NOTES *and* COMMENT

The Anomaly Of Aliens Incorporating Under Act No. 1459

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SECTION 6 of Act No. 1459, as amended, provides: "Five or more persons, not exceeding fifteen, a majority of whom are residents of the Philippines, may form a private corporation for any lawful purpose or purposes."

The context of Section 6 as well as the common sense of the situation suggests that natural persons are meant. (*Gov't. of the Philippines vs. El Hogar, 50 Phil. 461*). But the term "persons" unquestionably include corporations (*U. S. vs. Union Supply Co., 215 U. S. 50, 30 Sup. Ct. 15, 54 U. S. [L. Ed.]*); however, for the purposes of this article, the term "persons" shall be limited to natural persons.

The above-cited section uses the term "residents." A resident is one who resides or dwells in a place permanently or for a considerable time. (*Lancaster vs. Toronto, 38 Ont. L., 374, 380*). Whether the term "residents" refers to resident citizens or resident aliens as well, our law does not specify. Where the law requires residence only, it is held that citizenship is unnecessary. (*Humphreys vs. Mooney, 5 Colo. 282; Moxie Nerve Food Co. vs. Baumback, 32 Fed. 205*). Where all or part of the corporators are required to be residents of the state of the proposed corporation, the court, the officer or person whose duty it is to pass upon the sufficiency of the application, articles of incorporation or charter, should require strict compliance with these conditions as to residence. (*Thompson, Corporations, Sec. 177, 2nd Ed.*)

Subject to constitutional and statutory restrictions, the right and capacity to become incorporators, stockholders, or members of a corporation extend to alien friends. (*Commonwealth vs. Hemmingmay, 7 L. R. A. 360; Blien vs. Rand, 77 Minn. 110, 79 N. W. 606, 46 L. R. A. 618; Boatman's Bank vs. Gillespie, 108 S. W. 74, 209 Mo. 217; Princeton Mining Co. vs. Butte First National Bank, 19 P 210, 7 Mont. 530*). Alien enemies cannot become original organizers of a corporation, because the original association is founded on contract and under a principle of public law no contract between parties belonging to belligerent nations can be valid. (*Lamar vs. Browne, 92 U. S. 187; Flying Scud vs. U. S., 6 Wall. 263; U. S. vs. Alexander, 2 Wall. 404; Jecker vs. Montgomery, 18 How. 110*).

The requirement that a majority of the incorporators be residents of the Philippines must be complied with in order to create a *de jure* corporation. (*Am. Salt Co. vs. Heidenheimer, 80 Tex 344, 15 S. W. 1038*).

Other limitations on the rights of aliens to carry on business in the form of corporations are found in Sec. 1, Art. XII and Sec. 8, Art. XIII of the Philippine Constitution, Sec. 16, par. (a) of Commonwealth Act No. 146, Sec. 3 of Commonwealth Act No. 137, and Sec. 2 of Act No. 2719, as amended.

It will be noted that, subject to the above limitations, Act No. 1459, as amended, does not limit the right to organize a private corporation to citizens alone, but to aliens as well.

Ballantine states that the foremost object of incorporation is to gain special privileges not enjoyed by other citizens. (*Manual of Corporation Law and Practice*). By permitting aliens to incorporate Act No. 1459, as amended, concedes to aliens special privileges which not all citizens enjoy, thus placing aliens on a better footing than some citizens. While five to fifteen citizens of the Philippines, entitled as such to all rights attaching to citizenship, cannot incorporate without the further qualification that a majority of them be residents, aliens of an equal number can by a majority of them establishing residence incorporate without the further necessity of citizenship. If alien residents are allowed to incorporate, why not citizens who are non-residents?

It seems that the purpose of our law (Act 1459, as amended) in requiring that a majority of the incorporators be residents of the Philippines is to protect the public interest to the extent that, if the incorporators are residents, the public will be apprised of the integrity and financial stability of the persons behind a business venture. To allow aliens to incorporate when a majority of them are residents will defeat the purpose of the residence qualification embodied in Sec. 6 of Act No. 1459, as amended. Under this provision it will be legally possible for aliens to come to the Philippines for the sole purpose of establishing residence as a prerequisite for incorporation. After incorporating no law prohibits them from leaving their residence for their home-land. Thus we may have a corporation incorporated by aliens, a majority of whom are residents of the Philippines only at the time of incorporation, but who leave the Philippines a day or two immediately after incorporation. The corporation in this case is financed by foreign capital and administered by remote hands, yet enjoying the same privileges as a corporation composed of citizens of the Philippines. Apparently, there is no defective compliance with the law, no irregularities in incorporation, not even a vestige of fraud exercised on the public; but actually there has been an indirect violation of the law, or at least, the purpose for which the residence qualification, as provided for in Sec. 6 of Act No. 1459, as amended, stands for, has been defeated. For this indirect violation or the defeat of the purpose of the law, there is no remedy. Not even the State can proceed against the corporation by quo warranto proceedings, much less an individual dealing with the corporation, for it is not necessary to show a *de jure* existence, even as against the State, when the existence of the corporation is collaterally attached. (*Ballantine, Manual of Corporation Law and Practice, Sec. 19*). For all intents and purposes the corporation is a *de jure* corporation.

So, is it legally possible for aliens to incorporate and then buy all the stock or interest of the corporation and afterwards depart for

their native land, leaving here a dummy board of directors, each owning a share. (Sec. 30, Act No. 1459, as amended). Only two of the members of the board need be residents of the Philippines (Sec. 30, Act No. 1459, as amended), so the rest of the members of the board may be non-residents. Thus, we have another situation whereby a corporation of foreign capital reaping profits which all go into the coffers of a foreign nation, enjoying the same rights as a corporation incorporated by citizens.

Even worse is a case where a domestic corporation established by aliens, a majority of whom were residents at the time of incorporation, but become non-residents immediately thereafter, dispose of 60% of its stocks to citizens of the Philippines, as dummy stockholders, for the purposing of running around the constitutional inhibitions as provided for in Sec. 1, Art. XII and Sec. 8, Art. XIII. Assuming that the dummies are caught and prosecuted, yet the "master minds" go unscathed "with the bag," for they are beyond the reach of our laws.

Section 33 of Act No. 1459, as amended, requires that the secretary of the board of directors must be a citizen and a resident at the same time, but nowhere in that law can we find citizenship qualification for incorporators, directors or stockholders. If there is any need for a citizenship qualification, the post of a secretary is one for which citizenship is most unnecessary. In the light of Act No. 1459, as amended, Sec. 33 is not only difficult to justify but entirely unjustifiable! If aliens can be incorporators, directors or stockholders, then why not the secretary? If the secretary must be a citizen, with more reason must an incorporator, a director or stockholder be citizens!

"THERE is no freedom without choice, and there is no choice without knowledge—or none that is not illusory."—JUSTICE CARDOZO, *44 Harvard Law Review 682.*