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# Note and Comment

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# MICHIGAN LAW REVIEW

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## NOTE AND COMMENT

BASEBALL AND THE JUDICIARY—The acceptance by Judge Kenesaw Mountain Landis of the position of supreme arbiter of professional baseball, as recently announced, raises questions of good taste if not of propriety. It has been generally assumed that Judges of the District Court of the United States have their hands amply full if they do the work incumbent upon them in a way befitting a judge of the United States. It may well be true that the salary provided by the Government is grossly inadequate, but we dare say that no one has considered that the remedy for such condition was to be found through outside jobs paying additional compensation.

A man receiving a salary of $42,500 per year, the amount which it is said Judge Landis is to get from baseball, may reasonably be expected even in these days of high wages to give at least a considerable portion of his energies and time to the work for which he receives such sum. It would seem inevitable that the public service must suffer by such division of effort.

It must be further evident that it is the official position which Judge Landis holds and the really splendid record he has made in clearing up certain types of fraudulent and criminal practices that make him peculiarly acceptable to the baseball magnates. But for his judgeship he would prob-

ably be no more fitted or desired than thousands of able men interested in the national game. It appears to us that Judge Landis is prostituting his high office for the sake of a commercialized, professional sport.

If the distinguished jurist had resigned in order to accept his baseball position there might have been some to regret such yielding to the call of the flesh pots, but all would have agreed that such step was for Judge Landis alone to determine. We believe that among lawyers and the public generally the opinion must be widespread that Judge Landis in attempting to hold both positions is guilty of extremely bad taste, to say the least, and that it is a gross impropriety for him to make use of his judicial position and prestige to help him out as "czar of baseball." He ought to resign. Otherwise we may expect to see other judges with dulled senses of propriety accepting various more or less lucrative side-employments for which their offices make them peculiarly desirable.

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MUNICIPAL ZONING.—Modern City Planning is of recent origin, but of rapid growth. It began in Prussia less than fifty years ago. It soon spread to adjoining countries, and reached the United States about twenty years ago.

Its primary object is to control the physical structure of the city, by controlling the real property within its actual or prospective limits. This property is either *public* or *private.* The public property is controlled, in the main, through public *ownership;* private, through *regulation.*

These regulations, recently, have taken the form of *Zoning,*—regulating by prescribed districts the kinds of buildings erected, the portion of the lot covered, and the uses to which both are put, within the districts.

The New York ordinance of July 25, 1916, is a typical one of the best kind. It includes *height, area,* and *use* regulations. It creates districts in which the allowable heights of buildings are 2½, 2, 1½, 1¼, and 1 times the width of the adjacent street at the building line, with a set-back of one foot for every four feet above that height; if the street is over 100 feet wide no additional height is allowed; and if under 50 feet, the building may be as high as if the street were that wide. There is no limit to the height of towers, steeples, and chimneys.

Under *area* regulations, the districts are: A, warehouses, storage, and industrial establishments, which may cover 100 per cent of the lot; B, large office and high apartment buildings, — per cent; C, non-elevator apartment houses, etc., — per cent; D, one- and two-family private residences in blocks, — per cent; E, private detached residences, where new buildings may not cover over 30 per cent of the lot.

Under *use* regulations, the districts are: *Unrestricted,* all sorts of buildings and factories allowable; *Business,* business and residences both allowed; *Residence,* business and factories excluded, but clubs, churches, schools, libraries, etc., allowed. Three maps are made showing the districts according to the character of the regulations. The districts made on one basis need not coincide with those made on another basis.

Los Angeles, St. Louis, Detroit, Akron, Portland, Ore., and many other cities have recently passed similar ordinances.

These regulations have been made under the *Eminent Domain,* the *Police,* or the *Taxing* power. In some cases, by ordinance only, under general charter powers; in some, by ordinance, under special "Home Rule" charter provisions; in some, under express statutory authority, without constitutional provision; and in some, under authority supported by constitutional provision.

The general nature and limits of the taxing, police, and eminent domain powers, in relation to this subject, have been treated in a note in the MICH. L. REV., Vol. XVIII (April, 1920), pp. 523-528. The purpose of this note is only to review the important cases decided this year on this subject.

The first is *State* v. *Houghton,* decided by the Supreme Court of Minnesota, January 23, 1920 (176 N. W. 158), being a rehearing and reversal of the same case decided three months before (October 24, 1919), 174 N. W. 885. The attorneys, twelve for the plaintiff and eight for the defendant, and the judges (seven in number) were the same in both cases. The majority opinion on the first hearing was delivered by Dibell, J., with Holt, J., writing a dissenting opinion in which Hallam, J., concurred. The majority opinion on the rehearing was by Holt, J., with dissenting opinion written by Brown, C. J., concurred in by Dibell, J.

The action was mandamus to compel the granting of a permit to build a three-story apartment building, costing about $50,000, upon lots owned by plaintiff, in Minneapolis, located in a restricted residence district of only one block created under Laws of 1915, c. 128. This provided that on the petition of 50 per cent of the property to be affected the city council may "designate and establish * * * residence districts * * * wherein no building shall thereafter be erected, altered, or repaired for any of the following purposes, to-wit: hotels, restaurants, eating houses, mercantile business, stores, factories, warehouses, printing establishments, tailor shops, coal yards, cleaning and laundering establishments, bill-boards and other advertising devices, public garages, public stables, apartment houses, flat buildings, or any other building or structure for purposes similar to the foregoing."

"The council shall first designate the restricted residence district, and shall have power to acquire by eminent domain the right to exercise the powers granted by this act."

The council was to appoint appraisers who were to view the premises, take testimony, and determine the amount of damages suffered by, and the benefits to, each parcel of land in the district; and if the damages exceeded the benefits the excess was to be awarded as damages; and if the benefits exceeded the damages the difference was to be assessed as benefits; but the total assessments of benefits was not to exceed the aggregate net award of damages. Report was to be made to the council, which, after opportunity for a public hearing, might annul or confirm the report. If confirmed, such award of damages was to be a charge upon the city, for the payment of which its credit was pledged. The assessments of benefits were to be a

lien upon the parcels of land until paid. On the payment of the awards, "the several tracts of land shall be deemed to be taken and appropriated for the purposes of this act, and the right above specified shall vest absolutely in the city." Maps and plats were to be made of the restricted districts and were to be filed with the city clerk and the register of deeds, with a list of the parcels of land within such districts. The assessments were to be collected as other taxes.

The Constitution provided: "Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured."

The question involved in both hearings was conceded to be: "Whether there is a public use upon which to rest a condemnation?" It was also conceded that neither the city nor the public gets any physical use of the condemned premises; they cannot travel upon nor occupy them; no part of the ground is taken; the use is negative; the taking consists in a restriction of the use; it prevents an otherwise lawful use; the owner still owns the land; he may keep the people off; he may leave it vacant; he may build any, except the forbidden, building; a fifty per cent vote, with the approval of the council, has made it so; no considerable part of the public will derive any benefit; it will be paid for by assessments for benefits to the residents of the one block.

The decision in the case turned very largely on views of the judges of the nature of apartment buildings. Dibell, J., says: the use is legitimate; not all people can live in detached houses; some seek apartments; true, apartments are not welcome in exclusive residence districts; their appearance is not liked; the living conditions they offer are wholesome, and the people who use them are good people; they do not affect the public health, or public safety, or general well-being; when once the principle is announced that on a vote of the majority owners land may be condemned against its use for an apartment, it may reach the humble and shabby dwelling, for its appearance may be as objectionable as an apartment; and when the humble home is threatened by legislation on aesthetic grounds, at the instance of a particular class, who would rid themselves of its presence, a step will have been taken toward government controlled in the interests of a class rather than for the equal protection of all. Condemning property against a building which offends only because it is out of harmony with the neighborhood surroundings we do not find to be for a public use.

On the other hand, Holt, J., says: what is a public use is primarily a legislative question; many conditions justify this law; people are crowding into cities; lots are small; a person buys one and erects a modest building for a home; later some one buys the adjoining lots, erects a three or more story apartment on one side and a store on the other, up to the lot lines; the small home is utterly destroyed so far as enjoyment and value as a home go. Speculators buy in a desirable residence section and threaten to erect structures that will greatly depreciate values, be an eyesore to owners, who are forced to buy at an exorbitant price or submit to the injury. Public

welfare is served by protecting them. That which is appropriated for the public welfare is taken for a public use. It is time that courts recognize the aesthetic factor in the affairs of life; it promotes the general welfare of the dwellers; preserves and enhances values; fosters contentment; creates civic pride; produces better citizens; property taken for this is taken for a public use. The legislature so deemed; there is nothing in the federal or state constitutions that forbids.

To which Brown, C. J., replies: there is no public use to condemn, on the sole claim that an apartment deteriorates property values in the vicinity; if so, the owner of vacant land can only improve his land by a use that will leave the values round about stationary or enhances them. Condemnation money is not paid as tribute. However far we follow the argument, we return to the question whether a residence district voluntarily organized on a 50 per cent vote may exclude from its midst apartments, thoroughly sanitary, or an unsightly cottage which is the only possible home the owner can build or have. Back of all aesthetic considerations is the disinclination of the exclusive district to have in its midst those who dwell in apartments. It matters not how mentally fit, or how morally correct, or how decorous in conduct they are, they are unwelcome. The statute is aimed in the wrong direction, and is not in the promotion of the general welfare. It segregates people into classes founded on invidious distinctions, and extends to one the powerful eminent domain arm of the state, by which it may on aesthetic or fanciful grounds exclude from their selected neighborhood members of the other class equal in intelligence and moral standing with those temporarily vested with this powerful state weapon.

In 1898 the Massachusetts legislature limited the heights of buildings to be erected on lands abutting on Copley Square, Boston; in 1901 St. Louis prohibited the erection of business houses on any property on any boulevard; in 1910, a bill in Congress proposed to classify the streets of Washington, and to prohibit any kind of business building on class A streets. In all these, provision was made for compensation to the owners of property injuriously affected. The English Town Planning Law of 1909 also provides for compensation according to damage done, and also for the assessment back on to the property benefited of an amount equal to half of the benefits.

While it has generally been held in the bill-board and building line cases that one cannot be deprived of his use of his property for such purposes, under the *police power*, for *aesthetic* reasons alone, many of these cases have intimated that this might be accomplished under the eminent domain power; and the Supreme Judicial Court of Massachusetts, in *Attorney-General* v. *Williams* (1899), 174 Mass. 476, in sustaining the Copley Square legislation, intimated that "promoting the beauty of a public park" might be a "matter of such public interest as to justify the taking of private property." A few out of many bill-board cases are: *People* v. *Green* (1903), 85 App. D. 400; *Bill Posting Co.* v. *Atlantic City* (1904), 71 N. J. L. 72; *Commw.* v. *Boston Adv. Co.* (1905), 188 Mass. 345; *Varney & Green* v. *Williams*

(1905); 155 Cal. 318; *State* v. *Lamb* (N. J., 1916), 98 Atl. 459; *St. Louis* v. *Gunning Advt. Co.* (1911), 235 Mo. 99; *Thomas Cusack Co.* v. *City of Chicago* (1914), — Ill. —, 108 N. E. 340 (1917), 242 U. S. 526; *contra, Churchill* v. *Collector of Internal Rev.* (1915), 14 Off. Gaz. P. I. 383.

A few building line cases are: *St. Louis* v. *Hill* (1893), 116 Mo. 527; *Eubank* v. *Richmond* (1912), 226 U. S. 137; *Fruth* v. *Board of Affairs* (1915), 75 W. Va. 456.

For statutory efforts to regulate bill-boards, see note 18 MICH. L. REV., p. 527.

The next case in order is *Salt Lake City* v. *Western Foundry Works* (Utah, Feb. 17, 1920), 187 Pac. 829. Defendant was convicted of violating a city ordinance creating a residence district. The city was authorized "to direct the location and regulate the management and construction of * * * foundries * * * in and within one mile" from the city limits; and to make all regulations necessary to provide for the safety, preserve the health, promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants, and for the protection of property therein. The defendant bought a lot, obtained a permit to build "a building" thereon, and in April, 1917, began to erect a foundry thereon; the property owners protested; conferences followed, and the city offered to buy the site; the offer was not accepted; July 23, the ordinance was passed establishing the residence district and making it unlawful to erect a foundry therein, whether it was in operation or not. The defendant's foundry was the only one in the district, but the boundaries of the district were so fixed as not to include an operating brass foundry in the vicinity The defendant completed his foundry, began to operate it, was prosecuted, convicted, and appealed. Affirmed. The defendant claimed that, while the city could exclude objectionable businesses from *all* the city, it could not exclude them from a particular section and allow them to remain in other similar sections of the city. The court said that "one step in the right direction" was not conclusive that it "will not take another" in the course of time. So long as the legislature has conferred the authority to exclude such businesses from residential districts, where they would at once become intolerable, the courts will not say they have acted unreasonably, nor for merely aesthetic purposes. The district is residential; industrial plants within it would deprive many owners of the enjoyment of their property, or greatly depreciate its value; the police power extends to the needs of the general public, and ought not to be questioned on the ground that the exclusion was a taking without compensation.

In *Bebb* v. *Jordan* (Wash., April 22, 1920), 189 Pac. 553, the plaintiff sued to recover $10,000 for services in drawing plans and specifications for a six-story $100,000 *apartment* house; before these plans were completed the defendant changed his mind and directed new plans for an eight-story building; when these plans were completed the estimated cost was $40,000 more; the defendant then abandoned the project, and refused to pay the architect. The defense made was that the plans were useless, because they

did not conform to the city ordinance; they, however, were according to the directions given. The building ordinance required, for a building of this height, a court area of 1680 square feet, but the plans allowed only 1288; such building was also to have a back yard 13 feet wide; the plans called for a building covering the whole lot. Plaintiff claimed the ordinance was unreasonable. The statute authorized the city "to regulate the manner in which stone, brick, and other buildings shall be constructed."

The court said that such regulations are common, and "if aimed at promoting the public health, safety or welfare, and tend reasonably so to do," they are not open to constitutional objection. The ordinance is valid. *Olympia* v. *Mann,* 1 Wash. 389 (fire limits); *Seattle* v. *Hinckley,* 40 Wash. 468 (fire escape); *Eubank* v. *Richmond,* 110 Va. 749 (building line on lots adjoining a city park); *City of Detroit* v. *Kuhn,* 181 Mich 604 (15-foot yard at the rear of every tenement). The principle of these cases applies here. Plaintiff cannot recover for the plans which did not conform to the ordinance.

The next is an *apartment* house case, *State ex rel. Morris* v. *East Cleveland,* in the Common Pleas Court of Ohio at Cleveland, decided October, 1919, with rehearing April 30, 1920 (31 O. Dec. 98, 197). One Morris applied for a permit to build an apartment house on land owned by him in East Cleveland. At the time his plans conformed to the building regulations, and there was nothing to forbid such a building. A week later the city passed a zoning ordinance districting the city according to *use,* creating district D (in which the lot was located), restricted "against manufacture, business and tenement use," and reserved "for use as single and double residence property only." The permit was denied solely because of the ordinance. Mandamus was brought, and denied. It was claimed the ordinance took plaintiff's property without compensation, without due process, and denied the equal protection of the laws. The city claimed it was a valid exercise of the police power. The city had a "Home Rule" charter under constitutional provision giving authority "to exercise all powers of local self-government, and adopt and enforce such local police, sanitary and other similar regulations not in conflict with general laws." The charter said the city "may define, prohibit, abate, suppress and prevent all things detrimental to the health, morals, comfort and safety, convenience and welfare of the inhabitants of the city."

Foran, J., held the burden was on the plaintiff to show the ordinance was unreasonable and oppressive; and taking judicial knowledge of the subject, said: "the apartment house is a monstrosity and a deadly menace to life, health and morals." On the rehearing, after evidence was admitted as to the nature of apartment houses, Kramer, J., said: "There could be no two opinions that an apartment in a section of private residences is a nuisance; it shuts off light and air from its neighbors; it invades their privacy; it spreads smoke and soot; the noise of deliveries is almost continuous; the fire hazard is increased; the number of people in and out render immoral practices more difficult of detection and suppression; the danger

of the spread of infectious disease is increased; the erection of an apartment drives out the single residence adjacent, and the whole street is soon given over to apartments." Both judges held the ordinance valid, and are very much more specific in reference to the menacing character of the apartment than any of the judges was in the *Houghton* case above. In that case the *decrease in the value of the adjoining property* was emphasized, and almost nothing was said as to peril to health, safety and morals. The Minnesota court had before held a store could not, under the police power, be excluded from a residence district unless it was a nuisance in the way in which it was carried on, and not merely because it decreased the value of adjoining property. *State ex rel. Lachtman* v. *Houghton* (1916), 134 Minn. 226, 158 N. W. 1017. *Accord: Wilson* v. *Cooke* (1913), 54 Col. 320; *People ex rel. Friend* (1913), 261 Ill. 16.

In his dissenting opinion in the *Lachtman* case, Hallam, J., says in reference to this: "It is said this relator has a vested right guaranteed him by the constitution to damage his neighbors' homes by devoting his lot to a use incongruous with the use of property in the vicinity, and that no power can stop him, for to stop this damage would be to take his property without due process of law. If it be said that the owner of a lot in a district of homes has the vested right to use it as he sees fit, notwithstanding the damage to his neighbor, then what of the right of his neighbor whose property value he destroys? Has one a vested right to destroy, and the other no right at all to be protected? In my judgment, the slaughter of property value is something the legislature has the power to prevent."

The next case is *Clements* v. *McCabe* (Mich., May 10, 1920), 177 N. W. 722. In October, 1919, Clements applied for a permit to build an *automobile serving station* on a lot in Detroit owned by him. There were no building restrictions on the lot at the time, and he proposed to comply with the building code. The neighbors protested to the council, which directed the building commissioner not to issue the permit. Plaintiff brought mandamus. The city answered that on November 19 an ordinance was passed to zone for residential purposes that part of the city in which the lot was located. This ordinance provided that when 60 per cent of the frontage on any block is used for residential purposes it shall be deemed a residential zone, and it shall thereafter "be unlawful for any person to build any public garage, livery, boarding or sale stable, automobile, battery, or accessory service station * * * which may be dangerous, offensive, or detrimental to the public health, morals, comfort, safety or general welfare of the city in any block in which 60 per cent of the frontage of said block is used exclusively for residence purposes."

Under the "Home Rule" constitutional provision, the city had the power "to pass all laws and ordinances relating to its municipal concerns." The "Home Rule" act gave authority to provide "for the public peace and health, and safety of person and property; for the regulations of trade; * * * for the exercise of all municipal powers * * * in the administration of the government, whether expressly enumerated or not; for any act to advance the

interests of the city, the good government and prosperity of the municipality and its inhabitants." The charter provided for a City Planning Commission, to divide the city into zones "to carry out a definite plan for the betterment of the city" to be adopted by the council. The proposed plan included, first, residential; second, residential, commercial, industrial, and unrestricted districts. It had not been adopted by the council, but by agreement of counsel it was treated as if it had been. The lower court held the ordinance invalid, and directed that the permit be granted. This was affirmed. Steere, J., says: "The zoning power does not now exist, because not expressly conferred by the constitution or the supplemental legislation." It is claimed the city has the power under the police power, inherently, by its mere creation. This power relates to safety, order, morals, for the protection of health, person and property; in recent years it has expanded to new subjects which border the debatable line of constitutional rights; this power is an inherent attribute of sovereignty, but it belongs to subordinate governmental divisions only by constitutional or legislative provision; incorporation of a city invests it with certain primary police powers fundamentally essential to the ends for which it was created, but beyond these narrow limits it must be expressly delegated. The power to zone is clearly within this debatable sphere; it cannot be implied from mere incorporation; there is no hint of such power in the constitution; it is not essential to local government; neither is it specifically designated in the Home Rule act; this does not authorize the prohibitions necessary in a zoning system; the power is to regulate, not prohibit. Such power must be delegated in express terms. The court refused to pass on the question whether the legislature could grant such power under the present constitution.

This decision is in accord with the *Lachtman* case above, and the citations there given; also with *City of St. Louis* v. *Dorr* (1898), 145 Mo. 466; *Bostock* v. *Sams* (1902), 95 Md. 400; *Stubbs* v. *Scott* (1915), — Md. —, 95 Atl. 1060; *Byrne* v. *Maryland Realty Co.* (1916), 129 Md. 202; *People ex rel. Realty Co.* (1913), 209 N. Y. 434; *People* v. *Roberts* (1915), 153 N. Y. Supp. 143; *Quintini* v. *Mayor, Bay St. Louis* (1886), 64 Miss. 483,—all being futile efforts to create residence districts and exclude therefrom harmless industries, such as stores, etc.

Perhaps the most important opinion of the year along these lines is *In re Opinions of the Justices* (Mass., May 20, 1920), 127 N. E. 525, on the validity of a proposed zoning act.

An amendment to the constitution, in 1918, provided:

"The general court shall have power to limit buildings according to their use or construction to specified districts of cities and towns."

The proposed act provided:

"A city or town may by ordinance restrict buildings to be used for particular industries, trade, manufacturing, or commercial purposes to specified parts of the city or town, or may exclude from specified parts of the city or town, or may provide that such buildings, if situated in certain parts of

the city or town shall be subject to special regulations as to their construction and use."

The act authorized the same to be done with dwelling and tenement houses; and for this purpose "the city or town may be divided into districts or zones, and the construction and uses of buildings in each district or zone may be regulated as above provided," § 1 This was to be "carried out in such manner as will best promote the health, safety, convenience, and welfare of the inhabitants, will lessen the danger from fire, will tend to improve and beautify the city or town, will harmonize with its natural development, and will assist in carrying out any schemes for municipal improvement put forth by any municipal planning board," § 2.

Provisions were made for a public hearing before the ordinance was passed; requiring unanimous vote, in case of objections; repeal only by two-thirds vote; refusal of permit to those not complying; appeal to the council or a board; enforcement by injunction. It was not to apply to existing structures.

As to the effect of the proposed act, the court said:

"Owners of vacant land in certain parts of the city may be utterly prohibited from erecting a building for any residential use whatever, and be compelled to devote it exclusively to a designated industry." And "other land-owners in other specified places may be required to hold their vacant land solely for residential purposes and be deprived of the privilege of utilizing it for commerce, trade or manufacture."

The opinion upholding the validity of the propcsed act said: The delegation of power to cities is within the authority of the legislature. *Commonw.* v. *Slocum,* 230 Mass. 183, 190. Independent of the constitutional provision, under the police power, the exclusion of wooden buildings from fire limits, restricting air spaces and distances between outside walls, requiring interior fireproof walls, fire escapes, etc., are common and valid. *Stevens* v. *Landowner,* 228 Mass. 368 Also limitations on the heights of buildings, varying according to districts, are valid. *Welch* v. *Swasey,* 193 Mass. 364, affirmed, 214 U. S. 91.

But under Sec. 2 of the act, "all the considerations there named must be given appropriate weight. No one or more, less than all, can be selected as the exclusive basis for action, although the public health, safety, and welfare (defined with some strictness) have each been held sufficient ground for the exercise of the police power. *Commonw.* v. *Strauss,* 191 Mass. 545; *Holcomb* v. *Cramer,* 231 Mass. 99, 104-107.

While the powers given might go beyond the rational limits of the police power, it is assumed they will be exercised with a due regard to the rights of private property under the constitution. *Town of Lexington* v. *Suburban Land Co.,* 235 Mass. —, 126 N. E. 360.

Aesthetic considerations alone, such as those in Sec. 2, "do not afford sufficient foundation for imposing limitations upon the use of property under the police power," *James Byrne* v. *Maryland Realty Co.,* 129 Md. 202; yet "if the primary and substantial purpose of the legislation is such as justifies the

act, considerations of taste and beauty may enter in as an auxiliary" and "in a subsidiary way." *Welch* v. *Swasey*, 193 Mass. 364, 375, 214 U. S 91, 107; *St. Louis Poster Adv. Co.*, 249 U. S. 269. Sec. 2 requires "consideration in due proportion of all the elements named. Enhancement of artistic attractiveness * * * can be considered * * * only when the dominant aim in the establishment of districts based on use has primary regard to other factors lawfully within the police power. After reviewing many cases the court concludes, "the proposed statute cannot be pronounced on its face contrary to the Federal Constitution or its amendments." Certain kinds of business increase the risk of fire, endanger the health and security of those living in close proximity, especially of children and the old and feeble; public welfare in these matters may be facilitated by the establishment of zones for business alone, and "by excluding from areas devoted to residence the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops, and factories. * * * The proposed act would be constitutional," all seven judges concurring.

In *City of St. Paul* v. *Kessler* (Minn., June 11, 1920), 178 N. W. 171, defendant was convicted of violating an ordinance by establishing a *"funeral home"* in a residence district created under a statute based on the *police power* (instead of eminent domain, as in the *Houghton* case above). The charter gave power "to define, regulate, prohibit, or abate nuisances; to regulate the location of * * * unwholesome houses or places."

Defendant claimed the act authorizing districting under the eminent domain power superseded the authority to do so under the police power, and since "funeral homes" were not mentioned in the eminent domain act they could not be excluded. The court held otherwise.

The ordinance was attacked as depriving defendant of his property without due process. The court says: "it can be upheld only if it is a legitimate exercise of the police power; that depends on whether the business, if properly conducted, is liable to become a unisance; it is legitimate and a necessity; it is not a nuisance *per se;* but there are numerous occupations equally necessary, not nuisances *per se,* that a city may exclude from residential localities because of their proneness to become injurious to health, offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, as slaughter houses, tanneries, brick kilns, mills, laundries, livery barns, and the like. In our opinion, the undertaking business may be put in the same category," citing many recent cases.

In *Myers* v. *Fortunato* (Del., June 15, 1920), 110 Atl. 847, the city of Wilmington had power "to do all those matters and things for the well-being of the said city" not in contravention of the laws or constitution. An ordinance provided that "no permit shall hereafter be granted for the erection or alteration of * * * any public *garage* in the residential portion of the city * * * within 40 feet of the line of adjoining property, unless the written consent of all owners has been filed with the building inspector." The defendant got a permit to erect seven garages within a residence section,

and began to build without obtaining the consent of the property owners. Injunction was asked; demurrer sustained; the city appealed. Reversed.

The defendant claimed the ordinance was void, (1) as a delegation of legislative power, and (2) as unreasonable. As to (1), "the ordinance prohibits the erection of a public garage in the residential portions of the city, but allows the prohibition to be removed if the property owners most affected consent. The law is complete in itself wholly independent of what anyone may say or do. * * * The fact that those most affected may remove the prohibition in their favor does not make it a delegation of legislative power." *Weeks* v. *Huerich*, 40 App. D. C. 46; *Cusack Co.* v. *City of Chicago*, 242 U. S. 527; compare *Eubank* v. *Richmond*, 226 U. S. 137. As to (2), "the reasonableness of an ordinance is a judicial question, * * * when enacted under a general or implied power," *Chicago, &c., R. Co.* v. *City of Carlinville*, 200 Ill. 314; but there is not uniformity of decision when there is specific legislative authority, and the court thinks the ordinance is unreasonable. *People* v. *Ericsson*, 263 Ill. 368.

The ordinance was passed under the general welfare clause of the charter; it must have for its object the preservation of the public health, morals, comfort, safety and welfare; the presumption is in favor of its validity; automobiles are noisy machines; frequently emit offensive odors; go in and out of public garages at all times of day or night, producing noises which must interfere with the comfort of those in the immediate vicinity; clearly the legislature, in the exercise of the police power, may authorize municipalities to direct their location; and it is not unreasonable to require one who wishes to build such a garage to secure the consent of the adjoining property owners. The ordinance is valid.

In *Lincoln Trust Co.* v. *Williams Building Corp.* (N. Y., July 7, 1920), 128 N. E. 209, the vendor sued for specific performance, by the vendee, of a contract to buy a lot in a residence district. The defense was that the title was to be free and clear, and that it was encumbered by a resolution of the city council under the zoning law (mentioned above), limiting the heights and bulk of buildings, fixing the area of yards, courts, and open spaces; restricting the location of buildings according to uses; and establishing residence, business, and unrestricted districts. The ordinance was passed before the contract was made, but the defendant did not know this. *Held*, the ordinance was valid, and each party was bound to know of its existence. It does not create an encumbrance. The court distinguishes *Anderson* v. *Steinway*, 178 App. Div. 507. The court cites, and by analogy relies on, many decisions holding various regulations valid: *Village of Carthage* v. *Frederick*, 122 N. Y. 268 (the conduct of an individual and the use of his property may be regulated); *Hadacheck* v. *City of Los Angeles*, 239 U. S. 394 (manufacture of brick); *Reinman* v. *City of Little Rock*, 237 U. S. 171 (livery stable); *Fischer* v. *St. Louis*, 194 U. S. 361 (dairy); *Soon Hing* v. *Crowley*, 113 U. S. 703 (public laundry); *Cusack Co.* v. *Chicago*, 242 U. S. 526 (bill-boards in residence districts); *Matter of Machintosh* v. *Johnson*, 211 N. Y. 265 (garage); *Tenement House Dept.* v. *Moeschen*, 179 N. Y. 325 (sinks and

closets in tenements); *Grumbach* v. *Lelands,* 154 Cal. 679 (excluding certain businesses); *Ex parte Quong Wo,* 161 Cal. 220 (hay barn, wood yard, laundry); *Matter of Montgomery,* 163 Cal. 457 (stone crusher, machine shop, carpet beating, lumber yard); *Cronin* v. *People,* 82 N. Y. 318 (slaughtering animals); *City of Rochester* v. *Guthberlett,* 211 N. Y. 309 (disposition of garbage); *City of Rochester* v. *West,* 164 N. Y. 510 (limiting height of billboards); *Welch* v. *Swasey,* 214 U. S. 91 (limiting height of buildings); *City of Rochester* v. *Macauley, &c., Co.,* 199 N. Y. 207 (smoke prohibition); *Union Oil Co.* v. *City of Portland,* 198 Fed. 441 (storing of oil); and generally any business, as well as the height and kind of building, may be regulated under power conferred upon it by the legislature. *Hauser v. No. British, &c., Co.,* 206 N. Y. 455.

A short summary of these cases indicates:

1. Zoning according to *use* may be made under the eminent domain power, but with conflicting views as to what is a *public use* (*Houghton* case, above). It would seem the taking here would create an *incumbrance,* although it does not under the police power (*Lincoln Trust* case, above). In theory, under eminent domain, a *beneficial* use is acquired; under the police power, a *harmful* use is prevented. The acquisition of the latter, under eminent domain, is a strange sort of "public use."

2. Zoning may be done under the police power, conferred expressly by constitutional and legislative provisions (*Opinions of Justices,* above).

3. Zoning may not be done under general or implied police power (though expressly claimed in a Home Rule charter); there must be express *legislative* authority (*Clements* case, above).

4. Unless the business excluded is a nuisance, or is likely to become such, to safety, health, or comfort (*Foundry, Kessler, East Cleveland,* and *Myers* cases, above).

5. Zoning may be based on *heights* and *areas* of buildings if the public welfare demands (*Swasey* case, cited, and *Bebb* and *Lincoln Trust* cases, above).

6. Aesthetic considerations alone are not sufficient, as a basis, under the police power (*Opinions of Justices*), and probably not under eminent domain (*Houghton* case), but there is a decided tendency to give it more and more weight.

7. Depreciation of values alone, perhaps, is not sufficient, but that, too, is being given greater weight, and seems to be the only substantial basis in the *Houghton* (eminent domain) and *Kessler* (police power) cases above. Also the dissenting opinion of Hallam, J., in the *Lachtman* case, cited above.

H. L. W.

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PRIVILEGED COMMUNICATION BETWEEN PHYSICIAN AND PATIENT—WAIVER. —The case of *Maine* v. *Maryland Casualty Company et al.,* — Wis. —, 178 N. W. 749, involves the question of privileged communication and its waiver under a statute providing that a physician "shall not be permitted to disclose any information which he may have acquired in attending any patient

in a professional character," etc. The action was brought on an accident insurance policy and the testimony of the physician was offered to show that the death of the insured was caused accidentally, within the provisions of the policy, his information having been gained while acting in his professional character as the physician of the insured following the accident.

The court holds, in accordance with the general rule, that, notwithstanding the positive character of the statute—"shall not be permitted to disclose" —it is to be regarded as a protection to the patient rather han as a mere inhibition to the physician, and therefore is a privilege or protection which may be waived by him.

It is further held that his waiver is not to be implied from the fact that the contract of insurance provided for the making of the proofs of death as having resulted from causes within the provisions of the policy. It is quite uniformly held that these statutory provisions should not be so construed as to defeat the claim of waiver by conduct. Should the patient ask his physician or his lawyer to witness his will it is a waiver of the right of the client or patient to have the information gained by the lawyer or physician while serving him professionally in connection with the execution of the will protected from disclosure. This conclusion is arrived at through the application of the principle that where the circumstances are such as to justify the conclusion that the patient or client could not have expected the information to be kept secret, then there is no confidence to be protected. Here the insured had made a contract, under which, if he should die, the question of the cause of his death would be an important one, and the physician who should attend him in his last illness would be the person, above all others, by whom the cause of death could be most appropriately and satisfactorily established. But further, his contract requires that the circumstances of his death shall be disclosed. Is it not a reasonable conclusion that as between himself and his insurer at least he must have understood that those circumstances were not to be kept secret? In which event there is no confidence to be betrayed. There is certainly much reason for concluding that had he actually contemplated the precise question here being discussed he would have expected that his physician when called to support his contract of insurance would be allowed to testify.

The court further holds that not only was there no evidence justifying a finding that the insured had waived the privilege, but that after his death there was no one who could waive it. In this conclusion the court was controlled by the authority of *Casson* v. *Schoenfield,* 166 Wis. 401, L. R. A. 1918C, 162. The general rule would seem to be *contra: Johnson* v. *Fidelity & Casualty Co.,* 184 Mich. 406, L. R. A. 1916A, 475 (a case of waiver by a beneficiary under an insurance policy); *Penn Mutual Life Insurance Co.* v. *Wiler,* 100 Ind. 92 (same); *Denning* v. *Butcher,* 91 Ia. 425 (executor); *Groll* v. *Tower,* 85 Mo. 249 (any person claiming under deceased); *Fraser* v. *Jennison,* 42 Mich. 206 (personal representative).

But the privilege being the insured's and not the insurer's, what right has he, the insurer, whose every interest is antagonistic, to raise this ques-

tion of the insured's privilege? The rule is very clear that it is not for either party to litigation to interfere to prevent a witness from testifying to his own guilt of crime, though he is privileged not to do so, *and this because the privilege is not theirs. R.* v. *King Lake,* 11 Cox Cr. 500, 22 L. T. R. (N. S.) 335; *Samuel* v. *People,* 164 Ill. 379; *Cloyes* v. *Thayer,* 3 Hill 564; see Wright, J., in *Russ* v. *Steamboat War Eagle,* 14 Ia. 363, 375 (involving right of party to object that examination of witness involved disclosure of marital confidences). Are the circumstances in a case like that under consideration so different as to impose an obligation upon one party or the other to protect the privilege of one to whose interests his own are diametrically opposed. If the testimony is received against the objection of the insurer that it is privileged, can he assign error on the ruling? Upon what theory can he claim to be prejudiced when the privilege was another's and not his own? A stranger is not to be heard in protection of the privilege of another while living and able to insist upon it or waive it as he may please. Upon what theory does death make the stranger the guardian of that privilege?

One of the most fundamental of procedural principles is that all evidence having probative value should be received. While the law is opposed to compulsory disclosure of that which it has said may be kept secret, still there is no prejudice in the law against disclosure where privilege is not claimed. It is to be claimed by whom? Surely not by one in the service of his own interest as against that claimed through the one privileged.

V. H. L.

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TRIAL—USE OF UNPROVED MAP OR DIAGRAM IN ARGUMENT TO THE JURY.—In the trial of an action for an unlawful entry and detainer, counsel, against the objection of the party opposing, in his argument to the jury was allowed to use a rough sketch or diagram of the *locus in quo,* made by his client, the defendant, for the purpose of assisting the jury to understand the bearing of the testimony in the case. No witness had testified upon inspection of the diagram that it correctly represented the situation involved, nor did counsel claim that there was such testimony. What counsel evidently was claiming was that the testimony of the witnesses testifying in the case did establish the existence of facts illustrated by the diagram.

It was held by the reviewing court that such use of the diagram in argument to the jury was proper. *Wilson et al.* v. *McCoy et al.* (W. Va., 1920), 103 S. E. 42.

In another case reported in the same volume, on a trial for murder in which one of the defenses was that the defendant was insane, his counsel was allowed by the trial court, against objection, to use a sketch prepared by himself, in his argument to the jury. Considerable testimony was before the jury tending to show that several of the blood kindred of defendant, on both his father's and mother's side, were or had been insane, and that several had committed suicide.

Counsel had sketched a "genealogical tree" upon the basis of the testimony of the witnesses in the case, to present graphically these facts, claimed

by him to be established by such testimony. While using this sketch for this purpose, upon objection by the state that its accuracy was not proven, he was stopped and its further use prevented. The court reviewing the trial sustained the ruling of the lower court. This clearly appears from the opinion, although the syllabus of the case makes a directly opposite claim. *State* v. *Bramlett* (S. C., 1920), 103 S. E. 755.

These cases are directly opposed in their understanding of the controlling principle, or it is better said, the court in the case last mentioned failed to perceive the applicable principle. Of course counsel in argument should not be allowed to present facts to the jury and ask it to accept them upon the credit of his statement. Counsel does have the right however, to insist that the evidence in the case does establish the existence of particular facts which it tends to prove, and if he can better assist the jury to appreciate his contention by a graphical presentation of his idea than by spoken words alone, there is no reasonable objection to his so presenting it. As well might he be shackled in hand and foot lest by some gesture he make more emphatic and clear his contention, or forbidden to use illustration not proven in the case, lest the same result should follow. Witnesses are continually being allowed to present their ideas by the use of such aids, and why should not counsel have the same right? It is no answer that the witness is speaking under oath. True he is under oath, and he is not permitted to express his ideas unless he is, but counsel *is* permitted to express his ideas without taking any save his official oath. It is nonsense to say that he may present his ideas to the jury without oath if he does so by spoken words, but must be under oath if he would present them graphically. There can be no possible legal objection to the presentation by counsel in argument of a sketch of a "genealogical tree," and pointing out to the jury that the branches indicate the several kindred shown by the testimony to have kinship with a particular person, and that certain of those there indicated are by the testimony shown to have been insane, or to have committed suicide, where those facts are material. V. H. L.

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CRIMINAL LIABILITY OF CORPORATIONS.—The present-day tendency of holding criminal law applicable to corporations as well as persons in the ordinary sense is strikingly shown in *State* v. *Lehigh Valley R. Co.* (New Jersey, 1920), 111 Atl. 257, where, under an indictment for manslaughter by causing a person's death through the negligent handling of a car loaded with ammunition, there being no statute involved, it was held that a corporation was indictable. The case has been before the court on several prior occasions, and was disposed of by holding that the common law had been modified by the decision of Chief Justice Green in *State* v. *Morris & Essex R. Co.* (1852), 23 N. J. L. 360, and the cases following that decision, and that under these authorities the indictment could be sustained. Four members of the court dissented, holding that the common law had not been changed to this extent, and that this point had not been decided by any of these prior decisions.

In *State* v. *Morris, supra,* a corporation was indicted for creating a nuisance by the obstruction of a highway, and held liable, but the Chief Justice said: "A corporation is not liable for a crime of which a 'malus animus' is an essential ingredient. The creation of a nuisance involves no such element." And Nevius, J., in the concurring opinion declared: "It was urged that a corporation cannot be guilty of a battery or murder. Be it so; yet it does not follow that it may not be guilty of erecting a nuisance." In *State* v. *Passaic Co. Agr'l Society,* 54 N. J. L. 260, the same question was presented, and the court in its affirmative answer said: "It is difficult to see how a corporation may be amenable to civil suit for libel, and malicious prosecution, and private nuisance, * * * and at the same time not be indictable for like offenses where the injury falls upon the public." The majority of the court evidently believe that these two cases have given them a rather free hand in applying criminal law to corporations, and are willing to go very far in holding them liable. The New Jersey constitution makes the common law the law of the state unless changed by statute, and there certainly is much force in the argument of the minority of the court that the court should apply the common law unless the legislature sees fit to change it.

The extent of the criminal liability of a corporation has been in dispute from the earliest days. Lord Holt is reported to have said that "a corporation is not indictable, though the particular members of it are," and although this rule has never been admitted, certainly for many years prior to 1840 the rule was that a corporation could be liable only for non-feasance. *State* v. *Great Works Co.,* 20 Me. 41. In the case of *Queen* v. *Great North of England Co.,* 9 Q. B. R. 315, the English courts—and the American courts in decisions to the same effect, *Commonwealth* v. *New Bedford Bridge,* 68 Mass., 339—extended the liability to matters of commission as well as omission, with the limitation that "a corporation cannot in general be indicted for ordinary crimes and misdemeanors such as involve a criminal or immoral intent, as treason, felony, or breach of the peace, nor for manslaughter, assault and battery, nor larceny." 10 Cyc. 1231. That these limitations are rapidly crumbling away is amply demonstrated by recent cases. The courts, when faced with the fact that a corporation could not have a *"mens rea,"* imputed the agent's evil intent to the corporation. The courts have held a corporation guilty of contempt, *Comm.* v. *Telegram Newspaper Co.,* 172 Mass. 294; of criminal libel, *People* v. *Star Co.,* 135 N. Y. App. Div. 517; for keeping a disorderly house, *State* v. *Passaic Co. Agr'l Society, supra;* for permitting gambling, *Comm.* v. *Pulaski Co. Agr'l Society,* 92 Ky. 197; for peddling without a license, *Standard Oil* v. *Comm.,* 21 Ky. L. R. 1339; for violating liquor laws, *U. S.* v. *Joplin Mercantile Co.,* 213 Fed. 926; for conspiracy, *U. S.* v. *Nearing,* 252 Fed. 223; and in a recent case in the United States Court for China, *U. S.* v. *Sin Wan Pao Co.,* No. 993 (1920), the court said, "there is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil," and held that the guilty intent of a Chinese servant of the corporation in accepting, without the knowledge of the directors, an obscene advertisement printed in the company's Chinese

newspaper, rendered the corporation liable in criminal proceedings under a United States statute.

That a corporation is not indictable for manslaughter or assault and battery, as these crimes involve an offense against the person, has received the sanction of the courts in *Comm.* v *Punxsutawney R. Co.* (1900), 24 Pa. Co. Ct. 25; *Comm.* v. *Ill. Cent. RR. Co.* (1913), 152 Ky. 320; *Queen* v. *Gt. West Laundry Co.* (1900), 3 Can. Crim. Cas. 514. In the Pennsylvania case the court held that while a corporation is liable civilly for assault and battery committed by an employee, it cannot be indicted criminally for such a crime nor for manslaughter, saying "some courts have shown a tendency to enlarge on the criminal liability of corporations, but no court has gone as far as we are urged to go in this case." In *People* v. *Rochester Ry. Co.*, 195 N. Y. 102, the court refused to hold a corporation for manslaughter, but this was based on the peculiar wording of the New York statute defining manslaughter as the killing in a certain way "of one human being by another," and it was decided that the word "another" could only mean "another person" in the ordinary sense.

In contrast to these cases we find *Union Colliery Co.* v. *Queen* (1900), 31 Can. S. C. 81, in which a corporation was held liable for manslaughter under a statute, and the common law penalty of a fine inflicted, as the statute omitted any penalty, and the principle case in which the New Jersey court, relying on a line of cases holding a corporation indictable for maintaining a nuisance, holds a corporation indictable for voluntary or involuntary manslaughter, thus going as far as the Pennsylvania court refused to go in the earlier case. The explanation of these modern decisions is given by Justice Bigelow in *Comm. v. New Bedford Bridge, supra*, that with the great increase of corporations in modern society "the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them as far as possible, in their legal duties and responsibilities, to individuals." W. C. O'K.

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MARRIED WOMEN—HUSBAND'S RIGHT TO WIFE'S SERVICES AND TO HER EARNINGS.—A Michigan statute passed in 1911 (LAWS OF 1911, ch. 196; COMP. LAWS 1915, § 11478) provided that a married woman should be "entitled to * * * earnings acquired * ** * as the result of her personal efforts." A married woman, before 1911, had worked as housekeeper for X and had continued to work for him after 1911; on his death she filed a claim against his estate for her services during the whole period. *Held*, she could not recover for the period before 1911, as her services and earnings prior to that date belonged to her husband. *In re Mayer's Estate* (1920), 210 Mich. 188, 177 N. W. 488.

Plaintiff and her husband were working on a farm belonging to defendant. Plaintiff did the house work, made butter, and took care of the chickens. She sued defendant for the value of her services after the passage of the Act of 1911. *Held*, that her services were rendered as a member of her husband's family, in her husband's home, and were the ordinary services

a farmer's wife renders in his own home. As the Act of 1911 refers not to such services but to earnings in a separate business carried on by her, or to services performed by her for others than her husband, she can therefore not recover. *Sorensen* v. *Sorensen* (1920), 211 Mich. 429, 179 N. W. 256.

The husband's right to his wife's earnings, unquestioned at common law (*Prescott* v. *Brown*, 23 Me. 305), has been abolished by statute in most states. The Michigan statute cited above was enacted soon after the decision in *Root* v. *Root*, 164 Mich. 638, which followed the common law rule. Differences in the phrasing of the various statutes have led to some contrariety of decision, but generally the distinction is made, as in the two principal cases, between earnings and services; the former belong to the wife, the latter to the husband. The question is usually presented in two types of cases: first, in cases of personal injury to the wife, where it must be decided whether the wife or the husband is entitled to recover for the wife's inability to work; second, in cases where the husband has conveyed property to the wife, in payment for her services, and his creditors attack the conveyance as voluntary and fraudulent. The wife was held entitled, under such statutes, to recover for her loss of ability to work, in *Millmore* v. *Boston Elev. Co.*, 198 Mass. 370 (whether she had ever worked or not); *Green* v. *Muskegon &c. Co.*, 171 Mich. 18 (where she ran a boarding-house); and *Texas & P. Ry. Co.* v. *Humble*, 181 U. S. 57. And it is generally held, under such circumstances, that the husband cannot recover for the loss of the wife's earnings outside the home, but that he may recover for the loss of her services in the home; this distinction was made in *Riley* v. *Lidtke*, 49 Neb. 139; *Gregory* v. *Oakland, &c., Co.*, 181 Mich. 101; and *Blair* v. *Seitner, &c., Co.*, 184 Mich. 304. But it is sometimes held that if the wife is working for the husband, even though outside the home (as, for instance, helping him in his business), he may recover for the loss of such services. *Standen* v. *Penna. R. Co.*, 214 Pa. St. 189; *Georgia, &c., Co.* v. *Tice*, 124 Ga. 459. In cases of the second class—fraudulent conveyances—it has generally appeared that the wife's industry was pretty clearly in the nature of services, and conveyances based thereon have been set aside as voluntary. *Coleman* v *Barr*, 93 N. Y. 17; *Dempster Mill Co.* v. *Bundy*, 64 Kans. 444; *Milkman* v. *Arthe*. 221 Fed. 134, commented on in 14 MICH. L. REV. 62. And the same result was reached in a recent case in Michigan, even though the wife's work was done in connection with the husband's business and a part of it was done after the passage of the 1911 statute. *Henze* v. *Rogatsky*, 199 Mich. 558. On the other hand, many cases uphold conveyances made under similar circumstances. *Carse* v. *Reticker*, 95 Iowa 25; *McNaught* v. *Anderson*, 78 Ga. 499; *Ford Lumber Co.* v. *Curd*, 150 Ky. 738. E. H.