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Note and Comment

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NOTE AND COMMENT.

POWER OF THE GOVERNOR GENERAL TO EXPEL RESIDENT ALIENS FROM THE INSULAR TERRITORY OF THE UNITED STATES.—In the case of *Forbes et al.* v. *Chuoco Tiaco,* decided by the Supreme Court of the Philippine Islands July 30, 1910, 8 Off. Gaz., p. 1778, some of the most interesting, important, and fundamental questions were presented and determined for the time being, but not settled, it is reasonably safe to say until passed upon by the Supreme Court of the United States. The questions involved were whether the Governor General of the Philippine Islands has the power to expel resident Chinese aliens without a hearing or an opportunity to be heard, and whether the Governor, if he exceeded his authority, and those who carried out his orders, were civilly liable to the persons deported.

The facts were: August 19, 1909, the Chiefs of Police and Secret Service of the City of Manila, acting under the orders of Governor-General Forbes, between 8 and 9 o'clock in the evening, without a warrant, seized *Chuoco Tiaco,* and eleven other persons of Chinese race, six of whom including Tiaco, were merchants and property owners in the Philippines where they had resided from 16 to 35 years, and had wives and children, one having

been president of the Chinese Chamber ot Commerce in Manila. They were taken to the police station, deprived of their certificates of registration and other documents required of Chinese persons, showing lawful residence under the laws, hauled to the water front in a patrol wagon, placed in a launch, and put on board a steamship and, under cover of darkness, after the courts were closed, were shipped to China, without opportunity to say farewell to their families, arrange their business, and without notice that any charge of any kind had been made against them.

On March 29, 1910, these six returned to Manila, and brought habeas corpus proceedings in the Court of First Instance to secure their liberty; the court took them into custody and held them until the immigration authorities passed upon their right to land; three were permitted to land as members of the exempt class by the immigration authorities, and three were not; pending these proceedings the Governor ordered them all to be sent away again, whereupon action was brought in the Court of First Instance by the three allowed to land against the Governor, Chief of Police, and Chief of the Secret Service, praying for damages and an injunction against redeportation. A temporary injunction was issued; the defendants demurred on the ground that the court had no jurisdiction; the demurrer was overruled, and instead of answering, the defendants applied to the Supreme Court for a writ of prohibition, which was issued; the Court of First Instance issued the writ of *habeas corpus* in favor of the other three excluded by the immigration authorities.

While the cases were pending on demurrer the Governor sent a message to the Philippine Legislature saying, "In the exercise of the power vested in me by Congress, as Chief Executive of the Philippine Islands," he caused "the deportation of certain Chinamen whose antecedents, character and conduct were such that said Chinamen were recognized as being *undesirable troublesome, and dangerous* even by the Chinese Chamber of Commerce, to such an extreme that the deportation of the aforesaid Chinamen was then urgently requested by the representative of His Imperial Chinese Majesty, the Emperor of China, the Consul-General resident in Manila. After careful investigation I found that the allegations were reasonable and that the presence of the said persons of Chinese nationality in the Philippines was not only liable to result in serious harm to the Chinese colony, but that it might and as the investigation showed, did constitute a serious menace to public order and to the well-being of the whole community," and designated this deportation as one of the subjects to be considered by them.

The Legislature thereupon, reciting the statements of the Governor's message, passed an act, to the effect that "The action of the Governor-General is hereby approved, and ratified and confirmed and in all respects declared legal and not subject to question or review."

At the outset a question was raised whether the suit by the Chinamen was against the defendants in their *official,* or in their *personal,* capacity. The Court of First Instance held the latter. Three of the judges of the Supreme Court held the suit was against the defendants in their *official* capacity, and two of them held it was only against them in their *personal* capacity,

but all agreed in making the writ of prohibition permanent, and ordering the suit of the Chinamen dismissed.

Judge JOHNSON with whom ARELLANO, C.J., and TORRES, J., concurred, held: (1) That the Government of the United States in the Philippine Islands is a government possessed with "all the military, civil, and judicial powers necessary to govern the Philippine Islands," and as such has the power and duty, through its political department, to deport aliens whose presence in the territory is found to be injurious to the public good and domestic tranquility of the people.

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

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

The opinion of MORELAND, J., concurred in by TRENT, J., contains an elaborate discussion of the *personal* liability of the Governor-General for acts in excess of, or without, jurisdiction in the matter, and concludes that the same considerations of public policy which exempt judges of the courts of superior jurisdiction from civil suits for damages for official acts should apply to the Governor-General; that the test of judicial immunity is not jurisdiction, but the exercise of *judicial functions*; that there is immunity, if the judge is at the time exercising judicial functions, whether within, in excess of, or entirely without, his jurisdiction, and whether he acts maliciously or corruptly or not; that whether a judge has jurisdiction is a question of law, and in determining this question, the judge necessarily exercises judicial functions,—or in other words has jurisdiction to determine what his judisdiction is; that the test of what is a judicial question is whether a qualified judge can regard it as having two sides, or whether there is a *real* question of law involved; and the test of judicial functions is whether two men properly qualified, might really reach different results; but if the matter is so clear that there is or can be no real question, or difference in conclusions, it is not a judicial question or function; that whether the Governor-General has authority to expel aliens is a question of law, upon which two qualified persons might easily differ; that he is obliged to determine the question; in doing so he acts judicially, and should be protected from civil suit for damages; but the courts have authority to review his conclusions and hold them illegal and void, and place as nearly as possible in status quo one who has been deprived of his liberty or property by such act.

It will be noted that the majority opinion is based on these propositions: (1) Every independent government has a right to expel aliens; (2) the Philippine government is such; (3) the power is a political one; (4) it re-

sides in the executive department, that is, the Governor-General; (5) if not, his acts can be ratified by the Legislature. We believe that (2), (4) and (5) are more than doubtful.

In considering these opinions it is desirable to recall the principal facts relating to the establishment of government of the United States in the Philippines. April 19, 1898, the United States Congress resolved, "That the people of the island of Cuba are and of right ought to be, free and independent," demanded that Spain relinquish its authority over the island, and authorized the President to use the military and naval forces of the United States to carry this resolution into effect. Spain elected to go to war, and Congress declared war, April 25, and directed the President as Commander-in-Chief to carry it on. (30 U. S. St. 364, 738); May 1, Admiral Dewey destroyed the Spanish fleet in Manila Bay, and the City of Manila was captured August 13, by the naval forces of Dewey and the land forces under General Merritt; by order of the President, May 19, General Merritt was to be military governor with powers "absolute and supreme," but the municipal laws were to remain in force and be administered by the same tribunals so far as possible, as before occupation, but by officials appointed by the government of occupation. December 10, the treaty of Paris was signed by Spain and the United States, by which Spain ceded the Philippine Islands to the United States, "the civil rights and political status of the *native* inhabitants" to be determined by the United States Congress, and the Senate resolved that it was not intended "permanently to annex said islands as an integral part of the territory of the United States."

The Filipinos continued hostile, and military rule, exercising legislative, executive, and judicial functions, continued until September 1, 1900, when by order of the President April 7, 1900, a Philippine Commission was created; the Military Governor was to continue to exercise "the executive authority now possessed by him not expressly assigned to the Commission," subject however to the order enacted by the Commission in the exercise of the legislative powers conferred upon them; these included various enumerated things and "all other matters of a civil nature for which the Military Governor is now competent to provide by rules or orders of a legislative character," but upon "every branch of the government must be imposed these inviolable rules: that no person shall be deprived of life, liberty or property without due process of law. * * *"

March 2, 1901, Congress enacted that "All military, civil and judicial powers necessary to govern the Philippine Islands shall * * * be vested in such person or persons and shall be exercised in such manner, as the President shall direct for the establishment of civil government and for maintaining and protecting the *inhabitants* in the free enjoyment of their liberty, property, and religion." On June 21, 1901, the President appointed W. H. Taft, Civil Governor, after July 4, 1901, to exercise "the executive authority in civil affairs," under and in conformity to the instructions * * * dated April 7, 1900." July 1, 1902, Congress enacted the Philippine Bill, approving the creation of the Philippine Commission by the President, and authorizing it to exercise "the powers of government to the extent and in the manner

and form and subject to the regulation and control set forth in the instructions" of April 7, 1900, and the creation of the office of Governor-General "to exercise the powers to the extent and in the form set forth in the executive order dated June 21, 1901." This bill also defines Philippine citizenship; contains a bill or rights, including the provision that "No law shall be enacted in said Islands which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws;" provides for the organization of a Philippine legislature, and a judiciary, with appellate jurisdiction from the Supreme Court to the United States Supreme Court; also confers authority on the government to do certain things, but all laws passed shall be reported to Congress, which reserves the power to annul the same.

Prior to the conquest and occupation, the Spanish Law of Foreigners of 1870 provided "The foreigners who reside in the Spanish provinces shall have the right of security of their persons" as established for Spaniards, which by the Constitutions of 1869 and 1876, (not extended to the Philippines) required a judgment of a competent court to deport anyone. By royal order of the King of Spain, August 2, 1888, the Governors-General "have authority to determine the legal convenience of deportation which they consider necessary for the preservation of public order," to be exercised only by the Governor-General himself (and not his subordinates) and subject to revocation by the Supreme Government. In Cuba where this constitutional provision was in effect, it had been held that such provision abrogated any special power of the Governor to deport, and authorized the return of such as had been deported. It was argued that the "due process" clause of the President's order of April 7, 1900, was equivalent to the promulgation of the Spanish constitutional provision. This view seems reasonable.

By Act of Congress of April 29, 1902, the Chinese exclusion acts of the United States were made applicable to the island territory, and required every "Chinese laborer other than a citizen, rightfully in, and entitled to remain in any of the insular territory of the United States" to obtain within a year "a certificate of residence in the insular territory wherein he resides, which certificate shall entitle him to reside therein," and authorized the Philippine Commission to make the rules necessary to enforce these provisions in those islands.

By the Immigration Act of February 20, 1907, alien idiots, insane, paupers, diseased, criminals, etc., were excluded from the United States, including the Philippines, with power in the Secretary of Commerce and Labor, when he "shall be satisfied that an alien has been found in the United States. in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, to cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came."

By the Constitution of the United States, all legislative power is vested in Congress,—to establish an uniform rule of naturalization; declare war; make all laws necessary and proper to carry into execution the powers vested in the government or in any department or officer thereof; make all need-

ful rules and regulations respecting the territory belonging to the United States; but the right of the *people* to be secure in their persons against unreasonable seizures shall not be violated, and no *person* shall be deprived of life, liberty, or property without due process of law.

The executive power is vested in the President, who is to swear to faithfully execute the office and preserve, protect, and defend the Constitution; act as commander of the forces when in actual service; make treaties with the advice and consent of the Senate, and take care that the Laws be faithfully executed. The judicial power shall extend to all cases in law and equity arising under this Constitution, and the laws and treaties made thereunder, and which are to be the supreme law of the land.

By the Insular Cases, the Supreme Court of the United States ruled that the territory of the United States included: (1) States; (2) territory incorporated into the Union by declaration of Congress; and (3) territory appurtenant or annexed to the Union by conquest or treaty, but not incorporated into the Union. All of the judges held that all the limitations of the powers of Congress and the guaranties of the Constitution, extended over the States; four of the judges held the same as to *all* the territory, whether incorporated or appurtenant only; four others held that all the limitations and guaranties included the States and incorporated territory only, but there are certain "limitations of so fundamental character," as to restrain Congress in whatever capacity, or over whatsoever territory, it may be acting; the other judge held that the constitutional limitations and guaranties extended in their full vigor only over the states, but admits that there are some "prohibitions that go to the very root of the power of Congress to act at all," and suggests that the right to personal liberty, due process of law, equal protection of the laws, immunity from unreasonable seizures, are probably of this class. (*Downes* v. *Bidwell*, 182 U. S. 241, 21 S. C. Rep. 770). In *Hawaii* v. *Mankichi*, 190 U. S. 197, 23 S. C. 787, it was held the provisions of the 5th and 6th Amendments as to indictment by grand jury, and trial by petit jury, did not apply to Hawaii, which had been *annexed* to the United States; and in *Dorr* v. *U. S.*, 195 U. S. 138, 24 S. C. Rep. 808, it was held that trial by jury was not a necessary incident to due process of law in the Philippines.

From the foregoing it is reasonable to say that the "due process of law" provisions, by the direction of the President, by authority of Congress, and *ex proprio rigore*, extend over the territory and inhabitants of the Philippine Islands. and have the same effect as in the United States. *Weems* v. *U. S.*, 217 U. S. 349.

While "due process of law" does not require *judicial* trial, and the decision of an administrative officer duly authorized by Congress to pass on the matter, no abuse of authority being shown, may be final as to the *status* of a particular individual, if depending on facts only, it will not be so if depending on matter of law, and the courts will then review administrative acts. *Davies* v. *Manolis*, 179 Fed. 818; *U. S.* v. *Ju Toy*, 198 U. S. 253, 25 S. C. Rep. 644; *U. S.* v. *Williams*, 194 U. S. 279; *Gonzales* v. *Williams*, 192 U. S. 1, 24 S. C. Rep. 171; *Japanese Immigration Case*, 189 U. S. 86. But "due process of law" whether in court or before an administrative officer re-

quires "notice and an opportunity to be heard," *Garfield* v. *Goldsby*, 211 U. S. 249. McGehee, Due Process of Law, pp. 73-84.

In *Wong Wing* v. *U. S.*, 163 U. S. 228, 237, it was said "No limits can be put by the courts upon the power of *Congress* to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and *unlawfully* remain therein. *But to declare unlawful residence within the country to be an infamous crime,* punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial." And as to a Chinaman already lawfully domiciled in the United States, "while he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured to all persons of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States." *Lem Moon Sing* v. *U. S.*, 158 U. S. 538, on 547.

Again by the Immigration Treaties of 1880, and 1894, Chinese then permanently residing in the United States, or lawfully there were to be protected as the subjects of the most favored nations. By the 10-year exclusion act of 1882, Chinese laborers who were here prior to 1880, were considered to be lawfully here, as were domiciled Chinese merchants and those not laborers, *Lau Ow Bew* v. *U. S.*, 144 U. S. 47; one brought before a United States Court or Commissioner and found *unlawfully* in the United States could be deported, but if tried by a Commissioner, he had a right of appeal to the District Court. By Act of 1892, the exclusion was to continue for 10 years more, the former laws were to continue in force, and any Chinese person arrested under any of these laws was to be deemed unlawfully in the United States unless he could affirmatively prove otherwise, *Le Sing* v. *U. S.*, 180 U. S. 486, 21 S. C. Rep. 449, but those lawfully in the United States at the time were given six months to get certificates of that fact from the internal revenue collectors, and any Chinaman found to be unlawfully in the United States was to be imprisoned at hard labor for a year, and then deported. In 1902, these laws were continued in force and made applicable to the Philippines.

If this review is correct, then Congress has legislated on the subject of exclusion of aliens, including Chinese, throughout the territory of the United States, and no power is conferred upon the President or any officer anywhere, to deport a resident alien not unlawfully,—*i.e.*, in violation of some of the exclusion acts,—in the United States; there is no power *conferred* by Congress upon anyone to deport any such, except that, under the Alien Enemy Act of 1798, in time of war, and in case of actual or threatened invasion, the President by proclamation is authorized to direct the conduct to be observed toward alien enemies, the restraint to be put upon them, and to provide for the removal of such as are directed, but refuse, to depart.

Whether Congress itself has the power to direct alien friends, domiciled and resident within the United States, coming under the comity of friendship

and good will, pursuing the peaceful pursuits of lawful business, to be seized and deported without charge of violation of law, without notice, and without opportunity to be heard, is more than doubtful. The only time when such attempt has been made in our history was under the Alien Friends Law of 1798, which with the sedition act of the same year, as Von Holst says, "Sealed the fate of the Federal party and gave rise to the doctrine of nullification." Even Hamilton said they "appear to me highly exceptionable * * * Let us not establish a tyranny"; and they called forth the famous Kentucky and Virginia Resolutions of 1798, the first framed by JEFFERSON, and the latter by MADISON.

This law conferred upon the President "power to send away all such aliens as he judged dangerous to the peace and safety of the United States, or had reason to think were hatching treason or laying plots against the government. Should any one so ordered to depart be found at large, without license to remain, he might be imprioned for three years and could never become a citizen. Aliens imprisoned in pursuance of the act were subject to removal from the country on the order of the President, and on voluntarily returning, to reimprisonment for such time as the President might think the public good required." Aliens sent away were to be allowed to carry their goods and chattels or dispose of them as they pleased. The law was to last only two years. (MCMASTER, HIST. OF PEOPLE OF U. S., Vol. I., p. 395.) It was never enforced.

Objections to it were: (1) It subverted the general principles of free government; (2) it was contrary to the letter and spirit of the constitution; (3) no power over alien friends was delegated to Congress, but they were under the protection of the states wherein they dwelt; (4) the migration of persons that the states think fit to admit was not to be prohibited by Congress prior to 1808; (5) imprisonment without accusation, hearing, trial by jury, confronting accusers, or attendance of witnesses, for failing to obey the President's order to depart, deprived such persons of their liberty without due process of law.

These were answered by the Federalist Committee of the House of Representatives: (1) The migration provision was to prevent Congress from abolishing the slave trade prior to 1808, and not to prevent the exclusion of aliens in general; (2) but if not, exclusion of alien immigrants was one thing, but "to send off, after arrival, emigrants who were dangerous to the peace and safety of the country was quite another thing"; such construction would deny the right of Congress of "driving from the soil a band of men who with arms in their hands had come to invade it"; (3) as to jury trials it was said: the Constitution was made for citizens, not aliens; they had no rights under it; they merely lived in the country and enjoyed the benefit of the laws, not as a right, but as a favor, and this could be recalled at will; jury trials apply to crimes, and removing an alien was neither committing nor punishing such. (MCMASTER, HIST. PEOPLE OF U. S., Vol. I., p. 417 et seq.)

The second reason is similar to Judge JOHNSON's in the case under review. He says: "Suppose, for example, that some of the inhabitants of the thickly populated countries situated near the Philippines should suddenly

decide to enter, and should without warning appear in one of the remote harbors, and at once land for the purpose of stirring up the inhabitants and inciting dissensions against the present Government. And suppose that the Legislature was not in session; could it be denied that the Governor-General, under his general political powers to protect the very existence of the Government has the power to take such steps as he may deem wise and necessary for the purpose of ridding the country of such obnoxious and dangerous foreigners?"

Many Federalists believed this Alien Act valid; the Anti-Federalists believed otherwise; St. George Tucker declares it invalid (TUCKER'S BLACKSTONE, Vol. I., p. 301); Judge STORY and Judge COOLEY are non-committal (COOLEY'S STORY'S CONST. LAW, § 1294), but VON HOLST says "for a long time, they (the Alien and Sedition laws) have been considered in the United States as unquestionably unconstitutional." (CONSTL. HIST., Vol. I., p. 142). The courts did not pass on them.

The foregoing relates to the power of Congress to confer such power on the President; and if Congress has no such power to confer, much less would it exist in him or in any officer, unless it *inheres* in the nature of his office; but if so, it is also subject to the due process provisions of the Constitution, for no department of our government is above the Constitution.

It is not doubted that by the law of nations every sovereign and independent nation has the inherent and inalienable right to expel alien friends subject only to the constitutional restraints it has placed upon itself, *Fong Yue Ting* v. *U. S.*, 149 U. S. 709. This power is vested in the political department of the government, regulated by treaty or Act of Congress (with us), executed by the executive authority, without interference by the judicial authority except so far as treaty, statute, or *constitutional provision* requires. *Ekiu* v. *U. S.*, 142 U. S. 651; *Turner* v. *Williams*, 194 U. S. 279; *U. S.* v. *Ju Toy*, 198 U. S. 253; *Chin Yow* v. *U. S.*, 208 U. S. 8.) WILLOUGHBY, CONST. LAW, p. 253. But any arbitrary expulsion may give rise to a diplomatic claim for relief. (*Moore, Digest Int. L.*, § 550.)

In England resident alien friends so long as they behave peaceably, are under the King's protection "though liable to be sent home whenever the King sees occasion." (1 BL. COM., p. 260), but all merchants, by the Great Charter of John (c. 41) shall have a right to come and stay in England for the exercise of trade, except in time of war; in the Charter of Henry III. (c. 30) the same right was continued, "unless publicly prohibited beforehand," which public prohibition must be made by Parliament according to Lord COKE (2 Inst. c. 30). So too no freeman was to be exiled except by the law of the land; the Crown has not exercised this right of expulsion since 1575. During the French Revolution, in 1793, Parliament passed an Alien Act authorizing the Secretary of State to remove such French refugees as were suspected of conspiracies against the Government, and during the disturbances of 1848 a similar act was passed authorizing the executive to remove foreigners considered dangerous to the public peace, but the power, in neither case, was exercised. Both acts were to last for one year but the first was renewed from time to time till 1826. (TASWELL-LANGMEAD ENGLISH

CONST. *HIST.*, p. 667 note; LAWS OF ENGLAND, Ed. by LORD HALSBURY, Vol. I., p. 320, ¶ 705; *Musgrove* v. *Chun Teeong Toy* [1891] A. C. 272.) Under the present law of England, the Secretary of State may order an alien out of the country if a court (including a court of summary jurisdiction) certifies he has been convicted of a crime, and recommends expulsion, or if such court, after proceedings taken for the purpose within 12 months after the alien last entered the United Kingdom, certifies that the alien is destitute, vagrant, lives in crowded and unsanitary conditions, or has been elsewhere convicted of crime.

In England, the Crown enjoys the sole right, in his absolute discretion, acting upon the advice of his cabinet to make treaties, declare war and peace, unfettered by direct supervision by Parliament or otherwise,—subject in recent years to the convention that foreign relations will conform to the wishes of Parliament. THE LAWS OF ENGLAND, Vol. 6, CONSTL. LAW, p. 427.) The President of the United States has no such prerogative, and much less the Governors of the states and territories.

In colonies before representative legislatures have been granted the Crown has the prerogative right of establishing laws, but not such as are contrary "to the fundamental principles of the British Constitution, or exempting them from the power of Parliament, and every colony is subject to the paramount authority of the Imperial Parliament." (LAWS OF ENGLAND, Vol. 6, p. 423). In Canada, (Const. 91 [25]); Australia (51, XIX), and South Africa (139) some power is conferred by their constitutions to legislate on naturalization and aliens, but the Naturalization Act of 1870 (33 & 34 Vict. c. 14); is controlling in many respects in the colonies. (WOOLSEY, COMPARATIVE STUDY OF SOUTH AFRICAN CONST., Am. J. Int. Law, Jan., 1910, p. 80.) In the colonies the colonial legislatures have of course such powers as the King by his prerogative can exercise, or has authorized, (*Attorney General* v. *Cain*, H. L. App. Cas. 1906, p. 545) or Parliament has bestowed upon them (*Hodge* v. *Reg.*, 9 App. Cas. 117), neither of which is limited by "due process of law" provisions of the Federal constitution.

Prior to the revolution the American Colonies enacted laws regulating the admission of aliens; this power continued in the States under the Confederation; the regulations were so diverse that Madison proposed a uniform rule as early as 1782. It was natural, therefore, to confer such power on Congress under the Constitution. While it was at first considered that this power was concurrent with that of the State (*Collet* v. *Collet*, 2 Dallas 294) yet it has long been settled that the power of *naturalization* is exclusively vested in Congress, (VAN DYNE, NATURALIZATION, p. 6), and it would seem also that under the treaty making power vested in the United States, that the States cannot admit or keep, those whom the Federal Government excludes, although in the absence of exclusion acts of Congress the States may undoubtedly admit whom they please, though probably not expel those whom the Federal Government admits. WILLOUGHBY, CONST. LAW, §§ 122-5, 128-132.)

It would seem from this that *Congress* has not and probably cannot, nor has or can the President, confer on the Philippine Legislature or the Gover-

nor-General, the power to do what the Governor did in the case under review, in the way he did it; that his acts were unauthorized and void; and this for the reason that probably Congress could not lawfully under the Constitution do or cause them to be so done itself; that the Philippine government,—Legislative or Executive, is not an independent and sovereign government in the international sense, in which there inheres any political power of an international or diplomatic kind, to deport aliens, not violating laws, or charged with some offense. Such power is vested exclusively in the Congress of the United States.

If this is so then there is much authority for holding the Governor or his subordinates civilly liable, (*Hendricks* v. *Gonzales*, 67 Fed. R. 351; *Kilbourn* v. *Thompson*, 103 U. S. 168; *U. S.* v. *Lee*, 106 U. S. 196; *Head* v. *Porter*, 48 Fed. 481; *Lorsch* v. *Koehler*, 144 Ind. 278; *Blair* v. *Struck*, — Mon. —, 74 Pac. 69; *Belknap* v. *Schild*, 161 U. S. 18; *Little* v. *Barreme*, 6 U. S. (2 Cr.) 170; *Bates* v. *Clarke*, 95 U. S. 204; *Mostyn* v. *Fabrigas*, 1 Cowp. 150; although probably the decisions in the United States are the other way in a discretionary, or quasi-judicial function of this kind, (*Spalding* v. *Vilas*, 161 U. S. 483, 16 S. C. R. 631; *In re Fair*, 100 Fed. 149; *Marbury* v. *Madison*, 1 Cranch 137; *Kendall* v. *U. S.*, 12 Pet. 524, 610; *Decatur* v. *Paulding*, 14 Pet. 497; COOLEY, TORTS (Students' Ed.) p. 375, § 207. H. L. W.

CONFUSION OF THE DOCTRINE OF ESTOPPEL WITH THAT OF BONA FIDE PURCHASE FOR VALUE WITHOUT NOTICE.—In order that a plaintiff recover against a defendant in an action for deceit he must prove the following allegations: (1) that the defendant made a representation to the plaintiff; (2) that the representation was false in fact; (3) that the defendant knew that it was false, or at least did not believe that it was true; (4) that the defendant intended the plaintiff to act upon it; or should have foreseen that the plaintiff would act upon it; (5) that the plaintiff did act upon it and was damaged thereby. The doctrine of equitable estoppel differs from the action of deceit in allowing one to use the misrepresentation in a negative way by taking away a cause of action or defense from the one making the false representation. This usually results in giving specific reparation instead of damages; that is, the party relying upon the representation is placed in the position which he would have occupied if the representation had been true. For example, if A fraudulently represents to B that certain property which he owns belongs to C, and thereupon B buys the property from X, B may either sue A for the deceit or he may use the misrepresentation as a bar to an action brought by A.

It is frequently said that the requirements of equitable estoppel are the same as those of deceit; *Trust Co.* v. *Wagener* (1895), 12 Utah 1, and in the early history of the doctrine this seems to have been true. But in recent years there has been a tendency to modify the third requirement of equitable estoppel so as to apply the doctrine in cases where the representation was made innocently, with belief in its truth.

In a recent case in Iowa, *Reints & DeBuhr* v. *Uhlenhopp*, 128 N. W.

400, P had executed a note to C with S as surety. At the maturity of the note, P asked C for an extension of time; C agreed, provided B would secure a renewal note signed by S as surety. P agreed to procure it and later tendered to C a note executed by himself, with S's name forged thereon. C accepted this note, marked the first note paid and delivered it so cancelled to P. P told S that the note had been paid and that he had it in his possession. Four years later C sued S upon the new note; S pleaded the forgery and C then declared upon the old note. At the time of the surrender of the old note, P was solvent and abundantly able to pay the same; but at the time when S was first informed of the fraud of P, the latter was insolvent and unable to pay anything. The court held that C could not recover on the surrendered note.

The decision can not, of course, be supported upon the ground of extension of time to P, because C was not bound;—he had not "tied his hands." At the moment of discovering the fraud he could have sued P upon the original note.

Though the word "estoppel" does not appear in the opinion, the court seems to have based its decision on that ground: "* * * the surrender of the original note is the equivalent of a declaration that it has been paid and satisfied, and, if the fact of such surrender comes to the knowledge of the surety and in reliance thereon he is lulled into security and the principal becomes insolvent before demand is made on the surety for the payment of the original note, the said note can not be enforced against the surety." Can this position be successfully maintained?

The fact that the representation of payment was an innocent one and obtained from C by the trick of P seems, in itself, not objectionable. In *In re Bahia and San Francisco Railway Co.*, L. R. 3, Q. B. 584, the defendant was a joint stock company; one G presented to the secretary of the company a paper purporting to be a transfer by one T of five shares to G; the secretary registered G as holder of the five shares and issued certificates to him. G then sold the shares through a broker to the plaintiff. The purported transfer was a forgery, and T compelled the defendant to restore his name to the register as owner of the shares. The plaintiff therupon sued the company for wrongfully striking his name from the registry and contended that the defendant was estopped from setting up the facts in regard to the forged transfer; the court sustained this contention.

The difference between the English case and the recent Iowa case is this: In the English case it was a foreseeable consequence of registering the transfer and issuing the certificates that possible purchasers from G would act in reliance thereon. In the Iowa case C supposed that S had signed the renewal note; could have foreseen that S would act at all? What action was there for S to take if he had really signed the renewal note, as C supposed he had? If, instead of giving a renewal note P had paid C with worthless bank notes, or C had been fraudulently induced to accept a renewal note without S's name upon it, it would have been a probable consequence that S would act—either positively, by giving up counter securities to P, or negatively by failing to take steps to make P pay while still solvent. Under such a state of

facts there would be the same elements of estoppel as existed in the English case.

Though it seems difficult, if not impossible, to support the case on the ground of estoppel, there does seem to be a satisfactory basis for the case. If P had, by means of fraud, induced C to sell and convey to him the legal title to certain property and P thereupon sold and conveyed the property to S, who paid value therefor in good faith, S would be protected upon the ground of bona fide purchase for value without notice; that is, the equities of C and S are equal and the legal right being with S, he therefore prevails. In the actual case, does not S stand in an analogous position? The old note had been marked paid and surrendered; S has, therefore, a good common law defence. Under the old practice C, in order to sue on the old note, would have been compelled either to sue entirely in equity or to sue at law and then seek an injunction in equity against S's setting up his common law defence. If S's equity is equal to that of C's, it is clear that he could not recover. On the facts stated in the case, S might have compelled P to pay at the time of the surrender of the first note; whereas, four years later, when S first learned of P's fraud, P had become insolvent and unable to pay anything. It would seem, then, that S's equity is as great as that of C, and the case is right in refusing recovery. In case S had not been prejudiced in any way by the fraudulently procured surrender, he would stand in the position of a mere volunteer and would not be protected. *Dwinnell* v. *McKibben*, 93 Iowa 331; *Douglass* v. *Ferris*, 138 N. Y. 192. G. L. C.

THE WAY OF THE TRANSGRESSOR IS EASY, if he is shrewd enough to take an immunity bath, or avail himself of any of a dozen other provisions of the law made with good intentions and left lying about loose enough to be misappropriated. One rule that has served him many a good turn, is that there is no contribution between tort-feasors. Another way of stating it is that the courts are not open to help rogues out of the predicaments into which their dishonest dealings placed them, and the counterpart of the doctrine in equity is that he who comes into equity must come with clean hands. So far therefore as civil liability is concerned, all that is necessary to protect the knave is to get his dupe to join in the knavery. This successfully done he may fleece his victim with impunity. This doctrine has even been applied to criminal liability, under the notion that the prosecution is in some way for the redress of the person injured (*McCord* v. *People*, 46 N. Y. 470; *State* v. *Crowley*, 41 Wis. 271), theerby extending the immunity to both civil and criminal liability; but at this, most of the courts have balked, saying that if both are guilty, that is no reason why each should not be punished, and pointing out that the doctrine is inapplicable, because, in the criminal suit, the state is seeking relief and is no party to the knavery. Criminals have never been allowed to escape by merely showing that others are guilty and have not been punished (*Com.* v. *Morrill*, 8 Cush. 571; *In re Cummins*, 16 Colo. 451, 27 Pac. 887, L. R. A. 752, 25 Am. St. Rep. 291). In this connection the thing desired by the professional criminal is something that will

afford him ample protection against criminal prosecution; for he has sufficient civil protection in the doctrine above mentioned.

This desired protection from criminal liability was found for a while in the notion, declared by Chief Justice HOLT, that we are not to indict a man for making a fool of another, and therefore it is not an offense to be punished criminally to get the better of a man by means of a trick against which common prudence is a sufficient guard, as by lying to him, which the court considered to be only a common cheat to be redressed by a civil action. All that is necessary to make the immunity by this doctrine complete, is to play upon the cupidity of the victim, and make him think he is doing the cheating himself, whereby he will be barred from civil redress. By such means professional knavery soon became an established legitimate business; and it was also discovered that prudence was not such a cheap and common article as had been supposed. What was supposed to be sufficiently guarded against by common prudence was found frequently to catch both wise and otherwise. The result was the statute making it criminal to obtain money, goods, wares, or merchandise by false pertenses. In the interpretation of these statutes the courts again fell into the error of holding that the statute was not violated by a pretense so transparent that anyone of ordinary understanding would not be fooled by it, such as by the offer of the green-goods man to give $1,000 of good money for $100, or a thousand other games that are worked successfully on a large portion of the public, and not always confined to the simple-minded; and the courts also made the mistake of holding that the pretense referred to in the statute must be one relating to present or past alleged fact, and not matter of future promise, or matter of opinion.

With the law thus interpreted, it would seem that the door for the escape of the professional sharper still stands wide open. All he need do is to confine his operations to that simpler part of the community which most needs the protection of the law, which is nevertheless plenty large enough to pay well for the work, and he may ply his trade without fear of punishment. The viciousness of such a doctrine is so manifest that most of the courts have now come to the conclusion that it matters not how manifest the fraud may be if it really did deceive the victim.

But even with this defense eliminated, the professional crook still has a legitimate field of operations where he is liable neither civilly nor criminally; and that is the operation of a cheat which is accomplished by means of false promises, in which the victim is induced to believe that he is to obtain some illegal advantage, and acts for that purpose. It is a disgrace to the law that it is so, but it still remains the fact. A recent case will illustrate the way the trick can be and is being worked. One Foster told prosecutor that if she would give him $110 and accompany him to a place out of the state, he would there procure for her $1,000 in counterfeit money. The bad money was not to be given at once on receipt of the good money, but credit was to be given the crook to get it. The pretense was one of promise only; the prosecutor was induced to believe she would gain an illegal advantage, which shut the doors of the courts against her in seeking civil redress. The pretense was merely promissory, and so not within the statute. Here then is a legitimate

and honorable business, which may be conducted in the open without fear of liability either civilly or criminally. So holds the Court of Appeals of Georgia. *Foster* v. *State,* 68 S. E. 739.

The disgrace of our criminal law is the network of technicalities which enable the manifest criminal to escape liability, and the delay with which the result is reached even when the guilty party does not escape; and these delays and uncertainties combine to deprive our criminal code of its proper restraining influence of the criminal, or protection to the public.

As a final word, applicable to the precise case above put, it is interesting to note that a possible hope of conviction is held out by such decisions as *Crum* v. *State,* 148 Ind. 47 N. E. 833, obtaining money by such a fraud is common law larceny; which is disregarding the rule that if the fraud induces the owner to part with possession only and the taker converts it, the offense is larceny, but if by means of the fraud the crook induces the owner to part with both possession and title to him it is obtaining by false pretenses.

J. R. R.

DUTY OF THE MORTGAGEE TO GIVE NOTICE AND PROOF OF LOSS UNDER STANDARD POLICY.—That the mortgagee is not bound to give notice and proof of loss under the standard insurance policy upon failure of the mortgagor to do so, was recently decided by the Appellate Division of New York State in *Heilbrun* v. *German Alliance Insurance Co. of New York,* 125 N. Y. Supp. 374.

Although the standard insurance policy was adopted by the legislature of New York in 1886, this is the first case in that state on the exact point in issue. Cases have arisen in a few jurisdictions, which have settled the point one way or the other, but in a great majority of the states the question is an open one.

This standard policy requires among other things notice and proof of loss to be rendered by the insured as a condition precedent to a recovery. Such conditions have been held to be reasonable by the courts, and compliance therewith must be affirmatively shown. *Am. Cereal Co.* v. *Western Assur. Co.,* 148 Fed. 77; *Columbia Ins. Co.* v. *Lawrence,* 10 Pet. 507, 9 L. Ed. p. 512; *O'Brien* v. *Com. Ins. Co.,* 63 N. Y. 108. That compliance does not have to be shown unless defendant pleads non-fulfillment, was held in *Adkins* v. *Globe Ins. Co.,* 45 W. Va. 384, 32 S. W. 194. West Virginia seems to be alone in this holding. The mortgagor is of course the proper person to give the notice and proof, but in case he fails there is some conflict as to the right of the mortgagee, and a greater conflict as to his duty, to do so in order to protect himself. The insured must comply, and manifestly this cannot be done by anyone else provided it is possible for him to do so. VANCE, INSURANCE, p. 504, 1 JOYCE, INSURANCE, § 3308. Compliance by the mortgagee will protect the interest of all. *Watertown Ins. Co.* v. *Grover Machine Co.,* 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146. See JOYCE, INSURANCE, § 3304 and cases cited. At present there is little doubt as to the right of the mortgagee to comply.

A further condition of the policy is to the effect that no act of the mortgagor shall invalidate the policy as to the mortgagee. The questions are: Is the mortgagee insured within the meaning of the policy as to notice and proof of loss by the insured, and does the condition as to non-invalidation apply to failure to give this notice and proof?

Authorities are pretty well in accord that the mortgage clause of a standard policy creates a distinct contract between the mortgagee and the insurance company. This contract the mortgagor cannot invalidate. *Queen Insurance Co.* v. *Dearborn Ass'n.*, 75 Ill. App. 371, affirmed 175 Ill. 115, one judge dissenting. Under this contract the mortgagee is given the right to demand payment for his loss and the right to sue for the same. He is given the benefits of the policy. Is he free from its burdens? In *Queen Ins. Co.* v. *Dearborn Ass'n.*, supra, it was held that notice and proof of loss need not be given by the mortgagee. This case was followed in *Northern Assurance Co.* v. *Chicago Bldg. Ass'n.*, 98 Ill. App. 152, 198 Ill. 474. Here, however, proof of loss by the owner had been waived by the insurer by his denying all liability under the policy because of a change in the ownership of the building. In *Dwelling House Ins. Co.* v. *Kan. etc. Trust Co.*, 5 Kan. App. 137, 48 Pac. 891, the mortgagee was held not bound to give notice, but in this case the policy contained two conditions which, if applied to the mortgagee, would have been inconsistent, hence the court concluded that they were not meant to be so applied. In *Glens Falls Ins. Co.* v. *Porter*, 44 Fla. 568, 33 South. 473, the court held that, while there was a separate independent contract with the mortgagee, there was a contract free from certain conditions of the mortgagor's contract, one of which was the requirement as to notice and proof of loss. In *Adams et al.* v. *Farmer's Mut. Fire Ins. Co.*, 115 Mo. App. 21, 90 S. W. 747, under facts very similar to the Northern Assurance case, supra, the court came to a similar conclusion, overruling, but entirely ignoring one of its former decisions to the contrary, *Lombard Investment Co.* v. *Dwelling House Ins. Co.*, 62 Mo. App. 315. In *Southern Home Ass'n.* v. *Home Ins. Co.*, 94 Ga. 167, it was held that the insurer was entitled to notice, and if not given by the mortgagor, then it must be by the mortgagee, if he would protect his interest. In *Union Institution for Savings* v. *Phoenix Ins. Co.*, 196 Mass. 230, 14 L. R. A. (N. S.) 459, the mortgagee did not know of the fire for some time, but the court held him bound to give notice within a reasonable time after he learned of the same, and of such matters *as the mortgagee might reasonably be expected to know.*

Courts deciding that notice need not be given by the mortgagee reason that it is as easy for the insurer to discover the loss as for the mortgagee, that the wording of the policy is such as not to require such notice by the mortgagee and that insurance contracts should be construed against the insurer. As to the first proposition, it should be comparatively easy for the mortgagee to discover his loss and report it. He knows what his own interest is, at least; he is a qualified owner and as such might be presumed to keep a closer inspection. Certainly at no time could it work a hardship or injustice to him to be required to give notice within reasonable time of such matters as he might reasonably be expected to know regarding his own loss. Does he

expect to be paid his interest on the policy without furnishing any proof of loss, or does he expect the company itself to furnish the proof, and then make the payment? Certainly the reasons which make it reasonable for the owner to make proof, apply as well to the mortgagee. The company is entitled to protection in either case.

The main support for these decisions, however, is not based on the question of facility of proof or reasonableness of the same, but rather on the somewhat indefinite phraseology of the policy. A consideration of the policy then is necessary, for if this policy does not require notice by the mortgagee, expressly or impliedly, equitable arguments on the subject are useless. The policy provides that no act of the mortgagor shall invalidate the policy as to the mortgagee. This clause refers to the acts or neglect of the mortgagor while the policy is subsisting, such as increase of risk, transfer of interest, etc.,—acts which are beyond the control of the mortgagee, and not to acts subsequent to the fire, provided by the company merely to furnish evidence of the loss. *Union Institution for Savings* v. *Phoenix Ins. Co.*, supra. The purpose of the clause is to protect the mortgagee when he could not protect himself; hence the intent of the clause should not be extended beyond the scope for which it was originated. The mortgagee cannot control conditions before the fire; he can after.

The conditions, as to proof of loss, etc., are stated in the policy subsequent to the expression that "conditions *heretofore* contained shall apply to the mortgagee." This is relied on by the majority as indicating that only those conditions stated before this expression should apply to the mortgagee. At best we are taking one expression out of its context and interpreting it without regard to the rest. It is elementary that a part of a contract should be construed with reference to the whole. Admitting, however, that this is the proper construction of the word "heretofore," is there anything stated, subsequently in the policy which imposes upon the mortgagee the duty of giving notice and proof? We find that the "insured" must give notice and proof of loss. By the terms of the policy, the interest of the mortgagee in the same is not to be terminated by any act of the mortgagor. In other words after the mortgagor shall have forfeited his own right to be insured, the very contract itself, provides that the mortgagee shall continue to be insured; hence is it not logical to say he is insured before any breach on the part of the mortgagor, and as such under the obligation of giving the notice imposed upon such "insured"? To the effect that the mortgagor is such insured, see *Stainer* v. *Royal Ins. Co.*, 13 Pa. Sup. Ct. 27; *Watertown Fire Ins. Co.* v. *Grover Machine Co.*, supra. Contra: *American Cereal Co.* v. *West Assur. Co.*, 148 Fed. 77.

LAUGHLIN, J., in his dissenting opinion seems to have arrived at the intention of the framers of the policy taken as a whole, by treating the question from a more comprehensive point of view than the majority. Undoubtedly, however, the opinion of the majority is in keeping with the rule of interpretation of contracts of insurance, most strongly against the insurer. Nevertheless the question readily presents itself, is it fair to so construe a contract which has been imposed upon the insurer by the legislature? As LAUGH-

LIN, J., points out, it is no more the company's contract than the individual's. In *Hamilton* v. *Royal Ins. Co.*, 156 N. Y. 327, 42 L. R. A. 485; the court held the interpretation of such policies (in this case as regards the statutory period of limitation) should not be taken strongly against the insurer, since the conditions are imposed by law and not by contract. This view seems particularly equitable since the statutes provide that no condition may be changed, altered, or added without permission.

Undoubtedly this decision of New York, the mother state of the standard policy, following as it does the rule in Illinois, Missouri, and Kansas will establish a precedent which will be influential in jurisdictions which have yet to pass on this proposition. F. J. S.