

# REAL PROPERTY LAW SECTION

Vol 2, No 5

## *Newsletter*

**STATE BAR OF MICHIGAN**

No. 9

October, 1975

Patrick J. Keating  
Chairman

Frank S. Sengstock  
University of Detroit Law School  
Editor

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### COUNCIL MEMBERS

Patrick J. Keating . . . . . Chairman  
Mr. Keating also serves as a Commissioner and Second Vice-Chairman, Representative Assembly of the State Bar and has lectured for the Institute of Continuing Legal Education. He is a member of the firm of Wells, Wilmoth, Keating and Nitz, P.C. with offices at 1800 Fisher Building, Detroit, Michigan. Telephone No. 872-4620.

Ralph Jossman . . . . . Chairman-Elect  
Mr. Jossman has served as chairman of the Title Standards and Real Property Committees, State Bar of Michigan. He is presently Chairman of Committees in Real Property, Probate and Trust Section of the ABA. He has contributed articles on property to various legal periodicals. Mr. Jossman retired as the Michigan State Counsel for Lawyers Title Insurance Corporation. He resides at 792 Neff Road, Grosse Pointe.

Maurice S. Binkow . . . . . Vice Chairman  
Mr. Binkow has served on the Council since its beginning. He is a member of the firm of Honigman, Miller, Schwartz, and Cohn with offices at 2290 First National Building, Detroit. Telephone No. 962-6700.

John F. Wolnewitz . . . . . Treasurer  
Mr. Wolnewitz had served on the Real Property Committee before its reorganization into the present Real Property Section. He is on the engineering staff of the Michigan Bell Telephone Co. He maintains a private practice with offices at 1000 Huntington, Mount Clemens. Telephone No. 463-5259.

Marvin Canvasser . . . . . Secretary  
Mr. Canvasser is active in building construction. His offices are located at 26011 Evergreen #303, Southfield. Telephone No. 354-6450.

G. Norman Gilmore . . . . . Retired Chairman  
Mr. Gilmore is an ex-officio member of the Council. He has served two years as its chairman. He is presently chairman of the Real Estate Law Committee of the Detroit Bar Association and is a member of the Title Standards Draft Committee. He is a member of the firm of Reid, Gilmore and Reid with offices at 714 Ford Building, Detroit. Telephone No. 961-1950.

Andrew Cooke . . . . . Representative of  
Title Standards Com.  
Mr. Cooke is vice-chairman of the Title Standards Committee on which he has served for the past 15 years. He is a member of the firm of Vandervoort, Cooke, McFee, Carpenter with offices at 701 Michigan National Bank Building, Battle Creek. Telephone No. (616) 962-9515.

Frank S. Sengstock . . . . . Editor of Newsletter  
Mr. Sengstock is an ex-officio member of the Council. He has been the editor of the Newsletter for the past two years. He is a member of the faculty of the University of Detroit School of Law and taught property law in both St. Louis and Pittsburg. He has just published two volumes on Michigan Property Law. His offices are located at 651 E. Jefferson, Detroit. Telephone No. 927-1567.

Clarence M. Burton  
Mr. Burton has served as President of the Burton Abstract & Title Co. and is presently a member of the faculty of the Detroit College of Law. His offices are located at 136 E. Elizabeth St., Detroit. Telephone No. 965-0150.

James W. Draper  
Mr. Draper has been a member of the State Bar Title Standards Committee since 1950 and has also served as the Chairman of the Real Property Law Committee. He is a member of the firm of Dykema, Gossett, Spencer, Goodnaw and Trigg with offices at 2700 City National Building, Detroit. Telephone No. 963-6040.

Edward D. Gold  
Mr. Gold is a member of the Representative Assembly, 6th Circuit as well as President of the Southfield Bar Association. He has served as a volunteer investigator of the State Bar Grievance Board. He is a member of the firm of Hyman and Rice with offices at 1600 North Park Plaza, 17117 W. Nine Mile Road, Southfield. Telephone No. 559-7500.

Leonard J. Grabow  
Mr. Grabow is a member of the firm of Levin, Levin, Garvett, and Dill with offices at 1250 City National Building, Detroit, Michigan. Telephone number 962-9400.

Allen E. Priestley  
Mr. Priestley is a member of the Council of the Section of Real Property, Probate and Trust Law Section of the American Bar Association. He has served as the chief Title Officer for many years of Burton Abstract & Title Co. and is presently General Counsel of Burton Abstract & Title Co. and St. Paul Title Insurance Corp. His offices are located at 1650 West Big Beaver Rd., Troy. Telephone No. 643-4700.

David Snyder

Mr. Snyder is a past contributor of articles to the newsletter. He is a member of the firm of Gurwin, Snyder & Weingarden with offices at 17117 W. 9 Mile Road, Suite 1412, Southfield, Michigan. Telephone number 559-7714.

Maurice V. Victor

Mr. Victor has been a member of the Council since its beginning. He is a member of the firm of Victor, Covensky & Ellenbogen with business offices at 1 Northland Drive, Suite 319, Southfield. Telephone No. 352-5490.

Myron Winegarden

Mr. Winegarden has been a member of the State Bar Title Standards Committee since 1957. He is a member of the firm of Winegarden, Booth, Ricker and Shedd with offices at 501 Citizens Bank Building, Flint. Telephone No. (313) 767-3600.

Benham R. Wrigley, Jr.

Mr. Wrigley has been engaged in real property legal matters for the past several years. He has taught Real Estate Law at Aquinas College. He is a member of the firm of Schmidt, Heaney, Hawlett, & Van't Hoff with offices at 700 Frey Building, Grand Rapids. Telephone No. (616) 459-5151.

Minutes Of

REAL PROPERTY LAW SECTION

Section Meeting

September 18, 1975

The Annual Meeting of the Real Property Law Section was held on September 18, 1975, at the Raleigh House, Southfield, Michigan. The meeting was called to order at 9:00 a.m. by Chairman G. Norman Gilmore. Although only 42 members signed the attendance sheet, approximately 90 members were in attendance.

Since there were no corrections or objections, the minutes were accepted as read.

Motion: Victor-Gold to accept the Treasurer's report as read. Carried.

Motion: Draper-Priestley to amend Section 2 a) of the Section By-laws Restructuring Committees as attached and to submit the amendment to the Board of Commissioners for ratification. Carried.

Leonard Grabow submitted the Report of the Nominating Committee which submitted the nominees for the Section Council for the term 1975-1978 as follows:

Maurice S. Binkow  
James W. Draper  
Edward D. Gold  
David S. Snyder  
Maurice V. Victor

Motion: Grabow-Priestley to close nominations and instruct the Secretary to cast a unanimous ballot for the five nominees. Carried.

Chairman Gilmore declared Binkow, Draper, Gold, Snyder, and Victor as elected to the Section Council for the term ending with the annual meeting in 1978.

House Bill 5423 was discussed which provides for summary proceeding for foreclosure of mortgages. It would appear that the proposed bill is an inadequate and untimely reaction to the Northrip and Gorden Federal District Court Decisions. The Section's special subcommittee has proposed a substitute bill.

A list of the members of House Judiciary Committee was distributed to the members present with a suggestion that our members contact the members to express their opposition to the bill.

A suggestion was made from the floor that the Council write to the Judiciary Committee. Chairman Gilmore expressed the opinion that individual contact is preferred to Council action.

Another suggestion was made that the Council contact other interest groups for assistance and support for the substitute bill.

Motion: Beck-Victor that the Section adopt a resolution to express its opposition to House Bill 5423 which is considered to be impractical and unconstitutional as well as detrimental to mortgage financing and to advise the Board of Commissioners of the State Bar of this resolution. Carried.

Motion: Bailey-Victor directing the Section Council to adopt some positive response to the problem posed by the Northrip decision. Carried.

Motion: Wrigley-Potter to express the appreciation of the Section to Frank Sengstock for his excellent work as Editor of the Newsletter. Carried by acclamation.

Motion: Sengstock-Potter to express the Section's appreciation to G. Norman Gilmore as Chairman of the Section. Carried.

Motion: Priestley-Draper to adjourn.

The Meeting adjourned at 10:30 a.m.

Respectfully submitted,

John F. Wolnewitz, Secretary

Minutes Of

REAL PROPERTY LAW SECTION

Council Meeting

September 18, 1975

A regularly called meeting of the real Property Law Council was held at the Raleigh House, Southfield, Michigan. A quorum being present, Chairman G. Norman Gilmore called the meeting to order at 2:15 p.m. An attendance roster is attached to these minutes.

Chairman G. Norman Gilmore announced that the primary purpose of this meeting was the election of officers for the coming year. He announced that in accordance with our By-laws, Chairman-Elect Patrick Keating automatically becomes Chairman and Vice Chairman Ralph Jossman automatically becomes Chairman-Elect.

The Chairman called for nominations for the office of Vice Chairman. The following were nominated:

David Snyder  
Maurice Binkow

Motion: Keating-Priestley to close nominations.  
David Snyder withdrew his name from consideration.

Motion: Victor-Keating to close nominations and to direct the Secretary to cast a unanimous ballot for Maurice S. Binkow as Vice Chairman. Carried.

The Chairman called for nominations for Secretary. Marvin Canvasser was nominated. Motion: Priestley-Binkow to close nominations and direct the Secretary to cast a unanimous ballot for John F. Wolnewitz as Treasurer. Carried.

Motion: Jossman-Draper to continue Council meetings on the second Saturday of each month at the Michigan Inn, Southfield beginning at 10:00 a.m. except for the month of October when the meeting will be held on the third Saturday. Carried.

G. Norman Gilmore tendered his resignation as elected member of the Council but would continue to serve on the Council as immediate past Chairman.

Motion: Priestley-Snyder to accept G. Norman Gilmore's resignation as elected member and to appoint Myron Winegarden of Flint to fill the unexpired term.

Frank Sengstock tendered his resignation as elected member of the Council but remains on the Council as Editor of the Section Newsletter and nominated Russell Paquette to fill his unexpired term.

Motion: Draper-Binkow to accept Sengstock's resignation but to defer filling vacancy until our next meeting. Carried.

It was announced by Myron Winegarden that Andrew Cooke of Battle Creek would be the representative of the Title Standard's Committee to serve on the Council.

There followed discussion on William Dunn's substitute bill for House Bill 5423. The Council accepts the substitute bill in principle and suggests that it be introduced into the Legislature. In order to accomplish this, it was suggested that the Council meet with area legislators who are in the House Judiciary Committee.

A motion was made not to submit the substitute bill at this time but failed for lack of a second.

Motion: Gilmore-Binkow that Dunn's Bill be offered as a substitute bill to House Bill 5423. Carried.

Motion: Wolnewitz-Binkow to adjourn.

Meeting adjourned at 2:55 p.m.

Respectfully submitted,  
John F. Wolnewitz, Secretary

Re: Real Property Law Section: State Bar of Michigan  
'Why New Houses Cost Too Much'

Dear Professor Sengstock,

I looked forward with interest to the Real Property Section Newsletter article on 'Why New Houses Cost Too Much' in your August issue, and I was disappointed to learn that the article dealt only with the advantages of mass produced and prefabricated housing and ignored an equally major cause of why new houses cost too much; i.e., local zoning requirements that constantly raise minimum lot size requirements for single family homes.

As a former house counsel for a major Detroit area residential builder I attended literally hundreds of Planning Commission and Zoning Commission hearings over the past few years, and I learned that invariably the basic motivation for minimum lot size requirements as well as limited density for multiple zoning was not a desire to improve the health and welfare of the people who would actually live in the housing, but a desire to restrict and throttle all residential development within the community that didn't conform to it's own self-image.

I have never yet attended a public hearing on residential zoning in which one or more members of the community didn't get up and say more or less the following: "I came out here to get away from those people. I don't want those people moving out here and bringing in crime, traffic, pollution and social problems." The 'those people' referred to are not blacks. 'Those people' are middle class Americans, white and black, blue collar and white collar, who simply can't afford to buy a home that costs \$40,000 or more on a 70 or 80 foot lot.

As a result, suburban apartment ghettos are created for 'those people' along major highways, near industrial or commercial sites where they can act as a 'buffer' shielding the more expensive houses from obnoxious traffic and noise.

And even these apartment ghettos would not have been created were it not for the constant pressure applied by the courts in reviewing local zoning ordinances. They would have been kept out entirely if local communities could have had their way.

Robert H. Carey, President of Thompson-Brown Company in his last annual report on Current Homesite Development Costs printed March 1, 1974, estimated that the development cost of new lots (including gross profit to the developer) ran at approximately \$170 per front foot. Thus a 70 foot lot would cost \$11,900 to develop. Assuming that lot cost should not exceed 25% of the total house price, the final market price of a house on a 70 foot lot would be \$47,600. In fact, many developers swallow overhead and gross profit on lot development in order to sell houses, but the \$40,000 minimum price of a house on a 70 foot lot is in my experience a reasonable estimate.

In the last 30 and 40 years minimum lot sizes have been steadily increased. At one time 35 and 40 foot lot sizes were common. Today houses costing less than \$25,000 could still be built and marketed if lot sizes of 35 feet and under were permitted. Such lot sizes are undesirable and unhealthy we are told. So the average householder earning between \$12,000 and \$14,000 a year must live with his family in an apartment or condominium (or stay in older communities where houses were built on smaller lots). Today 70 feet is the common minimum lot size requirement.

The local community is in effect saying to the average family, "Since a house on a 35 foot lot with its own basement, garage, pet house and backyard garden and barbecue pit would be unwholesome for you, you and your family may move into our community and live in apartments and condominiums only." This is what minimum lot size requirements are really saying. It would be laughable if it weren't in fact, a tragedy of national scope that we've permitted to grow up around us.

Do large lot sizes actually encourage the health and welfare of communities?

I would say no. Large lot sizes waste our most precious natural resource, our land. They scatter and disperse urban populations over wide areas and effectively discourage rapid transit, regional shopping centers, cultural activities and other institutions, not to mention commerce and industry, which depend upon population concentrations for their economic and social feasibility. They create a commuter culture. Because of physical dispersal there is more social isolation, more dependence on the car and television for entertainment. And because so many people mortgage themselves over their heads to get into these 'bedroom communities' they add an additional burden of economic insecurity to our lives.

Minimum lot requirements are literally dividing us into two social classes -- people who can afford new houses costing \$40,000 and more and 'those' people who must live in apartments and condominiums because they have been priced out of the new house market -- not by rising construction costs, but by arbitrary and selfish minimum lot requirements imposed throughout the nation by local communities.

Perhaps as a former house counsel of a residential builder I have developed a jaundiced view of the situation. I would like to know whether other members of the Real Estate Section who may be more objective have nevertheless developed similar views. Perhaps by recognizing and defining the problem we can help bring back the \$25,000 house.

Very truly yours,  
Robert D. Honigman  
Fraser, Michigan

LIMITED PARTNERSHIP REAL ESTATE SYNDICATIONS --

SECURITIES LAW COMPLIANCE

By LAURENCE S. SCHULTZ

Based upon an Article in  
the October 1974 Issue of  
The Detroit Lawyer.

Mr. Schultz is a graduate of the University of Michigan Law School and a member of the Detroit law firm of Cross, Wrock, Miller & Vieson. He is also chairman of the Michigan Bar Association study group for revision of the Michigan Uniform Securities Act provisions concerning exemptions from registration.

In preparing a limited partnership real estate syndication for a small group of investors, it is not uncommon for an attorney to assume that his principal concerns lie in the areas of limited partnership law, taxation and real estate law. This approach could represent a costly oversight for the venture's promoters, because all limited partnership syndications involve a sale of a security under both the state

and federal securities laws (Michigan Uniform Securities Act, M.C.L.A. §§451.501 - 451.818 ("Michigan Act"); Securities Act of 1933, 15 U.S.C. §§77a - 77aa (" '33 Act")' and Securities Exchange Act of 1934, 15 U.S.C. §§78a - 77hh-1 (" '34 Act")), and failure to comply with these laws may result in damage or rescission actions against the promoters (Michigan Act, §410; '33 Act, §12(1), §12(2), and §17(a); '34 Act, §10(b) and Rule 10b-5, Reg. 240. 10b-5 (civil liability implied since 1946, Kardon v National Gypsum Co. (DC Penn. 1946) 69 F. Supp. 512). There are also criminal penalties for willful violation of the securities laws.).

#### Limited Partnership Interests Are Securities

It is well established that a limited partnership interest represents a security ('33 Act Release No. 33-4877, August 8, 1967, 32 F.R. 11705.). The definition of a security under both state and federal law includes investment contracts ('33 Act, §2(1); '34 Act, §3(a)(10); and Michigan Act, §401(1).), which are generally defined as investment in a common enterprise where profits are to come through the efforts of others (SEC v W. J. Howey Co., 328 U.S. 293, 301 (1946).). This broad definition obviously includes limited partnership interests because limited partners have invested in a common venture from which they expect to receive profits, and in which they do not participate.

#### Michigan Uniform Securities Act -- Exemption from Registration

Since the sale of a limited partnership interest constitutes the sale of a security, it is subject to the provisions of the Michigan Uniform Securities Act ("Michigan Act"). Under Section 301 of the Michigan Act, it is unlawful to offer or sell a security in Michigan unless the security is registered thereunder or is exempt from registration. Section 402 provides various exemptions from registration for certain types of securities and also certain transactions.

The exemption mostly likely applicable to a syndication of the type described is under Section 402(b)(9), which, under certain conditions, exempts transactions pursuant to offers to a limited number of offerees. Rule 802.3(c), adopted pursuant to Section 402(b)(9), sets forth the specific requirements to qualify for the 402(b)(9) exemption as it pertains to limited partnerships (Administrative Code 1968 AACs, Rule 802.3.). Under Rule 802.3(c), a limited partnership syndication would be exempt from registration if offers (not sales) are made to not more than twenty-five persons in Michigan during the initial period of twelve months after formation of the partnership, and to an aggregate of not more than ten persons during any subsequent period of twelve months, so long as (i) the seller, before consummating the sale, makes inquiry and reasonably believes that the buyers in Michigan are purchasing for investment, and (ii) no direct or indirect commission or remuneration is paid or given for soliciting any of the prospective buyers in Michigan.

At first glance, the attorney may feel that he has found an exemption from registration under the Michigan Act, and that his limited partnership offering may proceed if offers are not made to more than twenty-five persons in the State of Michigan and purchasers represent that they are buying for investment. However, usually this is not the case. The important factor here is that the exemption is available only so long as there is no direct or indirect commission paid or given for soliciting any of the prospective buyers in Michigan. This requirement is broadly interpreted by the Michigan Corporation and Securities Bureau, especially as it pertains to benefits received by the promoter. For example, an indirect

commission may be held to exist where: (i) the promoter receives an interest in the limited partnership for which he pays a consideration which is less than that paid by other investors; (ii) the promoter contributes real estate to the venture, which, for purposes of his partnership contribution, is valued at a price higher than that which he paid for the property; or (iii) the promoter becomes the general partner and is entitled to compensation from the syndication for his services, through contract or otherwise. In such cases the promoter's benefit is dependent upon his success in selling the limited partnership interests. Therefore the benefit is treated as an indirect commission received for soliciting buyers.

If the exemption is not available because a commission is present, registration may still be avoided by obtaining a Rule 802.3 order from the Michigan Corporation and Securities Bureau, waiving the requirement that there be no direct or indirect commission (Id.). The request for an exemption order should be filed with the Bureau, together with a copy of the offering circular, partnership agreement, and all other documents relating to the offering.

The Corporation and Securities Bureau has adopted guidelines applicable to offerings for which a Rule 802.3 exemption order is sought (The guidelines are set forth in the "Statement of Policy of the Corporation and Securities Bureau regarding Limited and Certain Qualified Offerings of Real Estate." Although adopted by the Bureau, the Statement of Policy has not yet been published in the regulations. Copies may be obtained by writing: Securities Division, Corporation and Securities Bureau, 5511 Enterprise Drive, Lansing, Michigan 48913.). The guidelines set forth various factors which are considered by the Bureau in determining whether or not to grant the exemption, including: (i) the promoter's degree of experience; (ii) the promoter's financial condition and business stability; (iii) the suitability of the offerees (the promoter must represent that interests will be sold only to investors who meet certain suitability standards); (iv) the minimum cash purchase; (v) the amount of fees, compensation and expenses; and (vi) the presence of certain types of conflicts of interest with the promoter. Also, certain provisions must be included in the partnership agreement concerning calling of meetings, voting rights, reports to limited partners, access to records, admission of participants, redemption and transferability of interests, and certain other matters concerning rights of limited partners.

The guidelines also require preparation and use of an offering circular and prescribe specific information to be included in the circular. The Corporation and Securities Bureau usually requests that the offering circular give special emphasis to conflicts of interest, compensation, and rights of the limited partners.

Upon receipt of an exemption request, the Corporation and Securities Bureau reviews the offering circular, partnership agreement, and other documents, to determine whether the offering complies with the guidelines. To the extent that the offering materials do not meet these standards, the Bureau may have comments and suggest changes, and may even request amendment of the partnership agreement.

It should be emphasized that the Bureau will review the substantive terms of the offering to determine whether the offering is made on fair and reasonable terms for the investor. Thus, the Bureau will examine the amount of the general partner's

compensation, any step-up in the price of the property being sold to the partnership, the terms of any management contract, etc., and may require adjustments in these areas as a condition of the exemption.

Once the documents are in order, the Bureau will issue its order authorizing the offering to proceed under the Section 402(b)(9) exemption. The review process generally takes from two to six weeks, depending upon the number of offerings being handled by the Bureau at the time, and the number and nature of the Bureau's comments. If the guidelines are carefully followed, the review time will be minimized.

Securities Act of 1933 --  
Exemption from Registration

In addition to obtaining an exemption from registration under the Michigan Act, the attorney must determine that the offering will be exempt from registration under the Securities Act of 1933 (" '33 Act"). The most likely exemptions are the intra-state offering exemption under Section 3(a)(11), and the private offering exemption under Section 4(2).

The intra-state offering exemption is usually available so long as (i) the project is located in the State of Michigan, (ii) all of the offerees are residents of the State of Michigan, (iii) the funds are raised and used in Michigan, and (iv) the purchasers represent that interests will not be re-sold to non-residents ('33 Act, §3(a)(11), and Rule 147, Reg. 230.146.). It should be emphasized that this exemption will be lost if a single offer is made to a non-resident of the State.

The availability of the private offering exemption is more difficult to determine and each case must be decided upon its own facts. Generally, in order to qualify for this exemption: (i) the number of offerees must be limited, the fewer the better; (ii) the offerees must be furnished with all material information concerning the offering and should have access to the promoter to obtain additional information; (iii) the offerees must purchase for investment; (iv) the offerees should be sophisticated investors and be able to show that they have the ability to understand and to afford the investment; and (v) the method of making the offering must be limited in that there must be no public advertisements or other communications which may, under any circumstances, be considered public offers ('33 Act Release 33-5487, Rule 146, Reg. 230.146.).

The SEC has adopted Rule 146, setting forth specific standards which, if met, assure the availability of the private offering exemption; however, compliance with these standards is often too burdensome for many limited partnership offerings. If the standards of Rule 146 cannot be met, and yet the private offering exemption is relied upon, it is essential that the attorney be fully aware of the limitations of this exemption as established by SEC releases and recent case law to assure that the exemption is available.

The burden of establishing the '33 Act exemption is on the promoter, and therefore, clear evidence of its availability is required. In order to document his exemption, the promoter should obtain a written statement from each purchaser acknowledging: (i) receipt of the offering materials; (ii) that he has purchased the security pursuant to an exemption from registration; (iii) that he meets the appropriate investor qualifications for the exemption; and (iv) that resale of the interest is restricted. The offering circulars should be numbered and their distribution carefully controlled in order to prevent out-of-state offers, or to limit the number of offerees, as appropriate.

### The Anti-fraud Provisions

It may come as a surprise to some attorneys that even though they have established their state and federal exemptions from registration, they must still contend with the anti-fraud provisions of the securities laws.

Under the Michigan Act, if there is an untrue statement or non-disclosure of any material fact in connection with the offer or sale of the limited partnership syndication, the purchaser may obtain rescission or damages, just as if the security had been sold in violation of the registration provisions of the law (Michigan Act, §101 and §410.).

Generally, real estate syndications also are subject to the Rule 10b-5 anti-fraud provisions under the Securities Exchange Act of 1934 (" '34 Act".)( '34 Act, §10(b) and Rule 10b-5. An anti-fraud action may also be maintained under §12(2) and §17(a) of the '33 Act.). Rule 10b-5 applies to the sale of a limited partnership interest if the transaction involves the use of any means or instrumentality of inter-state commerce, or of the mails. The number of offerees or purchasers is not even relevant to the applicability of the Rule. Under Rule 10b-5, an action may be based upon untrue statements or non-disclosure of material facts, or other fraudulent practices. Remedies available include rescission or damages.

To assure compliance with the anti-fraud provisions of the Michigan Act, and the '34 Act, the attorney must carefully review the offering circular and other offering materials to make certain that they accurately set forth all material facts concerning the investment. In this respect, the above mentioned guidelines of the Michigan Corporation and Securities Bureau may be helpful, for they refer to key areas of disclosure common to most offerings. Also, the promoter should be carefully briefed concerning his anti-fraud exposure.

#### Is the Promoter a Broker-Dealer?

If the promoter participates regularly in real estate ventures, and it therefore appears that he is engaged in the business of selling real estate syndication securities, he must register as a broker-dealer under the Michigan Act (Michigan Act, §401(c) and §201(a)). If, as a broker-dealer, he participates in interstate transactions, he also will have to register as a broker under the '34 Act ('34 Act, §3(a)(4) and §15 (a)(1)).

In determining whether the promoter is engaged in the business of selling securities, the size, number and nature of the offerings must be examined. Also significant are the promoter's other activities with respect to the venture.

If the promoter has no more than three exempt offerings a year, the Michigan Corporation and Securities Bureau generally acknowledges that he is not engaging in business as a broker-dealer under the Michigan Act. If more than three such offerings a year are to be conducted, it is advisable to seek prior clearance from the Bureau.

There are no formal or informal standards as to when selling securities constitutes a "business" under the '34 Act. Therefore, in cases of multiple offerings involving interstate transactions, it may be advisable to obtain an interpretation from the Securities and Exchange Commission as to whether registration is required (The procedure for requesting an interpretative letter from the Securities and Exchange Commission is set forth in '33 Act Release No. 33-5127, January 25, 1971, 36 F.R. 2600).

If the promoter acts as a broker-dealer under the Michigan Act or under the '34 Act, and fails to register, he may be subject to rescission or damage actions in connection with securities sales (Michigan Act, §410(a); '34 Act, §29(b)).

MECHANIC'S LIENS

A great deal of agitation exists to reform existing mechanic's lien laws. A recent decision by the Circuit Court for the County of Genesee, Williams E Works, Inc v Springfield Corporation upheld the constitutionality of the present Michigan Mechanic's Lien Act against a due process attack. The decision is presently being appealed. Your editor has decided that it may be of interest to reprint the following decisions dealing with due process attacks to such laws.

No. 15 22 55  
ROUNDHOUSE CONSTRUCTION CORP.  
VS  
TELESCO MASONS SUPPLIES CO., INC., ET ALS

SUPERIOR COURT,  
FAIRFIELD COUNTY, CONNECTICUT  
JUNE 20, 1974

MEMORANDUM OF DECISION

This is an action to foreclose a certain mechanic's lien filed by the plaintiff-contractor. On July 18, 1973, the defendants Fischers, residents of the state of New York, contracted with the plaintiff for the construction of a geodesic dome for a personal residence on real property owned by them, which is located in the town of Ridgefield, Connecticut. The contract for the construction of this residence was for \$58,595.00.

Since the beginning of the work, the defendants Fischers have paid from their own funds to the plaintiff on account of said contract \$13,595.00 and an additional \$3,725.00 for extras. For a variety of reasons not relevant to this decision, the defendants Fischers refused to make further payments on the contract and the construction of the dome stopped and it is presently incomplete.

The plaintiff-contractor filed its mechanic's lien on November 7, 1973, in the amount of \$20,000.00. The other defendants are sub-contractors who allegedly supplied services and/or materials in the construction of the house and have filed the following mechanic's liens: the defendant Telesco Masons Supplies Co., Inc. filed on November 16, 1973, in the amount of \$2,825.46; the defendant Ridgefield Supply Company filed on November 30, 1973, in the amount of \$2,125.73; the defendant Designs Unlimited filed on November 30, 1973, in the amount of \$1,735.25; and the defendant Harold Bishop, doing business as Bishop Associates, filed on December 20, 1973, in the amount of \$4,500.00.

The parties are before this court on an order to show cause brought by the defendants Fischers claiming that a permanent injunction be issued against the plaintiff and the other defendants from maintaining the mechanic's liens against the subject property. They claim the liens are invalid because they constitute a taking of property without due process as required under the Fourteenth Amendment of the United States Constitution. The parties stipulated to the facts and agreed that the court should at this time determine this issue.

The mechanic's lien statutory scheme which is being challenged in the case provides, inter alia, that "(i)if any person has a claim for more than ten dollars for materials furnished or services rendered in the construction, ... of any building ... and such claim is by virtue of an agreement with or by consent of the owner of the land upon which such building is being erected ... or of some person having authority from or rightfully acting for such owner in procuring such labor or materials, such building, with the land on which it stands, shall be subject to the payment of such claim. Such claim shall be a lien on such land, building and appurtenances ..." Sec. 49-33 of the General Statutes. The lien is limited to the total amount the owner agreed to pay for such building. Sec. 49-36 of the General Statutes. The lien becomes perfected if the person performing such services or furnishing such materials shall "...within sixty days after he has ceased to do so, lodges with the town clerk of the town in which such building is situated a certificate in writing, describing the premises, the amount claimed as a lien thereon and the date of the commencement of the performance of services or furnishing of materials, stating that the amount claimed is justly due, as nearly as the same can be ascertained, and subscribed and sworn to by the claimant; ..." Sec. 49-34, General Statutes.

The statute goes further; it allows a sub-contractor to file such a lien against the property for which he furnished labor and/or materials. For sub-contractors, there is also an additional requirement that they must not later than sixty days after ceasing to furnish the materials or render the services give written notice to the owner of the building that they have furnished or commenced to furnish the materials and/or render the services and intend to claim a lien on the building. Sec. 49-34 of the General Statutes.

It is important to note that the statutory procedure provides no opportunity for a hearing prior to perfecting the mechanic's lien on the real property. In fact, unlike our prior laws on attachment, garnishment and replevin, which at least required action on the part of a commissioner of the superior court, the mechanic's lien may be perfected and filed solely by the creditor.

The purpose of the mechanic's lien statute, which was first enacted in 1836, "... is to give to building creditors certain peculiar and different rights from those enjoyed by general creditors." New Haven Orphan Asylum v Haggerty Co. 108 Conn 232, 237, 238. Its design was to give a special security interest to that class of creditors involved in the building trades. Balch v Chaffee, 73 Conn 318, 320. For a comprehensive history of the Connecticut mechanic's lien statute see New Haven Orphan Asylum v Haggerty, supra.

It is fundamental law that property cannot be taken without procedural due process. This is guaranteed to us by the Fourteenth Amendment to the constitution (sic) of the United States and the First Article of the Constitution of the state of Connecticut. "We have held that these provisions of the federal and state constitutions have the same meaning and impose similar constitutional limitations." Cyphers v Allyn, 142 Conn 699, 703.

Boddie v Connecticut, 401 U.S. 371, 377, makes clear a principle which has been firmly established in the development of our constitutional law over the last hundred years. "(D) ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard! " (emphasis added) The opportunity to be heard must be granted at a "... meaningful time and in a meaningful manner." Armstrong v Manzo, 380 U.S. 545, 552.

The filing of a mechanic's lien is a taking of property within the constitutional sense. The mechanic's lien is no different in its effect on property than a real estate attachment. Although the lien does not deprive the owner of possession, such as replevin or garnishment does, it is equally repugnant in that it restricts the owner's ability to sell or mortgage or rent the property for its full value.

So, in the case of Bay State Harness Horse R & B Association v PPG Industries, Inc. 365 Fed Sup 1299, the court held at pp. 1304-5: "Nevertheless, even viewing the attachment as a non-possessory lien (Cohen v Wasserman, 238 F 2d 683 (1st Cir. 1956)), or as merely an encumbrance or cloud on the title (N.Y. N.H. & H.R.R. v Butter, 276 Mass 236, 176 N.E. 797 (1931)), the interest created by the attachment operates as a superior interest against subsequent purchasers, mortgagees or attaching creditors, and thus restricts the owner's ability to sell or mortgage the property at its full value. The determinative impact of the attachment is that it deprives the owner of a property right or interest significant not only to him in his use of the property but to the attaching party as well. The nature of such deprivation has been recognized even by earlier courts which refused to sustain a constitutional challenge to prejudgment attachments." Clement v Four North State Street Corp. 360 F Sup 933, 935; Gunter v Merchants Warren National Bank, 360 F Sup 1085.

The rationale of Fuentes v Shevin, 407 U.S. 67, fully applies to the instant case. The court at pp. 80-1 held in that case the following:

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See Lynch v Household Finance Corp., 405 U.S. 538, 552.

The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of right ... And no better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Refugee Committee v McGrath, 341 U.S. 123, 170-172 (Frankfurter, J., concurring)."

Fuentes makes clear that notice and a right to a hearing "... must be granted at a time when the deprivation can still be prevented." Fuentes, supra, p. 81. That clearly is before the lien attaches. The mechanic's lien certainly does not fall within one of the "extraordinary situations." Boddie v Connecticut, supra, at p. 379. These extraordinary situations which would permit such a lien before notice and hearing "... must be truly unusual." Fuentes v Shevin, supra, at p. 90.

Furthermore, it would clearly appear that the claims of a creditor who furnished labor or materials to improve real property requires less of a summary procedure to protect his interest in the real property than a creditor involved in personal property. The latter may very well involve a situation where the debtor may destroy or conceal the personal property which, of course, is not the case with real property.

The problem with Connecticut's mechanic's lien procedure does not stop with just the failure to provide for a prior hearing and notice; it goes further. There is no procedure by which a mechanic's lien wrongfully filed can be discharged, short of its validity being determined at the time of foreclosure. This being a statutory proceeding, the jurisdiction of the court is determined by the provisions of the statute. There being no statutory authority to dissolve a mechanic's lien, the court has no jurisdiction to do so. Sachs v Nussenbaum, 92 Conn 682, 687.

In the case of Ravitch v Stollman Poultry Farms, Inc., 162 Conn 26, 35, our Supreme Court recently cited Sachs v Nussenbaum, supra, with approval and held the following pertaining to an attachment of real estate, to wit: "... the language of the statute which allows such a dissolution only when the attachment is excessive, and, in ordering a dissolution, the judge had no power to test the legal sufficiency of the complaint or to weigh the chances for the plaintiff's recovery of his claim."

The Supreme Court of the United States in the case of Lynch v Household Finance Corp., 405 U.S. 538, discussed the state's prior garnishment statutes, which procedure was similar to that of a mechanic's lien in that it did not require court participation. The court, at p. 555, stated the following: "More important, the state court and its officers are insulated from control over the garnishment. Connecticut appears to be one of the few States authorizing an attorney for an alleged creditor to garnish or attach property without any participation of a judge or clerk of the court...." In the case of a mechanic's lien, it must be remembered state law does not even require an attorney; the creditor himself may file and perfect such a lien. The court also commented, at p. 555, about our garnishment statute as follows: "A person whose account has been seized can get only minimal relief at best." Footnote 26 of the opinion provided the following: "The courts have no authority to inquire into the probable validity of the creditor's claim, or whether special circumstances warrant provisional security for an alleged creditor. Sachs v Nussenbaum, 92 Conn. at 689, ... Prior to the termination of the litigation, a garnishment may be reduced or dissolved only upon a showing that the garnishment is excessive - i.e., in excess of the creditor's apparent claim - or upon substitution of a bond with surety. ... This involvement has been termed 'meager'." It is, therefore, apparent there is no way prior to foreclosure of the mechanic's lien for the owner of the property subject to such a lien to test the probable validity of the creditor's claim. Foreclosure procedure of the mechanic's lien can extend for a period of four years. See Sec. 49-39 of the General Statutes. It cannot be said that this is a hearing at a "meaningful time and in a meaningful manner."

The fact that the lien may be dissolved upon substitution of a bond with surety, Sec. 49-37 of the General Statutes, does not make it constitutionally acceptable. The debtor is still deprived of his property "... whether or not he has the funds, the knowledge, and the time needed to take advantage of the recovery provision." Fuentes v Shevin, supra, at p. 85.

The Supreme Court of the United States has recently decided the case of Mitchell v Grant Co. 42 L.W. 4671 (May 13, 1974). This case upholds the constitutionality of Louisiana's sequestration statute, which requires no prior notice or hearing. In a strongly worded dissent, Justice Stewart proclaimed the following:

"In short, this case is constitutionally indistinguishable from Fuentes v Shevin, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the Fuentes dissent. In light of all that has been written in Fuentes and in this case, it seems pointless to prolong the debate. Suffice it to say that I would reverse the judgment before us because the Louisiana sequestration procedure fails to comport with the requirements of due process of law."

But even within the holding of Mitchell v Grant, the mechanic's lien law of the state is unconstitutional. In the Mitchell case, the debtor may immediately have a full hearing following the execution of the writ; in Connecticut, the debtor is not entitled to a hearing until the time the lien is actually foreclosed which may be as long as four years after its perfection. In the Mitchell case, the court pointed out the judge issues the writ of sequestration only on a "clear showing"; in Connecticut, the mechanic's lien is issued and filed on the land records by the creditor. In the Mitchell case, the right of sequestration is limited to the existence of a lien specifically granted to the vendor and the issue of default; in Connecticut, no specific lien is given by the property owner and there need not be a default on the part of the debtor. Clearly, even under the Supreme Court's pronouncement in the Mitchell case, Connecticut's mechanic's lien law is unconstitutional in that it is violative of the due process clauses of the constitution of the United States and the state of Connecticut.

The defendant-lien holders in the case argue that justice requires the protection of those who furnish labor and material and thereby enhance the value of the debtor's property. This court cannot quarrel with this philosophy. What the defendant-lien holders fail to recognize is that the property owner must also be protected against having his property taken without due process of law. The mechanic's lien procedure in Connecticut does not represent "... a constitutional accommodation of the conflicting interests ..." Mitchell v Grant, supra, at p. 4673.

It would appear to this court that due process provisions require an opportunity to be heard before the creditor has a right to place such a lien on the property of the owner or, at the very least, there should be an immediate hearing after the perfection of the lien to determine if there is probable cause to sustain the validity of the creditor's claim. The right to substitute a bond for such a lien is not the answer. In such a case the property owner is forced to substitute other property in violation of the constitution for the release of such a lien. See Fuentes v Shevin, supra, at p. 81-85.

This court is mindful of its obligation when reviewing the constitutionality of a statute. "When a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear. ... (cases cited) 'It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.' Homes, J., in Interstate Consolidated Street Ry. Co. v Massachusetts, 207 U.S. 79, 88, 28 S. Ct. 26, 52 L. Ed. 111." Snyder v Newtown, 147 Conn. 374, 390.

The instant matter is a clear case where the state statute is violative of the due process clause of the constitutions of the United States and the state of Connecticut. The owners in this case have sustained their burden of overcoming the presumption of constitutionality of the statutes pertaining to mechanics' liens.

The court hereby issues a permanent injunction against the plaintiff, Roundhouse Construction Corp., and the defendants Telesco Masons Supplies Co., Inc., Ridgefield Supply Company.

RUOCCO v BRINKER  
USDC SFla, 7/9/74, 43 L.W. 2056

"The property owner against whose property the lien was filed argues that the filing of a lien, which places an encumbrance upon his property, without a prior opportunity to be heard impedes his ability to freely alienate his property or otherwise use that property for loan security. This, the property owner argues, violates essential notions of procedural due process as set forth in Sniadach v Family Finance Corp. 395 U.S. 337, 37 LW 4520 (1969), Fuentes v Shevin, 407 U.S. 67, 40 LW 4692 (1972). In Sniadach, the Supreme Court held that a garnishment procedure by which creditors could effectively freeze one half of the wages due to an alleged debtor, without according the debtor an opportunity for a prior hearing, violated fundamental principles of due process. The court reasoned that the use of the garnished wages during the interim period between the garnishment and the main suit is an important property interest of which a wage earner cannot be deprived without notice and a prior hearing that seeks to establish the probable validity of the underlying claim against the debtor. The Supreme Court also applied this reasoning in striking down the replevin laws of Florida and Pennsylvania in Fuentes. The replevin laws of both states permitted a creditor to seize chattels from their possessor without prior notice and hearing.

Despite Sniadach and Fuentes, two courts have upheld mechanics' lien laws similar to those attached in this case. In Spielman-Fond, Inc. v Hansons, Inc. (D. Ariz. 9/12/73), a three-judge federal district court distinguished Fuentes and cited the fact that the statutes at issue involved no actual dispossession of property. The court rejected the argument that by restricting the right to alienate property the lien statutes deprive the owners of a significant property interest. Similarly, in Cook v Carlson, 364 F. Supp. 24 (1973), the court stated that the deprivation of property rights under the lien statute was "de minimis". The procedural safeguards of the statute, which did not include a prior hearing, were deemed adequate.

If this court were compelled to pigeonhole its analysis into the guidelines of Fuentes, the decision would rest on the conclusion reached in Spielman-Fond and Cook v Carlson, i.e., that the infringement on property rights created by the mechanic's lien law is de minimis. But the court is not so compelled. In Mitchell v W. T. Grant Co., 42 LW 4671 (1974), the Supreme Court overruled Fuentes to the extent that Fuentes required a hearing prior to the deprivation of any significant property interest without regard to the weight of the interests deprived or the length of such deprivation. More significantly, however, the Mitchell decision reaffirmed the propriety of a flexible procedural due process analysis. There may be instances where the deprivation of property is so severe and the post-deprivation safeguards so inadequate that a prior opportunity to be heard is necessary. This is not one of those instances. The format of the claim of lien with the detailed inquiries therein and the variety of post-imposition hearings set forth in Florida's mechanics' lien laws are sufficient to satisfy procedural due process. The law might well be deemed constitutionally infirm if the scheme provided for actual dispossession of property; but no dispossession occurs here. - Dyer, J."

ROUNDHOUSE CONSTRUCTION CORPORATION v TELESCO  
MASONS SUPPLIES COMPANY, INC. ET AL

SUPREME COURT  
of CONNECTICUT

February Term, 1975

House, C. J. This action was brought by the plaintiff to foreclose a mechanic's lien on the property of the defendants Richard P. and Bonnie R. Fischer. The Fischers contracted with the plaintiff, Roundhouse Construction Corporation, for the construction of a geodesic dome for a residence on real property owned by them in the town of Ridgefield. After construction had begun and after some payments had been made on the contract, the Fischers ceased making payments, and the structure is incomplete. On November 7, 1973, the plaintiff filed a mechanic's lien on Fischer property and by complaint dated January 24, 1974, brought the present action to foreclose that lien. Also named as defendants in this action were four subcontractors who had filed mechanic's liens on the Fischer property.

The Fischers, hereinafter referred to as the defendants, denied the substantive portions of the plaintiff's complaint, asserted certain special defenses including a claim that the plaintiff's workmanship was unsatisfactory and that the structure had collapsed, counterclaimed against the plaintiff, and cross-complained against the four other lienors. One of the grounds set forth in the cross complaint and counterclaim was that the mechanics' liens were invalid in that they constituted a taking of the defendants' property without due process of law contrary to the provisions of the fourteenth amendment to the United States constitution. The Fischers then moved the court, on the same constitutional basis, for an order to show cause why an injunction should not be issued against maintaining the lienors. The parties stipulated to the facts which we have hereinbefore briefly summarized and agreed that the Superior Court should determine the sole issue of the constitutional validity of the mechanics' liens on the Fischer property. The court, filing a well-reasoned memorandum of decision, found the Connecticut mechanic's lien statutes unconstitutional as violative of the due process clauses of the fourteenth amendment to the constitution of the United States and article first, §10, of the constitution of Connecticut and rendered judgment enjoining the plaintiff and the other four lienor defendants from maintaining their mechanics' liens on the Fischer property and declaring the liens to be invalid. The present appeal was taken solely by the plaintiff. The other four lienor defendants against whom judgment was also rendered did not appeal.

The decisive issue on the appeal is whether the Connecticut statutory procedure governing mechanics' liens is unconstitutional because it does not comply with the due process of law requirements of the fourteenth amendment to the federal constitution and article first, §10, of the Connecticut constitution. "We have held that these provisions of the federal and state constitutions have the same meaning and impose similar constitutional limitations." Cyphers v Allyn, 142 Conn 699, 703, 118 A2d 31S; Katz v Brandon, 156 Conn 521, 537, 245 A2d 579. The appeal raises for the first time in this court a question as to the constitutionality of Connecticut's mechanic's lien procedure. The United States Supreme Court, however, has recently had occasion to consider the constitutionality of the attachment, garnishment, sequestration and mechanic's lien procedures in several states, and the decisions of that court guide and must control our decision.

The Connecticut mechanic's lien statutes are found in §§49-33 through 49-40a of the General Statutes. While the statutory provisions are too lengthy to be

repeated here in their entirety, they provide, in brief, that "(i)f any person has a claim for more than ten dollars for materials furnished or services rendered in the construction, raising, removal or repairs of any building or any of its appurtenances .. and such claim is by virtue of an agreement with or by consent of the owner of the land upon which such building is being erected or has been erected or has been moved, ... such building, with the land on which it stands ... shall be subject to the payment of such claim. Such claim shall be a lien on such land, building and appurtenances ...." General Statutes §49-33.

Section 49-34 provides, in pertinent part, that "(n)o such lien shall be valid, unless the person performing such services or furnishing such materials, within sixth days after he has ceased to do so, lodges with the town clerk in the town in which such building is situated a certificate in writing, describing the premises, the amount claimed as a lien thereon and the date of the commencement of the performance of services or furnishing of materials, stating that the amount claimed is justly due, as nearly as the same can be ascertained, and subscribed and sworn to by the claimant; which certificate shall be recorded by the town clerk with deeds of land." Section 49-35 requires that subcontractors and materialmen whose written contracts with the original contractor have not been assented to in writing by the other party to the original contract and who claim mechanics' liens must give notice to the owner of the property against which the liens are claimed. This requirement of notice, however, does not apply to a principal contractor such as the present plaintiff. Section 49-36 provides that the amount of the lien on any building or its appurtenances cannot exceed the amount agreed upon in the contract for such building and its appurtenances, and §49-37 provides that the owner of the real estate subject to the lien may apply to the Superior Court for dissolution of the lien upon substitution of a bond with surety. In addition, no mechanic's lien shall remain in force for a period longer than four years after it has been perfected unless the lienor commences an action to foreclose the lien within two years from the date the lien was filed, and provision is made for the discharge of the lien on the records if no action is brought to foreclose it within two years from the date it was perfected. General Statutes §49-39, Section 49-51 permits any person having an interest in any real estate "described in any certificate of lien which lien is invalid but not discharged of record" to give notice to the lienor to discharge the lien and, if such request is not complied with in thirty days, to bring his complaint to the court which would have jurisdiction of the foreclosure of such lien, if valid, claiming such discharge. That court may adjudge the validity or invalidity of the lien, and a certified copy of a judgment of invalidity recorded on the land records shall fully discharge it.

The defendants argue that this mechanic's lien statutory scheme in Connecticut operates to deprive them of their property without the due process of law guaranteed them by the federal and state constitutions. More specifically, they assert that the Connecticut statutes fail to provide for prior notice to property owners such as themselves and an opportunity to be heard at a meaningful time and in a meaningful manner and that, under procedural due process standards, the absence of such provisions renders the procedure unconstitutional.

It is fundamental that property cannot be taken without procedural due process as guaranteed by the fourteenth amendment to the constitution of the United States and article first, §10, of the constitution of Connecticut. For more than a century, the central meaning of procedural due process has been clear. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v Hale, 68 U.S. 223, 233, 17 L.Ed. 531; Windsor v McVeigh, 93 U.S. 274, 23 L. Ed. 914; Hovey v Elliott, 167 U.S. 409,

17 S. Ct. 841, 42 L. Ed. 215; Grannis v Ordean, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62. The United States Supreme Court has reiterated that these fundamental requirements apply to the deprivation of "any significant property interest." Boddie v Connecticut, 401 U.S. 371, 379, 91 S. Ct. 780. In Bell v Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90, the Supreme Court held that the suspension of the drivers' licenses "adjudicates important interests of the licensees" and that "(i)n such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." The court noted that "(t)his is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'" and held (p. 542) that "it is fundamental that except in emergency situations ... due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."

This effective opportunity to be heard is gravamen of the currently accepted standards of procedural due process in the area of property rights as now prescribed in the United States Supreme Court landmark cases of Fuentes v Shevin, 407 U.S. 67, 92 S. Ct. 1983, rehearing denied, 409 U.S. 902, 93 S. Ct. 177 L. Ed. 2d 165; Lynch v Household Finance Corporation, 405 U.S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d, rehearing denied, 406 U.S. 911, 92 S. Ct. 1611 L. Ed. 2d 822; and Sniadach v Family Finance Corporation, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349. It was these decisions, spelling out the requirements of due process of law in creditor proceedings which led to the passage by the General Assembly of Public Acts 1973, No. 73-431, entitled "An Act Concerning Prejudgment Remedies," now chapter 903a of the General Statutes. See 16 Conn. H.R. Pt. 12, 1973 Sess., pp 58\_\_\_\_; E. J. Hansen Elevator, Inc. v Stoll. Conn. (36 Conn. L.J., No. 34, p. 1). That act, however, has no application to the enforcement of mechanics' liens. By its terms, it is limited to "any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment but shall not include a temporary restraining order."

In Sniadach, the court held that the prejudgment garnishment of wages without notice and a prior hearing violated the fundamental principles of due process; and, in Fuentes, the court struck down the replevin statutes of Florida and Pennsylvania as violative of the due process clause of the fourteenth amendment because they failed to provide for a hearing before the repossession of chattels. In both cases the court concluded that, under the statutes in question, the prejudgment deprivation of property, i.e., the actual dispossession of wages or personalty, was so severe that notice and a meaningful opportunity to be heard prior to the taking were required by the due process clause of the fourteenth amendment. Fuentes v Shevin, supra, 96-97; Sniadach v Family Finance Corporation, supra, 342.

The court appeared to retreat somewhat from the seemingly strict requirement of Fuentes v Shevin, supra, that the hearing take place prior to the dispossession of personalty, when in a subsequent decision it upheld the constitutionality of the Louisiana sequestration statute. Mitchell v W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406. That statute allows to a holder of a mortgage or lien a writ of sequestration authorizing a constable to sequester and take possession of goods - in order to forestall encumbrance or alienation of the property

from the debtor. The court noted two principal provisions present in the Louisiana statute which satisfied the requirements of procedural due process and thus obviated the necessity of a prior hearing. The first of these is that although the application for the writ is granted ex parte and without prior notice to the debtor, the writ itself issues only on the order of a judge and on a specific factual showing of the nature of the claim. *Id.*, 606. Secondly, and more importantly, the Louisiana statute allows the debtor to seek immediate dissolution of the writ unless the creditor proves the grounds upon which the application for the writ was granted. *Ibid.* In addition, the party seeking the writ must furnish security for the payment of any damages the debtor may sustain when the writ is obtained wrongfully. *Ibid.* Such a procedure, the court concluded, "effects a constitutional accommodation of the conflicting interests of the parties." *Id.*, 607. The court expressly refrained from overruling Fuentes and Sniadach and sought to distinguish those cases on the factual situations involved. Mitchell v W. T. Grant Co., supra, 614, 615.

In a very recent case, North Georgia Finishing Inc. v Di-Chem. Inc., \_\_\_ U.S. \_\_\_, 95 S. Ct. 719 42 L. Ed. 2d 751, the court struck down a Georgia prejudgment garnishment statute in an opinion which substantially reaffirmed Fuentes v Shevin, supra. Significantly, the court stated that the Georgia statute was not saved by the ruling in Mitchell v W. T. Grant Co., supra, since the statute possessed none of the characteristics of the Louisiana sequestration statute which we have noted above. North Georgia Finishing, Inc. v Di-Chem. Inc., supra, \_\_\_. It is also significant to note that although the North Georgia Finishing decision relied heavily on Fuentes, the court did not speak in terms of procedural due process as requiring a prior hearing, as it did in Fuentes, but, rather, an "early hearing." The difference is substantial. The clear indication now is that in testing whether a lien or sequestration procedure complies with the requirements of due process it will be examined in its entirety, and the lack of a provision for a prior hearing in and of itself will not be constitutionally fatal if other saving characteristics are present.

Although the United States Supreme Court has not as yet spoken definitively on the subject of the due process requirements of mechanic's lien statutes, it has affirmed without opinion a case involving the Arizona mechanic's lien statute. Spielman Fond, Inc. v Hansons, Inc., 379 F. Sup. 99 (D. Ariz.), aff'd, 417 U.S. 901, 94 S. Ct. 2596, 4 L. Ed. 2d 208. In that case, a three-judge United States District Court upheld the constitutionality of the Arizona statute on the ground that mechanics' and materialmen's liens did not amount to taking significant enough for due process to require notice and an opportunity to be heard prior to the filing of the lien. *Id.*, 999-1000. It is to be noted, however, that the Arizona statute restricted the validity of a mechanic's lien to no longer than six months unless an action is brought to foreclosure within that period. Ariz. Rev. Stat. Ann. §33-9 (1974). Such a provision would seem to offer the bar minimum of due process protection consistent with the extent of deprivation present.

Other lower federal courts have sustained the constitutional validity of questioned mechanic's lien procedures. In Cook v Carlson, 364 F. Supp. (S.D.S.D.). A federal district court in South Dakota upheld the mechanic's lien statute of that state, voting that the deprivation of property resulting from a mechanic's lien did not actually deprive the owner of the use or possession of his property to the extent present in Fuentes and Sniadach and concluding that notice and a hearing prior to filing of the lien are not required. That court used a glancing test, weighing, on the one hand, the extent of the deprivation involved and, on the other, the nature of the creditor's interest to be protected, and the court noted (p. 27) that the deprivation caused by the South Dakota mechanic's lien statute was mitigated by

the provision in that statute which allowed the owner of the property subject to the lien to "force an expeditious adjudication on the merits, without cost to him, by demanding that the lien be foreclosed, whereupon the lienholder must commence foreclosure proceedings within thirty days or forfeit the lien."

In still another recent case, Ruocco v Brinker, 380 F. Sup. 432 (S.D. Fla.), a Florida mechanic's lien statute withstood a constitutional attack on the ground of lack of procedural due process. Relying substantially on Mitchell v W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406, the court concluded that there is now a flexible test for determining the existence of due process and that a prior hearing is no longer constitutionally mandated in every case. Ruocco v Brinker, supra, 437. The court refused to classify the deprivation of property rights under mechanic's lien laws as de minimis, but, viewing the Florida statute in its entirety, found that it constitutionally accommodated the rights and interests of the parties. *Ibid.* Material factors in the court's analysis of the statute included the fact that although the statute did not require a hearing prior to the filing of the lien it did provide that a mechanic's or materialmen's lien may be discharged upon failure to enforce it within one year, and, in addition, the owner of property subject to a lien can force the lienor to bring suit within sixty days or the owner may institute a proceeding requiring the lienor to show cause why his lien should not be enforced by action or vacated and cancelled of record. *Id.* 434.

We have discussed these cases at some length because the precise constitutional due process requirements in legal sequestration procedures have not as yet been definitively prescribed by the United States Supreme Court. The general requirements, however, appear from an analysis of these cases, and it is clear that the present Connecticut mechanic's lien procedures do not meet those requirements of constitutional due process. Under Connecticut procedure, the party claiming the lien is not required to post any bond or provide any surety to protect the owner of the property subjected to the lien against damages from an unenforceable lien. Compare Mitchell v W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406; North Georgia Finishing, Inc. v Di-Chem. Inc., \_\_\_ U.S. \_\_\_, 95 S. Ct. 719, 42 L. Ed. 2d 751. The filing and perfection of the lien may be done by a claimant entirely ex parte, without authorization, supervision or control by a judicial officer. Compare Mitchell v W. T. Grant Co., supra. The certificate itself, which is recorded in the town clerk's office, is statutorily required to contain only a description of the subject premises, the date work was commenced, the amount claimed, and a statement that the amount claimed is justly due. General Statutes § 49-34. Such a certificate is a conclusory statement, totally devoid of any substantive underlying facts. Compare Ruocco v Brinker, 380 F. Sup. 432 (S.D. Fla.).

Most conspicuously absent from the Connecticut procedure is any provision whatsoever for any sort of a timely hearing, either before or after the recording of the lien, which would give the property owner an opportunity to be heard or require the lienor to justify his lien. The statutes allow the lien to continue for two years without any further action on the part of the lienor, during which time the owner of the property is without recourse in the courts to contest the merits of the claim underlying the lien. Compare Mitchell v W. T. Grant Co., supra; Cook v Carlson, 364 F. Sup. 24 (S.D.S.D.). As we have noted, the prejudgment remedy procedures for a judicial determination and a hearing provided by Public Acts 1973, No. 73-431 (General Statutes, c 903a) were not made applicable to the enforcement of mechanics' liens, nor is there any statutory provision for a hearing on and discharge of an excessive lien such as exists in the case of excessive attachments. See General Statutes §§52-301, 52-302. The provision in General Statutes §49-37 for dissolution of a mechanic's lien upon the substitution of a bond does not

afford adequate relief, since the authority of the court is limited to the issuance of an order dissolving the lien only upon the substitution of a bond "in such amount as a court of competent jurisdiction may adjudge to have been secured by such lien." In such a proceeding, "(t)he office of the judge before whom the application is pending, is to discover the amount of the plaintiff's apparent claim, and not to pass upon its legal validity or to weigh the chances of recovery upon it." Sachs v Nussenbaum, 92 Conn. 682, 688, 104 A. 393.

The plaintiff argues that the "taking" of the property under a mechanic's lien statute is de minimis. It is true that the deprivation which results from the filing of a mechanic's lien is not as obvious or as great as the dispossession of property under the statutes struck down in Fuentes v Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 550, and Sniadach v Family Finance Corporation, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 340, but the recording of a mechanic's lien, while it does not prevent alienation of the property, does, as a practical matter, severely restrict the opportunity for and possibility of its alienation. As the United States Supreme Court observed in Fuentes v Shevin, supra, 86: "Any significant taking of property by the State is within the purview of the Due Process Clause." Referring to this statement from Fuentes in North Georgia Finishing, Inc. v Di-Chem. Inc., \_\_\_ U.S. \_\_\_, -5 S. Ct. 719, 42 L. Ed. 2d 751, the United States Supreme Court continued: "Although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort. Because the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment."

We are well aware of the long history of mechanic's liens in this state, dating back to the Public Acts of 1836, Chapter 76. We have recognized the remedial intent of the law governing a mechanic's lien, which is the creature of statute, and have consistently construed the statute "so as to reasonably and fairly carry out its remedial intent." Parsons v Keeney, 98 Conn. 745, 748, 120 A. 505; City Lumber Co. v Borsuk, 131 Conn 640, 645, 41 A2d 775. We are not unmindful of the presumption of constitutionality which attaches to a statutory enactment and the burden which rests upon a party asserting its invalidity to establish not only that it is unconstitutional beyond a reasonable doubt but that its effect or impact on him adversely affects a constitutionally protected right which he has. Lublin v Brown, \_\_\_ Conn (36 Conn L.J., No. 39, pp. 14, 16); Adams v Rubinow, 157 Conn 150, 152, 251 A2d 49. Nevertheless, we must conclude that the absence of a statutory provision for a hearing for the defendants "at a meaningful time and in a meaningful manner"; Armstrong v Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62; has deprived them of their constitutional rights to due process of law as those rights have been recently enunciated by the United States Supreme Court. We, accordingly, find no error in the judgment of the Superior Court.

There is no error.

In this opinion the other judges concurred.

CAPLAN BROS., INC.  
vs  
THE VILLAGE OF CROSS KEYS, INC.  
IN THE  
CIRCUIT COURT  
OF  
BALTIMORE CITY, MARYLAND  
FILE NO: A-54150  
DOCKET: A-114  
FOLIO: 322-363  
FEBRUARY 27, 1975

MEMORANDUM OPINION

The above entitled case is before the court on the plaintiff's exceptions to a report of the General Equity Master in which he recommended that the plaintiff's motion for summary judgment be denied; that the defendant's motion for summary judgment be denied; that the defendant's motion for the summary judgment be denied insofar as it was predicated on the plaintiff's alleged failure to comply with the notice provisions of the Real Property Article, §9-103 (a) and that the defendant's motion be granted on the issue of constitutionality of the Mechanics' Lien Law of Maryland.

On June 18, 1974, the plaintiff, Caplan Brothers, Inc., filed a bill of complaint to enforce its purported mechanics' lien recorded December 18, 1973 involving sixty seven-acres more or less owned by the Village of Cross Keys, Inc. Named as co-defendants and since dismissed by mesne proceedings were three additional parties. The plaintiff, a subcontractor, moved for summary judgment at the time of the filing of its initial pleading. After filing its affidavit in opposition thereto on August 12, 1974, the owner/defendant filed its motion for summary judgment on October 2, 1974. Following the practice of this court, the motion and cross-motion then came on for hearing before the Master.

Westinghouse Electric Corporation, Westinghouse Electric Supply Company Division and ASA of Baltimore, Inc. each sought to be admitted as amicus curiae. Show cause orders were granted in each instance and no cause has been shown why they should not be permitted to intervene in that capacity. Neither party presented an order absolute permitting the intervention but, upon presentation, such an order will be signed. A memorandum was filed by Westinghouse Electric Corporation and counsel for both petitioning intervenors were permitted participation in the proceedings.

The matter was argued before the court and testimony admitted at the request of the defendant to establish all facts necessary for a determination of the issues.

The court is of opinion that the recommendation of the Master properly and adequately disposes of the plaintiff's motion and the first issue of the defendant's motion which is directed at the adequacy of notice by a subcontractor to the owner. There is no dispute as to any material fact. In such case, the general rule is that one of the motions be granted. In the instant case, however, the Master found, and the court agrees, that there are insufficient facts upon which to base judgment.

The second issue, to wit: the constitutionality, vel non, of Maryland's Mechanics' Lien Law is one which has given this court considerable concern. That some form of extraordinary protection must be afforded mechanics and materialmen

in circumstances which the statute contemplates is undisputed and, it is suggested, undisputable. It is the means by which such remedy is obtainable that forms the target of the attack. The owners need protection also and are entitled to the constitutional safeguards which form a guardianship for their property and their property rights.

The law is a reflection of socio-economic change, developed in the interest of maintaining a peaceful and progressive society. As such, it should always be subject to scrutiny lest it become outmoded or contrary to the ultimate purpose it is designed to serve. If circumstances reach that state the old principles or practices must be challenged and changed.

In this case, it is the opinion of the Master in Equity that the Mechanics' Lien Law is sufficiently defective to render it unconstitutional. This court is convinced that the conclusions of the Master are correct, that the plaintiff's exceptions should be overruled and that summary judgment should be entered for the defendant, owner. The court in making its ruling is not unmindful of the long history of mechanics' liens in this state, the remedial interest of the law, and the presumptions of constitutionality.

The opinion of the Master does not set forth in detail all of the findings of fact and law leading to his decision. This need, if indeed there be one, is intended to be satisfied by that which follows.

A study of the Maryland statutes, rules and practice governing liens discloses that mechanics' liens equate almost precisely with the liens of prejudgment attachments of real property without ouster. In neither case is there an ouster, the right to alienation is similarly restricted, the lien is held to secure payment of an alleged but as yet unproven debt, and the lien may be obtained without process upon the defendant. Because of this similarity, attachment cases are herein considered insofar as they furnish guidelines for a decision.

The court finds as to the Maryland statute concerning mechanics' liens and the practice in connection therewith that:

1) No prefiling nor postfiling notice need be given the owner to perfect the lien (Some states require prior notice. I do not consider this significant unless as a result of the notice the owner has an immediate right to protect himself. A notice which permits no action is no notice.).

2) No affidavit is required to establish either the validity of the claim or the necessity of invoking the extraordinary remedy that is sought.

3) The address of the claimant need not be given.

4) No bond need be filed by the claimant.

5) The clerk of the court must of course accept and file or record the claim of lien and thereupon a lien exists upon the property.

6) There is no prehearing.

7) There is no judicial supervision of the legal sufficiency of the documents or the apparent need for the use of the remedy; nor is there any judicial balancing of the impact upon the owner and the interest of the State in providing ex parte preliminary relief for the claimant.

8) The burden of instituting judicial inquiry as to the bona fides of the claim and/or its validity rests upon the owner. The claimant has no burden until he attempts to enforce his lien, an event which need not occur for a period of eighteen months after the imposition of the lien.

9) The owner may have "immediate" relief only by posting a bond the cost of which is not recoverable as part of the costs of suit.

The plaintiff relies principally on the following cases in support of its contention that the Maryland Mechanics' Lien Law does not violate constitutional principles: Cook v Carlson, 364 F. Supp. 24 (D.C., So. Dak., 1973); Connolly Development, Inc. v Superior Court of Merced County, App., 116 Cal. Rptr. 191 (1974); Hutchinson v Bank of North Carolina, (D.C., No. Car., Greensboro Div., No. C-74-58-G, Apr. 17, 1975); Mitchell v W. T. Grant Co. 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974); Ruocco v Brinker, 380 F. Supp. 432 (D.C., Fla., S.D., 1974); Spielman-Fond, Inc. v Hanson's, Inc. 417 U.S. 901, 94 S. Ct. 2596, 41 L. Ed. 2d 208 (1974).

The circumstances giving rise to the holding of constitutionality of mechanics' lien and attachment statutes in the above cases are readily distinguished from the circumstances surrounding Maryland's Mechanics' Lien Law and practice.

CONNOLLY DEVELOPMENT, INC., et al., Petitioners, v  
THE SUPERIOR COURT OF MERCED COUNTY, Respondent;  
DIAMOND INTERNATIONAL CORPORATION, Real Party in Interest  
(Civ. No. 2057. Fifth Dist. Sept. 3, 1974)  
41 C A 3rd 543 -- Cal Rptr --

#### OPINION

BROWN (G.A.), P.J. -- Petitioners herein challenge the constitutional validity of the California mechanics' lien and stop notice provisions as set forth in article XX, section 15, of the California Constitution and chapters 2 and 3, title 15, part 4, division 3 of the Civil Code. This is yet another in a continuum of cases calling into question the validity of summary prejudgment creditors' remedies under the procedural due process clauses of the California and federal Constitutions, following the decision in Sniadach v Family Finance Corp (1969) 395 U.S. 337 (23 L. Ed. 2d 349, 89 S. Ct. 1820) and its progeny. Sniadach held that Wisconsin's prejudgment wage garnishment statute was unconstitutional since it permitted the garnishment of the debtors' wages without prior notice and a hearing. Randone v Appellate Department (1971) 5 Cal. 3d 536 (96 Cal. Rpt. 4. 709, 488 P. 2d 13) (cert. den., 407 U.S. 924 (32 L. Ed. 2d 811, 92 S. Ct. 2452)) explains: "the recent line of cases, commencing with Sniadach, reaffirms the principle that an individual must be afforded notice and an opportunity for a hearing before he is deprived of any significant property interest, and that exceptions to this principle can only be justified in 'extraordinary circumstances'" (at p. 541) and "...rather than creating a special constitutional rule for wages, the Sniadach opinion returned the entire domain of prejudgment remedies to the long-standing procedural due process principle which dictates that, except in extraordinary circumstances, an individual may not be deprived of his life, liberty or property without notice and hearing" (at p. 547). Finally, the decision makes clear that the same principles apply though the deprivation only be temporary. (see pp. 551, 552.)

Under the California statutory scheme, materialmen and other persons defined in Civil Code section 3110 (All references will be to the Civil Code unless otherwise indicated.) who furnish labor or materials at the instance of the owner or the

owner's contractor upon a "work of improvement" are entitled to file a mechanic's lien upon the property upon which the work of improvement is located. A material-man must file a preliminary notice with the owner, the general contractor and the construction lender within 20 days after furnishing the materials (§§3097, 3114) and thereafter record in the office of the county recorder the claim of lien within 90 days of the completion of the work of improvement, or, if a notice of completion or notice of cessation of work is recorded, then within 30 days of such notice (§§3092, 3093, 3116).

The lien constitutes a direct lien (§3123) on the improvement and the real property to the extent of the interest of the owner or the one who caused the work of improvement to be constructed (§§3128, 3129) and takes priority over the encumbrances attaching subsequent to the "commencement of the work of improvement" (§§3134, 3138).

The owner may cause the lien to be released by posting a bond equal to one and one-half times the amount of the lien (§3143). The lien terminates unless an action to enforce it is commenced within 90 days of the completion of the improvement (§3144) and such action is subject to discretionary dismissal if not brought to trial within two years (§3147).

(1) Though the statutory provisions pertaining to the stop notice are contained in the same title as the Mechanics' Lien Law, the rights and remedies created are independent of and cumulative to mechanics' lien rights. (Bohannan Bros., Inc. v Lo Jean Dev. Co. (1969) 3 Cal. App. 3d 200, 205 (82 Cal. Rptr. 922)).

The stop notice claimant must give the 20-day preliminary notice (§§3097, 3160) and then serve on the construction lender within the time a mechanic's lien may be filed (§3159) his notice to withhold funds. Upon receipt of a bonded stop notice carrying a bond equal to one and one-fourth times the amount claimed (§3083), the construction lender is required to set aside funds from the borrower (owner), or any other person to whom the lender is obligated, to make payments sufficient to answer the stop notice claim unless a payment bond has been recorded (§§3162, 3235). The stop notice may be released by posting a bond in an amount equal to one and one-fourth times the amount stated in the notice (§3171). An action must be commenced to enforce payment of the amount claimed in the stop notice between 10 and 90 days after filing (§3172) and is subject to discretionary dismissal if not brought to trial within two years (§3173).

Turning to the facts in the instant proceeding, Connolly Development, Inc. ("Connolly") as owner and developer of a shopping center in the city of Los Banos, entered into a construction contract with Ralph E. Carlsen Construction Co. ("Carlsen") to construct the work of improvement and arranged with Union Bank ("Bank") for a construction loan to finance the improvement. Diamond International Corporation ("Diamond"), at the request of Carlsen, furnished materials for the shopping center for which on February 15, 1973, after complying with the preliminary notice requirements, a mechanic's lien for \$6,727.84 was duly recorded and on February 22, 1973, it filed a bonded stop notice in the same amount with the Bank.

Thereafter Diamond filed a timely complaint to foreclose the mechanic's lien (first cause of action) and to enforce the stop notice (second cause of action). Connolly and the Bank demurred to the complaint on the ground the mechanic's lien and stop notice were violative of procedural due process, which demurrer was overruled. Connolly and the Bank thereupon petitioned this court for a writ of mandate and/or prohibition praying that the trial court be directed to dismiss the complaint

or prohibited from further proceedings in said action. We entertained the writ because of the public importance of the issues involved. (Mooney v Pickett (1971) 4 Cal. 3d 669, 674-675 (94 Cal. Rptr. 279, 483 P. 2d 1231)).

#### STATE ACTION

(2, 3) Initially Diamond contends that any taking represented by filing a mechanic's lien and stop notice does not involve the significant state action required to invoke the protection of the Constitution (Evans v Newton (1966) 382 U.S. 296, 299-300 (15 L. Ed. 2d 373, 377-378, 86 S. Ct. 486)) since the seizure is not made by a state officer or pursuant to court process. However, the recent case of Adams v Department of Motor Vehicles (1974) 11 Cal. 3d 146 (113 Cal. Rptr. 145, 520 P. 2d 961) is to the contrary and is dispositive of this issue. In Adams the court held that action undertaken by a private individual in retaining possession of and selling a customer's vehicle pursuant to the garageman's lien (see §3067 et seq.) was state action. In so holding the court relied on three principal factors: "... the lien is expressly provided for by statute, its execution by sale is authorized by statute, and a state agency oversees the sale and records the transfer of title." (11 Cal. 3d at p. 153).

Applying these principles, the Mechanics' Lien Law clearly constitutes state action. First, the lien is thoroughly regulated by constitutional and statutory provisions. Secondly, in order to "enforce a lien" it must, as in Adams, supra, be recorded with a state agency, in this case the county recorder. If it is not so recorded within the time prescribed by statute, it is of no force and effect. (§3116; see L. W. Blinn Co. v American C. P. Co. (1921) 51 Cal. App. 479, 481 (197 P. 142)). Thirdly, court action is necessary to enforce the lien, for if no action is taken within the time allowed the lien expires. (§3144.)

While there is less state involvement in the filing and perfecting of a stop notice in that it is not required to be recorded or filed with any public office before it becomes effective, the right was nonexistent at common law and the provisions of the statute compel the construction lender to withhold the funds under threat of a judgment for the amount claimed in the stop notice. "This is not just action against a backdrop of an amorphous state policy, but is instead action encouraged, indeed only made possible, by explicit state authorization." (Klim v Jones (N.D. Cal. 1970) 315 F. Supp. 109, 114.) As was stated in United States v Classic (1941) 313 U.S. 299, 326 (85 L. Ed. 1368, 1383, 61 S. Ct. 1031): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." Accordingly, it has been held in similar situations that statutes which create a private remedy of summary seizure do constitute state action. (Hall v Garson (5th Cir. 1970) 430 F. 2d 450, 438-440 (landlord's lien); Dielen v Levine (D. Neb. 1972) 344 F. Supp. 823, 824 (same); Klim v Jones, supra, 315 F. Supp. 109, 114-115 (innkeeper's lien)). We agree with those pronouncements.

#### MECHANIC'S LIEN

Taking a cue from Sniadach, the courts have embarked upon a series of decisions holding that various prejudgment remedies are constitutionally infirm. (See Adams v Department of Motor Vehicles (1974) 11 Cal. 3d 146 (113 Cal. Rptr. 145, 520 P. 2d 961) (that portion of garageman's lien permitting foreclosure and sale on a customer's car without a prior hearing); Randone v Appellate Department (1971) 5 Cal. 3d 536 (96 Cal. Rptr. 709, 488 P. 2d 13) (garnishment of bank account); Blair v Pitchess (1971) 5 Cal. 3d 258 (96 Cal. Rptr. 42, 486 P. 2d 1242, 45 A.L.R. 3d 1206) (claim and delivery law); McCallop v Carberry (1970) 1 Cal. 3d 903 (83 Cal.

Rptr. 666, 464 P. 2d 122) (attachment of wages); Damazo v MacIntyre (1972) 26 Cal. App. 3d 18, 24 (102 Cal. Rptr. 609) (attachment in unlawful detainer action); People ex rel. Younger v Allstate Leasing Corp. (1972) 24 Cal. App. 3d 973, 975-976 (101 Cal. Rptr. 470) (attachment of money due the state or a political subdivision upon an obligation or penalty imposed by law); Gray v Whitmore (1971) 17 Cal. App. 3d 1 (94 Cal. Rptr. 904) (landlord's lien); Mihans v Municipal Court (1970) 7 Cal. App. 3d 479 (87 Cal. Rptr. 17) (writ of possession in unlawful detainer actions).) Subsequent to Sniadach, in Fuentes v Shevin (1972) 407 U.S. 67 (32 L. Ed. 2d 556, 92 S. Ct. 1983), the Supreme Court held in a four to three decision that prejudgment replevin statutes requiring no prior hearing before the seizure of goods were likewise unconstitutional. (However, in Mitchell v W. T. Grant Co. (1974) \_\_\_\_\_ U.S. \_\_\_\_\_ (40 L. Ed. 2d 406, 94 S. Ct. 1895), the Supreme Court, in a five to four decision, held that the Louisiana sequestration statutes were not unconstitutional. The majority purportedly distinguished Fuentes v Shevin, supra, but the four dissenting justices, as well as one concurring justice, clearly indicated that Fuentes should be considered overruled. Accordingly, although the sequestration statute upheld in Mitchell is distinguishable from the Mechanics' Lien Law in several material respects, it seems apparent that the floodgates have started to close and that Sniadach and its offspring will probably be limited by the Supreme Court of the United States.)

(4) Exceptions to the due process requirement of notice and opportunity for a hearing before a person is deprived of any significant property interest "can only be justified in 'extraordinary circumstances'" (Randone v Appellate Department, supra, 5 Cal. 3d 536, 541) "'...where some valid governmental interest is at stake that justifies postponing the hearing until after the event'" (Fuentes v Shevin, supra, 407 U.S. at p. 82 (32 L. Ed. 2d at p. 571); see also Randone v Appellate Department, supra, 5 Cal. 3d 536, 552-553; (Blair v Pitchess, supra, 5 Cal. 3d 258, 277-279). Thus whether or not a prior hearing is required in a given situation is dependent upon a judicial weighing of the seriousness of the deprivation against the importance of a governmental or public interest served by the summary process. (Boddie v Connecticut (1971) 401 U.S. 371, 377-379 (28 L. Ed. 2d 113, 118-120, 91 S. Ct. 780).) Accordingly, the standard remains a flexible one requiring courts to weigh the competing interests in determining what type of safeguards due process requires.

Varied forms and applications of this "balancing process" are found in virtually every decision following Sniadach. Factors which these cases have indicated should be taken into consideration include whether the creditor has possessory interest in the property allegedly "taken" by virtue of his adding labor or materials "to which he originally had a right of possession in"; whether the invocation of the remedy works a change of possession (Adams v Department of Motor Vehicle, supra, 11 Cal. 3d 146, 154-155); whether the claimant is required to post a bond which theoretically would deter frivolous claims; the importance of the interest taken; whether the taking is necessary to "secure an important governmental or general public interest"; whether there is a need for very prompt action; whether a governmental official or private individual may make the decision to invoke the "taking" (Fuentes v Shevin, supra, 407 U.S. at pp. 83-93 (32 L. Ed. 2d at pp. 571-577); the length of the deprivation (Fuentes v Shevin, supra; Adams v Department of Motor Vehicles, supra); the nature of the creditor's interest in the property, if any; whether the debtor can immediately seek dissolution of the action which constitutes the taking; and whether the alleged debtor could effectively dispose of the property in the absence of the prejudgment remedy. (Mitchell v W. T. Grant Co. (1974) \_\_\_\_\_ U.S. \_\_\_\_\_ - \_\_\_\_\_ (40 L. Ed. 2d 406, \_\_\_\_\_ - \_\_\_\_\_, 94 S. Ct. 1895, 1900-1901).)

Of particular significance to the constitutionality of the Mechanics' Lien Law are such factors as the increase in the value of the property as the result of the mechanic or materialman contributing labor or materials to the improvement thereon, the minimal impingement of the lien upon the owner's possession and continued use of the property, and the public interest in maintaining the balance in the traditionally unstable construction industry.

With respect to the significance of the property interest infringed upon when the lien is imposed, it is readily apparent that the owner is not deprived of the possession of his property in any way; nor is he, as petitioner contends, deprived of the use of his property. (Cf. Blair v Pitchess, supra, 5 Cal. 3d 258, 278.) In Randone v Appellate Department, supra, 5 Cal. 3d 536, 544-545, fn. 4, the court observed: "Because the attachment of real estate does not generally deprive an owner of the use of his property, but merely constitutes a lien on the property, the 'taking' generated by such attachment is frequently less severe than that arising from other attachments. In view of this basic difference in the effect of such attachment, it has been suggested that a statute which dealt solely with the attachment of real estate might possibly involve constitutional considerations of a different magnitude than those discussed hereafter."

"See generally Note, Attachment in California: A New Look at an Old Writ (1970) 22 Stan. L. Rev. 1254, 1277-1279.) The instant statute is not so limited, however, and the great majority of cases arising under it do involve the deprivation of an owner's use of his property; thus we have no occasion in this proceeding to speculate as to the constitutionality of a prejudgment attachment provision which does not significantly impair such use."

Similarly, in Empfield v Superior Court (1973) 33 Cal. App. 3d 105 (108 Cal. Rptr. 375), the court rejected a challenge to the constitutionality of a prejudgment lis pendens, stating: "The notice of lis pendens does not deprive petitioners of 'necessities of life' or any significant property interest. They may still use the property and enjoy the profits from it. (Citation) Concededly, the marketability of the property may be impaired to some degree, but the countervailing interest of the state in an orderly recording and notice system for transactions in real property makes imperative notice to buyers of property of the pending cause of action concerning that property. (Citations.)" (33 Cal. App. 3d 105, 108; italics added.)

This notion has been applied in at least two cases upholding the constitutionality of mechanics' lien laws (It is also noted that at least one federal court has struck down a "mechanic's lien law" (see Mason v Garris (N.D. Ga. 1973) 360 F. Supp. 420). There, however, the challenged statute was in effect a "garagemen's lien," and the court only held that the summary foreclosure of the lien without a prior hearing was constitutionally infirm. Accordingly, that decision did no more than what was done by our Supreme Court in Adams v Department of Motor Vehicles, supra.). In Cook v Carlson (D.S.D. 1973) 364 F. Supp. 24, 27, the court observed: "The mechanics' and materialmen's lien, however, neither deprives the owner of the possession nor of the use of his property. Although the use of the property might be said to be curtailed, in that selling the property, borrowing on the property, or renting the property may be more difficult or less profitable, the owner is not legally prevented from selling, encumbering, renting or otherwise dealing with his property as he chooses. Although the value of the property may be diminished due to the existence of the lien, two factors tend to mitigate that harm: (1) while the value of the property may be diminished by the amount of the lien, the improvements, at least theoretically, have increased the value of the property by the amount of the lien, thereby minimizing harm to the owner; and, (2) the owner can force an expeditious adjudication on the merits, without cost to him, by demanding

that the lien be foreclosed, whereupon the lienholder must commence foreclosure proceedings within (90 days) or forfeit the lien. (Citation.)" (See also Spielman-Fond, Inc. v Hanson's, Inc. (D. Ariz. 1973) \_\_\_\_\_ F. Supp. \_\_\_\_\_) (No. Civ. 72-417 Phx WEC, filed September 12, 1973, subsequently ordered published June 1974.)

With respect to the relative interests in the property, the recent case of Adams v Department of Motor Vehicles, *supra*, 11 Cal. 3d 146, indicates that one who performs labor on and contributes material to property has a "possessory interest" therein until compensation for the labor and materials is forthcoming. In upholding the constitutionality of the interim retention provisions of the garageman's lien, the court observed: "In none of the cases bearing on temporary deprivation of use and enjoyment of property did the creditor have a possessory interest of the same character as a garageman's interest in a car left for him to repair with his own labor and materials. Usually the claim of an attaching or garnisheeing creditor is a general claim unrelated to the specific property seized. And while the claim of a conditional vendor or chattel mortgagee arises out of a transaction involving the seized chattel itself, the interest of such creditor in the seized chattel is ordinarily purely pecuniary; the creditor has not, subsequent to the acquisition of the chattel by the vendee or mortgagee, mixed his own labor with it, nor, more significantly, has he added to it materials to which he originally had a right of possession." (Fn. omitted; italics added; 11 Cal. 3d at pp. 154-155.)

Furthermore, the public interest in maintaining the stability of the construction industry is a factor of some significance. In Cook v Carlson, *supra*, 364 F. Supp. 24, 29, the court observed: "The mechanics' and materialmen's lien originated in the necessity of protecting the construction industry and those in its employ. Labor and materials contractors are in a particularly vulnerable position. Their credit risks are not as diffused as those of other creditors. They extend a bigger block of credit, they have more riding on one transaction, and they have more people vitally dependent upon eventual payment. They have much more to lose in the event of default. There must be some procedure for the interim protection of contractors in this situation. A contractor must have some protection against subsequent bona fide purchasers between the time he completes the work and the time he gets a judgment. Considering their vulnerability, and especially considering their importance to the stability of the American economy, I think there exists sufficient justification for the South Dakota statutory scheme which creates a lien as a matter of law as soon as labor and materials are furnished."

(5) We conclude that since the mechanics' lien provisions impose a minor encumbrance on the property in favor of persons who presumably have added materials or labor to the value of the property, that since it does not interfere with the possession or use of the property by the debtor, protects the mechanics' and materialmen's interest in the property, and is necessitated by the importance of the construction industry to the economy, the provisions of the mechanics' lien statute providing for the imposition of a lien upon the work of improvement and real property upon which it is located prior to a hearing are not unconstitutional. (Petitioners' contention that the Mechanics' Lien Law denies equal protection of the law (Hollenbeck-Bush P. Mill Co. v Amweg (1917) 177 Cal. 159, 165 (170 P. 148) and amici curiae's argument that petitioners waived their constitutional rights to due process of law by contracting "with the law before them" are without merit. (Fuentes v Shevin, *supra*, 407 U.S. 67, 94-96 (32 L. Ed. 2d 556, 578-579).)

#### STOP NOTICE

(6a) The challenge to the constitutionality of the bonded stop notice (§§3156-3172) poses a significantly more serious question than does the mechanic's lien.

Upon receipt of the bonded stop notice the construction lender must set aside the funds for payment to the claimant (\$3162). The stop notice constitutes an "equitable garnishment" on the balance of the loan funds in the amount stated in the notice (Calhoun v Huntington Park First Sav. & Loan Assn. (1960) 186 Cal. App. 2d 451, 459 (9 Cal. Rptr. 479)) and in effect mandates the withholding of the funds in the amount stated from the owner and general contractor to whom the funds belong. (Systems Inv. Corp. v National Auto. & Cas. Ins. Co. (1972) 25 Cal. App. 3d 1057, 1061 (102 Cal. Rptr. 378)).

Furthermore, despite any contractual rights the construction lender may have by his contract with the owner, he cannot apply the garnished funds to the payment of amounts due to the lender himself. Even though the loan is in default and the lender is otherwise entitled to use the funds remaining in the construction loan account to cure the default or reduce the debt, the fund becomes frozen when a bonded stop notice is received and the lender in effect cannot use his own funds to satisfy his own debt. (\$3166; Idaco Lumber Co. v Northwestern S. & L. Assn. (1968) 265 Cal. App. 2d 490, 496-497 (71 Cal. Rptr. 422); Rossman Mill & Lbr. Co. v Fullerton S. & L. Assn. (1963) 221 Cal. App. 2d 705, 709-710 (34 Cal. Rptr. 644).)

The claimant's priority is over all other persons who claim an interest in the funds. A lender cannot apply the funds to complete the construction (H. O. Bragg Roofing, Inc. v First Federal Sav. & Loan Assn. (1964) 226 Cal. App. 2d 24, 27-28 (37 Cal. Rptr. 775)) and, except for actual possession, the rights of the stop notice claimant to the garnished funds are complete.

Thus the procedure clearly calls for a summary prejudgment "taking" by the claimant of the construction loan funds without a hearing though the claimant has no interest in the funds save the possibility that he might eventually recover judgment. (7) This possibility is immaterial, however, for as the Supreme Court observed in Fuentes v Shevin, supra, "'to one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.'" (407 U.S. at p. 87 (32 L. Ed. 2d at p. 574).) It is precisely this fact, that is, the taking before the validity of the claim is determined, that violates due process. (Diamond urges that it had an interest in the construction fund from the beginning in that the fund was established for the purpose of paying the claims of persons furnishing labor and materials for the project and amounts to a trust fund for that purpose. However, the enactment of section 3264 abolished any theory of equitable lien or trust fund. It states: "The rights of all persons furnishing labor, services, equipment, or materials for any work of improvement, with respect to any fund for payment of construction costs, are governed exclusively by Chapters 3 (commencing with Section 3156) and 4 (commencing with Section 3179) of this title, and no person may assert any legal or equitable right with respect to such fund, other than a right created by direct contract between such person and the person holding the fund, except pursuant to the provisions of such chapters.")

(6b) Unlike the mechanic's lien, the claimant does not contribute to or improve or increase the fund by labor or material and interference with the use of the "fund" is total. Moreover, merely because the claimant has posted a bond to protect the debtor against damages from wrongful seizure is not sufficient to justify a summary taking of his property. (Fuentes v Shevin, supra, 407 U.S. at pp. 79-80 (32 L. Ed. 2d at pp. 569-570).)

In Sniadach it was clear that the property right taken by the wage garnishment was the use of the garnished wages (Sniadach v Family Finance Corp., supra, 395

U.S. at p. 342 (23 L. Ed. 2d at p. 354) (Harlan, J., Concurring); see also Randone v Appellate Department, *supra*, 5 Cal. 3d 536, 548, fn. 9; Blair v Pitchess, *supra*, 5 Cal. 3d at pp. 277-278), just as the owner, contractor and construction lender are, upon the filing of the stop notice, totally deprived of the use of construction funds in the amount claimed. In the normal course of events, the owner or contractor will be deprived of the use of these funds without a hearing for a period up to two years.

Sniadach, Randone and other cases additionally refer to the hardship that results when wages and bank accounts are garnished. Similar hardships can be suffered by the owner, contractor and/or lender when the loan funds are garnished. (See Miller, Validity of the Stop Notice as a Summary Remedy (1973) 48 State Bar J. 44, 106-107; Stop Notice! -- Construction Loan Officers' Nightmare (1964) 16 Hastings L.J. 187; Comment, California's Private Stop Notice Law: Due Process Requirements (1974) 25 Hastings L.J. 1043.) The contractor, for instance, depends upon the construction funds for payment of his costs of construction. Deprivation of these funds usually results in an inability to pay necessary expenses and employees and the consequent incurrence of additional costs. Similarly, as a result of the prehearing garnishment of the funds, the owner may be in default under the terms of his loan and may be unable to complete the improvement, causing the loss of his property by foreclosure pending a hearing on the merits of the claim. As to the lender, he relies upon the funds to assure the construction project is completed and the costs of construction are paid, it being a usual and customary provision in the construction loan agreements that upon default by the borrower the lender may use the construction fund to complete the improvement in order that it may have the full and bargained-for security for its loan. This is an important property right in the loan funds of which the lender is deprived upon garnishment.

While the same public policy in favor of mechanics and materialmen referred to in our discussion of the Mechanics' Lien Law is applicable, inasmuch as the less ruthless remedy of mechanics' lien is available to claimants the public interest in the "cumulative" remedy of a stop notice (Idaco Lumber Co. v Northwestern S. & L. Assn., *supra*, 265 Cal. App. 2d 490, 498) is muted.

We have thus arrived at the inescapable conclusion that Diamond's bonded stop notice was invalid because the statutory base upon which it rests offends fundamental principles of procedural due process. (It is noted that there are summary procedures which provide for a quick adjudication of the validity of the creditor's claim when a stop notice is imposed in connection with a "public work." (See §§3197-3205.) While these summary procedures would probably satisfy due process (Mitchell v W. T. Grant Co., *supra*, \_\_\_ U.S. \_\_\_), for reasons not clear their provisions are expressly made inapplicable to stop notices on private work (§3179). (See generally, Comment, California's Private Stop Notice: Due Process Requirements (1974) 25 Hastings L.J. 1043, 1047, 1072-1073.)

Let a writ of prohibition issue prohibiting the Superior Court of Merced County from proceeding further upon the second cause of action of the complaint except to dismiss said cause of action. The order to show cause is otherwise discharged. Gargano, J., and Franson, J., concurred.

PRORATION OF TAXES

Dear Mr. Sengstock,

In reply to your request in the Real Property Law Section Newsletter for information relative to pro-ration of taxes, I wish to advise you of the procedure followed in Iosco County for tax pro-ration.

In Iosco County the custom has been to pro-rate taxes based on a calendar year basis in Townships and in the two (2) cities of East Tawas and Tawas City, on their fiscal year which ends June 30th. Taxes payable in the year 1975 are attributed to 1975. The Seller is charged for that portion of the year he has occupied the premises to the date of sale. The amount to be pro-rated is based upon the previous year's tax statement and is treated as an estimate. An example will illustrate the procedure followed in Iosco County:

County Taxes for the year 1974 based on calendar year  
1 January - December 31: \$300.00

City Taxes for the year 1974 based on fiscal year  
June 30 - July 1: \$200.00

Closing date of transaction: June 1, 1974

5/12th of County Taxes being \$300.00 = \$125.00

11/12th of City Taxes being \$200.00 = \$183.34

Total amount of pro-rated taxes = \$308.34 which is paid  
by Seller to Buyer

This system appears to work quite well and I would certainly recommend it to any Counties that are presently using another system, it seems to be by far the most fair system for proportioning taxes.

Sincerely,

Kenneth J. Myles  
Tawas City, Michigan

STATE OF MICHIGAN

COURT OF APPEALS DIGEST

(MICHIGAN SUPREME COURT CASES INCLUDED)

CHARLES ANDERSON CO v ARGONAUT INSURANCE CO (Aff'd)

July 22, 1975 21042

SURETIES - NOTICE REQUIREMENT - NON-COMPLIANCE - ACTION - PRECLUDED Where a subcontractor who sought to recover on a payment bond executed by defendant surety company failed to serve written notice of the labor to be performed upon the principal contractor within 30 days after the commencement of work on the project, the subcontractor is precluded from maintaining an action upon the payment bond. Summary judgment against the plaintiff subcontractor was proper.

STATUTE: MCLA 129.207(a)

STATUTES - CONSTRUCTION - CONTRACTOR'S BOND - NOTICE REQUIREMENT A prior law which required a subcontractor who intended to rely upon a payment bond to serve written notice upon the governmental body within 60 days of the completion of its services was construed as creating a condition precedent to recovery on the bond even absent a showing that the defendant surety company had been damaged by the subcontractors failure to serve timely notice. The similar notice provisions of the present statute, which plainly states that a claimant "shall not have a right of action upon the payment bond unless" it complies with both the 30 and the 60 day notice requirements, are to be strictly construed. Therefore, "substantial compliance" with the statute is not sufficient.

STATUTE: MCLA 129.207(a)

PLEADINGS - INCOMPLETE - DEFENSE - LACK OF NOTICE - NOT WAIVED Where the plaintiff failed to cite in its complaint either the proper statute upon which it relied or the date on which work was commenced it cannot be said that the defendant surety company waived the notice defense by failing to assert it until 2 years after the filing of the original pleadings.

PANEL: Brennan (dissenting), Gillis, WALSH

KELLER v LOCKE (Aff'd)  
July 22, 1975      20474

APPEAL AND ERROR - FINDING OF FACT - REVIEW - STANDARD As trier of facts, a trial judge has wide discretion in his determination of the facts. This Court will not substitute its judgment on questions of facts unless the facts clearly preponderate in a different direction.

HIGHWAYS - PUBLIC - CREATION - USER In this case, the use of a road by a city in hauling out fill dirt did not constitute the type of control necessary by public authorities to establish a highway by user. Nor did infrequent maintenance and repairs by the county make it a public road. Public use of a roadway must be open, notorious and exclusive; proofs presented by defendants do not meet such requirements.

HIGHWAYS - PUBLIC - CREATION - PERMISSIVE USE The trial court did not err in its determination that defendant's use of the road was permissive and not adverse in holding that defendants had not acquired a prescriptive easement over the road.

PANEL: MCGREGOR, Holbrook, Sr., Kaufman

STACHNIK v WINKEL (Rev'd)  
June 24, 1975      55418

EQUITY - "CLEAN HANDS" - STANDARD The clean hands maxim is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behaviour of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be the abettor of inequity.

APPEAL AND ERROR - EQUITY - "CLEAN HANDS" - SUA SPONTE - REVIEW - DE NOVO Courts may apply to clean hands maxim on their own motion even though it has not been raised by the parties or the courts below. This court reviews equity parties or the courts below. This court reviews equity actions de novo, it is not precluded from considering whether the plaintiffs come before us with clean hands.

EQUITY - "CLEAN HANDS" - FRAUD - DISTINGUISHED Plaintiff's claim that even if misrepresentations were made by him to defendants, the doctrine of clean hands should not be applied because defendants failed to establish that they relied upon those misrepresentations, is meritless. While all the elements of fraud must be present, including reliance upon the misrepresentation, all elements need not be present before this Court may exercise its discretion and invoke the clean hands maxim to bar specific performance.

PROPERTY - SPECIFIC PERFORMANCE - DENIED - MISREPRESENTATION - DISLOYALTY TO EMPLOYER Plaintiffs, in their efforts to acquire property from defendants, intentionally misrepresented themselves as agents of a timber company in order to enhance their chances of success. Additionally, one plaintiff acted disloyally and without good faith towards his employer by entering into negotiations and purchasing the land while being aware of its importance to his employer's operations. Plaintiffs cannot be said to come before this Court with clean hands. Therefore, plaintiff's request that defendant landowner be required to specifically perform an agreement for the sale of property is denied.

PANEL: Entire Bench (Except Swainson, Lindemer)  
WILLIAMS, Fitzgerald (dissenting)

TOWNSHIP OF BEDFORD v BATES (Aff'd)  
July 23, 1975            21944

STATUTES - CONSTITUTIONALITY - PUBLIC SEWER SYSTEMS It is the commonest exercise of the public power of a state or city to provide for a system of sewers and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties. The community is to be considered as a whole in the matter of the health of all inhabitants, for a failure by a few to conform to sanitary measures may inflict ill health and death upon many. Though the action of the governing board may work a hardship on one or more individuals whose facilities may be sanitary, their action cannot be regarded as unconstitutionally arbitrary, or the taking of property without due process of law. It would seem that although properly operated private septic tanks may afford a sanitary disposal system, the publicly maintained sewage system of the whole community is undoubtedly better as doing away with potential as well as actual health dangers. Therefore, defendant's claim that plaintiff's ordinance and the enabling state statute, which force her to connect with the public sewer system without a showing that her septic tank system is inadequate, unconstitutionally deprive her of a property right without just compensation, is meritless.

STATUTE: MCLA 123.281

PANEL: Bashara, GILLIS, Cavanagh

CITY OF DETROIT v WEBER (Aff'd)  
July 21, 1975            20266

CONDEMNATION - SEPARATE TRIAL - DENIED The trial court in a condemnation case did not abuse its discretion in denying defendant's motion for a separate trial where the parties, witnesses and proofs were nearly identical, the defendants did not file their separate trial motion until just prior to the presentation of proofs relative to their parcel of land, and where the applicable statute neither contemplates more than one proceeding for the condemnation of lands of different persons in a locality, nor requires more than one jury to decide the questions involved.

STATUTE: MCLA 213.23

PANEL: T. M. BURNS, Cavanagh, O'Hara

CRAIB v COMMITTEE ON NATIONAL MISSIONS OF THE PRESBYTERY OF DETROIT OF THE UNITED PRESBYTERIAN CHURCH, U.S.A. (Rev'd)

July 22, 1975 20703

CONTRACTS - TERM - DISQUALIFICATION - TRIAL COURT Where the language of a writing unambiguous, it is the duty of the trial court and not the jury to define its terms.

CONTRACTS - BROKER - COMMISSION - AVOIDED - TIME LAPSE Where the terms of broker's contract are not performed because of the lapse of a time condition on a buy and sell agreement and the buyer and seller continue to negotiate for over a year until a sale is consummated, the broker is not entitled to a commission provided that payment was not avoided in bad faith.

CONTRACTS - BROKER - TERMS - DISCLOSURE A memorandum of a broker's contract must sufficiently disclose the terms of the agreement.

STATUTE: MCLA 566.132

PANEL: T. M. Burns, CAVANAGH, O'Hara

JAQUES v SMITH (Aff'd)

July 23, 1975 21972

CONTRACTS - OFFER - SIGNED - NOT AN ACCEPTANCE Where the records and briefs disclose that there is no contract, note or memorandum in writing, signed by the party by whom the sale is to be made, or his agent, the contract alleged is void. It is patently ridiculous to urge that plaintiffs signed offer, witnessed by a real estate agent, constitutes an acceptance.

STATUTE: MCLA 566.108

CONTRACTS - SPECIFIC PERFORMANCE - PART PERFORMANCE - PRELIMINARY ACTS Although specific performance can be compelled in cases of part performance of agreements barred by the statute of frauds, the acts of plaintiff did not constitute part performance because they were preliminary to the formation of a contract to purchase.

STATUTE: MCLA 566.110

CONTRACTS - BREACH - CONSPIRACY - CONTRACT - NONEXISTENT In actions for procuring the breach of a contract, the contract concerned must have been valid. Since the contract herein concerned was not valid, the trial court correctly granted to defendants a summary judgment on the conspiracy claim.

PANEL: T. M. Burns, Quinn, KELLY

KERMANS v PENDLETON (Aff'd)

July 21, 1975 20368

INSURANCE - HOMEOWNER - EXCLUSION - BUSINESS PURSUIT The trial court's finding, that a non-business pursuit exclusion of an insurance policy applies to the case at bar since the defendant was engaged in his business pursuit at the time of the shooting incident and but for this business pursuit the shooting would not have occurred, was correct.

INSURANCE - HOMEOWNER - EXCLUSION - INTENTIONAL ACT Where the insured defendant shot the plaintiff, an insurance policy exclusion for acts done intentionally operates to exclude liability on the defendant-insurer's part. There was no allegation of provocation, negligence or accident; the pointing of a firearm at another human being and discharging same is of itself an intentional act, and one whereby the actual results could be anticipated.

INSURANCE - NOTICE PROVISIONS - PURPOSE The purpose of provision in insurance contracts requiring the insured to give the insurer prompt notice of accident or suit is to allow the insurer to make a timely investigation of the accident in order to evaluate claims and to defend against fraudulent, invalid or excessive claims.

INSURANCE - NOTICE PROVISION - FAILURE TO COMPLY - PREJUDICE The defendant's failure to comply with the notice requirements of the applicable insurance policy materially prejudiced the garnishee-defendant since it had no opportunity to physically examine the plaintiff, to determine if there was a viable affirmative defense, nor to determine whether or not there was an obligation to defend; furthermore, the garnishee-defendant might not have agreed to the consent judgment had it been aware of the action.

PANEL: T. M. BURNS, Cavanagh, O'Hara

COMSTOCK v WHEELLOCK (Aff'd)

August 12, 1975 20120

HIGHWAYS - PUBLIC - PUBLIC USE - ELEMENTS The law gives the public rights in private roadways under the doctrine of "highway by user," The elements of the cause of action are: There must be a defined line used and worked upon by public authorities, traveled by the public for 10 consecutive years without interruption and it must be public, open notorious and exclusive.

STATUTE: MCLA 221.20

HIGHWAYS - PUBLIC - "HIGHWAY" - RECREATION AREA The highway by users statute clearly applies to highways; if the parcel of land in question has never been used as a highway, the plaintiffs in an action for highway by users will have failed to state a cause of action. Where the parcel of land in contention was obviously used for recreational purposes, and not as an access point for an adjoining lake, the highway by users statute is inapplicable and defendants are entitled to a summary judgment.

PARTIES - STANDING - PUBLIC RIGHTS Plaintiffs lack standing to bring suit on behalf of the public; under Michigan law, public rights actions must be brought by public officials vested with such responsibility. Plaintiff's lack of standing cannot be

avoided by claiming private rights (though private prescriptive easements) where plaintiffs stipulated that they are raising only public rights and they assert no greater rights than that of the general public.

PANEL: McGregor, HOLBROOK, SR., Kaufman

MOTT v STANLAKE (Aff'd)  
August 14, 1975      22241

PROPERTY - RESERVATION - EXCEPTION - DISTINGUISHED An ancient rule of conveyancing law states that an attempted reservation for the benefit of a stranger to the conveyance is ineffective. A reservation is defined as a clause by which the grantor creates and reserves to himself some interest in the estate granted. An exception is a clause by which the grantor excepts something out of that which he granted before by the deed; an exception withdraws from operation of deed part of the thing granted which would otherwise pass to grantee. Thus, the distinction is that a reservation is retained by the grantor for himself; it is only the case of an exception that the interests of third parties come into play. Thus, when properly analyzed, the rule regarding reservations for third parties being ineffective is virtually nonexistent, since provision for third parties makes a clause and exception rather than a reservation.

PROPERTY - DEED - EXCEPTION Where a warranty deed to plaintiff's predecessor contained a clause "reserving the East 100 feet of said lot which is reserved and dedicated to the use of the lot owners of this subdivision," no attempt was made to reserve any interest to the grantor. This clause was an exception; the rule rendering ineffective an attempted reservation for the benefit of a stranger is not applicable.

PANEL: T. M. Burns, Quinn, KELLY

FORD MOTOR COMPANY v MICHIGAN STATE TAX COMMISSION (Rev'd & Rem'd)  
August 25, 1975      19600

APPEAL AND ERROR - STATUTES - INTERPRETATION - LEGISLATIVE INTENT In resolving cases involving disputed interpretations of statutory language it is the function of the reviewing court to seek to effectuate the legislative intent.

STATUTES - CONSTRUCTION - CLEAR - UNAMBIGUOUS If a statute is clear and unambiguous on its face there is no room for judicial construction and the statute must be enforced as written.

TAXATION - PROPERTY ASSESSMENT - INVENTORY - METHOD - CHOICE A taxpayer is permitted to elect to have its inventory in a particular assessing district assessed according to the average monthly inventory without regard to the method selected in another assessing district.

STATUTE: MCLA 211.13

TAXATION - PROPERTY ASSESSMENT - INVENTORY - ABUSE - CORRECTION If a taxpayer chooses to juggle his inventories as tax day approaches so as to decrease the overall amount of tax which must be paid, the solution lies in the proper enforcement of the law and not in the reviewing court's adopting of a strained construction of the statute which would deny a legislatively granted right to non-offending taxpayers.

TAXATION - PROPERTY ASSESSMENT - AVERAGE - DETERMINATION Where a taxpayer's property in the assessing district comprises approximately 23% of the value of all property located therein, this will constitute a significant factor in determining the average level of assessment, and the taxpayer's property should be excluded from the computations in arriving at the average level of assessment.

TAXATION - PROPERTY ASSESSMENT - AVERAGE - DETERMINATION - METHOD Where the value of one taxpayer's property is a significant factor in determining the average level of assessment, the proper method for determining the average level of assessment is to divide the assessed value of all taxable personal property in the assessing district, exclusive of the assessed valuation placed on taxpayer's taxable personal property by the Commission, by the true cash value of all taxable personal property in the assessing district, exclusive of the true cash value assigned to the taxpayer's taxable personal property by the Commission.

STATUTE: MCLA 211.13

PANEL: BRENNAN, Gillis, Walsh

SAVESKI v CALIFORNIA SAVINGS & LOAN ASSOC. (Rev'd)  
August 27, 1975      21183

SUMMARY JUDGMENT - MORTGAGE - FORECLOSURE - EVICTION - TENANT - LACK OF NOTICE Plaintiffs were lessees and occupants of an upper flat. Defendant foreclosed the mortgage taken on the building occupied by plaintiffs, whereupon a bailiff gained access to plaintiffs' apartment, evicted plaintiffs' possessions, and padlocked the premises. Defendant was granted a summary judgment on the ground that it did not direct the bailiff's method of serving the writ of restitution nor his method of ousting plaintiffs from possession. This was error; defendant's affidavit in support of summary judgment does not satisfy its burden of showing the absence of a genuine issue as to a material fact. This is so because if in fact defendant knew or should have known of plaintiff's occupancy, it could have been found to have impliedly directed the bailiff's improper actions in evicting plaintiffs without notice.

PANEL: T. M. Burns, Quinn, KELLY

BENNETT v EISEN (Aff'd)  
September 11, 1975      21665

PROPERTY - OPTION TO BUY - GIFT - QUIETING TITLE - EQUITY An option to buy certain real property if the grantor of the option should decide in future to sell, did not prevent the court in an equitable action from quieting title in recipients of said property in gift where there was no indicator that this was done to circumvent the option.

EVIDENCE - PAROL - INADMISSIBILITY - DEED - EASEMENT Where a deed is absolute in its terms, without any indication expressed or implied of a condition or reservation, parol evidence tending to show contemporaneous oral agreement which is contradictory of the deed is inadmissible.

CONTRACT - OPTION - CONSTRUCTION - STRICT - REASONABLE TIME Options should be strictly construed, and absent specific time limits, are only for a reasonable period of time. This option had not been exercised in 20 years.

PANEL: ALLEN, Walsh, O'Hara

SABO v TOWNSHIP OF MONROE (Aff'd)  
August 19, 1975 54953

ZONING - MOBILE HOMES - USE - REASONABLE - PERMITTED Even if present zoning is not unreasonable or confiscatory, a proposed use should be permitted if reasonable under all the circumstances.

ZONING - ORDINANCE - TOWNSHIP - PLAN - REQUIREMENT The Township Rural Zoning Act does require that "provisions of the zoning ordinance shall be based upon a plan." The Township Planning Act provides that the township "planning commission shall make and adopt a basic plan as a guide for the development of unincorporated portions of the township." The "plan" limitation in the zoning enabling act requires that the community zone in a pre-established and comprehensive manner rather than on an ad hoc basis. The "plan" required for zoning purposes is not dependent on the adoption of a master plan and may properly emanate from the zoning ordinance or map itself.

STATUTE: MCLA 125.273; MCLA 135.326

ZONING - ORDINANCE - PLAN NONEXISTENT - ORDINANCE - VALIDITY Zoning enabling acts and zoning ordinances were enacted before legislation authorizing planning commissions and the adoption of master plans. Invalidation of otherwise valid zoning regulations solely because they were enacted in the period between creation of a planning commission and actual adoption of a master plan would result in wholesale invalidation of zoning regulations leaving an absolute void of any land use regulation.

PANEL: Entire Bench (Except Swainson, Lindemer),  
LEVIN, Williams (concurring), Coleman (dissenting)

XEROX CORPORATION v CITY OF DETROIT (Aff'd)  
September 10, 1975 20039; 20056

TAXATION - PROPERTY ASSESSMENT - ADMINISTRATIVE REMEDIES - EXHAUSTED - COURT ACTION - NOT PRECLUDED In a suit to recover allegedly illegal taxes, paid under protest, the taxpayer's action is not foreclosed by virtue of having previously sought a review of said taxes from the State Tax Commission.

STATUTE: MCLA 211.53

TAXATION - PROPERTY ASSESSMENT - VALIDITY - STC DETERMINATION - NOT FINAL In a suit to recover allegedly illegal taxes paid under protest, a motion for summary judgment is properly denied where it is alleged that the method of assessment results in a valuation which bears no reasonable relationship to the true cash value of the property. The basic thrust of plaintiff's allegations are that defendant's methods of valuation were unconstitutional in that they constituted a fundamentally wrong principle of assessment. An STC determination is not final and binding where the validity of the tax or plaintiff's right to recover allegedly illegal taxes are involved.

PANEL: Brennan, McGREGOR, Walsh

ADDENDUM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

ALFRED F. NIGGLE and  
BARBARA E. NIGGLE,

Plaintiffs,

VS

Case No. 75-18537-CH

STATE BANK OF MICHIGAN  
a/k/a COOPERSVILLE  
STATE BANK,

Defendant,

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HONORABLE GEORGE R. COOK, Circuit Judge

O-P-I-N-I-O-N

. . . The other thing I'd like to ask counsel is: Do you still feel Fuentes is good law in view of Mitchell v W. T. Grant Co., 94 Supreme Court 1895?

MR. BAILEY: Your Honor, we do. I think the issue has been addressed to some degree in the Garner decision. In the body of the Garner decision, I believe, W. T. Grant has been handled, if you will, when considered in the Garner decision. I would also indicate to the Court on that score.

THE COURT: Well, let me ask you this, Mr. Bailey. Apparently, the 6th Circuit Court of Appeals feels differently because on P. 610 of Turner v Impala, which is 503 Fed, 2d 607, the Court says, "However, in the recent case of Mitchell v W. T. Grant Co., it would appear that Fuentes has been effectively overruled." And then refer to the concurring opinion of Mr. Justice Powell in that case.

MR. BAILEY: Your Honor.

THE COURT: Go ahead. Then I'm going to have to take these sentences.

MR. BAILEY: On that score I would cite the case of North Georgia Finishing, Inc., v Die. Chem. Inc., a U.S. Supreme Court case decided January 22, 1975, where in the majority of the opinion of the court, the Fuentes Case is still cited.

THE COURT: Well, I'm sure they still cite it. I just question -- Don't you think it's basically, at least if it hasn't been overruled, it's been so watered down that it really doesn't have a whole lot of effect anymore? . . .

Thank you, gentlemen. Let the record indicate this opinion is being dictated from the bench, and the Court will reserve the right to edit it should transcription become necessary for appellate purposes.

This was brought to the Court's attention initially on a petition filed in this Court on September 4th, asking this Court to enjoin a mortgage sale which was

due to take place at 10 o'clock, as I recall it, that morning. We had an emergency meeting or session on the record in chambers, and the Court refused to issue a temporary injunction, but I indicated that the constitutional matter should be decided promptly in view of the fact that the six month redemption period was running. The Court did not feel that the temporary injunction was required because nothing is going to happen to this property until the expiration of redemption period, which I think is six months or September 4th. Thereafter, plaintiff filed an amended complaint on September 22, again asking that a permanent injunction issue on the basis of the statute of the mortgage foreclosure statute was unconstitutional and let me say that the Court may differ from you gentlemen.

I thought that was the issue which was to be decided today, and that's what the plaintiff wanted. And the plaintiff wanted an early hearing. And this, of course, was the first date that we could give him which is not -- If there is an answer filed, the Court does not see it in the file.

The Court is of the opinion that the statute governing foreclosure by advertisement in Michigan is MCLA 6.3201, is not that kind of State action which the Supreme Court indicates brings in a constitutional question. If there was no State action in the State of Pennsylvania given a license to the Moose Lodge, that case is recorded in 92 Supreme Court, 1965, this Court at least, can't see that there's any State action in authorizing a sale by foreclosure by advertisement. It is essentially private contractual agreements between parties as to what is to happen in the case of default.

Now, the problem has really come up recently in Michigan because of two cases, the Northrip Case and the Garner Case, both arising out of the Eastern District. And there the theory of the case was that by providing foreclosure by advertisement action rather than by judicial action, there was an encouragement theory of State action. I don't think this Court is to be bound by two decisions out of the Eastern District when neither our Court of Appeals or our Supreme Court have addressed themselves to that question. Further, I understand at least one of the cases, I understand the Garner Case was settled. The only reason I understand that was that Jack Bronkema was a named defendant, so I got all the papers, although believe me, I did absolutely nothing. But that the Northrip Case has been appealed and presumably an opinion will be forthcoming shortly from the Circuit.

In view of the decisions of our Sixth Circuit in Turner versus Impala and in the action of the Court of Appeals in a memorandum opinion overturning Judge Fox's opinion in Watson v Branch County Bank, which is in 380 Fed, Sub 915, the overruling -- that opinion, incidentally is apparently not a reported opinion, but the Court has a copy of it, and if any of you would like --. It seems to me that there is no -- The Court is going to hold or the law in Michigan is that there is no State action under the mortgage foreclosure by advertisement. And other states have followed that rule. The one case is Federal National v Howlett, 521 South-Western, 2d 428, which is a Missouri case and Bryant v Jefferson, 509 Fed, 2d 511, which I believe is a District of Columbia case. Neither does it seem to me that foreclosure by advertisement deprives anyone of any notice, requirements, or anything under the due process provisions of the 14th Amendment. Foreclosure by advertisement has been the rule in Michigan for I don't know how many decades, and the only real attacks on it have been Garner and Northrip. And banks, lending institutions and savings and loan institutions have for years depended upon the validity of their mortgages and their ability to foreclose them if they are a default.

For those reasons, the prayer of the plaintiffs' complaint and amended complaint will be denied. And Mr. Knapp, you may draw an order dismissing the complaint. Thank you again. And I'd particularly like to thank the Michigan Bankers Association for their amicus brief. Thank you, gentlemen.

MR. BAILEY: Thank you, Your Honor.

MR. BREAY: Thank you, Your Honor.

THE COURT: Plaintiffs' counsel asserts that there is State action because a Deputy Sheriff bids in the property at the mortgage foreclosure sale. If this line of reasoning is valid then birth, marriage and death are likewise State actions because in each instance the County Clerk issues a certificate. This Court rejects that line of reasoning for the reason that then almost everything in life becomes, in effect, State action.

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GEORGE R. COOK, Circuit Judge

Dated: October 7, 1975