

THE UNITED STATES, PLAINTIFF AND APPELLANT, VS. JUAN HERNANDEZ ET AL., DEFENDANTS AND APPELLEES.*G. R. No. 9699. August 26, 1915*

Ponente: ARAULLO, J.

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The defendants named above were sentenced in the justice of the peace court of Batangas, of the province of the same name, for infraction of a municipal ordinance regulating fishing privileges. They appealed from the judgment and the cases against them were carried to the Court of First Instance of said province, wherein the provincial fiscal filed complaints against the said defendants, one on October 1, 1913, against Juan Hernandez, Lorenzo Claus, Donato Dimasacat, Crisanto Como, Pedro Hermedilla, Rosalio Antenor, Fausto Godoy, Gabriel Bartolome, Eulalio Driz, and Manuel Godoy to form case No. 2371, and three against Cornelio Arellano on August 6 of the same year, 1913, which were the bases of cases Nos. 2372, 2383, and 2409.

The first of said complaints is couched in the following terms:

"The undersigned provincial fiscal in the above-entitled cause, brought into this Court of First Instance on appeal, charges Juan Hernandez, Lorenzo Claus, Donato Dimasacat, Crisanto Como, Pedro Hermedilla, Rosalio Antenor, Fausto Godoy, Gabriel Bartolome, Eulalio Driz and Manuel Godoy with infraction of a municipal ordinance, committed as follows:

"In the night of March 2 of the current year, 1913, in the barrio of Pinamucan, municipality of Batangas, Batangas, in the jurisdiction of this Court of First Instance, the said defendants fished by torchlight with small hand-nets in a portion of the sea marked off as No. 106, intended for a fish weir and leased for that purpose to Lino Mendoza who at that time had no weir installed in that portion of the sea, without the knowledge or consent of said lessee; and in this way they caught fish as follows:

Juan Hernandez, to the value of

P2.00

Lorenzo Claus, " " " "

2.00

Donato Dimasacat " " " "

2.00

Crisanto Como " " " "

2.00

Pedro Hermedilla, " " " "

0.40

Rosalio Antenor, " " " "

0.40

Fausto Godoy, " " " "

0.40

Gabriel Bartolome, " " " "

0.40

Manuel Godoy, " " " "

0.40

Eulalio Driz, " " " "

0.40

"An act performed in violation of article 10, in connection with article 15, of municipal ordinance No. 4, regulating fishing privileges, of the municipality of Batangas."

One of the complaints filed against Cornelio Arellano is to the following effect:

"The undersigned provincial fiscal, in the above-entitled cause, brought into this Court of First Instance on appeal, charges Cornelio Arellano with infraction of a municipal ordinance committed as follows:

"On or about April 27 of the current year, 1913, in the barrio of Pinamucan of the municipality of Batangas, Batangas, in the jurisdiction of this Court of First Instance, the defendant, although provided with a license for fishing on the surface of the water in accordance with section 14 of municipal ordinance No. 4 of Batangas regulating fishing privileges, did maliciously fish with a small drag-net, called a bayacus, in the portion of the sea set apart for fish weirs, marked off as No. Ill, without the knowledge or consent of Lino Mendoza who is the lawful grantee of said portion of the sea, even though he had not then placed any fish weir there; the defendant having caught fish to the value of P14, which constitutes an infraction of section 10 of said ordinance, penalized by section 15 thereof."

The other two complaints filed against the same Arellano are identical with the foregoing and refer to the same offense, although they state that the defendant made use of a contrivance for fishing called alangang munti, and that said fishing' was carried on in weirs Nos. 112 and 113 in one instance and in weirs Nos. Ill and 112 in the other.

Counsel for the defendants filed a demurrer in case No. 2371 on the ground that the facts alleged therein did not constitute a crime or infraction, because the ordinance in question was unconstitutional, illegal and inapplicable and that the acts alleged in the complaint were not penalized by said ordinance, and therefore he prayed for dismissal of the case, with costs de officio. An identical prayer for dismissal had also been previously made on the same grounds by the defendant Arellano in each of the three cases instituted against him. After a hearing in the four cases had been granted to the fiscal who opposed the foregoing motion, the Court of First Instance of Batangas on January 20, 1914, issued in No. 2371 a single order for each and all of the said cases, dismissing the four complaints and assessing the costs de officio, cancelling the bond filed by the defendants for their release and directing that a copy of the same order be annexed to the other cases instituted against Arellano. Said dismissal was based on the finding that section 10 of the ordinance in question was an illegal provision and consequently null and void and of no force or effect, and that, even though the validity and legality of said section should be admitted, the infraction thereof was not included in the penal sanction prescribed in section 15 of the same

ordinance.

The judgment set forth was appealed from by the prosecution and said cases have been brought up to this Supreme Court by virtue of that appeal. In a single brief filed by the Attorney-General in support of said appeal in the four cases mentioned, it is maintained that the trial court erred: (1) In taking judicial notice in its order of January 20, 1914, of the existence of ordinance No. 4 of the municipality of Batangas; (2) in discussing in said order the validity and legality of the provisions of said ordinance; (3) in declaring section 10 of ordinance No. 4 of the municipality of Batangas illegal and null and void; and (4) in finally dismissing the complaints filed in cases Nos. 2371, 2372, 2383, and 2409.

Section 10 of the municipal ordinance cited in the complaint as violated reads thus: "Any person provided with a license for a fish weir, even though he does not install it, may utilize for his exclusive fishing by means of a net the space of 50 meters set apart for his weir, and no other fisherman shall disturb him in this privilege or make use of said area without his knowledge and consent"

Section 15 of the same ordinance, also cited in the said complaints, likewise reads: "Any person who makes use of the concession for fishing on the surface of the water without the corresponding license shall upon conviction be punished by a fine not exceeding two hundred pesos (P200) or by imprisonment for not more than six (6) months in the discretion of the court according to the seriousness of the offense"

The Attorney-General says in connection with the first assignment of error in his brief that while Act No. 183, known as the Manila Charter, as amended in section 42 by Act No. 612, provides that the municipal court of Manila, as well as the Court of First Instance of Manila, shall take judicial notice of the existence of all the municipal ordinances enacted by the municipal board of the city of Manila, yet in Act No. 82, called the Municipal Code, that is, the law organizing the municipalities of the Philippine Islands, with the exception of the city of Manila, there is no provision similar to the one above cited, and this silence in said Act demonstrates that the Courts of First Instance in the provinces cannot and must not take judicial notice of the existence of municipal ordinances, even when it takes cognizance of an infraction thereof on appeal from a judgment by the justice of the peace.

It is true that there does not appear in Act No. 82, to wit, the so-called Municipal Code, any provision analogous to that contained in Act No. 183, known as the Manila Charter, with reference to the point mentioned, but this silence cannot be taken to mean that it was (the intention of the legislator to deprive the Courts of First Instance in the provinces of these Islands of the authority conferred, not by Act No. 136, to wit, the law organizing the judiciary of the Philippine Islands, but by the organic act of the city of Manila, for the reason that, according to the said law organizing the judiciary (section 57), both the Courts of First Instance of the provinces and of Manila have appellate jurisdiction' over all cases arising in justices' and other inferior courts of their respective provinces; and there is no reason for making between the various courts distinctions that said Organic Act does not make for the exercise of their jurisdiction and the means of exercising it, among which must be included the authority to take judicial notice of the existence of the municipal ordinances in force in their respective districts. And we do not think that the fact that no provision even tacitly so providing is found among the provisions of Chapter X of Act No. 190, to wit, the Code of Civil Procedure, is any reason for maintaining, as the Attorney-General understands, that the Courts of First Instance lack such authority, because, in the first place, we do not think that chapter of the Code of Civil Procedure the appropriate place for setting forth such authority or duty, and, in the second place, if in giving such a reason the intention was to maintain that among the rules of evidence contained in said Chapter X there is none which refers to the means or method of proving the existence of a municipal ordinance so that the court trying the case may take notice thereof, we may turn to section 313, No. 5, included in said Chapter X, wherein, in fixing the "Proof of official documents" (in addition to that set forth in the preceding

sections), among which are unquestionably the proceedings or ordinances of the municipalities of these Islands, it is stated: "Official documents may be proved as follows: * * *5. The acts of a municipal corporation of the Philippine Islands, or of a board or department thereof may be proven by a copy certified by the legal keeper thereof, or by a printed book published by the authority of said corporation," and it will be perfectly comprehended that, according to the provision quoted, a certified copy of a municipal ordinance of the Islands may be presented as evidence in court.

Furthermore, in each one of the four cases enumerated above, after the complaint and before the motion to dismiss, there is annexed a duly certified copy of the municipal ordinance in question, with the infraction thereof the defendants were respectively charged in said informations. It does not appear by whom said copies were presented, but they must have been submitted either by the provincial fiscal himself along with the complaints, especially when reference is made therein to said ordinance, or by counsel for the defendants in filing the motion to dismiss. The filing of said copies clearly demonstrates the need the court had for taking notice of said ordinance in order to be able to decide the questions raised by counsel in his prayer for dismissal and in order to determine whether it had been violated, as the complaints charged.

However it may have been, the certain and positive fact is that copies of that ordinance were presented to the court and it had to take them into account in rendering final judgment in the case, and it cannot be said that because they were not introduced as evidence in due course of the trial presentation thereof was not effected, for a question of fact was involved in discussing the motions to dismiss said four cases, to wit, whether or not the infraction of section 10 of said ordinance was an act penalized by section 15 thereof, aside from the fact that in order to decide the question relating to the unconstitutionality or illegality of said ordinance it was necessary to know the terms thereof and consequently to consult it. Those copies therefore constitute evidence presented on that point, and it is to be noted that the provincial fiscal, the prosecutor, who was heard thereon and opposed the dismissal sought, offered no objection to the presentation of said copies or to the court's taking judicial notice of the existence of said ordinance, which compliance signifies acknowledgment on the part of the prosecution in the Court of First Instance of the authority and the duty of the court in connection with such notice and bars the admission and consideration of such objection at the present stage of the proceedings, and so much the more so when, as has been said, it is possible that those copies may have been presented in the Court of First Instance by the fiscal himself.

In other respects, there is nothing in the law to prohibit the Courts of First Instance of the provinces in these Islands from taking judicial notice of the ordinances enacted by the municipalities of their districts, or which establishes that they cannot exercise such authority or perform their duty, when it may become necessary for the determination of the questions submitted to their jurisdiction.

On the other hand, there has been laid down in decisions of some of the courts of the sovereign country the principle, observance whereof is reasonable and justifiable in these Islands, that in cases analogous to the one at bar judicial notice must be taken of the municipal ordinance that is called into question.

"Where a conviction is had for the violation of a city ordinance and an appeal to the district court, the ordinance of the city need not be introduced in evidence. The district court should take judicial notice of such ordinance; but where said ordinance is given in evidence, over the objection of the defendant, held, not error." (Downing vs. City of Miltonvale, 36 Kan., 740.)

"Where an action for the violation of a city ordinance is commenced and prosecuted to conviction and sentence before the police judge of such city, and the case is then taken by the defendant on appeal to the district court, the district court should, with reference to such case, take judicial notice of the incorporation of such city, and of the existence and substance of its ordinances." (City of Solomon vs. Hughes, 24 Kan., 154.)

In the body of the decision in the case of *Smith vs. City of Emporia* (27 Kan., 528, 530), it is stated: "When the case was taken on appeal from the police court to the district court, it was not only within the power, but it was the duty of the district court to try the case in the same manner that it should be tried before the police court. The district court was in fact substituted for the time being for the police court, and whatever the police court could have taken judicial notice of while the case was in that court, the district court could and should have taken judicial notice of after the removal of the case to the district court.

"Municipal courts, and the circuit courts on trial de novo on appeal from them, will take judicial notice not only of the ordinances of a city, but of such journals and records of the common council as affect their validity, meaning, and construction, just as state courts take official notice of the public statutes of the State and the journals of the legislature." (*Portland vs. Tick*, 44 Ore., 439.)

It cannot be held, therefore, that the trial court committed the first error assigned by the appellant in his brief, nor in the second, namely, in considering, in the order appealed from, the validity and legality of the provisions of Ordinance No. 4 of the municipality of Batangas, of which he took judicial notice..

The Municipal Code, section 43 (c), as amended by section 1 (:) of Act No. 303 and section 3 of Act No. 1530, includes among the municipal revenues, or, what amounts to the same thing, among the methods the municipalities may adopt for raising revenue for public purposes in their respective localities "the granting of the privilege of fisheries in fresh-water streams, lakes, and tidal streams included within the municipality and not the property of any private individual, and in the marine waters included between two lines drawn perpendicular to the general coast line from points where the boundary lines of the municipality touch the sea at high tide, and at third line parallel with the general coast line and distant from it three marine leagues."

Act No. 1634, section 1, also authorizes the municipalities to let at public auction the privilege or license to fish in definite fishing grounds in case the latter have been previously indicated by the municipality. ,

The right to engage in fishing is a common and general one, but it can be regulated by a municipal corporation under a provision of law or authority granted by the Legislature, being in this case a delegation of the state's authority to the municipality.

"By the common law all persons have a common and general right of fishing in the sea, and in all other navigable or tidal waters; and no one can maintain an exclusive privilege to any part of such waters unless he has acquired it by grant or prescription, notwithstanding the title to the bed of such a stream is in the riparian owner." (19 Cyc, 992, and cases there cited.)

"In the absence of statute, the right of fishery in navigable waters within the limits of a municipal corporation belongs to the public, and the corporation as such can exercise no control over it; * * *. But power to regulate and control fisheries within its limits has generally been given to such towns by patent or grant, or by an act of the legislature. Under such grants or acts the right of fishing in waters within the limits of a particular town may be given exclusively to the inhabitants thereof, * * *" (19 Cyc, 1004, and cases there cited.)

Moreover, the same Municipal Code, section 39 (jj) authorizes the municipalities of these Islands to "make such ordinances and regulations, not repugnant to law as may be necessary to carry into effect and discharge the powers and duties conferred by this Act, 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; and enforce obedience thereto with such lawful fines and penalties as the municipal council may prescribe under the provisions of paragraph (dd), of this section."

Hence, the municipal council of Batangas has acted in accordance with law and in strict compliance therewith in

enacting the ordinance No. 4, which is here in question, to require the granting of a license for securing the privilege of fishing in the rivers and the marine waters of said municipality, in regulating the exercise of said privilege and in prescribing the methods for securing the same, in safeguarding the right of the grantee by fixing penalties for any of the cases of disturbance thereof, and in also fixing penalties for the grantee himself should he in the exercise of his privilege cause injury to the public or to the grantees of adjoining areas. The fact that section 10 of the same ordinance prescribes that no other fisherman shall disturb the grantee in the exercise of his privilege or make use of the space granted to him without his knowledge or consent does not mean that said section, and consequently the said ordinance, is illegal and null and void, for such a concession would not be a privilege but a permit of a general nature to fish in a definite area. The exclusive right of the grantee in the instance to which said section 10 refers is exactly what is inherent in the privilege itself, just as the privilege would cease to exist if such right could, not be exercised. It is a principle of law that the grantee cannot use his privilege to the exclusion of another grantee, whence it necessarily follows that he can use it to the exclusion of others who do not enjoy the privilege. And as has already been stated, municipal corporations are authorized by law to grant such a privilege.

It is true, as stated in the order appealed from, that the Municipal Code contains no provision which expressly confers upon municipalities authority to grant the exclusive use of a portion of the sea in its jurisdiction for fishing purposes and to give the grantee the right to require permission to fish in the portion granted. But the Municipal Code does not contain such provisions because they are absolutely unnecessary for the purpose of determining the meaning of the granting of the privilege for fishing, to which the section 43 cited makes reference, for the simple reason that the right to fish in the marine and other navigable waters or tidal waters within the boundaries of a municipal corporation is public, common and general. In mentioning in the said code as one of the sources of revenue for the municipalities the granting of privileges for fishing in the marine waters within its jurisdiction, not the property of any private individual, and in the marine waters within the lines fixed in said section 43, reference was made to the granting of privileges for fishing in definite areas or parts of that portion of the sea, not in the sea in general, since for this such a grant was unnecessary; and in accordance with the provision cited from the ordinance here in question and for the purpose of the granting of said privilege, the water along the seashore seems to be included in the second group to which section 1 refers for in treating of the rights and obligations of the grantee mention is made of the places for weirs, that is, definite portions of the sea, within which the grantee may exercise that right. Anybody provided with a license for a weir is authorized by section 10, even though he may not have installed it, to make use of the space of 50 meters for his exclusive fishing with a net, as set aside for his weir, and not for fishing in the sea in general, because such a grant would not, we repeat, be necessary therefor. And still less was it necessary for the said Municipal Code to confer expressly upon the municipalities authority to confer upon the grantee the right to require permission to fish in the portion granted, because that right is inherent in the very granting of the privilege to fish in a definite place in the sea, which is what the granting mentioned in section 43 amounts to, and the authority of the municipality to confer this right is also included in the authority to make the grant, for the thing granted would not be a privilege if the grantee could not exercise such right.

Finally, we see nothing in the ordinance in question which justifies the conclusion, as set forth in the order appealed from, that the granting of the privilege, as regulated therein, lends itself to abusive and odious combinations, to prevent which an effort should have been made, for section 3 of the same ordinance states that the license for securing the privilege shall be let at public auction, that is, in accordance with the provisions of section 1 of Act No. 1634, and the other sections contain prescriptions referring to the use and enjoyment of the privilege which are not contrary to law. While it is true that in the exercise of the privilege or in the exclusive use of the space granted to him for fishing, the grantee may violate the law or abuse his right by means of

combinations that may be prejudicial to the public interest, or rather the welfare of the locality, there are means within the pale of the law to suppress them and even to provide punishment for them. Moreover this possibility is no reason for holding that the provision contained in section 10 of said ordinance is illegal, and consequently null and void and of no force or effect, as the lower court has held, thus incurring the third error assigned by the appellant in his brief, as well as the fourth, by dismissing on such ground the complaints in the four cases enumerated above.

Nevertheless, dismissal is proper on the ground set forth in the very order appealed from that the infraction of said section 10 is not included within the sanction prescribed by section 15 of said ordinance, and to convince oneself of this fact the mere reading of said two sections is sufficient.

On this ground, and declaring the provision contained in section 10 of said ordinance of the municipal council of Batangas to be legal and valid, we affirm the judgment appealed from, with the costs de officio. So ordered.

Arellano, C. J., and Torres J., concur. Johnson, J., concurs in the result.

CONCURRING

CARSON, J.,

I concur in the disposition of this appeal.

I think it well to indicate however that the comment of the opinion in regard to the right of the courts to take judicial notice of the contents and the enactment of municipal ordinances should be held to be limited strictly, in the language of the opinion itself, to "casos analogos al de quese trata."

The general doctrine, as I understand it, is quite clearly set forth by Judge McQuillin in his work on Municipal Corporations, from which I extract the following:

"PAR. 849.—Courts will judicially notice the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a public statute, but when it is public or general in its nature or purposes. But state courts will not take judicial notice of ordinances of municipal corporations; hence, as mentioned, they must be pleaded with as much certainty of description as to their subject-matter as a contract or other private paper.

"Courts of the state take judicial notice of public laws of the state. Ordinances when legally enacted, operate throughout the limits of the city in like manner as public laws operate within the state limits. The city or municipal courts bear the same relation to ordinances of the city as the state courts do to the public laws of the state. Hence, on principle, the municipal courts may for like reason take judicial notice of all city ordinances of a general nature, or those having a general obligatory force throughout the city. And the rule that courts will not take judicial notice of municipal ordinances does not apply to police courts and city courts, which have jurisdiction of complaints for the enforcement of ordinances. They will take judicial notice of their ordinances, without allegation or proof of their existence.

"PAR, 861.—While, as we have seen, municipal or city courts will take judicial notice of the ordinances and resolutions passed and in force within the jurisdiction of the court, without being pleaded and proved, in many jurisdictions it is held, and the weight of authority seems to be that, on appeal from such courts to a state court the latter will not take judicial notice of ordinances unless they have been pleaded in the municipal or city court and set out in the record. But the better view appears to be that where an action for the violation of an ordinance has been commenced in a municipal or police court and the case is appealed, the latter court, whether state or municipal, will take judicial notice of the incorporation of the city and of the existence or

substance of its ordinances."

I may say also that I think that under the rulings of this court in *United States vs. Tamparong* (p. 321 supra), the appeal should have been dismissed forthwith, with out discussing the merits, when the court had satisfied itself as to the validity of the ordinance, the sole ground upon which appellants were permitted to maintain their appeal being the alleged invalidity of the ordinance.

Nevertheless, as the judgment entered by this court has substantially the same effect as that which would be secured by dismissing the appeal, I have not felt constrained to dissent on this ground alone.

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