

**W.CAMERON FORBES, J.E. HARDING, AND C.R. TROWBRIDGE,
PLAINTIFFS, VS. CHUOCO TIACO (ALIAS CHOA TEA) AND A.S.
CROSSFIELD, DEFENDANTS.**

G.R. No. 6157. July 30, 1910

Ponente: JOHNSON, J.

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JOHNSON, J.:

An original action commenced in this court to secure a writ of prohibition against the Hon. A. S. Crossfield, as one of the judges of the Court of First Instance of the city of Manila, to prohibit him from taking or continuing jurisdiction in a certain case commenced and pending before him, in which Chuoco Tiaco (alias Choa Tea) (respondent herein) is plaintiff, and W. Cameron Forbes, J. E. Harding, and C. R. Trowbridge (petitioners herein) are defendants.

Upon the filing of the petition in this court, Mr. Justice Trent granted a preliminary injunction restraining the said lower court from proceeding in said cause until the question could be heard and passed upon by the Supreme Court.

The questions presented by this action are so important and the result of the conclusions may be so far reaching that we deem it advisable to make a full statement of all of the facts presented here for consideration. These facts may be more accurately gathered from the pleadings. They are as follows:

FACTS.

"SECOND AMENDED COMPLAINT.

"The plaintiffs set forth:

"I. That all the parties in this case reside in the city of Manila, Philippine Islands.

"II. That the plaintiff W. Cameron Forbes is the Governor-General of the Philippine Islands and that the plaintiffs J. E. Harding and C. R. Trowbridge are, respectively, chief of police and chief of the secret service of the city of Manila.

"III. That the defendant A. S. Crossfield is one of the judges of the Court of First Instance of the city of Manila.

"IV. That the defendant Chuoco Tiaco (alias Choa Tea) is a foreigner of Chinese nationality and a subject of the Chinese Empire.

"V. That on the 1st of April, 1910, the defendant Chuoco Tiaco (alias Choa Tea) filed a suit in the Court of First Instance of the city of Manila against the plaintiffs in which substantially the following allegations and petition were made, alleging that on the 19th of August, 1909, under the orders of the said W. Cameron Forbes, Governor-General of the Philippine Islands, he was deported therefrom and sent to Amoy, China, by the aforesaid J. E. Harding and C. R. Trowbridge, chiefs, as above stated, of the police and of the secret service,

respectively, of the city of Manila, and that having been able to return to these Islands he feared, as it was threatened, that he should be again deported by the said defendants, concluding with a petition that a preliminary injunction should be issued against the plaintiffs in this case prohibiting them from deporting the defendant, Chuoco Tiaco (alias Choa Tea), and that they be sentenced to pay him P20,000 as an indemnity.

"VI. It is true that the said defendant Chuoco Tiaco (alias Choa Tea) was, with eleven others of his nationality, expelled from these Islands and returned to China by the plaintiffs J. E. Harding and C. R. Trowbridge, under the orders of the plaintiff W. Cameron Forbes, on the date mentioned in Paragraph V of this complaint, but the said expulsion was carried out in the public interest of the Government and at the request of the proper representative of the Chinese Government in these Islands, to wit, the consul-general of said country, the said W. Cameron Forbes acting in his official capacity as such Governor-General, the act performed by this plaintiff being one of the Government itself and which the said plaintiff immediately reported to the Secretary of War.

"VII. The said complaint having been filed with the defendant A. S. Crossfield, he, granting the petition, issued against the plaintiffs the injunction requested, prohibiting them from deporting the defendant Chuoco Tiaco (alias Choa Tea).

"VIII. The plaintiffs, having been summoned in the matter of the said complaint, filed a demurrer against the same and presented a motion asking that the injunction be dissolved, the grounds of the demurrer being that the facts set out in the complaint did not constitute a motive of action, and that the latter was one in which the court lacked jurisdiction to issue such an injunction against the plaintiffs for the reasons set out in the complaint; notwithstanding which, the defendant A. S. Crossfield overruled the demurrer and disallowed the motion, leaving the complaint and the injunction standing, in proof of which the plaintiffs attach a certified copy by the clerk of the Court of First Instance of the city of Manila of all the proceedings in said case, except the summons and notifications, marking said copy 'Exhibit A' of this complaint. (See below.)

"IX. The Court of First Instance, according to the facts related in the complaint, lacks jurisdiction in the matter, since the power to deport foreign subjects of the Chinese Empire is a privative one of the Governor-General of these Islands, and the defendant A. S. Crossfield exceeded his authority by trying the case and issuing the injunction and refusing to allow the demurrer and motion for the dismissal of the complaint and the dissolution of the injunction.

"Therefore, the plaintiffs pray the court:

"(a) That an injunction immediately issue against the defendant A. S. Crossfield ordering him to discontinue the trial of said cause until further orders from this court;

"(b) That the defendants being summoned in accordance with law, a prohibitive order issue against the said defendant A. S. Crossfield, restraining him from assuming jurisdiction in said case and ordering him to dismiss the same and cease from the trial thereof;

"(c) Finally, that the plaintiffs be granted such other and further relief to which they may be entitled according to the facts, and that they may be allowed the costs of the trial.

"Manila, July 9, 1910.

"IGNACIO VILLAMOR,

"Attorney-General

"W. A. KINCAID,

"THOMAS L. HARTIGAN,

"By W. A. KINCAID,

"Attorneys for the plaintiffs.

"UNITED STATES OF AMERICA,

"Philippine Islands, city of Manila, ss:

"W. A. Kincaid, being first duly sworn, states that he is one of the attorneys for the plaintiffs in the preceding second amended complaint, and that all the facts alleged therein are true, to the best of his knowledge and belief.

(Signed) "W. A. KINCAID.

"Subscribed and sworn to before me this 9th day of July, 1910. Cedula No. F. 1904, issued in Manila on January 3, 1910.

(Signed) "IGNACIO DE ICAZA,

"Notary Public.

"(My appointment ends Dec. 31, 1910.)

"We" have received a copy of the above,

(Signed) "O'BRIEN & DEWITT,

"HARTFORD BEAUMONT,

"Attorneys for defendants."

"EXHIBIT A.

"[United States of America, Philippine Islands. In the Court of First Instance of the city of Manila. No. 7740. Chuoco Tiaco (alias Choa Tea), plaintiff, vs. W. Cameron Forbes, Charles R. Trowbridge, and J. E. Harding, defendants.]

"COMPLAINT.

"Comes now the plaintiff, by his undersigned attorneys, and for cause of action alleges:

"First That the plaintiff is and has been for the last thirty-five years a resident of the city of Manila, Philippine Islands.

"Second. That the defendant W. Cameron Forbes is the Governor-General of the Philippine Islands and resides in the municipality of Baguio, Province of Benguet, Philippine Islands; that the defendant Charles R. Trowbridge is chief of the secret service of the city of Manila, and that the defendant J. E. Harding is chief of police of the city of Manila, and that both of said defendants reside in the said city of Manila, Philippine Islands.

"Third. That the said plaintiff is a Chinese person and is lawfully a resident of the Philippine Islands, his right to be and remain therein having been duly established in accordance with law by the Insular customs and immigration authorities.

"Fourth. That on or about the 19th day of August, 1909, the defendants herein, Charles R. Trowbridge and J. E. Harding, unlawfully and fraudulently conspiring and conniving with the other defendant herein, the said W. Cameron Forbes, and acting under the direction of the said defendant, W. Cameron Forbes, did unlawfully seize and carry on board the steamer Yuensang the said plaintiff herein against his will, with the intent by said force to unlawfully deport and expel the said plaintiff herein from the Philippine Islands against the will of the

said plaintiff herein.

"Fifth. That the said defendants herein and each of them, after forcibly placing the said plaintiff herein upon the said steamer Yuensang, as herein before alleged, did cause the said steamer Yuensang to take and carry away the plaintiff herein from the Philippine Islands to the port of Amoy, in the Empire of China.

"Sixth. That the said defendants herein, unlawfully conspiring and conniving together, the said Charles R. Trowbridge and the said J. E. Harding, acting under the direction of the said defendant, W. Cameron Forbes, did forcibly prevent the plaintiff herein from returning to these Philippine Islands until the 29th day of March, 1910.

"Seventh. That the defendants herein, by their unlawful acts herein before alleged, have damaged the plaintiff herein in the sum of twenty thousand pesos (P20,000) Philippine currency.

"SECOND CAUSE OF ACTION.

"As a second cause of action the plaintiff alleges:

"First. He repeats and reiterates each and every allegation contained in the first (1st) and second (2d) paragraphs of the first cause of action, and hereby makes the said paragraphs a part of this cause of action.

"Second. That the said plaintiff herein is a Chinese person who is and has been a resident of the Philippine Islands for the last twenty-nine years, he having duly established his right to be and remain in the Philippine Islands since the American occupation thereof in accordance with law.

"Third. That the said plaintiff herein, during his residence in these Islands, has acquired and is actually the owner, or part owner, of property and business interests and enterprises of great value within the Philippine Islands, and that the said property and business interests and enterprises require the personal presence of the plaintiff herein in the Philippine Islands for the proper management and supervision and preservation thereof.

"Fourth. That the said plaintiff has a family in the Philippine Islands and that said family is dependent upon the said plaintiff for support and that it is impossible for the said plaintiff to give the said family that support unless he, the said plaintiff, is actually present within the Philippine Islands.

"Fifth. That on or about the 19th day of August, 1909, the defendants herein, Charles R. Trowbridge and J. E. Harding, unlawfully and fraudulently conspiring and conniving with the other defendant herein, the said W. Cameron Forbes, and acting under the direction of the said defendant, W. Cameron Forbes, did unlawfully seize and carry on board the steamer Yuensang the said plaintiff herein with the intent by said force to unlawfully deport and expel the said plaintiff herein from the Philippine Islands against the will of the said plaintiff herein.

"Sixth. That, notwithstanding the efforts of the said defendants herein to forcibly and unlawfully prevent the said plaintiff herein from returning to the Philippine Islands, the said plaintiff herein returned to the said city of Manila, Philippine Islands, on the 29th day of March, 1910, and was duly landed by the customs and immigration authorities in accordance with law, after having duly established his right to be and to remain herein.

"Seventh. That since the arrival of the said plaintiff herein in the Philippine Islands on the 29th day of March, 1910, as hereinbefore alleged, the said defendants herein unlawfully and fraudulently conniving and conspiring together, the said J. B. Harding and Charles R. Trowbridge, acting under the orders and directions of the said defendant, W. Cameron Forbes, have threatened, unlawfully, forcibly, and against the will of the plaintiff herein, to expel and deport plaintiff herein from the Philippine Islands, and that the defendants herein, and each and every one of them are doing all that is in their power to procure the unlawful, forcible, and involuntary expulsion of the plaintiff herein from the Philippine Islands in violation of the right of the said plaintiff herein to be and to remain in the Philippine Islands as established by law.

"Eighth. That the plaintiff herein has no adequate remedy other than that herein prayed for.

"Wherefore, the plaintiff prays that a temporary writ of injunction issue out of this court enjoining the said defendants and each of them and their and each of their agents, servants, employees, attorneys, successors in office, subordinate officers, and every person in any way in privity with them, from expelling or deporting or threatening to expel or deport or procure in any way the expulsion or deportation in any way of the plaintiff herein during the continuance of this action.

"And upon the final hearing of the cause the said temporary writ of injunction be made perpetual, and that the defendants and each of them be condemned to pay to the plaintiff herein the sum of twenty thousand pesos (P20,000) damages and the costs of this action.

"Manila, P. I., April 1, 1910.

(Signed) "O'BRIEN & DEWITT,
"H. BEAUMONT,
"Attorneys for plaintiff.

"CITY OF MANILA, Philippine Islands, ss:

"C. W. O'Brien, holding cedula No. 1095, dated at Manila, P. I., January 4, 1910, being duly sworn, upon oath deposes and says that he is one of the attorneys for the plaintiff and has read the above-entitled complaint and knows that the facts therein stated are true and correct, except such as are stated upon information and belief, and as to those he believes them to be true.

(Signed) "C. W. O'BRIEN.

"Subscribed and sworn to before me this 1st day of April, 1910, at Manila, P. I.

(Signed) "J. MCMICKING."

The Hon. A. S. Crossfield issued the following order:

"ORDER.

"To the defendants, W. Cameron Forbes, Charles R. Trowbridge, J. E. Harding, and all their attorneys, agents, subordinates, servants, employees, successors in office, and all persons in any way in privity with them greeting:

"The plaintiff having presented a complaint before this Court of First Instance of the city of Manila, in the cause above entitled, against the defendants W. Cameron Forbes, Charles R. Trowbridge, and J. E. Harding, above named, and having prayed likewise that a temporary injunction issue against the said defendants restraining them from doing and continuing to do certain acts mentioned in the said complaint and which are more particularly set forth hereinafter in this order; in view of the said complaint and the verification thereof by this attorney, and it appearing satisfactorily to me because of the facts alleged in said complaint that the case is one in which a preliminary injunction ought to issue, and the required bond having been executed in the sum of P2,000:

"It is hereby ordered by the undersigned, judge of this Court of First Instance of the city of Manila, that the said defendants, W. Cameron Forbes, Charles R. Trowbridge, and J. E. Harding, and all of their attorneys, agents, subordinates, servants, employees, successors in office, and all persons in any way in privity with them, are, and each of them is, hereby restrained and enjoined from expelling or deporting or threatening to expel or deport, or procuring in any way the expulsion or deportation in any way of the plaintiff herein during the continuance of this action.

"Manila, P. I, April 9, 1910.

(Signed) "A. S. CROSSFIELD,

"Judge, Court of First Instance, city of Manila, P. I."

"DEMURRER.

"Comes the defendant, W. Cameron Forbes, Governor- General of the Philippine Islands, and -

"I. Demurs to the first count or cause of action in the complaint because the same does not state facts sufficient to constitute a cause of action against the defendant.

"II. He demurs to the second count or cause of action in the complaint because the same does not state facts sufficient to constitute a cause of action against this defendant.

"Wherefore he prays the judgment of the court upon the sufficiency of each of the pretended causes of action set forth in the complaint.

(Signed) "W. A. KINCAID,

"THOMAS L. HARTIGAN,

"By W. A. KINCAID,

"Attorneys for defendant W. Cameron Forbes.

"Comes the defendant, W. Cameron Forbes, and moves the court to dissolve the temporary injunction issued against him in this cause, without notice to this defendant, for the following reasons:

"I. The complaint is insufficient to justify the issuance of the injunction.

"II. The court is without jurisdiction to issue said injunction.

(Signed) "W. A. KINCAID AND

"THOMAS L. HARTIGAN,

"By W. A. KINCAID,

"Attorneys for defendant W. Cameron Forbes.

(Signed) "IGNACIO VILLAMOR,

"Attorney-General"

"DEMURRER.

"Come the defendants, C. R. Trowbridge and J. E. Harding, and -

"I. Demur to the first count or cause of action in the complaint because the same does not state facts sufficient to constitute a cause of action against these defendants.

"II. They demur to the second count or cause of action in the complaint because the same does not state facts sufficient to constitute a cause of action against these defendants.

"Wherefore, they pray the judgment of the court upon the sufficiency of each of the pretended causes of action set forth in the complaint.

(Signed) "W. A. KINCAID AND

"THOMAS L. HARTIGAN,

"By W. A. KINCAID,

"Attorneys for defendants C. R. Trowbridge
and J. E. Harding.

(Signed) "IGNACIO VILLAMOR,
"Attorney-General.

"Come the defendants, C. R. Trowbridge and J. E. Harding, and move the court to dissolve the temporary injunction issued against them in this cause, without notice to these defendants, for the following reasons:

"I. The complaint is insufficient to justify the issuance of the injunction.

"II. The court is without jurisdiction to issue said injunction.

(Signed) "W. A. KINCAID AND
"THOMAS L. HARTIGAN,
"By W. A. KINCAID,
"Attorneys for defendants C. R. Trowbridge
and J. E. Harding.

(Signed) "IGNACIO VILLAMOR,
"Attorney-General."

"ORDER.

"This case is now before the court for hearing the demurrer presented by the defendants to plaintiff's complaint and defendants' motion to dissolve the injunction issued against the defendants upon plaintiff's complaint.

"Messrs. O'Brien and DeWitt appeared for the plaintiff; W. A. Kincaid, esq., for the defendants.

"The demurrer is based upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The motion to dissolve the injunction is grounded upon an insufficiency of the complaint and lack of jurisdiction in the court.

"Counsel for both parties made exhaustive arguments, both apparently considering the primal issue to be whether the defendant, W. Cameron Forbes, had authority at law, as Governor-General of the Philippine Islands, to deport plaintiff, as alleged in the complaint, and whether the court had jurisdiction to restrain him from making such deportation.

"No question was raised as to the sufficiency of the complaint if all question as to the Governor-General's authority was eliminated.

"A reading of the complaint discloses that the Governor-General of the Philippine Islands, as such, is not a party to the action,

"The allegations of the second paragraph of the complaint, to the effect that W. Cameron Forbes is the Governor-General of the Philippine Islands, that Charles R. Trowbridge is chief of the secret service of Manila, and J. E. Harding is chief of police of Manila, are descriptive only, and there is no allegation in the complaint that any of the defendants performed the acts complained of in his official capacity.

"The court can not determine the authority or liability of an executive officer of the Government until the pleadings disclose that his actions as such officer are brought in issue.

"The complaint upon its face states a cause of action.

"The complaint, stating a cause of action and alleging that the plaintiff is threatened with,an injury by the defendants, they may be properly restrained from committing the alleged injury until issues raised have been tried and determined and the court has jurisdiction to issue an injunction.

"The demurrer is, therefore, overruled. The motion to dissolve the preliminary injunction is denied.

"Manila, P. I., this 17th day of May, 1910.

(Signed) "A. S. CROSSFIELD, Judge"

Upon the filing of the original complaint and after a due consideration of the facts stated therein, the Hon. Grant Trent, acting as vacation justice, on the 24th day of May, 1910, issued the following order or injunction:

"PRELIMINARY INJUNCTION.

"Whereas, from the facts alleged in the complaint filed in the above-entitled case, it is found that the plaintiffs are entitled to the preliminary injunction prayed for by them;

"Therefore, the bond of P500 mentioned in the order of the 24th of May, 1910, having been filed, the Hon. A. S. Crossfield, judge of the Court of First Instance of the city of Manila, is hereby notified that, until he shall have received further orders from this court, he is prohibited from proceeding with the trial of the case filed by the defendant Chuoco Tiaco, alias Choa Tea, in the Court of First Instance of this city, against the within plaintiffs for indemnity as damages for the alleged deportation of the said Chuoco Tiaco, alias Choa Tea.

"Given in Manila this 24th day of May, 1910.

(Signed) "GRANT TRENT,

"Associate Justice, Supreme Court, acting in vacation."

On the 2d day of June, 1910, the defendants presented the following demurrer to the original complaint:

"And now come the defendants in the above-entitled cause, by their undersigned attorneys, and hereby file their demurrer to the complaint upon the grounds that the facts alleged in the complaint do not constitute a right of action.

"Therefore the court is petitioned to dismiss the complaint, with the costs against the plaintiff.

"Manila, June 2, 1910.

(Signed) "O'BRIEN & DEWITT, and

"HARTFORD BEAUMONT,

"Attorneys for defendants.

"To the plaintiffs or their attorneys:

"You are hereby notified that on Monday, the 13th inst, at nine o'clock in the morning, we shall ask the court to hear and decide the preceding demurrer.

"Manila, June 2, 1910.

(Signed) "O'BRIEN & DEWITT, AND

"HARTFORD BEAUMONT,

"Attorneys for defendants.

"We have this day, June 2, 1910, received a copy of the above.

(Stamp) "W. A. KINCAID AND

"THOMAS L. HARTIGAN,

"By J. BORJA,

"Attorneys for plaintiffs."

On the 2d day of June, 1910, the defendants made a motion to dissolve the said injunction, which motion was in the following language:

"And now come the defendants in the above-entitled case and pray the court to dissolve the preliminary injunction issued in the above-entitled case, on the 24th day of May, 1910, on the grounds:

"(1) That the facts alleged in the complaint are not sufficient to justify the issuance of the said preliminary injunction;

"(2) That the facts alleged in the complaint do not constitute a right of action.

"Manila, P. I., June 2, 1910.

(Signed) "O'BRIEN & DEWITT, AND
"HARTFORD BEAUMONT,
"Attorneys for defendants.

"To the plaintiffs and to their attorneys:

"You are hereby notified that on Monday, the 13th inst., at nine o'clock a. m., we shall ask for a hearing on the preceding motion.

"Manila, June 2, 1910.

(Signed) "O'BRIEN & DEWITT, AND
"HARTFORD BEAUMONT,
"Attorneys for defendants.

"We have this day received a copy of the foregoing.

(Stamp) "W. A. KINCAID AND
"THOMAS L. HARTIGAN,

"By J. BOBJA,
"Attorneys for plaintiffs."

Later the plaintiffs obtained permission to file the second amended complaint above quoted. By a stipulation between the parties "the demurrer" and "motion to dissolve" were to be considered as relating to the said second amended complaint.

By said "demurrer" and "motion to dissolve" the question is presented whether or not the facts stated in "the second amended complaint" are sufficient upon which to issue the writ of prohibition prayed for. If it should be determined that they are not, then, of course, the writ should be denied and the injunction should be dissolved. If, on the other hand, it should be determined that the facts stated are sufficient to justify the issuance of said writ, then it should be granted and the injunction should not be dissolved, but should be made perpetual.

From the allegations of the complaint (second amended complaint), including Exhibit A (which constituted the pleadings in the court below), we find the following facts are admitted to be true:

First. That the plaintiff W. Cameron Forbes is the Governor-General of the Philippine Islands;

Second. That the plaintiff J. E. Harding is the chief of police of the city of Manila;

Third. That the plaintiff C. R. Trowbridge is the chief of the secret service of the city of Manila;

Fourth. That the defendant, A. S. Crossfield, is one of the judges of the Court of First Instance of the city of

Manila;

Fifth. That the defendant Chuoco Tiaco (alias Choa Tea) is a foreigner of Chinese nationality and a subject of the Chinese Empire;

Sixth. That the plaintiff W. Cameron Forbes, acting in his official capacity as Governor-General of the Philippine Islands, in the public interest of the Philippine Government and at the request of the proper representative of the Imperial Government of China, to wit: the consul-general of the said Imperial Government, did, on or about the 19th day of August, 1909, order the said defendant, together with eleven others of Chinese nationality, to be deported from the Philippine Islands;

Seventh. That whatever the said plaintiffs J. E. Harding and C. R. Trowbridge did in connection with said deportation was done by each of them, acting under the orders of the said Governor-General, as the chief of police of the city of Manila and as the chief of the secret service of the city of Manila;

Eighth. That later, and on the 29th day of March, 1910, the said defendant Chuoco Tiaco returned to the Philippine Islands;

Ninth. That the plaintiff W. Cameron Forbes, acting through the said chief of police and the said chief of the secret service, was threatening to again deport the said Chuoco Tiaco from the Philippine Islands;

Tenth. That upon the 1st day of April, 1910, the said Chuoco Tiaco' commenced an action against the plaintiff herein (the said W. Cameron Forbes, Governor-General) in the Court of First Instance of the city of Manila and in that branch of said court over which the said A. S. Crossfield was presiding as one of the judges of said court, for the purpose of -

(a) Recovering a judgment against said defendants (plaintiffs herein) for P20,000 damages for said alleged wrongful deportation; and

(b) To procure an injunction against said defendants (plaintiffs herein) to prevent them from again deporting said plaintiff (defendant herein) from the Philippine Islands;

Eleventh. That upon the presentation or filing of the petition in the said action in the Court of First Instance and on the "9th day of April, 1910, the said A. S. Crossfield issued a preliminary injunction against the defendants, W. Cameron Forbes, J. E. Harding, and C. K. Trowbridge, and all their attorneys, agents, subordinates, servants, employees, successors in office, and all persons in any way in privity with them, forbidding them from expelling or deporting or threatening to expel or deport or procuring in any way the expulsion or deportation of the plaintiff (Chuoco Tiaco) during the continuance of the action;

Twelfth. Later, and on the.....day of....., 1910, the plaintiffs herein (defendants below) each presented -

(1) A demurrer to the causes of action described in the petition filed; and

(2) A motion to dissolve the said preliminary injunction upon the general grounds -

(a) That the facts alleged were not sufficient to constitute a cause of action or for the issuance of the injunction; and

(b) Because the court was without jurisdiction.

Thirteenth. On the 17th day of May, 1910, A. S. Crossfield, after hearing the arguments of the respective parties, found -

(1) That the facts alleged in the petition did constitute a cause of action; and

(2) That the Court of First Instance did have jurisdiction to try the questions presented.

Fourteenth. On the 24th day of May, 1910, the plaintiffs herein, through their attorney, W. A. Kincaid, presented a petition in the Supreme Court asking that -

(a) An injunction be issued against the said A. S. Crossfield, restraining him from proceeding in said action until further orders from this court; and

(b) That the writ of prohibition be granted against the said judge, forbidding him from taking jurisdiction of said action and to dismiss the same.

Fifteenth. On the 24th day of May, 1910, the Hon. Grant Trent, Associate Justice, acting in vacation, issued the preliminary injunction prayed for.

On the 2d day of June, 1910, the attorneys for the defendants (herein), Messrs. O'Brien & DeWitt, and Hartford Beaumont, filed:

(1) A demurrer to the petition; and

(2) A motion to dissolve said injunction, each based upon the general ground that the facts alleged in the petition were insufficient to constitute a cause of action.

The said "demurrer" and "motion to dissolve" were brought on for hearing before the Supreme Court on the 11th day of July, 1910, and the questions presented were argued at length by the attorneys for the respective parties.

One of the questions which is presented by the pleadings and by the arguments presented in the cause is whether or not the action pending in the lower court is an action against the Governor-General, as such, as well as against the other defendants in their official capacity. If it should be decided that the action is one against the defendants in their official capacity, then the question will be presented for decision whether or not the courts have jurisdiction over the Governor-General, for the purpose of reviewing his action in any case and with especial reference to the facts presented.

The pleadings presented in this court affirmatively allege that the action in the lower court was against the defendants (plaintiffs herein) in their official capacity. The pleadings here also allege positively that the acts complained of in the lower court were done by the defendants in their official capacity; that the expulsion of the defendant (plaintiff below) was in the public interest of the Government, at the request of the consul-general of the Imperial Government of China; that the said plaintiffs J. E. Harding and C. R. Trowbridge acted under the orders of the plaintiff W. Cameron Forbes; that W. Cameron Forbes acted in his official capacity as Governor-General, the act being an act of the Government itself, which action was immediately reported to the Secretary of War.

The pleadings in the lower court simply described the defendants (plaintiffs herein) as W. Cameron Forbes, Governor-General ; J. E. Harding, chief of police of the city of Manila, and C. R. Trowbridge, chief of the secret service of the city of Manila. The lower court held that:

"The allegations of the second paragraph of the complaint, to the effect that W. Cameron Forbes is the Governor-General of the Philippine Islands, that Charles R. Trowbridge is the chief of the secret service of Manila, and that J. E. Harding is the chief of police of Manila, are descriptive only, and there is no allegation in the complaint that any of the defendants (plaintiffs herein) performed the acts complained of in his official capacity."

The theory of the lower court evidently was that the defendants should have been described, for example, "W.

Cameron Forbes, as Governor-General," etc. In this theory the lower court has much authority in its support. However, this failure of correct and technical description of the parties is an objection which the parties themselves should present, but when all the parties treat the action as one based upon a particular theory, that theory should be accepted. Upon this question the lower court, in his order, said:

"Counsel for both parties made exhaustive arguments, both apparently considering the primal issue to be whether the defendant, W. Cameron Forbes, had authority at Jaw, as Governor-General of the Philippine Islands, to deport plaintiff, as alleged in the complaint and whether the court had jurisdiction to restrain him from making such deportation."

It will be noted also that the prayer of the complaint in the lower court asked for relief against "his successors in office." The injunction also ran against "his successors in office." Thus clearly it appears that the action was against the defendants in their official capacity.

In this court there was no pretension by the attorney for the defendant (plaintiff below) that the action was not against the Governor-General as Governor-General, and the others as well, in their official capacity. In fact, when an inquiry was made of the attorney for the defense concerning his theory, his reply was simply that the acts of the Governor-General, being illegal, were not performed in his official capacity.

The argument of the attorney for the defendant was directed to the proposition that the Governor-General, in deporting or expelling the said Chinamen, did not act in accordance with that provision of the Philippine Bill (sec. 5, Act of Congress, July 1, 1902), which provides that:

"No law shall be enacted in said Islands which shall deprive any person of life, liberty, or property, without due process of law; or deny to any person therein equal protection of the laws."

The attorney for the plaintiffs, in answering this argument, maintained:

First. That the act of the Governor-General was the act of the Philippine Government and that he had a right, inherent in him as the representative of the Government and acting for the Government, to deport or expel the defendant; and

Second. In the absence of express rules and regulations for carrying such power into operation, he (the Governor-General) had a right to use his own official judgment and discretion in the exercise of such power.

In order to arrive at a correct solution of the questions presented by the foregoing facts, we shall discuss the following propositions:

I.

WHAT ARE THE POWERS OF THE PHILIPPINE GOVERNMENT TO DEPORT OR EXPEL OBJECTIONABLE ALIENS?

The Government of the United States in the Philippine Islands is a government with such delegated, implied, inherent, and necessary military, civil, political, and police powers as are necessary to maintain itself, subject to such restrictions and limitations as the people of the United States, acting through Congress and the President, may deem advisable, from time to time, to interpose. (Instructions of President McKinley to the Taft Commission; executive order of President McKinley dated June 21, 1901, appointing Mr. Taft Civil Governor of the Philippine Islands; that part of the Act of Congress of March 2, 1901, known as the Spooner Amendment; *Barcelon vs. Baker*, 5 Phil. Rep., 87; *U. S. vs. Bull*, 15 Phil. Rep., 7, 8 Off. Gaz., 271.)

The Spooner Amendment provided that -

"All military, civil, and judicial powers necessary to govern the Philippine Islands * * * shall, until otherwise provided by Congress, be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said Islands in the free enjoyment of their liberty, property, and religion."

By this Act of Congress a system of government was established in the Philippine Islands which carried with it the right and duty on the part of such government to perform all acts that might be necessary or expedient for the security, safety, and welfare of the people of the Islands.

In the case of *United States vs. Bull*, this court, speaking through Mr. Justice Elliott, said:

"Within the limits of its authority the Government of the Philippine Islands is a complete governmental organism, with executive, legislative, and judicial departments exercising the functions commonly assigned to such departments. The separation of powers is as complete as in most governments."

Having reached the conclusion that the Government of the United States in the Philippine Islands is a government with all the necessary powers of a government, subject to certain control in the exercise thereof, we are of the opinion, and so hold, that it has impliedly or inherently all such powers as are necessary to preserve itself in conformity with the will of the Congress of the United States and the President thereof, and to this end it may prevent the entrance into or eliminate from its borders all such aliens whose presence is found to be detrimental or injurious to its public interest, peace, and domestic tranquillity. Every government having the dignity of a government possesses this power. Every author who has written upon the subject of international law and who has discussed this question has reached the same conclusion. Among these authors may be mentioned such noted men and statesmen as Vattel, Ortolan, Blackstone, Chitty, Phillimore, Puffendorf, Fiore, Martens, Lorimer, Torres, Castro, Bello, Heffter, Marshall, Cooley, Wharton, Story, Moore, Taylor, Oppenheim, Westlake, Holland, Scott, Haycroft, Craies, Pollock, Campbell, and others.

Not only have all noted authors upon this question of international law reached this conclusion, but all the courts before which this particular question has been involved have also held that every government has the inherent power to expel from its borders aliens whose presence has been found detrimental to the public interest.

This court, speaking through its Chief Justice, in the case of *In re Patterson* (1 Phil. Rep., 93), said:

"Unquestionably every State has a fundamental right to its existence and development, and also to the integrity of its territory and the exclusive and peaceable possession of its dominions, which it may guard and defend by all possible means against any attack. * * * We believe it is a doctrine generally professed by virtue of that fundamental right to which we have referred that under no aspect of the case does this right of intercourse give rise to any obligation on the part of the State to admit foreigners under all circumstances into its territory. The international community, as Martens says, leaves States at liberty to fix the conditions under which foreigners should be allowed to enter their territory. These conditions may be more or less convenient to foreigners, but they are a legitimate manifestation of territorial power and not contrary to law. In the same way a State may possess the right to expel from its territory any foreigner who does not conform to the provisions of the local law. (Martens's Treatise on International Law, vol. 1, p. 381.) Superior to the law which protects personal liberty, and the agreements which exist for their own interests and for the benefit of their respective subjects, is the supreme and fundamental right of each State to self-preservation and the integrity of its dominion and its sovereignty. Therefore it is not strange that this right should be exercised in a sovereign manner by the executive power, to which is especially entrusted, in the very nature of things, the preservation of so essential a right, without interference on the part of the judicial power. If it can not be denied that under normal circumstances when foreigners are present in the country the sovereign power has the right to take all necessary precautions to prevent such foreigners from imperiling the public safety and to apply repressive measures in case they should abuse the hospitality extended to them, neither can we shut our eyes to the fact

that there may be danger to personal liberty and international liberty if to the executive branch of the government there should be conceded absolutely the power to order the expulsion of foreigners by means of summary and discretionary proceedings; nevertheless, the greater part of modern laws, notwithstanding these objections, have sanctioned the maxim that the expulsion of foreigners is a political measure and that the executive power may expel, without appeal, any person whose presence tends to disturb the public peace."

The Supreme Court of the United States, speaking through Mr. Justice Field, in the case of *Chao Chan Ping vs. United States* (130 U. S., 581) (A. D. 1888), said:

"These laborers are not citizens of the United States; they are aliens. That the Government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be, to that extent, subject to the control of another power. The United States in their relation to foreign countries and their subjects or citizens are one nation invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. * * *

"* * * The power of exclusion of foreigners being an incident of sovereignty, belonging to the Government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the Government, the interests of the country require it, can not be granted away or restrained on behalf of anyone. The powers of the Government are delegated in trust to the United States and are incapable of transfer to any other parties. They (the incidents of sovereignty) can not be abandoned or surrendered nor can their exercise be hampered when needed for the public, by any consideration of private interests."

In the case of *Ekiu vs. United States* (142 U. S., 651, 659) (A. D. 1891) the Supreme Court of the United States, speaking through Mr. Justice Gray, said:

"It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the National Government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the Government and may be exercised either through treaties made by the President and Senate or through statutes enacted by Congress."

Later, the Supreme Court of the United States, in the case of *Fong Yue Ting vs. United States* (149 U. S., 698) (A. D. 1892), speaking through Mr. Justice Gray, again said:

"The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."

The power to exclude or expel aliens being a power affecting international relations is vested in the political department of the Government. The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same, reasons, and are, in truth, but the exercise of one and the same power.

In a very recent case - *The Attorney-General of Canada vs. Cain* (House of Lords Reports, Appeal Cases, 1906), Lord Atkinson, speaking for the court, said (p. 545):

"In 1763 Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights

which had at any time been held or acquired by the Crown of France, were ceded to Great Britain (St. Catherine's Milling and Lumber Company vs. Beg., 14 Appeal Cases, 46, 53). Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it and, save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them.

"One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests." (Citing Vattel's Law of Nations in support of his proposition.)

In the case of *Hodge vs. Reg.* (9 Appeal Cases, 117) it was decided that a colonial legislature, under the British Government, has, within the limits prescribed by the statute which created it, an authority as plenary and as ample as the imperial parliament in the plenitude of its power possessed and could bestow.

See also *In re Adams*, 1 Moore's Privy Council, 460, 472- 476 (A. D. 1837); *Donegani vs. Donegani*, 3 Knapp, 63, 68 (A. D. 1835) ; *Cameron vs. Kyte*, 3 Knapp, 332, 343 (A. D. 1835) ; *Musgrave vs. Pulido*, Law Reports, 5 Appeal Cases, 102 (A. D. 1879) ; *Musgrave vs. Chun Teeong Toy*, Law Reports, Appeal Cases, 272 (A. D. 1891); *Hill vs. Bigge*, 3 Moore's Privy Council, 465; *The Nabob of Carnatic vs. The East Indian Company*, 1 Vese, Jr., 388; *Fabrigas vs. Mostyn*, 1 Cowper, 161.

Mr. Vattel, writing as early as 1797, in discussing the question of the right of a nation or government to prevent foreigners from entering its territory or to expel them, said:

"Every nation has the right to refuse to admit a foreigner into the country when he can not enter without putting the nation in evident danger or doing it manifest injury. What it (the nation) owes to itself, the care of its own safety, gives to it this right; and in virtue of its national liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner. Thus, also, it has a right to send them elsewhere if it has just cause to fear that they will corrupt the manners of the citizens; that they will create religious disturbances or occasion any other disorder contrary to the public safety. In a word, it has a right, and is even obliged in this respect, to follow the rules which prudence dictates." (Vattel's Law of Nations, book 1, chapter 19, sees. 230, 231.)

Mr. Ortolan said:

"The government of each State has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier; this right is based upon the fact that the foreigner, not making a part of the nation, his individual reception into the territory is a matter of pure permission and simple tolerance and creates no obligation. The exercise of this right may be subject, doubtless, to certain forms prescribed by the domestic laws of each country; but the right exists, none the less, universally recognized and put in force. In France, no special form is now prescribed in this matter; the exercise of this right of expulsion is wholly left to the executive power." (Ortolan, *Diplomatic de la Mer*, book 2, chapter 14, 4th edition, p. 297.)

Mr. Phillimore said:

"It is a received maxim of international law that the government of the State may prohibit the entrance of strangers into the country and may, therefore, regulate the conditions under which they shall be allowed to remain in it or may require or compel their deportation from it." (1 Phillimore's International Law, 3d edition, chapter 10, sec. 220.)

Mr. Taylor said:

"Every independent State possesses the right to grant or refuse hospitality. Undoubtedly such a State possesses the power to close the door to all foreigners who, for social, political or economical reasons, it deems expedient to exclude; and for like reasons it may subject a resident foreigner or a group of them to expulsion, subject, of course, to such retaliatory measures as an abuse of the excluding or expelling power may provoke." (Taylor, International Public Law, p. 231.)

Mr. Oppenheim said:

"Just as a State is competent to refuse admission to foreigners, so it is in conformity with its territorial supremacy competent to expel at any moment a foreigner who has been admitted into its territory. And it matters not whether the respective individual is only on a temporary visit or has settled down for professional or business purposes on that territory, having taken his domicile thereon.

"It has also been held that a State may expel a foreigner who has been residing within its territory for some length of time and has established a business there, and that his only remedy is to have his home State, by virtue of the right of protection of a State over its citizens abroad, to make diplomatic representations to the expelling State and ask for the reasons for such expulsion; but the right being inherent in the sovereignty or State, it can expel or deport even domiciled foreigners without so much as giving the reasons therefor. The expulsion of aliens from a State may be an unfriendly act to the State of the individual expelled, but that fact does not constitute the expulsion an illegal act, the law of nations permitting such expulsions." (Oppenheim, International Law, sec. 323.)

Mr. Martens said:

"The government of each State has always a right to compel foreigners who live within its territory to go away, having them conveyed to the frontier. This right has its cause in the fact that as a stranger does not form a part of a nation, his individual admission into the country is merely discretionary, a mere act of tolerance, in no way obligatory. The practice of this right might be subject to certain forms prescribed by the international laws of each country, but the right is always universally acknowledged and put into practice." (Martens's Droit des Gens, book 3, p. 91.)

This implied or inherent right in the Government to prevent aliens from entering its territory or to deport or expel them after entrance, has not only been recognized by the courts and eminent writers of international law, but has also been recognized many times by the executive and legislative branches of the Government. Acts of the Congress of the United States, of the Parliament of Great Britain, as well as the British colonial parliaments, and royal decrees might be cited in support of this doctrine. One of the very early Acts of the Congress of the United States (A. D. 1798) authorized the President of the United States to order all such aliens as he should judge to be dangerous to the peace and safety of the country, or that he should have reasonable grounds to suspect of being concerned in any treasonable machinations against the Government, to deport out of the territory of the United States within such time as he should express in his order. And it was further provided that if any such aliens, so sent out, should return without the permission of the President, they should be imprisoned so long as, in the opinion of the President, the public safety might require.

Mr. Frelinghuysen, as Secretary of State of the United States (1882), said:

"This Government (United States) can not contest the right of foreign governments to exclude, on policy or other grounds, American citizens from their shores."

Mr. Gresham, Secretary of State of the United States, in speaking of the right of Hayti to expel from its borders American citizens, said:

"This government does not propose to controvert the principle of international law which authorizes every independent State to expel objectionable foreigners or class of foreigners from its territory. The right of

expulsion or exclusion of foreigners is one which the United States, as well as many other countries, has, upon occasions, exercised when deemed necessary in the interest of the Government or its citizens. * * *

"Every State is authorized, for reasons of public order, to expel foreigners who are temporarily residing in its territory, but when a Government expels foreigners without cause and in an injurious manner, the State of which the foreigner is a citizen has a right to prefer a claim for this violation of international law and to demand satisfaction, if there is occasion for it."

Many other cases might be cited showing the arbitrary manner in which aliens have, from time to time, been deported.

Expulsion is a police measure, having for its object the purging of the State of obnoxious foreigners. It is a preventive, not a penal process, and it can not be substituted for criminal prosecution and punishment by judicial procedure.

The right of deportation or expulsion is generally exercised by the executive head of the Government, sometimes with and sometimes without express legislation. Sometimes it is delegated in particular instances to the heads of some departments of the Government. (Act No. 265, U. S. Philippine Commission.)

In Canada the right was given by statute to the attorney-general of Canada. (Dominion Act, 60th and 61st Victoria, chap. 11, sec. 6, as amended by 1st Edward 7th, chap. 13.)

It having been established that every government has the implied or inherent right to deport or expel from its territory objectionable aliens, whenever it is deemed necessary for the public good, we deem it pertinent to inquire:

II.

IN WHAT DEPARTMENT OR DEPARTMENTS OF THE INDEPENDENT DEPARTMENTS OF A GOVERNMENT DOES THIS INHERENT POWER EXIST?

The rule of law permitting nations to deport or expel objectionable aliens, while international in its character, is yet, nevertheless, in its application, executed by the particular nation desiring to rid itself of such aliens and must, therefore, be carried into operation by that department of the government charged with the execution of the nation's laws. Its enforcement belongs peculiarly to the political department of the government. The right is inherent in the government and, as Mr. Justice Field said, "can not be granted away or restrained on behalf of anyone." It being inherent in the political department of the government, it need not be defined by express legislation, although in some States the legislative department of the government has prescribed the condition and the method under which and by which it shall be carried into operation. The mere absence of legislation regulating this inherent right to deport or expel aliens is not sufficient to prevent the chief executive head of the government, acting in his own sphere and in accordance with his official duty, to deport or expel objectionable aliens, when he deems such action necessary for the peace and domestic tranquillity of the nation. One of the principal duties of the chief executive of a nation is to preserve peace and order within the territory. To do this he is possessed of certain powers. It is believed and asserted to be sound doctrine of political law that if in a particular case he finds that there are aliens within his territory whose continued presence is injurious to the public interest, he may, even in the absence of express law, deport them. The legislative department of the government is not always in session. It may require days and even months for that department to assemble. Sudden and unexpected conditions may arise, growing out of the presence of obnoxious and untrustworthy foreigners, which demand immediate action. Their continued presence in the country may jeopardize even the very life of the government. To hold that, in view of the inherent power of the government, the chief executive authority was

without power to expel such foreigners, would be to hold that at times, at least, the very existence and life of the government might be subjected to the will of designing and obnoxious foreigners, who were entirely out of sympathy with the existing government, and whose continued presence in the territory might be for the purpose of destroying such government.

Suppose, for example, that some of the inhabitants of the thickly populated countries situated near the Philippine Archipelago, should suddenly decide to enter the Philippine Islands and should, without warning appear in one of the remote harbors and at once land, for the purpose of stirring up the inhabitants and inciting dissensions against the present Government. And suppose, for example, that the Legislature was not in session; could it be denied that the Governor-General, under his general political powers to protect the very existence of the Government, has the power to take such steps as he may deem wise and necessary for the purpose of ridding the country of such obnoxious and dangerous foreigners? To admit such a doctrine would be to admit that every government was without the power to protect its own life, and at times might be subjected to the control of people who were out of sympathy with the spirit of the Government and who owe no allegiance whatever to it, and are under no obligations to assist in its perpetuity.

It has never been denied, in a government of separate and independent departments, executive, legislative, and judicial, that the legislature may prescribe the methods or conditions for the exercise of this power, but the mere absence of such rules neither proves that the power does not exist nor that the executive head of the government may not adopt for himself such methods as he may deem advisable for the public good and the public safety. He can only be controlled in the conditions and methods as to when and how the powers shall be exercised. The right itself can not be destroyed or bartered away. When the power is once created and no rules are adopted for its enforcement, the person or authority who has to exercise such power has the right to adopt such sane methods for carrying the power into operation as prudence, good judgment and the exigencies of the case may demand; and whatever rules and regulations may be adopted by the person or department possessing this power for carrying into operation this inherent power of the government, whether they are prescribed or not, will constitute due process of law. (See speech delivered by John Marshall in the House of Representatives of the United States, Annals of the Sixth Congress, 595; *United States vs. Robins*, Fed. Cas. No. 16,175, 27 Fed. Cas., 825; *Moyer vs. Peabody*, 212 U. S., 78; *Murray vs. Hoboken Land & Improvement Co.*, 18 How., 272; *U. S. vs. Ju Toy*, 198 U. S., 253, 263.)

We have said that the power to deport or expel foreigners pertains to the political department of the government. Even in those jurisdictions where the conditions under which persons may be deported are left to the courts to decide, even then the actual deportations must be carried into operation by the executive department of the government. The courts have no machinery for carrying into operation their orders except through the executive department.

In the present case the fact is charged and admitted that the defendant was deported by W. Cameron Forbes as Governor-General of the Philippine Islands, acting for the Government. Mr. Forbes is "the chief executive authority in all civil affairs of the Government of the Philippine Islands" and as such it is his duty to enforce the laws. It is our opinion and we so hold that as such "executive authority" he had full power, being responsible to his superiors only, to deport the defendant by whatever methods his conscience and good judgment might dictate. But even though we are wrong in our conclusions that he is the possessor of the inherent right to deport aliens, and it is true that the power belongs to the legislative department to prescribe rules and regulations for such deportation, yet, in the present case, the legislative department expressly recognized his authority and approved his acts by a resolution adopted by it on the 19th of April, 1910. This power of the legislature to expressly ratify acts alleged to be illegal by the executive department, has been expressly recognized by the Supreme Court of the

United States in the case of *United States vs. Heinszen & Co.* (206 U. S., 370); *O'Reilly de Camara vs. Brooke, Major-General* (142 Fed. Rep., 859). An act done by an agent of the Government, though in excess of his authority, being ratified and adopted by the Government, is held to be equivalent to previous authority. (142 Federal Reporter, *supra*; *Phillips vs. Eyre*, Law Reports, 6 Queen's Bench Cases, 1; *Secretary of State vs. Kamachee Baye Sahaba*, 13 Moore's Privy Council, 22; *O'Reilly de Camara vs. Brooke, Major-General*, 209 U. S., 54.)

It is also admitted that the act of the Governor-General in deporting the defendant was in compliance with a request made by the official representative of the Imperial Government of China. It would seem, therefore, that said request, in the absence of any other power, would be sufficient justification of his act. The mere fact that a citizen or subject is out of the territory of his country does not relieve him from that allegiance which he owes to his government, and his government may, under certain conditions, properly and legally request his return. This power is expressly recognized by the Congress of the United States. (See Act of Congress of January 30, 1799, 1 Statutes at Large, 613; sec. 5533, Revised Statutes of United States; sec. 5, United States Penal Code, adopted March 4, 1909.)

It was strenuously argued at the hearings of this cause that the defendant was deported without due process of law, in fact, that was the burden of the argument of attorney for the defendant.

"Due process of law, in any particular case, means such an exercise of the powers of the government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." (*U. S. vs. Ling Su Fan*, 10 Phil. Rep., 104, 111; *Moyer vs. Peabody*, 212 U. S., 78; *Murray vs. Hoboken Land & Improvement Co.*, 18 How., 272; *U. S. vs. Ju Toy*, 198 U. S., 253, 263.)

An examination of the methods by which the defendant was deported, as stated by the attorney for the defendant, as compared with the numerous cases of deportation by the various governments of the world, shows that the method adopted in the present case was in accordance with the methods adopted by governments generally and the method sanctioned by international law. (See *Moore's International Law Digest*, vol.4.)

It has been repeatedly decided when a government is dealing with the political rights of aliens that it is not governed by that "due process of law" which governs in dealing with the civil rights of aliens. For instance, the courts of the United States have decided that in the deportation of an alien he is not entitled to right of trial by jury, the right of trial by jury being one of the steps in the "due process of law" in dealing with civil rights. (*Fong Yue Ting vs. U. S.*, 149 U. S., 698; *U. S. vs. Wong Dep Ken*, 57 Fed. Rep., 206; *U. S. vs. Wong Sing*, 51 Fed. Rep., 79; *In re Ng Loy Hoe*, 53 Fed. Rep., 914.)

In the case of *Moyer vs. Peabody, Governor of Colorado* (212 U. S., 78), Mr. Justice Holmes, speaking for the court upon the question of what is "due process of law," said:

"But it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus, summary proceedings suffice for taxes and executive decisions for exclusion from the country."

Neither will the fact that an alien residing in the territory holds a certificate of admission justify his right to remain within such territory as against an act of the executive department of the Government which attempts to deport him. (*Chae Chan Ping vs. U. S.*, 130 U. S., 581, 36 Fed. Rep., 431.) The certificate is a mere license and may be revoked at any time. An alien's right to remain in the territory of a foreign government is purely a political one and may be terminated at the will of such government. No cases have been found, and it is confidently asserted that there are none, which establish a contrary doctrine.

Having established, as we believe:

- (a) That a government has the inherent right to deport aliens whenever the government believes it necessary for the public good; and
- (b) That the power belongs to the political department of the government and in the Philippine Islands to the Governor-General, who is "the chief executive authority in all civil affairs" in the Government of the Philippine Islands: We deem it pertinent to inquire:

III.

WHETHER OR NOT THE COURTS CAN TAKE JURISDICTION IN ANY CASE RELATING TO THE EXERCISE OF THIS INHERENT POWER IN THE DEPORTATION OF ALIENS, FOR THE PURPOSE OF CONTROLLING THIS POWER VESTED IN THE POLITICAL DEPARTMENT OF THE GOVERNMENT.

The question whether or not the courts will ever intervene or take jurisdiction in any case against the chief executive head of the government is one which has been discussed by many eminent courts and learned authors. They have been unable to agree. They have not been able to agree even as to what is the weight of authority, but they all agree, when the intervention of the courts is prayed for, for the purpose of controlling or attempting to control the chief executive head of the government in any matter pertaining to either his political or discretionary duties, that the courts will never take jurisdiction of such case. The jurisdiction is denied by the courts themselves on the broad ground that the executive department of the government is a separate and independent department, with its duties and obligations, the responsibility for the compliance with which is wholly upon that department. In the exercise of those duties the chief executive is alone accountable to his country in his political character and to his own conscience. For the judiciary to interfere for the purpose of questioning the manner of exercising the legal, political, inherent duties of the chief executive head of the government would, in effect, destroy the independence of the departments of the government and would make all the departments subject to the judicial. Such a conclusion or condition was never contemplated by the organizers of the government. Each department should be sovereign and supreme in the performance of its duties within its own sphere, and should be left without interference in the full and free exercise of all such powers, rights, and duties which rightfully, under the genius of the government, belong to it. Each department should be left to interpret and apply, without interference, the rules and regulations governing it in the performance of what may be termed its political duties. Then for one department to assume to interpret or to apply or to attempt to indicate how such political duties shall be performed would be an unwarranted, gross, and palpable violation of the duties which were intended by the creation of the separate and distinct departments of the government.

It is no answer to this conclusion to say that the chief executive authority may violate his duties and the constitutional guaranties of the people, or that injustice may be done, or that great and irreparable damage may be occasioned without a remedy. The judicial is not the only department of the government which can do justice or perpetually conserve the rights of the people. The executive department of the government is daily applying laws and deciding questions which have to do with the most vital interests of the people. (*Marbury vs. Madison*, 1 Cranch, U. S., 152; *State of Miss. vs. Johnson*, 4 Wall., 475, 497; *Hawkins vs. The Governor*, 1 Ark., 570 (33 Am. Dec, 346); *Sutherland vs. The Governor*, 29 Mich., 320; *People vs. Bissell*, 19 Ill., 229 (68 Am. Dec, 591); *State vs. Warmoth*, 22 La. An., 1.)

In the case of *State vs. Warmoth* (22 La. An., 1) Mr. Justice Taliaferro said (pp. 3, 4):

"He [the governor] must be presumed to have this discretion, and the right of deciding what acts his duties require

him to perform; otherwise his functions would be trammelled, and the executive branch of the government made subservient, in an important feature, to the judiciary.

* * * * *

"When the official acts to be performed by the executive branch of the government are divided into ministerial and political, and courts assume the right to enforce the performance of the former, it opens a wide margin for the exercise of judicial power. The judge may say what acts are ministerial and what political. Circumstances may arise and conditions may exist which would require the Governor of a State, in the proper exercise of his duty, and with regard to the interests of the State, not to perform a ministerial act. Is the judge to determine his duty in such case, and compel him to perform it? The reasons of the executive for the nonperformance of an act, the judge may never know, or, if brought to his knowledge, he may review and overrule them, and, in so doing, assume political functions. He would determine, in such a case, the policy of doing the act. The legislator himself, who prescribed the act, might hold the executive harmless, while the judge condemned him."

We believe that there are certain inherent powers vested in the chief executive authority of the State which are universally denominated political, which are not defined either by the constitution or by the laws. We believe that those inherent powers would continue to exist for the preservation of the life and integrity of the State and the peace and quietude of its people, even though the constitution were destroyed and every letter of the statutes were repealed. This must necessarily be true, or, otherwise, the hands of the chief executive authority of the government might, at times, be paralyzed in his efforts to maintain the existence of the government. The United States Government never intended to create in the Philippine Islands a government without giving it adequate power to preserve itself and to protect the highest interests of the people of the Archipelago.

These inherent, inalienable, and uncontrollable powers which must necessarily exist in the absence of express law in the chief executive authority of a nation have been clearly demonstrated by the action of the President of the United States, notably in putting down what is known as the "Whisky Rebellion" in the State of Pennsylvania, in the case of the protection of a judge of the United States (In re Neagle, 135 U. S., 1, 64), as well as in the case of the uprising of labor organizations in the city of Chicago under the direction and control of Mr. Debbs (In re Debbs, 158 U.S., 568).

These powers and the right to exercise them according to his own good judgment and conscience and his acts in pursuance of them are purely political and are not subject to control by any other department of the government. It is believed that even the Legislature can not deprive him of the right to exercise them.

Upon the question of the right of the courts to interfere with the executive, this court has already pronounced, in the case of In re Patterson (1 Phil. Rep., 93) that:

"Superior to the law which protects personal liberty and the agreements which exist between nations for their own interests and the benefit of their respective subjects is the supreme and fundamental right of each state to self-preservation and the integrity of its dominion and its sovereignty. Therefore it is not strange that this right should be exercised in a sovereign manner by the executive power to which is entrusted, in the very nature of things, the preservation of so essential a right, without interference on the part of the judicial power"

This court has also announced the doctrine, in the case of *Barcelon vs. Baker et al.* (5 Phil. Rep., 87) that:

"Under the form of government established in the Philippine Islands one department of the Government has no power or authority to interfere in the acts of another, which acts are performed within the discretion of the other department."

In the case of *Martin vs. Mott* it was decided by the Supreme Court of the United States, whenever the

performance of a political duty devolved upon the chief executive authority of a nation and when he had decided as to the method of performing that duty, that no court could question his decision. We are of opinion and so hold, whenever the authority to decide a political question devolves upon any separate and distinct department of the Government, which authority imposed upon that department the right to decide whether the exigencies for its exercise have arisen, and when that department had decided, that that decision is conclusive upon all other persons or departments.

This doctrine has been further recognized by this court in the case of *Merchant vs. Del Rosario* (4 Phil. Rep., 316) as well as in the case of *Debrunner vs. Jaramillo* (12 Phil. Rep., 316).

Under the system of government established in the Philippine Islands the Governor-General is "the chief executive authority," one of the coordinate branches of the Government, each of which, within the sphere of its governmental powers, is independent of the others. Within these limits the legislative branch can not control the judicial nor the judicial the legislative branch, nor either the executive department. In the exercise of his political duties the Governor-General is, by the laws in force in the Philippine Islands, invested with certain important governmental and political powers and duties belonging to the executive branch of the Government, the due performance of which is entrusted to his official honesty, judgment, and discretion. So far as these governmental or political or discretionary powers and duties which adhere and belong to the Chief Executive, as such, are concerned, it is universally agreed that the courts possess no power to supervise or control him in the manner or mode of their discharge or exercise. (*Hawkins vs. The Governor*, supra; *People vs. The Governor*, supra; *Marbury vs. Madison*, supra; *Meecham on Public Officers*, sec. 954; *In re Patterson*, supra; *Barcelon vs. Baker*, supra.)

It may be argued, however, that the present action is one to recover damages against the Governor and the others mentioned in the cause, for the illegal acts performed by them, will not an action for the purpose of in any way controlling or restraining or interfering with their political or discretionary duties. No one can be held legally responsible in damages or otherwise for doing in a legal manner what he had authority, under the law, to do. Therefore, if the Governor-General had authority, under the law, to deport or expel the defendants, and the circumstances justifying the deportation and the method of carrying it out are left to him, then he can not be held liable in damages for the exercise of this power. Moreover, if the courts are without authority to interfere in any manner, for the purpose of controlling or interfering with the exercise of the political powers vested in the chief executive authority of the Government, then it must follow that the courts can not intervene for the purpose of declaring that he is liable in damages for the exercise of this authority. Happily we are not without authority upon this question. This precise question has come before the English courts on several different occasions.

In the cases of *The Lord-Lieutenant of Ireland* (*Governor of Ireland*), *Tandy vs. Earl of Westmoreland* (27 State Trials, 1246), and *Luby vs. Lord Wodehouse* (17 Iredell, Common Law Reports, 618) the courts held that the acts complained of were political acts done by the lord-lieutenant in his official capacity and were assumed to be within the limits of the authority delegated to him by the Crown. The courts of England held that, under the circumstances, no action could lie against the lord-lieutenant, in Ireland or elsewhere.

In the case of *Chun Teeong Toy vs. Musgrave* (Law Reports, Appeal Cases 1891, p. 272) the plaintiff, a Chinese subject, brought an action for damages against the defendant as collector of customs of the State of Victoria in Australia, basing his action upon the refusal of the Victorian government to permit him to enter that State. Upon a full consideration the Privy Council said:

"Their Lordships can not assent to the proposition that an alien refused permission to enter British territory can, in an action against the British Crown, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament and the relation of this country to her self-governing colonies. When once it is admitted that there is no absolute and

unqualified right of action on the behalf of an alien refused permission to enter British territory, their Lordships are of opinion that it would be impossible, upon the facts which the demurrer admits, for an alien to maintain an action."

If it be true that the Government of the Philippine Islands is a government invested with "all the military, civil, and judicial powers necessary to govern the Philippine Islands until otherwise provided by Congress" and that the Governor-General is invested with certain important political duties and powers, in the exercise of which he may use his own discretion, and is accountable only to his superiors in his political character and to his own conscience, and the judicial department of the Government is without authority to interfere in the control of such powers, for any purpose, then it must follow that the courts can not take jurisdiction in any case against him which has for its purpose the declaration that such acts are illegal and that he is, in consequence, liable for damages. To allow such an action would, in the most effective way possible, subject the executive and political departments of the Government to the absolute control of the judiciary. Of course, it will be observed that we are here treating only with the political and purely executive duties in dealing with the political rights of aliens. The conclusions herein reached should not be extended to cases where vested rights are involved. That question must be left for future consideration.

From all the foregoing facts and authorities, we reach the following conclusions:

First. That the Government of the United States in the Philippine Islands is a government possessed with "all the military, civil, and judicial powers necessary to govern the Philippine Islands" and as such has the power and duty, through its political department, to deport aliens whose presence in the territory is found to be injurious to the public good and domestic tranquillity of the people.

Second. That the Governor-General, acting in his political and executive capacity, is invested with plenary power to deport obnoxious aliens whose continued presence in the territory is found by him to be injurious to the public interest, and in the absence of express and prescribed rules as to the method of deporting or expelling them, he may use such methods as his official judgment and good conscience may dictate.

Third. That this power to deport or expel obnoxious aliens being invested in the political department of the Government, the judicial department will not, in the absence of express legislative authority, intervene for the purpose of controlling such power, nor for the purpose of inquiring whether or not he is liable in damages for the exercise thereof.

Therefore the lower court was without jurisdiction to consider the particular questions presented in the cause, and it is hereby ordered and decreed that the writ of prohibition shall be issued, directed to the defendant, the Hon. A. S. Crossfield, perpetually prohibiting him from proceeding in the cause in which Chuoco Tiaco (alias Choa Tea) is plaintiff and W. Cameron Forbes, Charles R. Trowbridge, and J. E. Harding are defendants, and to dismiss said action, as well as to enter an order dissolving the injunction granted by him in said cause against the said defendants.

It is further ordered that a decree be entered overruling the demurrer presented in this cause, and ordering that said action be dismissed, as well as a decree making perpetual the injunction heretofore granted by Mr. Justice Trent.

It is so ordered, without any finding as to costs.

Arellano, C. J., and Torres, J., concur.

CONCURRING

MORELAND, J., with whom concurs TRENT, J.,

The nature of this action has been fully set forth, by way of quoting the entire proceedings, in the opinion of Mr. Justice Johnson. It is unnecessary again to present the facts. I differ, however, from that portion of the relation of the facts in that opinion, and the conclusion drawn therefrom, which touches the form of action commenced by Chuoco Tiaco against the Governor-General, and in which it is asserted that "thus clearly it appears that the action was against the defendants in their official capacity." In my judgment, the contrary, namely, that the action was against the Governor-General personally for acts which he sought to perform in his official capacity, clearly appears. The words "successors in office," as used in the complaint, refer only to the remedy by injunction and not to the damages prayed for by reason of the expulsion. The action no less certainly is directed against the other defendants personally.

When the case was decided in this court upon the merits, Mr. Justice Trent and myself signed the following opinion:

"I concur in so much of the opinion of Mr. Justice Johnson as holds that the action in the Court of First Instance from which this controversy arises can not be maintained against the Governor-General. With the reasons given and the arguments advanced in that opinion for the support of that conclusion I disagree. I can not assent to the theory upon which the opinion is framed nor to the reasons and arguments advanced in support thereof. I understand that the action in the court below, as appears from the records of that court and the concession of all parties interested, is one against the Governor-General personally for acts which he assumed to perform in his official capacity. That the Governor-General acted in the honest belief that he had the power to perform the acts complained of is nowhere questioned. This being so, whether or not he actually had such powers is, as I view this case, immaterial. I base my concurrence in the result solely upon the theory that the Governor-General, in his official capacity, being one of the coordinate branches of the Government (U. S. vs. Bull, 8 Off. Gaz., 271) [1], is entitled to the same protection against personal actions for damages by those who feel themselves aggrieved by acts which he performs in carrying out what he honestly deems to be the duties of his office as are the other coordinate branches of the Government. It is undoubted that neither the Legislature, nor a member thereof is liable in damages for any act which it performs, believing that it had the power so to act, even though it ultimately appears that such act is entirely outside of its powers and jurisdiction and is wholly and utterly void. It is equally undoubted, in my judgment, that neither the courts, constituting another coordinate branch of the Government, nor members thereof, are, under similar circumstances, liable in damages. (Bradley vs. Fisher, 80 U. S., 335; Spalding vs. Vilas, 161 U. S., 481, 493, 494.) If the want of jurisdiction was known to the court & the time it acted, another question might be presented.

"There comes to my mind no good reason why the same principles of nonliability should not be applied to the Chief Executive of the Government. Indeed the reasons and arguments of the courts and text writers advanced to support the principle of nonliability of legislatures and courts apply with even greater force to the Executive.

"The Governor-General, in determining whether or not he has the power or jurisdiction to perform a. certain act, should be protected against personal actions against him for damages as completely and effectively as he unquestionably is when, jurisdiction being conceded, he honestly acts in excess thereof. There is no dissimilarity in the quality of the mental process employed or the judgment brought to bear and exercised in arriving at a conclusion in the two cases.

"This theory does not in any way weaken the power of this court, in a proper action, to determine the legality of all official acts once performed and the legal consequences flowing therefrom. The necessity for such determination does not, however, arise in this case."

To that opinion we still adhere. A thorough reexamination of the questions involved and of the principles of law

which, we believe, must be applied in their solution adds to our conviction that the conclusions therein reached are sound and should guide the court in the disposition of the case before it. The principles enunciated in that opinion were not, however, presented or discussed by the attorneys, or either of them, in the extended and elaborate arguments which they made, both orally and in writing, to this court. A motion for a rehearing having been made and the objections and arguments of counsel having been particularly directed against the conclusions presented in our former opinion, we deem it advisable to present here, with some elaboration and detail, the reasons which impelled us to the conclusions reached therein.

In this opinion we discuss the subject, largely speaking, in two aspects.

First, the nature and quality of the functions exercised by the Governor-General in arriving at the conclusion that he had the right to expel Chuoco Tiaco. Our conclusion upon this branch of the subject is that the act was in the nature of a judicial act, the functions exercised were judicial in their quality, and that he should have the same protection against civil liability in exercising this function that would be accorded to a court under similar circumstances.

Second, the fundamental nature and attributes of the office of Governor-General, and whether or not public policy requires that there be applied to him and his acts the same principles which govern the liability of the members of the Legislature and of the judiciary. Our conclusion upon this branch of the case is that the Government here is one of three departments - executive, legislative, and judicial - that the office of Governor-General is one of the coordinate branches of the Government, and that the same public policy which relieves a member of the Legislature or a member of the judiciary from personal liability for their official acts also relieves the Governor-General in like cases.

It has been settled by previous decisions of this court that the Government established in the Philippine Islands is one of three departments - legislative, executive and judicial. In the case of the U. S. vs. Bull [1] (8 Off. Gaz., 271, 276), it is said:

"Within the limits of its authority the Government of the Philippines is a complete governmental organism with executive, legislative, and judicial departments exercising the functions commonly assigned to such departments. The separation of powers is as complete as in most governments. In neither Federal nor State governments is this separation such as is implied in the abstract statement of the doctrine. For instance, in the Federal Government the Senate exercises executive powers, and the President to some extent controls legislation through the veto power. In a State the governor is not a member of the legislative body, but the veto power enables him to exercise much control over legislation. The Governor-General, the head of the executive department in the Philippine Government, is a member of the Philippine Commission, but as executive he has no veto power. The President and Congress framed the Government on the model with which Americans are familiar, and which has proved best adapted for the advancement of the public interests and the protection of individual rights and privileges." (Lope Severino vs. The Governor-General and Provincial Board of Occidental Negros, 8 Off. Gaz., 1171.)[1]

The instructions of the President of the United States to the Philippine Commission, dated April 7, 1900, contain this statement:

"Until the complete transfer of control (from the military to the civil authorities) the Military Governor will remain the chief executive head of the Government of the Islands, and will exercise the executive authority now possessed by him and not herein expressly assigned to the Commission, subject, however, to the rules and orders enacted by the Commission in the exercise of the legislative powers conferred upon them."

Said instructions also include the following:

"Beginning with the 1st day of September, 1900, the authority to exercise, subject to my approval, through the Secretary of War, that part of the power of government in the Philippine Islands which is of a legislative nature is to be transferred from the Military Governor of the Islands to this Commission, to be thereafter exercised by them in the place and stead of the Military Governor, under such rules and regulations as you shall prescribe, until the establishment of the civil central government for the Islands contemplated in the last foregoing paragraph, or until Congress shall otherwise provide. Exercise of this legislative authority will include the making of rules and orders, having the effect of law, for the raising of revenue by taxes, customs duties, and imposts; the appropriation and expenditure of public funds of the Islands; the establishment of an educational system throughout the Islands; the establishment of a system to secure an efficient civil service; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the Military Governor is now competent to provide by rules or orders of a legislative character."

The powers conferred upon the Military Governor are contained in the following order of the President to General Merritt, dated May 19, 1898:

"Though the powers of the military occupant are absolute and supreme, and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property, and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force, and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion."

The Spooner amendment to the Army appropriation bill, passed March 2, 1901, provided that -

"All military, civil, and judicial powers necessary to govern the Philippine Islands * * * shall until otherwise provided by Congress be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct, for the establishment of civil government, and for maintaining and protecting the inhabitants of said Islands in the free enjoyment of their liberty, property, and religion."

On the 21st day of June, 1901, the President, in an order appointing a Civil Governor, said:

"On and after the 4th day of July, 1901, until it shall be otherwise ordered, the President of the Philippine Commission will exercise the executive authority in all civil affairs in the government of the Philippine Islands heretofore exercised in such affairs by the Military Governor of the Philippines, and to that end the Hon. William H. Taft, President of the said Commission, is hereby appointed Civil Governor of the Philippine Islands. Such executive authority will be exercised under, and in conformity to, the instructions to the Philippine Commissioners, dated April 7, 1900, and subject to the approval and control of the Secretary of War of the United States. The municipal and provincial civil governments, which have been, or shall hereafter be, established in said Islands, and all persons performing duties appertaining to the offices of civil government in said Islands, will, in respect of such duties, report to the said Civil Governor.

"The power to appoint civil officers, heretofore vested in the Philippine Commission, or in the Military Governor, will be exercised by the Civil Governor with the advice and consent of the Commission.

"The Military Governor of the Philippines is hereby relieved from the performance, on and after the said 4th day of July, of the civil duties herein before described, but his authority will continue to be exercised as heretofore in those districts in which insurrection against the authority of the United States continues to exist, or in which public order is not sufficiently restored to enable provincial civil governments to be established under the instructions to the Commission dated April 7, 1900."

On the 1st day of July, 1902, Congress passed an Act containing the following:

"That the action of the President of the United States in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form and subject to the regulations and control set forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of Governor-General and Vice-Governor-General of the Philippine Islands, and authorizing said Governor-General and Vice-Governor-General to exercise the powers of government to the extent and in the manner and form set forth in the Executive Order dated June twenty-first, nineteen hundred and one, * * * is hereby approved, ratified, and confirmed, and until otherwise provided by law the said Islands shall continue to be governed as thereby and herein provided."

From these citations it will be seen that the Governor-General is the executive head of the Government; that he has full, plenary, and perfect powers to execute the laws. Obviously, therefore, the primal necessity laid upon him, when, in a given case, he believes himself called upon to act, is to determine whether there is a law under which he may act - whether, in other words, he is authorized to act in that particular case. One occupying that high position owes a heavy obligation to the State. A careful and conscientious man, intensely anxious to meet the full requirements of this obligation, will inevitably dedicate his first consideration to the determination of what that obligation is. From the viewpoint of the governors of the American States, this is not, generally speaking, a difficult question. There conditions are settled. Society is old. Questions wholly new rarely arise. The constitutions confer the powers generally. The statutes specify them. The source of power is the constitution. The guide is the statutes. Both are written. They constitute the governor's textbook of power and procedure - specific, definite, certain. In the Philippine Islands the situation is different. Here, while the sources of the Governor-General's power are known, the extent and character of the power drawn from those sources are not so clear. Many times they are extremely difficult of ascertainment. The Government here is a new one. Its establishment is a step in ways heretofore untrodden by the American Republic. Its history furnished no example, its law no precedent. Her statesmanship had, up to the moment, framed no model from which a colony government might be fashioned; the philosophy of her institutions presents no theories along which action may unhesitatingly proceed. There is no experience to guide the feet; no settled principles of colonial government and administration to which men may turn to justify their action or dissipate their doubts. Therefore, when, seeing, as he believed, certain Chinese aliens outraging the public conscience and seriously threatening public security, the Governor-General, believing that the only procedure adequate to protect the public interests was the expulsion of the offenders, began an investigation to determine whether or not he had the power of expulsion, he was confronted with a question of very serious intricacy and doubt. It was of the very greatest importance also. It is undoubted that he was thoroughly convinced that he was required, by the obligation of his office, to act if the law authorized it. He knew the strength and the justice of the proposition that a public official may not sit supinely by and see outraged the very things that he is bound by his oath to protect without exhausting every atom of his power and every resource of his office in an attempt to meet the situation as it ought to be met. His primal duty, under such circumstances, would be to determine what were his powers. The situation would imperatively demand that he ascertain what he could do. This involves, as already said, a determination upon which even a court, learned in the law and experienced in its construction, would enter with hesitation and misgivings. The question to be resolved is so many-sided, its relations so intricate and numerous, the result of its determination so far-reaching, politically as well as legally, as to require the most careful consideration, the most exhaustive forethought. It involves not only the discussion and resolution of judicial as well as administrative questions of the most highly important kind, but also whether this Government has any power of expulsion whatever.

He has, then, as his initiatory resolution, to determine whether the Government of the Philippine Islands has the power of expulsion at all. As a condition precedent to the decision of that question he must adjudge (a) whether the Government here is in any sense a sovereign government; for the power to expel a domiciled foreigner is distinctively an attribute of sovereignty, to be exercised, under the uniform practice of the Government of the

United States, only in exceptional cases and then under recognized methods of procedure. If he resolve that question in the negative, he must then decide (b) whether the Government of the United States has conferred upon the Government here those powers of sovereignty necessary to authorize such act.

It is needless to say that the very gravest questions are involved in these determinations. I do not stop to enumerate them or to present the serious difficulties which must be met in making them. It suffices to say that, when he has fully resolved those questions, he is then only on the threshold of his inquiry. Inasmuch as it might appear to one investigating the subject for the first time that the power of expulsion might be an inherent attribute of the Executive, as in some countries it is alleged to be, he must determine, first, the fundamental nature of his executive powers. He must decide whether, under the form of the government of which his office is the executive part, the power of expulsion belongs to the executive exclusively, or solely to the legislative, or whether it belongs to both, in combination with the judicial. This requires that he distinguish his executive functions from those which are legislative, upon the one hand, and those which are judicial, upon the other - a determination most difficult in many instances, not only by reason of the considerations above set forth, but also for the reason that, while the broad distinction is clear, nevertheless, frequently, the nature of one verges so closely upon that of the other as to render the difference between them subtle, uncertain, and elusive.

He must, second, judge whether that power, whatever it is and whatever its extent, came untrammelled to the Military Governor from the hands of the President, or whether he received it modified and restricted. This determination is necessary for the reason already pointed out that the Governor-General has only such executive power as had the Military Governor. This involves an interpretation of the order of the President above quoted - a very real judicial construction of its legal signification.

He must decide, third, whether the acts or orders by which executive power was given to the Military Governor and those by which that power was transferred to him do or do not, by their very terms, define that power itself, its character and extent, or specify with more or less certainty the acts which he may perform under it. This again brings into play functions which approach the judicial so closely as to render them practically indistinguishable.

After all these investigations, interpretations, and constructions have been completed, there still remains to the Governor-General for solution one of the most difficult problems of all that of determining whether or not, irrespective of the foregoing considerations, there exists in force and vigor, under the American regime, a law of Spanish origin with which he may adequately meet the situation that faces him. As we have already seen, the instructions of the President of the United States to General Merritt, dated May 19, 1898, provide that -

"The municipal laws of the conquered territory, such as affect private rights of person and property, and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force, * * *"

We have also seen that the proclamation of General Merritt on the capitulation of the Spanish forces in Manila also provides that -

"The municipal laws such as affect private rights of persons and property, regulate local institutions, and provide for the punishment of crime shall be considered as continuing in force, so far as compatible with the purposes of military government, and that they be administered through the ordinary tribunals substantially as before occupation, but by officials appointed by the government of occupation."

It is evident that the character and contents of these two instruments necessitate that the Governor-General consider and decide when the laws and institutions of the United States are so incompatible with those of Spain in the Philippine Islands as to render the latter inoperative. This involves the consideration of the broad question of

when the laws, customs, and institutions of a conquering nation are so incompatible with those of the conquered as to render them inoperative and ineffective by the mere change of sovereignty. This is a theme upon which writers have differed and concerning which the courts have not been free from uncertainties and even contradictions. The field opened by this necessity is so wide, the subject-matter so uncertain and elusive, and the principles involved so dependent for their application upon the personal equation of the one dealing with the subject that it is extremely easy for two men, equally honest and able, to differ widely on a result. Much depends upon the atmosphere in which one is placed and the point of view from which the subject is seen. The Supreme Court of the United States has just held unconstitutional and void the law relating to the falsification of an official document by a public official, a law of Spanish origin, which had generally been supposed, and had repeatedly been held by the Supreme Court of the Islands, to have survived the change of sovereignty. The great body of our laws is of Spanish origin and comes to us and is enforced by us upon the theory that it has survived. As a result, this court is continually called upon to adjudicate the question whether a given Spanish law is still in existence. Parties are unceasingly asserting rights of property and of person based upon such laws. These assertions are as frequently denied. It is a subject over which the best judgments differ and a question over which uncertainty continually holds sway. It was a question, however, which had to be met and solved by the Governor-General. It could not be avoided. It confronted him squarely and insistently, because a condition and not a theory was thrust in his face. It appears that, prior to the conquest and occupation of the Islands by the Americans, there was in force here a royal decree giving the Spanish Governor-General power, when certain conditions conjoined, to expel domiciled foreigners. That decree reads:

"OFFICE OF THE COLONIAL SECRETARY.

"No. 607.

"EXCELLENCY: In view of the proceedings relative to the consultation had by the Audiencia de Manila with the government, through the supreme court, the latter having rendered a report on the subject-matter thereof, which refers to deportations, the case was forwarded for report to the political division of this office, and His Majesty the King (whom may God preserve), and in his name the Queen Regent, passing upon the report, has been pleased to decide that:

"1. According to laws 18, 19 and 20, title 8, book 7; 35, title 15, book 2; 7, title 4, book 3; 61, title 3, book 3, the royal cedula of May 19, 1819, and the special royal order of April 20, 1881 Governors-General of the Philippines have power to determine the legal expediency of the deportations which they may deem necessary for the preservation of public order.

"2. The record in any such cause commenced by the Governor-General must be transmitted to the supreme government of the nation, in the form and manner provided by the Laws of the Indies, in order that it may take cognizance of the reasons which he may have had for ordering the deportation.

"3. The kind and form of justification which should appear in the record is left to the reasonable discretion of the Governor-General.

"4. The Governor-General may deport any person who, had he been prosecuted in the courts of justice under a criminal charge, would have been pardoned, as expressed in law 2, title 8, book 7, of the Recompilation of the Laws of the Indies.

"5. With respect to such persons as were tried and acquitted by the courts of justice, if the charges, the reason for the deportation, were the subject-matter of the prosecution, then, bearing in mind the sanctity of a matter which has become *res adjudicata*, deportation by the Governor-General is improper.

"6. These deportations must be decreed by the Governor-General in person, and not by his *tenientes* and

auxiliares (lieutenants and assistants), in accordance with law 19, title 8, book 7, of the Recompilation of the Indies.

"7. The laws in force in the Philippines relative to deportations are those, of the Indies before mentioned, so that the lack of a faithful and exact compliance with requisites prescribed therein for the exercise of such power constitutes the crime defined in articles 211 and 212 of the Penal Code in force in the Philippines.

"8. The right of appeal to the audiencias, granted by royal order of May 25, 1847, from the action taken by the Governor-General, was abolished by the decree of November 28 of the same year, which provides in article 7 that orders issued by the Governor-General in matters pertaining to government or to the exercise of his discretionary powers, can only be revoked by the Supreme Government.

"The foregoing by this royal order is communicated to you for your information and the consequent effects. - May God preserve Your Excellency many years. - Madrid, August 2, 1888. (Signed) Ruiz y Capdepon.

"To the Governor-General of the Philippine Islands:

"Comply with and observe the above royal order and issue to the provincial chiefs the necessary orders thereunto pertaining. - (Signed) Weyler."

The question was thus squarely up. Did that law survive the American occupation? An answer must be given by the Governor-General, if he believed his duty to the State required him to act if he had the power. Once more he must interpret, construe, and determine; and in doing so he must tread legal mazes as intricate and bewildering as ever were trodden by a judge at court.

Having so far considered the processes which the mind of the Governor-General must pass through and the determinations which he must make in arriving at a conclusion as to whether he may or may not act in the case given, it is now necessary to inquire what is the nature of those processes and determinations. Evidently they involve the element of discretion of judgment as a result of investigation - a conclusion as to the existence of a law, an authority, a power, which lies at the very doorway of his activities. His judgment operates in a field over which he has general and exclusive jurisdiction and embraces a subject concerning which he must judge alone. It includes also a determination as to the character, quality, and extent of his own power and the rights and obligations of the person against or in reference to whom that power is to operate. Every act of enforcement of whatever law, real or imaginary, must necessarily and inevitably be preceded by two determinations. First, is there a law at all; and, second, if there is, what is the meaning of it; what is its interpretation? These determinations must always be made. They were laid upon the Governor-General by the very nature of his functions - an executor of the law. It is evident, therefore, in view of these considerations, that such functions involve much that is judicial. The executive and judicial functions here merge and overlap each other to a conspicuous extent; and it becomes at once apparent that the functions exercised by the Governor-General in reaching a conclusion to act in a given case, and especially in the case before us, were, in their nature, essentially judicial. If a judge had done the things which the Governor-General did in arriving at this conclusion, his act and determination would unquestionably have been judicial. Are they any the less so, in their essential nature, because a Governor-General and not a judge was the actor? The methods pursued by the two, Governor-General and judge, are not at all different. The subject-matter is precisely the same. The mental processes involved are identical. The discretion used is the same. The objects in view are wholly similar the application of a public law to personal misconduct; the protection of the public against the malicious activities of a corrupt individual.

It now becomes necessary to determine what would be the civil responsibility of a judge acting upon the same questions and making the same determinations involved in the activities of the Governor-General complained of in this suit. The reason for this necessity is found in the analogy which I propose to assert between the civil

liability of a judge performing judicial functions and of the Governor-General exercising essentially the same attributes. The result of that analogy is that if a judge, performing the acts complained of, would not be civilly liable, then the Governor-General is not.

I, therefore, proceed to discuss the civil liability of judges. I deal with it in three aspects: First, where the judge acts within the limits of his jurisdiction; second, where he acts wholly without jurisdiction, and, third, where he acts in "excess of jurisdiction." This discussion of the subject in such threefold aspect is rendered necessary by reason of the claim made in this case that the Governor-General, in whatever he did or brought about in the expulsion of the complainant and his companions, was wholly without authority, power, or jurisdiction and for that reason he is civilly responsible for whatever damages such illegal acts may have caused.

My position in the discussion of the question is that a judge may, in reality, act wholly without power, authority, or jurisdiction and still not be civilly liable; that jurisdiction ought not to be, and can not be, a vital - a controlling element in determining his liability; and that, if the question resolved by the judge be one whose determination required the exercise of the judicial functions, he is not civilly liable for damages caused by an act performed in pursuance of such determination even though he acts wholly without jurisdiction. I further contend that the doctrine making jurisdiction the test of liability is illogical and unsound, and that the doctrine of excess of jurisdiction, carried to its logical conclusion, is a complete refutation of the original theory.

It is the universal statement of text writers that "no person is liable civilly for what he may do as judge while acting within the limits of his jurisdiction." This is also a settled principle of law as applied by the courts. This doctrine is so thoroughly established that no authority need be cited to sustain it. It is also universally asserted by text writers, and maintained by many courts, that jurisdiction is the sole and exclusive test of judicial liability, and it is affirmed that a judge is always civilly liable if he act without jurisdiction. Mr. Cooley in his work on Torts (2d ed., p. 486) says:

"Every judicial officer, whether the grade be high or low, must take care, before acting, to inform himself whether the circumstances justify his exercise of the judicial function. A judge is not such at all times and for all purposes; when he acts he must be clothed with jurisdiction; and acting without this, he is but the individual falsely assuming an authority he does not possess. The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his cognizance, or cases between persons who are not, either actually or constructively, before him for the purpose. Neither is he exercising the judicial function when, being empowered to enter one judgment or make one order, he enters or makes one wholly different in nature. When he does this he steps over the boundary of his judicial authority, and is as much out of the protection of the law in respect to the particular act as if he held no office at all. This is a general rule."

This same rule, it is alleged, is laid down by many authorities, among them being: *Marshalsea* case (10 Coke, 68b; 2 Adol. & E. (N. S.) 978); *Piper vs. Pearson* (2 Gray, 120); *Van Slyke vs. Ins. Co.* (39 Wis., 390); *Stephens vs. Wilson* (115 Ky., 27); *Bradley vs. Fisher* (13 Wall., 335); *McCall vs. Cohen* (16 S. C., 445); *Bigelow vs. Stearns* (19 Johns., 39); *Vosburgh vs. Welch* (11 Johns., 175); *Terry vs. Wright* (9 Colo. App., 11); *Lange vs. Benedict* (73 N. Y., 12); *Austin vs. Vrooman* (128 N. Y., 229).

When, however, it became necessary to put this rule into practical operation, to apply it to a particular matter, it was found that it did not meet the necessities of the case. Its application did not work justice. It was found imperfect and inadequate. It was seen to be lame and halt. It condemned in one case and relieved in another when there existed no real distinction between them, either in logic or justice. While this was not admitted, perhaps, in words by the courts, it was, nevertheless, seen and felt. Accordingly, laboring under the pressure of these conditions and to avoid the anomalous results flowing from a rigid application of the theory, they announced the

doctrine of "excess of jurisdiction."

This doctrine holds "that judges of superior and general jurisdiction are not liable to civil actions for their judicial acts even when such acts are in excess of their jurisdiction." (Ross vs. Griffin, 53 Mich., 5; Grove vs. Van Duyn, 44 N. J. L., 654; Randall vs. Brigham, 7 Wall., 523; Jones vs. Brown, 54 Ia., 74; Lange vs. Benedict, 73 N. Y., 12; Yates vs. Lansing, 5 Johns., 282; Robertson vs. Parker, 99 Wis., 652; Willcox vs. Williamson, 61 Miss., 310; Calhoun vs. Little, 106 Ga., 336; Miller vs. Seare, 2 W. B1., 1141; Ackerly vs. Parkinson, 3 M. & S., 411; Austin vs. Vrooman, 128 N. Y., 229; Root vs. Rose, 6 N. D., 575; Webb vs. Fisher, 109 Tenn., 701; U. S. vs. Bell., 135 Fed., 336; English vs. Ralston, 112 Fed., 272; 85 Fed., 139; Bradley vs. Fisher, 13 Wall., 335.)

As before stated, the courts, in laying down the doctrine that a judge is exempt from civil liability if he acts within his jurisdiction, also assert at the same time that he is liable if he act without jurisdiction. In the same way, strange to say, the courts who lay down the doctrine that a judge is not liable civilly even if he act in excess of jurisdiction, also assert that he is liable if he act without jurisdiction. In other words, whether it be a court which asserts the doctrine of nonliability with jurisdiction or whether it be one who asserts the doctrine of nonliability with excess of jurisdiction, they all concur in asserting liability in case the court acts with lack of jurisdiction. To put it in a different way: The decisions make no distinction between cases where the court acts with jurisdiction and those where he acts in excess of jurisdiction; but they do make a crucial distinction between those cases where he acts in excess of jurisdiction and those in which there is a lack or want of jurisdiction. It is accordingly evident, under this judicial conception, that, so far as the civil liability of the judge is concerned, acting completely with jurisdiction and acting completely in excess of jurisdiction mean exactly the same thing; while acting completely in excess of jurisdiction and acting completely without jurisdiction mean exactly opposite things. This inference is the inevitable one because the judge is entirely exempt if he act within his jurisdiction, and he is wholly immune if he act in excess of jurisdiction; but if he act without jurisdiction, he is fully liable.

I confess my inability to see how two conditions so different in their nature and characteristics as acting with jurisdiction and acting in excess of jurisdiction can be held to produce the same result - having in mind always the proposition universally asserted by the courts to be the basis of that difference in liability, that the nature of the judge's act, i. e., whether it makes him civilly liable or not, depends entirely on jurisdiction. That jurisdiction and excess of jurisdiction are conceptions wholly different is perfectly evident from the standpoint of language alone. That their legal nature is entirely different will appear when we discuss want of jurisdiction and compare it with excess of jurisdiction.

If "excess of jurisdiction" means anything different from "want of jurisdiction" under the doctrine of excess of jurisdiction as it is asserted, it lies not at all in the essential nature of those conditions but, rather, in the accidental circumstance stated in the decisions, that the court, having once acquired jurisdiction of the subject-matter and the parties, any act of his during the proceedings which is beyond or outside of his real powers is in "excess" of jurisdiction merely, and has a different quality from that which the same act would have if there had been no jurisdiction in the first instance. In other words, jurisdiction having once been present in the cause, it continues to shed its beneficent influence over the court and his acts, no matter where he goes or what he does. This is the distinctive feature of the doctrine of excess of jurisdiction as that doctrine is laid down. Jurisdiction once present is, under that doctrine, the touchstone of non-liability. As a necessary consequence, the court who lacks this protective genius of jurisdiction may lose his fortune and perhaps his liberty, although he may perform exactly the same acts as he who is wholly excused because he exceeds his jurisdiction. It becomes necessary to inquire, therefore, in what way excess of jurisdiction differs essentially from lack of jurisdiction, for, if they produce results so violently in opposition, there must be a wide and essential difference between them - a difference wholly unlike that set forth in the decisions.

And first, as to excess of jurisdiction:

To exceed jurisdiction is to go outside of it; to pass beyond its limits. To exceed is "to go beyond; to go too far; to pass the proper bounds or measure." "Forty stripes he may give him and not exceed." Excess is "the state of going beyond limits." Excess of jurisdiction is the state of being beyond, i. e., outside the limits, of jurisdiction. This is the only definition of excess of jurisdiction which the term will permit. This is precisely the definition given in the very decisions which lay down the doctrine. One of the first cases in the United States to present the doctrine of excess of jurisdiction was that of *Lange vs. Benedict* (73 N. Y., 12). In that case it appeared that the defendant presided as judge at a regular session of the United States Circuit Court, before which plaintiff was tried and convicted of a statutory offense punishable by a fine or imprisonment. He was sentenced by the defendant to pay a fine and to be imprisoned. Plaintiff paid the amount of the fine to the clerk of the court, who paid it into the United States Treasury. The plaintiff was also imprisoned. A writ of habeas corpus was granted by and returned into said court during the same term, and, on such return, defendant, holding the court and as judge thereof, vacated and set aside the sentence, and resented the plaintiff to be imprisoned for the term of one year. Under this sentence the plaintiff was imprisoned. Such proceedings were subsequently had that the Supreme Court of the United States (*Ex parte Lange*, 18 Wall., 163, 176) adjudged the resentence to have been without authority and void. In deciding the case on the proceedings mentioned the Supreme Court of the United States said (*Ex parte Lange*, *supra*):

"We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish farther was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."

Commenting on this same case the Supreme Court of the United States in the case of *Ex parte Parks* (93 U. S., 23) said:

"But after the thorough investigation which has been given to this subject in previous cases, particularly those of *Ex parte Yager* (8 Wall., 85) and *Ex parte Lange* (18 id., 163), it is unnecessary to pursue the subject further at this time. The last-mentioned case is confidently relied on as a precedent for allowing the writ in this case. But the two are totally unlike. In *Ex parte Lange* we proceeded on the ground that, when the court rendered its second judgment, the case was entirely out of his hands. It was *functus officio* in regard to it. The judgment first rendered had been executed and satisfied. The subsequent proceedings were, therefore, according to our view, void."

In spite, however, of the fact that the Supreme Court of the United States had held that the act of the court in resentencing plaintiff was absolutely without jurisdiction and void, nevertheless, the court of appeals of the State of New York, deciding the action against the judge for damages (*Lange vs. Benedict*, *supra*) after the rendition of the judgment of the Supreme Court of the United States on the question of the resentence, said, in giving a definition of the phrase "excess of jurisdiction:" "The act of the defendant was then one in excess of or beyond the jurisdiction of the court." "He had jurisdiction of the cause originally. That jurisdiction had ceased. His further acts were beyond or in excess of his jurisdiction." "If it be admitted that at the instant of the utterance of that

order, jurisdiction ceased, as is claimed by the plaintiff, on the strength of the opinion in *Ex parte Lange* (supra), as commented upon in *Ex parte Parks* (93 U. S., 18), and that all subsequent to that was *coram non judice*, and void; still it was so, not that the court never had jurisdiction, but that the last act was in excess of jurisdiction."

If the intention of the New York court in that case was to use the phrase "excess of jurisdiction" in the sense that there was an essential and vital distinction between it and "want of jurisdiction," a distinction so essential and vital as to warrant liability in the one case and nonliability in the other, I am in entire disagreement with its conclusion. If I were unsupported in my disagreement, I should hesitate long and doubt much before I differed with authority so eminent. But the Supreme Court of the United States, as shown by the quotation given, has held in that very case that the district court, in resentencing *Lange*, acted with complete and utter absence of jurisdiction. I am in perfect accord with the use of the phrase "excess of jurisdiction" when it describes a particular legal condition which, in some of its colorings, some of its accidental or incidental features, is somewhat different from the legal condition "absence of jurisdiction." But I am not in accord with its use if it is meant to describe something which is essentially different in quality, that is, a different thing, from excess of jurisdiction. If the difference meant to be shown is, in its nature, the same difference which is indicated between two horses when it is said that one is black and the other bay, I agree. But if it is meant thereby to indicate that one is a horse and the other a cow, I disagree. The two legal conditions are essentially and really identical. Their coloring may be different but they are the same animal. The question before us is not whether there is such a difference in markings that the two conditions ought to be given different names as a matter of convenience, but, rather, is there a difference so important, so essential, so vital that we may establish upon that difference as an eternal foundation a just principle of law which wholly saves in the one case and utterly destroys in the other. The real and practical question for us is "What does that difference amount to?" What results may it justly produce to the parties and to the court? What results must it necessarily produce ?

In the case of *Clarke vs. May* (2 Gray, 410), a justice of the peace, having jurisdiction of the cause, summoned a person to appear before him as a witness therein. The person disobeyed. The case was tried and ended. Thereafter the justice issued process to punish for contempt the person who had disobeyed his subpoena. He was arrested, fined, and not paying, was committed. It was held on appeal to the Supreme Court "that the power and jurisdiction of magistrates in such cases was only incidental and auxiliary to the trial of the cause in which the witnesses were summoned; and could not be legally exercised, except during the pendency of such cause; that after its final disposition by a judgment, the authority to punish such contempt ceased, and that *Clarke* was therefore illegally committed. * * * Although he had jurisdiction of the subject-matter, he was. empowered by law to exercise it only in a particular mode, and under certain limitations. Having disregarded these limitations, and exercised his authority in a manner not sanctioned by law, he has been guilty of an excess of jurisdiction, which renders him liable as a trespasser to the injured party."

In the case of *Gordon vs. Longest* (16 Peters, 97), where the defendant took the proper steps, under a statute which required a State court under certain conditions to transmit the cause to the United States courts, to remove an action brought against him in the State court to the United States court, and, where the State court persisted, notwithstanding such steps, in trying the cause, the court said:

"This being clear in the language of the above act, it was the duty of the State court 'to proceed no further in the cause.' And every step consequently taken, in the exercise of a jurisdiction in the case, whether in the same court or in the Court of Appeals, was *coram non judice*."

The case of *Austin vs. Vrooman* (128 N. Y., 229) is one very similar to the one last mentioned. There the defendant, a justice of the peace, caused the plaintiff to be arrested on a charge of supplying diluted milk to a butter factory. Plaintiff, on being arraigned, pleaded not guilty, waived preliminary examination and offered bail

for his appearance before the next grand jury. The offer was overruled by the defendant. He was tried, found guilty, and sentenced to pay a fine and to be imprisoned until paid, not to exceed ninety days. Pursuant to such sentence he was confined in the county jail. The statute making the act of plaintiff a crime provided that when a person charged with a violation of the Act should be brought before a justice of the peace, he should, have the right to elect to be tried by a jury after indictment, and on such election the justice could not proceed to try him but could only hold him to a court having authority to inquire, by intervention of a grand jury, into offenses triable in the county. In this case the court said, after referring to the case of *Gordon vs. Longest* (supra), in which it was held that, in a case very similar in principle to the one under consideration, any action taken by the State court after refusing to transmit the cause before it to the United States court was wholly void:

"Here, in the course of proceedings which he was forced to entertain, and in the case of one over whose person he has properly acquired jurisdiction, the justice is confronted with the necessity of deciding a question depending upon the construction to be given to a statute, and that question must be decided by him one way or the other before he can take another step in those proceedings which, up to that moment, have been legally and properly pending before him, and over which he has had full and complete jurisdiction. It seems plain that his decision upon the question is one in the course of a proper exercise of the jurisdiction first committed to him, and that his error in deciding that he had jurisdiction to proceed was an error of judgment upon a question of law, and that he is, therefore, not responsible for such error in a civil action. It is unlike the case where a justice of the peace proceeded to try a civil action for assault and battery. (*Woodward vs. Paine*, 15 John., 492). The justice never had in such case obtained jurisdiction over the subject-matter and he could not obtain it by deciding that he had it. The case falls under the principle of law that where a judge never has had jurisdiction over the subject-matter, he acts as a trespasser from the beginning in assuming it, and his decision that he has it is no protection to him. I know it was stated in *Gordon vs. Longest* (16 Peters, 97), in a case where the defendant took the proper steps to remove an action brought against him in the State court to the United States court and where the judge of the State court persisted, notwithstanding those steps, in trying the case, that every step subsequently taken by the State court in the exercise of jurisdiction was *coram non judice*. Yet in such a case the question is put whether the State judge would be liable for proceeding with the case in the honest exercise of his judgment."

Being thus informed of the judicial meaning of the phrase "excess of jurisdiction," it becomes necessary, second, to determine what is meant judicially by the expression "lack of jurisdiction." An example frequently given by the courts to express what is meant by lack or failure of jurisdiction is that of a justice of the peace taking cognizance of and trying a civil action for assault and battery. Over such actions jurisdiction was never in any way conferred by law upon justices of the peace. In fact, the law expressly prohibits them from taking cognizance of such actions. In such case, the justice never obtains jurisdiction over the subject matter. He acts wholly without any authority or jurisdiction. A case illustrating want of jurisdiction is that of *Piper vs. Pearson* (2 Gray, 120). There a justice of the peace of the County of Middlesex tried an individual named Russ for an offense committed within the district of Lowell. By statute said justice had no power or authority to take cognizance of offenses committed "within the district of Lowell." The court said: "In the case at bar, the defendant had no more power to entertain jurisdiction of the complaint against Russ than any other individual in the community." "If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void." "If he has no jurisdiction of a cause, he can not sit as a magistrate to try it, and is entitled to no protection while acting beyond the sphere of his judicial power. His action is thus extrajudicial and void."

This case, however, is not one which ought fairly to be taken as generally illustrative of that class wherein the court acts wholly without jurisdiction, inasmuch as here whether or not the court had jurisdiction was a question of fact. Whether or not the crime was committed "within the district of Lowell" was not a question of law. Nevertheless, the same principle would have been involved if there had been a dispute as to the district within

which the crime was actually committed and the court had decided that question upon conflicting evidence.

In the case of *Bradley vs. Fisher* (13 Wall., 335), the court gave the following as illustrating a condition of complete lack of jurisdiction.

"Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority."

"But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons."

This excerpt illustrates clearly the difference between excess of jurisdiction and lack of jurisdiction as it is universally presented by text writers as well as by courts.

The suggestions made after the discussion of the case of *Lange vs. Benedict* are, in principle and in effect, applicable to the cases just presented. Nothing could be clearer than that the court, in *Clarke vs. May*, acted wholly without jurisdiction. It is of no consequence what it is called, whether excess of jurisdiction or failure of jurisdiction; it still remains the same thing. The court itself said so when it used the words "after its final disposition by a judgment, the authority to punish such contempt ceased, and that Clarke was therefore illegally committed." The case of *Austin vs. Vrooman* is very like that of *Gordon vs. Longest*, wherein the Supreme Court of the United States held that the lower court acted wholly without jurisdiction in retaining the cause before it and proceeding to its disposition.

Being now fully informed of the meaning of the two legal conditions, "excess of jurisdiction" and "lack of jurisdiction," and also of the difference between them as presented in the decisions of the courts, I now desire to consider whether this difference is worthy in any manner of effecting the exactly opposite legal results which it is alleged they produce. If they produce results so unlike, they should be so different in their essential natures as to be plainly and easily distinguishable. Yet in spite of that, after a careful consideration of every adjudicated case upon the subject within my reach, I have been forced irresistibly to the conclusion that there is not, really and intrinsically, the slightest difference between them. The alleged difference is a fiction of law, pure and simple, born of the necessity to escape the logical but wholly unjust and indefensible consequences of a rule of liability based on no sound principle of law and incapable of defense upon any theory of logic or justice.

While we have seen from the cases cited the different circumstances which attended the courts up to the time when they performed the acts complained of, namely, that the one never had jurisdiction at all and the other had it at first but abandoned it later, we have nowhere seen in those authorities anything of the real nature of those two conditions nor why they should produce results so violently in opposition. We have also seen from those cases that excess of jurisdiction is the state of being beyond the limits of jurisdiction, i. e., outside of the power and

authority conferred - so far outside indeed that the act of the court is coram non judice and void. (Gordon vs. Longest, 16 Peters, 97; Ex parte Lange, 18 Wall, 163; Clarke vs. May, 2 Gray, 410; Ex parte Parks, 93 U. S., 23.) We have also noted from those decisions that the only characteristic of excess of jurisdiction, the quality and the only quality which distinguished it from lack of jurisdiction, that which gave it its peculiar and distinctive virtue, was that, in excess of jurisdiction the court had jurisdiction at the beginning of the cause, but lost it later; whereas in lack of jurisdiction the court never had jurisdiction at all.

Now, if a court is really outside of the limits of his jurisdiction, what difference does it make, as to his liability for subsequent acts, when he arrived there? Ought the time when he finds himself outside to have any significance whatever? Should the fact that he was outside at the beginning of the cause, instead of when it had run half its course or more, have any force or effect? Is the judge who was never inside the jurisdictional inclosure any more outside of it than he who, having once been within, voluntarily steps wholly outside? Both being completely outside, is one in worse position, legally or morally, than the other? Does the mere fact that the one had never been inside necessarily make him a greater malefactor than the other who comes as completely out, having once been in? Ought the legal consequences of their acts to be different when both are acting from exactly the same basis, viz, outside of their authority? One who steps from his house into the street is as much outside the structure as though he had never entered it; and while there, he is as unprotected from the elements as though he had never had a roof over his head. Although he may return to his house and enjoy again its shelters and comforts, still he can never change the fact that he once stood unprotected in the street, that the changing Wind had once buffeted him as it willed, that the storms had once drenched him to the skin, and that the frost had once bitten him to the bone. He who owns a million of money and throws it into the sea remains in as penniless a poverty as he who never owned a dollar in all his life. The court who, having once been clothed in the garment of jurisdiction, divests that garment, stands forth as judicially naked as he who had never been robed with the vestments of authority. So, the court that once had jurisdiction of a cause and divests that power by his own act stands thereafter as bereft of judicial authority as though he had never acted under sanction of the law. As a matter of language, that is the only meaning that can be given to the expression, "excess of jurisdiction;" as a matter of fact, that is the only definition claimed for it.

I am fully aware that a judge of a court which acts wholly without jurisdiction is, in a sense, a usurper. I know that a judge who proceeds in complete absence of jurisdiction, really and effectually by such act, makes a law to fit the case. In other words, he legislates. I admit that to permit a judge thus to make a law and then to adjudicate it also is to permit an approach to tyranny. I am fully aware that this is the essence of the argument against the immunity of the judge who thus acts. It must not be forgotten, however, that we are discussing whether there is an essential difference between lack of jurisdiction and excess of jurisdiction. If, therefore, we find that there is fully as much tyranny in the one as in the other, what matters it how much tyranny there may be in lack of jurisdiction? The cry of tyranny against acting without jurisdiction will be effectually stopped if it appears that acting in excess of jurisdiction, the thing which is permitted by the courts wholly to excuse, effects exactly the same result. That the one is as tyrannical as the other can not be doubted. A judge, having by law general jurisdiction criminally, who declares a state of facts presented to him to be a crime within the provisions of that law, when in reality it is not a crime at all, creates a law as distinctively and completely as does the judge who decides that there is a law giving him jurisdiction criminally, when in fact no such law exists. In such case, he declares a crime to exist when it really does not. To enable a court to declare an act a crime, there must be a law making it a crime. To declare an act a crime when there is no law making it such, is, so far as that particular case and all others like it are concerned, to make a law by judicial fiat. What signifies it that the court has jurisdiction of all larcenies if he declares an act a larceny which in truth and reality is not? The fact that he has jurisdiction of all larcenies none the less makes his erroneous act the creation of a new law. What does it signify that he once had jurisdiction when he

thus, by his naked fiat, makes criminal an act otherwise legal and moral, and thereby convicts and imprisons an innocent man in violation of the law of the land. He could go no farther, could do no more, if he acted wholly without jurisdiction from the beginning. Of what significance is it that in the one case he acts in excess of jurisdiction and in the other without jurisdiction when he does exactly the same thing and produces exactly the same result in both cases?

We have already seen that the only difference which any court or text writer has been able to point out between the two cases is the fact that in the case of excess of jurisdiction the court had jurisdiction of the subject-matter at the beginning whereas in the other case jurisdiction was never present at all. The only use which courts and text writers have made of that difference, the only use in fact that could possibly be made of it, is that, having jurisdiction of the subject-matter, the court then has the power to determine whether or not a given set of facts presented to him to induce his action falls within his jurisdiction; whereas, in the case of failure of jurisdiction, there being in fact no law conferring powers, the court had no power or authority to determine anything whatever. It is urged also that an indispensable prerequisite of the effective administration of justice is that a judge, having jurisdiction, be allowed to decide whether a given set of facts is within the law by which his jurisdiction is conferred. But is it any more necessary and essential that he be allowed to decide that question than it is that he be allowed to determine whether he has any power at all in the premises? Is it more essential for him to be allowed to decide whether a certain set of facts is or is not within his powers than it is to allow him to determine whether or not he has powers? Is it any more an inevitable prerequisite that he be permitted to determine the extent of his powers than that he be allowed to decide whether he has powers? If he is a court, that very fact makes it necessary to determine what his powers are. To do that he must not only determine what the laws are and what they mean, but he must also determine whether there is a law. It is sometimes a very much more difficult question to determine whether there is any law at all than it is to decide what the law means when its existence is admitted. But, comes the suggestion, the court in such cases having once had jurisdiction of the subject-matter "no personal liability to civil action for such acts (in excess of jurisdiction) would attach to the judge, although those acts would be in excess of his jurisdiction or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, * * ." (Bradley vs. Fisher, *supra*.) This suggestion may be answered in two ways:

It means nothing to say that the law required the lower court to act upon the question before it, it having jurisdiction of the cause at the time and it already having proceeded therewith to the point where it was confronted with the question concerning which it erred. Exactly the same thing, in effect and in principle, may be said of the court which proceeded to take cognizance of a cause in entire absence of authority to do so. For, the law also requires a court to act whenever a question is presented to it, no matter if it be one over which it has no power or authority whatever. Law and necessity alike compel him. If he have no jurisdiction or authority, he must, nevertheless, act. He must declare he has not and refuse to proceed. But the point is, he must act, he must decide, he must adjudicate; and he must do so whether the question of Jus jurisdiction be clear or doubtful. In both cases, excess of jurisdiction and failure of jurisdiction, the courts are confronted with exactly the same necessity, each must act. The question confronting one court, viz, whether it has jurisdiction or not, may be much more doubtful and far more difficult of solution than that which faces the other. Yet one is liable and the other not, I have looked in vain for a valid or convincing reason why, both being in error, the judge of one court should be destroyed and the other saved.

This suggestion also contains an admission rather than an argument - an admission which destroys absolutely the theory that the crucial test in determining the civil liability of a judge is that of jurisdiction. This suggestion admits that the thing which excuses is not jurisdiction, but judicial action; not jurisdiction, but the exercise of the judicial function; not jurisdiction, but "judicial consideration;" and that the only reason why the one excuses and the other does not is the opportunity which the former furnishes for the use of the judicial faculty. We must

conclude, therefore, since it is not jurisdiction, but judicial action, which excuses, that whenever and wherever a court exercises the judicial function, he will not be personally liable civilly for the result of his action, and this utterly regardless of whether he ever had jurisdiction or not. And that is precisely what I am contending for. I regard the doctrine of jurisdiction as counter to that public policy which lies at the base of and is the sole and whole reason for the immunity of judges from civil liability. That public policy demands that a judge shall be protected when he is a judge, not when he has jurisdiction. He is a judge when he acts like a judge; that is, when he acts judicially. All that public policy requires in order to extend its perfect protection over the judge is that the question in which the error is made shall be a judicial question. In other words, it is the nature of the question involved which is transcendently important, and not the position in which the judge finds himself legally, before, at the time of, or after his error. The question is "What kind of question were you deciding when you made that error?" not "What was your position before or after you made it?" It is, it can be, of no consequence whatever whether there be failure of jurisdiction or excess of jurisdiction. Is the question for determination one which requires the exercise of judicial functions for its resolution? If it is, then that is an end of the matter of liability, utterly irrespective of jurisdiction. An error by which a court induces itself to act wholly without jurisdiction is an error of law, an error of judgment after consideration, of exactly the same nature as that which induces a court to act in excess of jurisdiction. It is an error of judgment as to whether he has any power at all in the premises. It is an erroneous determination of a question which, by virtue of the fundamental constitution of his office, is inexorably forced upon him for determination as his very first act in every case. Public policy, indeed, public necessity, demands that he act, if he is judge. The safety, stability, and perpetuity of the State and its institutions imperatively require him to act. Therefore, being thus driven to act, and his first act being necessarily and inevitably to determine whether his authority comprehends the subject-matter presented to him, can it possibly be true that public policy, the very force that drove him to act, will punish him for such action if he has exercised the very functions with which that public policy has endowed him? I am aware that it may be said that public policy does not protect those who act wholly without authority. But my contention is that he has authority. The fact that he is a judge means nothing else. That one has been named a judge is no idle thing. It is to be presumed that he has some powers, that some authority attaches to the office, or it would not have been created. As a judge he has responsibility of the most solemn and important character. He has duties correspondingly solemn and important. By far the greatest and most important of these is to determine what those powers are. But this is simply the determination of the question of jurisdiction. This is, as we have seen already, a judicial determination of the purest character. If he determines that question wrongly and proceeds thereafter to act, he acts wholly without jurisdiction. But is he more guilty or culpable than the judge who, with equal error, determines a similar question of jurisdiction but at a different period of the cause? Is it possible that one can be appointed to one of the highest and most august positions in the gift of man, and still not be able to determine what he may do without subjecting himself to the risk of financial ruin, and, mayhap, of imprisonment? If so, his office is not only a monstrous farce, but is also a thing which deserves, as it certainly will receive, the contempt and the jeers of mankind. I repeat that a judge acts judicially as purely and as perfectly when he is determining, at the very inception of the proceeding, the question of whether or not he has any jurisdiction whatever in the premises as he does when, later in the case, he decides what the extent of that jurisdiction is. That is a judicial determination as clearly and unmistakably as would be his decision that A was entitled to a judgment against B - only of a very much more fundamental character. So that, if it is the use of the judicial function which absolves, why should the one be excused with the respect of the community and the other condemned with ruin and disgrace? But, comes the reply, a judge is not a judge if he have no jurisdiction; and he can not exercise judicial functions unless he is a judge. Therefore, if he have no jurisdiction he can not exercise judicial functions. Not being able to exercise judicial functions, he can not, as a necessary consequence, be excused from liability, inasmuch as immunity from liability springs solely from "the exercise of such functions. But that logic is fatally defective. Its major premise, namely, that if he have

not jurisdiction a judge is not a judge and can not, therefore, exercise judicial functions, is wholly false. How is he to know whether he has jurisdiction or not? By what process does he determine whether or not he has any power at all? Does that determination come to him by inspiration? Is it handed to him ready-made? How does he arrive at the conclusion that he has jurisdiction or that there is a complete failure of it? Why does he arrive at one of these conclusions and not the other; and why does he not arrive at both? Is he simply a man when he determines the question of jurisdiction but a judge when he decides every question in the case? The answer to these questions is simple. The determination by the court of the question whether he has or has not jurisdiction is a judicial determination. The indispensable prerequisite to the simplest and most elementary judicial act of any court is the determination of the question of jurisdiction. It is utterly impossible for him to act in the simplest matter that can be brought before him without first making that determination. It is an inevitable necessity which is inexorably required to precede everything else in the functions of every court. It is thrust upon him instantly with the appearance of the first suitor in his court. It is the indispensable prerequisite of every judicial act. It was elemental in the creation of the judicial office. The implacable forces that created the office, the unalterable nature of its functions, drive him irresistibly to that primordial determination. That necessity is ever with him. It is imperative, merciless, and inexorable. Born with his office, it dies only with his office. May we say, then, that it is not a judicial determination - the exercise of judicial functions? Shall we assert that it is not an exercise of judicial function to resolve the very question which the elemental nature of his office inevitably requires him to decide as an absolute condition precedent to the performance of any other act in the cause? It seems to me that it can not be doubted that it is a judicial determination, and one of the very first importance. In fact, it is the highest and most important judicial function which a court can possibly exercise.

The court, although he sees his jurisdiction written as clear as light, makes, nevertheless, the judicial determination of jurisdiction as really and as fully as does the court who spends days and nights of laborious inquiry into doubtful laws to decide the same question. The court who had jurisdiction and then exceeded it inevitably determined first of all that very question of primary jurisdiction as completely as did the court who, really having no jurisdiction, determined erroneously that he had; and, if the first had made a mistake in determining jurisdiction at the beginning, ought he to suffer more than he did suffer for making later in the cause the very same mistake, the mistake by which he exceeded his jurisdiction? The mistake in either case was over the same question, namely, jurisdiction. Ought it, in fairness, to make any difference when the jurisdictional mistake is made? Ought the judge who made the mistake at the beginning of the cause to suffer more than he who made a mistake over the same question later in the same case? Ought an error in regard to jurisdiction made at the opening of court be more fatal or require severer punishment than one made at the close? Is a mistake greater because it was made at 10 a. m. than at 5 p. m.? To be sure, in the one case he had jurisdiction at first; but he used it only as a means to exceed that jurisdiction later, to put himself outside of it. That is simply a history of how he came to be outside of his jurisdiction but, of itself, it furnishes no reason why he should be excused from liability while the judge who never had jurisdiction should be ruined financially, disgraced before the public and his usefulness as a judge destroyed, wholly irrespective of the nature of the questions involved or the functions exercised, and utterly without regard to the results produced. I know it may be urged that the law having given the court jurisdiction and power to embark upon the cause, it must necessarily be presumed that he has also power and jurisdiction to dispose of it; and that if that disposition is wrong he ought not to be liable as he was simply performing the judicial duty which the law imposed. Exactly. But when the judicial office is created and a judge is appointed, is there not, must there not be, a presumption of power on his part to determine the limits and extent of his jurisdiction? Indeed, must he not necessarily have the power to determine whether he has any power at all or not? The jurisdiction to determine whether he has jurisdiction? The question whether a court has any power at all is often involved in greatest doubt. The very existence of the law under which he is asked to act may be doubtful. When its existence is assumed, its meaning, extent, scope, and application are many, many times open to the

various interpretations. He must decide all these questions before he proceeds with the case presented. I say again, he must have, necessarily, jurisdiction to determine whether he has jurisdiction. Who is to determine that question if he does not? He has no one to do it for him; no one to whom he may turn for assistance. There is no one to whom he may hand the responsibility. He must act. He alone must assume the responsibility. He may not sit idly on his bench and refuse to act because he is uncertain whether or not he has the authority to act. Such conduct would warrant his removal from office. But removal would not be the cure inasmuch as his successor would be in the same condition of doubt. If the judge refused to act in every case where jurisdiction was in doubt, a court of justice would be a rank imposture. The judge must act, and he must act not only in cases of doubt upon the merits where jurisdiction is conceded, but he must also act in cases where jurisdiction itself over the whole subject-matter is a serious and doubtful question. How can it be said, then, that in the one case he is liable and in the other he is not? A judge of a court having jurisdiction and acting on the merits of a question may, by a decision plainly and manifestly in violation of the law, literally confiscate the property of a party litigant and thereby reduce him and his family to beggary, himself escaping entirely unscathed; while the judge of another court who, by an erroneous assumption of jurisdiction after a thorough and painstaking investigation of that question, a question concerning which the best minds might reasonably differ, promotes thereby real justice between the parties upon the merits, would, nevertheless, be helplessly liable to respond fully in damages for the injuries caused by his act, with all that such liability might imply to his fame, his fortune, and his official position.

It may be added, by way of repetition, that it signifies nothing to say that, because a court finds himself lawfully in the midst of a cause, he must be allowed to determine it in one way or another, and that in doing so he should be protected. It is no more essential that he continue it than that he begin it. A litigant who is not permitted to finish is in no worse condition than one who was never allowed to begin. Moreover, if it is held that the law requires a court to begin right, it must be equally true that a court having begun right, must continue right. There should be no more license to continue wrong than to begin wrong. The prohibition should be equal in both cases. While it is true that a court can not give itself jurisdiction by determining that it has it, nevertheless, that idea in nowise militates against the position here taken, as the argument which it presents is as applicable to a case involving excess of jurisdiction as to one where there is want of jurisdiction.

If we follow strictly the rule which holds civilly liable the court who, at the beginning of the cause, errs as to his jurisdiction over the subject-matter, and wholly excuse him who errs as to his jurisdiction over the subject-matter later in the cause, we have this result:

A matter is presented to a court for action. He has really no jurisdiction whatever over it; but, after due deliberation decides that he has, and proceeds. He arrests A, tries and convicts him of homicide, and sentences him to twenty years in prison. Question determined, jurisdiction. Act, *coram non iudice* and void. Result, judge liable.

A matter is presented to another court for action. He has jurisdiction in the first instance. He proceeds. Later he arrives at a point in the case where he fails absolutely of jurisdiction to proceed further with the cause. But, after due deliberation, he nevertheless decides that he has jurisdiction and proceeds. He tries and convicts B of homicide and sentences him to twenty years in prison. Question determined, jurisdiction. Act, *coram non iudice* and void. Result, judge not liable.

Why this difference in result? It is no answer to say that, in the second case, the court, having jurisdiction, had, therefore, the right to determine any question that might arise during the progress of the case, even if it be a question as to his jurisdiction to proceed further, and in making such determination he would be protected; for, in the first case, the fact that he is a court gives him this right, as it places upon him the duty to determine whether he has the authority to inaugurate the proceedings, and in the determination of that question he, too, ought to be

protected. The determination of the jurisdictional right to begin, is of exactly the same nature and quality as the determination of the jurisdiction to continue. The resolution of the two questions involves exactly the same mental processes, the use of exactly the same discretion, the adoption of precisely the same methods, the exercise of identical functions; while the purposes animating the courts in their decisions are absolutely the same in both cases, namely, the faithful and efficient discharge of the duties and obligations of the office. The two questions themselves, as representing the two legal conditions, are exactly the same inherently. The fact that one question is determined at one stage of the cause, while the other is decided at another, is purely accidental and incidental.

Let me give an example more concrete: Whether or not a Court of First Instance of the Philippine Islands has jurisdiction over a given subject-matter depends upon whether or not a certain law of Spanish origin in force prior to the American occupation survived the change of sovereignty. If that law survived he has jurisdiction. If it did not, he is absolutely devoid of jurisdiction. The determination of that question involves a careful investigation of the fundamental law of the Islands as derived from American sources; an interpretation of its force and significance as well as the scope of its application; the construction of the order of the President to General Merritt and of the proclamation of the latter to the Philippine people, both heretofore quoted, and last, and perhaps most difficult of all, the resolution of the question presented by that part of the above-mentioned order of the President which provides that "the municipal laws of the conquered territory, such as affect private rights of person and property, and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things." When is a Spanish law "compatible with the new order of things." and when incompatible? Upon the determination of that question depends absolutely the jurisdiction of the court. Was ever a question more perfectly judicial? Could there possibly be a question in the resolution of which the judicial function was more clearly exercised? Has there ever been, or will there ever be, a situation in which a man could be more a judge than here? Yet we are asked to hold that the Court of First Instance would not be protected in the determination of that question.

Moreover, this rule takes no cognizance whatever, as we have before noted, of the nature of the questions to be solved by the two judges in question. It makes no difference between cases where the question of jurisdiction is of great doubt and difficulty and those where the lack of jurisdiction and authority is so plain and clear that it ceases altogether to be a question. For example, in the illustration given, wherein the Court of First Instance was obliged to determine the existence of a Spanish law, there is presented a question of great intricacy and extreme difficulty of determination. Yet the judge who decides that question, after the most careful and painstaking investigation and study, and decides it wrongly, receives, under the doctrine we are discussing, no more mercy than another judge who, during the progress of the cause, orders the head of one of the parties stricken off by the sheriff. Although the lack of jurisdictional authority or power to make such an order is so clear and so plain that it can not be a question of any kind or from any point of view, and especially not one requiring for its solution the exercise of the judicial functions; and although such an act so transgresses every judicial precedent, so violates every principle of law, so outrages the commonest sense of justice, and so debauches the functions and purposes of a court, that no judge can be heard to say that he was exercising judicial functions in the performance of such an act, nevertheless, that judge, so far as his civil responsibility is concerned, stands, under the doctrine referred to, in exactly the same position as the judge who clearly and admittedly exercised judicial functions in the determination of a question over which the best legal minds have been found to differ.

Still worse. A judge who, even while acting in excess of his jurisdiction, corruptly and criminally sells his judgment to whomsoever pays him highest, and thus debauches and prostitutes the functions of his office before the world, would not be liable civilly to the person injured; while another judge, learned in the law, unimpeachable in integrity, unquestioned in honesty, but who made a mistake of judgment over the intricate and doubtful question of his initial jurisdiction, would be ruined financially and his usefulness as a judge completely

destroyed. And all this because one judge erroneously decided the question of jurisdiction at the beginning of the cause, while the other erroneously decided the same question later in the case.

Under this doctrine I am anxious to know what reason would be given for holding civilly liable a judge who, as a court, having jurisdiction of the cause and parties, should order the head of one of the parties stricken off and that order should be obeyed. That he would be so liable is certain. But what reason could be given for it under the doctrine that jurisdiction is the touchstone of liability? He had jurisdiction of the cause, and, under the doctrine, had the right to pass upon any question which he might regard as related to the case, and he could not be questioned civilly for so passing his judgment even though it lead him wholly outside and beyond his jurisdiction and induced him to perform acts completely illegal and void. It is no answer to say that the act was wholly outside of his jurisdiction and power to perform and was illegal and void, for, so was the act of the United States Circuit Court judge in *Lange vs. Benedict*, supra; and yet he was held not to be civilly liable. The only difference between the two cases, from the standpoint of the doctrine of jurisdiction, is in degree and not in kind. The mere fact that he acted in excess of his jurisdiction is not sufficient to condemn under the doctrine. Neither is it a reply to say that such a question could not possibly arise in the case, nor that such an act was so gross and apparent a violation of the duties of the court and such a palpable prostitution of his proper functions, that he would not be allowed to say that he acted as a judge in the performance of such an act. These are not answers, they are admissions; for they impliedly and necessarily base the liability of the judge not upon the question of jurisdiction but upon the proposition that the question was one the determination of which required the exercise of judicial functions. The essence of the whole matter is this: Was the determination of the question whether he had the right to perform the act complained of one which required the exercise of the judicial function? Whether or not he was, in the resolution of the question, exercising judicial functions does not at all depend upon whether he had jurisdiction of the subject-matter of the cause. As we have said, a court may exercise judicial functions as perfectly and as fully in determining whether he has jurisdiction of the subject-matter presented to him for action as he may in deciding any question in the case when his jurisdiction of the subject-matter is conceded. A court always has power and jurisdiction to determine whether it has jurisdiction.

We thus see the embarrassment which is necessarily present in attempting, under the doctrine that jurisdiction determines liability, to hold a judge who has jurisdiction of the cause civilly liable for performing an act outside of his jurisdiction no matter how far outside it may be. It is as apparent, also, that all such embarrassment disappears when, instead of making jurisdiction the test of liability, we make the exercise of judicial functions the real test.

I believe that it has been thoroughly established that the test of judicial liability is not jurisdiction. I believe it has also been as thoroughly established that such liability depends wholly upon the nature of the question which was being determined when the error complained of was made by the court; that is, it must have been a question the determination of which required the exercise of judicial functions. With that condition, jurisdiction has nothing vital to do.

When, then, is a judge civilly liable for his illegal acts? When the question which he wrongly determines is one in the solution of which he can not be said to use judicial attributes. I again present the illustrations I have already given. During the course of a trial the judge orders the head of one of the parties stricken off by the sheriff. As we have already said, such an act so transgresses every judicial precedent, so violates every principle of law, so outrages the commonest sense of justice, and so debauches the functions and purposes of a court, that no judge can be heard to say that he was exercising judicial functions in its performance. His lack of power is so clear that, whether he has such power, ceases to be a question. There are certain limits beyond which a judge will not be permitted to say that he was a judge, or that he was acting as a judge. On the other hand, the example given in

which the Court of First Instance was required to determine the question of the survival of the Spanish law in order to reach a conclusion as to whether he had jurisdiction or not, clearly dis-closes a case where the judicial attributes were exercised. That is a question over which courts in general may really differ. Concerning it two opinions are allowable. In other words, there are two sides to the question. If the question is one which a judge, qualified in the average way for the position occupied by the offending judge or for a similar judicial position, would regard as a question, then it is one whose determination requires the exercise of judicial functions. But if it is one so clear that a judge, qualified as aforesaid, would not regard it as a question, then it is one whose determination does not require the exercise of judicial functions. In the former case the judge is not liable. In the latter, he is. To put it in another way: If the question is one which can be regarded by a judge, qualified as above stated, as having two sides, then the judge is not liable for an erroneous decision. But if it be one which can not be regarded by such judge as having two sides, then the judge is liable for a wrong decision.

Although it is admitted, as I do admit, that the Governor-General had and has no power or authority to expel domiciled aliens, it must, nevertheless, be freely conceded, and this is the vital and conclusive point in this case, that from his point of view there are two sides to that question. That such is the case is conclusively established by the fact that three judges of this court have already decided, after mature deliberation, that he actually has such powers. This being so, it becomes a real question, the determination of which requires the exercise of judicial functions. In such determination he is protected even though he errs.

Whether or not a given question is such a one as I have above described, that is, whether it is one which would be regarded by a judge, qualified in the average way for the position occupied by the offending judge or a similar judicial position, as having two sides, is always a question of law and not of fact. It is a condition established by the existing law. It is a matter not susceptible of proof. The court is required to take judicial notice of the law of the land. It can not be established by evidence. The condition, the state, of the law when the offending act was committed is fixed. It can not be changed by evidence. When the act is admitted, liability is a pure question of law. Even the motive which influenced or controlled the judge in his decision can not be proved. It is immaterial under the doctrine of *Bradley vs. Fisher*. He is not judged from his moral but from his legal relation to the question.

The foregoing is an explanation, if one were needed, of the expression in my former opinion in this case, in which I made reference to the Governor-General acting "in the honest belief," that he had the authority to perform the acts complained of. By such expression I did not mean to call attention to the Governor-General subjectively. I did not mean to bring in issue his state of mind, morally or ethically, at the time he acted, nor the motive which impelled him. What was meant there is, Was the question which confronted him for solution one over which men qualified for that or a similar station would really differ; one which the average man fit for that position would regard as a real question? In other words, Is it one which, from the viewpoint of a man ordinarily qualified for that position, has two sides? "Honestly," as used, referred to the nature of the question rather than the state of mind or motive of the Governor-General. The state of mind morally of a judge, the motives which induce him to act, are of no consequence in determining his liability. In the case of *Bradley vs. Fisher*, *supra*, cited in my former opinion as well as in this, the court says:

"Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives can not in this way be the subject of judicial inquiry. This was adjudged in the case of *Floyd and Barker*, reported by Coke, in 1608 (12 Coke, 25), where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the King himself, and it was observed that if they were required to answer otherwise, it would 'tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations.'

"The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties and, consequently, exciting the deepest feelings, are being constantly determined in those courts, in which there is a great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

"If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party - and that judge perhaps one of an inferior jurisdiction - that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

"Some just observations on this head by the late Chief Justice Shaw will be found in *Pratt vs. Gardner* (2 Cush., 68), and the point here was adjudged in the recent case of *Fray vs. Blackburn* (3 Best & S., 576) by the Queen's Bench of England. One of the judges of that bench was sued for a judicial act, and on demurrer one of the objections taken to the declaration was that it was bad in not alleging malice. Judgment on the demurrer having passed for the defendant, the plaintiff applied for leave to amend his declaration by introducing an allegation of malice and corruption; but Mr. Justice Compton replied: 'It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent them being harassed by vexatious actions;' and the leave was refused. (*Scott vs. Stansfield*, L. R., 3 Exch., 220.)

"In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to account by an impeachment and suspended or removed from office. In some States they may be thus suspended or removed without impeachment by a vote of the two houses of the legislature.

"In the case of *Randall vs. Brigham* (7 Wall., 523; 74 U. S., 285), decided by this court at the December term of 1868, we had occasion to consider at some length the liability of judicial officers to answer in a civil action for their judicial acts. In that case the plaintiff had been removed by the defendant, who was one of the justices of the Superior Court of Massachusetts, from the bar of that State, and the action was brought for such removal, which was alleged in the declaration to have been made without lawful authority and wantonly,

arbitrarily, and oppressively. In considering the questions presented, the court observed that it was a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction; that with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction; that if this were the case with respect to them, no such limitation existed with respect to judges of superior or general authority; that they were not liable in civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, 'unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly.¹ The qualifying words were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.

"In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts; even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."

Applying to the case at bar the analogy to which we have so far consistently adhered, it is necessary to conclude, from the principles asserted in the quotation, that the motives with which the illegal acts of the Governor-General were performed can not affect in any way his responsibility. For the same reason, and for the reasons stated heretofore, the liability of the Governor-General is a question of law and not of fact. It depends entirely on the state of the law, of that the court takes judicial notice without proof.

The foregoing discussion is not a criticism of the case of *Bradley vs. Fisher*, so many times referred to. On the contrary, I am confident that this case, when properly viewed, is, as I have heretofore stated, fully in accord with the considerations and conclusions indulged herein, and may reasonably, indeed, if the dictum therein contained have any force whatever, must necessarily be taken as an authority for them. In that case the name of the plaintiff was stricken from the roll of attorneys practicing in the criminal branch of the supreme court of the District of Columbia by the judge thereof, the defendant in the action. The following was the order entered by the court:

"On the 2d day of July last, during the progress of the trial of John H. Suratt for the murder of Abraham Lincoln, immediately after the court had taken a recess until the following morning, as the presiding justice was descending from the bench, Joseph H. Bradley, esq., accosted him in a rude and insulting manner, charging the judge with having offered him (Mr. Bradley) a series of insults from the bench from the commencement of the trial. The judge disclaimed any intention of passing any insult whatever, and assured Mr. Bradley that he entertained for him no other feelings than those of respect. Mr. Bradley, so far from accepting this explanation or disclaimer, threatened the judge with personal chastisement. No court can administer justice or live if its judges are to be threatened with personal chastisement on all occasions whenever the irascibility of counsel may be excited by imaginary insult. The offense of Mr. Bradley is one which even his years will not palliate. It can not be overlooked or go unpunished.

"It is, therefore, ordered that his name be stricken from the roll of attorneys practicing in this court."

The suit was founded on this order, the plaintiff alleging that the defendant "falsely, fraudulently, corruptly, and maliciously intended thereby to give color of jurisdiction" for making the order referred to, and that he acted unlawfully, wrongfully, unjustly, and oppressively in making such order. The action was one against the judge for damages occasioned by such act. In deciding the case the court said:

"In other words, it sets up that the order for the entry of which the suit is brought was a judicial act, done by

the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act, and the jurisdiction of the court, the defendant can not be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.

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"The criminal court of the District, as a court of general criminal jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practicing attorney. This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice.

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"The criminal court of the District erred in not citing the plaintiff, before making the order striking his name from the roll of its attorneys, to show cause why such order should not be made for the offensive language and conduct stated, and affording him opportunity for explanation, or defense, or apology. But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.

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"A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person applies in cases of this kind, and for the same reasons."

It must be noted, in the first place, that, inasmuch as the court, in that case, was found to have had full jurisdiction

of the person of the plaintiff and the subject-matter before him, the court erring simply in his method of procedure, the question of the civil liability of a judge for acts performed with complete lack of jurisdiction did not arise.

In the second place, especial and particular attention is called to certain expressions in the decision which occur in that portion relative to the liability of a judge acting in complete absence of jurisdiction: "Where there is clearly no jurisdiction over the subject-matter any authority is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." Again: "Thus if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority."

Those portions of the sentence quoted which I have italicized contain the essence of the whole matter of judicial liability where there is a lack or failure of jurisdiction. I am of the opinion that those expressions indicate necessarily and decisively that the principle which I have herein laid down as the one logically and inevitably governing judicial liability is the true one and the only one whose results are not absurdities in many cases. Otherwise those expressions are wholly meaningless and the suggestions they contain valueless. If jurisdiction is the real test of liability, if a judge acting wholly and completely without jurisdiction is necessarily liable, as contend text writers and courts generally, what difference does it make whether the want of jurisdiction "clearly" appears or not. If entire absence of jurisdiction is decisive, what does it signify whether or not "the want of jurisdiction is known to the judge." If the crucial test is jurisdiction, what means the phrase "and this (entire want of jurisdiction) being necessarily known to its judge?" If these expressions mean nothing, then there is an end of the matter so far as the case we are discussing is concerned. But if they mean anything at all commensurate with the signification which would ordinarily be given to the words which compose them, then they destroy utterly the doctrine that jurisdiction is the test of judicial liability. The word "clearly" refers either to the judge himself or to some one or something apart from him. If to the judge, then the want of jurisdiction must be clear to him before he can be liable. But if his want of jurisdiction is clear to him and he still goes forward with the cause, he must be actuated by a motive other than his belief that he is within his jurisdiction. If, therefore, "clearly" refers to the judge himself, to his subjective condition, then it can have no relation or materiality except to disclose the motive which moved him. But motive has been expressly held by this very case to be wholly immaterial in determining a judge's civil liability. Motive "Is merely a state of mind. If motive can have no influence on the matter, then it is of no consequence whatever what the state of mind may be. This is in perfect accord with the universal doctrine that one man's rights can not be made to depend on another man's mind. If A illegally injures B, B's right of action can not be dependent on A's state of mind when he caused the injury, Such state of mind might have some influence on the amount of damages or the kind of action to be brought, but never on the right of action. So the right of action against a judge never can be made to depend on the state of mind of the judge who causes the injury, but only and solely upon the nature of the question determined. Rights are children of the law, not of man's fancy.

If, however, the word "clearly" refers to some one or something apart from the judge himself, then the expression in which it occurs has meaning and significance. If the want of jurisdiction is so "clear," not to that judge in particular, but to a judge having the average qualifications for the position occupied by the offending judge, or a similar judicial position, that whether or not there is jurisdiction is not a question at all, then we can understand what was intended by the use of the word "clearly." The whole doctrine that the civil liability of a judge depends upon jurisdiction alone, as stated by text writers and enforced by most courts, is utterly at variance with the conception that the state of mind of the offending judge should have any influence on his liability. Moreover, the

very case I am discussing holds clearly that public policy requires that the motives of a judge in deciding a cause, his state of mind accompanying or even causing his decision, shall have no influence in determining his liability. We find in that case the following:

"Yet it is precisely in this class of cases that the losing party feels most keenly the decision against Mm, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his conviction of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfections of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

Motive, as here used, can not be restricted to a state of mind morally wrong. It includes also a state of mind legally wrong. A judge, knowing full well that he is absolutely without jurisdiction, who, in spite of that knowledge, proceeds with the cause, condemning one of the parties in complete violation of the law, may be impelled thus to violate the law by an honest belief that he is thereby doing justice between the parties; but his motives are nevertheless tainted with illegality, and, even though they are not morally wrong, they fall within the definition of "motives" as that word is used in the decision I am discussing. But even though I be wrong in that contention, it nevertheless is certain that if a corrupt motive can not be influential in determining the liability of a judge, one not corrupt can not be.

It, therefore, seems to me clear that the word "clearly" as used in the case under discussion does not refer to the state of mind of the offending judge, but rather to the nature of the question which he determines; not to the way the judge himself views the question, but to the way it would be viewed by the standard judge, the average judge, as I have heretofore stated.

What I have said of the word "clearly," as it appears in the case under discussion, is equally applicable to the other expressions quoted therefrom. The phrase "when the want of jurisdiction is known to the judge" presents precisely the same question. As I have said, the very case in which that expression occurs holds unequivocally that the motives which move the judge to action are not permitted to weigh for or against him, even though they are corrupt and immoral. It can not be possible, then, that any other motive, especially an honest one, can be permitted to affect his case. The conclusion is, therefore, unavoidable that the phrase "when the want of jurisdiction is known to the judge" does not refer to the actual state of mind of the judge but to the state of mind which he ought to be in and which he would have been in if he had taken into consideration properly the nature of the question before him. In other words, he will be deemed to have been in the same state of mind as the ideal, the standard judge of whom we have spoken would have been had he had the same question before him. We have here somewhat the idea which is predominant in the theory of negligence embodied in the question, "Did he use the care which an ordinarily careful and prudent man would have used under the same circumstances?" This means simply that everything depends, in the last analysis, on the nature of the question with which the judge was dealing when he committed the error made the basis of the action against him.

Lastly, as to the phrase "and this [the want of jurisdiction] being necessarily known to its judge."

The word "necessarily" seems to me to be absolutely conclusive as to the intention of the Supreme Court of the

United States in the case under discussion relative to the doctrine of judicial liability in cases involving a failure or want of jurisdiction. This expression, it will be remembered, was used in connection with the illustration of a probate court assuming criminal jurisdiction. Why, in such illustration, should the want of jurisdiction be "necessarily" known to the judge? No reason can be given except that it was a perfectly plain case, and, in consequence, he was bound to know it, whether he actually did or not. In other words, the question which he was called upon to decide was so plain and so clear that the standard judge would not have regarded it as a question at all; i.e., there was really only one side to it. It could be decided in only one way. Therefore, the judge was bound to know it; it was necessarily known to him. The nature of the question was such that he was estopped from denying knowledge. Thus are we brought back again to the proposition I have so often asserted, that the liability of the judge depends wholly upon the nature of the question in the determination of which the error was made.

It appears to me to be evident, therefore, that the case of *Bradley vs. Fisher* is an authority, so far as dictum can be such, in support of the doctrine I am advocating, both affirmatively and negatively. Affirmatively, because it asserts the doctrine that the nature of the question controls. Negatively, because it also asserts that the motives which induced the judge to the error which is the basis of his liability are wholly immaterial in establishing that liability. This necessarily means, as we have already seen, that the state of mind of the judge by which the error was induced, of whatever kind it may be, good, bad, or indifferent, is entirely without significance as an element of his liability. This is all I set out to establish. (See *Bishop Non-Contract Law*, par. 783; *Root vs. Ross*, 72 *Northwestern*, 1022; *Grove vs. Van Duyn*, 15 *Vroom*, 654.) Section 9 of the Code of Civil Procedure relating to the liability of judges is simply declaratory of the law as heretofore set forth.

The discussion up to this point has proceeded upon the theory that the Governor-General acted wholly without power, authority, or jurisdiction. I here note by way of suggestion merely that it should be remembered that the Governor-General, in performing the acts complained of, was operating in a field distinctively his own, namely, that of the execution of the law. Of that branch of the government he is the head. Over that field he has general authority and jurisdiction. Taking for the moment the position of those who maintain that there is a difference between excess of jurisdiction and an entire failure of jurisdiction, may not his act of expulsion have been in excess of jurisdiction rather than in complete failure thereof? I do not now stop to argue this question, inasmuch as I have already presented the matter fully from the other point of view.

I have treated thus at length the liability of judges of analogical purposes, founding myself not only upon the reason and principle involved, but also upon the case of *Spalding vs. Vilas* (161 U. S., 483), in which the opinion discussed at length the civil liability of judges, using the principles there applied as a foundation for the determination of the liability of the defendant, who was postmaster-general, and who had been sued for damages alleged to have been caused by certain acts performed by him in the execution of what he believed to be the duties of his office. This is precisely what I have done in the case at bar.

So far I have discussed the liability of the Governor-General for the acts complained of, viewing the acts as springing from the determination of questions judicial in their nature. I now propose to treat the question at bar as arising from determinations made and acts performed by the Governor-General in discharging the duties laid upon him as Chief Executive of the Government.

The immunity of judges from personal liability for damages resulting from their wrongful acts while in the discharge of the duties of the office rests wholly in public policy. The reasons for such immunity are nowhere better stated than in Mr. Cooley's work on Torts. He says:

"1. The necessary result of the liability would be to occupy the judge's time and mind with the defense of his own interests, when he should be giving them up wholly to his public duties, thereby defeating, to some extent, the very purpose for which his office was created.

"2. The effect of putting the judge on his defense as a wrongdoer necessarily is to lower the estimation in which his office is held by the public, and any adjudication against him lessens the weight of his subsequent decisions. This of itself is a serious evil, affecting the whole community; for the confidence and respect of the people for the government will always repose most securely on the judicial authority when it is esteemed, and must always be unstable and unreliable when this is not respected. If the judiciary is unjustly assailed in the public press, the wise judge refuses to put himself in position of defendant by responding, but he leaves the tempest to rage until an awakened public sentiment silences his detractors. But if he is forced upon his defense, as was well said in an early case, it 'would tend to the scandal and subversion of all justice, and those who are most sincere would not be free from continual calumniations.'

"3. The civil responsibility of the judge would often be an incentive to dishonest instead of honest judgments, and would invite him to consult public opinion and public prejudices, when he ought to be wholly above and uninfluenced by them. As every suit against him would be to some extent an appeal to popular feeling, a judge, caring specially for his own protection, rather than for the cause of justice, could not well resist a leaning adverse to the parties against whom the popular passion or prejudice for the time being was running, and he would thus become a persecutor in the cases where he ought to be a protector, and might count with confidence on escaping responsibility in the very cases in which he ought to be punished. Of what avail, for example, could the civil liability of the judge have been to the victims of the brutality of Jeffreys if, while he was at the height of his power and influence and was wreaking his brutal passions upon them amidst the applause of crowded court rooms, these victims had demanded redress against him at the hands of any other court and jury of the realm?

"4. Such civil responsibility would constitute a serious obstruction to justice, in that it would render essential a large increase in the judicial force, not only as it would multiply litigation, but as it would open each case to endless controversy. This of itself would be an incalculable evil. The interest of the public in general rules and in settled order is vastly greater than in any results which only affect individuals; courts are for the general benefit rather than for the individual; and it is more important that their action shall tend to the peace and quiet of society than that, at the expense of order, and after many suits, they shall finally punish an officer with damages for his misconduct. And it is to be borne in mind that if one judge can be tried for his judgment, the one who presides on the trial may also be tried for his, and thus the process may go on until it becomes intolerable.

"5. Bui where the judge is really deserving of condemnation a prosecution at the instance of the State is a much more effectual method of bringing him to account than a private suit. A want of integrity, a failure to apply his judgment to the case before him, a reckless or malicious disposition to delay or defeat justice may exist and be perfectly capable of being shown, and yet not be made so apparent by the facts of any particular case that in a trial confined to those facts he would be condemned. It may require the facts of many cases to establish the fault; it may be necessary to show the official action for years. Where an officer is impeached, the whole official career is or may be gone into; in that case one delinquency after another is perhaps shown - each tends to characterize the other, and the whole will enable the triers to form a just opinion of the official integrity. But in a private suit the party would be confined to the facts of his own case. It is against inflexible rules that one man should be allowed to base his recovery for his own benefit on a wrong done to another; and could it be permitted, the person first wronged, and whose right to redress would be as complete as any, would lose this advantage by the very fact that he stood first in the line of injured persons.

"Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits, In effect, the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State and the peace and happiness of society; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a

dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer." (Cooley on Torts, 2d ed., pp. 475-478.)

The following cases are also in point: *Bradley vs. Fisher* (13 Wall., 335), *Spalding vs. Vilas* (161 U. S., 483), *Pratt vs. Gardner* (2 Cush., 63), *Yates vs. Lansing* (5 Johns., 282, 291), *Fray vs. Blackburn* (3 B. & S., 576), *Scott vs. Stansfield* (L. R., 3 Exch., 220).

It needs no use of the imagination to permit the assertion that the execution of the law is a matter fully as important as the creation or determination of the law. One branch of the government is, largely speaking, as necessary and important as the other. The whole system of representative ' government is founded in that proposition. The three departments are not only coordinate; they are co-equal; they are co-important. Whatever affects adversely the efficiency of one affects adversely the efficiency of all. One is quite useless without the other. The legislature is supream than a king in the making of laws, but if they remain unexecuted they are but dry thunder that rolls and growls along the sky but disappoints the husbandman in a thousand thirsty fields. The judiciary is an invincible and irresistible giant in promulgating its decrees, but a day-old infant in their execution.

Whatever impedes or prevents the free and unconstrained activity of a governmental department, within its proper limits, tends to evil results. The civil responsibility of the chief executive would produce in him an inevitable tendency, insidious in character, constant in pressure, certain in results, to protect himself by following lines of least resistance and to temper the force of his executive arm in places and upon occasions where there was strong opposition, either by powerful and influential persons or by great federated interests, and where public prejudice was intense, active, and threatening. Personal interest is a force which in the long run is apt to drive as it will. Reputation, pride, riches, family, home, all endangered in many respects by personal responsibility, are influences which grip and cling with thews of steel and exert a power upon men almost incalculable in its extent, almost certain in its results. To allow these well-nigh irresistible forces to exercise to the full their effects upon the coordinate branches of the government, through men who, for the moment, are, in a sense, the state, is to drive a blow at the very vitals of impartial government.

Anyone may bring an action. It needs no merits, no real grounds, no just cause, no expectation of winning, to commence suit. Any person who feels himself aggrieved by any action of the chief executive, whether he have the slightest grounds therefor or not, may begin suit. Or, not particularly desiring to bring action upon his own initiative, he may be induced thereto by any evil-disposed person, any political rival, party antagonist, or personal enemy of the chief executive, or by any person desiring for any reason to see his administration hampered and brought into contempt by public display of the alleged inefficiency of the chief functionary. For the purposes in view, it is almost immaterial whether or not the action succeeds. Substantially the same results are attained by commencing the action and carrying it haltingly to its final determination. A person who brings an action for the reasons mentioned, or his inducers, will always be fertile and conscienceless in the method of conducting it. Every means will be employed to make it sensational. Every effort will be used to bring the salient features of the plaintiff's claim before the public. Opposition papers will deem it strategy to lend their ready columns to everything that reflects adversely on the defendant. Startling headlines will appear in every issue inviting all people to read the charges against their chief executive. Occasions for delay will be found or made. The case will drag along through months of calumny, vituperation, and sensation until the people, nauseated and weary of the noise and the spectacle, cry for riddance. This is precisely the result desired by the plaintiff. The matter can be stopped and quieted only by the removal of the offending official. This would usually follow in one way or another.

Moreover, the bringing of an action against him because of his act in relation to a given matter would naturally

prevent his taking further or other steps against other persons similarly circumstanced until the final determination of the pending action. Respect for law and the judiciary, as well as his own protection, would probably require this. No words are necessary to indicate the intolerable condition thus resulting from general civil responsibility. Action upon important matters of state delayed; the time and substance of the chief executive spent in wrangling litigation; disrespect engendered for the person of one of the highest officials of the State and for the office he occupies; a tendency to unrest and disorder; resulting, in a way, in a distrust as to the integrity of government itself.

Although the three departments of the government are coordinate and of equal importance in the administration of governmental affairs, nevertheless, it is generally recognized that, in many ways, and at least popularly, the chief executive is the first man in the state. He is regarded by the public generally as the official who most nearly represents the people, who most perfectly epitomizes the government and the state. An assault upon him is, popularly speaking at least, an assault upon the people. An offense against him is an offense against the state. Generally speaking, the government is good or bad as he is good or bad. To degrade and humiliate him is to degrade and humiliate the government. To put him on trial as a wrongdoer is to put on trial government itself. To bring him publicly to the bar is to breed in the public mind an unwholesome disrespect not only for his person but for his office as well; while a decision against him is, popularly speaking at least, not only a license to disregard his subsequent acts as unworthy of consideration, but also a partial demonstration of the inefficiency of government itself. As the state may not be held liable, and by such process its sovereignty weakened, without express provision of law, so the person most perfectly its incarnation should not be subjected civilly to personal liability for damages resulting from the performance of official acts except by law equally express.

While the three coordinate governmental departments are mutually dependent, each being unable to perform its functions without the other, they are, nevertheless, paradoxical as it may seem, wholly independent of each other, except for what is known as the checks and balances of government. That is to say, one department may not control or interfere in any way with another in the exercise of its functions. This, of course, is fundamental. The legislature may neither dictate to the courts what judgments they shall render, nor modify, alter or set aside such judgments after they have been promulgated. The legislature can not be permitted to override executive action nor interfere with the performance of those duties laid by the constitution upon the chief executive. In the same way, the courts have no power to control or interfere in any way with the legislature in the making of laws or in taking or refraining from taking any action whatever, however clear may be its constitutional duty to take or not to take such action. The legislature may refuse to pass laws which are absolutely necessary for the preservation of society, thus clearly and openly violating and disregarding the trust reposed in it, and still neither the judicial nor the executive branch can interfere. The courts may openly and flagrantly violate their duty, render the most partial, unjust, illegal, and even corrupt judgments, thereby openly prostituting their proper functions, yet neither the legislature nor the executive department can interfere.

Moreover, except as herein before indicated, neither the members of the legislature nor of the judiciary are subject to personal liability for damages either by their failure to perform their duties or for their open defiance of the plain command of the constitution to perform them.

The power to interfere is the power to control. The power to control is the power to abrogate. Upon what reasons, then, may we base the right of the courts to interfere with the executive branch of the government by taking cognizance of a personal action against the chief executive for damages resulting from an official act; for, to take jurisdiction of such an action is one of the surest methods of controlling his action. We have already seen the dangers which lurk in the unhampered privilege of personal suit against the chief executive from the viewpoint of the effects which it would have on him personally and, therefore, on the general enforcement of the law. Another

question closely akin to this is that of the effect on the independence of that branch of the government. In that argument we touched the results of such responsibility from the viewpoint of the influence wielded by the person who complained by suit against the act of the chief executive. Here we refer to it from the standpoint of the force, the power, the instrumentality by which the complaint is made effective. Every argument advanced against the civil responsibility of the chief executive founded in the baneful results to the public welfare which such responsibility would inevitably carry, is applicable to the proposition that the court may take cognizance of personal actions against him for damages resulting from his official acts. If the courts may require the chief executive to pay a sum of money every time they believe he has committed an error in the discharge of his official duty which prejudices any citizen, they hold such a grip upon the vitals of the executive branch of the government that they may swerve it from the even tenor of its course or thwart altogether the purpose of its creation. If such responsibility would prove harmful by reason of the influence thus given to persons or interests involved in the execution of the law, how much more disastrous would be the results of such responsibility which would normally flow from the power which the courts might wield, that power which alone makes effective the influence of the persons or interests referred to, not only determining their remedy and adjudicating their rights, but also fixing the amount of damages which the infringement of those rights has occasioned. That the courts may declare a law passed by the legislature unconstitutional and void, or an act of the executive unauthorized and illegal; or that the legislature may curtail within limits the jurisdiction and power of the courts, or restrict, in a measure, the scope of executive action; or that the executive may, by his veto, render null and ineffective the acts of the legislature and thus effectually thwart the purposes of the majority, is no reply to the argument presented. These are merely the checks and balances made by the people through the constitution inherent in the form of government for its preservation as an effective institution. Without them the government would collapse like a house of cards. In spite of these checks and balances, if not by reason of them, the fundamental departments of the government are independent of each other in the truest sense of the word. The quality of government consists in their remaining so.

It must not be forgotten that there is a great difference, intrinsically and in result, between the power to declare the executed acts of the chief executive illegal and void, and the power to hold him personally responsible in damages resulting from such acts. In the one case the results are, in a real sense, entirely impersonal. No evil to him directly flows from such acts. He is secure in his person and estate. In the other, he is directly involved personally in a high and effective responsibility. His person and estate are alike in danger. In the one case he acts freely and fearlessly without fear of consequences. In the other he proceeds with fear and trembling, not knowing, and being wholly unable to know, when he will be called upon to pay heavy damages to some person whom he has unconsciously injured.

The principle of nonliability, as herein enunciated, does not mean that the judiciary has no authority to touch the acts of the Governor-General; that he may, under cover of his office, do what he will, unimpeded and unrestrained. Such a construction would mean that tyranny, under the guise of the execution of the law, could walk defiantly abroad, destroying rights of person and of property, wholly free from interference of courts or legislatures. This does not mean, either, that a person injured by the executive authority by an act unjustifiable under the law has no remedy, but must submit in silence. On the contrary, it means, simply, that the Governor-General, like the judges of the courts and the members of the Legislature, may not be personally mulcted in civil damages for the consequences of an act executed in the performance of his official duties. The judiciary has full power to, and will, when the matter is properly presented to it and the occasion justly warrants it, declare an act of the Governor-General illegal and void and place as nearly as possible in status quo any person who has been deprived of his liberty or his property by such act. This remedy is assured to every person, however humble or of whatever country, when his personal or property rights have been invaded, even by the highest

authority of the state. The thing which the judiciary can not do is to mulct the Governor-General personally in damages which result from the performance of his official duty, any more than it can a member of the Philippine Commission or the Philippine Assembly. Public policy forbids it.

Neither does this principle of non-liability mean that the chief executive may not be personally sued at all in relation to acts which he claims to perform as such official. On the contrary, it clearly appears from the discussion heretofore had, particularly that portion which touched the liability of judges and drew an analogy between such liability and that of the Governor-General, that the latter is liable when he acts in a case so plainly outside of his power and authority that he can not be said to have exercised discretion in determining whether or not he had the right to act. What is held here is that he will be protected from personal liability for damages not only when he acts within his authority, but also when he is without authority, provided he actually used discretion and judgment, that is, the judicial faculty, in determining whether he had authority to act or not. In other words, he is entitled to protection in determining the question of his authority. If he decide wrongly, he is still protected provided the question of his authority was one over which two men, reasonably qualified for that position, might honestly differ; but he is not protected if the lack of authority to act is so plain that two such men could not honestly differ over its determination. In such case, he acts, not as Governor-General, but as a private individual, and, as such, must answer for the consequences of his act.

The attorneys for the defendant in the action before us earnestly contend that even though the Governor-General is not liable, his agents, Harding and Trowbridge, are. In support of that contention they cite numerous authorities. One of those is *Little vs. Barreme* (2 Cranch, 170). This was a case in which the commander of a ship of war of the United States had obeyed certain instructions emanating from the President of the United States which were not strictly warranted by the law under which said instructions were given; and had seized a ship not subject to seizure under the law. The attorneys for the defendant cite that portion of the opinion of Mr. Chief Justice Marshall in that case which reads as follows:

"These orders given by the executive under the construction of the Act of Congress made by the department to which its execution was assigned, enjoined the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the Act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce a suspicion that the vessel was American, would excuse the captor from damages when the vessel appeared in fact to be neutral.

"I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires, that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions can not change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."

The case cited is distinguishable from the case at bar in that in that case the duty to exercise judgment as to what

vessels should be seized was placed, by express provisions of the law, upon the commander of the American warship. No duty whatever was placed upon the President of the United States. Under the law he might, if he chose, give instructions to commanders of American war vessels to subject to examination any ship or vessel of the United States on the high seas which there might be reason to suspect was engaged in commerce contrary to the tenor of the law; but the duty of action, of using judgment and discretion as to whether or not a given ship was susceptible of seizure under said law, was placed wholly upon the commander of the vessel. This appears from reading the Act. Section 5 thereof provides as follows:

"That it shall be lawful for the President of the United States to give instructions to the commanders of the public armed ships of the United States to stop and examine any ship or vessel of the United States on the high seas which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor hereof; and if, upon examination, it shall appear that such ship or vessel is bound or sailing to any port or place within the territory of the French republic, or her dependencies, contrary to the intent of this Act, it shall be the duty of the commander of such public armed vessel to seize every such ship or vessel engaged in such illicit commerce, and send the same to the nearest port in the United States; and every such ship or vessel, thus bound or sailing to any such port or place, shall, upon due proof thereof, be liable to the like penalties and forfeitures as are provided in and by the first section of this Act."

Under the law as quoted, the commander was acting for himself, upon his own responsibility. He had no authority whatever from the President of the United States to act in a given way, or at a particular time, or upon a given ship, or upon a given set of facts. He was controlled entirely by the provisions of the law, not by the orders or instructions of the President. The source of his authority was the Act, not the President. He was acting for himself, as principal, upon whom lay all of the obligation and all of the responsibility, and whose duties were clearly specified in the Act, and not as agent or servant of the President. He was acting in the performance of his own duty, and not in the performance of a duty laid upon the President of the United States.

In the case at bar no duty whatever was laid by law upon Harding or Trowbridge. The only duty, if there was a duty in connection with the act performed, was laid upon the Governor-General personally. If the law was as he supposed it to be, it was his duty and not their duty which they were performing. They acted not as principals upon whom an obligation was directly or indirectly laid by law. They were at the time merely the hands of the Governor-General.

The case of *Tracy vs. Swartwout* (10 Peters, 80), is distinguishable upon the same grounds.

In the case of *Marbury vs. Madison* (1 Cranch, 137), the court said (p. 164):

"By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived, by adverting to the Act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that Act, is to conform precisely to the will of the President: he is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and can not, at his discretion, sport away the vested rights of others."

I do not discuss here the other citations made by the attorneys for the defendant for the reason that those authorities refer exclusively to the liability of executive officers of the Government occupying subordinate positions, who were creatures of the legislature and not of the constitution, and whose duties are specified by the law under which they acted and were by nature different from those laid upon the chief executive. As we have distinctly stated heretofore, the rule of liability, herein set forth, applicable to the chief executive is not applied in this opinion to those occupying subordinate positions. The principle of the nonliability of the chief executive rests in public policy. It is not held in this case that public policy reaches persons other than those who, in the highest sense, constitute the coordinate departments of the government. That question is not involved and is not discussed.

I have looked in vain for any logical reason which requires us to hold Harding and Trowbridge liable when the person whose act they were in reality performing is himself free from responsibility.

[1] On August 3, 1910, for the reasons stated in this case, writs of prohibition were granted, demurrers overruled, injunctions made perpetual, and the actions dismissed in the cases of W.Cameron Forbes, et al. vs. Gan Tico and A.S. Crossfield (No. 6158), and W.Cameron Forbes et al. vs. Sy Chang and A.S. Crossfield (No. 6159).[1] 15 Phil. Rep., 7.

[1] 15 Phil. Rep., 7.

[1] Page 866, supra.

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