

BENITO TAN CHAT ET AL., PLAINTIFFS AND APPELLEES, VS. THE MUNICIPALITY OF ILOILO, DEFENDANT AND APPELLANT.

G. R. No. 39810. August 31, 1934

Ponente: IMPERIAL, J.

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IMPERIAL, J.:

On December 14, 1931, the municipal council of Iloilo, Province of Iloilo, passed the following ordinance:

"ORDINANCE No. 10—AMENDING ORDINANCE No. 7, SERIES OF 1931.

"Be it enacted by the Municipal Council of Iloilo, Province of Iloilo, by authority of Act 2711, known as the Revised Administrative Code:

"Ordinance No. 7, series of 1931, is hereby amended so that the same will read as follows:

"Section 1. The storing and sale of lumber and the keeping of lumber stores are prohibited on the following streets: Jose Ma. Basa, Andres Bonifacio, Iznart, Ledesma (from Gay Square to Mabini Street), P. Arroyo, General Hughes, General Blanco, Rosario, Progreso, General Luna (from Iznart to Jalandoni), Aldeguer, Zamora, Delgado, Rizal (from Zamora to Iznart), Marina, Sto. Nino, Arsenal, Ortiz and Cotta Drive: Provided, That the lumber stores on said streets Jose Ma. Basa, Andres Bonifacio, Iznart, Ledesma (from Gay Square to Mabini Street), P. Arroyo, General Hughes, General Blanco, Rosario, Progreso, General Luna (from Iznart to Jalandoni), Aldeguer, Zamora, Delgado, Rizal (from Zamora to Iznart), Marina, Sto. Nino, Arsenal, Ortiz and Cotta Drive, which this municipal council considers as public nuisance, are given six (6) months to move, from the date this ordinance takes effect;

"SEC. 2. Violation of this ordinance shall be punished with a fine not to exceed two hundred pesos (P200), or imprisonment not to exceed six (6) months or both penalties in the discretion of the court;

"SEC. 3. This ordinance shall take effect on January 1, 1932.

"Approved by the Municipal Council in its special session held on December 14, 1931.—Adopted unanimously."

The plaintiffs, merchants residing in said city, instituted an action in the Court of First Instance of the province for the purpose of annulling said ordinance, alleging that the same is illegal and in violation of their rights. Upon a bond duly filed by them a writ of preliminary injunction was issued which continues in force up to this time.

In its answer the defendant interposed the following special defenses:

"3. That the streets named in ordinance No. 10, series of 1931, referred to in the fourth paragraph of the complaint constitute the most important commercial and residential zone and the most thickly populated section of the downtown district of this municipality of Iloilo, capital of this Province of Iloilo; and particularly Iznart Street is of the greatest importance because on said street are located numerous and important commercial establishments and beautiful and costly commercial and residential buildings, besides being the principal thoroughfare used by the residents of the downtown district of Iloilo in going to various public

offices, centers of learning and charitable institutions, and to many of the municipalities of this province and vice versa.

"4. That in its ordinances No. 1, series of 1911; No. 14 (15), series of 1913; No. 9, series of 1914; and No. 6, series of 1920, the defendant following a plan of expansion, urbanization, beautification and the public safety of its inhabitants, has declared the streets enumerated in ordinance No. 10, series of 1931, referred to in paragraph 4 of the complaint, as zones for strong material and fire-proof buildings.

"5. That in violation of the ordinances mentioned in the preceding paragraph, the plaintiffs residing on Iznart Street and other persons and entities residing on the other streets referred to in the ordinance mentioned in paragraph 4 of the complaint, have constructed ugly and unsightly buildings, without protection against fire and the spread thereof, wherein they have operated and are operating sawmills and have piled and are piling large quantities of lumber and sawdust, thus marring the beauty of said streets and creating a public nuisance and a source of fire which constantly threatens with destruction and loss of valuable business and individual properties, particularly, as far as this case is concerned, those properties mentioned in paragraph 3 of this answer.

"6. That in accordance with the plan of urbanization and public safety mentioned in paragraph 4 of this answer, and in order to abate the public nuisance caused by the plaintiffs and others as described in the preceding paragraph, and in pursuance of the powers conferred by sections 2238, 2242 (h), and 2243 (c), of the Administrative Code, Act 2711, this last section as amended by Act 3259, the municipal council of Iloilo has passed ordinance No. 10, series of 1931, referred to in paragraph 4 of the complaint and consequently said ordinance is legal and valid.

"7. That the defendant has given the plaintiffs ample and reasonable time to enable them to remove and transfer their lumber stores and sawmills above mentioned, to some other place not prohibited by the ordinance, but they refused and still refuse to do so without legal excuse or justification."

The defendant appealed from the judgment rendered holding null, illegal and unconstitutional said ordinance, and declaring final and perpetual the preliminary injunction theretofore issued, with costs.

It appears from the evidence that the plaintiffs are lumber merchants with their place of business on Iznart Street, some of them having opened their business previous to the year 1931, and constructed their buildings of strong material with galvanized iron roofing, some of them built on their own land and others on leased land. Inside said buildings sawed lumber is stored and on the premises blocks and big pieces of lumber are deposited, which are sawed by means of a small sawmill run by petroleum belonging to the plaintiff Benito Tan Chat. The loading of sawed lumber sold by these merchants is usually done within said buildings without annoyance to the neighbors nor to passers-by.

The defendant alleges that the following errors were committed in the judgment:

"I. The lower court erred in holding that ordinance No. 10, series of 1931, of the municipality of Iloilo is null and void.

"II. The lower court committed error in holding that defendant-appellant was not empowered to regulate and prohibit plaintiff-appellees' lumber business and yards, and by not declaring them as a nuisance within a certain area of the townsite of Iloilo.

"III. The lower court erred in denying defendant-appellant to establish the fact that on both sides of Iznart Street of the municipality of Iloilo there are costly and beautiful large buildings for commercial or store and residential purposes immediately adjoining the saw-mills, lumber business and yards belonging to plaintiff-appellees."

In our opinion the only question to be determined is whether or not the ordinance in question was enacted by the defendant in the exercise of the powers conferred upon it by the Legislature, in other words, in the exercise of its police power including the power to abate public nuisances and to divide its territory into commercial and residential zones.

Such powers are enumerated in sections 2238, 2242, and 2243 of the Revised Administrative Code. The provisions applicable to the instant case are as follows:

"SEC. 2238. General power of council to enact ordinances and make regulations.—The municipal council shall enact such ordinances and make such regulations, not repugnant to law, as may be necessary to carry into effect and discharge the powers and duties conferred upon it by law and such as shall seem necessary and proper to provide for the health and safety, promote the prosperity, improve the morals, peace, good order, comfort, and convenience of the municipality and the inhabitants thereof, and for the protection of property therein."

"SEC. 2242. Certain legislative powers of mandatory character.—It shall be the duty of the municipal council, conformably with law:

* * * * *

"(h) To declare and abate nuisances."

"SEC. 2243. Certain legislative powers of discretionary diameter.—The municipal council shall have authority to exercise the following discretionary powers:

* * * * *

"(c) To establish fire limits in populous centers, prescribe the kinds of buildings that may be constructed or repaired within them, and issue permits for the erection or repair thereof, charging a fee which shall be determined by the municipal council and which shall not be less than two pesos for each building permit and one peso for each repair permit issued. The fees collected under the provisions of this subsection shall accrue to the municipal school fund."

By virtue of the police power and the express provisions of section 2242 (h) of the Revised Administrative Code, there is no question that the municipalities have power to enact ordinances for the purpose of abating public nuisances. (*Switzer vs. Municipality of Cebu*, 20 Phil., 111; *Iloilo Ice & Cold Storage Co. vs. Municipal Council of Iloilo*, 24 Phil., 471.)

The question which now arises in connection herewith is whether or not the sawmill and lumber stores of the plaintiffs constitute nuisances per se or per accidens. Bearing in mind the nature of such business and the indisputable fact that the conduct thereof necessarily disturbs and annoys passers-by and the neighbors, we do not hesitate to declare that said business constitutes nuisance per accidens or per se.

In the case of *State vs. Rosenstein* (181 N. W., 107), the Supreme Court of Minnesota said:

"It cannot seriously be doubted that the matter of the location, and to an extent the condition and care of lumber yards, where large quantities of lumber and building material are accumulated in piles and tiers of piles are matters proper for appropriate police regulation and control. The location of such yards may, even though properly cared for by the owner, become a fire menace and a source of danger to and destruction of surrounding property, a rendezvous for thieves and other violators of the law, and their location at least should be within control of the proper municipal authorities of every city and village having a population and built-up district sufficiently large to render them or their use a menace to public order and safety. The Legislature could itself by appropriate statutory provisions regulate the subject, and may delegate the authority to local

municipalities. That the authority is fully vested in the city of Minneapolis by the quoted provisions of its charter is clear. It is there granted in clear terms and is in no way restricted by the proviso added thereto, as above quoted, except perhaps that regulations imposed by city ordinances existing at the time the present charter power was granted may not be changed. But whether the earlier regulations may be changed or modified is not here involved. The authority thus conferred upon the city is full and complete and sustains the ordinance in question."

The ordinance clearly states that the sawmill and the sale of lumber by the plaintiffs on Iznart Street constitute public nuisances; and although the question of fact herein involved may properly be reviewed by the courts, the evidence of record sufficiently justifies such conclusion. The power of the municipalities, in the exercise of their police power, to regulate and abate public nuisances is indisputable, when the measure taken to that end is sound and reasonable, and redounds to the benefit of the locality. Such power has been expressly delegated by the Legislature according to the section above cited.

"One of the most usual powers enjoyed by municipal corporations is that of suppressing nuisances. The abatement of nuisances by municipal corporations is a governmental function. The legislature may, and often does, confer such power upon them. The power may arise by express grant or by necessary implication. It usually is enjoyed as part of the police power, especially that part of the police power dealing with the protection of the health of the inhabitants of the municipal corporation. And the exercise of the power is generally considered as a proper municipal function which it is the duty of municipal corporations to exercise. The power to abate nuisances may extend to abate nuisances created by public utilities.

"Primarily .it is within the power of municipal authorities to determine and declare what shall constitute a nuisance. A large discretion rests with the municipal governing body in determining what constitutes nuisances. But the power must be exercised reasonably and not arbitrarily. The declaration by municipal authorities that a thing is a nuisance is not a final determination of the question; it is subject to review by the courts both as to its reasonableness and as to the thing inveighed against being in fact a nuisance. A municipal corporation cannot make a thing a nuisance by merely declaring it to be such. Even though the corporation is empowered to declare what shall constitute a nuisance, it cannot declare that to be a nuisance which is not so in fact; it cannot arbitrarily and without support of reason or fact declare that which is harmless a nuisance. The power is limited to such things as the common law or statute declares to be nuisances. But the power may extend to those things which in their nature may be nuisances but as to which there may be honest differences of opinion in impartial minds. Things which are not in their nature nuisances but which may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc., may, and can only, be declared nuisances by municipal corporations when they are such in fact. The power does not extend to include the power to suppress acts merely vicious or immoral. But the power of a municipal corporation over nuisances may tend to authorize it to prevent a condition likely to become detrimental to the public health as much as it is to abate such conditions after the evil consequences appear. In so far as the legislature may declare nuisances, a municipal corporation nra*y be empowered to declare by ordinance or by-law things or acts nuisances, although they may not be such in the absence of such ordinance or by-law. The power to regulate does not authorize entire prohibition." (43 C. J., pp. 401-404.)

The next question relates to the establishment of industrial, commercial, and residential zones. This power of municipal corporations is recognized in almost all jurisdictions. It is derived from the police power itself and it is exercised for the protection and benefit of the residents of a locality.

"The power of municipal corporations to enact zonin regulations may be derived from constitutional or statutory provisions. Within its constitutional limitations the legislature may authorize such enactment. The power may also be derived directly from the constitution of the state; and state constitutional provisions conferring the power have been upheld as against the objection that they violated the federal constitution as a denial of the equal protection of the law, or discrimination. Also, the statutes conferring the power have been

upheld as against the objection that they were violative of the federal constitution." (43 C. J., pp. 333, 334.)

"It has been suggested that the police power residing in the state legislature is sufficient to authorize the enactment of zoning statutes, if done wisely; that zoning under the power of eminent domain is unwise; and that there is no necessity for constitutional amendment to provide for zoning." (Ibid., p. 334.)

"As a general rule, subject to the limitations to be noted hereinafter, municipal corporations may enjoy the right or power to enact reasonable zoning regulations. Regulations to that effect have been upheld as against the objection that they were unconstitutional, as denial of due process or equal protection of the law, and that they were discriminatory. The power is not an inherent one; it can be exercised only when it is expressly conferred on the municipal corporation or rises by necessary implication. While it has been held that the power to enact certain zoning regulations cannot be exercised as an incident of the municipal police power, the weight of authority is to the effect that reasonable zoning regulations may be proper exercise of the municipal police power. * * ?" (Ibid., pp. 334, 335.)

In the case of *People vs. Cruz* (54 Phil., 24), this court said:

"It has been definitely settled by both Philippine and American cases that in the exercise of their police power, municipal corporations may enact ordinances and regulations on zonification, (43 Corpus Juris, 334.) Within the powers granted to municipal councils by section 2238 of the Revised Administrative Code, the municipal council of Cabanatuan was authorized to enact the zonification ordinance here in question.

"If the municipal council of Cabanatuan was authorized to establish said zone, it was likewise authorized to determine the kinds of machinery that might be installed therein. In prohibiting the installation within the zone of all kinds of machinery save those excepted in the ordinance, the municipal council has done no more than regulate their installation."

In the case of *Seng Kee & Co. vs. Earnshaw and Piatt* (56 Phil., 204), in discussing the power of the City of Manila to enact ordinances establishing industrial and residential zones, this court said:

"There can be no doubt that the City of Manila has the power to divide its territory into residential and industrial zones, and to prescribe that offensive and unwholesome trades and occupations are to be established exclusively in the latter zone.

" 'The benefits to be derived by cities adopting such regulations (zoning) may be summarized as follows: They attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquillity, and good order of the city. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of the police power. He who owns property in such a district is not deprived of its use by such regulations. He may use it for the purposes to which the section in which it is located is dedicated. That he shall not be permitted to use it to the desecration of the community constitutes no unreasonable or permanent hardship and results in no unjust burden.' (State ex rel. Carter vs. Harper, 182 Wis., 148.)

" 'It is a matter definitely settled by both Philippine and American cases, and the defendant-appellant so admits, that municipal corporations may, in the exercise of their police power, enact ordinances or regulations on zonification (43 Corpus Juris, 334). Within the powers granted to municipal councils in section 2238 of the Revised Administrative Code, the municipal council of Cabanatuan was authorized to enact the zonification ordinance with which we are now concerned.' (People vs. Cruz, 54 Phil., 24, 27.)

"Likewise, it cannot be denied that the City of Manila has the authority, derived from the police power, of forbidding the appellant to continue the manufacture of toyo in the zone where it is now situated, which has been declared residential, without providing for any compensation; these provisions of the Revised Ordinances do not in fact deprive Manila residents of their property without just compensation, for it deprives them neither

of the ownership nor of the possession thereof, but simply restricts them from the use of such property at certain places for the good of the majority of inhabitants.

" 'The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public' (Murphy vs. California, 225 U. S., 623.)

" 'Police regulations are not a taking under the right of eminent domain or a deprivation of property without due process of law. Thus, a prohibition on the use of property, for purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community cannot, in any sense, be deemed a taking or an appropriation of property for the public benefit, as such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it. It is only a declaration by the state that its use by any one for certain forbidden purposes is prejudicial to the public interests, the exercise of the police power by the destruction of the property, which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.' (Mugler vs. Kansas, 123 U. S., 623; 8 Sup. Ct, 273; 31 L. ed., 205.)"

In the case of *Euclid vs. Ambler Realty Co.*, 71 Law. ed., 303, 310 et seq., the Supreme Court of the United States said:

"Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

"The ordinance now under review and all similar laws and regulations must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with the circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim '*sic utere tuo ut alienum non laedas*,' which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. *Sturges vs. Bridgman*, L. R. 11 Ch. Div., 852, 865—C. A. nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. (*Radice vs. New York*, 264 U. S., 292, 294; 68 L. ed., 690, 694; 44 Sup. Ct. Rep., 325.)

"There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. (See *Welch vs. Swasey*, 214 U. S., 91; 53 L. ed., 923; 29 Sup. Ct. Rep., 567; *Hadacheck vs. Sebastian*, 239 U. S., 394; 60 L. ed., 348; 36 Sup. Ct. Rep., 143; Ann. Cas. 1917 B, 927; *Reinman vs. Little Rock*, 237 U. S., 171; 59 L. ed., 900; 35 Sup. Ct. Rep., 511; *Thomas Cusack Co. vs. Chicago*, 242 U. S., 526, 529, 530; 61 L. ed., 472, 475; L. R. A., 1918 A, 136; 37 Sup. Ct. Rep., 190; Ann. Cas. 1917 C, 594.)

"Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. (*Hebe Co. vs. Shaw*, 248 U. S., 297, 303; 63 L. ed., 255, 258; 39 Sup. Ct. Rep., 125; *Pierce Oil Corp. vs. Hope*, 248 U. S., 498, 500; 63 L. ed., 381, 382; 39 Sup. Ct. Rep., 172.) The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the prescribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of merely arbitrary fiat.' (*Purity Extract & Tonic Co. vs. Lynch*, 226 U. S., 192, 204; 57 L. ed., 184, 188; 33 Sup. Ct. Rep., 44.) Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed."

In the case of *In re Montgomery* (163 Cal., 457), the Supreme Court of California said:

"An ordinance of the City of Los Angeles, dividing the territory included in the municipality into industrial and residential districts, and prohibiting the maintenance or conduct within the residential district of 'any stone-crusher, rolling-mill, machine-shop, planing-mill, carpet-beating establishment, hay-barn, woodyard, lumber-yard, public laundry or wash-house,' is a legitimate and constitutional exercise of the police power of the city."

And in the case of *State vs. McDonald* (121 So. R., 613, 614), the Supreme Court of Louisiana said:

"Provision of zoning ordinance requiring that businesses in affected area must liquidate within one year and remove from area held not harsh, arbitrary or unreasonable.

"Discretion of municipal authorities in enacting zoning ordinances under Const. 1921, art. 14, sec. 29, and Act No. 27 of 1918, and Act No. 240 of 1926, to order removal of business establishments from residential districts, and to fix time limits, will not be interfered with by courts, unless its exercise is found to be manifestly and palpably hostile and unreasonable."

The argument that the provision of ordinance giving the plaintiffs a fixed period, to move their sawmill and lumber stores to some other adequate place is unconstitutional, on the ground that said measure is confiscatory and does not provide adequate compensation, is untenable, for the reason that in this case the city of Iloilo does not take over the ownership of said business but simply prohibits the conduct of said industry or business within the limits established in the ordinance, and said prohibition is within the powers conferred upon the municipality. In enacting the ordinance in question the city of Iloilo has done nothing but to safeguard the health, safety, and welfare of its inhabitants, and it is perfectly fair that the herein plaintiffs should abide by the provisions thereof which are in accordance with the old and well-known maxim: *salus populi suprema, lex*.

In view of the foregoing, the above quoted ordinance is hereby declared valid and the judgment appealed from is reversed, with costs of both instances against the plaintiffappellees. The preliminary injunction heretofore issued is set aside. So ordered.

Avancena, C. J., Malcolm, Abad Santos, Vickers, and Diaz, JJ., concur.

DISSENTING

VILLA-REAL, J., :

The ordinance which the majority opinion declares to be constitutional and valid, and by virtue of which the municipality of Iloilo seeks to prohibit, through force, the herein plaintiffs from selling in their own establishments and buildings erected on both sides of Iznart Street of the municipality of Iloilo sawed lumber therein stored, and to compel them to remove and transfer said lumber and lumber stores to other places reads as follows:

"Section 1. The storing and sale of lumber and the keeping of lumber stores are prohibited on the following streets: Jose Ma. Basa, Andres Bonifacio, Iznart, Ledesma (from Gay Square to Mabini Street), P. Arroyo, General Hughes, General Blanco, Rosario, Progreso, General Luna (from Iznart to Jalandoni), Aldeguez, Zamora, Delgado, Rizal (from Zamora to Iznart), Marina, Sto. Nino, Arsenal, Ortiz and Cotta Drive: Provided, That the lumber stores on said streets Jose Ma. Basa, Andres Bonifacio, Iznart, Ledesma (from Gay Square to Mabini Street), P. Arroyo, General Hughes, General Blanco, Rosario, Progreso, General Luna (from Iznart to Jalandoni), Aldeguez, Zamora, Delgado, Rizal (from Zamora to Iznart), Marina, Sto. Nino, Arsenal, Ortiz and Cotta Drive, which this municipal council considers as public nuisance, are given six (6) months to move from the date this ordinance takes effect."

The facts to which the defendant municipality attempts to apply the provisions of the above-quoted ordinance and which the trial court found proven in its decision are as follows:

"That prior to the year 1931, some of the plaintiffs opened their lumber business on both sides of Iznart Street, of this city of Iloilo, Province of Iloilo, and for that purpose constructed buildings of strong material with galvanized iron roofing, suitable to the business, some on their own land and others on leased land, with the defendant municipality's permit, each plaintiff having paid the corresponding license tax on business; and in said buildings classified by the ordinance as 'lumber stores' there were kept for sale by the plaintiffs blocks and pieces of lumber, sawed and planed, coming from various parts of the archipelago;

"That the work of loading and unloading of both the lumber received for storing as well as that sold to customers, is done within the building of each plaintiff without molesting, annoying or otherwise prejudicing either the neighbors or passers-by in said Iznart Street, the only lumber store on said street having a small motor for sawing lumber run by crude petroleum being that of the plaintiff Benito Tan Chat who used it for cutting sawed and planed lumber in order to meet the customers' demand."

The ordinance under consideration does not state for what purpose of public interest it prohibits the "storing and sale of lumber" on certain streets, of the municipality of Iloilo; it simply says that said lumber stores constitute a public nuisance without explaining how or why.

In the case of *Iloilo Ice & Cold Storage Co. vs. Municipal Council of Iloilo* (24 Phil., 471), this court laid down the following doctrine:

"2. Municipal Corporations ; Abatement op Nuisances in Emergencies.—A nuisance which affects the

immediate safety of persons or property, or which constitutes an obstruction to the streets and highways under circumstances presenting an emergency, may be summarily abated under the undefined law of necessity. But, in any case, the declaration of the municipal council that the thing or act is a nuisance is not conclusive. The owner of the alleged nuisance has the right to test the validity of the action of the council in a court of law."

And in the case of *Yates vs. Milwaukee* (77 U. S., 497), the Supreme Court of the United States laid down the following doctrine:

"Facts: In the 1856 a wharf was constructed by plaintiff on a lot owned by him near the Milwaukee River in order to reach the navigable part of said river. In 1865 the City of Milwaukee passed an ordinance declaring this wharf an obstruction to navigation and a nuisance and ordered it to be abated. Hence this action:

""Held: * * * 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."

According to the doctrines above quoted, it is not enough that a municipality declare that a certain business is a nuisance or public annoyance in order to be so. but it is necessary that said business be really so.

In volume 5, third series, p. 499 of *Words & Phrases*, a comprehensive judicial definition of the word "nuisance" is given, to wit:

"A 'nuisance' is anything that works an injury, harm, or prejudice to an individual or the public, and will embrace everything that endangers life or health, offends the human senses, transgresses laws of decency, or obstructs, impairs, or destroys the reasonable, peaceful, and comfortable use of property."

There is no proof showing that the lumber stores in question affect the immediate safety of persons or property or that they constitute an obstruction on Iznart Street of Iloilo, and therefore there exists no compelling necessity for their summary abatement in accordance with the doctrine laid down in the case of *Iloilo Ice & Cold Storage Co. vs. Municipal Council of Iloilo*, above cited.

There is no question that in the exercise of its police power the municipality of Iloilo may enact ordinances establishing residential, commercial and industrial zones etc., for the beautification of the municipality, the protection of the health of its inhabitants, the value of real property and the safety of the buildings from fire. But such ordinances cannot be given retroactive effect by ordering the destruction of buildings already erected which do not measure up to the standard therein prescribed unless they constitute a danger to public health and morals and to the safety of the inhabitants and their property. The right of ownership and the use and enjoyment of property is a natural and constitutional right, of which nobody shall be deprived without due process of law and adequate compensation, even through the exercise of the eminent domain of the State. In accordance with these principles a municipality can only deprive a person of the use and enjoyment of his property when public necessity so demands as in the case of expropriation ; or when the use and enjoyment thereof constitute a menace to public health, morals and comfort, in which case summary and drastic measures may be taken; or when a city is divided into zones for the welfare of the community. It is only in the second case, to wit, when a real "nuisance" or public inconvenience exists, that a summary exercise of the police power of a municipality is authorized, and

this is so because the right of ownership and the right to use and enjoy property implies a social obligation on the part of the owner to exercise such right without causing injury to others, and looking to the attainment of the common good. In the first case a complaint for expropriation is necessary and in the third case there must be a zoning ordinance or law with prospective operation regulating the erection of buildings and the repair of those already erected in the residential zone, as well as the conduct of commerce and industry in the commercial and industrial zones, but not the destruction of buildings already erected, the removal of the business or industries already established, unless they be a menace to public health and morals and to the safety of persons and property.

Therefore, the ordinance under consideration is unconstitutional and void because it is arbitrary and does not constitute a reasonable exercise of police power.

Butte, J., with whom concur Street, Hull, and Goddard, JJ., dissenting:

The majority sustain the validity of ordinance No. 10 of the municipality of Iloilo on two grounds: first, because the tablerias of the appellees are a nuisance in fact, and second, because the ordinance, being a zoning ordinance, lies within the statutory power of the municipality.

The plaintiffs-appellees are Chinese who are operating their tablerias under licenses from the municipality of Iloilo. They made their investments and developed their establishments under licenses issued by the municipality of Iloilo several years ago, one of them as far back as the year 1918, since which time they have regularly paid their license fees including the current year. Their business is therefore lawful in every sense of the word. They may properly invoke section 3 of the Organic Act of these Islands (Act of Congress of August 29, 1916) commonly known as the Jones Law, which provides as follows:

"SEC. 3. That no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws. Private property shall not be taken for public use without just compensation."

It seems to me illogical to say that a business, especially licensed by law, may be abated as a nuisance. The licenses granted to the plaintiffs by the municipality of Iloilo have not been revoked nor has the municipality tendered the plaintiffs any refund of any portion of the license fees paid by them for the unexpired term of their licenses. It follows that the municipality should be equitably estopped to abate the establishments of the plaintiffs during the term of their licenses.

It is assumed that the power granted municipalities under section 2242, paragraph (k) of the Revised Administrative Code "To declare and abate nuisances" authorizes a municipality to declare a legitimate business like that of the plaintiffs to be a nuisance per se. I am constrained to register my emphatic dissent to such a proposition. It is a proposition so fraught with danger that I cannot believe it was the intention of the Legislature to confer such an unlimited power. Only such businesses as are nuisances in fact may be declared to be nuisances per se.

It is stated in the majority opinion: "Bearing in mind the nature of such business and the indisputable fact that the conduct thereof necessarily disturbs and annoys passers-by, and the neighbors, we do not hesitate to declare that said business constitutes nuisances per accidens or per se" In support of the aforesaid statement, the majority rely upon the case of *State vs. Rosenstein* (181 N. W., 107). The passage quoted from said decision clearly discloses that the lumber yards therein referred to are very different in nature from the tablerias of the appellees. Lumber yards' as they are commonly known in the States are not covered buildings like those of the petitioners but usually consist of many piles or stacks of lumber graded according to size which are placed out in open spaces usually without any enclosure. It would be absurd to say of the tablerias of these petitioners, as is said in the case of *State vs. Rosenstein*, that they are "a rendezvous for thieves and other violators of the law" and that they may become

"a menace to public order and safety."

Moreover, it is not correct to assume that lumber yards in the United States are nuisances per se. I have found no decision so holding. The following decision is directly to the contrary: *Shamburger vs. Scheurrer* (198 S. W., 1069).

An examination of the decision in the case of *State vs. Rosenstein*, supra, will disclose how dissimilar and inapplicable that decision is to the case before us.

The charter of the City of Minneapolis granted by the State expressly authorizes the city:

" 'To regulate the piling of lumber, shingles, or laths in said city, and to require any person maintaining any lumber, shingle and lath pile or mill woodyard to remove the same when the same is or may become dangerous to any building, buildings or other property near the same * * *. Provided, however, that nothing herein contained shall interfere with the limits within which such lumber, shingles, lath and mill wood may not be piled as now established by ordinance of said city, or within the fire limits of said city, as now existing or which may hereafter be established by ordinance of said city/ " Pursuant to this express authority, the City of Minneapolis enacted an ordinance on March 14, 1916, the material portion of which is as follows:

" 'Section 1. No person shall hereafter install or open any lumber yard or erect any building for the sale or storage of lumber within the City of Minneapolis without the consent of the city council.'" (Special attention is called to the word hereafter occurring in section 1, supra.)

On August 6, 1919, the defendant *Rosenstein* applied to the city council for a license to operate a lumber yard on premises on which no buildings were erected. In fact he had already installed thereon piles of lumber and other material for use in his business. The city refused to issue a license. Notwithstanding this fact, he continued to operate his lumber yard and was prosecuted and convicted. His conviction was affirmed, not on the ground that his business was a nuisance or that the ordinance in question was a zoning ordinance, but solely on the ground that the ordinance was a police measure expressly authorized by the Legislature. The word "nuisance" occurs nowhere in the opinion. The basis of the decision is summarized in the following paragraph:

"It (the ordinance in question) follows the lines of most police regulations, declaring that no person shall install or conduct a lumber yard within the city without the consent or permission of the city council. The dance halls, the peddlers, the hawkers, hackmen and other trades, professions, and occupations are thus regulated. The only thing required of one desiring to enter into the particular occupation is an application to the city council for a license or permit. There is nothing unreasonable or unfair in that, and the conclusion must be therefore that the ordinance is valid."

The majority are not willing to rest their decision upon the proposition that the tablerias of the appellees are a nuisance per se, for it is stated:

"The ordinance clearly states that the sawmill and the sale of lumber by the plaintiffs on Iznart Street constitute public nuisances; and although the question of fact herein involved may properly be reviewed by the courts, the evidence of record sufficiently justifies such conclusion."

The majority do not cite or summarize the evidence in the record which they hold proves sufficiently that the tablerias of the appellees constitute a nuisance in fact, and no reason is given for rejecting the clear findings of fact of the trial court.

Upon the trial of the case in the court below the municipality of Iloilo, in support of the ordinance, offered the following witnesses: Victoriano Honesto, Jose Villanueva Mapa, Manuel Zerrudo, Jose Locsin Sian and Apolonio Elegio besides Exhibits 1 to 52. We shall now examine this evidence in detail.

Victoriano Honesto is a photographer whose testimony is confined to the identification of Exhibits 1 to 41 which are photographs taken by him of various buildings situated on some of the streets mentioned in ordinance No. 10, including the establishments of the plaintiffs. He stated that he photographed only such buildings as were pointed out to him by the fiscal, and admitted that there were many other buildings on the same streets which were very different from those shown on the photographs. Apparently, the purpose of the fiscal in selecting the most handsome buildings on the various streets covered by the ordinance was to show that the beauty and harmony of the streets was marred by the buildings of the plaintiffs. Apart from the fact that the photographs are partial and misleading, they are entirely irrelevant upon the fundamental proposition that the establishments of the plaintiffs are a nuisance.

The second witness, Jose Villanueva Mapa, is the secretary of the municipality of Iloilo and his testimony is confined to the identification of the ordinances and the service of copies thereof upon the plaintiffs (Exhibits 42 to 46).

Manuel Zerrudo, the next witness, is the "maestro de obras municipal de Iloilo" and city architect. He identified Exhibit 47 which is a plan of the city of Iloilo and marked thereon the locations of the establishments of the plaintiffs. In the course of his testimony the fiscal stated:

"Juzgado. ¿Que dice usted, señor Fiscal?

"Sr. Fiscal. Con la venia del juzgado. Una de las contenciones del demandado es que al aprobarse esa ordenanza ha sido con el objeto de urbanizar la Ciudad de Iloilo obedeciendo al piano' de embellecimiento y urbanizacion; y ahora vamos a probar, señor Juez, que en la calle Iznart hay edificios hermosos y costosos al lado de los cuales estan esas tablerias de los demandantes que constituyen un peligro para la comunidad y afea inclusive el sitio. Ese es el objetivo talmente de esta serie de preguntas al testigo."

Questions along this line were objected to and the objections were sustained on the ground that they were impertinent, immaterial and irrelevant.

The next witness, Jose Locsin Sian, is one of the members of the municipal council of Iloilo. Practically the entire testimony of the witness is confined to the identification of the various buildings shown on the photographs and an attempt to make a comparison between Iznart Street in the City of Iloilo and Avenida Rizal in the City of Manila, beginning at Plaza de Goiti and extending to Calle Azcarraga. The only pertinent part of his testimony that favors the municipality of Iloilo is as follows:

"P. ¿De que material estan hechas esas tablerias? de los demandantes?—R. * * * este * * * por de pronto, la tableria que esta al lado del City Hall, actualmente en la calle Iznart, y que es del señor Ong Kim * * * pues * * * esta casi en los jardines del edificio ese del City Hall que es de Dona Maria Gay * * * - este * * * las maderas se exponen casi al borde de la calle, se amontonan, aunque dentro hay un poco de camino * * *."

"Sr. Zulueta. Creo que no es responsiva la contestacion del testigo, señor Juez.

"Juzgado. Consta en los records lo que ha contestado el testigo. Otra pregunta, señor Fiscal." He admitted that he had not been in Manila since the year 1921.

Apolonio Elegio, the municipal treasurer, was offered to identify Exhibits 48 to 52 which are tax declarations of Ramon Campos, Teodoro Benedicto, Manuel Ledesma, Maria Gay and Julio Ledesma. Upon objection to this line of examination, the court asked the fiscal the purpose of this testimony. He replied: "Probar nuestra contención de que existen edificios costosos en la calle Iznart." The first exhibit covers improvements in Iznart Street valued at P56,155; the second, improvements in Iznart Street valued at P51,346; the third, improvements in Iznart Street valued at P37,755; the fourth, improvements in Iznart Street valued at P15,000; the fifth, improvements in

Bonifacio Street valued at P23,310.

It is upon this evidence—and ignoring the evidence of the six witnesses on behalf of the plaintiffs—that we are asked to reverse the findings of the trial court. The trial judge, who had the witnesses before him, made the following findings:

"De los hechos probados durante el juicio nada hay que indique alguna lesi6n, inconveniencia, per juicio o estorbo al ptiblico causados por las tablerias de los demandantes abiertas en ambos lados de la calle Iznart, Iloflo, ni tampoco hay algd que pueda estorbar, molestar, lesionar o perjudicar al ptiblico con el almacenaje, dep6sito y expendio de maderas en propiedades privadas que bordean la citada calle; y siendo el caso asi, una tableria en la que se deposita, se almacena y se expende maderas, que no es nuisance per se ni nuisance per accidens, pero declarada, calificada y considerada por el Consejo Municipal de un municipio en una ordenanza como nuisance, nada mas porque le ha venido en gana calificarlo asi, Ese convierte acaso en nuisance y puede ser suprimida ? El Juzgado con vista de todas las pruebas aporriadas en el juicio no lo cree asi, porque la mera declaraci6n de que cierta construction no la convierte en tal cosa ni puede semejante declaraci6n transformarla en nuisance a menos de que en realidad tuviera tal caracter; y tampoco concurre con la pretension de la entidad demandada de que un concejo municipal, sin leyes generates ya de la ciudad o del Estado segun las cuales una determinada construccio"n pueda resultar peligrosa, pueda por el mero hecho de declarar que lo es hacerla susceptible de remocidn por parte de cualquiera que se considere agraviado, o aun por la misma ciudad, porque ello vendrfa a colocar a todas las casas, a todos los negocios y a todas las propiedades de la Ciudad de Iloilo a la merced ilimitada del Concejo Municipal de Iloilo.

* * * * *

"Resulta, sin embargo, de las mismas fotograffas aportadas como pruebas por el demandado en la vista de esta causa, que los edificios o tablerfas contra los cuales se dirige expresamente la ordenanza Exhibit B estan contruidos de madera y techados de hierro galvanizado, del mismo material, por tanto, que las otras casas residenciales levantadas en ambos lados de la citada calle Iznart. En otros te"rminos, tanto las tablerfas de los demandantes como las casas residenciales, todas en la calle Iznart, son del mismo material, esto es, de madera y con techado de hierro galvanizado.

* * * * *

"El Juzgado, despues del examen de las pruebas aportadas en el juicio, no encuentra nada en autos que indique que las tablerfas de los demandantes, objeto de la ordenanza Exhibit B, pueden en algun modo ser perjudiciales a la salud y seguridad publica, o la paz o al buen orden dentro del Mumcipio de Iloilo, o que vaya en pugna con la comodidad o conveniencia de sus habitantes." (Bill of Exceptions, pp. 19-22.)

Above, we have summarized all of the evidence offered by the city of Iloilo to prove that the establishments of the plaintiffs are nuisances in fact and we have quoted the findings of fact of the trial court which support its conclusion that the record signally fails to indicate that the tablerias of the plaintiffs in any wise are injurious to the health, order, safety or convenience of the public. But that is not all. The findings set out in the majority opinion likewise conclusively establish the harmless nature of plainr tiffs' business. These findings are thus stated:

"It appears from the evidence that the plaintiffs are lumber merchants with their place of business on Iznart Street, some of them having opened their business previous to the year 1931, and constructed their buildings of strong material with galvanized, iron roofing, some of them built on their own land and others on leased land. Inside said buildings sawed lumber is stored and on the premises blocks and big pieces of lumber are deposited, which are sawed by means of a small sawmill run by petroleum belonging to the plaintiff Benito Tan Ghat. The loading of sawed lumber sold by these merchants is usually done with said buildings without annoyance to the neighbors nor to passers-by."

It is probably a purely accidental circumstance that all the plaintiffs are Chinese, but no legitimate business, not

even of a resident citizen, is safe and secure if any municipality may declare any business to be a public nuisance upon no better proof than was presented in this case. It is probably because he was conscious of his utter failure to prove that the establishments of the plaintiffs were nuisances that the fiscal resorted to the theory that ordinance No. 10 is a zoning ordinance.

Examining now this aspect of the case, we are at once confronted by the deficiencies of the ordinance itself. Nowhere in the ordinance is any reference made to zoning. It does not appear whether it creates a residential zone, an industrial zone, a fire district or any other kind of zone. On the contrary, an examination of the map of the city of Iloilo discloses that the streets named in the ordinance form no sort of a zone. The ordinance simply recites certain streets for their partial or entire lengths without reference to other streets. The establishments of the plaintiffs on Calle Iznart are not embraced within any zone. AH of the establishments of the plaintiffs could be moved just round the corner and continue operating without violating the ordinance. There is no rational basis for ordinance No. 10 as a zoning ordinance and the conclusion is irresistible that the object of the ordinance was simply to drive the plaintiffs out of calle Iznart.

Without discussing the correct meaning of the maxim *salus populi suprema lex*, it suffices to say here that there is no evidence in this record that the *salus populi* has ever been or is now in any way jeopardized by the business establishments of the plaintiffs. May not the *salus populi* be jeopardized when the rights of a humble citizen are trampled upon by the arbitrary use of political power? When that happens the courts are his last bulwark of defense. And it is the glory of our judicature that here the poorest and humblest subject—be he citizen or alien—may ask for justice, not cringingly as a beggar soliciting alms but boldly as a creditor claiming what is due him.

Because no lawful business carried on in a lawful manner is a nuisance *per se* and because the evidence in this case miserably fails to establish that the plaintiffs' *tablerias* are a nuisance in fact, and because ordinance No. 10 of the municipality of Iloilo does not even pretend to be a zoning ordinance, I think that the decision of the trial court declaring this ordinance null and void as an arbitrary, illegal and unconstitutional abuse of power is correct and should be affirmed.

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