, 1945, he has been unlawfully detained and imprisoned by Major Crisologo, Provost Marshal of the Military Police, Philippine Army, at Camp Murphy; that he has not been charged, prosecuted, or convicted by any officer, judge or court whatsoever, or by any person authorized by law to render judgment for any offense; that he believes that the reason for his detention is that he has allegedly deserted from the Philippine Army when, in fact, he was properly discharged by his Commanding Officer on December 10, 1941, by virtue of an order to that effect, dated about the end of November of said year, from Philippine Army headquarters in Manila; that he has demanded his immediate release, but refused, and attempted by all means available to him to secure a copy of any charge, if ever there is any, but was unable to do so; that because he is a civilian and not an enlisted man, any further delay in his release from said illegal detention, is to give violence to his constitutional rights.

The respondent was ordered to show cause why the petition should not be granted, and the hearing of this case has

been set on Monday, September 10, 1945, at 10 a. m.

As the respondent did not file any return or show up at said hearing, this Court postponed the hearing until the next morning, ordering at the same time the respondent to appear, bringing with him the body of the petitioner, and to show cause why he should not be punished for contempt, for failing to comply with the first order of this Court.

At the hearing set on September 11, 1945, the respondent appeared with Captain Nave, who brought with him the person of the petitioner.

The respondent, besides showing a sample copy of a commitment signed by Major Lope Quial, to the effect that Francisco Reyes be detained pending proposal of a charge for desertion, could not give any information as to the grounds for the restraint of the petitioner, or as to whether any formal charge has been filed against the petitioner or he is subject to any court martial proceedings.

Captain Nave was also questioned, but he could not furnish any information that can enlighten this Court as to the reason for the detention of the petitioner.

Answering to questions propounded by members of this Court, Francisco Reyes stated that, due to physical inability, which he is still suffering, he requested to be relieved from the Army service since September, 1941, and that he was discharged on December 10 of said year at Balayan, Batangas, but at the end of said month he went to Bataan to follow his brother Fidel Reyes, who was Commanding Officer of Company K, 41st Inf. Regiment, 41st Div.; that they came back days later, and at daybreak on January 1, 1942, when they were intending to return to Bataan, they were unable to go through in view of the appearance of enemy forces.

In order to get more information, this Court had suspended the hearing several times to allow Major Lope Quial to appear, and to verify whether any formal charge has been filed against the petitioner.

Major Quial stated, when he appeared before this Court, that he issued the order of commitment as a result of an investigation and that instructions had been issued in order that formal charges be filed against the petitioner, but he has no knowledge of any charge filed so far.

The confidential report rendered as a result of the investigation is dated August 11, 1945, and it therein appears that Francisco Reyes was not present during the investigation. He was not even contacted by the investigators.

Major Crisologo and Major Quial were instructed to communicate with Army headquarters to inquire whether any charge has been filed against Francisco Reyes, and both informed the Court that no paper has been located in the Army offices to show that charges had been filed.

We believe that, under these circumstances, the petitioner is entitled to be immediately released, as his detention is not based on any, legal ground.

In fact, even after the first hearing, we were already of the opinion that the order of release should be immediately issued, it appearing clearly that petitioner was deprived of his liberty without due process of law, in open defiance of the Constitution.

It must be remembered that at the first hearing, respondent did not appear either personally or through somebody else; failed to file the return ordered by this Court, for which reasons he was later ordered to show cause why he should not be punished for contempt; and did not make any answer or any showing as to the reasons and circumstances of the detention of the petitioner.

But instead of ordering the immediate release of the petitioner, when the further illegal detention of the same must

not be tolerated, if our Constitution must be complied with, this Court decided to be lenient with respondent and harsh with the petitioner, by giving the respondent another opportunity in another hearing, which was set for September 11, 1945.

In this second hearing, as we have seen, it also appeared very plainly that there was, that there is no legal justification for restraining the liberty of the petitioner. So we moved that redress be granted as prayed for in the petition, and the petitioner be immediately set free.

A majority of the Court thought wise to, once more, be lenient with the respondent, and, once more, harsh with the petitioner, by ordering another hearing, the third one, and granting the respondent further opportunity to file a return.

The third hearing was set for September 12, 1945.

On said day Major Aranas appeared, gave information, argued, and at the same time filed a return in behalf of the respondent, stating that formal charges were prepared on September 9, 1945, which will be formally presented if and when duly approved by the proper officer. The draft of said formal charges was presented as an appendix of the return.

We notice that, although said draft of formal charges is dated September 9, 1945, the figure "9" appears in the return superimposed upon an erasure in the paper, where the traces of figure "11" are left. Of the erased figure, the first figure "1" can still be clearly read to the effect that, it seems, the real figure in the paper is "19," although figure "1" is somewhat blurred.

We have examined the carbon copy served on the attorneys of petitioner, and said copy bears exactly the same appearance of the original draft as to the date of the document, superimposed on the erased figure formerly written on the paper.

What we happened to note as to the date of the draft of formal charges led us to justify the assumption that, as a matter of fact, the draft of formal charges was not prepared on September 9, as alleged in the return, but on September 11, most probably after the hearing of this case which took place on the same date.

The above-mentioned assumption compels us to conclude that said draft was presented to us to make us believe that, even before the hearings of this case on the 10th and 11th of September, definite steps have been taken for the filing of formal charges before a court martial against petitioner.

We cannot refrain from deploring the unfortunate means employed to make us appear that further detention of the petitioner is in some way justified. We cannot countenance any attempt at misrepresentation in a judicial case, especially of such importance as is inherent in all cases where personal freedom, constitutionally guaranteed, is at stake.

We shall be the last to allow desertion unpunished. Much less when desertion is committed at a time when the territory, integrity and the national freedom of the Fatherland are threatened by the hordes of an invading army. The dereliction of duty and cowardice shown by the deserter under such circumstances is a crime so heinous as flagrant treason itself. A deserter forfeits even the fundamental right to live in the country he betrayed. He is shunned by his country and by the rest of the world as a social outcast.

It is better for him to enjoy an eternal peace than to face the universal despoise which will hang on him for the rest of his life. The stigma of a political pariah shall brand his forehead forever.

But the question here is not whether desertion should be left unpunished or not, which question must be considered and decided by the proper tribunal in the proper case, but whether a Filipino citizen is being deprived

of his liberty without due process of law. Liberty is a fundamental human right of paramount import, not only to the individual but also to the body politic. No country can face the world with dignity if the liberty of their citizens is jeopardized. No nation is free if their citizens are not free. "Give me liberty or give me death," clamored Patrick Henry, voicing the quintessence of human aspirations, the synthesis of the aims in life of all men, women, and children, and of all countries who want to enjoy a life of honor and dignity in the concert of nations.

In the present case, the constitutional mandate that no person shall be deprived of his liberty without due process of law has been continuously flagrantly violated. The petitioner is deprived of his personal freedom without any process at all. No formal charges having been presented so far, which is the initial step in a desertion case, there is no process that justifies the undue and illegal restraint of the petitioner.

There is no use alleging that the initial step for the proper process against the petitioner might be taken within a few days or a week. It is the question whether a given principle must be maintained, and whether we should obey and give full effect to what is expressly provided in the Constitution. Shall we, or shall we not obey the Constitution?

From the viewpoint of our official duty, we cannot conceive of any possible answer. We must obey the Constitution.

The petitioner is being held for alleged desertion, but no formal complaint has been filed so far against him, notwithstanding the fact that about twenty days before his arrest an investigation has been completed, and, as a result of it, a report submitted asserting that he is guilty and must be prosecuted.

Is this enough to justify his apprehension and detention?

The Supreme Court of the United States of America, in the leading case of *Ex Parte Milligan* (4 Wall., 2; 18 Law. ed., 281), applied the writ of habeas corpus to order the release of a person found guilty of aiding the rebellion and sentenced by a military court to be hanged. That is, notwithstanding the fact that the guilt of said person has been proven conclusively while in the present case not even a complaint has been filed.

Milligan was a citizen and resident of Indiana, which was not one of the rebellious States during the American Civil War. Charged with aiding the rebellion, he was arrested by order of the commander of the military district of Indiana, tried by a military commission organized under the direction of said commander, was found guilty, and was sentenced to be hanged.

Milligan sued out a writ of habeas corpus in the district court of Indiana, and the case was certified to the Federal Supreme Court. The Supreme Court issued the writ, holding that upon these facts neither the military commander nor the military commission had authority or jurisdiction to order Milligan's arrest, or to try and sentence him, as Milligan not being a member of the armed forces, the offense charged against him was triable by the civil courts of Indiana. The court said:

"Every trial involves the exercise of judicial power; and from what source did the Military Commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it 'in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish/ and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be held as a source of jurisdiction.'

"But it is said that the jurisdiction is complete under the laws and usages of war.

"It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in state, which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in no wise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed judges appointed during good behavior."

The court then inquired why Milligan was not proceeded against in the circuit court of Indiana, saying:

"Why was he not delivered to the circuit court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offenses charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the circuit court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a Marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offenses, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection/ the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended."

It then proceeded to say that while members of the armed forces might, with propriety, be swiftly dealt with under the military law, no such power exists in respect of other persons.

"The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.

All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity."

It concluded its discussion by saying:

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of actual military 'Operations, where, war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is

continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity, in one state, when, in another, it would be 'mere lawless violence.'" (Italics ours.)

Another leading case is *Johnson vs. Jones* ([1867], 44 111., 142; 92 Am. Dec, 159). In 1862, during the Civil War, Johnson, a resident of Illinois, was arrested by the defendant Jones, a United States Marshal, and by his deputies the other defendants, and was confined in military prisons in New York and Delaware, under an order of the President of the United States issued on the ground that Johnson was "in full sympathy with the rebels, and rendering them his moral, co-operation and aid." It was urged for the defendants that plaintiff was a war prisoner and his case could therefore be decided by the army. This contention was rejected by the court, on the authority of the *Milligan* case, *supra*.

The court said, among other things:

"It cannot be denied that when this plaintiff was arrested without writ or warrant, and conveyed by the Marshal to the city of New York, and there delivered, not into the custody of the law upon a criminal charge, but to a military officer, to be imprisoned in a military fortress, without judicial investigation and without even the charge of crime, the letter and the spirit of all the foregoing provisions of the Constitution were plainly violated, unless under the state of facts set forth in the pleas their operation as to the plaintiff had been temporarily suspended. Was such the fact? On the answer to this question must depend the decision of this case.

"It is urged by the counsel for the defendant that, although the government cannot lawfully make an arrest of this character in time of peace, the power is necessarily incident to a period of war when exercised in regard to those who are giving aid and comfort to the enemy. The argument, briefly stated, is as follows: The facts set up in the plea, and admitted by the demurrer, show that the plaintiff was co-operating with the rebels. The rebellion was more than an insurrection. It was a public war, as decided by the Supreme Court of the United States in the Prize Cases, reported in 2 Black, 635, at least after the passage of the act of Congress of July 13, 1861. Being a public war, the government could exercise both belligerent and sovereign rights. While the rebels did not cease to be rebels, they were at the same time public enemies, and the government had the right so to treat them, notwithstanding they were citizens of the United States. It could exercise against them as public enemies all the powers given or recognized by the laws of war; and if the plaintiff was co-operating with them in the manner stated in these pleas, he too was a public enemy, and liable, not merely to prosecution in the civil courts, but to be arrested and imprisoned by the military power as a prisoner of war or a belligerent.

"We have tried to state the argument of the defendants' counsel fairly. Its fallacy consists in the assumption that the plaintiff, by virtue of the facts alleged in the pleas, could be regarded as a belligerent in any such sense as to make him a prisoner of war.

"If the plaintiff was a belligerent, as insisted by the defendants' counsel, the order of the President was wholly unnecessary to authorize the arrest. Any soldier has the right, in time of war, to arrest a belligerent engaged in acts of hostility toward the government, and lodge him in the nearest military prison and to use such force as may be necessary for that purpose, even unto death. This is the law of war, to which the defendants appeal for their justification. Have counsel considered to what this theory of belligerency among our own citizens would have led if reduced to practical application in the late war?

"This (The *Milligan* decision) is decisive authority as to whether the plaintiff in the present case can be considered as having been arrested and imprisoned as a belligerent or prisoner of war. The principle, indeed,

had already been settled by the same court in the Prize Cases, above quoted, where they held that all persons residing in the rebel states, whose property might be used to support the hostile power, were liable to be treated as enemies without reference to their personal loyalty. This is the settled doctrine—that the status of any person as to the question of belligerency depends upon his citizenship or nationality. The late rebellion grew to such consistency and magnitude that our own as well as foreign governments recognized the people of the rebel states as belligerents, but the citizens and residents of a Northern State did not become a belligerent whatever may have been his sympathies, or however wicked his plots.

"So far, then, as it is sought to justify the arrest of the plaintiff by assuming that he was arrested as a belligerent and held as a prisoner of war, the argument is untenable. He was not a prisoner of war."

On the scope and limit of martial law, the court said:

"But beyond the enforcement of martial law on the actual field of military operations, which is the result of an overmastering necessity, and its establishment in districts which, though remote from the seat of war, are yet so far in sympathy with the public enemy as to obstruct the administration of the laws through the civil tribunals, and render a resort to military power a necessity as the only means of restraining disloyalty from overt acts, and preserving the authority of the government, we know of no ground upon which its exercise can be defended. It is the result of an absolute necessity during a period of war, and should terminate with the necessity itself. The doctrine that a state of war of itself suspends, at once and everywhere, the constitutional guaranties for liberty and property, finds no support in the Constitution, and is inconsistent with every principle of civil liberty and free government."

This case has never been reversed and that it is looked upon as leading case is shown by the fact that it is cited in American Jurisprudence. (11 Am. Jur., 653, 654.)

Ex-Associate Justice of the United States Supreme Court, R. B. Curtiss, wrote in 1862 ("Executive Power") :

"What, then is the commanding general's authority over the persons and property of citizen? I answer that over all persons enlisted in his forces he has military power and command; that over all persons and property within the sphere of his actual operations in the field he may lawfully exercise such constraint and control as the successful prosecution of his particular military enterprise may, in his honest judgment, absolutely require * * * .

"But when the military commander controls the persons or property of citizens who are beyond the sphere of his actual operations in the field, when he makes laws to govern their conduct, he becomes a legislator. * * * If he have the legislative power conferred on him by the people, it is well. If not he usurps it. He has no more lawful authority to hold all the citizens of the entire country, outside of the sphere of his actual operations on the field, amenable to his military edict, than he has to hold all the property of the country subject to his military requisition. He is not the military commander of the citizens of the United States, but of its soldiers." (Birkhimer, Military Government and Martial Law, 376, 377.)

As late as January of this year, it was said by a United States District Court, Sullivan, J., that:

"The military necessity for action taken in the theater of war will not ordinarily be inquired into by the courts, but outside the theater of war the President, as Commander in Chief, does not have unlimited power over the persons and property of citizens," (United States vs. Montgomery Ward and Co., Jan. 27, 1945; certiorari denied by U. S. Sup. Ct., Mar. 12, 1945; CCH War Law Service, par. 3707.)

The great principles of constitutional government vis- a-vis the war powers of the executive are summarized in American Jurisprudence in the following language:

"Public danger may warrant the substitution of executive process for judicial process, and a state may use its military power to put down an armed insurrection too strong to be controlled by the civil law, trial by the civil

courts, and the operation of the writ of habeas corpus should be read and interpreted so as to harmonize with the retention in the executive and legislative departments of power necessary to maintain the existence of such guaranties themselves. The fact that a military occupation of a territory, in a state of peace and order, differs radically from the prosecution of a war in the same territory, is well established. Martial law is operative only in such portions of the country as are actually in a state of war and continues only until pacification. Ordinarily, the entire country is in a state of peace, and, on extraordinary occasions calling for military operations, only small portions thereof become theaters of actual war. In these disturbed areas the paralyzed civil authority can neither enforce nor suspend the writ of habeas corpus, and it is powerless to try citizens for offenses or to sustain a relation of either supremacy or subordination to the military power, for in a practical sense it has ceased. But in all the undisturbed peaceable, and orderly sections, the constitutional guaranties are in actual operation and cannot be set aside." (11 Am. Jur., 653, 654.)

In the dark and hazy past, when liberty was struggling to obtain a foothold among the nations of the earth, the human principle underlying the great Writ of Habeas Corpus first saw the light of day and at once grappled with tyranny and oppression, then so prevalent in England, where a system of jurisprudence, though rude and rough, had done much to uphold the onward march of civilization. Pollock and Maitland in their splendid "History of English Law, Before the Time of Edward I," tell us that as early as 1187, A. D., "If a man was arrested he was usually replevied or mainprised: that is to say, he was set free as soon as sureties undertook or became bound for his appearance in court." Both Glanville and Bracton, England's earliest law writers, say, "If a man has been appealed or indicted of any felony, other than homicide, he is usually replevied." Thus it will be seen that the principle of liberty had early permeated the jurisprudence of that day and Pollock and Maitland in their history just cited, in describing the gradual development of law in England in the twelfth century, said: "Those famous words, HABEAS CORPUS, are making their way into divers writs, but for any habitual use of them for the purpose of investigating the cause of an imprisonment we must wait until a later time." Along about this period it became a very common occurrence for the king's justices, unquestionably out of consideration for the persistent grumbling of the masses, but apparently upon their own motion, to clean out the various prisons of the realm and many prisoners long held on frivolous charges, regained their liberty, and it grew more and more difficult to hold even the political offender on the mandate of the sovereign. This spirit of judicial resistance to royal tyranny, backed up by an even growing sentiment among the people favorable to justice and liberty gradually aroused the masses to a full realization of the suffering and oppression to which they had previously submitted, not even offering the slightest protest.

The twelfth century was the period which was noted for the greatest strides towards the "liberty of the subject," even-handed justice to all, without money, or price of favor and the adoption of a more humane policy towards those who were so unfortunate as to find themselves within the clutches of the law. In England the king's courts had been focused at Westminster by mandate of the sovereign himself and this great central judicial system had absolute control over the whole province of criminal justice. To appease the rising storm and to satisfy justice's demand infrequently a sheriff would be directed to send up prisoners to Westminster for trial. However, it was a common complaint that the legal cause of the "caption and detention" was not always promptly investigated by the courts. The king's court must not set itself up against the will of the king, this had been a judicial truism for so long a time that the liberty of the people had been entirely forgotten. The king's justices had always been his obedient servants, but the awakening came. In 1234, the first royal court of Westminster, through Justice William Raleigh, declared null and void the outlawry of Hubert de Baugh, which the king himself had specially commanded. His outlawry was adjudged to be wrong and unlawful by the court, over the protest of the sovereign, and De Baugh was released from imprisonment amid great public rejoicing. This signal victory of the law and its orderly administration over arbitrary power was a memorable event in the British Empire, second only to the great Magna Charta, and marked the very beginning of a new era in the courts, whereby they freed themselves and the

king's will no longer held in confinement those who were charged with violating the mandates of royalty. From thence on the king himself respected the majesty of the law.

The writ of Habeas Corpus so far as America is concerned antedates the Declaration of Independence, the Articles of Confederation and the Constitution of the United States, coming to said country from the venerable "Magna Charta," of A. D., 1215, and the grant of the common law to the colonies by the mother country "for us and our heirs forever." Inherent and everlasting the privilege of the writ stands "not to be suspended, unless in case of rebellion or invasion the public safety may require it."

In an opinion by Chief Justice Chase, the Supreme Court of the United States elaborately reviewed the history, purpose and nature of his great writ. Thus it is stated: "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom." In England, after a long struggle, it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679, 3 Brit. Stat. at 1397, 3 Hallam, Const. Hist. 19, "for the better securing the liberty of the subject," which, as Blackstone says, "is frequently considered as another Magna Charta." (3 Bl. Com., 135.)

It was brought to America by the colonists and claimed as among the immemorial rights descended to them from their ancestors. Naturally, therefore, when the confederated colonies became United States, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words: "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it."

"The terms of this provision necessarily imply judicial action. In England all the higher courts were open to applicant for the writ, and it is hardly supposable that under the new government, founded on more liberal ideas and principles, any court would be intentionally closed to them.

"We find accordingly, that the first congress under the Constitution, after denning by various sections of the Act of September 24, 1789, the jurisdiction of the district courts, the circuit courts and the Supreme Court in other cases, proceeded in the 14th section to enact 'that all the aforesaid mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' (1 Stat. at L., 81.) In the same section it was further provided: 'that either of the Justices of the Supreme Court as well as Judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of inquiry into the cause of commitment; provided that writs of habeas corpus shall in no case extend to prisoners in jail, unless they are in custody, under or by color of authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought before the court to testify.'

"That this court is one of the courts to which the power to issue writs of habeas corpus is expressly given by the terms of this section, has never been questioned. It would have been indeed a remarkable anomaly if this court, ordained by the Constitution for the exercise in the United States of the most important powers in civil cases, of all the highest courts of England, had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares these courts possess. But the power vested in this court is, in an important particular, unlike that possessed by the English courts. The jurisdiction of this court is conferred by the constitution and is appellate; whereas, that of the English courts, though declared and defined by statutes, is derived from the common law and its original.

"The intent in respect to the writ of habeas corpus is manifest; it is that every citizen may be protected by judicial action from unlawful imprisonment." (Ex parte Gerger, 8 Wall., 85; 19 Law. ed., 332.)

Thus it was expressed by another court, with respect to its use in the state courts: "Relief from illegal imprisonment by means of this remedial writ, is not the creature of any statute. The history of the writ is lost in antiquity. It was in use before Magna Charta, and comes to use as part of our inheritance from the mother country, and exists as a part of the common law of this state. It is intended and well adapted to effect the great object secured in England by Magna Charta, and made a part of our Constitution that no persons shall be deprived of his liberty 'without due process of law.' Whenever the virtue and applicability of the writ has been attacked or impugned, it has been defended and its vigor and efficiency reasserted, as the great bulwark of liberty." (People ex rel. Tweed vs. Liscomb, 60 N. Y. 559, 565; 19 Am. Rep., 211.)

The Federal Courts having no common-law jurisdiction, derive their power in respect to the writ, from the Constitution of the United States, and the laws passed in pursuance thereof, while the power is inherent in the state courts of original jurisdiction by virtue of the common law, preserved by the constitution of the states.

It is a prerogative writ, not ministerially issuable, that is not of course, and yet a writ of right on a proper foundation being made by proof. At common law it stood on the same footing with other prerogative writs, such as mandamus, quo warranto, certiorari, prohibition, etc., and was issued and dealt with upon the like general grounds and principles. Thus as to the affidavit and motion for allowance, the form of the writ, the return, the right to question the truth of the return, the right to amend, etc., the common-law doctrine respecting other prerogative writs is applied to the writ of habeas corpus, and may still be resorted to by way of throwing light on the rules relating to the latter.

The writ lies in all cases of imprisonment by commitment, detention, confinement or restraint for whatsoever cause or under whatever pretense. In this respect the statute and common law are the same.

The great object of the writ is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error to examine the legality of the commitment, detention or restraint; the proper remedy for all unlawful imprisonment both in civil and criminal cases; the remedy which the law gives for the enforcement of the civil right of personal liberty. While it becomes necessary oftentimes to resort to it, where enforcement of laws for the punishment of crime has been attempted, yet the proceeding under the writ is not to inquire into the criminal act which is complained of, but the right of liberty notwithstanding the act.

The rule is that a person restrained of his liberty is entitled as a matter of right to the writ, upon presentation to the proper officer or tribunal of his petition showing proper ground therefor.

True, it was held, where it was obvious that before a return to the writ could be made, or any other action taken, the restraint of which the petitioner complains, would have terminated, the court declined to grant leave to file the petition for a writ of habeas corpus and certiorari; the court stating: "It is well settled that this court will not proceed to adjudication where there is no subject matter upon which the judgment of the court can operate." (Ex parte Baez, 177 U. S., 378; 44 Law. ed., 813; 20 Sup. Ct. Rep., 673.)

However, it can be said, that such refusal was based upon the reason that sufficient grounds did not appear to justify the granting of the writ.

True, also, it was said, application for leave to file a petition for a writ of habeas corpus will be denied if it be apparent that the only result, if the writ were issued, would be remanding the prisoner.

This ruling was in effect that proper or sufficient grounds for issuing the writ did not appear.

In most of the American states, statutes have been enacted providing for heavy penalties in case any officer authorized to grant the writ, shall wilfully refuse to grant it.

The general rule is that in order to make a case for habeas corpus there must be actual confinement or the present means of enforcing it. Mere moral restraint is not sufficient.

Its purpose ordinarily is to enable the court to inquire first, if the petitioner (or some other person in certain cases) is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful it must then discharge the prisoner. It was said by Miller, J., in *Wales vs. Whitney* (114 U. S., 564, 571): "There is no very satisfactory definition to be found in the adjudged cases of the character of the restraint or imprisonment suffered by a party applying for the writ of habeas corpus which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief. Confinement under civil and criminal process may be so relieved; wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a mad house, as well as those under military control, may all become proper subjects of relief by the writ of habeas corpus. Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed." Something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it. What is meant by this expression is illustrated by the facts to which it was applied. A court martial was ordered to try a surgeon general of the navy after he had vacated that office under charges and specifications for conduct as chief of the bureau and surgeon general; and the Secretary of the Navy notified him thus: "You are placed under arrest, and you will confine yourself to in the limits of the City of Washington." "It was stated that it was evident that the petitioner was under no physical restraint. As a naval officer, the Secretary of the Navy could order him to remain at Washington., and he could not leave without obtaining a leave of absence. There was no more restraint of his personal liberty by the order of arrest than there was before. In cases of military officers, who are more or less at all times subject in their movements to the orders of their superior officers, it should be made clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ. The distinction was made in case of an officer with a writ in his hands for the-arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied. The officer has the authority to arrest and the power to enforce it. If the party named in the writ resists or attempts to resist, the officer can summon bystanders of his assistance, and may himself use personal violence. Here the force is imminent and the party is in presence of it. It is physical power which controls him, though not called into demonstrative action." (*Wales vs. Whitney*, 114 U. S., 564; 29 Law. ed., 277; 5 Sup. Ct. Rep., 1050.)

The expression first referred to is further illustrated by cases where parties under indictment have given bail for appearance to answer the indictment. They may be under moral restraint, but are not under such physical restraint that habeas corpus will lie.

In the last case cited it was said: "The sheriff did not restrain him, since he had admitted him to the benefits of the bonds; the doors of the jail were not closed upon him; and if he was detained, it was not by the sheriff or jailer. If his was a moral restraint it could not be an illegal one." All the provisions of legislative acts concerning this writ contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such person before the court or judge that, he may be liberated if no sufficient reason is shown to the contrary. In case of a person going at large with no one controlling or watching him or detaining him, his body cannot be produced by the person to whom the writ is directed, unless by consent of the alleged prisoner or by his capture and forcible production into the presence of the court.

The twenty-ninth chapter of Magna Charta says: "Ne corpus liberi hominis capiatur nee imprisonetur nee disseisietur nee utlagetur nee exuletur, nee aliquo modo destruat, nee rex eat vel mittat super cum vi, nisi per

judicium parium suorum, vel per legem terras." No freeman shall be taken or imprisoned or disseized or outlawed or banished, or any ways destroyed, nor will the king pass upon him, or commit him to prison, unless by the judgment of his peers, or the law of the land.

By this chapter "alone," says Sir William Blackstone, "would have merited the title that it bears of the Great Charter." (4 Bl. Com., 424.)

Justice Cooley, in his treatise on "Constitutional Limitations" (Chapter XI), expresses in this way: "The people of American States, holding the sovereignty in their own hands, have no occasion to exact pledges from any one for a due observance of individual rights; but the aggressive tendency of power is such, that they have deemed it of no small importance, that, in framing the instruments under which their governments are to be administered by their agents, they should repeat and re-enact this guaranty, and thereby adopt it as a principle of constitutional protection. In some form of words, it is to be found in each of the State constitutions; and though verbal differences appear in the several provisions, no chance in language, it is thought, has in any case been made with a view to essential change in legal effect; and the differences in phraseology will not, therefore, be of importance in our discussion. Indeed, the language employed is generally nearly identical, except that the phrase 'due process (or course) of law' is sometimes used, sometimes 'the law of the land,' and in some cases both; but the meaning is the same in every case. And, by the fourteenth amendment, the guaranty is now incorporated in the Constitution of the United States."

In the famous Dartmouth College Case, Webster gave the following often quoted definition: "By the law of the land, is most clearly intended, the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land." (Dartmouth College vs. Woodward, 4 Wheat., 519; Works of Webster, Vol. V.) Then the great American orator, lawyer and statesman proceeds: "If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law or to administer the justice of the country."

Mr. Justice Edwards has said: "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." (Westervelt vs. Gregg, 12 N. Y., 202, 209.) And Mr. Justice Johnson of the Supreme Court, of the United States: "As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice;" (Bank of Columbia vs. Okely, 4 Wheat, 235, 244.)

"A writ of habeas corpus is a writ of right of very ancient origin, and the preservation of its benefit is a matter of the highest importance to the people, and the regulations provided for its employment against an alleged unlawful restraint are not to be construed or applied with over technical nicety, and when ambiguous or doubtful should be interpreted liberally to promote the effectiveness of the proceeding." (Ware vs. Sanders, 146 Iowa, 233; 124 N. W., 958.)

Habeas corpus must be granted when one is detained under a defective commitment (Republic, etc. & Bynum,

Dallam [Tex.] 376; where force deprives one of his liberty (In re Baker, 29 How. Pr. [N. Y.], 485); where one is committed in default of giving" bail, by a Magistrate who has no authority to take bail (Com. vs. Ridgway, 2 Ashm. [Pa.], 247); where one has been committed or sentenced by a magistrate whose want of jurisdiction appears upon the face of the proceedings (Herrick vs. Smith, 1 Gray, 50; 61 Am. Dec, 381) ; where one has been held to answer for a crime without the necessary statutory conditions having been established against him (People vs. Lomax, 6 Abb. Pr. [N. Y.], 139); where the warrant of arrest was illegally served (Sanborn vs. Carleton, 15 Gray [Mass.], 538); where excessive bail having been required of him, he gives bail in a reasonable sum (Jones vs. Kelly, 17 Mass., 116).

In the case of Raquiza vs. Bradford (p. 50, ante) where this Court, by a majority opinion, denied the petition for a writ of habeas corpus, in a vigorous dissenting opinion, Mr. Justice Ozaeta, with the concurrence of Mr. Justice Paras, said the following:

"The right to due process of law is more than a prerogative. It is an immanent and inalienable right of every man, woman, and child living under a government of laws. It cannot be dispensed with or brushed aside either in time of war or in time of peace. In time of war martial law may be declared. But even under martial law appropriate tribunals such as courts-martial are set up to hear and decide the case before anybody can be punished."

Since Japan accepted the Potsdam allied declaration and signed at the Tokyo bay the document of formal unconditional surrender on September 2, 1945, said Justices and ourselves agreed in the proposition that war in the Philippines, in fact, in the whole world, has ended.

The situation in our country is one of peace and, therefore, there are no emergency nor extraordinary circumstances that might justify in not faithfully, scrupulously, and religiously upholding the constitutional guaranties for individual rights.

In another case recently decided by this Court (L-29), wherein the petition of Alejo Labrador, former member of the House of Representatives and former Judge of First Instance of the Commonwealth, to be released from an illegal detention was denied by a majority vote, as the circumstances were substantially identical to those pertaining to the Raquiza vs. Bradford case, Mr. Justice Ozaeta, Mr. Justice Paras and ourselves dissented also, because we were of the opinion that the petitioner was entitled to his immediate liberty, of which he was deprived without due process of law, in fact, without any legal process at all.

The fact that Labrador was wrongfully detained was recognized by the Commonwealth Government when, as soon as said petitioner was transferred from the American Army control to that of our civil government, the Commonwealth released him, without even requiring him to file any bond.

The present case of petitioner Francisco Reyes is substantially identical to the Raquiza and Labrador cases. In all three cases the victims suffered illegal detention without any complaint filed against them, without due process, without any process.

The only difference consists in the fact that in the Raquiza and Labrador cases the officers responsible for the wrongful deprivation of the liberty of the petitioners are Americans, while in the present case, they are Filipinos.

It is evident that whether the authors of the wrongful detention are Americans or Filipinos does not make any difference as to the legal question presented.

Wrong and right have no place of birth. Wrong and right are not distinguishable by reason of nationality. The flag under which they are done does not make wrong right, nor right wrong. Illegal detention, whether committed by this or that national, remains to be illegal until righted by the proper redress. A violation of the Constitution

continues to be a violation whether perpetrated by an American or by a Filipino.

In the question of personal freedom and the necessity of protecting it from official abuses, we stick to the principles and the philosophy espoused in our opinions in the case of *Raquiza vs. Bradford* (L-44).

The majority seems to rely more on the question as to whether there is or there is not a proper case of desertion against the petitioner, than on the question whether the petitioner is deprived of his liberty without due process of law.

Whether the petitioner is guilty or not the crime of desertion is not an issue in this habeas corpus case. This is not a case wherein we can investigate his guilt. This is not a criminal proceeding where the petitioner could be tried for the offense imputed to him. No complaint has been filed before us to justify our trying any offense.

Let us remember that this is a case of habeas corpus. It is a case where the main and only question is whether the petitioner should be freed or not, whether he is illegally detained, whether he is entitled to the constitutional guaranty that no person shall be deprived of his liberty without due process of law.

What we must determine, therefore, is whether there is due process for the detention of the petitioner.

The facts we have before us show conclusively that the petitioner is being deprived of his liberty, not only without due process of law, but without ANY PROCESS at all.

Suppose, instead of simply depriving the petitioner of his personal freedom, he is killed. Is there any due process, or any process at all, that in this case may justify the deprivation of his life?

Shall this Court acquit the authors of the homicide or assassination on the strength of the circumstances under which it denies the petitioner of his constitutional right to be free in the present case?

The majority tries to show that it is reasonable to presume that the investigation of the case of the petitioner had been satisfactory as to the sufficiency of the facts warranting at least the formulation and reference of the charges of desertion, but forgets that there are no formal charges filed so far and, therefore, there is not any process initiated to warrant the arrest of the petitioner. The draft of the complaint presented is yet to go through the long process of red tape before it can be filed, if the Chief of Staff approves its filing, as stated by Major Aranas.

The majority also tries to justify the violation of the precept in Article of War 71 to the effect that charges 'should, be forwarded, that is formally filed, within eight days after the arrest or confinement, by giving undue weight, to the additional testimony taken from several Army officers after the detention of the petitioner.

But the delay is absolutely unwarranted. In the report as to the result of the investigation it is stated that enough evidence was there at hand to show conclusively the guilt of the petitioner. The report is dated 11th of August, 1945.

From then on, very many days were at the disposal of the persons who have the duty of taking charge of the prosecution to file the formal complaint.

This could have been filed much before the arrest of the petitioner on: August 30, 1945, the real date of the arrest, as stated at the hearing by Major Aranas, and not August 31, as appears in the return.

How long does it take to prepare and file the complaint? Minutes? Hours? Days? Is one hour or even one day riot enough?

We cannot believe that the Philippine Army, from August 11, 1945, to the day of the last hearing of this case, more than one month later, that is, on September 12, 1945, was unable to attend to the simple matter of preparing

and filing a formal complaint for desertion, when the necessary evidence was already at hand.

It would be a terrible indictment of gross negligence and inefficiency for an official organization of our Government, precisely the same which, for reasons of efficiency, has to undergo an exceptional system of training and discipline.

If in the military service we cannot have efficiency, in what part of the Commonwealth Government can we expect any efficiency at all?

If in more than one month it cannot prepare and file a formal complaint for desertion, which is usually drafted by filing a printed form with a few typewritten lines and the signature of the accusing officer, as can be seen in the draft submitted to us with the return, what defense can our country expect from such organization in case of danger of a new invasion?

Whether the petitioner has been discharged, as claimed by him, or is still a member of the Philippine Army, as contended by the respondent, that is, whether the petitioner committed desertion or not, from the point of view of the majority is the "decisive question that presents itself under the averments of the parties."

And immediately adds: "We are of the opinion that said question, which is one of fact, should be raised before, and can better be determined by, the proper military court which, under the Articles of War (Commonwealth Act No. 408), has unquestionable jurisdiction over the serious military offense of desertion." Admitting that "we cannot decide said factual issue without necessarily touching the merits of the case for desertion."

The majority proceeds, notwithstanding, to consider and make pronouncements on the very merits of the alleged desertion and to decide the factual issue which from their very words, belongs properly to the jurisdiction of a military court.

Why this inconsistency? Simply because no chance has been given so far to a military court to take cognizance of the question, as a result of the complete absence of any process that could justify the arrest and confinement of the petitioner.

While we may satisfy ourselves that we are adhering strictly to our profession to be cautious and slow in interfering with the official acts of another agency of the Government, because there is no proceeding before any military court to be interfered with, as in this case no formal complaint has been filed, we cannot but confess that we are missing the real issue in this habeas corpus case by intruding in the military jurisdiction over the desertion case, which should properly be presented before a court martial, and by not putting aside completely the question as to whether the petitioner deserted or not, whether he was discharged or not, when the real question that we must answer is whether the petitioner is being deprived of his liberty without due process of law.

"No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the law." (Sec. 1 [1], Art. III, Constitution of the Philippines.)

The petitioner is a person. He has been deprived of his liberty since August 30, 1945, that is for two weeks already. The deprivation of liberty has been done without due process of law. Without any process of law.

Here we have a clear, undisputable, flagrant violation of the Constitution.

It is unbelievable that such violation of the Constitution has been committed, is being committed by members of the Philippine Army, whose gallant soldiers fought in thousands of fronts of heroic (battle, in Bataan and Corregidor, to , keep burning in our land the faith in the great democratic ideals, among them, personal liberty. It is unbelievable that after the hour of liberation, what the hated Japanese kempei did could be wantonly repeated under the shadows of the American and Filipino flags. It is unbelievable that these flags could not now offer the

protection that we have always expected, whenever a fundamental human right was in danger.

Shall we believe that the dreadful shadows of the Fort Santiago Kempeis are still haunting us with irretrievable tenacity? Shall we believe that the liberation which was accomplished so spectacularly was just a beautiful dream, now replaced by the most horrible nightmare, which will : keep us constantly trembling for our precarious personal liberty, always exposed to be snatched from us by a Filipino version of the Japanese military police?

The victim of a flagrant violation of the Constitution comes to us for protection. The tribunals are the palladium of the civil liberties of the people. They are the sanctuary where the fundamental human rights are safeguarded. Shall we fail in the crucial hour of actual test? Shall we disappoint the unfortunate victim? This is the last asylum where the victim can resort to. Shall we reject him with freezing indifference? Here comes for salvation a drowning man. Shall we throw him to his doom? From the deepest bottom of our souls surges a powerful No, as an overpowering answer. No. We cannot do that. We must protect the victim. It is our unavoidable duty. It is an imperative mandate of the conscience.

No. One thousand times, no. We will not remain deaf and unmoved at the clamoring voice which, in the wilderness of injustice, is resounding with pathetic tragedy. We cannot deny our help to a citizen who, before our own eyes, is writhing under the shackles of an illegality. He is knocking at the doors of the temple of justice. Shall we let him remain under the rain and storm of iniquity? He is appealing to five decades of American democracy and Anglo Saxon law, to four centuries of Roman jurisprudence and Christian charity, to milleniums of oriental human understanding and Malayan heredity of fair play. We cannot be unfaithful to such magnificent traditions, the priceless spiritual and moral treasure of our people. We must keep them pure, untarnished, resplendent, for all generations to come.

If we allow unheeded the petition in this case, under the circumstances that depict an utter disregard of the constitutional mandate that no person shall be deprived of his liberty without due process of law, we will be sanctioning here the establishment of an army tyranny, flaunting the most sacred rights of our citizens. We had more than enough with the Japanese Army tyranny, and we faced all kind of hardships and sacrifices, we defied death, to overthrow it. At last we can breathe freely, because the American forces of liberation, the Filipino soldiers, our heroic guerrillas, were able to defeat it. Shall we permit that it be replaced by another tyranny, because the new tyrants are our countrymen? Never. All tyranny, shall always be hateful, without excluding a Filipino tyranny. Numerous pages of the history of the world are stained by the blood spilled in revolutions and rebellions against all tyranny, either from outsiders or from insiders. Let us avoid, by all possible means, the bitter experience of oppressed peoples. Let us wipe out all causes for popular unrest.

Soon our country will enjoy national independence. Soon under our sky we will have waving alone the flag of the free Republic of the Philippines. Let us endeavor to insure its stability, by eliminating all injustices and iniquities, all kinds of oppression and tyranny. To achieve that patriotic purpose, there is no better way than to uphold the Constitution, to obey the laws, to require all officials, civil and military, to stick to their duties, and to respect and' to protect the civil rights and freedom of the people.

In the present case we have the golden opportunity of rendering that national and human service. Let us not miss such opportunity.

Recent statements regarding the atomic bomb seem to cloud again the future of the world. One scientist said that, as the principles upon which it is based are universally known, eventually other countries will be able to manufacture the terrible weapon. And one of the scientist :who helped manufacture it in America said that there is no defense possible to shield a country against the atomic bomb. This might be correct from the physical or material view point. Therefore, it seems that mankind is doomed, there being an apparent agreement that with said

bomb it is possible to destroy all the inhabitants of the world.

But this pessimistic point of view does not take into consideration the force of right, the influence of justice in human actions. It is a point of view based on lack of faith in the ethical and juridical sense of humanity. Of course, if we have no dispense with all sense of right, with all principles of justice, then the collective doom of men will be inevitable, even without the atomic bomb or any other weapon of the same tremendous destructive force. But, fortunately, men still have faith in the principles of justice, and on that faith hinges the salvation of humanity.

When we were under the Japanese regime, no one dared to talk loudly with any Japanese, much less to show him any kind of opposition, even though to press a right. But the reign of terror disappeared. And, now, the humblest citizen may, freely and without any danger to his person and civil liberties, criticize the American Army, the strongest in the American and Asiatic continents, the American Navy, the greatest in all history, and the American Nation, the most powerful world power. Why is it that a single Japanese was more dreaded than the whole strength of America? Because the Japanese knows no right, while the Americans abide by law and justice. An ideological chasm of ethical character is the one that establishes the difference among both situations. That is, law and justice, when duly acknowledged, are strong enough to control the greatest power imaginable. Law and justice are therefore the hope of our people, of all peoples, of all mankind. Our salvation and the salvation of all men depend on law and justice, and law and justice in the service of fundamental human rights, among them, personal freedom.

Nobody will fail to notice that we are the lone dissenters in the decision of this case. It is not the first time that we are occupying the position of a minority of one. Almost one-fourth of a century ago we were a minority of one in proposing the adoption of Tagalog as our national language, of a system of national defense, of an elective mayor for Manila, and other ideas which later were concurred in by the majority of our people. In this case we are just complying with our sworn duty to do what we believe is right. We are adhering to our moral, legal and political philosophy. In this autumn of our life, it is too late to reverse the philosophy of a life-time. We have been always of the opinion that consistency and deep-rooted convictions are indispensable in public life. It is one of the fundamental tenets of our political creed.

In the matter of unswerving loyalty to personal conviction, of unbreakable faith in high principles, of steadfast consistency of moral and patriotic conduct, this Supreme Court is not lacking of an outstanding precedent to follow. Chief Justice Jose Abad Santos, when submitted to the supreme test, unflinchingly chose death instead of a life preserved to help the machiavelic plans of the enemy. He preferred eternal peace to an unhappy conscience. When the Japanese executioner announced that he will be killed soon, because of his refusal to collaborate, the judicial patriot and martyr accepted his fate with socratic smile, in the true Biala tradition. With sublime serenity he consoled his tearful son by saying that to many, seeking it, is denied the glory of dying for the Fatherland. He spoke with the wisdom of a prophet who auscults the mysteries, of the future, and the future presented to our country, as a magnificent revelation, the gigantic moral figure of a new Malayan hero under the iridescent rainbow of immortality.

The episode was so simple, so natural, so unspectacular as that of a beautiful bird which, by the hunter's gun, falls dead from the tree, abruptly interrupted in the full glory of her singing. But its pathos is worthy of a page in the masterly dialogues of Plato. It is the mighty, climax of a brilliant long career in the service of his people. It is the Grand Seal stamped at the end of a line of official opinions, where he wrote judicial thoughts for all time, for all generations to read and ponder. Whenever a crucial question is presented to us, where we need intellectual courage, we can always have a controlling precedent that will inspire and guide us, by looking back at the last decision of Justice Abad Santos, the one he wrote with all his blood in the field of a southern island, in the middle

of towering columns and feathery palms of coconut groves, under the panoply of entrancing beauty of the Philippine sky.

Undeniably it would give a feeling of ease and relaxation if we could agree or enter into an equitable compromise with the majority. To follow the line of least resistance is an innate human tendency and predisposition. In the absence of connecting ideas and opposing criteria, discussion could be avoided. The exacting and exhausting clash of dialectics will be dispensed with. Without stimulus, no straining nor bending of mental energy is needed. But when in the process of our scrutiny a question of principle is involved and the imperative category of justice so demands, it is inevitable to renounce the natural satisfaction derived from thinking and feeling in unison with our brethren.

It is our inescapable duty to do justice to the petitioner.

Justice is the dominating thought in our Constitution. In the preamble it emphasizes the establishment of a regime of justice. International law and social justice are among the first principles it advocates. And it does not allow the President of the Philippines to enter on the execution of his office without first solemnly swearing to "do justice to every man." (Sec. 7, Art VII.)

We cannot violate with impunity the irreversible mandates of our own conscience. When her ire is provoked, there is no enemy more terrible. It is then to be dreaded more than the myrmidons of the diabolical Nazi Gestapo, more than the hated ferocious Japanese kempis. All other enemies can be destroyed, but not conscience. Once you defy her, she will curse and persecute you relentlessly, at day time and at night time, whether you are awake or asleep, implacable Nemesis that will not give you rest until the end of your life. So it is the best policy to court and befriend her, by always yielding to her entreaties and following the path pointed by her unfailing finger.

Here is the case of a man deprived of his liberty without due process of law, without any legal process, and flagrantly denied the equal protection of law. By virtue of specific precepts of our Constitution, by virtue of the law of habeas corpus, by virtue of the cardinal principles of true justice, he is conclusively and absolutely entitled to his immediate liberty. He appeals to the protection of this Supreme Court, where lies his last hope. This Supreme Court, under the circumstances, is the only authority who has the power to offer the needed protection. This Supreme Court has the imperative duty of affording the redress. We believe that there is no force in the world that can induce us to shirk from that moral and legal duty. We make this avowal of our definite and irrevocable conviction, if in law and justice there still remains any substantial meaning, and they are not a mere persiflage, deserving the bantering wit of Aristophanes and Rabelais.

The pernicious effects of the denial of petitioner's prayer for personal freedom cannot be viewed but with grave concern by all liberal minded persons. The reactionary spirit that that denial represents is evident. It is a retrogression and complete reversal of the great movement started in the last century by Lopez Jaena, Del Pilar, Panjjaniban, Rizal the great political leaders whom we worship as heroes because they fought for the civil liberties of our people. The backward counter-current against the universal wave of liberalism that is sweeping all peoples of the world must be exposed. We cannot avoid but to sound the alarm, lest our anachronistic viewpoint might place us in the position of obstructionists in the progressive evolution towards a higher concept of human dignity. From the denial of the petition, just one step more, and we are sanctioning involuntary servitude, in fact, human slavery. Shall we need to disturb Lincoln in his eternal rest, to rehearse again in our country the whole drama of the American Civil War of Emancipation?

Convinced that it is the only right thing to do, we vote for the issuance of an order for the immediate release of the petitioner.

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