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NORTH DAKOTA'S ANTI-CORPORATE FARMING ACT

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By way of a sequel to Professor White's learned discourse at our last meeting on the tax aspects of corporate farming, I have some general thoughts I'd like to pass along to you with respect to North Dakota's Corporate Farming Act. Like most of us here, my only brush with that Act was a passing reference to it in law school, but certain developments in the past year and a half have caused me to take a long look at the act and at what courts have had to say about it and somewhat similar laws.

My interest was awakened because of an action brought in the summer of 1958 by the Attorney General's office in the name of Grand Forks County against a corporate client of mine, which action alleged a violation of our corporate farming act and prayed for escheat of some 3,000 acres of Red River Valley farm land.

This particular act was given birth in the June primary of 1932 through an initiated measure approved by a vote of 114,496 to 85,932 and is now found in a slightly amended form as Chapter 10-06 of the North Dakota Revised Code of 1943. At the time of its adoption by the people of this state North Dakota was at the bottom of the great depression, and I believe it safe to say that the Act was aimed in large measure at life insurance companies and out-state corporate lenders which had foreclosed on thousands of acres of North Dakota agricultural land.

In brief, the act as subsequently amended by the 1933 legislature provides:

(1) All corporations, both foreign and domestic, *except as otherwise provided in this chapter,* are prohibited from engaging in the business of farming or agriculture.[1]

(2) All corporations . . . shall dispose of rural real estate, *except such as is reasonably necessary in the conduct of their businesses,* on or before July 29, 1942.[2]

(3) All lands acquired by a corporation since July 29, 1932, *except* . . . shall be disposed of within ten years after such acquisition.[3]

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1. N.D. Rev. Code § 10-0601 (1943).
2. *Ibid,* § 10-0602.
3. *Ibid.* § 10-0603.

(4) Cooperative corporations are exempt from the act where 75 per cent of their members reside on farms or depend principally on farming for their livelihood.[4]

(5) In case any corporation fails to dispose of its rural lands within the time fixed by this chapter, title thereto shall escheat to the county on an action brought by the state's attorney. The lands shall be sold at public auction, and proceeds therefrom, after expenses, remitted to the corporation.[5]

North Dakota is not unique in possessing this type of statute. Somewhat similar laws going back to the ancient mortmain statutes of the thirteenth century are found in no less than seven other states of the union. The mortmain acts, as will be recalled from common law history, were the "dead-hand" statutes which prohibited religious bodies from indefinitely holding lands devised to them. Such acts have uniformly been held constitutional as within a state's power to determine its own public policy.

For instance, *Kansas* provides that a corporation may not be formed for the purpose of engaging in the business of producing, planting, raising, harvesting or threshing wheat, corn, barley, rye, oats, or potatoes, or for milking cows.[6]

Kentucky prohibits corporate holdings of reality, except such as is proper and necessary for carrying on the corporation's legitimate business affairs, for longer than five years under penalty of escheat.[7]

Minnesota prohibits a corporation with alien control from owning over 90,000 square feet of land.[8]

Mississippi provides that no corporation may hold or cultivate more than 12,500 acres for agricultural purposes.[9]

Missouri prohibits corporate holding of realty, except such as is proper and necessary for carrying on its legitimate business affairs, for longer than fifteen years.[10]

Oklahoma provides that no corporation may own land outside an incorporated city or village, except such as is necessary and proper for carrying on the business for which the corporation was formed.[11]

West Virginia provides that a corporation's charter must state the number of acres of land to be held by it.[12]

4. *Ibid.* § 10-0604.
5. *Ibid.* § 10-0606.
6. Kan. Rev. Stat. § 17-2701 (Supp. 1941).
7. Ky. Const., § 192.
8. Minn. Laws (1959) c. 495.
9. Miss. Code § 5329 (1957).
10. Mo. Const., Art. XI.
11. Okla. Laws § 18-1.20 (1951).
12. W.Va. Code § 930 (1955).

What have the courts had to say about such laws as North Dakota's Chapter 10-06 and the similar acts to which I have just referred? More particularly, what does the "reasonably necessary" exception mean?

The particular statute with which we are here concerned provides:

> "All corporations, both domestic and foreign, which now own or hold rural real estate . . . used or usable for farming or agriculture, except such as is *reasonably necessary* in the conduct of their business, shall dispose of the same . . . ."[13]

Generally, in dealing with statutory enactments limiting corporate powers or limiting the right of corporations to acquire real estate, the word "necessary" has been given a reasonable construction and not one which would hamper the reasonable exercise of its corporate powers.[14] In *Folk v. State Capital Savings & Loan Ass'n.*,[15] the Court said: "When it comes to determining what is 'necessary' for the conduct of the business and transaction of the affairs for which a corporation has been chartered, it must, of course, be understood that what is meant is a due and profitable transaction of its lawful purposes; that the 'necessity' contemplated is a relative one having reference to economy, convenience, efficiency and success; and that some latitude is to be allowed to the discretion of the corporation itself in deciding what, from time to time, is or is not, in that sense, necessary."

However, we are not here limited to analogous cases giving general rules of interpretation and definition to the words 'necessary or reasonably necessary' for there are other cases practically in point. It has been held as a matter of law that property owned by a corporation organized for the specific purpose "to buy, sell and lease lands" is necessary for its business and not subject to a constitutional provision prohibiting corporations from owning lands for more than a specific period "except such as may be necessary and proper for the carrying on of its legitimate business."[16]

There are several unchallenged decisions from North Dakota courts on the point, the first being *Asbury Hospital v. Cass*

13. N.D. Rev. Code § 10-0602 (1943).

14. J. L. Young Co. v. Minchew, 42 Ga. App. 228, 155 S.E. 356 (1930); Folk v. State Capital Savings & Loan Ass'n., 214 Pa. 529, 63 Atl. 1013 1013 (1906).

15. 214 Pa. 529, 63 Atl. 1013, 1016 (1906).

16. Folk v. State Capital Savings & Loan Ass'n, 214 Pa. 529, 63 Atl. 1013 (1906); Commonwealth v. Louisville Property Co., 139 Ky. 689, 121 S.W. 399 (1909); Cree v. Associates Co., 192 Ky. 669, 234 S.W. 288 (1921); Sylvester Watts Smyth Realty Co. v. American Surety Co., 292 Mo. 423, 238 S.W. 494 (1921); Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225 (1895).

County,[17] wherein the Supreme Court said that: "When the statute provides that there shall be excepted from its operations such real estate 'that is reasonably necessary in the conduct of' the business of the corporation, it means such real estate as is *reasonably necessary for carrying on the business or activity which the corporation was created to carry on.*" (emphasis supplied).

I think most lawyers of the state have long felt that the *Asbury* case unqualifiedly upheld an absolute ban on corporate ownership of rural lands in North Dakota. The decision did uphold the constitutionality of the law, and did say, in effect, that Asbury Hospital had no right to hold a quarter section of land in Cass County. But Asbury was chartered as a hospital and nothing in its purpose clause gave it power to own, hold or manage real estate of any kind. Its sole right to hold any land, including that whereon its hospital stood, was derived from the general powers given non-profit corporations under the laws of the state of Minnesota, and it was in no position to say that owning rural realty was reasonably necessary to the operation of a hospital.

Several years after the *Asbury* case the North Dakota Supreme Court handed down its only other decision to date involving the corporate farming act. This second case[19] was a quiet title action wherein the defendants contended plaintiff corporation was prohibited from taking title to the land in question by Chapter 10-06. The Supreme Court disposed of this contention by saying: "A corporation may acquire and *hold indefinitely* real estate that is otherwise within the prohibited category if it is reasonably necessary in the conduct of its business."[20]

Following the *Asbury* case, two actions for declaratory judgment were brought by foreign corporations licensed to do business in this state seeking a determination as to the status of farm lands owned by such corporations under the Act here involved. In an action entitled *Baldwin Corporation v. Dickey County*,[21] decided October 26, 1942, in the District Court of the Third Judicial District in and for Dickey County, the trial court there found that the plaintiff was incorporated "To acquire by purchase or otherwise, own, hold, buy, sell, convey, lease, mortgage or encumber, and generally deal in real estate or property, — and to do and perform all things needful and lawful for the development of the same for

17. 72 N.D. 359, 7 N.W.2d 438 (1943).
18. 72 N.D. at 375, 7 N.W.2d at 447.
19. Loy v. Kessler, 76 N.D. 738, 39 N.W.2d 260 (1949).
20. 76 N.D. at 760-61, 39 N.W.2d at 272.
21. Unreported.

agriculture, residence, trade and business . . . . " The court further found that since 1917 plaintiff had been actively engaged in the business of buying, selling, leasing, managing, developing and otherwise dealing in land within the state, and that it was not engaged in the business of farming in the state.

Following its findings, the court concluded as a matter of law that "the right to acquire by purchase or otherwise, own, hold, buy, sell, convey, lease, mortgage or encumber, and generally deal in real estate or property is essential to the business in which the plaintiff is engaged, and all lands so acquired by the plaintiff are reasonably necessary to the conduct of its business within the meaning of (the Act)." Judgment was thereupon ordered perpetually enjoining the enforcement of the Anti-Corporate Farming Act against plaintiff.

The sole remaining case of which we are aware is *Northwestern Improvement Co. v. Morton County*,[22] decided February 24, 1942, in the District Court of the Sixth Judicial District in Morton County. In this case, likewise seeking a Declaratory Judgment, the trial court found, inter alia, that the plaintiff was chartered "to purchase or in any wise acquire for investment or for sale or otherwise, lands, contracts for the purchase or sale of lands, buildings, improvements and any other real property . . . and to manage, improve, develop and turn to account any lands or contracts . . . . "

The court further found that since 1897 plaintiff had been actively engaged in the business of buying, selling, leasing, managing, and otherwise dealing in land within the state, and that it had never engaged in the business of farming and disclaimed any intention of engaging in farming in North Dakota. As a conclusion of law the court then held that the Act was not applicable to plaintiff, and that it was entitled to a permanent injunction restraining enforcement of the Act against it.

It should be noted no appeal was taken in either the *Baldwin* or *Northwestern* cases. We would also cite 19 C.J.S. 640, where it is said: "Where the constitution or statutes so provide, a corporation may not own or hold for more than a prescribed period real estate not necessary or proper for its legitimate business. Such a prohibition does not prevent a corporation from holding indefinitely what is necessary or incidental to its business, or from acquiring and holding in good faith beyond the prescribed period for necessary future use. Where a corporation abandons its purpose to use

22. Unreported.

the property for its business, the time within which it must dispose thereof begins to run on such abandonment . . . . "

Aside from the question of the effect to be given to the exceptions clause in the statute, there is an additional question: when does the statute of limitations commence to run on the escheat action?

N. D. Rev. Code § 10-0602 (1943) provides that all corporations which now own or hold rural real estate which was acquired prior to July 29, 1932, and which is used or usable for farming or agriculture, except such as is reasonably necessary in the conduct of their businesses, shall dispose of the same on or before July 29, 1942.

N. D. Rev. Code § 10-0606 (1943) provides that "In case any corporation fails, within the time fixed by this chapter, to dispose of any real estate to which it has acquired title . . . then title to such real estate shall escheat to the county . . . upon an action instituted by the state's attorney . . . ."

N. D. Rev. Code § 28-0117 (1943) provides that an action upon a statute for a penalty or forfeiture must be commenced within three years after the cause of action has accrued. N. D. Rev. Code § 28-0120 (1943) provides that an action upon a statute for a penalty or forfeiture given in whole or in part to any person who will prosecute for the same must be commenced within the year by a private party, and if not so commenced, then within two years thereafter in behalf of the state . . . by the state's attorney of the county where the offense was committed. N. D. Rev. Code § 28-0122 (1943) provides that an action for relief not otherwise provided for must be commenced within ten years after the cause of action shall have accrued.

N. D. Rev. Code § 28-0123 (1943) provides that the limitations prescribed in Chapter 28-01 shall apply to actions brought in the name of the state, or for its benefit, in the same manner as to actions by private parties.

It has been held that a county is amenable to the statutes of limitation of North Dakota,[23] and that an action of escheat is in the nature of a forfeiture.[24]

About this time you're probably wondering what's happened to my case with the Attorney General. By informal agreement the action is in abeyance, with a pending motion by the defense for

23. Rosedale School Dist. No. 5 v. Towner County, 56 N.D. 41, 216 N.W. 212 (1927); Lakeville Township v. Northwestern Trust Co., 74 N.D. 396, 22 N.W.2d 591 (1946).

24. Black's Law Dictionary 679. See also St. Anthony & Dakota Elevator Co. v. Martineau, 30 N.D. 425, 153 N.W. 416 (1915); 53 C.J.S., Limitation of Actions § 89.

judgment on the pleadings based on the statute of limitations. I expect the action to remain dormant pending possible action by the 1961 legislature.

In 1959 Representative Murray Baldwin of Fargo introduced House Bill 724 in an effort to modify and soften some of the provisions of the present corporate farming act. The bill was introduced late in the session, somewhat hurriedly, and without adequate discussion and study before it reached the floor. It consequently died aborning. The text of the measure is reproduced here:

> "A Bill For an Act creating and enacting section 10-0607 of the North Dakota Revised Code of 1943 authorizing certain corporations to engage in farming and ranching operations.
>
> *Be it Enacted by the Legislative Assembly of the State of North Dakota*:
>
> SECTION 1.) Section 10-0607 of the North Dakota Revised Code of 1943 is hereby created and enacted to read as follows:
>
> 10-0607. CERTAIN CORPORATIONS EXEMPTED FROM PROVISIONS OF CHAPTER.)
>
> Nothing in this chapter shall be construed as prohibiting any domestic corporation from owning rural real estate or carrying on farming or ranching operations, if such domestic corporation meets the following qualifications:
>
> 1. Stockholders shall not exceed ten in number; and
> 2. The corporation shall not have as a stockholder a person, other than a trust or estate, who is not a natural person; and
> 3. The corporation shall not have as a stockholder any nonresident alien; and
> 4. The corporation shall not have more than one class of stock; and
> 5. An officer of the corporation shall actively supervise the farming or ranching operations; and
> 6. At least eighty percent of the gross income of the corporation shall come from farming or ranching operation."

It will be observed that the provisions of H.B. 724 are patterned substantially after the sub-chapter "S" provisions of the Internal Revenue Code relating to tax option corporations.[25]

25. Int. Rev. Code § 1372 et seq.

It is the writer's personal belief that this bill or one similar to it will again be introduced in the 1961 legislature, for a good deal of pressure for a change in the apparent harsh language of the existing corporate farming act is being exerted among ranchers in the western part of the state, and the agriculture committee of the Greater North Dakota Association has been studying the problem.

Quite likely the time has come when farmers should be given equal opportunities with other citizens to determine for themselves the most appropriate type of ownership structure with which to effectively and economically farm.