

THE ILOILO ICE AND COLD STORAGE COMPANY, PLAINTIFF AND APPELLEE, VS. THE MUNICIPAL COUNCIL OF ILOILO ET AL., DEFENDANTS AND APPELLANTS.

G.R. No. L-7012. March 26, 1913

Ponente: TRENT, J.

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TRENT, J.:

According to the pleadings, the plaintiff, upon authority granted by the defendant, constructed an ice and cold storage plant in the city of Iloilo. Some time after the plant had been completed and was in operation, nearby residents made complaints to the defendant that the smoke from the plant was very injurious to their health and comfort! Thereupon the defendant appointed a committee to investigate and report upon the matters contained in said complaints. The committee reported that the complaints were well founded. The defendant council then passed a resolution which reads in part as follows:

"That after the approval by the honorable provincial board of this resolution, a period of one month will be granted to the said entity, The Iloilo Ice and Cold Storage Company, in which to proceed with the elevation of said smokestacks, and if not done, the municipal president will execute the order requiring the closing or suspension of operations of said establishment."

Upon receipt of this resolution and order, the plaintiff commenced this action in the Court of First Instance to enjoin the defendant from carrying into effect the said resolution. The fifth paragraph of the complaint is as follows:

"That the defendants intend and threaten to require compliance with said resolution administratively and without the intervention of the court, and by force to compel the closing and suspension of operations of the plaintiff's machinery and consequently of the entire plant, should the plaintiff not proceed with the elevation of the smokestacks to one hundred feet, which the plaintiff maintains it is not obliged to do and will not do."

Upon notice and after hearing, a preliminary injunction was issued. Subsequently thereto the defendant answered, admitting paragraphs 1 and 4 and denying all the other allegations in the complaint, and as a special defense alleged:

"1. * * * * *

"2. That the factory of the plaintiff company stands in a central and populated district of the municipality;

"3. That the quantity of smoke discharged from the smokestacks of said factory is so great and so dense that it penetrates into the dwelling houses situated near it and causes great annoyance to the residents and prejudice to their health;

"4. That the municipal board of health of the city has reported that the smoke discharged from the smokestacks of said factory is prejudicial and injurious to the public health;

"5. That the plaintiff company has no right to maintain and operate machinery in its factory under the

conditions which it is at present operating the same, without complying with the regulations which were imposed upon it when the license for its installation was granted, because it thereby violates the ordinances of the city now in force upon the matter.

"Wherefore, the defendant prays that it be absolved from the complaint and the plaintiff be declared to have no right to the remedy asked, and that the preliminary injunction issued in this case be set aside, with the costs against the plaintiff."

The plaintiff demurred to this answer upon the following grounds:

- "1. That the facts alleged in the answer do not constitute a defense; and
- "2. That the answer is vague and ambiguous and contains arguments and conclusions of law instead of facts."

This demurrer was sustained, the court saying:

"The defendant will amend his answer within five days or the injunction will be permanently granted as prayed for, with costs to the defendant."

To this order the defendant excepted and, not desiring to amend its answer, appealed to this court.

It is alleged in paragraph 1 that both the plaintiff and the defendants are corporations duly organized under the laws of the Philippine Islands; and paragraph 4 sets forth the resolution complained of, the dispositive part of which is inserted above. The allegations in paragraphs 2, 3, 5, 6, 7, and 8, which are specifically denied in the answer, all (except the fifth) relate to the building of the plant under authority granted by the defendant, the cost of its construction, the legality of the resolution in question, the power of the defendant to pass such resolution, and the damages which will result if that resolution is carried into effect. As before stated, the allegations in paragraph 5 to the effect that the defendants intend and are threatening to close by force and without the intervention of the courts the plaintiff's plant is specifically denied. The issue in this case, according to the pleadings, relates to the power of the municipal council to declare the plant of the petitioner a nuisance as operated, and the method of abating it.

The municipal council is, under section 39 (j) of the Municipal Code, specifically empowered "to declare and abate nuisances." A nuisance is, according to Blackstone, "Anything that worketh hurt, inconvenience, or damage." (3 Black. Com., 216.) They arise from pursuing particular trades or industries in populous neighborhoods; from acts of public indecency, keeping disorderly houses, and houses of ill fame, gambling houses, etc. (2 Bouv., 248; Miller vs. Burch, 32 Tex., 208.) Nuisances have been divided into two classes: Nuisances per se, and nuisances per accidens. To the first belong those which are unquestionably and under all circumstances nuisances, such as gambling houses, houses of ill fame, etc. The number of such nuisances is necessarily limited, and by far the greater number of nuisances are such because of particular facts and circumstances surrounding the otherwise harmless cause of the nuisance. For this reason, it will readily be seen that whether a particular thing is a nuisance is generally a question of fact, to be determined in the first instance before the term nuisance can be applied to it. This is certainly true of a legitimate calling, trade, or business such as an ice plant. Does the power delegated to a municipal council under section 39 (j) of the Municipal Code commit to the unrestrained will of that body the absolute power of declaring anything to be a nuisance? Is the decision of that body final despite the possibility that it may proceed from animosity or prejudice, from partisan zeal or enmity, from favoritism and other improper influences and motives, easy of concealment and difficult to be detected and exposed? Upon principle and authority, we think it does not.

In Rutton vs. City of Camden, 39 N. J. L., 122, 129; 23 Am. Rep. 203, 209, the court said:

"The authority to decide when a nuisance exists is an authority to find facts, to estimate their force, and to

apply rules of law to the case thus made. This is a judicial function, and it is a function applicable to a numerous class or important interests. The use of land and buildings, the enjoyment of water rights, the practice of many trades and occupations, and the business of manufacturing in particular localities, all fall on some occasions, in important respects, within its sphere. To say to a man that he shall not use his property as he pleases, under certain conditions, is to deprive him pro tanto of the enjoyment of such property. To find conclusively against him that a state of facts exists with respect to the use of his property, or the pursuit of his business, which subjects him to the condemnation of the law, is to affect his rights in a vital point. The next thing to depriving a man of his property is to circumscribe him in its use, and the right to use property is as much under the protection of the law as the property itself, in any other aspect, is, and the one interest can no more be taken out of the hands of the ordinary tribunal than the other can. If a man's property cannot be taken away from him except upon trial by jury, or by the exercise of the right of eminent domain upon compensation made, neither can he, in any other mode, be limited in the use of it. The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the land of the individual, is a common law right, and is derived, in every instance of its exercise, from the same source that of necessity. It is akin to the right of destroying property for the public safety, in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and whether present or not, must be submitted to a jury under the guidance of a court. The finding of a sanitary committee, or of a municipal council, or of any other body of a similar kind, can have no effect whatever for any purpose, upon the ultimate disposition of a matter of this kind. It cannot be used as evidence in any legal proceeding, for the end of establishing, finally, the fact of nuisance, and if it can be made testimony for any purpose, it would seem that it can be such only to show that the persons acting in pursuance of it were devoid of that malicious spirit which sometimes aggravates a trespass and swells the damages. I repeat that the question of nuisance can conclusively be decided, for all legal uses, by the established courts of law or equity alone, and that the resolutions of officers, or of boards organized by force of municipal charters, cannot, to any degree, control such decision."

The leading case upon this point is *Yates vs. Milwaukee*, (10 Wall., 497; 19 L. ed., 984). The following quotation from this case has been cited or quoted with approval in a great number of cases. (See Notes to this case in 19 L. ed., Notes, page 356.)

"But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the circuit court; for that single ordinance of the city, declaring the wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public."

In *Cole vs. Kegler* (64 Ia., 59, 61) the court said:

"We do not think the general assembly intended to confer on cities and towns the power to finally and conclusively determine, without notice or a hearing, and without the right of appeal, that any given thing constitutes a nuisance, unless, probably, in cases of great emergency, so strong as to justify extraordinary measures upon the ground of paramount necessity. The law does not contemplate such an exigency, and therefore does not provide for it. If it did, it would no longer be the undefined law of necessity. (Nelson, J., in *The People vs. The Corporation of Albany*, 11 Wend., 539.)

"Nuisances may be abated by an individual, but they must in fact exist. The determination of the individual that a nuisance exists does not make it so, and if he destroys property on the ground that it is a nuisance, he is

responsible, unless it is established that the property destroyed constituted a nuisance. This precise power, and no more, is conferred by the statute on cities and towns. In *Wood on Nuisances*, section 740, it is said: 'If the authorities of a city abate a nuisance under authority of an ordinance of the city, they are subject to the same perils and liabilities as an individual, if the thing in fact is not a nuisance. '

In *Grossman vs. City of Oakland* (30 Ore., 478, 483) the court said:

"In our opinion this ordinance cannot be sustained as a legitimate exercise of municipal power. The charter of the city confers upon it the power to prevent and restrain nuisances, and to 'declare what shall constitute a nuisance;' but this does not authorize it to declare a particular use of property a nuisance, unless such use comes within the common law or statutory idea of a nuisance. (2 *Wood on Nuisances* (3d ed.), 977; *Yates vs. Milwaukee*, 77 U. S. (10 Wall.), 497; *Village of Des Plaines vs. Poyer*, 123 Ill., 348; 5 Am. St. Rep., 524; 14 N. E., 677; *Quintini vs. City Board of Aldermen*, 64 Miss., 483; 60 Am. Rep., 62; 1 So., 625; *Chicago & Rock Island R. R. Co. vs. City of Joliet*, 79 Ill., 44; *Hutton vs. City of Camden*, 39 N. J. Law, 122; 23 Am. Rep., 203.) By this provision of the charter the city is clothed with authority to declare by general ordinance under what circumstances and conditions certain specified acts or things injurious to the health or dangerous to the public are to constitute and be deemed nuisances, leaving the question of fact open for judicial determination as to whether the particular act or thing complained of comes within the prohibited class; but it cannot by ordinance arbitrarily declare any particular thing a nuisance which has not heretofore been so declared by law, or judicially determined to be such. (*City of Denver vs. Mullen*, 7 Colo., 345)."

In *Western & Atlantic R. Co. vs. Atlanta* (113 Ga., 537, 551), after an extensive review of the authorities, the court, per Lumpkin, J., said:

"It is our opinion that the provisions of our code require, when a municipal corporation is seeking to abate a nuisance such as it was alleged the floor of the union passenger station was in this case, that the parties interested be given reasonable notice of the time and place of hearing at which the fact whether the property complained of is or is not a nuisance shall be inquired into and determined; that, without such notice and a judgment on the facts by the body invested with power to abate the nuisance, it is unlawful to enter thereon and remove or destroy it as a nuisance. If the thing, as we have said, is declared by law to be a nuisance, or if it is unquestionably a nuisance, such as a rabid dog, infected clothing, the carcass of a dead animal on a private lot, the presence of a smallpox patient on the street, it may be abated by the municipal authorities at once, by order, from the necessity of the case, and to meet an emergency which exists, to at once protect the health and lives of the people."

In *Everett vs. City of Council Bluffs* (46 Ia., 66, 67), where the council passed an ordinance declaring trees on certain streets to be a nuisance and ordering the marshal to abate the same, the court held:

"The defendant is incorporated under a special charter, which provides that the city council has power to declare what shall be a nuisance, and to prevent, remove, or abate the same.' This general grant of power, however, will not authorize the council to declare anything a nuisance which is not such at common law, or has been declared such by statute."

In *Frostburg vs. Wineland* (98 Md., 239, 243) the court said:

"The first question, then, in the case resolves itself to this, Was the summary proceeding of the appellants in declaring the two trees in front of the appellee's property to be a nuisance and an obstruction to the paving and curbing of the street, and directing them to be removed and destroyed, so far final as not to be reviewable by the Courts?

"This question we think was in effect settled by this court in the recent cases of *New Windsor vs. Stocksedale* (95 Md., 215) and *King vs. Hamil* (97 Md., 103). In the latter case it is said that equity will not lend its aid to enforce by injunction the by laws or ordinances of a municipal corporation, restraining an act, unless the act is

shown to be a nuisance per se. * * *

"It is clear, we think, both upon reason and authority, that when a municipality undertakes to destroy private property which is not a nuisance per se, it then transcends its powers and its acts are reviewable by a court of equity."

In *C. R. I. & P. R. Co. vs. City of Joliet* (79 111., 25, 44) the court said:

"As to the ordinance of the common council of the city of Joliet, of September, 1872, declaring the railroad a nuisance, we regard that as without effect upon the case, although the charter of the city confers upon the common council the power to abate and remove nuisances, and to punish the authors thereof, and to define and declare what shall be deemed nuisances. We will, in this respect, but refer to the language of the Supreme Court of the United States in *Yates vs. Milwaukee* (10 Wall, 505)." (See *supra*.)

In the leading case of *Denver vs. Mullen* (7 Colo., 345, 353) where an extended review of the authorities is made, the court said:

"The basis of authority for the action of the city in the premises is made to rest upon certain provisions of the city charter, and certain ordinances, which are set out as exhibits in the testimony; and the following, among other of the enumerated powers conferred by the legislature upon the city, in said charter, is relied upon, viz: 'To make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same.'

"The proper construction of this language is that the city is clothed with authority to declare, by general ordinance, what shall constitute a nuisance. That is to say, the city may, by such ordinance, define, classify and enact what things or classes of things, and under what conditions and" circumstances, such specified things are to constitute and be deemed nuisances. For instance, the city might, under such authority, declare by ordinance that slaughterhouses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to health, or causing obstruction or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any, particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination. (*Everett vs. Council Bluffs*, 40 Iowa, 66; *Yates vs. Milwaukee*, 10 Wall., 497.) No law or ordinance, under which the city council assumed to act in respect to this ditch, has been cited which defines nuisances, or within the meaning of which such ditch is comprehended.

* * * * *

"It is only certain kinds of nuisances that may be removed or abated summarily by the acts of individuals or by the public, such as those which affect the health, or interfere with the safety of property or person, or are tangible obstructions to streets and highways under circumstances presenting an emergency; such clear cases of nuisances per se, are well understood, and need not be further noticed here to distinguish them from the case before us. If it were admitted that this ditch, by reason of its obstruction to the use of the public streets, at the time of the acts complained of, was a nuisance, it must also be admitted that it was not a nuisance per se. It was constructed for a necessary, useful and lawful purpose, was used for such purpose, and therefore in its nature was not a nuisance, as a matter of law. Nor as a matter of fact was it a nuisance while it was no hurt, detriment, or offense to the public, or to any private citizen. If, then, it has become a nuisance, it is by reason of a change of circumstances brought about neither by the ditch itself, nor its use. Indeed, the sole matter complained of, to warrant its being regarded as a nuisance, is the absence of bridges at street crossings. The town has become populous; its growth has extended beyond the ditch and along its line for a great distance; streets laid out across its course have come to be traveled so much, that without bridges, the ditch, as appears by the testimony, has become inconvenient, detrimental, and an obstruction to the full, safe and lawful use of such streets as highways by the public. To this extent, and from these causes outside the ditch and its use per se, has

the ditch come to be a public nuisance, if, as a matter of fact, it is such. But whether it is such or not is a fact which must first be ascertained by judicial determination before it can be lawfully abated, either by the public or by a private person."

In *Joyce vs. Woods* (78 Ky., 386, 388) the court said:

"There was no judicial determination that there was a nuisance, and no opportunity offered the owner of the lot to contest that matter. Under the exercise of the police power, it may be conceded that municipalities can declare and abate nuisances in cases of necessity, without citation and without adjudication as to whether there is in fact a nuisance. But whenever the action of the municipality in declaring and abating a nuisance goes so far as to fix a burden upon the owner of the property, he is entitled to be heard upon the question as to the existence of the nuisance. This right to a hearing upon this question may come before or after the nuisance is abated, as circumstances may require, but there must be an opportunity offered him to be heard upon that matter before his property can be loaded with the cost of the removal of the nuisance. To the extent that property is thus burdened by the action of the city council, when there is no necessity to precipitate action without adjudication, the owner is deprived of his property, regardless of the law of the land.' The meaning of that provision of the constitution has generally been construed to be a law that hears before condemning, and arrives at a judgment for the divestiture of the rights of property through what is ordinarily understood to be judicial process—the general rules that govern society in reference to the rights of property; and it is only in extreme cases, where the preservation and repose of society or the protection of the property rights of a large class of the community absolutely require a departure, that the courts recognize any exception. In this case there is no pretense of a necessity for precipitate action. There is no reason why appellant should not have been permitted to test the question as to the existence of the nuisance."

In *Everett vs. Marquette* (53 Mich., 450, 451) the court, per Cooley, J., said:

"But it is not necessary in this case to determine whether the permission given by the village council was in due form for the purposes of a permanent appropriation, or even whether the council had the power to consent to such an appropriation. It is undoubted that the council had general control of the streets under the village charter; and it was a part of its duty to prevent the creation of any public nuisance within them. It is not to be assumed that consent would have been given to such a nuisance, and when, by formal resolution the council assumed to give permission to complainant to make the openings and build the stairways complained of it must have been done in the belief that no public inconvenience would follow. If the permission was effectual for no other purpose, it at least rebutted any presumption which might otherwise have existed, that this partial appropriation of the street was per se a nuisance.

"If the permission was a mere license, and the subsequent action of the city council is to be regarded as a revocation of the license, it does not follow that the plaintiff has by the revocation immediately been converted into a wrong doer. The question will then be whether the act of the complainant in maintaining his structures constitutes a public nuisance; and while the city council is entitled, under its supervisory control of the public streets, to consider and pass upon that question for the purpose of deciding upon the institution of legal proceedings for abatement, it cannot make itself the judge. Maintaining a nuisance is a public offense; and the fact, as in other cases of alleged criminality, is to be tried on proper accusation and in the regular courts. The mere fact that the party makes use of some part of a public street for his private purposes does not make out the public offense. This was decided in *People vs. Carpenter* (1 Mich., 273), and has never been doubted in this State.

"The city in this case was proceeding in an act of destruction on an assumption that the structures were already condemned as illegal. This was unwarranted, and it was quite right that the action should be restrained."

The above authorities are collated in Judge Dillon's work on *Municipal Corporations*, fifth edition, section 634, with the following comment by the author:

"It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extra judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such."

The questions discussed in this august array of authorities are exactly those of the present case, and the controlling principles and the reasoning upon which they are founded are so fully and lucidly set forth as to justify us in refraining from comment of our own. It is clear that municipal councils have, under the code, the power to declare and abate nuisances, but it is equally clear that they do not have the power to find as a fact that a particular thing is a nuisance when such thing is not a nuisance per se; nor can they authorize the extrajudicial condemnation and destruction of that as a nuisance which in its nature, situation, or use is not such. These things must be determined in the ordinary courts of law.

In the present case it is certain that the ice factory of the plaintiff is not a nuisance per se. It is a legitimate industry, beneficial to the people, and conducive to their health and comfort. If it be in fact a nuisance due to the manner of its operation, that question cannot be determined by a mere resolution of the board. The petitioner is entitled to a fair and impartial hearing before a judicial tribunal.

The respondent has, we think, joined issue by its answer denying that it was intending to proceed with the abatement of the alleged nuisance by arbitrary administrative proceedings. This is the issue of the present case, and upon its determination depends whether the injunction should be made permanent (but limited in its scope to prohibiting the closing of petitioner's factory by administrative action), or whether the injunction should be dissolved, which will be done in case it be shown that the municipal officials intend to proceed with the abatement of the alleged nuisance in an orderly and legal manner.

It is said that the plaintiff cannot be compelled to build its smokestack higher if said stack is in fact a nuisance, for the reason that the stack was built under authority granted by the defendant, and in accordance with the prescribed requirements. If the charter or license does not expressly subject the business or industry to the exercise of the police power by the State, it is conceded by the great preponderance of authority that such a reservation is implied to the extent that may be reasonably necessary for the public welfare. (Freund, Police Power, § 361 et seq, and § 513 et seq.)

For the foregoing reasons, the order sustaining the plaintiff's demurrer to the defendant's answer is reversed. The record will be returned to the court whence it came with instructions to proceed with the trial of the cause in accordance with this opinion. No costs will be allowed in this instance. So ordered.

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

Johnson, J., dissents.

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