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## A CRITICAL STUDY OF "AN ACT DEFINING THE CONDITIONS UNDER WHICH THE GOVERNMENT OF THE PHILIPPINE ISLANDS MAY BE SUED"

(ACT 3083)

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### PART I.

#### THE DOCTRINE OF GOVERNMENT'S IMMUNITY FROM SUIT

The immunity of the governments of sovereign states from suit is a well recognized principle of constitutional law. This immunity from suit is an inherent attribute of sovereignty. The Supreme Court of the United States has well enunciated this doctrine when it said that "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." (*Kawananakoa vs. Polyblank* 205 U. S. 349, 353). The same court said that "The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and, consequently, controlled in the use and disposition of the means required for the proper administration of the government." (*The Siren vs. U. S.* 19 L. ed. 129, 130).

The immunity of the government from suit, however, extends only to the central government of a sovereign state and not to its political subdivisions or municipal corporations. But in the United States the Eleventh Amendment to the Constitution extends the immunity from suits to the states of the Union in its provision that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to a coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor

convenient that the several states of the Union, invested with that large residuum of sovereignty which has not been delegated to the United States, should be summoned as defendants to answer the complaint of private parties, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent and in favor of individual interests..." (In *Re Ayers* 125, U. S. 443). The immunity from suit exists when there is a sovereignty involved.

The exemption of the Government from suit refers not only to actions brought directly against it, but also to actions brought indirectly. No action can be brought against the property of the Government. As justly observed, there is no distinction between suits against the government directly and suits against its property. (*The Siren vs. U. S.* 19 L. Ed. 129). Likewise a suit nominally against an officer, but really against the State to enforce performance of its obligation in its political capacity will not lie. An action against the officers of the government which seeks performance by compelling those things to be done by the officers which, when done, would constitute a performance by the government cannot be maintained. (*Lousiana vs. Jumel* 107 U. S. 711; *In Re Ayers* 123 U. S. 443; *Hagood vs. Southern* 117 U. S. 52).

The government can only be sued if it so consents. This consent of the government is expressed through legislative enactments. (*Railroad Co. vs. Tennessee* 101 U. S. 337; *Railroad Co. vs. Alabama* 101 U. S. 832). But the government can attach any conditions it pleases to its consent. "As the state may withhold all remedy, it may attach to the remedy it actually gives whatever conditions and limitations it chooses; and its own interpretation and application of its statutes on that subject, given by its own judicial tribunal, are conclusive upon the parties seeking the benefit of them. No right... is affected by them unless they are framed or administered so as, in some particular case, to deprive the party of his property without due process of law or to deprive him of equal protection of the laws." (*De Saussure vs. Gaillard* 127 U. S. 216). But when the government sues a private individual, such individual can present any set-offs, counterclaims and other defenses against the government. As the Supreme Court of the United States has said: "Although direct suits cannot be maintained against the United States, nor against their property, yet when the United States, institutes a suit, they waive their exemption so far as to allow a presentation

by the defendants of set-offs; legal and equitable, to the extent of the demand made or property claimed, and when they proceed in rem, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of the defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them beyond the demand or property in controversy." (*The Siren vs. United States* 19 L. Ed. 129). But a state or government by appearing in a suit brought against it may waive its immunity. The immunity of the government from suit is like a personal privilege that may be waived, so that in a suit, well brought, in which a government has sufficient interest to entitle it to become a party defendant, its appearance in the court through a duly authorized legal representative is a voluntary submission to the court's jurisdiction. (*Clark vs. Bernard* 108 U. S. 436; *Richardson vs. Fajardo Sugar Co.* 60 L. Ed. 879, 241 U. S. 44).

#### THE APPLICABILITY OF THE DOCTRINE IN THE PHILIPPINE ISLANDS

We have pointed out that the immunity of the government from suit exists when there is a sovereignty involved. The Supreme Court of the United States has interpreted this doctrine in such a way as to extend to the territories of the United States. The United States Supreme Court said: "the doctrine is not confined to powers that are sovereign in the full sense of judicial theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow." (*Kawananakoa vs. Polyblank* 205 U. S. 349, 353). And according to that same tribunal this doctrine of immunity from suit is applicable to the government of the territories of Porto Rico and Hawaii. (*Kawananakoa vs. Polyblank*, supra; *People of Porto Rico vs. Rossally y Castillo* 227 U. S. 270). There is no decision of the United States Supreme Court regarding the applicability of this doctrine to the Philippine Islands. However, reasoning by analogy, it is concluded that the government of the Philippine Islands cannot be sued without its consent. As Justice Malcolm of the Philippine Supreme Court very well says, "The govern-

ment established by the United States in the Philippines is of such a nature as to bring it within the general rule of exempting a state from suit without its consent. The framework of government is, in its essentials, quite similar to Hawaii, Porto Rico and a state of the American Union. It has, at least, as many sovereign attributes as those territories or a state. Reasons of public policy operate as strongly here as elsewhere. Laws are made here and logic teaches that a legal right cannot subsist against the authority which creates it. It cannot be presumed that Congress intended to permit destruction of a government which it went to such pains to set up." (G. A. Malcolm, Philippine Constitutional Law, p. 288.) The Supreme Court of the Philippine Islands has also held that the Government of the Philippine Islands cannot be sued without its consent. (*Merrit vs. Government of the Philippine Islands* 34 Phil. 311; *People vs. Santiago* 43 Phil. 120).

The Government of the Philippine Islands has from time to time given its consent to be sued by legislative enactments. At present there is one general law embodied in Act 3083 of the Philippine Legislature which defines the conditions under which the Government of the Philippine Islands may be sued by private individuals. It is the purpose of this study to make some critical comments regarding some provisions of the said law.

## PART II.

### AN ACT DEFINING THE CONDITIONS UNDER WHICH THE GOVERNMENT OF THE PHILIPPINE ISLANDS MAY BE SUED

(ACT 3083)

Act 3083 of the Philippine Legislature was intended to do away with the enactment of enabling laws every time an action would be brought against the Government of the Philippine Islands. It had for its object to authorize any person who had a claim against the government to present the corresponding action after due compliance with the conditions imposed by the law. In effect, Act 3083 was passed in order to eliminate the delays and difficulties of securing the legislative enactment before a suit can be instituted against the government. (See Explanatory note to the original bill by the author).

This act originated as Senate Bill No. 196 presented by Senator Vicente Vera during the special session of the Philippine Legislature in 1923. The bill suffered slight changes in the Senate, but when it was under consideration in the House of Representatives material changes in the provisions were made.

It was these material changes made in the House of Representatives, that, in the opinion of the writer, have caused the anomaly in the interpretation of the law. The bill as amended was finally approved as Act 3083 on February 24, 1923. (See *Actas del Senado*, Tomo VII.) In the subsequent discussion, the writer will endeavor to point out, what to his mind is, the fundamental defect of this law.

We will now discuss the Sections of the Act.

#### SECTION I.

*Subject to the provisions of this Act, the Government of the Philippine Islands hereby consents and submits to be sued upon any moneyed claim involving liability arising from contract, express or implied which could serve as a basis of civil action between private parties.*

We have referred in the preceding part of this work that the government may attach any condition it pleases to the consent it gives to be sued. We see in this first section of Act 3083 that the government has limited its consent to be sued only to money claim arising from contractual relations. It is a recognized principle, however, that apart from the conditions that the government may impose its liability must be determined like that of any individual. (*Green vs. State* 73 Cal. 29). The provision of this section has a similarity with certain provisions of the Act of the United States Congress providing for a Court of Claims. The United States Court of Claims was so constituted in order to provide a remedy for those persons who may have a claim against the United States Government on any liability arising from any contract, express or implied. In one case it was held, "that the United States is liable to damages for breach of its contract, on the same principle and to the same extent as a private party; and a suitable remedy has been provided by law in the jurisdiction conferred upon the Court of Claims." (*Chicago and Northwestern Railroad Co. vs. United States* 104, U. S. 680). In another case it was also held that a money judgment can be rendered against the United States by the Court of Claims and by no other courts. (*Case vs. Terrel*, 20 L. Ed. 134). The Court of Claims has jurisdiction of cases against the United States and to render judgment therein, only by Acts of Congress granting such jurisdiction; and when a case is referred to it by resolution of Congress, the jurisdiction is subject to whatever limitations are prescribed in such resolution. (*De Grout vs. United States*, 18 L. Ed. 700). We see then that Congress may

grant other jurisdiction to the Court of Claims. But the allowance of particular claims by Congress cannot be regarded as a recognition by the Government of its liability upon other demands of like character. (*United States vs. Jones*, 121 U. S. 89).

The Section provides that the Philippine Government can only be sued upon any money claim. According to the case of *Prig vs. Pennsylvania* (10 L. Ed. 1060) "a claim in a just juridical sense is a demand of some matter, as of right, made by one person upon another, to do, or to forbear to do, some act or thing, as a matter of duty." In so far as this Act is concerned, therefore, a claim against the government is a right to demand money from the government. Any other demand is not within the purview of this Act. The section further provides that the claim must involve liability arising from contract, express or implied, which could serve as a basis of civil actions between private parties. What is a contractual relation between the Government of the Philippine Islands and the person or entity suing it is to be determined in each particular case. In this respect the provisions of the Civil Code, the Administrative Code, and the decisions of the Philippine Supreme Court regarding contracts should govern. (See Civil Code, Book IV, Title II; Administrative Code, Secs. 568, 590, 606-608, 1907, 1917). According to the Administrative Code, "'Contract' includes every species of engagement or agreement competent to originate legal liability or to serve as the basis of a civil action between private parties." Claims against the Government arising from illegal exaction of taxes by the Collector of Internal Revenue, or the illegal exaction of customs duties by the Collector of Customs are not included in the provision of Section I of Act 3083, because the law has provided procedure for such purposes. (Administrative Code. Secs. 1579, 1370-1393.)

There is no implied obligation on the part of the Philippine Government, however, to respond for damages arising from the fault or negligence of its officers. And the waiver of the government from its immunity from suit does not concede its liability for the torts of its agents or officers. (*Merritt vs. Government of the Philippine Islands* 34 Phil. 311). No government has ever held itself liable to individuals for misfeasance, laches or unauthorized exercise of power by its officers and agents. (*Gibbons vs. United States*, 19 L. Ed. 453). In the language of Judge Story, "The Government does not undertake to guarantee to any person the fidelity of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, difficulties, and losses, which would be

subversive of the public interest." (Quoted in the last two cases cited). The United States Supreme Court speaking about the jurisdiction of the Court of Claims wherein the United States can only be sued for liability arising from express or implied contracts said: "The reason for this restriction is very obvious upon a moment's reflection. While Congress might be willing to subject the Government to judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do act which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of someone. For such acts, however high the position of the officer or agent who did or commanded them, Congress did not intend to subject the Government to payment of damages for all the wrongs committed by the officers or agents, under a mistaken zeal or actuated by worthy motives." (Langford vs. The United States, 101 U. S. 341). The Government of the Philippine Islands is only liable for the negligent acts of its officers, agents and employees when they are acting as special agents. (Civil Code, Art. 1903, par. 6; Merritt vs. Government of the Philippine Islands, 34 Phil. 311).

## SECTION 2.

*A person desiring to avail himself of the privilege herein conferred must show that he has presented his claim to the Insular Auditor and that the latter did not decide the same within two months from the date of its presentation.*

This is the most important section of Act 3083, and it is upon it that this work is especially centered. It is the opinion of the writer that there is a fundamental defect in the provision of this section, and a careful analysis of its provisions is here necessary.

This section requires as a condition precedent before a suit can be instituted against the government for the recovery of a moneyed claim arising from contract, express or implied, that the claim must first be presented to the Insular Auditor and that the auditor did not decide the same within two months from the date of its presentation. Since the enactment of Act 3083 in 1923 only one case has been decided by the Supreme Court wherein the provision of Section 2 was in question. That was the case of *Compañía General de Tabacos de Filipinas vs. The Government of the Philippine Islands* (45

Phil. 633). Briefly the facts of this case were as follows: About February 2, 1923, the plaintiff and the defendant agreed that the plaintiff's steamer "Mauban" should transport from Manila to the port of Currimaoc, Ilocos Norte, six cases of denatured alcohol and four cases of office supplies, for which the defendant agreed to pay the usual charges. The cargo was duly delivered by the plaintiff to the port of destination, but the defendant did not pay even a part of the charges which amounted to P283.63. Pursuant to the provision of Act 3083, on August 24, 1923, the plaintiff presented its claim to the Insular Auditor who on the same day decided the claim adversely to the plaintiff. Thereafter the plaintiff brought this action in the Court of First Instance. The defendant demurred to the plaintiff's complaint, which demurrer was sustained by the Court. The question involved was the legal force and effect of Section 2 of Act 3083. In affirming the decision of the Lower Court, the Supreme Court in construing Section 2 of Act 3083 said, "Giving the language its plain, ordinary meaning, it should be construed to read that a claimant must first present his claim to the Insular Auditor, and, second, that he did not allow or reject it within two months from the date of its presentation." The Court further said that "Inasmuch as it is an unusual and extraordinary remedy, the right to maintain an action against the Government must be conferred by the plain, positive, express provision of a statute, the meaning of which should not be left to doubt or construction." Undoubtedly the Supreme Court interpreted the section to the letter, and it could not have done otherwise, unless it meant to alter the express provision of the law.

With the above interpretation of Section 2 in mind, we cannot escape the conclusion that the Insular Auditor is granted an enormous power in the determination of claims against the Government. If he decides, either favorably or adversely, no relief in the court under Act 3083 can be sought by the dissatisfied claimant. It is only when the Insular Auditor keeps silent for two months that the claimant can go to court. As a certain writer has pointed out, Act 3083 "in effect delegates to the Auditor the right to permit a person to bring suits against the Philippine Government." (Sinco, Principles of Philippine Constitutional Government, p. 23). We believe that the Insular Auditor of the Philippine Islands is not so powerful an officer of the Government as to exercise the power to pass final judgment on the contractual rights of private persons, or to determine whether a person can bring suit against the Govern-

ment or not. Our task now is to inquire into the nature and extent of the decision of the Insular Auditor.

The powers and duties of the Insular Auditor are provided for in the Act of Congress of August 29, 1916, known as the Jones Law, and in the Administrative Code of 1917. Referring to the decisions of the Insular Auditor, the Jones Law provides:

"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." (Section 24 par. 6.)

"That any person aggrieved by the action or decision of the auditor in the settlement of his account or claim, may within one year, 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 reason and authorities relied on for reversing such decision.

"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 fail to sustain the action of the auditor, he shall forthwith transmit his grounds of disapproval to the Secretary of War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be final and conclusive." (Section 25).

The Administrative Code of 1917 provides the following regarding the decisions of the Insular Auditor:

SECTION 653. *Appeal from Decision of Auditor.*— Any person aggrieved by the action or by any decision of a district auditor in the settlement of an account or claim may within one year appeal to the Insular Auditor; and any person similarly aggrieved by the action or decision of the Insular Auditor may likewise within one year appeal to the Governor General.

From a decision adversely affecting the interest of the Government the appeal may be taken by the proper head of Department, or in the case of provinces and municipalities, or other form of local government, by the head of the Office or branch of the Government immediately concerned.

SECTION 654. *Procedure incident to appeal.*— All appeals shall be in writing and the particular action or decision to which exception is taken shall be specifically set forth, with the reasons and authorities relied on for

modifying or reversing the same, all the papers in the cause being at the same time transmitted to the officer to whom the appeal is taken.

SECTION 655. *Finality of Decision made by Auditor.*—A decision of the Insular Auditor or of a district auditor upon any matter within their respective powers shall be conclusive upon the executive branches of the Government, subject to appeal or review as hereinafter provided.

SECTION 656. *Final action by the Governor General or Secretary of War.*—If the Governor General shall upon any appeal to him, confirm the action of the Auditor, he shall so indorse the appeal and transmit it to the Auditor, and such action shall be final. Should he fail to sustain the action of the Auditor, he shall forthwith transmit his grounds of disapproval to the Secretary of War, together with the appeal and the papers necessary to a proper understanding of the matter; and the decision of the latter officer shall thereupon be conclusive.

In cases where the Insular Auditor exercises his discretionary power, on matters within his jurisdiction, the Court cannot compel him to change his decision by a writ of mandamus. This is specially true in cases involving an examination and settlement of an account, the balancing of items of debit and credit, because no other officer of the Government is empowered to settle and decide those questions. (*Lamb vs. Phipps*, 22 Phil. 456). It must be remembered, however, that there is always a remedy by administrative appeal from the decisions of the Insular Auditor. Mandamus will only lie against the Insular Auditor when powers which are ministerial are in question. (*Compañía General de Tabacos vs. French*, 39 Phil. 34; *Inchausti vs. Wright* 47 Phil. 866; *Advance Opinions*, U. S. Supreme Court, January 1, 1927, p. 267).

The Jones Law as well as the Administrative Code of 1927 provides that "the decisions of the Insular Auditor shall be final and conclusive upon the executive branches of the Government." This provision has been interpreted to mean that the decisions of the Insular Auditor has no binding effect upon the Legislature and the Judiciary. As the Supreme Court in the case of *Inchausti vs. Wright* (47 Phil. 866, 893) says: "It is fundamental that all governmental power is vested in the executive, legislative, and judicial branches of the government, and the powers and duties of each branch are separate and distinct and clearly defined, and this law (Jones Law) specifically says that the decisions shall be final and conclusive upon the 'Executive Branches of the Government.'" It does not say that his

decisions shall be final and conclusive upon either the legislature or judiciary. The reason is very apparent. If the law had intended that the Auditor's decisions should also be binding upon the legislative and judicial branches, it would have said so. The fact that it says that his decisions shall be final and conclusive upon the 'Executive Branches of the Government' is conclusive... that it was never the intent of the law that his decisions should be final and conclusive upon the courts. Again, with all due respect to the Governor-General and the Secretary of War, it was merely intended that either of them should exercise judicial functions or decide judicial questions of a civil nature. If the law did so provide, it might well be contended that it would be void and unconstitutional." (See also *Compañia Gral. de Tabacos vs. French* 39 Phil. 34, 56). The decisions of the Insular Auditor are controlling only upon the departments, bureaus and offices of the Executive Branch of the Government. When the right of a private person is prejudiced by the decision of the Insular Auditor, especially if that right is based upon contractual relations with the government, it would be an act of injustice to shut the doors of the Court to him and deprive him of the benefits of an open, public, and fair trial before a judicial tribunal. It would be shocking to think if an executive or administrative officer, in a country like the Philippines where the principles of democracy and constitutional limitations are the foundations of government, can deprive a person of ten or one hundred thousand pesos without the intervention of the courts. That would amount to a deprivation of property without due process of law.

It is true that the Jones Law and the Administrative Code of 1917 provide for appeal from the decision of the Insular Auditor, but the result of that appeal is not binding upon the courts, as we have already pointed out. And it will be noted that neither Section 25 of the Jones Law nor Sections 653 to 656 of the Administrative Code specify that such an appeal shall be an exclusive remedy. The Supreme Court has the following to say regarding this point: "In section 653 of the Administrative Code (1917) it is declared that any person aggrieved by a decision of the Insular Auditor may, within one year, appeal to the Governor General. In section 656 it is declared that the action of the Governor General affirming the Auditor's decision shall be final; but if he reverses the Auditor, the matter goes to the Secretary of War whose decision shall be conclusive. Provisions to the same effect are in the Jones Law, sections 24, 25. It is our opinion that the word 'final,' as used in section 656 of the

Administrative Code in speaking of the action of the Secretary of War, has reference to the finality and conclusiveness of the proceeding in the administrative sense—that is, final and conclusive upon the executive branches of the Government. . . . It results that the proceedings under sections 653 to 656 inclusive, of the Administrative Code of 1917 are at no stage binding upon the courts whether an administrative appeal is taken or not. . . . The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts." (*Compañia Gral. de Tabacos vs. French* 39 Phil. 34, 57, 58). In another case the Supreme Court said, "The law having defined and limited the finality and conclusiveness of the decisions of the Auditor to and upon the 'Executive Branches of the Government' only, it must follow that the appeal for which section 25 (Jones Law) provides is an appeal from a decision of the Insular Auditor which would be final and conclusive upon the 'Executive Branches of the Government' only, and that it was never intended that the provisions for such appeal should apply to questions which are purely judicial." (*Inchausti vs. Wright* 47 Phil. 866, 893, 894). It was also held by the Supreme Court of the United States that "the decision of an accounting officer against the validity of a claim against the United States is not regarded as conclusive upon the courts." (*United States vs. Wallace* 116 U. S. 398; 29 L. Ed. 675).

The nature of the office of the Insular Auditor is administrative, and it was never intended to clothe his decisions upon matters that affect the contractual rights of persons with the finality of a judicial decision. To let the decision of the Insular Auditor have the effect of a judicial pronouncement will be to make him an arbiter of the whole government.

It is true that the Administrative Code of 1917 in Section 584 provides:

*"General Jurisdiction of Bureau of Audits.*—The authority and powers of the Bureau of Audits extend to and comprehend all matters relating to accounting procedure, including the keeping of accounts of the Government, the preservation of vouchers, the methods of accounting, the examination and inspection of the books, records, and papers relating to such accounts, and to the audit and settlement of the accounts of all persons respecting funds or property received or held by them in an accountable capacity, as well as to the *examination and audit of all debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches.* . . . ." (*Italics is mine*).

But such action of the Bureau of Audits, or, more specifically, the Insular Auditor, in passing upon the validity and propriety of any debt or claim, due from or owing to the government, which come to him for audit and examination, is purely an administrative act which has no other force or effect except as it affords a conclusive rule for the guidance of the offices in the executive branch of the government. When the Philippine Legislature provided in Section 2 of Act 3083 that the claim must first be presented to the Insular Auditor, the legislators had in mind that the Insular Auditor should act upon it not as a judicial officer but as an administrative officer.

What must have been the intention of the Legislature when it enacted Act 3083? In order to answer this question we have to go into the proceedings when Act 3083 was under consideration in the Legislature.

As we have already referred to, Act 3083 originated as Senate Bill No. 196. As originally presented, Section 2 of Act 3083 read as follows:

*"ARTICULO 2.—La persona que desee utilizar el privilegio que por esta Ley se confiere debe demostrar que ha presentado su reclamación al Auditor Insular y que la ha gestionado en vano hasta el fin, por la vía administrativa, en la forma que se prescribe en los artículos 653 al 656 inclusive, del Código Administrativo." (Actas del Senado, Tomo VII, p. 255).*

The Senate passed the bill without making any change in the provisions of Section 2. When the bill was under consideration in the House of Representatives, Representative Diez sponsored it, and during the course of his speech the following interpellations and answers were made:

SR. PADILLA.—*Y se dice en el proyecto que el Auditor es el que va a decidir?*

SR. DIEZ.—*Si, señor, porque si el Auditor da por buena la reclamación no habría necesidad de acudir a los tribunales.*

SR. PADILLA.—*Supongamos que el Auditor rechaza la acción?*

SR. DIEZ.—*"Entonces el reclamante puede acudir a los juzgados para hacer efectivo su derecho."*

SR. MENDOZA.—*En el artículo 2 se provee que antes que una persona puede entablar acción contra el gobierno, hace falta que se presente la reclamación ante el Auditor Insular, y si después de haber gestionado en vano por las*

*vías administrativas resultaren infructuosas las gestiones, en este caso es cuando se puede proceder directamente contra el Gobierno.*

SR. DIEZ.—*Si, señor.*

SR. MENDOZA.—*No cree S. S. que esto se debe enmendar en el sentido de que se determine el tiempo dentro del cual el Auditor Insular debe resolver la reclamación presentada?*

SR. DIEZ.—*Determinar un tiempo fijo, no sería conveniente hacerlo, porque pudiera suceder que los que reciben las reclamaciones tuvieran necesidad de bastante tiempo para estudiarla. Pudiera ser que el Auditor necesitase de muchos datos antes de aprobarla o rechazarla. Dejamos pues, a la diligencia de la persona interesada a gestionar la pronta resolución de su reclamación por el Auditor.*

SR. MENDOZA.—*No cree S. S. que tal como esta redactado el Artículo 2 daría lugar a que los asuntos que se presentan ante el Auditor sean interminables?*

SR. DIEZ.—*Creo que no hay motivos de dudar de que los asuntos que se sometan al Auditor Insular se estancuen en su mesa.*

SR. MENDOZA.—*Si el objeto de la Ley, Sr. Ponente, es obtener una pronta administración de justicia, por que no determinar un plazo razonable dentro del cual el Auditor esté obligado a resolver el asunto?*

SR. DIEZ.—*Es por el motivo que ya he manifestado a S. S. pues podría ser que el asunto requiera un estudio largo, de tal manera que no sea suficiente el plazo que fijemos en la ley.*

SR. MENDOZA.—*Pero supongamos S. S. que el Auditor no resuelva la cuestión dentro de un año, como quedarían los intereses de las partes?*

SR. DIEZ.—*No creo que ocurra ese caso, porque el Auditor puede ser requerido por la parte interesada a resolver prontamente su reclamación.*

SR. MENDOZA.—*Es que tal como esta redactado el proyecto, el Auditor siempre tendría razón diciendo que todavía está estudiando el asunto.*

SR. DIEZ.—*En ese caso, el Auditor responderá ante el Jefe correspondiente de la dilación innecesaria en el despacho del asunto.*

SR. MENDOZA.—*No sería un tramite mas embarazosa y dilatorio el tramite que S. S. dice?*

SR. DIEZ.—*Creo que no.*

SR. MENDOZA.—*No estaría S. S. conforme en que se determine un plazo razonable?*

After more discussions, Representative Mendoza presented the following amendment:

SR. MENDOZA.—*Sr. Presidente, propongo que se sustituyan las palabras "la ha gestionado en vano, hasta el fin, por la vía administrativa," que aparecen en las líneas 9 y 10 de la página 1 por las siguientes: "este no lo ha resuelto dentro del plazo de dos meses a contar desde la fecha de la presentación."*

The amendment of Representative Mendoza was approved by the House, and it was also approved by the Senate. So that Section 2 of Act 3083 as amended and approved read:

*"ARTICULO 2. La persona que desee utilizar el privilegio que por esta Ley se confiere, debe demostrar que ha presentado su reclamación al Auditor Insular y que éste no lo ha resuelto dentro del plazo de dos meses a partir desde la fecha de la presentación." (See Journal of the House of Representatives, unbound typewritten copy, for February 24, 1923. Special Session).*

It can be observed that the intention of the Legislature in having the claim presented to the Insular Auditor, as a condition precedent before an action can be brought against the Government, was to make said officer of the Government exercise his administrative function on the claim, as an accounting officer. Of course, if the Insular Auditor did not find any doubt or irregularity in the claim presented to him, he may readily allow such claim; and there would be no necessity of going to the courts. But in so exercising such power to allow or disallow a claim, the Insular Auditor exercises no more than an administrative function which is conferred upon him by law. The original bill as approved in the Senate clearly showed the legislative intent of that body as shown by the provision of Section 2 of the Bill which read partly, thus: *"ha presentado su reclamación al Auditor Insular y que la ha gestionado en vano, hasta el fin, por la vía administrativa, en la forma que se prescribe en los artículos 653 al 656 inclusive, del Código Administrativo."* We have already quoted the sections of the Administrative Code referred to, and there is no doubt as to the meaning of those sections.

The House of Representatives in its deliberation on Senate Bill No. 196 even went farther than the Senate by setting a time limit when the Insular Auditor should exercise his administrative function. Not content with simply limiting the time of the Insular Auditor, the House altogether suppressed the provisions regarding appeal through administrative channels. The amendment of the House of Representatives was accepted by the Senate. Surely the intention of the Legislature was to provide for a prompt relief from any adverse action of the Insular Auditor,

and at the same time to do away with the delays and difficulties which are incident in administrative appeals. This intention can be well justified because, as we have pointed out in the preceding discussions, the decisions in the administrative appeal have no binding effects upon the courts. To afford a prompt and final remedy to the aggrieved claimant was what was intended by Act 3083.

The Supreme Court has interpreted Section 2 of Act 3083 to mean that (1) the claim must first be presented to the Insular Auditor, and that (2) the Auditor did not allow or reject it within two months from the date of its presentation. (*Compañía Gral. de Tabacos vs. Government* 45 Phil. 663, 666). For the Insular Auditor not to allow or reject a claim presented to him would be tantamount to his paying no attention at all to a claim presented against the Government through him. If the Insular Auditor would act that way, he would violate the express provision of the Administrative Code of 1917 which charges him with "the examination and audit of all debts and claims of any sort due from or owing to the Government of the Philippine Islands." (Sec. 584). It is absurd if not ridiculous to say that, in order to attain the purposes of Act 3083, the Legislature authorized the Insular Auditor to keep silent for two months, thereby authorizing him to neglect a duty that is imposed upon him by law. It must be noted also, that the same Legislature that enacted Act 3083 passed Act 3066 amending Section 584 of the Administrative Code of 1917, and the provision of Section 584 regarding the examination and audit by the Insular Auditor of claims against the Government was untouched. We cannot conceive of the idea that the Insular Auditor would only shut his eyes and ears to a claim presented to him, especially if the claim involves thousands of pesos. If within two months, the Insular Auditor does not decide whether to allow or reject a claim presented to him, his attitude is tantamount to the rejection of the claim. No difference should exist between the silence of the Insular Auditor and his express disapproval. This is an instance where a denial can be presumed from mere silence.

We repeat that the intention of the Philippine Legislature in the provision embodied in Section 2 of Act 3083 was that if the Insular Auditor disapproves the claim within two months from the date of its presentation to him, the aggrieved claimant can go to court and file an action directly against the Government. This is the inescapable conclusion that can be made after a reading of the legislative record of the proceedings when Act 3083 was under deliberation. It is to be regretted that the mem-

bers of the Philippine Legislature, perhaps due to haste or excitement during the last days of the legislative session, overlooked the proper wording of the law that they were making; so that it resulted that they did not express what they meant. Legislative records show that Senate Bill No. 196—which later became Act 3083—suffered many amendments in the House of Representatives within a period of scarcely one hour. We wonder if the legislators had enough time to deliberate on the words that they were using in their amendments.

The Philippine Supreme Court could not have made another interpretation of Section 2 of Act 3083 because the wordings of the statute were such that no other construction was available. It is a principle of statutory construction that "The Legislature must use words which in some way express intent, for a court cannot amend the law to make it agree with what it is believed the Legislature must have intended. . . . 'Courts must administer the law,' said Mr. Justice Ladd in an early opinion, 'not as they think it ought to be but as they find it and without regard to consequences.' Where a statute is plain and unambiguous, expediency or practical utility cannot be considered." (Malcolm, Philippine Statutory Construction, Philippine Law Journal, February 1916, pp. 300, 303).

We have shown that the intention of the Legislature in the provisions of Section 2 of Act 3083 was to allow an aggrieved claimant to go to the courts and sue the Government directly in case of an adverse judgment by the Insular Auditor. Said section should have been worded as follows:

SECTION 2. A person desiring to avail himself of the privilege herein conferred must show that he has presented his claim to the Insular Auditor and that the latter disapproved or did not decide the same within two months from the date of its presentation.

Act 3083 in its present form is practically useless. As it is construed at present, the Insular Auditor is given power to decide on the contractual rights of persons. To allow the Insular Auditor such power, in addition to the enormous powers which his office has often claimed, would indeed be a dangerous precedent. Act 3083 should be amended in order to afford the relief that it intended to afford. As Justice Malcolm says: "For all practical purposes, Act 3083 is thus merely so much paper." (Malcolm, Philippine Constitutional Law, p. 290).

## SECTION 3.

*Original actions brought pursuant to the authority conferred in this Act shall be instituted in the Court of First Instance of the City of Manila or of the province where the claimant resides, at the option of the latter, upon which court exclusive original jurisdiction is hereby conferred to hear and determine such actions.*

The Organic Act of the Philippine Islands prohibits the Philippine Legislature from diminishing the jurisdiction of the Courts of First Instance and the Supreme Court, and by virtue of this prohibition the Legislature can only increase such jurisdiction. It is the exercise of this power to increase the jurisdiction of the Court of First Instance and the Supreme Court that the Philippine Legislature in Section 3 of Act 3083 conferred original jurisdiction upon the Court of First Instance in actions brought against the Government. The claimant is given the option of bringing his action either in Manila or in the province of his residence. This provision of section 3 of Act 3083 has a similarity with certain provisions of Section 377 of the Code of Civil Procedure governing the venue of personal actions. The convenience of the claimant is given allowance by this section.

The Philippine Legislature, in conferring original jurisdiction upon the Courts of First Instance in actions against the government upon liability arising from contract, express or implied, has given such courts the nature similar to the Court of Claims in the United States. In deciding cases referring to claims against the government it would not be amiss, therefore, to make reference to the American jurisprudence touching the Court of Claims.

## SECTION 4.

*Actions instituted as aforesaid shall be governed by the same rules of procedure, both original and appellate, as if the litigants were private parties.*

We have already pointed out that when the government allows itself to be sued, its liability must be determined just like any private individual. In accordance with the provision of Section 4 of Act 3083, therefore, the provisions of the Code of Civil Procedure, the Rules of Court, and other laws governing procedure in civil actions should govern the proceedings in actions against the government. An appeal from the decision of the Court of First Instance may be brought to the Supreme Court of the Philippine Islands, and if the amount of the claim

warrants, the appeal may even be brought to the Supreme Court of the United States.

An exception to this provision regarding procedure must, however, be noted. Although the Government when sued under the provisions of this Act stands as a private party, its liability in case of adverse judgment against it does not extend to the payment of costs and interest. In the case of *Marine Trading Company vs. Government of the Philippine Islands* (39 Phil. 29), the Philippine Supreme Court held that the State never pays interest nor is liable for costs unless it is so expressly provided in the statute allowing the suit against the Government. Inasmuch as Act 3083 is silent as to the liability of the Government for the payment of interest and cost, it may be concluded that in judgments upon cases brought in pursuance to the provisions of this Act the Government cannot be made to pay costs and interests. An Act permitting a suit against the State gives rise to no liability not previously existing, unless it is clearly expressed in the Act. (*Merritt vs. Government of the Philippine Islands*, 34 Phil. 311).

#### SECTION 5.

*When the Government of the Philippine Islands is plaintiff in an action instituted in any court of original jurisdiction, the defendant shall have the right to assert therein, by way of set-off or counterclaim in a similar action between private parties.*

The provision of this section is but equitable, since we have pointed out that the government stands like a private suitor when it brings an action against a private individual or entity. (*The Siren vs. The United States* 19 L. Ed. 129). In the language of the United States Supreme Court: "... when an action is brought by the United States to recover money in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny him the right of setting up such claim in a court of justice, and turn him around to an application to Congress." (*U. S. vs. Ringgold*, 8 L. Ed., cited in *Sinco, Principles of Philippine Constitutional Government*, p. 22).

The liability of the government, however, in case of an affirmative relief interposed against it by the party it sues, does not go beyond the demand or the property involved. (*The Siren vs. U. S.* 19 L. Ed. 129). It might be argued that inasmuch as the Government by Act 3083 allows itself to be sued it might just as well allow itself to be held liable to a set-off or

counterclaim beyond its demand, when such set-off or counterclaim is in money and arising from contract express or implied. This argument may be answered by the clear provisions of Section 2 of Act 3083 requiring a previous presentation of the claim against the Government to the Insular Auditor whose action would determine as to whether the claim may be brought to court or not. In so far as the excess of the counterclaim or set-off of the defendant over the demand of the government is concerned, such excess is a distinct claim, and before it can prosper the provisions of Section 2 of Act 3083 must be strictly followed.

#### SECTION 6.

*Process in actions brought against the Government of the Philippine Islands pursuant to the authority granted in this Act shall be served upon the Attorney General whose duty it shall be to appear and make defense either himself or through delegates.*

The Bureau of Justice of which the Attorney General is the head is the law office of the Government of the Philippine Islands. The Attorney General is the principal law officer of the Government and he has the authority to act for and represent the Government of the Philippine Islands, its officers, and agents in any official investigation, proceeding, or matter requiring the services of a lawyer. There is an assistant chief in the Bureau of Justice who is the Solicitor General and a number of assistant attorneys. The Attorney General may therefore delegate to any of the assistant attorneys in his office the duty that is imposed upon him by the provision of Section 6 of Act 3083. (See Administrative Code of 1917, Sections 1659, 1660, and 1661.)

#### SECTION 7.

*No execution shall issue upon any judgment rendered by any court against the Government of the Philippine Islands under the provisions of this Act; but a copy thereof duly certified by the clerk of the court in which judgment is rendered shall be transmitted by such clerk to the Governor General, within five days after the same becomes final.*

The provision of the first part of this Section is in consonance with the principle that the property of the state can not be sued directly. Thus, even public funds in the hands of officers of the government cannot be reached indirectly by attachment or garnishment. (Director of Commerce and Industry vs. Concepcion, 43 Phil. 384).

The duty of the clerk of the court, as provided in the second part of this section, is purely procedural and not much comment on it is necessary.

#### SECTION 8.

*The Governor General, at the commencement of each regular session of the Legislature, shall transmit to that body for appropriate action all decisions so received by him, and if said body determines that payment should be made, it shall appropriate the sum which the Government has been sentenced to pay, including the same in the appropriations for the ensuing year.*

By the provisions of Sections 7 and 8 of Act 3083, the courts, after the rendition of the judgment, have no other power. No execution can issue against the property of the Government, and no remedy can be enforced by the court for the satisfaction of its judgment.

The Legislature is at liberty to determine whether to pay or not to pay the claim. The claimant has only the faith and the credit of the Government to rely on. It is not likely, however, that the Legislature which granted this remedy would be the first to disregard it by refusing to appropriate the amount which the Government has to pay for its just and legitimate obligations.

#### SECTION 9.

*This Act shall take effect upon its approval.*

*Act 3083 was approved on March 16, 1923.*

#### RESUME

In this critical study of Act 3083, we have come to the following conclusions:

1.—That the government of a sovereign state can not be sued without its consent.

2.—That the governments of the territories of the United States, exercising as they are a large measure of self-government, are included in the doctrine of government's immunity from suit without its consent; so that the Government of the Philippine Islands cannot be sued without its consent.

3.—That the government can impose any condition in the consent that it gives.

4.—That when the government gives its consent to be sued, its liability is to be determined like that of any private individual.

5.—That the Government of the Philippine Islands, by Act 3083, gave its consent to be sued for moneyed claims arising from contract, express or implied, after due presentation of the claim to the Insular Auditor.

6.—That the decision of the Insular Auditor has no binding effect upon the courts.

7.—That the object of Act 3083 was to allow an aggrieved claimant against the government to resort to the courts in case of an adverse decision by the Insular Auditor.

8.—That Act 3083 is improperly worded in the provisions of Section 2 thereof, so that the legislative intention is not attained in the application of said law.

#### RECOMMENDATION

It is the earnest hope of the writer that this work will in some way be of some use to the Legislature. It is recommended, therefore, that Section 2 of Act 3083 be amended in order to read as follows:

SECTION 2. "A person desiring to avail himself of the privilege herein conferred must show that he has presented his claim to the Insular Auditor and that the latter disapproved or did not decide the same within two months from the date of its presentation."

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