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Zoning - Particular Uses - Regulation of Agricultural Land Adjacent to City Limits

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minor in the departure of the parent.[20] One jurisdiction felt that if recovery were allowed the family relationship would be commercialized.[21]

North Dakota is liberal in allowing recovery by a spouse for alienation of affection,[22] but has not been faced with the question of an action by a minor against an enticer of his parent. This writer feels that North Dakota would allow recovery by a minor under the existing statute[23] or, barring statutory recovery, would adopt the invasion of privacy principle expressed in Minnesota.[24] Allowing recovery, either under statute or expansion of the common law, raises problems similar to those discussed in the instant case.

Although a novel contention, it might be asserted that the minor is a third party beneficiary under the marital contract and therefore subject to recovery for a wrong committed by a paramour. It is suggested that North Dakota allow each child a cause of action with a guardian ad litem appointed for minors bringing the action. The jury should be allowed discretion in awarding compensatory and punitive damages, placing such award in trust for the child. A minor's right of action should arise when a paramour entices the parent to leave the home. The court should carefully scrutinize this form of action to prevent fraud and collusion, but should not deny recovery merely because the assessment of damages is burdensome or difficult. The action should become moot when the child reaches legal age or is capable of self-support.

It is this author's opinion that this sociological and legal problem should be dealt with by the legislature, but in the absence of legislative action the courts should act to do substantial justice.

BRUCE E. COLEMAN

ZONING—PARTICULAR USES—REGULATION OF AGRICULTURAL LAND ADJACENT TO CITY LIMITS—Plaintiffs purchased a home in a

20. Morrow v. Yannantuono, *supra* not 14; Garza v. Garza, *supra* note 17. *Contra,* Johnson v. Luhman, *supra* note 5; Miller v. Monsen, *supra* note 1. The latter two decisions attacked the previous reasoning as not viewing the changes which have taken place in viewing the family as a unit. Daily v. Parker, *supra* note 5, has suggested that a parent leaving home is not worth anything because he was virtually valueless prior to his departure, and that the value of a parent goes to the question of damages.

21. Henson v. Thomas, *supra* note 13.

22. See Tice v. Mandel, 76 N.W.2d 124 (N.D. 1956); Rott v. Goehring, 33 N.D. 413, 157 N.W. 294 (1916).

23. N.D. CENT. CODE § 14-02-06 (1960): "The rights of personal relation forbid: 1. The abduction or enticement of a husband from his wife, or of a parent from his child; . . ." This statute should be considered in conjunction with the N.D. CONST. art. I, § 22. North Dakota's statute relating to personal relations is derived from the CAL. CIV. CODE § 49, which formerly read the same as that now found in North Dakota. California amended the statute in 1939 so it now reads: "The rights of personal relations forbid: (a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody; . . ." The amendment omitted "or of a parent from his child," and a California decision, Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P.2d 984 (1948), held that the legislature expressed the necessary intent to deny a cause of action by a minor for the enticement of a parent from the home.

24. Miller v. Monsen, *supra* note 1.

subdivision one-fourth mile from the city limits of Emporia, Kansas. At the time of the purchase one feed lot was located one-half mile from the plaintiffs' home, and later two new lots were opened one-fourth mile from plaintiffs' home. Subsequently 15,000 cattle and 12,000 sheep were fed in the area. The plaintiffs sought damages on the grounds that the feed lots were a nuisance and a permanent injunction under the Lyon County Zoning Ordinance which requires permits to be obtained for stockyards or facilities for the slaughtering of animals.[1] With one justice dissenting, the Supreme Court of Kansas *held* that the defendants were to abate conditions amounting to a nuisance, but did not award a permanent injunction because the feeding of livestock was an "agricultural enterprise." Under Kansas law, county zoning officers have no authority to regulate land used for argricultural purposes.[2] The dissenting judge reasoned that feed lots were purely commercial enterprises and the feeding of livestock within a residential area was a nuisance. *Fields v. Anderson Cattle Company*, 193 KAN. 558, 396 P.2d 276 (1964).

Forty-seven states have enacted statutes empowering counties, towns or townships to pass zoing ordinances.[3] North Dakota has enacted county and township enabling statutes which allow county officers and municipal officers to co-ordinate zoning regulations.[4] Within these general statutes, many states include a clause restricting the zoning regulations from applying to land used for agricultural enterprises.[5]

This clause has placed upon the courts the burden of defining agriculture, agricultural use, and farming. The Kansas Supreme Court defines agriculture to include farming, dairying, horticulture, animal and poultry husbandry, and the sale of such products by one engaged in agriculture.[6] In general the court has found that agriculture is the science of supplying all human wants by raising products of the soil and by animal husbandry.[7] Therefore, agriculture includes all enterprises related to the cultivation of crops and the feeding of all kinds of farm livestock. Once the court has accepted this definition under the clause restricting zoning reg-

1. The 1956 Lyon County Zoning Ordinance was adopted pursuant to KAN. GEN. STAT. ANN. § 19-2927 (Supp. 1961).

2. KAN. GEN. STAT. ANN. § 19-2929 (Supp. 1961).

3. *E.g.*, ILL. ANN. STAT. ch. 34 §§ 3151-61 (Smith-Hurd 1960); IOWA CODE ANN. §§ 358 A.1-.26 (1964); KAN. GEN. STAT. ANN. §§ 19-2901-37 (Supp. 1961); MINN. STAT. ANN. §§ 366.10-.19, 394.01-.17, 396.01-.21 (1957).

4. N.D. CENT. CODE §§ 11-33-01 to 11-33-20, 58-03-11 to 58-03-15, 11-34-01 to 11-34-04 (1960).

5. *E.g.*, N.D. CENT. CODE § 11-33-02 (1960), "No regulation or restriction, however, shall prohibit or prevent the use of land or buildings for farming or any of the normal incidents of farming."; IDAHO CODE ANN. § 31-3803 (1963); ILL. ANN. STAT. ch. 34 § 3151 (Smith-Hurd 1960); IOWA CODE ANN. § 388.A2 (1964); KAN. GEN. STAT. ANN. § 19-2929 (Supp. 1961); MO. REV. STAT. §§ 64.090 and .620 (1959).

6. Carp v. Board of County Comm'rs, 190 Kan. 177, 373 P.2d 153 (1962).

7. *Ibid.*

ulations from affecting agricultural land it is impossible to prevent the raising of livestock in rural residential areas.

Rather than use the term "agriculture" in its restricting clause, North Dakota applies the term "farming."[8] The Supreme Court of Nebraska held that the term "agriculture" is more broad in meaning than "farming."[9] It has been held that a dairy farm is permissible under a zoning regulation permitting the occupancy of land for "agricultural uses," but the maintenance of a piggery is not permissible under a zoning regulation allowing the land to be used as a farm.[10] Other decisions have held that the proposed use of less than a three-acre tract for a poultry house for 800-1,000 hens is not permissible as farming[11] and the keeping of 1,200 hens on a half acre does not reasonably fall within the term "agriculture" or for "agricultural purposes."[12] But a man who owns one hundred dairy cattle is a farmer even if he operates a dairy business to deliver his products to a nearby town.[13] Thus the burden of defining "farming" seems as confusing and troublesome as defining "agriculture."

By applying the principle that powers granted to local governments are to be strictly construed,[14] it is difficult to restrict the term "agriculture" or "farming." As a result, people presently building in residential areas outside the city limits have no guarantee that a feed lot will not move in next door. This all points to a problem for the growing cities since urban zoning is often chaotically developed, and the presence of the clause in favor of agriculture will not improve the planned development of these areas adjacent to cities.

North Dakota has a plan for the zoning of territory adjacent to cities[15] while Kansas limits its program to a three-mile radius of a municipal corporation.[16] In each case the effect of this clause could be reduced as applying to this land by omitting the clause completely or by regulating livestock production in these areas. If the troublesome clause restricting county zoning regulations from affecting agricultural land were omitted, the county zoning boards could work with the municipal zoning boards to guarantee the orderly and well planned development, without exception, of land which may in future years become part of the cities.

As the law stands today, residential districts both within and

8. *Supra* note 5.
9. Rodgers v. Nebraska State Ry. Comm'n, 134 Neb. 832, 279 N.W. 800 (1938).
10. Town of Lincoln v. Murphy, 314 Mass. 16, 49 N.E.2d 453 (1943).
11. Chudnov v. Board of Appeals, 113 Conn. 49, 154 Atl. 161 (1931).
12. Welsh v. Flo, 146 Kan. 807, 73 P.2d 1084 (1937).
13. Gregg v. Mitchell, 166 Fed. 725 (6th Cir. 1909).
14. Carp v. Board of County Comm'rs, *supra* note 6; Julian v. Golden Rule Oil Co., 112 Kan. 671, 212 Pac. 884 (1923).
15. N.D. CENT. CODE ch. 11-34 (1960).
16. KAN. GEN. STAT. ANN. § 19-2927 (Supp. 1961).

outside the city limits are continually under threat of the nuisance of feed lots which may move into this area adjacent to the city. By modifying the restricting clause, the exclusion of livestock programs from land adjacent to cities would prevent these nuisances. Upon modification of existing statutes as suggested above, the dissenting opinion would be sound in result.

EDMOND REES

EVIDENCE—SEARCHES AND SEIZURES—ADMISSABILITY IN CIVIL CASE WHEN ILLEGALLY OBTAINED BY PRIVATE PERSONS—In a jury trial the plaintiff was granted a divorce on the ground of his wife's adultery. The wife appealed on the theory that the evidence of her adultery should have been excluded because it was obtained by a violation of her rights under the fourth amendment to the United States Constitution.[1] The violation consisted of an illegal, forcible entry into the wife's home by the husband and several of his private investigators. The New York Court of Appeals *held*, two judges dissenting, that evidence of a wife's adultery was admissable in a divorce action even though obtained by an illegal, forcible entry. The dissenting judges reasoned that the exclusionary rule applied in criminal cases should be extended to civil cases where the violation of rights was committed by a private person rather than a governmental unit. *Sackler v. Sackler*, 15 N.Y.2d 40, 203 N.E.2d 481 (1964).

The common law rule regarding admissibility of evidence was that the court would not be concerned with how it was obtained.[2] Under this rule, evidence obtained by unreasonable search and seizure was admissable even though the United States Constitution forbids such invasion.[3] The reason given was that crime detection should not be needlessly burdened and that the accused's remedy was a civil action for trespass rather than exclusion of the evidence so obtained.[4] The first step toward abrogating this rule was the exclusion of such evidence from federal courts[5] and the adoption of the exclusionary rule by a number of states through their own constitutions.[6] The next step came in 1949 when the United States Supreme Court ruled that the fourth amendment was enforceable against the states through the fourteenth amendment. But the prohibition against unreasonable search and seizure did not

1. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."
2. Olmstead v. United States, 277 U.S. 438, 467 (1928).
3. *Supra* note 1.
4. People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).
5. Weeks v. United States, 232 U.S. 383 (1914).
6. Elkins v. United States, 364 U.S. 206, Appendix at 224-32 (1960).