

IN RE R. MCCULLOCH DICK.

*G.R. No. 13862**. April 15, 1918*

Ponente: CARSON, J.

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CARSON, J.:

Counsel for petitioner moves for a rehearing, and in support of his motion relies more especially upon the provisions of Act No. 2757 of the Philippine Legislature, approved February 23, 1918. This Act is as follows:

"[No. 2757.]

"AN ACT TO PENALIZE THE PUBLICATION OF LIBELS AGAINST THE GOVERNMENT OF THE PHILIPPINE ISLANDS OR OF THE UNITED STATES DURING THE PRESENT WAR.

"Be it enacted by the Senate and House of Representatives of the Philippines in Legislature assembled and by the authority of the same:

"Section 1. It shall be unlawful to print, publish or circulate articles, manuscripts, engravings, or caricatures directly or indirectly creating sentiments favorable to the cause of the nations with which the United States is at war, or redounding to the contempt or dishonor of the Government of the Philippine Islands or of the United States, or tending to create obstacles for said Governments in the successful prosecution of the present war in favor of the United States.

"Sec. 2. Any person violating any of the provisions of this Act shall be punished by a fine of not to exceed two thousand pesos or by imprisonment for not less than one year, or both. In case the offender is a subject of a neutral foreign nation, the Governor-General may, besides, order him deported after service by the accused of the penalty imposed upon him.

"Sec. 3. This Act shall take effect on its approval and shall continue in force until the sixteenth day of October next following the date on which the President of the United States shall proclaim that peace has been reestablished between the United States and Germany and her allies.

"Approved, February 23, 1918."

In explanation of his failure to invite the attention of the court to the provisions of this statute when the case was submitted for judgment, counsel for the petitioner informs us that he first learned of its enactment on the day following the promulgation of our decision; and he asserts that although it may have been published and circulated in pamphlet form, it had not appeared in any publication of general circulation prior to that date.

The contention of counsel would seem to be:

(1) That the express grant of power to deport subjects of neutral foreign nations under the conditions indicated in the statute, carries with it an implied negation of the right to deport aliens under any other conditions whatever, and, especially, to deport alien subjects of allied nations.

(2) That the express grant of power to deport certain specifically defined classes of aliens under Act No. 2757, discloses the belief of the legislature, itself, that the Governor-General had no power, theretofore, to deport such aliens under the provisions of section 69 of the Administrative Code of 1917.

These contentions seem to overlook the fact that the statute is manifestly a war measure granting extraordinary powers during the period of war; and that its provisions touching the deportation of neutral aliens are not inconsistent with the exercise of the regulated power by the Governor-General to deport aliens under the provisions of section 69 of the Administrative Code.

The manifest purpose and object of the deportation provisions of the statute is merely to authorize the Governor-General, in his discretion, to order the deportation of a subject of a neutral foreign nation without holding an investigation of the ground upon which his action is based, under the terms of section 69 of the Administrative Code, where it appears that such person has been convicted of any of the crimes dennd and penalized in the statute: such investigation having been rendered unnecessary by the opportunity given the convict to be heard and to defend himself in the course of his trial, prior to his conviction, in a court of competent jurisdiction. Clearly, there is no ground for a contention that this grant of power to the Governor-General, during the period of the war, to order the summary deportation of certain aliens, after their conviction in a court of law, without prior investigation, was intended to have the effect of repealing by implication the regulated power theretofore conferred upon him to deport aliens, upon prior investigation conducted in the manner and form prescribed in section 69 of the Administrative Code.

We are not advised as to the reasons which induced the Legislature to limit the application of the deportation provisions of the Act to subjects of neutral foreign nations, though it may be that this was due, as suggested by counsel for the petitioner, to the fear that a provision looking to the summary deportation from the Philippines of subjects of allied or enemy foreign nations might conflict with the terms of some treaty of alliance between the United States and her allies, or with the measures adopted by the United States looking to the internment or imprisonment of dangerous subjects of enemy countries.

But whatever may have been the reason which controlled the action of the Legislature in this regard, we find no conflict between the provisions of Act No. 2757, looking to the summary deportation of convict subjects of neutral foreign nations, and the provisions of section 69 of the Code conferring a regulated authority upon the Governor-General to deport aliens as an act of state, upon investigation conducted in the manner and form prescribed in that section. Certainly, the Act does not deprive the Governor-General of any power he may have had, prior to its enactment, to deport aliens other than those mentioned therein.

As to the contention that the express grant of power to deport certain aliens, contained in Act No. 2757, demonstrates that the Legislature itself did not believe that power was conferred upon the Governor-General to deport aliens under the provisions of section 69 of the Administrative Code, and that this court should not place a construction on that statute other than that given to it by the lawmaker himself, it is to be observed.

(1) That under our system of government the duty and ultimate power to construe the laws is vested in the judicial department, just as the duty and ultimate power to make the laws is vested in the legislative department. So that even if it were true, which we do not admit, that the provisions of Act No. 2757 disclose that the legislative body which enacted it was of opinion that prior thereto the Governor-General had no authority under the law to deport aliens, we should not be bound thereby. (Sutherland on Statutory Construction, 2d. Ed., Vol. II, par. 358, and many cases there cited in support of the doctrine.)

(2) The enactment of the deportation provisions of Act No. 2757 does not justify the assumption of counsel that the legislator himself was of opinion that the Governor-General is not authorized under the provisions of section

69 of the Administrative Code to deport aliens on prior investigation conducted in the manner and form therein indicated. No such inference can legitimately be drawn from the express grant in Act No. 2757 of temporary authority, as a war measure, to deport summarily, and without holding the investigation prescribed in the code, subjects of a neutral foreign power who have been convicted of any of the offenses defined and penalized therein. The express grant of power to deport such convicts without holding a prior investigation discloses merely the legislative belief, that after conviction in a court of law wherein the accused is given every opportunity to be heard and to defend himself, a further investigation by the Governor-General upon the question of his deportation will, in most instances, be unnecessary, and that the summary deportation of such convicts as a war measure may be of prime importance in the interests of the state.

Even if it were admitted that the legislator had some doubt as to whether lawful authority had been conferred upon the Governor-General to deport aliens under congressional or focal legislation prior" to the enactment of Act No. 2757; and that confronted by the urgent or threatened necessity for the exercise of such power in certain cases arising during the war, he deemed it prudent to remove all occasion for doubts by an express grant of power in such cases; the existence of such doubts in the mind of the legislator as to the meaning and effect of the provisions of the statutes enacted by himself or his predecessors, should not be permitted to have controlling, or even persuasive influence with the courts when called upon to interpret and construe such legislative provisions.

The motion for a rehearing should be and is denied.

Arellano, C. J., Torres, Araullo, and Avanceña, JJ., concur.

CONCURRING OPINION

MALCOLM, and FISHER, JJ., concurring:

Petitioner moves for reconsideration bringing to our attention Act No. 2757, reading as follows:

"Section 1. It shall be unlawful to print, publish or circulate articles, manuscripts, engravings or caricatures directly or indirectly creating sentiments favorable to the cause of the nations with which the United States is at war, or redounding to the contempt or dishonor of the Government of the Philippine Islands or of the United States, or tending to create obstacles for said governments in the successful prosecution of the present war in favor of the United States.

"Sec. 2. Any person violating any of the provisions of this Act shall be punished by a fine of not to exceed two thousand pesos or by imprisonment for not less than one year, or both. In case the offender is a subject of a neutral foreign nation, the Governor-General may, besides, order him deported after service by the accused of the penalty imposed upon him.

As far as Act No. 2757 affects the case, it merely serves as persuasive authority demonstrating that express and explicit legislative authority is necessary in order to deport aliens. The sovereign right to deport aliens, the Legislature says, is not to be inferred as an act of state in a government of derived powers and is not to be implied from a section of the Administrative Code regulating but not conferring power. When the Legislature desires such power to exist, it will grant it in language as plain as that found in Act No. 2757. The motion has no merit as based on this ground.

DISSENTING OPINION

STREET, J., dissenting:

As one of the dissenting Justices in this case I take advantage of the opportunity afforded by the presentation of a motion for a rehearing briefly to express my views on certain important phases of the case, avoiding, so far as practicable, a repetition of what has been said in the dissenting opinions of Justice Johnson and Justice Malcolm.

I.

The first proposition which we propose to maintain is that the power to deport does not inhere in the Governor-General by virtue of his office.

The Governor-General holds his commission from the people of the United States. He therefore derives his powers from statutes which embody the principles of the American law and reflect the policy and traditions of the American people. The President does not exercise any such power as that here ascribed to the Governor-General; and no attempt was ever made by Congress to bestow such power upon the President, save in a single instance, and this episode in American history deserves to be here recorded.

In the year 1798, it may be remembered, war with France seemed imminent; and the Federalist party which was then dominant in American politics thought well to pass four Acts which have been known in subsequent history as the Alien and Sedition Laws. By the Alien Act of June 25, 1798, the President was empowered to order out of the country all aliens whom he should judge dangerous to the peace and safety of the country and forcibly to deport or imprison any aliens who should disregard his order.

This Act expired in 1804, and though President Adams did little or nothing to enforce its measures, the statute was criticised by the followers of Thomas Jefferson as constituting an infringement of the principles on which the Republic was founded. The adverse public sentiment thus engendered was so great as to contribute measurably to the downfall of the Federalist party and the consequent rise to power of the political force which has been known in subsequent history as the Democratic party. The fate of that law and its authors is here mentioned in order to show that the idea of deporting aliens by executive authority runs directly counter to the most fundamental notions of the American people.

It has always been taken for granted both in England and in the United States that the stranger who comes within our gates is free to remain unless amenable to deportation under the special and express provisions of law. The general practice thus favors the right to remain in the chosen domicile, and exportation is admitted only in aid of the supervision and control exercised by Congress over the subject of immigration. In the whole history of the country no single instance can apparently be cited where an alien has been deported against his will without the express warrant of law. It is true that several years ago Governor-General Forbes deported several Chinese from these Islands ; but the deportees soon came back and instituted a civil action against him for damages. No further attempt was made by him to exercise his supposed power of deportation against them.

The reasons why the American people have always been deeply suspicious of laws designed to sanction the expulsion of aliens by executive authority are manifold. The early pioneers of America were in great part refugees from persecution. When they occupied the American soil they dedicated it to the purposes of liberty and determined that America should be an asylum for the oppressed of all nations. The character so stamped upon the country has not been divested.

Nor should it be supposed that the consideration shown to foreigners by the laws of the United States is a mere manifestation of sentiment born of conditions peculiar to us. It came to us from England as a heritage from the

past. The Magna Charta (1215, A. D.) contains provisions restraining the authority of the king in dealing with the subjects of foreign powers (arts. 41 and 42). Merchants in particular were to have free ingress and egress except in times of war and were expressly declared to be exempt from unjust exactions. This was at a time, be it observed, when feudal barons throughout Europe were accustomed to rob and pillage merchants. It is a recognized fact in the constitutional history of England that, although anciently the king was supposed to have the right to expel aliens, the power fell into disuse at an early day and has never been exercised since 1575, A. D., in the reign of Queen Elizabeth. (Tasewell-Langmead, English Constitutional History, 5th ed., p. 554, note.)

In other words, under the policy which is at the basis of the institutions both of England and the United States, neither the King nor the President exercises the power of deporting aliens without the express authority of statute. It is believed that the basic principle thus settled should not be lightly surrendered in any jurisdiction subject to the sovereignty of the United States. History plainly teaches that if the constitutional bulwarks which have been erected in the course of centuries are permitted to be worn away under the subtle pressure of inherent or implied administrative powers, no effectual resistance can ever be interposed to the encroachments of executive authority.

II.

The principal question in the case is whether a power to deport was conferred on the Governor-General by Act No. 2113 of the Philippine Legislature. It cannot be maintained that Act No. 2113 expressly confers upon the Governor-General a power to deport; but it is insisted that the Legislature recognized the existence of such a power in passing a law to restrain its abuse; and it is accordingly argued that the power has been thus created by implication. Several weighty reasons suggest themselves to the mind of this writer why such a proposition cannot possibly be true.

The process of drawing things out of a statute by implication is merely an incident in the process of discovering the legislative intent; and where the intention is revealed, no interpretation or construction is admissible which contradicts that intention.

The preamble of this statute clearly shows that the Legislature intended to strike at a manifestation of executive power which was believed to be a menace to "the individual security of all residents of these Islands;" and though it is recited, in the preamble, that it had been decided that the Governor-General had authority to deport, it is evident that the Legislature could not have intended either to create that power or to recognize it except as a de facto exercise of authority which should be restrained. As a matter of fact the statement concerning what had been decided was only partially true, and the recital was therefore apparently based to some extent upon a misconception. This would be of no importance if the statute had stated in express terms that the Governor-General should have the power in question, for a legislative Act cannot be impeached by showing that the legislators misconceived the situation with which they were dealing. But when it is attempted to derive by implication a power which has not been expressly granted, the recitals of the preamble are relevant to show what the real intention was.

It believes human intelligence to suppose that a Legislature which in one breath denounced a certain power as dangerous to individual security and in another made a law to curb its exercise, intended thereby to create what they had denounced. Above all, that a Philippine Legislature, composed almost entirely of native Filipinos, intended to recreate from Spanish times and place in the hand of a foreign ruler, however benevolent, a power fraught with such dangerous possibilities passes belief. The more reasonable supposition is that the Legislature intended to regulate the procedure only, leaving the occasions for its exercise to be sought in other statutes or perhaps to be defined in future laws. In the majority opinion there is one statement with which we heartily agree. It is in these words: "The cautious phrasing of the paragraph of the preamble which declared that it has been

decided that the Governor-General has authority to deport foreigners by due process of law quite clearly indicates that the lawmakers desired to reserve their own views on that subject." The extreme tension which existed in those days between the Philippine Assembly and the Chief Executive of the Islands is matter of history.

It will be observed that the power which is supposed to have been conferred upon the Governor-General by Act No. 2113 is undefined, since the causes which might justify him in deporting an alien are not specified. It results that, if this general power exists, he will be the sole judge of the sufficiency of the cause for deportation. The mere recognition of the existence of such a power in the Governor-General would cause thousands of the inhabitants of these Islands instantly to feel that the security of person and property, to the preservation of which the honor of the American people is here pledged, had been gravely and perhaps irremediably impaired.

A further reason for believing that the power in question was not created by implication is this: There are some things which the law does not accept upon mere implication. Since the days of the Stuarts at least no person living under the common law has, with the approval of the courts, been deprived of life or liberty by power created by implication. He who would touch life or liberty is required to show the express authority of law. Magna Charta declares that no freeman shall be taken or imprisoned or exiled except by the legal judgment of his peers or of the law of the land (art. 39). The constitutions of the various American States, as well as the Organic Law of these Islands, bring down to our own day the force of the term "law of the land" in the phrase "due process of law," and the latter expression imports the necessity, not only of a method of proceeding, but a law upon which the process can operate.

It is rudimentary in our jurisprudence that statutes authorizing summary proceedings, i. e., such as are not according to the course of the common law or are without the ordinary forms of judicial procedure, are to be strictly construed. (36 Cyc, 1189.) Again, a statute in derogation of common law or common right is not to be extended beyond the words used by the Legislature; and it is said that where a statute not only effects a change in common law but is also in derogation of common right, it must be construed with especial strictness. (36 Cyc, 1179.) Statutes which operate in restraint of personal liberty are of this class.

There are some things which are too fundamental to be expounded; they can only be felt; and to be felt they must be imbibed, so to speak, from the atmosphere in which one has been nurtured. To the mind of a person indoctrinated with the spirit of the common law there must always be the strongest kind of bias against the abrogation or impairment of personal security by the mere implication or artificial construction of any statute.

III.

If Act No. 2113 did not create a power in the Governor-General to deport, it is evident that no such power was created by the incorporation of the substance of that Act in section 83 of the Administrative Code of 1916, or its successor, section 69 of the Administrative Code of 1917. Section 3 of both these Codes defines their relation to prior laws by declaring that such provisions of the Code as incorporate prior laws shall be deemed to be made in continuation thereof and to be in the nature of amendments thereto, without prejudice to any right already accrued. The reenactment of this provision in the two Codes therefore raised no additional presumption of a legislative intent to create the power. It will be observed that the Administrative Code is chiefly conversant with the organization and administration of the Government, and while it defines the powers of the different officials so far as general statements concerning their powers could be conveniently framed, it is not concerned with defining the conditions and rules which protect individuals who come within the orbit of the operation of governmental functionaries. As the provision now stands in the Code (sec. 69) it must be considered to be of a purely procedural nature.

IV.

As we have already shown the laws of the United States with reference to the right of foreigners to reside therein uniformly proceed upon the assumption that they are entitled to remain unless subject to deportation under special and express provisions of law. The Act of Congress of February 5, 1917, which was passed over the Presidential veto, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States" is the last special Act of Congress dealing with the subject of immigration. This Act was expressly made applicable to the Philippine Islands (sec. 1) and should be construed in *pari materia* with our own laws. It purports in its title to deal with the residence of aliens in American territory; and in the body of the Act are found numerous provisions, especially in section 19, denning the conditions under which aliens who have come into the country may be lawfully deported.

Considering the large purview of this statute and the detailed character of the legislation contained in it, the conclusion seems irresistible that Congress intended that aliens not deportable under its provisions, or by some other statute expressly authorizing deportation, such as the Chinese Exclusion Law, should have a right to remain on American territory. Of course if we had upon the statute books of the Philippine Islands a law giving the Governor-General the express power to deport, this Act of Congress would not have the effect of abrogating such law. But the power claimed on behalf of the Governor-General under the local statute arises by implication only; and we think the implication from the Act of Congress that an alien not deportable under the provisions of that, or some other special Act, is entitled to remain in American territory is at least as strong as the implication from Act No. 2113 (sec. 69, Admin. Code) that the Governor-General may put him out. In *Tiaco vs. Forbes* (228 U. S., 549) Justice Holmes observed that the extension of the Chinese exclusion and immigration laws to the Philippine Islands had no bearing on that case; but that could only have been said because a special Act (No. 1986) had been passed by our legislature which determined the case and made the other statutes irrelevant.

Something is said in the majority opinion to the effect that inasmuch as section 69 of the Administrative Code was enacted and approved by the President after the Act of Congress of February 5, 1917, had already become a law, the Code provision last mentioned necessarily superseded anything to the contrary in the Act of Congress and restored the law to where it was before the latter Act was passed. The trouble, however, is the same as before namely, in getting this power out of the Code provision by implication; and in the end the question is, as it was in the beginning, on the proper construction to be placed upon section 69, and the preceding provision in Act No. 2113.

V.

Act No. 2757 of the Philippine Legislature also furnishes confirmatory proof of the correctness of the position of the dissenting judges. This Act was passed upon February 23, 1918, the same day the Governor-General issued his order for an investigation of the charges preferred in this case against the petitioner. The Act contains internal evidence that it was drawn in contemplation of the very offense which the petitioner is supposed to have committed, namely, obstructing the Government in the prosecution of the present war. The statute does not say in so many words that the Governor-General shall not exercise a power of deportation otherwise than in conformity with this Act; and hence it may still be argued that if the general power to deport already existed under section 69 of the Administrative Code, it is not taken away by this Act. We do not think, however, that this argument quite meets the case. The Act indicates that the Legislature thought the situation was one requiring legislative action; and the circumstance that the Act makes provision for the deportation of the subjects of neutral foreign nation—not of belligerent foreign nation—after conviction in a court of justice, shows that in the opinion of the Legislature the general power to deport was non-existent. It is as if the Legislature had been called upon to express its opinion

upon the point whether the general power to deport existed and had replied in this rescript that it does not. It was certainly singular for the Legislature to insert into this Act a special provision for the deportation of a certain class of foreigners, after conviction in court, if it had been supposed that the Governor-General already had the power to deport all. And again we may say, repeating a form of expression already used with reference to the Act of Congress of February 5, 1917, the implication from Act No. 2757 to the effect that the petitioner may remain in the Islands is at least as strong as the implication from section 69 of the Administrative Code that the Governor-General may put him out. And any doubt that exists should be resolved favorably to the right of individual security.

VI.

That we may not be supposed to be advocating a view of the case which, if adopted, would expose public interests in these Islands to peril, we will add that there are ample provisions upon our statute books under which such activities as are charged against the petitioner can be punished and controlled. This is obvious not only from the penal provisions of Act No. 2757, but also from Act No. 1692 (amendatory of section 8 of Act No. 292) and from subsection (b) of section 1954, in relation with subsection (e) of section 2757, of the Administrative Code. Under Act No. 1692 any person who publishes a writing which tends to disturb the peace of the community or the safety or order of the Government is punishable by a fine of four thousand pesos or by imprisonment for not exceeding two years or both. Under subsection (b) of section 1954 of the Administrative Code all written or printed matter which tends to disturb the peace of the community or to stir up the people against the lawful authorities is absolutely non-mailable, and any person who deposits such matter for carriage in the Philippine mails is subject to a fine of not more than three hundred pesos or imprisonment for not more than six months, or both. (Admin. Code, sec. 2757-e).

VII.

The prevailing opinion written by Justice Carson in this case, in so far as it relates to the source of the power of deportation, will be found to rest on three cardinal ideas or propositions which we cull from different parts of the opinion and here exhibit in what appears to be their logical order. They are these:

"1. We think that an examination of the history of the office of the Chief Executive in these Islands under American sovereignty will disclose that, until and unless he is deprived of such authority by some Act of Congress or of the Philippine Legislature, the power of the Philippine Government to deport aliens as an act of state is vested in the Governor-General by virtue of his office, subject only to the regulations prescribed in section 69 of the Administrative Code of 1917, or by future legislation on the subject.

"2. We are well satisfied, also, that under American sovereignty, the essentially civil power to deport aliens as an act of state was originally vested in the Military Governor and thereafter in the first Civil Governor; and that it has continued in the office of the Chief Executive, the Governor-General, ever since, except in so far as his power has been restricted, limited, or controlled by the various acts of the Philippine Legislature to which reference has already been made.

"3. The Governor-General of the Philippine Islands has power to deport aliens, as an act of state, upon prior investigation conducted in the manner and form prescribed in section 69 of the Administrative Code."

In all of these statements there appears a factor which to some extent envelops the meaning in obscurity. This is found in the phrase "act of state." As the term is used by Justice Carson it is evidently intended to admonish us that we are here confronted with a manifestation of power of so exalted a type as to be beyond the range of judicial scrutiny. We submit that the expression has little or no relevancy to the present discussion and that the

suggestion intended to be conveyed by it has no support in legal authority. The mere circumstance that an act is an act of state (i. e. an act exerted by a government against the subject of a foreign power), by no means makes' it valid, when directly attacked upon writ of habeas corpus, if it is in fact unauthorized.

The term "act of state" is used by the English Courts to indicate the immunity from civil liability which is enjoyed by the crown, the officers of state, and their agents, in respect to damage which may be done to aliens in exercising certain governmental powers. (Street, *Foundations of Legal Liability*, Vol. I, pp. 36, 37.) The peculiar doctrine indicated by this term has been frequently applied in cases arising in India between British subjects acting under authority of the Indian Government and citizens of the independent States. (See "Act of State as Applied to the Government of India," by C. P. Ilbert, 1 Eng. Rul. Cas., 821 et seq.) By virtue of this doctrine it is held that a state official, or person acting under orders from him, is not liable for the damage inflicted by an act of state on the subject of a foreign power even though the act which causes such damage is unauthorized by law.

The doctrine in question has rarely been the subject of discussion in American decisions; but the idea came within the ken of the Supreme Court of the United States in the case of *Tiaco vs. Forbes* (228 U. S., 549; 57 L. ed., 967). This as has been stated, was a civil action to recover damages brought in the courts of the Philippine Islands by certain Chinese who alleged that they had been unlawfully deported. In order to protect the Governor-General from the possible consequences of this deportation the Philippine Legislature by a special Act ratified and confirmed his action. (Act No. 1986.) The Supreme Court of the United States held, affirming the decision of this court, that the action for damages could not be maintained. The decision was chiefly based on the effect of the curative Act; and the court expressly refrained from deciding whether the Governor-General would have been protected in that case without the aid of the statute, on the ground of an immunity enjoyed by him in the exercise of powers of state. The case at bar is wholly different. Here the authority of the Governor-General to make the order of deportation is directly attacked on a writ of habeas corpus, and the question is simply whether the Governor-General has the power to deport—not whether he would be civilly liable in damages for the consequences of that Act, supposing it to be illegal.

The doctrine indicated by the term "act of state" is a shield, or weapon of defense, for the state official—not a magical device for enduing him with power.

Something must now in turn be said concerning each of the three propositions above quoted by us from the prevailing opinion.

The first statement to the effect that the power to deport is vested in the Governor-General by virtue of his office and may be exercised by him except as he is deprived of such authority by Act of Congress or of the Philippine Legislature is wholly mistaken. The exact converse is true, namely, that there is no such power vested in the Governor-General by virtue of his office, and he has only such power in this respect as is conferred by Act of Congress or of the Philippine Legislature.

No person has had the temerity to argue or assert in this court that the Governor-General under American sovereignty has inherited the power to deport which was conferred on the Spanish Governor-General by royal orders of the King of Spain. It is accepted by all that that power was of a political nature and vanish with the change of sovereignty.

As we have already shown, the political and constitutional history of our own country affords no support for proposition that such a power exists, and that it did not exist is also clearly demonstrated in the dissenting opinion of Mr. Justice Malcolm in this case. It is absolutely inconsistent with the law and practice of our Government from the beginning.

But because there was once a Military Governor here who was charged with the duty of pacifying an insurrection the whole order of things is supposed to have been changed. In the case of *Forbes vs. Chuoco Tiaco and Crossfield* (16 Phil. Rep., 534), three of the Justices of this court signed an opinion which was in part based on the idea of the existence of such a power in the Governor-General; but that notion was impliedly repudiated by the Supreme Court of the United States upon appeal and is no longer sustained by the Justice of this court who wrote the opinion signed by three in that case. It should be permitted to pass into history like the memory of an evil dream.

The second proposition is closely connected with the first. It is as thin and as nicely spun as a cobweb and equally fragile. The idea is that the Military Governor had the right to deport aliens, but that in his hands it was an essentially civil power. Being a civil power, it was naturally inherited by the Civil Governor, who succeeded, or superseded, the Military Governor; and it therefore passed ultimately to the Governor-General. (Be it observed that if it had been admitted that it was a military power, it could not have been argued that the Civil Governor had inherited it). Subtleties such as these awaken no response in the consciousness. If the Military Governor had wanted to deport an alien of course he would have done it; but in doing so he would have been acting under the authority of the President of the United States as Commander in Chief of the American Army. Something has been said of the Spooner Amendment of March 2, 1901. Anybody who reads it with a detached mind will see that it was a purely transitory provision and that it speaks of the past. There never was, of course, any Presidential order or statute of any sort, created by American authority, which expressly gave the power to deport to anybody.

The third proposition which we have quoted from the prevailing opinion is somewhat more inclusive and requires more careful examination. It is supposed to have two legs upon either of which, or both, it can rest at will. We quote from that portion of the opinion in which this phenomenon is elucidated.

"It is not necessary, at this time, to determine whether, under the various organic acts of the Philippine Government, the power to deport aliens, as an act of state, is vested in the Governor-General 'by virtue of his office alone,' subject merely to regulation by the Philippine Legislature; or whether his authority in the premises is derived wholly from the Philippine Legislature by virtue of a grant of power, express or implied, in section 69 of the Administrative Code of 1917; because deportations of aliens by the Governor-General, as an act of state, upon prior investigation conducted in the manner and form prescribed in section 69 of the Administrative Code may properly be regarded as made 'under the combined powers' of the Governor-General and the Philippine Legislature; authority for such deportations having been conferred upon the Governor-General, so far as that may be necessary, by the provisions of that section, as we believe and shall endeavor to show hereafter."

We submit that the proof rather doubtfully promised in the closing words of this paragraph is not forthcoming and cannot be produced. The author of the opinion, it is true, glides off smoothly into a quotation from the decision of the Supreme Court of the United States in the case of *Tiaco vs. Forbes* (228 U. S., 549) which seems superficially to give some countenance to his generalization, but which on examination falls far short of meeting the exigency. The truth is Justice Carson has put a strain upon the decision of the Supreme Court of the United States which it cannot bear.

In *Tiaco vs. Forbes* the Legislature of the Philippine Islands had passed a special Act (No. 1986) after the deportation had been effected, ratifying it in all respects. Justice Holmes, delivering the opinion of the court, considered that this curative statute operated with the same legal effect as if there had been an antecedent express authority from the Legislature to make the deportation in question. The legislative authority therefore unquestionably existed; and the Governor-General, as Chief Executive, had acted in pursuance of that authority. It was therefore entirely correct to say, as Justice Holmes said, simply and as we think without any occult meaning, that the deportation was effected under the combined powers of the Legislature and of the Governor-General, that

is, the power of the Legislature to direct and of the Governor-General to execute. In the present case the Governor-General stands ready to execute; but the question to be decided is; Has the legislative authority been granted? Justice Carson in forming his combination in this case, so as to give to the deportation the support of "the combined powers of the Governor-General and of the Philippine Legislature," has overlooked the important fact that, where two integral members are essential to a combination, the combination is worthless unless both members will function. A chain is no stronger than its weakest link. The opinion of the Supreme Court of the United States, to which reference has been made, does not give the slightest support to the position assumed by this court; and if the prevailing opinion is sound, it must rest upon the validity of the interpretation placed by the majority upon section 69 of the Administrative Code. Our reasons for believing that the interpretation of that provision adopted by them is erroneous have already been expressed.

VIII.

It remains to say a few words about the case of Chan Yick Sam vs. Prosecuting Attorney of Manila (31 Phil. Rep., 560), upon which much reliance is apparently placed in the prevailing opinion as authority for the proposition that Act No. 2113 furnished full and lawful authority to the Governor-General to proceed to deport a foreigner upon grounds satisfactory to himself. We do not so regard it. The only point actually decided in that case was that a writ of prohibition would not lie to restrain a person, acting under orders from the Governor-General, from holding an investigation in conformity with the procedure prescribed in that Act. No attempt had been made to deprive the petitioner of his liberty or to deport him, and no attempt had even been made to compel him to appear before the agent. The result of the investigation might have been favorable to the petitioner or, if adverse, the Governor-General might have decided that he had no authority to deport him, in either of which events the mere holding of the inquiry which he was seeking to restrain would not have injuriously affected any right of the petitioner.

Nobody has here questioned the authority of the Governor-General to appoint an agent to conduct an investigation under section 69 of the Administrative Code (see also section 71 of same Code); and if such an investigation should reveal a statutory ground for deportation, the Governor-General would be the proper official to make it. For instance, a person judicially convicted of a violation of section 2 of Act No. 2381 (the Opium Law) and sentenced to deportation as a recidivist might by eluding the vigilance of the authorities reenter the Islands. By the Jones Law (Act of Congress of August 29, 1916) the Governor-General is made directly responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative therein. He would therefore have the power, if he should see fit, to proceed under section 69 in effecting a second deportation of the convicted person. A careful gleaning of our statutes would undoubtedly reveal other situations which would support similar administrative proceedings under the same section; and if any defect should be revealed in the machinery for the enforcement of the immigrating or Chinese exclusion law, recourse might be of course had to the same provision, as supplying an appropriate procedure.

This is mentioned not only for the purpose of showing that a writ of prohibition, really an injunction, could not be properly issued against an agent conducting an investigation for the Governor-General, but also to indicate that even as section 69 now stands in the Administrative Code, and considered simply as a procedural provision, there are already upon our books provisions authorizing deportation which can be carried into effect in the manner prescribed by that section.

It is not improbable that the Justices who concurred in the opinion in the Chan Yick Sam case were then of the opinion that the Governor-General had authority under Act No. 2113 to deport the petitioner and regarded the proceedings of which complaint was made as a proper preliminary to the exercise of that power; but nothing actually stated in the opinion expresses that belief. Certainly we do not regard a mere inference as to the existence of such a power to be binding upon this court as a precedent in a matter of such vital importance. It is evident,

from the brevity of the opinion and the failure definitely to determine the grounds upon which it was to be supported, that it was accorded but a scanty consideration—doubtless quite sufficient to warrant the conclusion that prohibition would not lie in that particular case, but wholly insufficient to justify the engrafting upon our jurisprudence of the doctrine which it is supposed to establish by inference.

IX.

The conclusion in my opinion is that the Governor-General has no power to deport the petitioner upon the facts appearing of record, that the petitioner should have been set at liberty upon the original hearing before this court, and that consequently the motion for a rehearing should now be granted and the former judgment reversed,—not exclusively on the special ground stated in the motion to rehear, but on the ground that the original judgment is fundamentally erroneous.

DISSENTING OPINION

FISHER, J., dissenting:

I concur in the dissenting opinion of Justices Johnson, Malcolm, and Street. I think it proper to add, however, to what has been said by them, that to my mind the most important effect of the decision in this case is the definite abandonment by this court of the doctrine of the "inherent power" of the Governor-General to deport aliens. This is clearly shown by the statement in the majority opinion that the concurring Justices are "of opinion that by the enactment of the series of statutes just cited the Philippine Legislature conferred upon the Governor-General authority to deport subjects of foreign powers * * *."

Recognition of the fact that the Legislature is the repository of the power to expel or exclude aliens is frequently repeated in the majority opinion. It is true that after exhaustively stating the grounds for the opinion that the Legislature intended to confer and did confer the power under consideration it is said that "an examination of the history of the office of the Chief Executive in these Islands under American sovereignty will disclose that until and unless he is deprived of such authority by some act of Congress or of the Philippine Legislature the power of the Philippine Government to deport aliens as an act of state is vested in the Governor-General by virtue of his office. * * *."

I am of the opinion that neither the statutes cited nor the historical antecedent invoked justify the conclusions which the majority draw from them, but I rejoice to know that those conclusions rest the power to deport aliens upon a grant of power from the Philippine Legislature or the acquiescence of that body in its exercise and not upon the pernicious and utterly undemocratic doctrine of the "inherent powers" of the Executive.

If the extraordinary powers with which the majority conceive the Governor-General to be invested are derived from rules of law enacted by the Philippine Legislature or over which it has the power of repeal that body may, by the repeal or amendment of those rules, withdraw or modify that power. If the authority has been conferred by the Philippine Legislature, or although derived from some other source, may be withdrawn by it, the full responsibility for its existence rests, as it should, directly upon the Legislature, as the immediate source—by grant or by acquiescence—of that authority, and indirectly upon the electorate to which the Legislature is accountable for all its acts or omissions.

An oppressive or unwise statute may for a time be endured with fortitude, for the injustices resulting from its enforcement are certain, in the end, to bring about its repeal ; but an "inherent" executive power, above the law and the very source of law, would be bound, by its very nature, to cause the keenest apprehension on the part of

those exposed to its action, regardless of the integrity and honesty of the official in whom that power might be vested. To destroy every vestige of such power and to subject every officer of the Government, from the highest to the lowest, to the rule of law, has been the purpose of democracy from the birth of the idea to the present day. In no country has the attainment of that object been more earnestly sought than in the United States. It would, indeed, be strange were the United States to leave as a legacy to this new democracy of the Orient, the false doctrine that the rule of the people is compatible with the existence of an executive office whose incumbent is vested with "inherent" powers beyond their control.

The reasons for my dissent are principally that the majority opinion assumes not only that it is to be inferred that by the enactment of section 69 of the Administrative Code and its antecedent statutes the Legislature intended to confer upon the Governor-General the unrestricted power to deport aliens, but that it may lawfully delegate to him such authority. I say "unrestricted" power, because while section 69 requires that certain formalities be complied with before the obnoxious alien may be deported, those formalities afford no protection whatever. Of what does it avail that the alien is to be given a hearing, to be informed of the charges against him, to have counsel, and to produce witnesses, if there is no rule by which to determine the legal effect of the answer which he may make to the charges? It is a useless and vain formality, to require that the alien shall be heard before he is expelled, if the expulsion may take place regardless of anything he may say. I maintain that the mere formality of a hearing is not in itself sufficient to constitute due process of law. The requirement of due process in such cases implies not only a hearing, but a rule of law defining the standard of conduct for the violation of which the right of residence and asylum which aliens enjoy under our statutes is to be forfeited. As was said by the Supreme Court of the United States in the Japanese Immigrant Case (189 U. S., 100):

"This court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard before such officers, in respect of the matters upon which that liberty depends, * * *."

It is not enough that they be given an opportunity to be heard before being deprived of their liberty—that alone would be a vain formality—but they must be heard "in respect of the matters upon which that liberty depends." By whom is to be determined for what matters that liberty may be forfeited? I answer unhesitatingly, by the Legislature. Law is essentially, a rule of conduct, prescribed by the law-making power. An alien is or is not obnoxious according to his adherence to or departure from the course of conduct prescribed by the rule. Under the various Acts of Congress and of the Philippine Legislature which expressly authorize the deportation of aliens, the conduct required of them is made known by the prohibition of certain acts, the doing of which renders them liable to expulsion, after a hearing upon the issue of the commission of the acts which produce the forfeiture of the right of residence—"in respect of the matters upon which the liberty depends"

I am, therefore, of the opinion that if the Philippine Legislature—with the approval of the President, as required by the Jones Law with respect to acts which "affect" immigration—had, in so many words, attempted to confer upon the Governor-General the unrestricted discretionary power to deport aliens, after such a hearing, whenever he might deem it proper to do so, such a statute would be void as being obnoxious to the requirement of due process of law. Furthermore, it would, in my judgment, be invalid as an attempt to delegate to him power of a legislative nature. The determination of the rules of conduct by which the inhabitants of our Territory are to be governed is a function essentially legislative in character. The Legislature may delegate to an executive the authority to ascertain the existence of the facts upon which the application of the rule of law depends, but not the authority to create the rule for each particular case, apply it, and enforce his judgment.

It is significant that it was in a case involving the rights a Chinese alien (Yick Wo vs. Hopkins, 118 U. S., 356) that our highest court thus epitomized the essence of that system of government which we are striving to maintain for ourselves and which we hope the people of these Islands will forever retain as the best gift we can bestow upon them:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave the room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

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