

TOMAS MONTEVERDE, PLAINTIFF AND APPELLANT, VS. SEBASTIAN T. GENEROSO, PROVINCIAL GOVERNOR OF DAVAO, ET AL., DEFENDANTS AND APPELLEES.

G.R. No. 28491. September 29, 1928

Ponente: MALCOLM, J.

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MALCOLM, J.:

This is a case the determination of which could easily be made difficult by the injection of numerous controversial questions of fact and law, but which as we view it can readily be decided on a basic legal point arising from the undisputed facts and on a concession without decision of all disputed facts in favor of the Government. On this basis, the ultimate and decisive question is this: Is a provincial governor, a district engineer, or a district health officer authorized to destroy private property consisting of dams and fishponds summarily and without any judicial proceedings whatever under the pretense that such private property constitutes a nuisance?

The undisputed facts are these: Tomas Monteverde is the owner of a parcel of land situated in the barrio of Santa Ana, municipality of Davao, Province of Davao. He possesses a Torrens title to the land obtained in 1921. The parcel of land is bounded on the northwest by the Agdao River. The Tambongon Creek is a branch of the Agdao River and runs through Monteverde's land. For fishpond purposes, Monteverde constructed two dams across the Agdao River and five dams across the Tambongon Creek. The two dams in the Agdao River were destroyed by order of the district engineer of Davao. The provincial governor of Davao also threatened to destroy the other dams in the Tambongon Creek. The motive behind the destruction of the dams of the Agdao River and the proposed destruction of the dams in the Tambongon Creek was to safeguard the public health. To prevent the contemplated action with reference to the Tambongon Creek, Monteverde sought in the Court of First Instance of Davao to obtain an order of injunction in restraint of the provincial governor, the district engineer, and the district health officer, but in this attempt Monteverde was unsuccessful in the lower court.

To the undisputed facts, there may be added for the purposes of the decision without necessarily having to resolve them the following: The fishponds were constructed in 1921 and 1922 and did not exist as the result of a concession in Spanish times. The Tambongon Creek running through Monteverde's property is navigable and as such is of public ownership. (See in this connection the cases of Samson vs. Dionisio and Fabian [1908], 11 Phil, 538, and Bautista vs. Alarcon [1912], 23 Phil., 631.)

The reason for the contemplated action by the provincial governor and the legal authority on which he relied are 126 disclosed by the communication from the provincial governor to the plaintiff reading as follows:

"Mr. TOMAS MONTEVERDE

"Sta. Ana, Davao

"SIR: There have been referred to this office several complaints against you for having closed some of the branches of the Agdao River for fishpond purposes without 'previous authorization from competent authorities,

thus obstructing the flow of water and causing the development of stagnant water which serves as suitable breeding places for mosquitos.

"For the good of public sanitation, and by virtue of the authority conferred me by section 24 of the Water Law, you are hereby ordered, upon receipt hereof, to open all the ditches by destroying the dams so constructed therein as obstruction of the water flow, the construction of same not being in accordance with the law.

"Prompt compliance to this order is enjoined, otherwise, the district engineer will be ordered to effect the work at your costs.

"Very respectfully,

(Sgd.) "S. T. Generoso
"Provincial Governor"

Again emphasizing that the facts for the purposes of the appeal may be conceded to be as contended by the Government, we then must determine if any existing law authorizes the provincial governor and the other provincial officials to remove without a hearing or legal process any private construction on a navigable stream.

The law is found in many places. There have been cited sections 938, 941, 978, 980, 995, 2592, 2594, 2604, and 2625 of the Administrative Code; section 89 of the Land Registration Act; articles 389, 844, 407, 412, and 490 of the Civil Code; and article 24 of the Spanish Law of Waters of 1866. With reference to this varied assortment of law, the flat statement is advanced without fear of contradiction that with the possible exception of article 24 of the law of Waters no law expressly empowers the provincial governor to order the removal of obstructions and the destruction of nuisances in a navigable stream. On the contrary, the law specifically grants to the municipal council the power by ordinance or resolution "to declare, prevent, and abate nuisances." (Sec. 2625 [aa], Administrative Code; *Bernardino and Zaplan vs. Governor and Provincial Board of Cavite* [1910], 17 Phil., 176.) As to article 24 of the Spanish Law of Waters of 1866, it provides:

"Any person may, upon his own private property, construct artificial ponds of sea water, having communication with the sea, for use as bathing places or vivaries, or for any other commercial or recreative purpose, notice thereof being given to the governor of the province. During two months, the governor shall have power to order the suspension of the work if, after consultation with the naval officer in command and the provincial engineer, it appear. that the work might be substantially prejudicial to the public interests. In such an event the interested party may appeal to the Government." But as to the applicability of this article, it necessarily would have to conform to the principles of the existing public law.

Nuisances are of two classes: Nuisances per se and per accidens. As to the first, since they affect the immediate safety of persons and property, they may be summarily abated under the undefined law of necessity. But if the nuisance be of the second class, even the municipal authorities, under their power to declare and abate nuisances, would not have the right to compel the abatement of a particular thing or act as a nuisance without reasonable notice to the person alleged to be maintaining or doing the same of the time and place of hearing before a tribunal authorized to decide whether such a thing or act does in law constitute a nuisance. Such in effect was the holding in *Iloilo Ice and Cold Storage Co. vs. Municipal Council of Iloilo* ([1913], 24 Phil., 471). Applied here, it is self-evident that a dam or a fishery constructed in a navigable stream is not a nuisance per se. Of course, a dam or a fishpond may be found to be a nuisance where it endangers or impairs the health or depreciates property by causing water to become stagnant. The public health may be conserved but conserved only in a legal manner. Due process of law must be observed before the citizens' property or personal rights or liberty can be interfered with. Conceding without deciding that article 24 of the Law of Waters is in force, we reiterate that it can only be made use of by conforming to the provisions of the organic law.

The case of *Lawton vs. Steele*, originally decided in the Court of Appeals of New York and then taken to the United States Supreme Court, is the leading case on the subject. This was an action brought to recover the value of sixteen nets belonging to the plaintiffs which were destroyed by defendant. He, as a state fish and game protector, justified himself by citing the section of the law authorizing the seizure and removal of nets. The court recognized the legislative power to regulate fishing in public waters, and the right of summary abatement of nuisances without judicial process or proceeding for the protection of the health; but said the court: "In the process of abating a nuisance there are limitations both in respect of the agencies which may be employed, and as to what may be done in execution of the remedy." In the United States Supreme Court, it was in part said:

"It is not easy to draw the line between cases where the property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room.

"Upon the whole we agree with the Court of Appeals in holding this act to be constitutional, and the judgment of the Supreme Court is, therefore, affirmed." (119 N. Y., 226; 152 U. S., 133.)

In contrast with *Lawton vs. Steele*, *supra*, (1) there is no law authorizing the summary abatement of nuisances by the provincial governor; and (2) the dams and fishponds are not of trifling value. The question at issue is answered in the negative.

In accordance with the foregoing, the judgment appealed from must be as it is hereby reversed, and instead the injunction prayed for shall issue prohibiting the defendants from destroying the dams and fishponds in question. It is so ordered without express finding as to costs in either instance.

Johnson, Street, Ostrand, Romualdez, and Villa-Real, JJ., concur.

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