

CARROLL H. LAMB, PETITIONER, VS. W. H. PHIPPS, AS AUDITOR FOR THE PHILIPPINE ISLANDS, RESPONDENT.

G.R. No. 7806. July 12, 1912

Ponente: JOHNSON, J.

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JOHNSON, J.:

This was an application for the writ of mandamus presented to the Supreme Court. The petition alleged that:

"I. Relator states that both of the parties to this proceeding are within the jurisdiction of this court, respondent residing in the city of Manila and is the duly appointed and acting Auditor for the Philippine Islands; relator residing in the pueblo of Tacloban, Leyte, Philippine Islands, and prior to January 1, 1912, was an employee of said Government as superintendent of the Iwahig Penal Colony.

"II. Respondent, as the 'Insular Auditor' has certain legal duties to perform which are especially enjoined by law or which are obligatory upon him by virtue of his office as Auditor for the Philippine Islands; and the said duties which relator desires coerced do not require on the part of said Auditor the use of discretion; but should this court decide that said duties are discretionary, then this relator alleges that respondent's use of such discretion is exceptionally arbitrary and illegal.

"III. It is the legal duty of respondent to issue an auditor's certificate (clearance) to any employee or agent of the Government who has left the service, when the legal records of the office of the Auditor for the Philippine Islands demonstrate and show that the accounts of said employee or agent are balanced and that said agent or employee has properly accounted for all government property and funds which have come into his possession during the time of said employment. This status of relator's accounts so exist, but respondent, though requested both verbally and in writing, has failed and refused, and unlawfully neglected to issue said certificate (clearance) -- as a result of which relator is unlawfully excluded from the use and enjoyment of two of his rights:

"First. Without this clearance relator cannot collect from the Government the amounts due him for accrued leave, salary and transportation. (See note on Exhibit C.)

"Second. Without this clearance relator is deprived of his liberty and unable to leave these Islands; in fact, should necessity demand his leaving, and should he even attempt to leave, it would be a criminal offense for him to do so. (Sec. 665, Compilation of the Acts of the Philippine Commission.)

"IV. For twelve years relator has faithfully served the Government of the Philippine Islands, as soldier, as provincial treasurer of Marinduque, as provincial treasurer and supervisor of Mindoro, as provincial treasurer of Laguna, and for the past four years he has been the superintendent of the Iwahig Penal Colony, from which last named position, on account of ill health, relator voluntarily presented his resignation, and which was, on January 2, 1912, reluctantly accepted, as appears by Exhibits A and B, hereto attached.

"V. By respondent's omission and neglect of legal duty, and by improper presentation of facts and law to the Chief Executive of these Islands, relator, in addition to the disgrace and discredit to his character and

reputation, had instituted against him three charges for 'malversation of public funds.'

"These charges, which should never have been presented, have, by direction of the Governor-General, the Honorable W. Cameron Forbes, been ordered dismissed or the prosecution thereof discontinued.

"VI. The copies of said charges demanded from the Attorney-General, being the only legal information of official misconduct received by relator, and they having been eliminated, relator's attorney applied for his clearance, in order that relator might be at liberty and obtain the amounts due him from the Government, which amounts are badly needed by himself, wife and child; whereupon respondent placidly informed the said attorney that -

" 'He would not grant said clearance, and that relator could not obtain any amounts due him, awaiting the result of a probable civil suit which might be filed by one Fernandez against the Government.'

"Yet the legal records of respondent's office show that this same Fernandez has signed the vouchers and the warrant of payment, acknowledging to have received in full from the Government the amounts which would be the foundation for this 'probable suit'

"VII. The dates of the transactions which would figure in the foundation of this 'probable suit' fall within the period from September 5, 1909, to November 17, 1910; and since said dates relator's accounts have been balanced, and he was, on March 11, 1911, granted a clearance, copy hereto attached and marked Exhibit C; and up to the date of said clearance his accounts have been fully audited and balanced and closed; and said audit has not been revoked or reopened, nor can said accounts be now reopened so as to in any way affect the rights of relator in these proceedings.

"VIII. Covering the period from March 11, 1911, the date of said clearance, which latter is absolute and binding upon the Government and on respondent, up to and including December 31, 1911, the date of the effective acceptance of relator's resignation, relator has accounted for all property and funds of the Government which have come into his possession; and it is not even claimed by the 'Insular Auditor' that he has not done so.

"The said W. H. Phipps, as auditor, refused to issue said clearance for the above noted period because of the danger of a probable suit, application to bring which has not even been made, and never will be granted, as the last allegation in Paragraph VI of this petition demonstrates that this auditorial Fernandez claim has not the shadow of a shade of legal ground.

"IX. Respondent's action in the investigation of this whole affair has been illegal and improper. He has not only failed specifically to inform relator of the facts upon which this complaint was based, but actually refused to permit an attorney from his Office to sit with the Attorney-General in order that relator might be confronted with the facts alleged against him and given an opportunity to explain same.

"During relator's absence from the colony, respondent's deputies or agents, without warrant of law or without even asking permission of relator, seized a locked and sealed box, the property of relator, and without his permission or warrant of law forcibly broke open same and extracted therefrom documents and papers, the personal property of relator and property for which relator, as superintendent of Iwahig Penal Colony, was responsible, and respondent has not returned same though requested to do so. This act of robbery respondent attempts to justify on the ground that it was 'done in the presence of witnesses.'

"X. Relator's attorney has been in Manila more than a month engaged in this case, trying to obtain from respondent a legal hearing; and relator himself, at great financial loss and mental worry, has remained ready to comply with any legal requirements of respondent for nearly three months. Both relator and his attorney have exhausted all ordinary means within human power to obtain from respondent this clearance or a legal reason for its withholding; but all efforts so to do have been in vain, and there is no other plain, speedy or adequate

remedy in the ordinary courts of law by which relator can obtain relief, except through these proceedings.

"XI. Therefore, relator, in utter despair, appears before this court and begs it to hear his petition and to issue a peremptory mandate commanding W. H. Phipps, as Auditor for the Philippine Islands, to issue at once to C. H. Lamb a perfect clearance and one fully effective, so relator can enjoy his constitutional rights to liberty and property and upon which the said C. H. Lamb may obtain from the Government of the Philippine Islands all amounts due him for salary, accrued leave and transportation, by virtue of his employment as superintendent of the Iwahig Penal Colony.

"Relator further asks damages against respondent in the amount of one thousand pesos (P1,000) Philippine currency, the expenditure of which amount relator has had to make by virtue of respondent's illegal acts and neglect of duty, and that respondent pay the costs of these proceedings.

"XII. In view of the fact that practically all the evidence upon which this petition is based is documentary and government reports, easily obtainable, and in view of the great unnecessary delay, expense and hardship already suffered by relator, and in view of the fact that relator is the general manager of a large business, just inaugurated by Amzi B. Kelly in Tacloban, Leyte, and that said business is practically at a standstill and without a head, the court is requested to expedite these proceedings, in accordance with the provisions of section 518 of the Code of Civil Procedure.

"Manila, March 18, 1912.

(Sgd.) "AMZI B. KELLY,
"Attorney for relator."

"EXHIBIT A.

"DEPARTMENT OF PUBLIC INSTRUCTION,

BUREAU OP PRISONS,

"Manila, January 2, 1912.

"Sir : I have the honor to inform you that your resignation effective December 31st, 1911, has been accepted

"You were appointed superintendent of Iwahig Penal Colony, on September 1st, 1908, at P6,000 per annum, by transfer from provincial treasurer of Laguna.

"Your services have been satisfactory and no objection exists on the part of this Bureau to your reinstatement in any branch of the Philippine service.

"Very respectfully,

(Sgd.) "M. L. STEWART,
"Director of Prisons."

"Mr. C. H. LAMB, Manila, P.I."

"EXHIBIT B.

"DEPARTMENT OF PUBLIC INSTRUCTION,

"BUREAU OF PRISONS,

"Manila, January 2, 1912.

"MY DEAR MR. LAMB: In accepting your resignation as superintendent of Iwahig Penal Colony, I desire to express my appreciation of the very excellent work done by you in that capacity.

"When you relinquished your duties as treasurer of the Province of Laguna to accept this position on September 1st, 1908, the Iwahig Penal Colony was a problem, which you have very satisfactorily solved, and have succeeded in placing the colony in first class condition.

"You have worked untiringly, intelligently, and satisfactorily, many times to the detriment of your own health, but as a result the Iwahig Penal Colony stands out as one of the best examples that the history of penology knows.

"I trust that your future will be as successful as your past and I know that you will give to your new duties the same loyal work that you have¹ given to the Iwahig Penal Colony.

"With very best wishes, I am,

"Very sincerely,

(Sgd.) "M. L. STEWART,

"Director of Prisons.

"Mr. C. H. LAMB, Manila, P.I."

"EXHIBIT C.

"AFFIDAVIT OF OFFICER AND AUDITOR'S CERTIFICATE.

"Personally appeared before me, the undersigned C. H. Lamb, who exhibited to me his cedula certificate numbered 8715, issued at Manila dated 1/30/09, and who, being duly sworn, deposes and says, that he has rendered a full and complete accounting to the Auditor for the Philippine Islands for all funds and property for which he has been accountable or responsible under the provisions of existing law.

(Signed) "C. H. LAMB,

"Supt. I. P. C.

"Subscribed and sworn to before me at Manila, P. L, this 11th day of March, 1911.

(Signed) "CHAS. A. STILES, Notary Public.

"My commission expires Jan. 1st, 1913."

(Here appears seal of Chas. A. Stiles, notary public.)

"I hereby acknowledge receipt of duplicate copies of this affidavit, which is confirmed by an examination of the records of this date, of accounts-current and property returns as rendered and received.

"Manila, P. L, March 11, 1911.

(Signed) "W. A. RANDALL,

"Acting Auditor.

"By C. A. STILES.

"Note. - In the case of civil officers the proper disbursing officer will withhold final pay until the officer's copy of this certificate is presented, duly signed by the auditor."

(Signed in duplicate.)

"THIS CERTIFICATE MUST BE HELD IN READINESS FOR PRESENTATION, IF CALLED FOR, UPON EMBARKATION."

"PHILIPPINE ISLANDS,

"City of Manila, ss:

"Carroll H. Lamb, late superintendent of Iwahig Penal Colony, states that he is the relator in the proceedings; that he has read and is familiar with the contents of each of the paragraphs of this petition, and that the statements made herein, except the conclusions of law and those quotations appearing as made by the Auditor for the Philippine Islands, are true and correct, and that the said conclusions of law and the said statements made to the relator's attorney by said auditor are true to the best of relator's knowledge and belief.

(Sgd.) "C. H. LAMB, Relator.

"Sworn and subscribed to before me this 18th day of March, A. D. 1912, by C. H. Lamb, who presented cedula No. F-32719, issued at Manila on March 19, 1912.

(Sgd.) "V. Dimaguila, Notary Public.

"My commission expires December 31, 1912."

(Notary's seal.)

"PHILIPPINE ISLANDS,

"City of Manila, ss:

"Amzi B. Kelly, attorney for relator, states that he is familiar with the contents of this petition, and that the statements quoted from the Insular Auditor, as herein written, were made to him by W. H. Phipps, the Auditor for the Philippine Islands; that the conclusions of law necessarily stated in this petition are the result of careful investigation and are true to the best of affiant's legal knowledge and belief; that the other statements made in this petition have been investigated by affiant with much care and with all the power in his means, and that these statements are true to the best of his knowledge and belief.

(Sgd.) "AMZI B. KELLY,

&"Attorney for relator.

"Sworn and subscribed to before me, this 18th day of March, A. D. 1912, by Amzi B. Kelly, who presented cedula No. F-418732, issued at Tacloban, Leyte, on January 13, 1912."

(Sgd.) "V. DIMAGUILA, Notary Public.

"My commission expires December 31, 1912."

(Notary's seal.)

Upon the presentation of the foregoing petition, the Supreme Court ordered the respondent to appear and show cause within a period of twenty-four hours, if possible, why the writ prayed for should not be granted.

The respondent appeared and filed a demurrer based upon the following grounds, to wit:

"1. That the court has no jurisdiction to issue mandamus to the Auditor for the Philippine Islands.

"2. That the complaint does not state facts sufficient to constitute a cause of action."

Upon the issue thus presented by the complaint and the demurrer, the cause was duly submitted to the court. After a careful consideration of the facts contained in the petition and the law applicable thereto, the court, on the 30th day of March, 1912, directed the following order to be entered, sustaining in part the demurrer:

"With reference to the demurrer interposed by the defendant in the application for a writ of mandamus, No. 7806, Carrol H. Lamb vs. W. H. Phipps, Insular Auditor, and reserving the right to render later a more extended judgment, the court said:

"Two reasons are given for this demurrer: one, lack of jurisdiction of this court to take cognizance of the petitioner's application; and the other that the facts stated in the application do not constitute a cause of action; and

" In view of the fact that the petitioner has not established in his application any facts other than that he submitted his accounts to the defendant and that the latter has not yet approved them through risk or fear that a claim may be presented, and that, even though these facts may be sufficiently proved at the trial, in addition to being admitted in the demurrer, they would not furnish sufficient grounds for granting the writ of mandamus, the demurrer is sustained and the petitioner is authorized to amend his application within five days. Messrs. Justices Carson and Trent dissent and Mr. Justice Trent reserves the right to submit later in writing his dissenting opinion.' "

The above very brief order of the court was directed by reason of the fact that it was the last day of the session of the court for the January term of 1912, and for the further reason that no member of the court then had time to more fully state the reasons upon which said order was based. In view of the importance of the question presented, it is deemed advisable to more fully discuss the law relating thereto. It may be noted that the petitioner did not file an amended petition within the time mentioned in the above order. The facts involved in the present case are stated in the petition. The materiality of the exhibits is not quite clear. It is believed that all of the material allegations of the petition which the relator intended to make, eliminating all purely evidential and immaterial allegations, may be fairly stated as follows, to wit:

First, that the relator had been for a period of four years the superintendent of the Iwahig Penal Colony. (See paragraphs 1, 4 and 9 of the petition.)

Second, that the relator has rendered an account for all property and funds of the Government which have come into his possession. (See paragraphs 3 and 8 of the petition.)

Third ,that it is the legal duty of the respondent as Auditor for the Philippine Islands to issue an Auditor's certificate (clearance) to any employee or agent of the Government who has left the service, when the records of the office of the Auditor show that the accounts of said employee or agent are balanced and that said employee or agent has properly rendered an account for all Government property and funds which have come into his possession during the time of said employment. (See paragraph 3 of the petition.)

MEANING OF AUDITOR'S CERTIFICATE OR CLEARANCE.

Before discussing the rules of law controlling in the present case, a word of explanation of what is meant by the Auditor's certificate (clearance) may be of assistance to a better understanding of the purpose of the present petition. Act No. 1605 of the Philippine Commission provides that no bonded officer or bonded employee of the Insular Government, or of any provincial or municipal government in the Philippine Islands, or of the city of Manila, whether in the actual service of such Government or separated therefrom, shall leave or attempt to leave

the Philippine Islands without first securing a certificate (clearance) from the Auditor showing that his accounts with the Government of which he is or was such bonded officer or bonded employee have been finally settled by said Auditor. Said Act further provides that any such officer or employee violating any of the provisions of this Act shall, on conviction thereof, be punished by imprisonment for not exceeding six months or by a fine of not more than P1,000 or both, in the discretion of the court.

During the argument of the present cause, the attorney for the relator stated that he could not leave or attempt to leave the Philippine Islands, without rendering himself liable to a criminal prosecution under and by virtue of said Act (No. 1605), without having the Auditor's certificate or clearance. It will be noted upon reading the petition that there is no word or intimation therein indicating in any way (except the allegation that the relator had been the custodian of Government property and funds) that he was a bonded officer. Unless he was a bonded officer or employee of the Government, said Act does not apply to him and there is no necessity for a clearance. Said Act (No. 1605) only applies to bonded officers or employees. It may be assumed, however, for the purposes of the present case, that the relator was a bonded officer or employee of the Philippine Government and that in the absence of the Auditor's certificate or clearance he might be subjected to a criminal action under said Act (No. 1605) if he attempted to leave the Philippine Islands without said certificate.

DUTY OF THE AUDITOR IN APPROVING ACCOUNTS.

The relator alleges that he has rendered an account for all property and funds of the Government which came into his possession, and concludes that he is therefore entitled to an Auditor's certificate or clearance. Is the mere rendition of accounts of Government property and funds by an employee all that is necessary to entitle such employee to his clearance? Is the Auditor, who is responsible for the proper disposition of Government property and funds, obliged to accept a mere paper balance? Is the Auditor not to be given an opportunity to count the cash (funds) as well as to see that the property of the Government actually exists which had been in the possession or under the control of such employee? Is the Auditor not to be given an opportunity to make an actual inspection for the purpose of satisfying his own mind that the paper balance conforms with the actual facts? Experience has taught auditors as well as business men generally that mere paper balances are not always reliable. The actual funds and property are not always visible, in such balances.

It is confidently contended that the Auditor is not obliged under the law to accept a mere paper accounting as final and conclusive as to the real responsibility of Government employees and to issue a clearance upon that alone. He may, it is true, if he is satisfied; but certainly, he may, if he so desires and if he has any doubt about the correctness of such accounts, make an actual examination of the funds and property represented by such paper accounts or balances. If, then, the Auditor is not obliged to accept the mere paper accounts or balances, when or within what time must he make his investigations and pass upon the accounts rendered? Must he do so immediately? The law does not so require. In justice to all parties and especially for the best interests of the Government, he should verify the accounts rendered as soon as practicable. In any event, the accounts must be verified and accepted or rejected before the lapse of three years. (Sec. 29, Act No. 1792.) At least, it would seem under said Act (Sec. 29, Act No. 1792) that after the lapse of three years the accounts cannot be reopened against an employee or agent. In the present case there is no allegation showing when the accounts were rendered. The relator resigned from his position on the 31st day of December, 1911. His resignation was accepted January 2, 1912. Certainly, his final accounts were not rendered before that date. In the present case, at least, there seems to have been no unreasonable or unnecessary delay, and there is no allegation in the petition to that effect. In fact the relator alleged that the respondent had already acted and had denied his claim (see paragraph 8 of petition) and gave what seems to be a good reason therefor.

Whenever a duty is imposed upon a public official and an unnecessary and unreasonable delay in the exercise of such duty occurs, if it is a clear duty imposed by law, the courts will intervene by the extraordinary legal remedy of mandamus to compel action. If the duty is purely ministerial, the courts will require specific action. If the duty is purely discretionary, the courts by mandamus will require action only. For example, if an inferior court, public official, or board should, for an unreasonable length of time, fail to decide a particular question to the great detriment of all the parties concerned, or a court should refuse to take jurisdiction of a cause when the law clearly gave it jurisdiction, mandamus will issue, in the first case to require a decision, and in the second to require that jurisdiction be taken of the cause. (*De la Beckwith vs. Superior Court*, 146 Cal., 496; *State vs. Judges of Fifth Circuit Court of Appeals*, 48 La. Ann., 672; *Taylor vs. Montcalm Circuit Judge*, 122 Mich., 692; *Kelsey vs. Church*, 112 N. Y. App. Div., 408; *State vs. Smith*, 69 Ohio, 196; *Ex Parte Connaway*, 178 U. S., 421; *In re Grossmayer*, 177 U. S., 48; *Rex vs. Goodrich*, 15 Q. B., 671; 69 Eng. Com. Law, 671; *State vs. Foster*, 106 La. Ann., 425.) In the present case, however, the mandamus is not for the purpose of compelling action only. It is presented for the purpose of requiring particular action on the part of the Auditor. There is a very wide distinction between the use of the writ of mandamus to compel action and its use to compel particular action on the part of a public official, board, or officer upon whom particular duties are imposed by law. This difference will be discussed later.

LEGAL DUTIES OF AUDITOR.

As to the legal duties of the Auditor for the Philippine Islands, we find that they are generally prescribed by the laws of the Philippine Legislature. (See Acts Nos. 90, 145, 215, 328, 909, 1402, and 1792.) Those duties which are not specifically and positively defined by such laws are prescribed by comparison with the duties of other officers which are well defined by law. (See sec. 6, Act No. 1792.)

Generally, the duty of the Auditor for the Philippine Islands shall be to examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Insular Government, of the city of Manila, of the provinces, municipalities, townships, settlements, or other governmental branches. The jurisdiction of the Auditor for the Philippine Islands is exclusive over accounts, whether of funds or property, and all vouchers and records pertaining thereto. His decision upon such accounts is final and conclusive upon the executive branches of the Government except when an appeal therefrom is taken by the aggrieved party or the head of the department concerned within one year. Under the law of the Philippine Islands, the Auditor generally has like authority as that conferred by law upon the several auditors of the States of the United States and the Comptroller of the United States Treasury. (See sec. 6, Act No. 1792.) Sections 24 to 36 of Act No. 1792 provide in more or less detail a method of accounting for funds and property of the Philippine Government in its various branches and for the settlement of such accounts. Section 29 provides that even after accounts have been settled, the Auditor, on account of fraud, collusion, error in calculation, or newly discovered material evidence, or when in his judgment the interests of, the Government may seem to require it, is authorized within three years after the original settlement, to reopen any account previously settled by him or by a district auditor, and, after written notice to the person involved, and after a reasonable time for the reply or appearance of said person, to certify thereon a new balance.

The foregoing, in a most general way, points out the duties of the Auditor for the Philippine Islands. His duties may be restated briefly as follows: (a) He has exclusive jurisdiction to examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Insular Government, the city of Manila, the provinces, the municipalities, the townships, the settlements, or any other governmental branch; and (b) his decisions are final and conclusive except when an appeal is taken therefrom within one year. (Sees. 2, 6, Act No.

1792.) Section 36 of Act No. 1792 provides that when any person is aggrieved by the action or decision of the Auditor in the settlement of his accounts or claims, that such person, within one year, may take an appeal in writing to the Governor-General, which appeal shall specifically set forth the particular action of the Auditor to which exception is taken, with the reasons and authorities relied upon for a reversal of the action or decision of the Auditor. If the Governor-General shall confirm the action of the Auditor, he shall so endorse the appeal and transmit it to the Auditor and the action shall thereupon be final and conclusive. Should the Governor-General refuse to sustain or approve the action of the Auditor, he shall forthwith transmit his grounds of disapproval to the Secretary of War, together with the appeal and papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such cases shall be final and conclusive. To recapitulate then, we believe that the following propositions relating to the power and jurisdiction of the Auditor in auditing accounts for the different governmental entities of the Philippine Islands are true, to wit;

First, that the Auditor for the Philippine Islands has exclusive jurisdiction in the first instance to examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of every governmental entity within the Philippine Islands.

Second, that his decision or the result of his accounting upon such revenues and receipts and accounts is final and conclusive upon all parties unless an appeal is taken within a period of one year.

Third, that the Governor-General of the Philippine Islands (See sec. 36, Act No. 1792) is not possessed with power to revoke or alter or modify the results of accountings made by the Auditor without reference to the Secretary of War.

Fourth, that when an appeal is taken to the Governor-General and the latter disapproves of the accounting made by the Auditor, he must at once forward to the Secretary of War for final action the matter in controversy.

If, then, the Auditor for the Philippine Islands is possessed with exclusive and final jurisdiction to audit all accounts of the Philippine Government, and if his judgment is final unless an appeal therefrom is taken and finally reversed by the Secretary of War, it would seem to be a reasonable conclusion to hold that he has at least a certain discretion in arriving at an uncontrolled and independent conclusion as to any accountability of any accountable employee or official of the Philippine Government.

The question which we are now discussing is not a new one. Very early in the history of the American governments, both state and national, it was found to be very necessary to have some person or official of the government, who was absolutely free from control, to finally pass upon the legality of all governmental accounts. His freedom of action and his right to exercise his own discretion, untrammelled and uncontrolled, has been the basis of many a judicial, executive, and administrative decision. As early as the administration of President Jackson (1829-1837) and even before we find that this question was up for decision. In 1835 Mr. Jackson, then President of the United States, was asked to overrule a decision of the Comptroller of the United States. He declined so to do and made the following brief reply to said request:

"The decision of the second Comptroller is final, over whose decisions the President has no power except by removal."

During the administration of Mr. Polk, a request was made of him to interfere with the adjustment of a claim which had been presented to and passed upon by the Comptroller of the United States, He declined to interfere and in so doing made the following observation:

"I decline to interfere on the ground that Congress has expressly given the authority to settle claims to the accounting officers * * * and that I have no right to control these officers in the performance of their duties."

(Aug. 9, 1845.)

As early as 1789 an Act was passed by the Congress of the United States providing that the auditing and revision of accounts should be made by officers holding their, appointments independent of heads of the departments and wholly unconnected with the disbursement of the public money. The Congress of the United States, in said Act, deemed it essential to the judicious and economical administration of the financial affairs of the government, that the officers who directed the expenditures should not also judge of their legality. Hence, we have, from the very beginning of the Government of the United States, laws which provided for the adjustment of accounts, by accounting officers, whose decisions were final and who held their appointment independent of the heads of the departments and wholly unconnected with the disbursements of the public funds.

We find in Senate Document No. 6, at page 5 of the second session of the Twenty-third Congress of the United States, the following statement, which indicates the view of the Senate of the United States upon the question which we are discussing;

"No effectual check can ever exist in any case where the same officer authorizes the expenditure and then audits, or controls the audit of the accounts."

Auditors and comptrollers, as accounting officers, are generally regarded as quasi-official officers. They perform mere ministerial duties only in cases where the sum due is conclusively fixed by law or pursuant to law. Except in such cases, the action of the accounting officers upon claims coming before them for settlement and certification of balances found by them to be due, is not ministerial merely but judicial and discretionary. This is shown not only by the express language of the statutes generally, but by the rulings of the Supreme Court of the United States. In the case of *Watkins vs. United States* (9 Wall., 759, 764) Mr. Justice Clifford, delivering the opinion of the court, said:

"Vouchers are required by the very words of the Act of Congress * * *. Without such evidences before the accounting officers there could not be any intelligent scrutiny of the claim nor any decision which would be satisfactory to the claimant or to the public."

See also the decision of the Supreme Court of the United States in the case of *Decatur vs. Paulding* (14 Pet., 497) (1840), where Mr. Chief Justice Taney, in delivering the opinion of the court upon the question of the right of the courts to issue mandamus to control the action of an executive officer said:

"In general, the official duties of the head of one of the executive departments, whether imposed by Act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the attorney-general to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments, as well as for the President, unless their duties were regarded as executive in which judgment and discretion were to be exercised." (*Kendall vs. U. S.*, 12 Pet., 524.)

The statutes of the United States require the Comptroller to exercise his judgment upon the legality, not only of provisions of law and resolutions of Congress providing for the payment of money, but they also provide the means of procuring testimony upon which he may act. The statutes also provide him with counsel to enlighten him if he should deem it proper to extend his investigation beyond the papers submitted with the claim or account. (See Rev. Stat. of U. S., sees. 184, 187, 269, 277.) He (the Auditor or, Comptroller) is required to certify balances due in favor of or against the government. To certify is to make certain. To make a certificate is to exercise judgment and discretion. He is required to render decisions upon the legality of claims, and his conclusions are

not mere opinions. If they were mere opinions, they would not be final. In rendering decisions, judgment and discretion must necessarily be exercised. A decision is by the law presumed to be made after an intelligent scrutiny of all of the facts has been made. In the discharge of his duty (Auditor or Comptroller's) he is judge not only of the law but of the facts; and he would not be justified in accepting the views, opinions, findings or rulings of any other officer of the government upon the claims or vouchers admitted. In the performance of his duties, the Auditor is not subject to the jurisdiction of any officer of the executive branch of the government nor to that of any court of the judicial branch. He is not a mere machine to register or blindly execute the opinions or acts of other officers in matters which pertain, by the laws of the fiscal system of the government, by well defined public policy, and by long practice, to the jurisdiction of the accounting officer - a jurisdiction which it is his duty to maintain, even in cases in which its existence may be doubtful. (U. S. vs. Arredondo et al., 6 Pet., 689, 729.) The legislative department of the government would not have made the decisions of the Auditor final, unless an appeal is taken therefrom, without intending to give to the Auditor an uncontrollable discretion in fully examining and scrutinizing every account presented against the Government. The power to certify a balance, for a like reason, includes the authority to review and decide all questions of law and fact, and to use all sources of information for that purpose. A settlement of an account and a certificate of a balance which cannot go to the sources of evidence and examine all questions of law and fact would be practically no examination.

In the Case of Longwill vs. United States (17 Court of Claims, 291) it was said:

"The accounting officers of the treasury are in duty bound to scrutinize claims and accounts with great care, as is their custom, and it is the undoubted right of those who have authority to decide thereon to reject in whole or in part, as their judgment dictates, all those claims which they have reasonable cause to suspect are tainted with fraud or to which they believe there may be substantial defects in law or as to the validity of which they are in doubt."

In the case of the Board of Liquidation et al. vs. McComb (92 U. S., 541) the court said:

"The objections to proceeding against state officers by mandamus or injunction are: First, that it is, in fact, proceeding against the State itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual, and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter."

For the courts to require an auditor to allow or disallow a claim against or in favor of the Government would be to substitute the courts as the auditing officers of the Government. Such a result was not contemplated by a law, which conferred upon another department of the Government the final and exclusive jurisdiction to consider claims. (Kendall vs. U. S., 12 Pet., 524; The Borough of Uniontown vs. The Commonwealth of Pennsylvania, 34 Pa., 293; Habersham et al. vs. Savannah etc. Canal Co., 26 Ga., 665; State of Iowa etc. vs. County Judge etc., 7 Iowa, 186.)

Under the statutes of the United States the comptroller is by express statute authorized to examine accounts and to certify balances thereon. The exercise of this power necessarily involves the exercise of judicial discretion. Judicial action cannot be subject to any control or direction, except by law, or by an appeal. It is independent of all control except by law. The authority so given by statute should be exercised with that untrammelled independence of judgment which is essential to its proper exercise.

In the case of the United States vs. Lynch (137 U. S., 280), a petition was presented in which it was alleged -

"That the respondents (the comptrollers) have refused, and still do continue to refuse, to pay the petitioner, or

to credit him with, the sum of \$288.60, that being the amount remaining unpaid on the said travel under the said Act of Congress." To this petition the respondents (the comptrollers) demurred upon the following ground:

"That mandamus will not lie against an officer of the Treasury Department for refusal to allow and pay a claim against the United States, for, however obviously without legal justification his refusal may be, a mandamus against him to compel such allowance and payment is none the less in effect a suit against the United States."

In passing upon the right of the relator to the writ of mandamus, Mr. Chief Justice Fuller, speaking for the court and citing the case of *Decatur vs. Paulding* (14 Pet, 497), supra, said:

"It is now argued that the duty of the Fourth Auditor and of the Second Comptroller under the last clause of section 2 of the Act of 1835, and the decision of this court in relation to it, was merely ministerial, and that by the disallowance of relator's claim for mileage these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question. * * *

"We think that the authority of the second comptroller and the fourth auditor is not thus denied here, nor the validity of that authority questioned, but that what his claim is that in the exercise of a valid authority, the Auditor and Comptroller erred in respect to an allowance, in view of the decision of this court in another case.

"The writ of error must be dismissed and it is so ordered."

In the case of *Riverside Oil Co. vs. Hitchcock* (190 U. S., 316), the relator presented a petition in the Supreme Court of the District of Columbia asking for a writ of mandamus to compel the respondent, the Secretary of the Interior," to vacate a certain order made by him in relation to the disposition of public lands. Mr. Justice Peckham, speaking for the court and citing again the case of *Decatur vs. Paulding*, supra, said:

"That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statements of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus.

In this case the Supreme Court of the District of Columbia refused to issue the mandamus, and the Supreme Court of the United States affirmed that decision.

The writ of mandamus cannot be used to control the judgment and discretion of an officer in the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself.

In the case of *Bates and Guild Co. vs. Payne* (194 U. S., 105), an application was made for the writ of mandamus to compel Mr. Payne, then Postmaster-General of the United States, to receive and transmit through the mails, as matter of the second class, a certain periodical known as "Masters of Music." Mr. Justice Brown, speaking for the court, said: . "

"That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive unless the law allows an appeal"

With reference to the power of Comptrollers of the Treasury of the United States, it may be said that they are by express statute authorized to examine accounts and to certify balances thereon, (U.. S. Rev. Stat., sec. 269.) Tfre exercise of this power involves judicial discretion. Judicial action cannot be subject to any control or direction except by law and continue to be judicial action. It is independent of all control except by law or otherwise it

cannot be judicial. The authority so given should be exercised with that untrammelled independence of judgment which is absolutely essential to its proper exercise.

It will be noted that what has been said with reference to the independence of the Comptroller of the United States Treasury is also applicable to the Auditor for the Philippine Islands for the reason that section 6 of Act No. 1792 provides that he shall have like authority as that conferred by law upon the several auditors of the states of the United States and the Comptroller of the United States Treasury. We have hitherto cited authority from the courts of the United States. It will be interesting to know what the authors and law writers have said upon this question.

Dr. James L. High, one of the clearest American law writers, in his valuable work on "Extraordinary Legal Remedies" (3rd ed.) in section 102, after discussing the right of the courts to coerce the performance of purely ministerial duties, says:

"Where, however, auditing officers entrusted by law with the duty of passing upon and determining the validity of claims against the state, are vested with powers of discretionary nature as to the performance of their duties, a different rule from that above stated prevails. In such cases the fundamental principle denying relief by mandamus to control the exercise of official discretion applies, and the officers having exercised their judgment and decided adversely to a claimant, mandamus will not lie to control their decision or to compel them to audit and allow a rejected claim. The remedy, if any, for such a grievance, must be sought at the hands of the legislature, and not of the courts. (Auditorial Board vs. Aries, 15 Tex., 72; Auditorial Board vs. Hendrick, 20 Tex., 60; Towle vs. State, 3 Fla., 202; State vs. Doyle, 38 Wis., 92; People vs. Auditor of Colorado, 2 Colo., 97; State vs. Oliver, 116 Mo., 188; Burton vs. Furman, 115 N. C., 106; Wailes vs. Smith, 76 Md., 469; State vs. Babcock, 22 Neb., 38; State vs. Boyd, 36 Neb., 60.) Especially will relief by mandamus be refused in such cases when the party aggrieved has a plain and adequate remedy by appeal from the refusal of the auditing officer to allow his claim. And when a state comptroller is vested with certain discretionary powers in the adjusting and settlement of demands against the state, he cannot be compelled to issue his warrant or liquidate said claim for the payment of a particular sum, nor will the writ go to compel an officer to audit a claim unless it is clearly his duty so to do. (Wailes vs. Smith, 76 Md., 469; Drew vs. Russel, 47 Vt., 250.)"

Mr. Spelling, in his work on "Injunctions and Other Extraordinary Remedies," in a very learned and extensive discussion of the questions now before us says that mandamus will not lie in any matter requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, either to control the exercise of that discretion or to determine the decision which shall be finally given, but only to set him in motion and compel him to exercise his function according to some discretion when he has refused or neglected to act at all, (United States vs. Seaman, 17 How., 225; People vs. Fairchild, 67 N. Y., 334; State vs. Board of Liquidators, 29 La. Ann., 264; Freeman vs. Selectmen of New Haven, 34 Conn., 406; Rutter vs. State, 38 Ohio, 496; United States vs. Commissioner, 5 Wall., 563; People vs. Board of Commissioners of Cook County, 176 Ill., 576; People vs. Maher, 141 N. Y., 330; Boyne vs. Ryan, 100 Cal., 265.) And of course, where another remedy exists, as under the express statutes of the Philippine Islands, mandamus will not be granted.

Mr. Merrill, in his work on "Mandamus," in discussing the same question, says: [sec. 32.]

"The writ lies to make a body or officer charged with a duty, involving judgment or discretion, to take action in the matter. When a subordinate body is vested with power to determine a question of fact, the duty is judicial and though it can be compelled by mandamus to determine the fact it can not be directed to decide in a particular way, however clearly it may be made to appear what that decision ought to be. A court will be ordered to proceed to judgment, but it will not be instructed to render a particular judgment. * * * When a decision has been reached in a matter involving discretion, a writ of mandamus will not lie to review or correct it, no matter how erroneous it may be."

Mr. Arthur L. Sanborn, judge of the United States District Court for the western district of Wisconsin, in his article on "Mandamus," published in volume 26 of the Cyclopedia of Law and Procedure (Cyc), in discussing the right of the courts to issue mandamus against an auditor, says:

"Where a state auditor in the discharge of his duties has a discretion to exercise, as for instance, in the allowance or rejection of a claim against the state, his decision cannot be controlled by mandamus * * *. Where there is another adequate remedy, as for instance, where the right of appeal is given to a claimant whose claim has been disallowed in whole or in part by the auditor, the writ will not lie." (26 Cyc, 237.)

In speaking of the remedy by mandamus against the comptroller, Mr. Sanborn says: [26 Cyc, 239.]

"But the writ will not lie where its effect would be to interfere with the comptroller in matters requiring the exercise of judgment and discretion on his part. Thus, it is held that a state comptroller cannot be compelled to audit claims against the state in any particular way or for any particular amount. In the same way, where the duty of the comptroller to perform the act in question is not clear, or where there is another adequate remedy at law, the writ will not lie. (Patty vs. Colgan, 97 Cal., 251; People vs. Roberts, 163 N.Y., 70.)"

Not only has it been the uniform doctrine maintained by the authorities of the Government of the United States and the law writers that those who are charged with the responsibility of auditing accounts in favor of and against the government must be left absolutely free and untrammelled, but the state governments of the United States as well have established the same doctrine. In the case of *Holliday vs. Henderson* (67 Ind., 103) the court said:

"Where a state auditor in the discharge of his duties has a discretion to exercise, as for instance, in the allowance or rejection of a claim against the state, his decision cannot be controlled by mandamus, especially after the auditor has already acted upon the matter." [26 Cyc, 237.]

See also the following cases: (*Danley vs. Whiteley*, 14 Ark., 687; *People vs. Colorado Territorial Auditor*, 2 Colo., 97; *State vs. Thompson*, 41 Mo., 13; *State vs. Barnes*, 25 Fla., 298 (23 Am. St. Rep., 516); *Wailes vs. Smith*, 76 Md., 469; *Lewright vs. Love*, 95 Tex., 157; *People vs. Adam*, 3 Mich., 427; *Burton vs. Furman*, 115 N. C., 166; *County of San Luis Obispo vs. Gage*, 139 Cal., 398; *People vs. Roberts*, 163 N. Y., 70; *Rutgers College vs. Morgan*, 71 N. J. L., 663; *State vs. Nolan*, 8 Lea, 663; *People vs. Attorney-General*, 41 Mich., 728; *Thompson vs. Watson*, 48 Ohio, 552; *Ewbank vs. Turner*, 134 N. C., 77; *State Board of Dental Examiners vs. People*, 123 Ill., 227; *State vs. Slocum*, 34 Neb., 368.)

An examination of the decisions of the Supreme Court of the Philippine Islands will show that it has followed the general rule above noted with reference to, the issuance of mandamus. The general rule adopted by the Supreme Court of the Philippine Islands is that mandamus will never be issued (a) to control discretion, nor (b) when another adequate remedy exists. (See *Knight vs. McMicking*, 2 Phil. Rep., 698; *Manotoc vs. McMicking*, 10 Phil. Rep., 119; *Cruz Herrera vs. McMicking*, 14 Phil. Rep., 641; *Gonzalez y Salazar vs. The Board of Pharmacy*, 20 Phil. Rep., 367.) In this latter case, it was said:

"It is essential to the issuance of a writ of mandamus that the plaintiff have a clear legal right to the thing demanded and it must be the imperative duty of the defendant to perform the act required. It never issues in doubtful cases. While it may not be necessary that the duty be absolutely express, it is necessary that it should be clear. The writ will not issue to compel an official to do anything which it is not his duty to do or which it is his duty not to do, or to give to the applicant anything to which he is not entitled by law. The writ neither confers powers nor imposes duties. It is simply a command to exercise a power already possessed and to perform a duty already imposed. (*Calvo vs. Gutierrez*, 4 Phil. Rep., 203.)"

The writ of mandamus cannot be used to control the discretion of a judge or to compel him to decide a case or a motion pending before him in a particular way. He must be left to exercise the discretion which the law imposes

upon him; (Merchant vs. Rosario, 4 Phil. Rep., 316; Macke et al. vs. Camps, 5 Phil. Rep., 185; Debrunner vs. Jaramillo, 12 Phil. Rep., 316.)

DISCRETION DEFINED.

Discretion may be denned as "the act or the liberty to decide according to the principles of justice and one's ideas of what is right and proper under the circumstances, without willfulness or favor," (Standard Dictionary, ed. 1911.) Mr. Webster defines discretion as the "freedom to act according to one's own judgment; unrestrained exercise of choice or will."

Mr. Black in his valuable law dictionary says:

"Discretion, when applied to public functionaries, means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. * * *

"Lord Coke defined discretion to be 'discernere per legem quid sit justum.'"

Mr. Bouvier defines discretion as follows:

"That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law. The power exercised by courts to determine questions to which no strict law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court."

Judge Slanborn, in his article on mandamus (26 Cyc, 161) defines discretion, when applied to public functionaries, as the power or right conferred upon them by law acting officially under certain circumstances, according to the dictates "of their own judgment or conscience and not controlled by the judgment or conscience of others. (Farrelly vs. Cole, 60 Kan., 356, 44 L. R. A., 464; State vs. Hultz, 106 Mo., 41; Oneida Common Pleas vs. People, 18 Wend., 79; Rio Grande County vs. Lewis, 28 Colo., 378.)

MINISTERIAL DUTY DEFINED.

A purely ministerial act, in contradistinction to a discretionary act, is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety or impropriety of the act done. (Ex parte Batesville etc. Ry. Co., 39 Ark., 82, 85; American Casualty Ins. Co. vs. Fyler, 60 Conn., 448, 25 Am. St. Rep., 337; Gray vs. State, 72 Ind., 567; Flournoy vs. Jeffersonville, 79 Am. Dec, 468; State vs. Cook, 174 Mo., 100; Marcum vs. Lincoln Co. etc., 42 W. Va., 263, 86 L. R. A., 296.) A ministerial act is one as to which nothing is left to the discretion of the person who must perform. It is a simple, definite duty arising under conditions admitted or proved to exist and imposed by law. (Sullivan vs. Shanklin, 63 Cal., 247; Mississippi vs. Johnson, 4 Wall. (U. S.), 475.) It is a precise act accurately marked out, enjoined upon particular officers for a particular purpose. (Bassett vs. Atwater, 65 Conn., 355, 363, 82 L. R. A., 575.) If the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed, the duty is discretionary and not ministerial. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion nor judgment. (Henkel vs. Millard, 97 Md., 24.)

ANOTHER ADEQUATE REMEDY DEFINED.

As a general rule it may be said that by the phrase "another adequate remedy" is meant one specifically provided by law. If the remedy is specifically provided by law, it is presumed to be adequate. We cannot presume that a remedy expressly provided by the legislative department of the government is not adequate. If, perchance, and in fact it is not adequate, it is the duty of the legislative department and not of the judicial department to correct it.

Under the law the decision of the Auditor is final unless an appeal is taken within one year. The Auditor is the chief or director of one of the executive branches of the government. The appeal permitted is to the head of that branch of the government (first to the Governor-General and second to the Secretary of War).

The right to appeal from the decision of an offices or court to which a particular matter is specifically referred is purely statutory. If the legislative department of the government by statute has not given the right of appeal, such right does not exist. This court said in the case of Pavon vs. Telephone and Telegraph Co. (9 Phil. Rep., 247) that

"The right to appeal is and always has been statutory, and does not exist in common law. It is a remedy which the legislature may in its discretion grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken." (Resolution of Supreme Court, Nov. 25, 1907; Aragon vs. Araullo, 11 Phil. Rep., 7; Sullivan vs. Haug, 82 Mich., 548, 555.)

Under the law in cases like the present, the aggrieved party has the right to appeal. He did not take advantage of that right, nor has he exhausted the ordinary remedy afforded him by express law. He is not entitled to this extraordinary remedy until he has at least exhausted the ordinary remedies afforded him by law.

When a plain, adequate and speedy remedy is afforded by and within the executive department of the government, the courts will not interfere until at least that remedy has been exhausted. (Jao Igco vs. Shuster, 10 Phil Rep., 448; Ekiu vs. U. S., 142 U. S., 651; U. S. vs. Sing Tuck, 194 U. S., 161; U. S. vs. Ju Toy, 198 U. S., 253; Chiu Yow vs. U. S., 28 Sup. Ct. Rep., 201.) The administrative remedies afforded by law must first be exhausted before resort can be had to the courts, especially when the administrative remedies are by law exclusive and final. Some matters and some questions are by law delegated entirely and absolutely to the discretion of particular branches of the executive department of the government. When the law confers exclusive and final jurisdiction upon the executive departments of the government to dispose of particular questions, their judgments or the judgment of that particular department are no more reviewable by the courts than the final judgment or decisions of the courts are subject to be reviewed and modified by them.

Our attention has been called to what appears to be a typographical error in the wording of section 222 of Act No. 190. That section reads in part as follows:

"When the complaint in an action in a Court of First Instance alleges that any inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station * * * and the court, on trial, finds the allegations of the complaint to be true, it may, if there is no other plain, speedy and adequate remedy in the ordinary courts of law, * * *."

It is asserted that the phrase "courts of law" should read "course of law." Many of the provisions of said Act No. 190 were copied verbatim from the Code of Civil Procedure of California. Section 222 of Act No. 190 was taken from section 1085 of the California Code of Civil Procedure. The section of the California Code reads "course of law," instead of "courts of law." We believe that a mistake or error has been made in the printing of said section. We believe that it was the intention of the legislative department of the government to follow exactly the

provision of the California Code and that they intended to use the phrase "course of law" and not "courts of law." It will be noted in section 226, the section relating to the writ of prohibition, the legislature used the phrase "course of law." An examination of the Spanish translation of said section (222) more clearly indicates what the legislative department of the government intended. In Spanish the other remedy is not limited to the ordinary "courts of law." We are permitted under Act No. 63 as amended by Act No. 1788 to refer to the Spanish text, for the purpose of explaining the English text. Act No. 1788 provides:

"In the construction of all Acts or laws which may be enacted by the Philippine Legislature, the English text shall govern, except that in obvious cases of ambiguity, omission, or mistake the Spanish text may be consulted to explain the English text."

We cannot believe that the legislature intended to limit the jurisdiction of this court in mandamus to the cases where there was no other adequate and speedy remedy in the ordinary courts of law. It is our duty, therefore, to give the statute a sensible construction; such as will effectuate the legislative intention and, if possible, avoid an injustice or an absurd conclusion (*Lau Ow Bew vs. U. S.*, 144 U. S., 47, 59). Clerical errors or misprints, which, if uncorrected, would render the statute unmeaning or nonsensical or would defeat or impair its intended operation, will not vitiate the act; they will be corrected by the court and the statute read as amended, provided the true meaning is obvious, and the real meaning of the legislature is apparent on the face of the whole enactment. (*Black on Interpretation of Laws*, p. 77; *Lancaster vs. Frey*, 128 Pa., 593; *Lancaster County vs. City of Lancaster*, 160 Pa., 411.)

Since writing the foregoing we have received a very recent (March 11, 1912) decision of the Supreme Court of the United States, upon the question which we have been discussing. Again the doctrine announced in the case of *Decatur vs. Paulding* (14 Peters, 497) has been confirmed. In this decision (*U. S. ex rel. Ness vs. Fisher*, United States Supreme Court's Advance Sheets, No. 10, p. 356 [March 11, 1912]), the question was whether mandamus would lie against the Secretary of the Interior, for the purpose of controlling his decisions after he had rejected the relator's claim or application. The supreme court, speaking through Mr. Justice Van Devanter, said:

"So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law, and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own, and not having his approval. The question is not new but has been often considered by this court, and uniformly answered in the negative. (*Decatur vs. Paulding*, 14 Pet., 497, 515, 10 L. ed., 559, 568; *United States ex rel. Tucker vs. Seaman*, 17 How., 225, 230, 15 L. ed., 226, 227; *Gaines vs. Thompson*, 7 Wall., 347, 19 L. ed., 62; *Litchfield vs. Register* (*Litchfield vs. Richards*) 9 Wall., 575, 19 L. ed., 681; *United States vs. Schurz*, 102 U. S., 378, 26 L. ed., 167; *United States ex rel. Dunlap vs. Black*, 128 U. S., 40, 48, 32 L. ed., 354, 357, 9 Sup. Ct. Rep., 12; *United States ex rel. Riverside Oil Co. vs. Hitchcock*, 190 U. S., 316, 324, 47 L. ed., 1074, 1078, 23 Sup. Ct. Rep., 698.) Original discussion being foreclosed by these cases, we will merely quote from two of them to illustrate the reasoning upon which they proceed. In the *Decatur* case, *Decatur vs. Paulding* [*supra*], it was held that mandamus could not be awarded to compel the head of one of the executive departments to allow a claim, under one construction of a resolution of Congress, which he had disallowed under another construction, the court saying: 'The duty required by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by Act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. * * * If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his construction to be wrong, they would, of course, so pronounce their judgment. But

their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the Act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. * * * The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them.' And in the *Riverside Oil Co. case* (U. S. ex rel *Riverside Oil Co.* 190 U. S., 316) where it was sought by mandamus to compel the Secretary of the Interior to depart from a decision of his to the effect that a forest reserve lieu-land selection must be accompanied by an affidavit that the selected land was non-mineral in character and unoccupied, it was held that his judgment and discretion could not be thus controlled, it being said; 'Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands. * * * Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty, to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility, as well as the power, rests with the Secretary, uncontrolled by the courts.'

"The relator seems to believe that *Roberts vs. United States* (176 U. S., 221; 44 L. ed., 443; 20 Sup. Ct. Rep., 376) and *Garfield vs. United States* (211 U. S., 249; 53 L. ed., 168; 29 Sup. Ct. Rep., 62) in some way qualify the rule so stated; but this is a mistaken belief. Both cases expressly recognize that rule, and neither discloses any purpose to qualify it. In the former the duty directed to be performed was declared to be 'at once plain, imperative, and entirely ministerial.' And in the latter, the writ was awarded to compel the respondent to erase and disregard a notation which he arbitrarily and unwarrantably had caused to be made upon a public record, and which beclouded the relator's right to an Indian allotment.

"We conclude that the decision of the respondent in the present case was not arbitrary or merely ministerial, but made in the exercise of judgment and discretion conferred by law, and not controllable by mandamus, and therefore that the Court of Appeals rightfully directed that the petition be dismissed."

After a full and careful consideration of the facts and the law applicable to the same, our conclusions may be stated as follows:

- (a) That the courts will take jurisdiction of a cause against the Auditor for the Philippine Islands, in a proper case, to compel action on his part, when by reason of unnecessary delays in taking any action at all, persons have been deprived of a right and have no other adequate and speedy remedy in the ordinary course of law.
- (b) That the right to allow or disallow a claim against the Government of the Philippine Islands or any of its branches is, by law, within the discretion of the Auditor.

(c) That the remedy, by appeal, given under Act No. 1792, to the aggrieved party to the Governor-General and Secretary of War is another remedy and is speedy and adequate and exclusive.

(d) That when the final decision of a question is by law left to the executive branch of the government, the courts will not interfere until the remedy in that branch has been exhausted, and not always then.

We are of the opinion that the first ground of the demurrer should be overruled and that the second should be sustained; and for the reason that the relator has not amended his petition within the time heretofore prescribed by this court, the same is hereby dismissed with costs. So ordered.

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

Carson, J., dissents.

DISSENTING:

TRENT, J.,

I dissent. The importance of the questions involved in this case is recognized by all. They go to the very foundation of government. The personal liberty of a citizen is at stake. I therefore feel constrained to set forth at some length my reasons for dissenting.

The respondent's demurrer is based upon the following grounds:

"1. That the court has no jurisdiction to issue mandamus to the Auditor for the Philippine Islands.

"2. That the complaint does not state facts sufficient to constitute a cause of action."

I assert that the following propositions are true and rest upon principle and authority:

"1. Whether or not the writ of mandamus will issue is not to be determined by the nature of the office of the person to whom directed, but upon the nature of the duty sought to be enforced. There is but one exception to this rule (in so far as the civil officers and employees are concerned and this opinion deals with these officers only) in this jurisdiction.

"2. The Auditor for the Philippine Islands is an officer to whom, on legal principles, the writ of mandamus may be directed.

"3. Mandamus will lie to control the judgment and discretion of an officer in the decision of a matter as to which the law gives him the power and imposes upon him the duty to decide, when the officer has grossly abused such discretion or openly misinterpreted the law.

"4. If there be left to the respondent any discretion, whether or not he should issue the clearance, it falls within the third proposition, and can be controlled by mandamus.

"5. The remedy by appeal provided for in Act No. 1792 is not another plain, speedy, and adequate remedy.

"6. This court has committed a grave and serious error in amending the provisions of section 222, Act No. 190, so as to read 'in the ordinary course of law.' "

In the consideration of these propositions, it is well to bear in mind the following provisions of law, to wit: section 222 of Act No. 190, and section 1 of Act No. 1605.

Section 222 of Act No. 190 reads:

"When the complaint in an action in a Court of First Instance alleges that any inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person, and the court, on trial, finds the allegations of the complaint to be true, it may, if there is no other plain, speedy, and adequate remedy in the ordinary courts of law, render a judgment granting a peremptory order against the defendant, commanding him, immediately after the receipt of such order, or at some other specified time, to do the act required to be done to protect the rights of the plaintiff."

Section 1 of Act No. 1605 provides:

"No bonded officer or bonded employee of the Insular Government, or of any provincial or municipal government in the Philippine Islands, or of the city of Manila, whether in the actual service of such government or separated therefrom, shall leave or attempt to leave the Philippine Islands without first securing a certificate from the Insular Auditor showing that his accounts with the government of which he is or was such bonded officer or bonded employee have been finally settled by said Auditor. Every such officer or employee violating any of the provisions of this Act shall, on conviction thereof, be punished by imprisonment for not exceeding six months, or by a fine of not more than one thousand pesos, or both, in the discretion of the court."

Section 515 of Act No. 190 gives this Supreme Court concurrent jurisdiction with Courts of First Instance in mandamus proceedings.

In determining whether or not the writ of mandamus should issue, the court must be governed by the nature of the duty sought to be enforced and not by the nature of the office held by the respondent. (*Marbury vs. Madison*, 1 Cranch, 137.) But it is said that this court, in the case of *Severino vs. Governor-General* (16 Phil. Rep., 366), held otherwise. This is true, and the rule, to this extent, has been modified in this jurisdiction. But political necessity and public policy demanded this modification. There is nothing growing out of the official character of the respondent in the case at bar which exempts him from or places him beyond the jurisdiction of the court. He was appointed Auditor for the Philippine Islands by the Secretary of War, with the concurrence of the Governor-General and the approval of the Philippine Commission. The Bureau of Audits, of which he is the chief, in so far as it is under any direction in the Philippine Islands, comes under the executive control or supervision of the Governor-General. The duties of public officers are of two kinds: (1) those of a political or legislative character, in the discharge of which their discretion is uncontrollable by mandamus; (2) those administrative, judicial, and quasi-judicial duties imposed by law. No one will claim that the duties of the respondent belong to the first class. His duties, under the statutes, are administrative, and, to some extent, quasi-judicial, only. I am not unaware of the fact that the Government of the Philippine Islands is divided into three separate and coordinate departments: the legislative, the executive, and the judicial; that each department operates as independently of the other as the same departments do in the United States, and that the respondent is an executive officer. This being true, it is said that inasmuch as each department has the right to judge of the laws for itself and as each officer is only responsible for an abuse or usurpation in the mode pointed out in the law, it necessarily follows that the respondent must be supreme within the scope of his powers and not subject to control by the courts for the manner in which he performs or fails to perform his legal duties. This argument is founded on theory, rather than on reality. There is no express provision in the Organic Act, nor in any other statute, exempting the respondent, as

chief of the Bureau of Audits, from being sued in any of the courts of the Philippine Islands, or in any action coming within the jurisdiction of any particular court; upon contract or upon tort, quo warranto, habeas corpus, mandamus, or injunction; or from being liable to any process or writ, properly issued, by any court, such as subpoenas, summons, and other writs of process. If he is exempt from all kinds of suits in the courts and from all kinds of process issued by the courts, it must be because of some hidden or occult implications of the laws or statutes or from some inherent and insuperable barriers found in the structure of the government itself, and riot from the express provisions of the statutes.

As I have said, the question as to whether or not the courts of the Philippine Islands may control any of the acts of the Governor-General has been decided in the negative. The question, however, whether the courts of this country may control any of the acts of the Auditor should, in my opinion, upon well founded legal principles, be decided in the affirmative. If it be decided (and this court, for all practical purposes has so held this point to be examined later) that the Auditor, because he is chief of the Bureau of Audits, may, for that reason, be allowed to enjoy absolute immunity from all judicial process, even when, as in the given instance, the personal liberty of a citizen is at stake, then, why cannot the same exemption from judicial process be set up by any one of the officers of the executive department? Upon this theory there can be but one answer to this question.

"The duty of the Auditor (the respondent in this case) shall be to examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Insular Government and of the city of Manila, including trust funds and funds derived from bond issues; and to audit, in accordance with law and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the Insular Government and the city of Manila. (Act No. 1792, sec. 2.)

"The jurisdiction of the Auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive. * * *

"The decisions of the Auditor shall be final and conclusive upon the executive branches of the Government, except that appeal therefrom may be taken by the party aggrieved or the head of the Department concerned, within one year, in the manner hereinafter prescribed." (Id., sec. 6.)

Section 9 of Act No. 1792 authorizes the Auditor to summon witnesses, administer oaths, and to take evidence in certain cases, and by section 50 of the same Act the Auditor may, with the written consent of the Governor-General, mitigate, remit, remove, compromise, release, or discharge any liability, in whole or in part, to the Insular Government, a provincial or a municipal government, in any matter before him, when in his judgment the interests of the Government require it, provided, however, that no liability in excess of two thousand pesos shall be so mitigated, remitted, or compromised. By authority contained in section 29 of said Act, the Auditor, on account of fraud, collusion, error in calculation, or newly discovered material evidence, or when, in his judgment, the interests of the Government may seem to require it, is authorized, within three years after original settlement, to reopen such settlement, and after written notice to the person interested and after a reasonable time for the reply or appearance of such person, to certify thereon a new balance. The foregoing are all of the provisions of law touching the powers and duties of the respondent which are necessary to be considered in this case.

The conclusions of the court are stated in four paragraphs. In paragraph (a) it is stated that the courts will take jurisdiction against the Auditor for the Philippine Islands in a proper case to compel action on his part when by reason of unnecessary delays in taking any action at all persons have been deprived of a right and have no other adequate and speedy remedy in the ordinary course of law. It is here held that the court will compel the Auditor to act under certain circumstances when the injured party has no other adequate and speedy remedy. In paragraph (c) the court holds that the appeal provided for in Act No. 1792 is a speedy, adequate, and exclusive, remedy. Under this holding, if the Auditor fails to act at all, the courts will compel him to go forward, but not to decide the

question in any specific manner. If he denies the request for a clearance presented by any person, the only remedy that person has is by appeal to the Secretary of War through the Governor-General. He cannot, under this holding, obtain any relief whatever in any of the courts of the Philippine Islands. If such a decision of the Auditor is sustained by the Secretary of War, this court intimates in paragraph (d) of its conclusions that it might review the actions of the Auditor and the Secretary. But in the body of the opinion it is stated that the decision of the Auditor upon air accounts pertaining to the revenues and receipts, from whatever source, of every governmental entity within the Philippine Islands is final and conclusive upon all parties, unless an appeal is taken within one year to the Secretary of War through the Governor-General. It is also held that the decision of the Secretary of War upon such appeal is final and conclusive. After having decided that the decision of the Auditor and the Secretary of War upon all questions touching the revenues of the country and the allowance or disallowance of claims against the Government, is final and conclusive against all parties, the court says:

"When the law confers exclusive and final jurisdiction upon the executive department of the Government to dispose of particular questions, their judgments or the judgment of that particular department are no more reviewable by the courts than the final judgment or decisions of the courts are subject to be reviewed and modified by them."

No one at any time has ever intimated that the judgments or decisions of the courts are reviewable by any of the executive departments.

The result is that this court has decided: (1) that in the case at bar, as well as in all other cases, the Auditor, before he is required to issue a certificate of clearance, must examine, audit, and settle the accounts of the interested person; (2) that in reaching a decision upon these matters the Auditor must necessarily and does use judgment and discretion; (3) that such decisions by the Auditor are final and conclusive upon all parties, unless an appeal be taken as provided in Act No. 1792; and (4) that the decision of the Secretary of War upon such appeals is final and conclusive upon all parties. Or, in other words, mandamus will never lie to compel the Auditor to issue a certificate of clearance to any one. The court cites in support of this holding a long array of authorities. Before proceeding to inquire into the soundness of these holdings, it is well to carefully examine the allegations in relator's petition, bearing in mind that the questions in the case have been decided upon respondent's demurrer and not upon the merits after trial. It is necessary to here examine briefly the elementary rules of pleading touching demurrers. In the case of *Alzua et al. vs. Johnson* (21 Phil. Rep., 308), this court said:

"While it is sometimes loosely stated that a demurrer admits the truth of all the allegations of fact set out in the complaint, the rule thus broadly stated has many important and well recognized limitations and restrictions. A more accurate statement of the rule is that a demurrer admits the truth of all material and relevant facts which are well pleaded. It will readily be seen that the italicized portion of the rule as thus stated modifies the looser and broader statement of the rule to a marked degree. Without stopping to discuss the reasons for the various rules of pleading set out in the following paragraph, we lay them down here, relying upon the reasoning and authority of the cases cited in support of each and all of them.

"A demurrer admits only such matters of fact as are sufficiently pleaded (Com. Dig. Pleader (A 5); 4 Ia., 63; 14 Ga., 8; 9 Barb., 297; 7 Ark. 282; 6 Wash., 315; 7 Misc. Rep., 1); a demurrer does not admit the truth of mere epithets charging fraud; nor allegations of legal conclusions (144 U. S., 75); nor an erroneous statement of law (97 Ala., 491). The admission of the truth of material and relevant facts well pleaded does not extend to render a demurrer an admission of inferences or conclusions drawn therefrom, even if alleged in the pleading; nor mere inferences or conclusions from facts not stated; nor conclusions of law; nor matters of evidence; nor surplusage and irrelevant matter. Furthermore, it is settled that the general rule touching admissions by demurrer does not apply where the court may take judicial notice that the facts alleged are not true; nor does it apply to legally impossible facts; nor to facts which appear unfounded by a record incorporated in the pleading,

or by a document referred to; nor to general averments contradicted by more specific averments. So, also, the truth of scandalous matter, inserted merely to insult the opposing party, is not admitted. (In support of these propositions see many scores of cases cited in 31 Cyc, 333, 334, 335, 330, and 337, and 6 Enc. Pl. & Pr., 334, 335, 336, 337, and 338.) It has been deemed proper to set out these general propositions laid down by the courts of last resort in the United States touching the limitations on the general rule as to admissions by demurrer, because, in this jurisdiction, wherein a new system of procedure has been but lately introduced, the cases thus far decided have not very exhaustively considered the limitations on the rule; and for a clear understanding of this portion of our opinion, it is necessary that these limitations should be kept clearly in mind. But it is proper here to observe that most of these propositions are themselves subject to certain restrictions and limitations in accordance with the varying nature of the infinite variety of conditions to which they are applicable."

That a demurrer admits the truth of all material and relevant allegations of fact which are well pleaded is settled in this jurisdiction. It is not necessary to look elsewhere for authority to support this rule. This rule applies as well to mandamus proceedings as it does to any other case. (United States vs. County of Clark, 95 U. S., 769, 24 L. ed., 545; Ex parte Newman, 81 U. S., 152, 20 L. ed., 877.) So no one will deny that respondent, by demurring to the petition, admitted as true all of the material allegations contained therein. Now, what are the material allegations? In the majority opinion the court says:

"It is believed that all of the material allegations of the petition which the relator intended to make, eliminating all purely evidential and immaterial allegations, may be fairly stated as follows, to wit:

"First, that the relator had been for a period of four years, the superintendent of the Iwahig penal colony.

"Second, that the relator has rendered an account for all property and funds of the Government which have come into his possession.

"Third, that it is the legal duty of the respondent as Auditor for the Philippine Islands to issue an auditor's certificate (clearance) to any employee or agent of the Government who has left the service, when the records of the office of the Auditor show that the accounts of said employee or agent are balanced and that said employee or agent has properly rendered an account for all government property and funds which have come into his possession during the time of said employment."

This third statement is purely a conclusion of law, and can very well be eliminated.

"It is believed that all of the material allegations of the petition which the relator intended to make * * * may be fairly stated as follows:"

The majority of this court here solemnly assert that they believe that all the material allegations which the relator intended to make are: (1) that he had been for four years superintendent of the Iwahig penal colony and (2) that he has rendered an account for all property and funds of the Government which have come into his possession. After reading this petition, which is copied in the majority opinion, I ask, upon what grounds does this court base this belief? Why does the court say it is believed "all of the material allegations which the relator intended to make?" It is not stated that the relator did not make other material allegations, but that he did not intend to do so. All will admit that there are other material allegations in the petition, but this court believes that the relator did not intend to make them. The strongest proof obtainable in the world to show that the relator did intend to make these other material allegations is the fact that he did make them, and that they are material. In all the history of jurisprudence which I have yet had an opportunity to examine, I have been unable to find another adjudicated case where the highest court in the land, or any other court, disregarded strong, clear, and positive material allegations in a complaint or petition and substituted therefor its (the court's) belief that the plaintiff or relator did not intend to make such allegations. Now, what are these other allegations, and are they material? The relator, in paragraph 3

of his petition, states positively that the legal records of the office of the Auditor for the Philippine Islands demonstrate and show that his accounts are balanced and that he has properly accounted for all government property and funds which have come into his possession during the time he was an employee of the Government. Here the relator not only alleges that he has properly accounted for all government property and funds, but that his accounts are balanced and that the records of the respondent's office show these facts. Then, if the respondent's records show that the relator's accounts have been balanced, it necessarily follows that the respondent has balanced said accounts. Who can say that these allegations are not material to the issues involved in this case? They are the very foundation upon which the relator bases his right to a certificate of clearance, the propeller of his ship. Take them away and substitute therefor a belief and the relator must drift hopelessly upon the high seas of uncertainty. The respondent, by having demurred to the petition, admits that these allegations are true. Again, the court says:

"Is the mere rendition of accounts of government property and funds by an employee all that is necessary to entitle such employee to his clearance? Is the Auditor, who is responsible for the proper disposition of government property and funds, obliged to accept a mere paper balance? Is the Auditor not to be given an opportunity to count the cash (funds) as well as to see that the property of the Government actually exists which had been in the possession or under the control of such employee? Is the Auditor not to be given an opportunity to make an actual inspection for the purpose of satisfying his own mind that the paper balance conforms with the actual facts? Experience has taught auditors as well as business men generally that mere paper balances are not always reliable. The actual funds and property are not always visible in such balances."

Why talk about mere paper accounts, an opportunity to count funds and see property, and the experience of auditors and business men, when the respondent admits that the relator's accounts have been examined, audited, and balanced, and that the relator has properly accounted for all government funds and property which have come into his possession? These matters might come up on a hearing on the merits, but they have no place in the consideration of this case at the present time.

The relator further alleges that his accounts up to March 11, 1911, were "fully audited and balanced and closed; and said audit has not been revoked or reopened," and that on that date he was issued a clearance by the Auditor, and that "covering the period from March 11, 1911, the date of said clearance, * * * up to and including December 31st, 1911 the date of the effective acceptance of relator's resignation, relator has accounted for all property and funds of the Government which have come into his possession; and it is not even claimed by the 'Insular Auditor' that he has not done so." Here the relator again alleges in substance that his accounts have been balanced and that he has accounted for all government funds and property for which he was responsible; that he owes the Government nothing; that the Auditor does not even claim that these allegations are not true. Under the pleadings as they now stand, the respondent comes into this court and admits that these allegations are true. This court does not say that the relator has not made these allegations, nor that they are immaterial, nor that the respondent has not admitted that they are true, but the court does say that "it is believed" that the relator never "intended to make" them. Again, according to the allegations in the petition, which the respondent admits to be true, the reason why the respondent refuses to issue a certificate of clearance to the relator is on account of a "probable civil suit which might be filed by one Fernandez against the Government." Upon this point the court says:

"In fact the relator alleged that the respondent had already acted and had denied his claim (see paragraph 8 of the petition) and gave what seems to be a good reason therefor."

Here the court makes a little change in its "belief." Here it finds another material allegation and believes that the relator intended to make it. The principal ground, according to the pleadings, upon which the respondent based his decision denying relator's request for a certificate of clearance was this probable civil suit which one Fernandez

might file against the Government. This court says that this "seems to be a good reason." The court does not give any reason why it reached the conclusion that this probable civil suit was a good reason for the denial of the relator's request for a certificate of clearance. This probable suit is not mentioned anywhere else in the opinion; but I take it, from reading the whole decision, that the foundation for this holding of the court rests upon the proposition that the respondent, in reaching his conclusion upon this point, had to use judgment and discretion. Is this the kind of judgment and discretion which will defeat the relator's right to a writ of mandamus? In answering this question, it must be constantly borne in mind that the personal liberty of the relator is involved. He cannot leave the Philippine Islands to go to his home in the United States. He, for all intents and purposes, is a prisoner and must remain so. On the one side, we have a probable civil suit which might be brought against the Government, and on the other, the personal liberty of a citizen, whose home is in the United States. When the Auditor holds that a probable civil suit against the Government is a good and sufficient reason for denying the relator's request for a certificate of clearance and this court solemnly approves such a holding, and as a consequence, the relator remains a prisoner, is it not beginning to appear that the great and sacred principle contained in the fifth section of the Act of Congress of July 1, 1902, is a "chain of sand," a myth, a delusion, instead of a reality?

The relator further alleges that the respondent caused to be instituted against him three charges for malversation of public funds; that the Governor-General ordered the prosecution of these cases discontinued, and that they have been eliminated (dismissed). This court, in the majority opinion, says nothing of these allegations, for the reason, I assume, that, the respondent having admitted that these criminal charges had already been dismissed, the court did not think it necessary to discuss them. In this I fully agree. If these criminal charges for the malversation of public funds had not been dismissed before the filing of the petition in the case under consideration, they might have furnished some grounds for the justification of the action of the respondent in declining to issue the certificate of clearance; but as they were dismissed, neither this court nor counsel for respondent now consider them of any importance. And again, the relator alleges that without the certificate of clearance from the respondent, he cannot collect from the Government the amounts due him for accrued leave, salary, and transportation. This court does not directly and specifically discuss the relator's right to have these amounts paid him. But it does discuss at great length the question of the powers and duties of the respondent as Auditor to pass upon all accounts wherein the revenues of the Government are involved, and cites a number of authorities in support of its position in regard to these matters. I must, however, assume that the court had in mind at this time these claims of the relator against the Government, and I insist that as a legal proposition all of that part of the majority opinion which deals with or refers in any manner to claims in favor of or against the Government must rest upon the relator's right to receive the amounts due him for accrued leave, salary, and transportation. Upon what else can that part of the opinion be based, when we remember that the respondent, as I have so often said, admits, by reason of having demurred to the petition, that the relator has properly accounted for all Government funds and property which have come into his possession, and that he does not now owe the Government anything whatsoever?

Counsel for the respondent lays down the proposition that "mandamus will not lie where its primary and underlying motive is a suit against the Government of the Philippine Islands without its consent;" or, in other words, that the primal motive in instituting this action is not so much to secure a clearance as to enable the relator to receive his accrued leave, salary, and transportation; and if this court should order the respondent to issue a certificate of clearance to the relator, it would be sanctioning a suit not brought directly against an official personally, or even officially, but against the Government of the Philippine Islands, without its consent, as it would necessarily follow that these claims of the relator for accrued leave, salary, and transportation would have to be paid.

In the final analysis, the whole case, up to this point, is narrowed down to one question only; that is, Can the courts control by mandamus the judgment and the discretion which were exercised by the respondent when he denied the relator's request for a certificate of clearance upon the grounds (1) that a probable civil suit might be brought by one Fernandez against the Government, and (2) that the Government, in all probability, would have to pay the claims of the relator for leave, salary, and transportation? I shall now attempt to demonstrate that this question is, upon sound legal principles, to be answered in the affirmative, and in so doing, I shall disregard as inapplicable all the authorities cited in the majority opinion which tend to support the general proposition that the decision of the Auditor upon matters pertaining to the settlement of bonded officers' accounts is final and conclusive, because the accounts of the relator as superintendent Of the Iwahig Penal Colony have been, according to the pleadings, balanced, leaving the relator owing the Government nothing.

That one Fernandez cannot sue the Government in a civil action without its consent is well known by everyone. Then, why should the respondent be allowed to hold up the claims of the relator for accrued leave, salary, and transportation on this ground? In deciding to do so, what kind of judgment and discretion did he use?

"After at least two years' continuous, faithful, and satisfactory service, the Governor-General or proper head of Department shall, subject to the necessities of the public service, and upon proper application therefor, grant each regularly and permanently appointed officer or employee in the civil service, Insular or provincial, or of the city of Manila, except as hereinafter provided, accrued leave of absence with full pay, inclusive of Sundays and of days declared public holidays by law or executive order, for each year of service in accordance with the following schedule: * * * (Sec. 23 (a), Act No. 1698.)

"If an officer or employee elects to postpone the taking of any or all of the leave to which he is entitled under this section, such leave may accumulate and if his salary changes he shall receive the same amount of leave and pay as if he had taken the leave while receiving the salary at which it accrued: Provided, however, That after January first, nineteen hundred and five, no person shall at any time have to his credit more than the accrued leave allowed for five years' service. (Idem (b), idem.)

"An officer or employee separated from the service for cause, or who commits an act which requires his separation from the service, shall not be granted leave or any of the other privileges provided in this section and in the following sections. (Idem (h), idem.)

"Irrespective of leave granted, a regularly appointed officer or employee who has rendered continuous, faithful, and satisfactory service for three years or more after arrival in the Philippine Islands, shall, upon his retirement from the service, be allowed Half salary for thirty days in addition to full salary for the period which may be granted him as leave of absence under the provisions of this Act; and if appointed prior to January twelfth, nineteen hundred and four, he shall also be furnished transportation from Manila to San Francisco, or transportation of equal cost to the Government by any other route: Provided, That such transportation must be used within six months after retirement from the service." (Sec. 29 (d), idem.)

The accrued leave, salary, and transportation of the relator as superintendent of the Penal Colony were fixed under express authority of law, and the appropriation act provides the funds for the payment of the same. Again I ask, what kind of Judgment and discretion did the respondent use in deciding that these claims should not be paid? According to the doctrine laid down by this court the respondent must necessarily and did use judgment and discretion in deciding all of these questions, and, therefore, his decision in these matters can not be reviewed by the courts nor controlled by mandamus.

The writ of mandamus is a judicial writ and part of the recognized course of legal proceedings and is a writ of right. Two things must concur to authorize a writ of mandamus: the officer to whom it is directed must be one to

whom, on legal principles, such writ can be issued; and the person applying for it must be without any other plain, speedy, and adequate remedy. The writ does not issue as a matter of course. It will issue only where there is a clear legal right sought to be enforced. It will not issue to enforce a doubtful right. The writ lies to enforce individual rights arising under the laws of the Philippine Islands. The grounds for mandamus have gradually been extended. (Ex parte Virginia, 100 U. S., 313, 25 L. ed., 667.)

This court, in the case of Severino vs, Governor-General (16 Phil, Rep., 366), said:

"It is admitted and universally recognized that mandamus and injunction will never lie to enforce or restrict a duty which is discretionary. This proposition is elemental and it is unnecessary to cite authorities in support of the same."

I believe this to be sound law, but it cannot be said that every act is within the legal or official discretion of the officer performing it. In my opinion, "discretion," when applied to officers of the Government, means sound discretion, guided by reason. It must not be arbitrary, vague, and fanciful, but legal and regular. And when an officer's acts do not come within this rule, the courts have the power to and should intervene. Is this proposition founded upon principle and authority?

I shall first examine the decisions of the Supreme Court of the Philippine Islands touching the power of this court to review the acts or decisions of inferior boards and tribunals by mandamus or otherwise. In the majority opinion it is stated:

"Judicial action cannot be subject to any control or direction, except by law, or by an appeal.¹ It is independent of all control except by law.

* * * * *

"The writ of mandamus cannot be used to control the judgment and discretion of an officer in the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself.

* * * * *

"The general rule adopted by the Supreme Court of the Philippine Islands is that mandamus will never be issued (a) to control discretion, nor (b) when another adequate remedy exists.

* * * * *

"The writ of mandamus cannot be used to control the discretion of a judge or to compel him to decide a case or a motion pending before him in a particular way."

If I correctly understand the whole question, I conceive that judicial action cannot be subject to any control or direction except by law or according to law. My position is that where an officer, board, or tribunal abuses the discretion conferred by law, this court can review such action, and in so doing it proceeds according to law, and that this has been the constant holding of this court.

The Collector of Customs for the Philippine Islands is authorized and does appoint what is known as a Board of Special Inquiry to examine into the right of aliens to enter this country. This board operates under section 25 of the Act of Congress of March 3, 1903. This section provides that the decision of any two members of such board shall prevail and be final, but that either the alien or the dissenting member of said board may appeal through the Commissioner of Immigration at the port of arrival and the Commissioner-General of Immigration, to the Secretary of the Treasury, whose decision shall be final. In this country the appeal lies through the Collector of Customs to the Secretary of Finance and Justice. Here the statute expressly says that the decision of the

administrative officers is final; but this court, following the decisions of the Supreme Court of the United States, would not hesitate to review and control the action of these administrative officers wherein it is alleged and shown that such officers grossly abused the discretion conferred upon them or acted in open violation of the law. (Rafferty vs. Judge of First Instance, 7 Phil Rep., 164; Ngo-Ti vs. Shuster, 7 Phil. Rep., 355; Ko Poco vs. McCoy, 10 Phil. Rep., 442; Juan Co vs. Rafferty, 14 Phil. Rep., 235; Edwards vs. McCoy, 22 Phil. Rep., 598.) Act No. 1792 says that the Auditor shall audit, in accordance with law and administrative regulations, all expenditures, etc., and that his decision upon these matters shall be final and conclusive upon the executive branches of the Government; but this court says that such decisions are final and conclusive upon all parties. I understand that there is a great difference between the two statements. The first includes the executive branches of the Government only, and the second includes every branch of the Government. Must the different holdings in reference to the Special Board of Inquiry and the Auditor rest upon the fact that the latter is dealing with the revenues of the country? Surely this cannot be a sound basis when we remember, as in the case at bar, the personal liberty of a citizen is at stake, and in fact that the citizen is a prisoner and must, for all intents and purposes, remain so until some means are devised (which are yet unknown) whereby he may obtain a certificate of clearance. In the scales on the one side we have a question affecting the revenues of the Government, and on the other, the personal liberty of a citizen, with the result that the former outweighs the latter. It is the concurrent testimony of all history that no country ever maintained itself long in health, happiness and prosperity, where the people felt that their individual liberty was not safe under the law.

Again, this court does not hesitate to control by mandamus the judgment and discretion of the Courts of First Instance wherein it is alleged and shown that such courts have abused the discretion conferred upon them, or have erroneously interpreted the law, to the prejudice of private rights.

"This court will not interfere to modify, control, or inquire into the exercise of this discretion which is conferred by statute, , unless it be alleged and proven that there has been an abuse or an excess of authority on the part of the judge." (Calvo vs. Gutierrez et al., 4 Phil Rep., 203.)

In the case of Trinidad vs. Sweeney et al. (4 Phil. Rep., 531), the respondent judge was of the opinion that the petitioner was not entitled to an appeal in a certain case to the Supreme Court. In reaching this conclusion the judge had to exercise his judgment. This court held that upon the facts stated in the complaint the plaintiff was entitled to prosecute an appeal and overruled the respondent's demurrer.

In the case of Ricamora vs. Judge of First Instance (3 Phil. Rep., 137) the respondent refused to sign a bill of exceptions upon the ground that he had not tried the case. This court issued a writ of mandamus directing the respondent to sign and allow a bill of exceptions, saying:

"Section 143 of the Code of Civil Procedure nowhere states that the bill of exceptions shall be presented to the judge who tried the case. It is capable of the construction that the judge referred to is a judge of the court at the time the bill is presented for signature."

Here this court admitted that section 143 is capable of two constructions: first, that the bill of exceptions can only be presented to the judge who tried the case, and second, that it can be presented to the judge presiding at the time of its presentation. The lower court held that the former was the proper construction, but this court held that the respondent erroneously interpreted or construed the law and issued the writ.

In the case of Santos et al. vs. Judge of Land Registration (5 Phil. Rep., 171), the petitioners asked for a writ of mandamus to compel the respondent to sign and certify a bill of exceptions. The respondent stated that he would not sign and certify the said bill of exceptions because it was not presented within the period prescribed by law. This was held to be an insufficient reason and the writ was issued. (See also the case of Herrer vs. Herrera, 5 Phil.

Rep., 383, and Babasa vs. Judge of First Instance, 12 Phil. Rep., 766.)

In the case of Requepo vs. Judge of First Instance (21 Phil. Rep., 77) Requepo instituted a civil suit in the justice of the peace court against one Rosales to recover the possession of a certain parcel of land. Judgment was rendered in favor of the plaintiff and the defendant attempted to appeal without filing a bond. The justice of the peace certified the record to the Court of First Instance, where the cause was placed upon the docket. A motion was made asking the court to dismiss the appeal upon the ground that no bond had been filed. The judge denied the motion, and at the same time directed Rosales to present the required bond within twenty-four hours. The bond was presented. Plaintiff then made another motion to dismiss the appeal upon the ground that the bond was not presented at the proper time. This motion was denied, the judge holding that according to his interpretation of the law a person appealing from the judgment of a justice of the peace in cases of this character could present his bond in the Court of First Instance. The plaintiff brought mandamus proceedings in this court asking that the writ be issued directing the judge to dismiss the appeal. The writ was granted as prayed for.

In the case of Government vs. Judge of First Instance, (R. G. No. 7514)[1] one Cerredo and another were charged upon a sworn complaint signed by Eugenio Lagrazon, the husband of Cerredo, in the justice of the peace court with the crime of adultery. Upon completion of the preliminary investigation the justice of the peace bound the two accused over to the Court of First Instance, and the case was regularly docketed in that court upon a new complaint signed and sworn to by the offended husband. Before the accused were arraigned for trial, the offended husband filed a motion to dismiss the case on the ground that his wife had agreed to live with him. This motion was opposed by the fiscal upon the ground that under the existing law an offended person could not pardon accused parties in crimes of this character. The court granted the motion and dismissed the case and denied an appeal from that order to this Supreme Court. The Government instituted mandamus proceedings to compel the judge to allow the appeal. It was urged that the judge when he dismissed the complaint used the discretion vested in him by law and used his best judgment in the interpretation of the law as to whether or not he had the power to dismiss the case. But this court granted the writ and ordered the judge to admit the appeal. Here is a clear case of where both the judgment and the discretion of the lower court have been controlled, the first upon the ground that he erroneously interpreted the law, and the second upon the ground that he had abused his discretion.

There was much conflict in the earlier decisions in the United States as to whether the writ of mandamus would issue to the higher officers of the state. There is now, however, very little contention on this point, except as to its applicability to the chief executive. On this point the courts are, as we said in the case of Severino vs. Governor-General, *supra*, divided, and the leading case of Marbury vs. Madison, *supra*, is cited in support of both sides of the controversy. The province of the court is to decide on the right of individuals; not to inquire how the executive or executive officers perform duties which are in their nature political. The courts have no jurisdiction to decide whether a foreign country has become an independent state (Kennett vs. Chambers, 14 How., 38, 14 L. ed., 316); nor to deal with the admission of a state into the Union (Luther vs. Borden, 7 How., 1, 12 L. ed., 581); nor of the restoration of a state lately in rebellion (Georgia vs. Stanton, 6 Wall., 50, 18 L. ed., 721). All these questions are for the political or legislative departments and the courts cannot settle them. The decisions of such officers in these matters are final. But where the acts of executive officers involve the interpretation of the constitution or the laws they are, under certain circumstances, subject to review by the courts. It is often difficult to define in exact terms what the duties of public officers are. In such cases that which is incapable of exact definition is left to the officer's discretion. Probably as strong a statement of the refusal of the courts to interfere with the exercise of the duties imposed upon public officers as can be found is stated by the court in *Riverside Oil Co. vs. Hitchcock* (190 U. S., 316, 47 L. ed., 1074), and which is quoted with approval in the recent case of *United States ex rel Ness vs. Fisher*, decided March 11, 1912, and reported in *Advance Sheets No. 10*, at page 356. The majority opinion rests largely upon these two cases. In the *Riverside Oil* case, one C. W. Clark was the

owner in fee of certain lands in the state of Oregon, covered by a patent from the United States to his grantors. The land was situated in a forest reserve in that state. On the 28th of October, 1898, Clark executed a deed which conveyed in fee and relinquished to the United States said land. Certain other public lands were thereupon selected by Clark which had been duly surveyed and classified as agricultural lands prior to the selection, and appeared on the records of the Land Department as such and were subject to disposition under the Act of June 4, 1897. The Land Department required Clark to publish a notice of his selection for a period of sixty days. Clark complied with these requirements and on February 6, 1900, before the sixty days had expired, the Kern Oil Company filed a protest against this selection. On January 2, 1900, Clark conveyed by deed the selected land to the Riverside Oil Company. This company then filed a motion to dismiss the protest. A hearing was had before the Commissioner of the General Land Office, and his decision in the matter was that the title of the selector did not pass until approval by the commissioner, and that the land included in the selection was yet open to exploration under the mining laws, and if, at the date of the decision, the land is shown to be mineral, it defeats the selection. The land was not passed to patent. This decision was sustained by the commissioner's superiors. The Riverside Oil Company filed a petition asking for a writ of mandamus to compel the Secretary of the Interior to vacate the order made by him rejecting the selection of Clark and to order such selection passed to patent. The Secretary of the Interior decided, after hearing all the parties, that the land selected was not "vacant land." The petitioner urged that the Secretary erred in holding that a discovery of mineral upon the land selected, subsequent to the selection and before approval by the commissioner, would defeat such selection. This holding was not only a reasonable interpretation of the law, but it appears to be a correct interpretation. So this case is clearly distinguishable from that of *Ballinger vs. United States ex rel. Frost* (216 U. S., 240, 54 L. ed., 464), hereinafter cited, and cannot affect the holding of the court in the latter case.

In the case of *United States ex rel. Ness vs. Fisher*, supra, Mary S. Ness, being desirous of purchasing some land under the Timber and Stone Act, filed in the proper land office a written application in which she stated that the land described in her petition was unfit for cultivation, valuable chiefly for its timber, uninhabited, and contained no mining or other improvements. She swore to this petition. In the investigation it developed that the petitioner had never been upon the land described in her petition and that she made the above averments upon information and belief. The local land officer dismissed the petition. The Commissioner of the General Land Office and the Secretary of the Interior affirmed this decision. Mary S. Ness then filed a petition asking for a writ of mandamus to compel the Secretary of the Interior to accept, as conforming to the Timber and Stone Act, her application. The writ was denied. The local land officer, the Commissioner, and the Secretary of the Interior all held that the averments of the petition filed in the local land office that the land which relator sought to purchase was unfit for cultivation, valuable chiefly for its timber, uninhabited, and contained no mining or other improvements, must be made upon personal examination and inspection and not upon information and belief. This had been the repeated construction of the law by the Secretary of the Interior. The Supreme Court said:

"That the Secretary's decision rejecting the relator's application was not arbitrary or capricious but was based upon a construction of section 2 which was at least a possible one, had long prevailed in the Land Department, had been approved in the *United States vs. Wood* (70 Fed., 485), and *Hoover vs. Sailing* (102 Fed., 716), and has since been sustained by the Court of Appeals in the present case."

While the Supreme Court did not specifically and directly decide that this was the proper interpretation of the law, yet it did decide that it was not an arbitrary or capricious interpretation. So this case is likewise distinguishable from the *Ballinger* case and leaves the doctrine laid down in that case in full force and effect.

The rule that courts will not interfere where a public officer exercises discretion vested in him by law, was laid down in the early period of American jurisprudence. At that time there was present in the minds of all men the

fear and the abhorrence of a government in which the ultimate power might become vested in one particular branch. Having just escaped from such a government at a great sacrifice, the American people determined to so divide the powers of government that it would be impossible for any one man or set of men to control the whole system. In keeping with this policy, the courts early refused to attempt to review or revise the acts of the other departments. It was reasoned that if the courts were the final reviewing power in those cases where another branch of the government was vested with discretion, it would in effect make that branch the mere passive servant of the judiciary. The fallacy of this reasoning has long since been demonstrated. Instead of regarding the three departments of government as independent, they are now considered as coordinate, and the whole system is regarded as one of checks and balances. Cases very quickly arose in which officers were disregarding a reasonable construction of the law, and in fact abusing the discretionary power conferred upon them, to the injury of individual rights. In an endeavor to adhere to the rule as first laid down and yet reach the offenders, it was necessary to classify the duties sought to be enforced as ministerial. The fiction still prevails in many jurisdictions that courts will not review or control such discretion, while at the same time its arbitrary and abusive exercise is constantly being corrected and controlled by the courts under the guise of a ministerial duty. This applies only to those cases where the officer has acted, and not to the cases where he refuses to act, for the rule is still true that where the law vests discretion in an officer and he refuses to exercise it, the only function of the court by a writ of mandamus is to "set him in motion." The Supreme Court of the United States has consistently adhered to the ministerial-discretionary classification of duties of public officers. But it is said that the courts very often denominate a discretionary duty as a ministerial duty in order to take jurisdiction in those cases where a public officer has acted in a manner not in accordance with the intent of the law.

In the United States ex rel. Steinmetz vs. Allen (192 U. S., 541, 48 L. ed., 555) (1904) a petition for mandamus was filed in the Supreme Court of the District of Columbia to compel the Commissioner of Patents to require the primary examiner to forward an appeal, prayed by the petitioner, to the board of examiners in chief, to review the ruling of the primary examiner requiring petitioner to cancel certain of his claims in his application for a patent. The court dismissed the petition and its action was affirmed by the court of appeals. The case then went to the Supreme Court of the United States, where the decisions of the two lower courts were reversed and an order issued directing the granting of the mandamus. In this case the Supreme Court said in part:

"In *Bennet vs. Fowler* (8 Wall., 445, 19 L. ed., 431), a discretion in the Patent Office was recognized. The question arose upon the validity of two reissued patents for improvements, which 'had been embraced in one, in the original patent.' The court said:

" 'It may be that if the improvements set forth in both specifications had been incorporated into one patent, the patentee taking care to protect himself as to all his improvements by proper and several claims, it would have been sufficient. It is difficult, perhaps impossible, to lay down any general rule by which to determine when a given invention or improvements shall be embraced in one, two, or more patents. Some discretion must necessarily be left on this subject to the head of the Patent Office. It is often a nice and perplexing question.'

"Some discretion is not an unlimited discretion, and if the discretion be not unlimited it is reviewable. In other words, the statute gives the right to join inventions in one application in cases where the inventions are related, and it cannot be denied by a hard and fixed rule which prevents such a joinder in all cases. Such a rule is not the exercise of discretion; it is a determination not to hear. No inventor can reach the point of invoking the discretion of the Patent Office. He is notified in advance that he will not be heard, no matter what he might be able to show. His right is denied, therefore, not regulated. Such 'is the necessary effect of rule 41, as amended.

"Without that rule the action of the Patent Office can be accommodated to the character of inventions, and discretion can be exercised, and when exercised, we may say in passing except in cases of clear abuse, the courts will not review it."

Can it be said that the Commissioner of Patents did not exercise his discretion in this case? The Commissioner of Patents is authorized to establish such rules and regulations consistent with law as may be necessary for the proper conduct of his office. (12 Stat., 200, sec. 19.) The case in question hinged on whether a certain rule of the Patent Office was consistent with law. In establishing this rule and adhering to it, the Commissioner certainly had to exercise discretion. But it was a discretion which could be and in fact was controlled by the court. Again, suppose that instead of committing his determination to deal with such cases in the way he did to, paper, and embodying the same in the printed rules governing applications for patents, the Commissioner had made a mental reservation to that effect, and that when this case came up he had acted in exactly the same manner and from exactly the same motive (which was his belief that such a ruling was correct), by what means would the court have arrived at its conclusion that the respondent had not exercised his discretion?

In *Ballinger vs. Frost* (216 U. S., 240, 54 L. ed., 464) (1909), the Secretary of the Interior sought to dispossess a member of an Indian tribe of certain land which relator had acquired in accordance with prescribed regulations of the Department of the Interior. Section 24 of, the Act of July 1, 1902, reads as follows:

"Sec. 24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land."

In this case the court said:

"We have no disposition to minimize the authority or control of the Secretary of the Interior, and the court should be reluctant to interfere with his action. But as said by Mr. Justice Field in *Cornelius vs. Kessel* (128 U. S., 456, 461):

" The power of supervision and correction is not an unlimited or arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

* * * * *

"Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation. It must be borne in mind that this allotment provided by Congress contemplated a distribution among the Choctaw and Chickasaw Indians of the lands that belonged to them in common. They were the principal beneficiaries, and their titles to the lands they selected should be protected against the efforts of outsiders to secure them. White men settling on townsites were not the principal beneficiaries. Congress, it is true, authorized townsites, and the town of Mill Creek was established in compliance with the statute. It further provided for an enlargement of any townsite upon the recommendation of the Commission to the Five Civilized Tribes. That recommendation was made in respect to the town of Mill Creek, but disapproved by the Secretary of the Interior. Thereafter the relator selected the land in controversy, a tract of forty acres, on which were her improvements. Notice was given as required, and the time in which contest could be made - nine months - elapsed. Thereupon, as provided by the statute, the title of the allottee to the land selected became fixed and absolute, and the chief authorities of the Choctaw and Chickasaw nations executed to her a patent, as required, of the land selected. The fact that there may have been persons on the land is immaterial. They were given nine months to contest the right of the applicant. They failed to make contest, and her rights became fixed. Thereafter the Secretary of the Interior had nothing but the ministerial

duty of seeing that a patent was duly executed and delivered."

It was held in this case that under the circumstances the Secretary had nothing to do but to issue the patent. Yet, in arriving at this conclusion the court was forced to consider the merits of the case and to determine (as the Secretary had done) whether relator was entitled to it. The Secretary erred in the application of the law to the facts before him so that the Supreme Court was compelled to issue the writ in order to protect the private interests of the Indian. The court held that the Secretary of the Interior had nothing but the "ministerial duty " of seeing that a patent was duly executed and delivered. Suppose the Secretary had decided that the patent should issue and the "squatters" as they might be called had applied for the writ to compel the Secretary to cancel the patent. What view would then have been taken of this ministerial duty? Why not say (as it is a fact) that the discretion exercised by the Secretary of the Interior was not a sound legal discretion, guided by reason?

In *Garfield vs. United States ex rel. Goldsby* (211 U. S., 249, 52 L. ed., 168) (1908), (followed by the Court of Claims in *Whitmire vs. United States and Cherokee Nation*, 46 Ct. CL, 227) (1911), the writ was issued to the Secretary of the Interior to compel him to reinstate on the roll of a certain tribe of Indians entitled to participate in the division of certain lands, the name of one Goldsby who had first been regularly placed on the roll and then stricken off. By Act of March 3, 1901 (31 Stat. at L., 1077, Chap. 832), it was provided that the rolls made by the Commission to the Five Civilized Tribes, as approved by the Secretary of the Interior should be final. But the court said:

"We appreciate fully the purpose of Congress in numerous cases of legislation to confer authority upon the Secretary of the Interior to administer upon Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

In *Ex parte Bradley* (7 Wall., 364, 377, 19 L. ed., 214) the court says:

"For we agree that this writ does not lie to control the judicial discretion of the judge or court; and hence, where the act complained of rested in the exercise of this discretion, the remedy fails."

Mandamus was issued, however, the court concluding in the following language:

"But the proceeding is admitted to be the recognized remedy when the case is outside of the exercise of this discretion, and is one of irregularity, or against law, or of flagrant injustice, or without jurisdiction."

Mr. Chief Justice Marshall, in *Ex parte Burr* (9 Wheat, 529, 630, 6 L. edv 152) speaking of the review of the proceedings of a lower court by the writ of mandamus said;

"The court is not inclined to interpose, unless it were in a case where the conduct of the Circuit or District Court was irregular, or was flagrantly improper."

In *Baird vs. Supervisors* (138 N. Y., 95) it appeared that the board of supervisors of Kings County, in which the city of Brooklyn is located, had divided the county into 18 assembly districts as provided by the law, but in such a manner that some of the districts contained over three times as many inhabitants as others. It further appeared that the board was vested with discretion in defining these districts, and that the constitution as amended had omitted a clause providing for an equal population in each district. There was no specific law to control the supervisors in their decision. In disposing of the questions presented, the court said:

"The proper discharge of the duty of division by the board implies considerable discretion in the formation of the various districts. The discretion exercised must be an honest and a fair discretion, arising out of the

circumstances of the case, and reasonably affecting the exercise of the power of equal division. Before examining any division, it would be a prima facie presumption that the division actually made in any case was a proper one, and a full compliance with the duty imposed upon the board which made it. This would be in accordance with the presumption in favor of the due and proper discharge of official duty. Nor would the mere fact that the districts were to some extent unequal in population necessarily rebut this presumption. The necessity of considering the other facts provided for by the section and already alluded to, might reasonably account for many and even somewhat large aberrations from the initial point of equal representation. While it is impossible, in the nature of the case, to accurately describe and closely limit the amount of deviation from an equal representation that the practical working of the Constitution may in this respect permit, it is on the other hand sometimes quite possible to say of a particular example that it does or does not violate the constitutional mandate.

"We have no trouble whatever in detecting the difference between noon and midnight, but the exact line of separation between the dusk of the evening and the darkness of advancing night is not so easily drawn.

"A question of a somewhat similar nature was before us in *People ex rel. Carter vs. Rice* (cited supra). [135 N. Y., 478, 494.] The question there related to the amount of discretion reposed in the legislature in the creation of senate districts and in the apportioning of members of assembly among the several counties. It was there stated that it was not intended to intimate by the decision then made that in no case could the action of the legislature be reviewed by the courts, and that cases might easily be imagined where the action of the legislature would be so gross a violation of the Constitution that it was plain that instrument had been entirely lost sight of or intentional disregard of its commands both in the letter and in the spirit had been indulged in. If there were an abuse of discretion so as to clearly show an open and intended violation of the Constitution, we held in that case that the courts might interfere.

* * * * *

"We do not intend by this decision to hold that every trifling deviation from equality of population would justify or warrant an application to a court for redress. Such, we think, is not the meaning of the provision. It must be a grave, palpable and unreasonable deviation from the standard, so that when the facts are presented argument would not be necessary to convince a fair man that very great and wholly unnecessary inequality has been intentionally provided for."

In *People ex rel. Schau vs. McWilliams* (185 N. Y. (1906), 92) the writ was asked for to compel the board of civil service to change a classification it had made of a particular position. The court said

"It does not at all follow that the action of the civil service commission is not in any case subject to judicial control; but that such control is a limited and qualified one to be exercised by mandamus. If the position is clearly one properly subject to competitive examination, the commissioners may be compelled to so classify it. On the other hand, if the position be by statute or from its nature exempt from examination and the action of the commission be palpably illegal, the commission may be compelled to strike the position from the competitive or examination class, though in such case redress by mandamus would often be unnecessary, as a valid appointment could be made notwithstanding the classification. But where the position is one, as to the proper mode of filling which there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification. The present case is of this character. We ought not to interfere with the determination of the commissioners that it should be filled by competition; and if they had decided that the position should be filled without competition, equally ought we to refrain from interference. The position lies in that field where the action of the commission should be final."

The writ was accordingly denied.

In *People ex rel Lodes vs. Dept. of Health* (189 N. Y. (1907), 187) the board of health had revoked a license to sell milk, without either giving a hearing or notice to the licensee. The court said:

"The powers of thie members of the board of health being administrative merely, they can issue or re.voke permits to sell milk in the exercise of their best judgment, upon or without notice, based upon such information as they may obtain through their own agencies, and their action is not subject to review either by appeal or by certiorari. (*Child vs. Bemus*, 17 R. I., 230; *State ex rel Cont. Ins. Co. vs. Doyle*, 40 Wis., 220; *Wallace vs. Mayor, etc., of Reno*, 63 L. R. A., 337.) If, however, their action is arbitrary, tyrannical and unreasonable, or is based upon false information, the relator may have a remedy through mandamus to right the wrong which he has suffered.

In *People ex rel. E. C. T. Club vs. State Racing Com.* (190 N. Y. (1907), 31) respondents had refused to grant relator a license to conduct races on the ground that the racing season had been divided between six other clubs and that to grant relator a license would mterfere with the racing upon other tracks. By an order of the special term, the writ prayed for was denied. An appeal was taken to the Appellate Division, where the special term was reversed, and order for the writ issued. On appeal to the Court of Appeals, this latter order was affirmed. The court said (*per curiam*):

"Though we do not concur in the doctrine of the majority of the learned Appellate Division that the commission has no discretionary powers over the grant of a license and that 'its judgment related purely to the sufficiency of the acts constituting the corporation, and not to considerations of public or private policy/ we are still of opinion that the order of the Appellate Division should be affirmed. While the general rule is that mandamus will not lie to compel the performance of a power the exercise of which lies in the discretion of the officer against whom the writ is sought, to that rule there is the well-recognized exception that the action of the officer must not be capricious or arbitrary, and if such be the character of the reasons for refusing to act the writ will lie. (*Merrill on Mandamus*, sees. 38-41; *People ex rel. Cecil vs. Bellevue Hospital Medical College*, 60 Hun., 107; *affd. on op. below*, 128 N. Y., 621; *People ex rel Schau vs. McWilliams*, 185 N. Y., 92; *Illinois State Board of Dental Examiners vs. People ex rel Cooper*, 123 Ill., 227.) * * * Though we assume that the appellants have acted in entire good faith and in the belief that they possessed the authority they have sought to exercise, we must nevertheless hold that in point of law their reasons for rejecting the application of the relator were capricious and arbitrary."

In *Huidekoper vs. Hadley* (177 Fed. (1910), 1) the court said:

"The rule is well settled and fully recognized by us that when discretion is conferred upon public agents or officers their acts in the lawful exercise of that discretion cannot be controlled by mandamus. The rule is also well settled that, although the exercise of discretion will not be controlled by mandamus, yet the writ will lie to compel the person or the body in whom the discretion is lodged to proceed to its exercise. In view of these rules, we are of opinion that the discretion which cannot be controlled by mandamus is that discretion, and that only, which the law has vested in the person 6r body to be exercised. If the law has pointed out how or in what way the discretion shall be exercised, it is obviously not the exercise of the discretion imposed by law to proceed in any other way. To so proceed would be contrary to the law and would be the exercise of arbitrary power rather than discretion. To decline or refuse to proceed according to law or in the way pointed out by law, is in our opinion equivalent to not proceeding at all. In other words, the discretion which will withstand review by the courts must be exercised under law and not contrary to law." In *Dental Examiners vs. The People ex rel. Cooper* (123 Ill., 227) quoted in *People ex rel E. C. T. Club vs. State Racing Com.*, *supra*, the court said:

"In the *People ex rel. Sheppard vs. State Board of Dental Examiners* (110 Ill., 180), we held that the act did not specifically define what was a reputable college, and that it was left to the discretion and judgment of the board to determine what was a reputable college. In that case the mandamus was refused on the general ground, that the writ will not lie to compel the performance of acts or duties, which necessarily call for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is

required.

"But if a discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. They will interfere, where it is clearly shown that the discretion is abused. Such abuse of discretion will be controlled by mandamus. A public officer or inferior tribunal may be guilty of so gross an abuse of discretion or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law; in such a case mandamus will afford a remedy. (Tapping on Mandamus, 66 and 19; Wood on Mandamus, 64; Com'rs. of the Poor vs. Lynah, 2 McCord (S. C.), 170; The People vs. Perry, 13 Barb., 206; Arberry vs. Beavers, 6 Texas, 457.)"

In *City of Atlanta vs. Wright* (119 Ga. (1903), 207) an attempt is made to reconcile the supervisory control by the judiciary with the statement that "courts will not control the exercise of discretion."

"It has been generally, if not universally, held, that the writ (mandamus) will not lie to control the discretion of an officer vested with judicial powers, or powers which, in their nature, call for the exercise of judgment in their performance. The writ 'may set him in motion,' but 'it will not further control or interfere with his action, nor will it direct him to act in any specific manner.' (High's Ext. Leg. Rem. (3d ed.), sec. 34.) 'To do so would be to substitute the judgment and discretion of the court issuing the mandamus for that of the court or officer to whom it was committed by law.' (19 Am. & Eng. Enc. L. (2d ed.), 733-4.) There is but one exception to the rule that the function of the writ is to set in motion, and not to control the discretion of the officer to whom it is directed, and that is where the discretion reposed in the officer has been grossly abused, or has been arbitrarily or capriciously exercised. In such a case mandamus will lie to compel the proper exercise of the powers granted. (19 Am. & Eng. Enc. L. (2d ed.), 737-9.) This exception is more apparent than real, for such an exercise of power really amounts, in a legal sense, to no exercise, and the writ may still be said to only set the officer in motion."

But in California as early as 1888, the court held in *Wood vs. Strother* (76 Cal., 545, 9 Am. St. Rep., 249) that such a construction was a "misuse of language."

"The argument against the writ is, in substance, that the statute requires the auditor to examine the proceedings, and satisfy himself that they are legal, before signing; and that if he has examined them and become satisfied that they are not legal, the most that can be said is, that he has committed an error in a matter confided to his discretion, and that the function of the writ is not to review such exercise of discretion.

"It must be acknowledged that this argument is exceedingly plausible. There are innumerable cases in which it has been laid down that mandamus cannot issue to control discretion. The rule - which is undoubtedly correct when properly understood - has been expressed in various forms. It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tribunal to act in some way, but not in any particular way. These formulas undoubtedly express a truth, but they express it in an inaccurate and misleading manner; and by reasoning from them as if literally and in all cases true, courts have sometimes been led into error, and have frequently been forced to call acts 'ministerial' which are plainly not so. An examination of the authorities will demonstrate the inaccuracy, of the above phrases.

* * * * *

"So it is well settled that a mandamus may issue to compel a judge to sign a bill of exceptions (California citations). Whether the party has a right to have a bill, or whether it is in time, are certainly judicial questions, and they are to be decided in the first instance by the judge, who, if he decides them correctly, will not be compelled by the writ to take back his decision. (*Clark vs. Crane*, 57 Cal., 629.) Is anything gained by calling such decision a 'ministerial' act?"

In this California case the writ was issued to compel the auditor to countersign a street-assessment warrant under a

certain act. The act provided that the auditor should countersign the warrant, "who, before countersigning it, shall examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the proceedings have been legal and fair." The auditor claimed that he was not "satisfied that the proceedings upon which the same is based are or have been legal or fair." The court decided adversely to the auditor and issued the writ.

In *Com. ex. rel. vs. Philadelphia* (176 Pa. (1896), 588) the petition prayed for a mandamus to compel the controller of the city of Philadelphia to sign warrants for the payment of \$10,000 for Century Dictionaries alleged to have been contracted for by the board of education. The respondent alleged first, that having exercised his discretion in refusing to sign the warrants he was not subject to the order or direction of the court. And second, (1) that it appeared that no contract had been made for the purchase of the books as required by a certain act, (2) that the binding of the books was such as to render them entirely unserviceable for school use, and (3) that it was learned a very large commission had been allowed to the agent who sold the books. The court directed the issuance of the writ unless the respondent showed further and legal grounds why it should not and remarked:

"The answer appears to be based on a very exaggerated and erroneous idea of the controller's powers and authority, and the claim that he is 'not subject to the order or direction of the court' is not to be tolerated. The duties of the controller as was held in *Com. vs. George* (148 Pa., 463), are partly ministerial and partly discretionary, and while the courts will not review his discretion exercised in a proper case, yet he is not above the law, and his discretion is not arbitrary but legal. When therefore he is called upon by the courts the facts must be made to appear sufficiently to show that they bring the case within his discretion, and that it was exercised in obedience to law. On this subject the courts are the final authority, and their jurisdiction cannot be ousted by simply putting forth the assertion of discretionary power without showing that the matter was properly within such discretion."

In the late case of *State ex rel. Mauldin vs. Matthews* (81 S. C., 414, 62 S. E. 695, 22 L. R. A., n. s., 735) (1908), the Supreme Court of South Carolina affirmed its right to supervise the discretion vested in a public official in the following language:

"Whether the courts can control the action of officers or official boards vested with discretionary power when they refuse to act in consequence of a conclusion they have reached which is without any foundation in the facts before them, and therefore, in the view of the court, capricious or arbitrary, is a question of some difficulty. But it must be answered in the affirmative, on principle as well as authority. This was the view indicated not only in *State ex rel. Smith vs. Matthews*, supra, and *Commissioners of Poor vs. Lynah* (2 McCord, L., 170), but by Lord Mansfield in *R. vs. Askew* (4 Burr., 2186, 16 Eng. Ruling Cases, 760), where the application was to compel the admission of a physician to practice; and it is in accord with the weight of authority. (Ex parte Burr., 9 Wheat., 529, 6 L. ed., 152; Ex parte Virginia, 100 U. S., 339, 25 L. ed., 676; Ex parte Bradley, 7 Wall., 364, 19 L. ed., 214; *Atlanta vs. Wright*, 119 Ga., 207, 45 S. E., 994; *St. Louis Meyrose Lamp Mfg. Co.*, 189 Mo., 660, 61 Am. St. Rep., 474, 41 S. W., 244; *Wood vs. Strother*, 76 Cal., 545, 9 Am. St. Rep., 249, 18 Pac., 766; *Illinois State Dental Examiners vs. People*, 123 Ill., 227, 13 N. E., 201.) The courts should exercise, however, the utmost circumspection not to substitute their own discretion for that of the officers or board whose refusal to act is under consideration, and to interfere by mandamus only when the facts so clearly show the duty of the officer or board to act that there is really no room for the exercise of reasonable discretion against the doing of the act which the court is asked to require performed. In other words, the courts should interpose only where it clearly appears that the officer or board refuses to perform official duty, or so misconceives official power or duty that the purpose of the law will be defeated."

Where a statute authorized county boards to make allowances for public purposes "at their discretion" the court said:

"The words to 'make allowances at their discretion,' * * * mean to make allowances according to law, at their discretion. They do not mean an arbitrary, uncontrolled, unlimited discretion, contrary to law, or without authority of law; for where there is no law there is no act to do, and, therefore, no discretion to be exercised. They mean a legal discretion, not a personal discretion; for to allow the board a personal discretion would give them the power to make law." (Rothrock vs. Carr, 55 Ind., 334.)

Quoting further from *City of Atlanta vs. Wright*, *ubi supra*:

"It will have been observed that the petition does not complain of official inaction or inertia. On the contrary, the contention is that the comptroller-general has acted, but in the wrong manner, and that the course pursued by him has resulted injuriously to the petitioner. In other words, the ground relied on for the issuance of the writ of mandamus is that whatever discretion was vested in the comptroller-general has been exercised in an arbitrary and capricious manner, and that the court should step in and direct him to Act as required by law."

The court reviewed the facts, found that the comptroller-general had erred in his conclusions of law as applicable thereto, and issued the writ.

A similar conclusion was arrived at in *State ex el. Register of Lands vs. Secretary of State (ex officio auditor)* (33 Mo., 298). The register of lands had performed certain services for which he was to be paid at certain rates. The auditor as his reason for refusing to audit the claim presented by the register, alleged among other things, (1) that the rate of compensation claimed was not that fixed by law, and (2) that the work had been improperly done. The court, in reviewing the claim on mandamus, decided (1) that the rate of compensation claimed was that fixed by law, and (2) that the quality of the work was not within the purview of the respondent.

In *People vs. Supervisors* (73 N. Y., 173) the auditing board had allowed excess compensation to a county treasurer, and the writ issued compelling the board to reconsider, revoke, and annul the audit so far as it allowed the county treasurer compensation in excess of that fixed by law;

In *State ex rel. Davis vs. Disk Ct.* (30 Mont. (1903) 8), it appeared that a client on becoming insane was indebted to an attorney for fees. The guardian appointed could not allow the same until authorized to do so by the court, which the latter refused to do. The Supreme Court reviewed the action of the lower court, found that the claim was lawful and should be allowed and issued the writ accordingly.

Other courts have issued the writ for an abuse of discretion:

Missouri: *State ex rel. Hathaway vs. State Board of Health*, 103 Mo., 22, 15 S. W., 322; *State ex rel Kelleher vs. St. Louis Public Schools*, 134 Mo., 296, 35 S. W., 617, 56 Am. St. Rep., 503; *State ex inf. Folk vs. Talty*, 166 Mo., 529, 6Q S. W., 361; *State ex rel. vs. Roach*, 230 Mo. (1910) 408.

Wisconsin: *State ex rel. Wagner vs. Dahl*, 140 Wis., 301; *State ex rel Fourth National Bank vs. Johnson*, 103 Wis. (1899), 591, 51 L. R. A., 33, 79 N. W., 1081.

Utah : *Taylor vs. Robertson*, 16 Utah, 330, 52 Pac, 1, 3.

This court says that:

"Mr. Spelling, in his work on *Injunctions and Other Extraordinary Remedies*, in a very learned and extensive discussion of the questions now before us, says, that mandamus will not lie in any matter requiring the exercise

of official judgment or resting in the sound discretion of a person to whom a duty is confided by law, either to control the exercise of that discretion or to determine the decision which shall be finally given."

It will be noted that the court uses the words "official judgment" and "sound discretion."

Mr. Spelling, section 1384 (2nd ed.), says:

"While the general proposition is true that mandamus cannot be employed to control the exercise of discretion, yet it is often used to correct abuses of discretion when it has been made clearly to appear that the officer refusing to do the act has either not exercised his discretion at all, or has willfully chosen to act in manifest disregard to duty and the legal rights of individuals."

Mr. Spelling here directly supports the views taken by the various authorities cited by me.

This court also quotes from Mr. Merrill on Mandamus. This same author, in sections 40 and 41, recognizes the authority of the courts to control the actions of officers when there is an abuse of discretion. But he says before the court should interfere the proof must be very clear and convincing that such an officer has grossly abused the discretion conferred upon him.

Again, the court cites and quotes from Mr. Sanborn's article on mandamus, but the court did not quote the following from Judge Sanborn's article on mandamus, wherein he says:

"An exception to the general rule that discretionary acts will not be reviewed or controlled exists when the discretion has been abused, for example mandamus may in a case be granted where the action has been arbitrary or capricious or from personal selfish motives, or where it amounts to an evasion of a positive duty, or there has been a refusal to consider pertinent evidence, hear the parties when so required, or to entertain any proper question concerning the exercise of the discretion. Likewise it has been held that mandamus may issue where discretion has been exercised on questions not properly within it, or where the action is based upon reason outside the discretion imposed." (26 Cyc, 161.)

So this learned author also is in accord with the holdings of the various courts as above set forth.

Where anything is left to any person to be done according to his discretion, the law intends it must be done with a sound discretion and according to law. The discretion conferred upon officers by law is not a capricious or arbitrary discretion, but an impartial discretion guided and controlled in its exercise by fixed legal principles. It is not a mental discretion to be exercised ex gratia, but a legal discretion to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.

As a matter of fact, it is necessary for a public officer to exercise his own discretion and judgment as to whether a certain state of facts exists, even in the performance of a so-called ministerial duty.

"The duty is ministerial when it is to be performed upon a certain state of facts, although the officer or tribunal or body must judge according to their best discretion whether the facts exist, and whether they should perform the act. Otherwise it is obvious no mandamus could ever lie in any case." (26 Cyc, 161, note 10.)

If, then, the officer must determine whether a certain state of facts actually exists before he can perform a "purely ministerial" duty, it would seem that the only difference between the discretion which he thus exercises and that conferred upon him by express law is one of degree and not of kind. In the laws the duties of every officer are outlined as completely as human skill can do it. Yet, in the nature of things, doubts often arise as to what is the correct procedure under the laws. A public officer, on taking office, must necessarily be the first to interpret the laws relating to his position. When the time arrives for him to perform any one of his duties, he must first act or refuse to act before anyone else can take jurisdiction. Some of the duties prescribed for him by the laws are so plain as to practically admit of no argument. These are generally called ministerial duties. Still, it requires the

exercise of personal judgment to decide on the time, manner, and extent of performance. From these well-defined duties, which involve the exercise of so little judgment and discretion on the part of the officer, to those which may be performed in any one of a number of different ways, and therefore necessarily requiring a high degree of judgment, sagacity, and prudence in their performance, is a long step. But where can the line be drawn? The plainest and best defined duty of an officer requires that he recognize it as such. He must satisfy himself that the facts of the case combine in such a way as to require its performance. Such being the case, the division of his duties into those ministerial (that is, those very plain and well defined), and those discretionary (that is, those very hard or impossible to exactly define), serves only to confuse the mind and to establish a division of his duties which leaves a large share of them open to profitless dispute. It is much nearer the truth to say that a public officer exercises his own discretion and judgment in the discharge of all his duties. He interprets the law affecting him in the exercise of his official powers and acts according to that interpretation. If a dispute arises as to whether he has correctly interpreted the law applying to a particular case, his action is subject to review by the courts, it being their duty to construe the law. It must not be assumed, however, that a person who is dissatisfied with the performance of a duty by a public officer will always obtain relief by mandamus. Nothing could be more impracticable or foolish than to impose upon the judiciary the task of reviewing every decision of fact and law made by public officers in the discharge of their duties. They are presumed to exercise their powers in a legal and equitable manner. To encourage disgruntled claimants to press their claims in court would be to virtually transact all the business of the government in court. Such would be the result if the courts undertook to review the merits of every controversy settled by public officers. For slight errors of judgment on the part of public officers there can be, in the nature of things, no redress for the individual in the courts. In reviewing such acts on a petition for mandamus, courts require the relator to prove his case by much more than a mere preponderance of evidence. The abuse of official discretion must be manifest. It must be clear that the officer has acted in an arbitrary and illegal manner. The facts upon which relator bases his petition must combine in such a way that it will be evident that the law and equity require that he be granted that for which he prays.

The majority opinion states that for the courts to compel the Auditor to allow, or disallow a claim against or in favor of the Government would be to substitute the courts as the accounting officers of the Government. How many claims, reviewed by the courts under a method which requires the claimant to produce such a great preponderance of evidence, will be allowed against the decision of the Auditor? The Auditor passes upon thousands of claims every year. If the courts, adhering to this rule of evidence, were to overrule the Auditor in such a number of cases as to amount to a substitution, what manner of man would the Auditor be? Or would overruling his decisions in one instance or twenty instances out of thousands be a substitution of the courts for the Auditor? Restricted as the writ of mandamus is by the rules of evidence I have just stated, the Auditor, or any other public officer, has far more latitude in guiding his official conduct and performing his official duties than have the judicial bodies whose decisions are subject to review by an appellate tribunal. The decisions of lower courts are reviewed in the higher court by a strict preponderance-of-evidence rule (in civil cases). Nevertheless, can it be asserted that the appellate tribunal is a virtual substitution for those lower courts? How many cases, out of all those decided by the judicial bodies, even with this narrowing of the field of official discretion, reach the appellate tribunal? I think that the fear that the courts will ever usurp the prerogatives of a public officer by the writ of mandamus, issued in proper cases, is groundless.

But it may be argued that in all the cases from which I have quoted above it was found that the officer, board, or tribunal was acting without authority and consequently that that discretion vested in them by law was never exercised until set in motion by the writ of mandamus. Upon this reasoning it follows that when the courts review by mandamus the conduct of such an officer, whether the duty is declared to be discretionary or ministerial will depend upon the action the officer has taken: if the courts decide such act is in harmony with the law under which

his discretion was granted, they will declare the duty to be of a discretionary character and refuse to interfere; but if they decide that such act is repugnant to the law, they will point out what is the duty of the officer under the law and instruct him to act accordingly. The law intends that the officer shall act with fairness and justice, yet, as I have shown, it is not every slight injustice resulting from an exercise of such discretion which the courts will correct. The courts will not interfere where it is necessary to weigh the evidence and decide on which side a nice preponderance lies. A strict adherence to such a rule would, however, require the courts in every case to go into the merits and decide on which side the preponderance lies, exactly the same as in any ordinary case. In the meantime, the officer has, presumably, acted in good faith, according to what he believed to be right and just. Yet if the court decides that there has been a wide departure from the intent of the law, it must be held that he acted without discretion. In such case, what did prompt him to act? It may be true that he acted without that legal discretion which is all the law can confer upon him. But discretion is no concrete thing to be conferred or transferred as a piece of land or a commission to office. It is a trait of character bestowed by nature upon all men in a greater or less degree. If the law permits an officer to act with discretion, he must necessarily use that discretion. He can, in the nature of things, use no other. Legal discretion is, after all, nothing but a man-made standard for measuring and keeping within bounds the personal discretion of such public officers. If they fail to make their official acts conform to this standard, they will be called to account. For political or legislative acts, they are responsible directly to the people. But if it be administrative and properly within the jurisdiction of the courts, the courts will provide the remedy. It is, of course, possible that such an officer might not obey the dictates of his own discretion and act in accordance with the promptings of corrupt motives. But in mandamus proceedings there is no legal difference between acts done *virtute officio* and acts done *colore officii*. Thus, a board cannot require other credentials for an applicant to practice medicine than those required by law. (*State ex rel. Johnston vs. Lutz*, 136 Mo., 633.) (See also *State ex rel City of Chillicothe vs. Gordon*, 233 Mo., 383; *Cox vs. Common Council of Jackson*, 152 Mich., 630; *Swan vs. Wilderson*, 10 Okla., 547, 62 Pac, 422.) In the case mentioned, as well as in the other cases cited, the board was prompted by only the most laudable motives. They were attempting to raise the standard of professional skill required for the practice of medicine and surgery within the State of Missouri. They read the law in which their powers and duties were outlined and at a regular and official meeting decided upon requiring certain qualifications which the court in the mandamus proceedings decided were plainly not required by the law.

Guided by the doctrine enunciated in the foregoing decisions of the highest tribunals in the American Union, which are founded upon reason, justice, and the law, let us now again inquire whether or not the respondents decision denying the relator's request for a certificate of clearance is based upon sound discretion and the law, or whether he grossly abused the legal discretion conferred upon him and erroneously interpreted the law in reference to his powers and duties. This decision of the respondent is based upon the "probable civil suit which one Fernandez might bring against the Government" and that if he had issued the certificate of clearance the Government would have had to pay the relator the amounts due him for accrued leave, salary, and transportation. The Auditor, after an investigation and having the facts before him, decided that these were sufficient reasons for him to decline to issue the relator's clearance. I concede that the strict rules of evidence which govern the courts of justice do not apply to the respondent. The position of the Auditor for the Philippine Islands is one of great delicacy and difficulty where there is a suspicion of fraud or dishonesty against an officer. He should be allowed to consider not evidence, merely, as recognized in the courts, but suspicions prompted by his own investigation of the officer's accounts, as well as accusations made by others. But the courts have often held that the evidence upon which accounting officers have settled claims in a particular way was insufficient. Thus, in *United States vs. Dumas* (149 U. S., 278, 37 L. ed., 734) the Postmaster-General, who was authorized by the law to examine and pass upon the accounts of postmasters; declined to audit the accounts of the defendant in error, claiming that

said defendant had made false returns of business done. The court in its decision overruling the decision of the Postmaster-General, quoted the following from *United States vs. Barlow* (132 U. S., 271, 280, 33 L. ed., 346, 351), per Mr. Justice Field:

"We admit that where matters appertaining to the postal service are left to the discretion and judgment of the Postmaster-General, the exercise of that judgment and discretion cannot in general be interfered with, and the results following defeated. But the very rule supposes that information upon the matters upon which the judgment and discretion are invoked is presented to the officer for consideration, or knowledge respecting them is possessed by him. He is not at liberty, any more than a private agent, to act upon mere guesses and surmises, without information or knowledge on the subject."

Here the rule that the accounting officer must have something tangible upon which to base his decision is clearly recognized. Fernandez, as I have said, could not bring a civil suit against the Government without its consent. No argument is necessary to support this proposition. Furthermore, "the transactions which would form the basis of this probable civil suit fall within the period from September 5, 1909, to November 17, 1910," and Fernandez had signed vouchers and a warrant of payment, acknowledging to have received in full from the Government the amounts claimed by him. The respondent had issued to the relator a certificate of clearance covering the period from September 5, 1909, to November 17, 1910. Could the respondent deny the relator's request for a clearance upon this ground and at the same time exercise that legal or official discretion conferred upon him by law? Surely, no one can seriously contend that this could be done, either upon principle or authority. And more especially, when it is remembered that the decision of the respondent has the effect of depriving the relator of his liberty. I think judicial notice should be taken of the peculiar conditions existing in this country in the matter of bonded officers of the Government. They are continually leaving the Islands, either on leave of absence or on separation from the service. They usually have a large amount due from the Government in the form of accrued leave, salary, and transportation, which they depend upon to defray their expenses. The effective date of their resignation or of the commencement of their accrued leave is generally timed a few days in advance of their actual departure from the Islands, so that among the last matters they must arrange before leaving is a clearance from the Auditor. For the Auditor to refuse this clearance places these officers in a difficult position and subjects them to great disappointment and more or less pecuniary loss. For these and kindred reasons, such a refusal on the part of the Auditor should not be based upon frivolous pretexts. It is only justifiable on reasonable grounds. Act No. 1605 makes it a criminal offense for a bonded officer to leave or attempt to leave the Islands without a clearance. It is therefore plain that the Auditor has the power to cause great hardship to all such officers. This power should be exercised wisely and justly. To assert, as the majority opinion does, that the Auditor's action cannot be controlled for any reason in this particular by the courts, is to make that officer the absolute master of the persons of such officers for an almost indefinite length of time, or, as the majority of the court hold, for the period of three years. Think of the position of an officer who has separated himself from the service and who is anxious to return to his home being held virtually as a prisoner for the period of three years, awaiting the action of the Auditor. Can such a state of affairs and Act No. 1605 withstand the great principle that no one shall be deprived of life, liberty, or property without due process of law? But it is said that if the respondent be compelled to issue this certificate of clearance the Government will have to pay the relator his claims for accrued leave, salary, and transportation, and the result would be that these proceedings against the Auditor would be a suit against the Government without its consent. If it is right and just that these claims should be paid, then who can object? The Government itself has expressly declared in a solemn act that the relator is entitled to and shall receive these amounts. The Government has appropriated money for these purposes. It stands ready and willing to make the payments. Where the Government, by legislative action, declares that an officer shall receive fixed amounts for his services, such as salary, accrued leave, and transportation, and where an appropriation is made by the legislature setting aside money for these purposes, an action brought against officers of the Government whose duty it is to countersign

warrants or issue certificates, or to actually pay out this money, is not a suit against the Government. It is an action against the respondent officers to compel them to perform a duty imposed upon them by law. (Rolsten vs. Missouri Fund Commissioners, 120 U. S., 390, 30 L. ed., 721; Tindal vs. Wesley, 167 U. S., 203, 42 L. ed., 137; Pennoyer vs. McConnaughy, 140 U. S., 1, 35 L. ed., 363; Graham vs. Folsom, 200 U. S., 248, 60 L. ed., 464; Taylor vs. Louisville & N. R. Co., 31 C. C. A., 537, 88 Fed., 350; Huidekoper vs. Hadley, 177 Fed., 1.) Also see a long array of cases cited in 11 Enc. U. S. Sup. Ct. Rep., 50, note 47.

As has been said, respondent, denied relator's request for a clearance upon the ground that a probable suit might be brought against the Government by one Fernandez and that if he should issue the certificate the result would be that the relator would receive the amounts claimed for accrued leave, salary, and transportation. The Auditor had to exercise some judgment and discretion in reaching this conclusion. According to his interpretation of the law, it was his duty under these facts to deny the relator's request. This court says that the Fernandez probable suit "seems to be a good reason" for the Auditor's refusal, and that in all these matters relating to claims for or against the Government the Auditor must and does necessarily exercise judgment and discretion which cannot be reviewed nor controlled by the courts. If this were the rule in the United States (it is not, however), there exist well-founded reasons why the rule should be different in this jurisdiction. Among these is the fact that under the provisions of Act No. 1605 the officer is held virtually a prisoner during the pendency of the issuance of his certificate of clearance. There is no such law, either state or national, in the American Union. If this Act No. 1605 be held to be constitutional, then the courts must intervene in those cases where a citizen is deprived of his liberty in this manner. Why not say, as it is an absolute fact, that the Auditor, no doubt in good faith, has abused his discretion and erroneously interpreted the law as to his powers and duties, and that this court, being the highest tribunal in this country and being clothed with the power to interpret the laws, not only has the power to intervene, but that it is its sacred and solemn duty to do so. In the majority opinion are cited a long array of cases in support of the court's position that the judgment and discretion of the respondent in these matters cannot be reviewed. I. confidently believe, after an examination of a number of these authorities, that not a single one is applicable to the admitted facts in this case. On the contrary, it is held by practically all of the high courts in the United States that the courts will intervene and control the action of all administrative officers lower than the Chief Executive, where it clearly appears that such officers have grossly abused their discretion or erroneously interpreted the laws, and the injured party has no other plain, speedy, and adequate remedy. This, at least, is the modern holding of every court of last resort, the decisions of which I have had an opportunity to examine.

In this jurisdiction, we have an express provision of law (Sec. 222 of Act No. 190), authorizing the courts to issue the writ of mandamus to any inferior tribunal, corporation, board, or person. This court has said that it will not interfere with the acts of the Governor-General. This holding, as I have said, was based upon political necessity and public policy. But the respondent has no political duties to perform. He is not a political officer, and the reasons upon which the decision in the case against the Governor-General rest cannot by any means be extended to the respondent.

ANOTHER ADEQUATE REMEDY.

This court, in its conclusions, holds that the remedy by appeal provided in Act No. 1792 to the aggrieved party to the Governor-General and the Secretary of War is another remedy in the ordinary course of law, and is speedy and adequate and exclusive. Before the promulgation of this decision, the statute read "in the ordinary courts of law." But it now reads "in the ordinary course of law." If the statute stood in its original form, there could be no question. The offices presided over by the Governor-General and the Secretary of War are not courts of law. Neither an appeal nor writ of error would lie to this court from the decision of the respondent in any case. So the

relator not only did not have another plain, speedy, and adequate remedy in the ordinary courts of law, but he had no other remedy whatever in the courts.

We will now examine the question from the standpoint of the article as corrected by the majority opinion. Is the remedy by appeal under Act No. 1792 plain, speedy, and adequate? It appears to be plain, as the procedure is specifically and definitely pointed out. It is adequate, in the sense that the Governor-General and the Secretary of War would doubtless overrule the Auditor if his decision was contrary to law and equity. But is it speedy? Before the writ can be denied upon this ground, the remedy must be adequate; it must be plain; and it must be speedy. All three. If either is lacking, the writ must issue. In my opinion, the remedy is neither adequate nor speedy in contemplation of law. The relator being held virtually as a prisoner, seeks complete relief, and that immediately. The appeal provided for in Act No. 1792 is that from the decision of the respondent to the Secretary of War through the Governor-General. In the ordinary course of the transmittal of official matter, it would take about two months for the appeal to reach the Secretary of War after it had been entered. But a few days must necessarily elapse before the Secretary would pass upon the appeal. Then at least forty days more would be required for the Secretary's decision to be returned to the respondent, and if the decision be favorable to the relator, how long would the respondent take in issuing the certificate? He might and could very well, under the decision of this court, refuse absolutely to issue the certificate upon the ground of newly discovered evidence or that in his judgment the interests of the Government required that the accounts as they would then stand balanced should be reopened and reconsidered, notwithstanding that he had been reversed by the Secretary of War. Then another hearing would have to take place; another appeal, and probably another reversal. There would be no end to these appeals, as this court has held that in deciding all questions submitted to the Auditor relative to these matters he must necessarily use and does use such judgment and discretion as cannot be reviewed or revised by the court. How, then, can it be said that such a remedy is speedy? I say again, think of the position of an officer held as a prisoner waiting the final result of this long, uncertain process. Again, should the Secretary of War affirm the decision of the respondent, the relator would be in no better position than he was before the appeal was taken. In this the remedy is not adequate. Relief is what the relator wants, and not the uncertainties of an appeal.

In the case of *Hoey vs. Baldwin* (1 Phil. Rep., 551) the plaintiff brought mandamus proceedings against the defendant to compel him to pay a certain amount of salary due. The defendant demurred upon the ground, among others, that plaintiff was not entitled to the writ for the reason that he had another plain, speedy, and adequate remedy in that he could bring an action against the city or upon the defendant's official bond. The demurrer was overruled, the court saying:

"It is enough to say that such a remedy is certainly not a speedy one and there is difficulty in calling it a plain one." In this case the plaintiff was seeking to recover a small amount of money only. In the case at bar the relator is fighting for his liberty.

In the case of *Trinidad vs. Judge of First Instance* (4 Phil. Rep., 531) the petitioner had been convicted by the respondent judge on an appeal by the former from the municipal court for violation of a city ordinance. His appeal to the Supreme Court on the validity or constitutionality of the ordinance was denied. He asked this court to compel the judge by a writ of mandamus to allow this appeal. It was urged that if the petitioner was confined by virtue of that sentence and that if the ordinance was invalid his remedy would be by habeas corpus and not by mandamus, as the former was a plain, speedy, and adequate remedy. This court said:

"The fact, if it be a fact, that if the plaintiff is imprisoned by virtue of this judgment he can upon a writ of habeas corpus attack the validity of the ordinance for the violation of which he was convicted is no bar to the prosecution of this suit of mandamus." (Citing *Collins vs. Wolfe*, 4 Phil. Rep., 534.)

In the case of *People ex rel. La Grange vs. State Treasurer* (24 Mich., 468) the court said:

"But in cases where the right is clear and specific, and public officers or tribunals refuse to comply with their duty, a writ of mandamus issues for the very purpose, as declared by Lord Mansfield, of enforcing specific relief. It is the inadequacy, and not the mere absence, of all other legal remedies, and the danger of a failure of justice without it, that must usually determine the propriety of this writ. Where none but specific relief will do justice, specific relief should be granted if practicable. And where a right is single and specific it usually is practicable."

This was an ordinary civil case.

In the case of *the State vs. North-Eastern R. R. Co.* (9 Rich. Law (S. C), 247, 67 Am. Dec, 551) the court said:

"The general doctrine so earnestly insisted on by the appellant's counsel, that where there is a specific legal remedy the writ will not be granted, or if granted, will be quashed, is fully sustained by reason, and by the authorities to which the court has been referred. But this general rule has been restricted to cases where the legal specific remedy is equally convenient, complete, and beneficial."

Another ordinary civil case.

In the case of *Hopkins vs. The State of Nebraska ex rel. Omaha Cooperage Company* (64 Neb., 10) the court said:

"A remedy which is used to enforce a right or the performance of a duty, unless it reaches the end intended and actually compels the performance of the duty contemplated, is not adequate."

Almost an unlimited number of authorities from the United States could be cited which support the doctrine laid down in these three cases. This being the holding of the courts in ordinary civil actions, what should it be in a case where the interested party is actually and effectively deprived of his liberty?

And lastly, this court says:

"Section 222 of Act No. 190 was taken from section 1085 of the California Code of Civil Procedure. The section of the California Code reads 'course of law,' instead of 'courts of law.' We believe that a mistake or error has been made in the printing of said section. We believe that it was the intention of the legislative department of the government to follow exactly the provision of the California Code and that they intended to use the phrase 'course of law' and not the 'courts of law.' It will be noted in section 226, the section relating to the writ of prohibition, the legislature used the phrase 'course of law.' * * * We cannot believe that the legislature intended to limit the jurisdiction of this court in mandamus to the cases where there was no other adequate and speedy remedy in the ordinary courts of law. It is our duty, therefore, to give to the statute a sensible construction; such as will effectuate the legislative intention and, if possible, avoid an injustice or an absurd conclusion."

The statute was corrected or amended by the court so as to read "in the ordinary course of law:" "corrected" if it was the intention of the legislature to use the word "course" and "amended" if it was not. Courts have the power to thus correct, but not to amend.

There are three cases cited, together with *Black on Interpretation of Laws*, in the majority opinion, in support of the court's power to eliminate the word "courts" and substitute therefor the word "course." (*Lau Ow Bew vs. United States*, 144. U. S. 47, 59; *Lancaster vs. Frey*, 128 Pa., 593; *Lancaster County vs. City of Lancaster*, 160 Pa., 411; and *Black on Interpretation of Laws*, p. 77.)

In the first case it was sought to have the Supreme Court of the United States review by writ of certiorari a judgment of the Circuit Court of Appeals. The Act of Congress of March 3, 1891, was an act establishing Circuit

Courts of Appeal and defining and regulating the jurisdiction of the courts of the United States. By section 6 the circuit courts of appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error" the final decisions of the Circuit Courts "in all cases other than those provided for in the preceding sections of this Act unless otherwise provided by law." The court said:

"The words 'unless otherwise provided by law' were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the Act and be inconsistent with its context and its repealing clause."

The only thing before the court upon this point of the case was a construction of the words "unless otherwise provided by law." It was not a correction of errors made by the legislature. At page 59, cited in the majority opinion, the court said:

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

The court here had under consideration the construction of section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884. The plaintiff, Lau Ow Bew went to China to visit his relatives, having previously procured the proper evidence of his status in the United States as a merchant, in accordance with the regulations of the Treasury Department. On his return to the United States it was admitted by the collector that plaintiff was a merchant domiciled in the United States and the sufficiency of his proof of identity was acknowledged; yet the collector refused to permit him to land on the sole ground that he had failed and neglected to produce the certificate of the Chinese Government mentioned in section 6 of the Act of May 6, 1882, as amended by the Act of July 5, 1884.

In the second case, a statute of Pennsylvania relating to the apportionment of the expense of certain local improvements between a city and the county in which it was situated, provided that when the balance of expenditures should be against the city, any further expenditures should be "payable out of the treasury of said county, and be reimbursable out of the county treasury only when the balance shall be in favor of said city, and to the extent of such balance." It was held that the word "county," in the clause "be payable out of the treasury of said county," must be read as "city," for there was plainly a clerical error, by which "county" was substituted for "city." It was said by the court:

"The obvious meaning and purpose of the act is plain from the context. * * *

"In making this correction we are not to be understood as correcting the act of the legislature. We are enabled to carry out the intention of the legislature, from the plain and obvious meaning of the context, in which the real purpose or intention of the legislature is manifest. It falls within the province of the courts to correct a merely clerical error, even in an act of assembly, when, as it is written, it involves a manifest absurdity, and the error is plain and obvious. * * * The power is undoubted, but it can only be exercised when the error is so manifest, upon an inspection of the act, as to preclude all manner of doubt, and when the correction will relieve the sense of the statute from an actual absurdity, and carry out the clear purpose of the legislature." [128 Pa., 593.]

In the third case, the very same error in the same act was under consideration.

Mr. Black says on page 79:

"But it must be remembered that the courts are not at liberty to indulge in corrections and emendations of the

written laws, unless it is perfectly plain that there is a clerical error or misprint, and unless the text, as it stands, with, the error uncorrected, would be devoid of sensible meaning or contrary to the evident legislative intent."

In the State of Maryland a revenue law provided that all property within the state of every description except certain property therein particularly named should be "exempt from taxes for state or local purposes." It was almost incredible that the legislature meant what the words imported. The obvious intention was to say that all property except that mentioned should be subject to taxation. Yet the court refused to correct the mistake, saying that the language used was perfectly plain and unambiguous, and must be taken in its natural import. (Maxwell vs. State, 40 Md., 273.)

Under a Missouri statute providing that a demand against an estate in the probate court, if exhibited within two years, might be proved within three years, it was held that, though "three" was substituted by mistake for "two," yet the court could not construe away the plain words of the law. (Hicks vs. Jamison, 10 Mo. App., 35.)

"We are bound to give to the words of the legislature all possible meaning which is consistent with the clear language used. But if we find language used which is incapable of a meaning, we cannot supply one. To give an effectual meaning (in the present case) we must alter, not only 'or' into 'and,' but 'issued' into 'levied.' It is extremely probable that this would express what the legislature meant. But we cannot supply it. Those who used the words thought that they had effected the purpose intended. But we, looking at the words as judges, are no more justified in introducing that meaning than we should be if we added any other provision. (Green vs. Wood, 7 Ad. & El. (N. S.), 178, per Lord Denman.)"

The word "courts" as used in section 222 of our Code of Civil Procedure is plain, it is clear, and it is not ambiguous. This word has remained in this section for more than ten years. The question of "correcting" an act of the legislature by the courts is at all times one of much delicacy. An act should never be so corrected in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes, but it is not on slight implications and vague conjectures that the legislature should be pronounced to have been so careless and inattentive to duty as to sanction the publication of one of its acts and permit its remaining unchanged so long.

This court says:

"We cannot believe that the legislature intended to limit the jurisdiction of this court in mandamus to the cases where there was no other adequate and speedy remedy in the ordinary courts of law."

It appears to my mind that substituting the word "course" for "courts" curtails the jurisdiction of this court. To leave the word "courts" we have jurisdiction of cases which we cannot have under the word "course." The very case at bar illustrates this fact. As I have said, the relator had no other remedy whatever in the ordinary courts of law, for the reason that neither an appeal nor writ of error would lie to this court or any other court from the decision of the Auditor; but in the ordinary "course" of law he has a remedy by appeal to the Secretary of War, although that remedy is neither speedy nor adequate. Why not say that it was the intention of the legislature to give the courts great latitude in mandamus proceedings on account of the peculiar constitution of the government. The legislature undoubtedly had the power to confer this jurisdiction upon the courts and according to the plain wording of this section it did do so. It does not render the statute meaningless or nonsensical. It might be said that if the legislature intended to use the word "courts" the result would be that innumerable proceedings in mandamus would be instituted where the interested parties had a very plain, speedy, and adequate remedy in the executive branch of the government. But it is not probable that this would occur, for the reason that it is always within the sound discretion of the court whether or not a mandamus should issue.

Paragraph 4 of section 333 of Act No. 190 originally read "the judgment or order of the court when declared by

the court to be conclusive." The legislature, by Act No. 1431, passed January 3, 1906, changed the words "the court" to "this code." This tends to show that the code has been very carefully gone over.

One of the principal characteristics of judge-made law is uncertainty. This uncertainty comes in a great degree from the nature of the source whence the law is derived. It is made by the judiciary, not by the legislature. Made to fit particular cases, and always after the fact. The difference between judge-made law and jurisprudence founded upon statutes is as wide as the poles. The true function of the legislature is to make the law; the true function of the courts is to expound it. The function of legislation and interpretation can not under our form of government be placed in the same hands. Our first maxim is that the laws be made by one set of men and interpreted by another. In other words, that the legislative and judicial characters be kept separate. If we inquire what it is that gives force to an act of the legislature, the answer is that it is ultimately the will of the people. The people have willed that an assemblage of men organized in such and such a way shall make the laws for the entire community. It may be true that no legislature was ever so active as to make its statutes cover the entire field of admitted legal obligation. But where it has expressly by its solemn act covered a part of the field, the court should not interfere with its own legislative power, except, possibly, in extreme cases. Mr. Boyd Winchester, in his article "The Judiciary" (32 Am. Law. Rev., 807), says among other things:

"In the judgment of many no more serious evil has developed in our constitutional history than the growing tendency of the courts to stretch the powers devolved upon them by the federal and state constitutions, and usurp the functions of the political departments of the government. Not content with deciding questions of law and fact brought before them in the ordinary course of litigation, the courts have, in many instances, undertaken to legislate.

* * * * *

"Judicial power, in its nature, is power to hear and decide causes pending between parties who have the right to sue and be sued in the courts of law and equity."

Article 483 of the Penal Code provides that any person who in any case other than that permitted by law or without reasonable grounds therefor shall arrest or detain another person for the purpose of taking the latter before the authorities, shall suffer the penalties of *arresto menor* and a fine. In commenting upon this article, Viada, in volume 3, page 288, says:

"*Arresto menor*, a light penalty under the general scale of penalties set out in article 26, is here applied for the first and only time in this code, to an offense greater than a misdemeanor. It would appear that in place of this offense it was intended to prescribe *arresto mayor*"

Speaking in reference to the penalty here imposed by this article, this Supreme Court, in the case of *United States vs. Fontanilla* (11 Phil. Rep., 233) said:

"The penalty prescribed under this article is that of *arresto menor*, which seems hardly adequate in view of all the circumstances of this case, but it is the penalty prescribed by law and the only one which can lawfully be imposed.

* * * * *

"It is our duty to impose the penalty prescribed by law and no other."

Here the court practically admits that the legislature did not intend to use the words "*arresto menor*," but intended to use the words "*arresto mayor*."

Our Code of Civil Procedure was prepared and enacted in 1901 by a commission, the majority of whose members

were American lawyers of known reputation. Each section was discussed and examined separately. It was no doubt carefully gone over frequently after it became law. The Commission, before the convening of the Assembly, met in legislative session almost daily, and it does appear that if the word "courts" was used in section 222 by mistake, that it would have been discovered long before this time.

In the case of *Hoey vs. Baldwin*, *supra*, this court quoted the whole of section 222. The question whether or not the plaintiff had a plain, speedy, and adequate remedy in the ordinary courts of law was squarely before the court. The court did not even indicate in this case that the legislature did not intend to use the word "courts." I am of the opinion that it is rather late, after the code has been in effect for over ten years, to amend it in this manner.

Allowing the statute to stand as it was enacted, is it meaningless or nonsensical? The section provides in effect that when a person shows a departure from duty on the part of an officer, he shall have recourse to mandamus if there is no other plain, speedy, and adequate remedy in the ordinary courts of law. Does a strict interpretation of these provisions lead us into impossibilities or improbabilities? If it does not, certainly there can be no reason for going so far as to substitute new words for those used by the legislature.

"1. When the petitioner fails to show a departure from duty the remedial portion of the section cannot be applied by the courts. This is plain.

"2. When the petitioner shows a departure from duty but has an appeal to the courts (such as suit on official bond) which is not plain, speedy and adequate, the section applies. (*Hoey vs. Baldwin*, *supra*.)

"3. When petitioner shows a departure from duty but has an appeal provided by law through administrative channels which is not plain, speedy, and adequate, this court could logically take jurisdiction on the ground that petitioner's only remedy in the courts is by mandamus and, consequently, that he has no other remedy in the ordinary courts of law.

"4. When petitioner shows a departure from duty but has an appeal provided by law through administrative channels which is plain, speedy, and adequate, a strict interpretation of section 222 would confer jurisdiction on this court to afford relief if the petitioner elected to take his remedy in this way in preference to his plain, speedy and adequate remedy through administrative channels. Did the legislature intend to provide this duplicate remedy?"

In the majority opinion this court undertook to show that there was a clerical error in the preparation of the code because (1) the section is taken from the California Code which reads "course of law," and (2) section 226 of our own code relating to prohibition reads "course of law." I will add another, which is that that provision of a great number of the codes in the United States which vests in the courts the power to issue mandamus reads "course of law." In my opinion, all three of these reasons do not show a clerical error in section 222. But let it be said that they do operate to the extent that the legislature had a special purpose in using the word "courts," and, in so doing, that it changed the general rule in the United States. All will admit that the legislature had ample authority to make this change and to confer this power upon the courts. Suppose A, in his petition, should allege a gross abuse of discretion on the part of an officer in the performance of his duties and the court find this allegation to be true, and also that A had; another plain, speedy, and adequate remedy in administrative channels. This court, under the powers conferred upon it by the original statute, would have authority to afford the relief, but it does not follow that the court would exercise this power. As a matter of fact, it would not. The statute provides that the court may issue the writ. As I have said, the question as to whether or not the writ of mandamus shall issue rests in every case in the sound discretion of the court. Conferring upon the courts this extra power in mandamus proceedings, is not the only departure from the general provisions of the codes in the United States. This court has the power to increase, decrease, modify, etc., penalties in criminal cases. No such power is exercised by any of the courts in the

American Union. Again, our Courts of First Instance exercise powers in the trial of cases unknown in America. So also, the provisions of Act No. 1605 are unknown in the United States. This Act is a wide departure from the general laws relating to bonded officers in America. So it is not strange that this extra power has been conferred upon the courts in mandamus proceedings.

In my opinion, the use of the word "courts" in section 222 is not a clerical error, but a wise piece of legislation, and this court, in amending this section by substituting the word "course" has committed the grave, and serious error of taking away from the courts powers which were wisely conferred upon them by the legislature. When the legislature speaks it is our duty to obey. The legitimate province of the courts is to interpret the acts of the legislature as they are found. By so doing, that security of life, liberty, and property, which is the great end of human society and government, will be promoted, and the uncertainties which are sure to follow judicial legislation avoided.

In this case the relator is now and has been for some time deprived of his liberty without due process of law. He failed to obtain relief in the highest court in the land; the tribunal which has always been regarded as the bulwark of the people's liberties, the guardian of the great principles contained in the instructions of the President to the First Philippine Commission, and the final protector of life and property.

For the foregoing reasons, I firmly believe that the demurrer should have been overruled and the defendant required to answer.

[1] Not published.

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