MICHIGAN REAL PROPERTY REVIEW

REAL PROPERTY LAW SECTION

STATE BAR OF MICHIGAN

Vol. 4, No. 1 February, 1977

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Benvolio: An I were so apt to quarrel as thou art, any man should buy the fee simple of my life for an hour and a quarter.

Mercutio: The fee simple! O simple!

Shakespeare, Romeo and Juliet IIIi

LAND TITLE STANDARDS UPDATE

by

Andrew Cooke, Vandervoort, Cooke, McFee, Christ, Carpenter & Fisher

The 3rd edition of the Michigan Land Title Standards was introduced last February, through two live and four video taped programs sponsored by ICLE. After the work on this latest edition was completed last fall, there were a number of legislative and case developments which required review of several of the new standards. In September, three revised standards were published in the State Bar Journal:

7.12. This standard resolved the conflict between the notice requirements of the Probate Code, and the Probate Court Rules. Since the Supreme Court has the last word, the Rules supersede and take precedence over the notice requirements of the Code, and this is now stated.

8.3. As stated in the 3rd edition of the Title Standards, 8.3 relates to the recording requirements for disclosed trusts. This standard was republished in the same form as the old Standard 6.4, except for the addition of a "Caveat". Standard 8.3 stated that a conveyance by a trustee purporting to be given pursuant to a power of sale under a disclosed trust should not be approved unless:

(a) The trust instrument was of public record.

(b) The trust instrument established a valid trust.

(c) The trust instrument contained a valid power of sale.

Because of the resistance to requirement (a) above, a caveat was added to 8.3 in the 3rd edition which it was thought would mollify those members of the profession who thought it unnecessary for a title examiner to insist upon the opportunity to read the handiwork of the drafter and to insist upon having the trust instrument recorded so that it would always be available for future examination by others. The caveat to 8.3 acknowledge that "some capable title examiners" believe it safe to rely on a "certificate of existence" by a corporate trustee setting forth the conclusions of fact and law of such trust officer, be he a layman or an attorney. The "Caveat" merely stirred up more controversy.

As a result, a conference was held between members of the Title Standards Committee and members of the Probate and Trust Section, and the matter was thoroughly reviewed. Accordingly, 8.3 was reworded, and a new "Caveat" was added to revised Standard 8.3 which was adopted on June 25, 1976.

22.4. This standard relates to conveyance of tax reverted lands. The standard had to be revised because of Dow v. State, 396 Mich 192, 240 NW 2d 450, decided on April 1, 1976. In an effort to meet the objections of the Dow case, Act 292, PA 1976 was adopted and signed by the governor on October 25, 1976. This may help in the future, but it does not help with sales made by the State after April 1, 1976, that being the date of the decision in the Dow case.

The three revised standards noted above were, as stated, published in the September, 1976 Michigan State Bar Journal. If you purchased the 3rd edition and completed and mailed the registration card which appeared in the front of the book,

you will automatically receive the supplements which are from time to time published. For those of you who did not complete and mail this card, it is suggested you do so.

The first supplement to the 3rd edition will be published some time next spring, and it will include the standards published in the September Journal, and additional standards which have been approved since that time, 4.11, 7.1, and 16.26-1. Work is also being completed on Chapter VII, in the light of the Tax Reform Act of 1976, and other standards, including 9.3.

Standard 9.3 now reads as follows:

STANDARD 9.3

LIFE ESTATE WITH POWER TO CONVEY FEE

STANDARD: A LIFE ESTATE, COUPLED WITH AN ABSOLUTE POWER TO DISPOSE OF THE FEE ESTATE BY INTER VIVOS CONVEYANCE, IS A FEE SIMPLE ESTATE FOR SOME PURPOSES, BUT A GIFT OVER UPON FAILURE TO ALIENATE IS VALID.

One of the most common requests in a country law office is from a widow whose home is her principal asset, and who wishes to "avoid probate," by deeding her home to her children, reserving a life estate unto herself. Such conveyances have limited use. They do not permit the widow to convey the fee during her lifetime, and to retain the proceeds of the sale, without having her children "sign-off," and asking them to let her keep the proceeds of the sale.

Standard 9.3 as it is now written appears in Chapter IX on "Future Interests". Many lawyers would not think of looking in this chapter to solve the widow's problems. The retained life estate and the retained "power" sound like a present interest, and they would not even think of looking in Chapter IX for the answer.

Standard 9.3 as it is now written is tantalizing, but it only hints at the possibilities. A study is now under way to consider breaking 9.3 down into at least two parts, one covering the validity of conveyances or devises by the life tenant, and the other covering the effect of a failure to convey or to exercise the power. There is more interest in learning what powers may be reserved by a grantor in a deed, than there is in learning what power may be granted to a beneficiary in a will.

At the outset, this writer believes that the references to the provisions of the Powers of Appointment Act, MCL 556.114, MSA 26.155 (104) should be deleted from the "Authorities" cited under 9.3. This act was drafted by Professor Olin Browder, of the University of Michigan Law School, at the request of the Law Reform Commission. He recently stated to this writer that the act was never intended to modify or restrict what can be done under the common law.*

Confusion has been created in the minds of some attorneys by the reference to the Powers Act in Standard 9.3. The Definitions paragraph of the act, Paragraph (102), Section 2, Subsection (c), reads as follows:

> (c) "Power of Appointment" means a power created or reserved by a person having property subject to his disposition which

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* See Appendix

> enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property or the shares or the interests in which it shall be received; but it does not include a power of sale, a power of attorney or a power of amendment or revocation.

Paragraph (102) must be read in the light of Paragraph (119):

> (119) As to all matters not within this act or any other applicable statute, the common law is to govern. This section is not intended to restrict in any manner the meaning of any provision of this act or any other applicable statute.

Therefore, it can be seen that the Powers Act does not restrict or change what can be done or what cannot be done under existing common law through a power of sale in a will, a conventional power of attorney, or the customary powers of amendment or revocation contained in conventional trust agreements. Such language means that those things are not affected by the act and that they remain covered either by the existing common law, or by specific statute, or by both. Professor Browder and Professor Allan F. Smith agree with this conclusion.

It is therefore my conclusion that there should be no reference to any statute in 9.3, as a "Comment" or otherwise, unless to explain that the act does not apply and should be disregarded.

An analysis of Michigan case law is in order. I will start with the only case cited under 9.3, Quarton v. Barton, 249 Mich 474, 229 NW 465 (1930). In that case, the language of the will read:

> . . . I devise and bequeath all of my property . . . to my wife, for her lifetime, to do with as she sees fit. At her death my estate is to be divided among the following . . . .

Paraphrasing the unanimous opinion of the Court, written by Justice Sharpe, the language of the will was clear for, were not the words "to do with as she sees fit" inserted following the word "lifetime," it would seem obvious that a life estate was created in the widow with remainder over to the persons named. The question was whether these words should be construed as granting such an unlimited power of disposal in the widow that she takes the fee, notwithstanding the use of the words "for her lifetime." Justice Sharpe concluded:

> During her lifetime the absolute power of disposal is conferred upon her. She may sell or dispose of it as she sees fit to do so and use the proceeds for any purpose necessary for her support and comfort. But in my opinion, she may not give it away or dispose of it by will or by a deed operating as a testamentary disposition. The power of her disposal does not in itself create an estate in her in the property.

In other words, the grant to her was not so unqualified and absolute that she could do anything she wanted to do with it, and therefore she did not have all of the rights going with an absolute fee simple estate.

In the earlier case of Gadd v. Stoner, 113 Mich 689, 71 NW 111 (1897), the Court concluded that the power granted was limited and conditional, that the widow did not have an absolute fee simple estate, that the conveyance by her to her

daughter in consideration of her agreement to support her for life was subject to the limitation of good faith, and that the conveyance subverted the intent of the testator. As a result, the daughter was held to have a lien upon the land for the value of the services rendered, but not a fee simple title.

Farlin v. Sanborn, 161 Mich 615, NW 634 (1910), involved another will and the interpretation of the language thereof. On the facts in that case, the Court held that the widow had the right to use and dispose of the property only for her support and comfort, and that the will did not intend that she could give the property away by inter vivos gift, or by testamentary disposition. The right was not absolute, but conditional, and the testator's heirs had a vested remainer.

In the foregoing cases the courts decided that the language employed did not grant an unconditional and absolute power to the life tenant equivalent to a fee simple estate coupled with an absolute and unqualified power to convey. The following cases indicate fact situations which the Court said did constitute an intention to grant an unqualified and absolute power.

(a) In White v. Grand Rapids & Indiana Railway Co., 190 Mich 1, 155 NW 719 (1916), the testator devised to his wife all of decedent's estate, to be by her used and disposed of during her natural life, as the testator might have done, giving her full power to sell, exchange, invest, or reinvest such estate in the same manner as the testator might do, to distribute the same by gift or otherwise during her said life, and to apportion the same by will, but if any of it should remain undisposed of at the death of the wife, the residue should be equally divided among the testator's children. The Court held that the effect of the will was to vest an absolute fee in the widow, and that she was therefore the proper person to sustain a bill to quiet title.

(b) In Dills v. LaTour, 136 Mich 243, 98 NW 1004 (1904), the testator devised all of his property to his wife, to do and dipose of the same as fully as the testator might do, granting unto her the power to convey such property by warranty deed, provided that if any property should be left at the time of her death it should go to others. The wife died without having disposed of the property, but she left a will which was duly admitted to probate, by which the property in question was devised to others. The Court held that she took the fee simple, and that she was given an absolute and unconditional gift and power of disposition, and that the devise in the will was valid and completely effective. The Court held that it would follow Jones v. Jones, 25 Mich 401, and said:

> No service of value to the profession will be performed by a review of the cases cited. It seems to us sufficient to say that, applying the test just mentioned, the language of this will conveys . . . an estate coupled with an unlimited power of disposition . . . .

It can be seen that all Michigan cases recognize that if proper language is used, a life estate may be granted, and the life tenant may receive an absolute and unqualified power to convey, by inter vivos conveyance, or by the provisions of a last will and testament.

The foregoing cases deal with testamentary devises, not reservations by grantors in conveyances, but there does not appear to be any reason why the same life estate and the same power of disposition could not effectively be created by reservations by the grantor in a deed. It is too early to predict whether the Committee will feel the same way and adopt a standard or problems in standards to stating.

The Land Title Standards Committee welcomes suggestions for new standards, and amendments to old standards, especially regarding the above comments on 9.3.

APPENDIX

[Mr. Cooke's article was written in December, 1976. On January 5, 1977, Professor Olin L. Browder of The University of Michigan Law School wrote to Mr. Cooke concerning Standard 9.3, which is still under consideration by the Title Standards Committee. The following comments are from Professor Browder's letter.]

...those who deal with powers of appointment have always been troubled about the kind of powers you are concerned with, that is powers given to a life tenant to sell and consume or dispose of the fee. Is the latter power properly a power of appointment? Apart from statute, the courts generally have never treated the two kinds of powers as the same. This is especially true with that limited kind of power which (1) is given to a life tenant to sell and consume for the life tenant's support. If a broader power is given whereby (2) the life tenant may dispose of the fee without limits, including the power to make gifts and devises, it may be more difficult to distinguish such a power from a power of appointment. It is clear that the Internal Revenue Service, for marital deduction purposes, treats the second of these powers as a general power of appointment.

To say that the purpose of the Michigan Powers statute of 1967 was not to deal with these powers of disposition does not mean that a Michigan court will not treat these powers as powers of appointment under the statute. I think it is very unlikely that the first example stated above would be treated as covered by the statute. It could be said that it is within the exemption of "powers of sale." Assuming that a Michigan court might treat example (2) above as a general power of appointment covered by the Act, the result would be that the power would be valid, but the life tenant would have only a life estate plus a power, and any disposition of the property not disposed of by the life tenant would be valid. However, creditors and a surviving spouse of the donee of such a power would have access to the property as provided in the statute. What would be the result under the Michigan cases if the statute were not found applicable?

I have never undertaken to read all of the Michigan cases on powers of disposition. I have read those enclosed with your letter. These cases reveal a confusion of two principles that leaves the Michigan law in considerable doubt. The first principle provides that if a person is given a fee simple, any attempt to grant to other persons whatever part of the property remains undisposed of at the death of the life tenant is void. This rule, which has been declared also in some other states, is hard to justify. It is said that the gift over on death is repugnant to the grant of the fee. But it is no more repugnant than many other accepted sorts of limitations which may follow a defeasible fee, such as a gift over on death without issue. The acceptance of such a rule has caused most courts to struggle to construe the gift as creating only a life estate plus a power, so that any remainder limited thereon is valid. But the Michigan court was not able to extricate itself so easily, because of the second principle.

The second of the two principles referred to seems to be that if a property is given to a person without clearly indicating whether it is for life or in fee, plus an unqualified power of disposition, the donee takes a fee simple. There is some indication from the Michigan cases that the same result follows where the grant is expressly to one for life. That is, where an absolute power of disposition is

given to a life tenant he takes a fee simple. There is no more justification for this principle than for the one previously mentioned. Where one is given a life estate plus a general power of appointment by deed or will, it has never been the law that the life tenant takes a fee, although creditors of the donee of a general power of appointment at common law do have certain rights against the property as though it were owned by the donee in fee. It may be that this second principle derives from that early Michigan statute which appeared as Section 556.11 of the Compiled Laws of 1948. That section of course really did not say that, and as you pointed out, the Michigan court in its early cases did not rely upon that statute.

Although most of the Michigan cases, as stated, leave this matter in considerable confusion, the court in Quarton v. Barton did make an effort to clarify these issues. There is language in the opinion which seems to say that where a grantor clearly limits the property granted to a life estate, no addition of any power of disposition will enlarge the life estate into a fee. The court, however, goes on to say that the life tenant in that case could sell and use the proceeds for any purpose necessary for her support and comfort, but that she could not give it away or dispose of it by will. Is the court saying that the testator's wife took only a life estate because that was the estate expressly given to her, or that she took only a life estate because the power also given her was limited and not absolute? Doubt is also left on the question whether a power which in terms seems unlimited, like the power in Quarton, will nevertheless be construed by the court as not unlimited, that is, as a power to dispose for the purpose of providing for the support of the life tenant.

At least it seems clear from Quarton that the usual limited disposition to one for life with a power to dispose for support is a valid disposition, that the life tenant has only a life estate plus a power, and that a remainder limited over in what remains at the death of the life tenant is valid. I am not certain how the court would treat the case where a life estate is expressed plus a completely unlimited power which expressly includes the power to make gifts or devises.

Where does all this leave the effort to provide useful title standards? It seems to me that the real question is not whether any of these powers of disposition, whether limited or unlimited, is valid. The question rather is whether or when a limitation over upon the death of the life tenant is valid. If an unlimited power enlarges the life estate into a fee, the limitation over is invalid. Of course, where a power is limited there is always the question whether a life tenant has exercised the power within the proper limits.

With some diffidence I might suggest a standard which goes something like this:

> Where property is devised or granted or reserved to a life tenant coupled with a power to sell or encumber the fee and consume the proceeds for the support of the life tenant, a disposition of such part of the property or the proceeds of any sale thereof as may remain undisposed of after the death of the life tenant is valid.

I wish that I felt confident of saying the same thing about the case where the power is unlimited, but the Michigan cases leave me in some doubt upon that point. I am also in doubt, under Quarton, about whether or when a Michigan court will construe a power as being really absolute and unlimited. Since the new Powers statute did repeal the old statute (Section 556.11), it could be argued that thereafter the old rule by which an absolute power of disposition enlarges a life estate into a fee is no longer law. But I am not prepared to declare it before the court does.

THE LEGISLATIVE SCENE

Committee on Legislation
Joseph H. Hollender, Chairman

The following 1976 bills have been signed into law by the Governor and are effective immediately:

1) P.A. 385: Establishes a 5-year limit on recovery of possession or seeking a refund by a holder of a tax deed or certificate of purchase.

2) P.A. 386: Exempts from taxation value of deciduous and evergreen trees, etc., growing on agricultural land devoted to agriculture purposes. Also exempts from tax the value of land over the surface of which is located a public rights of way.

3) P.A. 431: Amends Subdivision Control Act by authorizing a municipality to order an assessor's plat if a parcel or tract has been improved by four (4) or more residences prior to January 1, 1968, and when division of the parcel or tract would result in lot sizes or configurations smaller than required by the act or local ordinance.

4) P.A. 438: Provides for the establishment of commercial development districts in which certain facilities may qualify for exemption from the payment of ad valorem real and personal property taxes.

5) P.A. 444: Provides a six (6) year limitation period for actions founded upon judgments entered in district courts prior to May 25, 1973. Judgments in district court after that date, except judgments in the small claims division, are judgments of a court of record. Actions on judgments entered in the small claims division are limited to three (3) years.

6) P.A. 375: Repeals section 1625 of 1961 P.A. 236, as amended (MCLA 600.1625) and amends in its entirety section 1621 thereof by establishing new venue requirements for certain types of actions.

7) P.A. 376: Creates authority to establish a "durable power of attorney" which exists until adjudication of incompetency, appointment of a guardian, revocation by the donor or death.

8) P.A. 365: Amends the act creating the State Tax Tribunal (see December issue of the Review for a more extensive description of this act).

9) P.A. 378: Adds language to section 4 of 1974 P.A. 116 which makes lien of State or local governing body under a development rights agreement or an easement subordinate to mortgage liens if such mortgages are recorded prior to the State's or local governing body's lien.

10) P.A. 361: Deletes language which formerly permitted an exemption from notice requirements when property tax assessments were increased.

Enrolled S.B. 1680 sought to transfer actions seeking review of certain taxes to the State Tax Tribunal. It also sought to abolish the Corporation Tax Appeal Board and State Board of Tax Appeals. However, it was recalled by the Senate in view of Attorney General Opinion No. 5138 (regarding repeal of statutes without republishing statutes repealed).

Two bills of interest died in the last session but are expected to be re-introduced in the near future: S.B. 1705 requiring a 40-day notice by the landlord to the tenant before raising the rent is expected to be re-introduced in the next several months. S.B. 1707 "The Construction Lien Act" is also expected to be re-introduced in February or March.

Newly Introduced Legislation

H.B. 4003: A bill to revise and consolidate the probate code. (Introduced January 12, 1977, by Rep. Bennett and referred to the Committee on Judiciary).

H.B. 4013: Would lower eligibility age to 62 years to qualify for a property tax credit. (Introduced January 13, 1977, by Reps. Scott, et al., and referred to the Committee on Taxation).

H.B. 4012: Bill to amend Sections 510 and 530 of Act No. 281, Income Tax Act of 1967. The bill would establish a two year limitation period for claiming a property tax credit.

H.B. 4016: Another bill to revise and consolidate the probate code -- (Introduced January 13, 1977, by Reps. McCollough, et al., and referred to the Committee on Judiciary).

H.B. 4019: A bill to amend the Insurance Code of 1956; requires payment or repair by insurer within certain time limits and under certain conditions. (Introduced January 13, 1977, by Reps. DiNello, et al., and referred to the Committee on Insurance).

H.B. 4021: Proposes amendments to the General Property Tax Act exempting certain facilities in commercial development districts from taxation. (Introduced January 13, 1977, by Reps. Montgomery and Ryan; referred to the Committee on Taxation).

H.B. 4030: A bill to provide for annexation and incorporation of townships (Introduced January 25, 1977, by Reps. Thomas H. Brown and Holcomb; referred to the Committee on Towns and Counties).

H.B. 4037: A bill to revise numerical requirement for reversing a decision of the zoning board of appeals. (Introduced January 25, 1977, by Rep. Welborn; referred to the Committee on Towns and Counties).

S.B. 3: Repeals 1939 P.A. 147 and permits creation of a new metropolitan authority. (Introduced January 12, 1977, by Sen. Hertel and referred to Committee on Municipalities and Elections).

S.B. 9: Prohibits certain corporations from engaging in an agricultural enterprise (Introduced January 13, 1977, by Sen. Hertel and referred to Committee on Agriculture and Consumer Affairs).

S.B. 12: Companion bill to H.B. 4016 re-writing Probate Code (Introduced by Sen. McCullough, et al., and referred to Committee on Judiciary).

S.B. 33: Exempts from true cash value costs of repairs for restoration or replacement of business property (Introduced January 25, 1977, by Sen. DeMaso, et al., and referred to Committee on Taxation).

S.B. 52: Repeals single business tax (Introduced February 1, 1977, by Sen. Davis, et al., and referred to Committee on Taxation).

S.B. 64: Revises requirements for payment and collection of real and personal property taxes by county treasurer (Introduced February 2, 1977, by Sen. Corbin and referred to Committee on Taxation).

State Agency Rules

1) Construction Code Commission: General Rules effective November 11, 1976.

2) Air Pollution Control Commission: Proposed amendments to General Rules -- proposed October 19, 1976.

3) Corporation Securities Bureau: Rules regulating sale of commodities effective February 16, 1977.

4) Corporation Securities Bureau: Proposed amendments to General Rules -- proposed November, 1976.

Federal Legislation

None to report.

Federal Agency Rules

1) 24 CFR 221,235 (11/19/76 - page 51011): Increases maximum section 235 program mortgage amount from $25,200 to $29,000, and from $28,800 to $33,000 in high cost areas.

2) 7CFR 1924.51 (11/15/76 - page 50272): Establishes program of management assistance to borrowers and individual applicants under the Farmers Home Administration program. Proposed Rules - Comment period expired December 15, 1976.

3) 17CFR 230 (12/9/76 - page 53808): Proposes to rescind SEC Rule 146 and solicits comments on operation of Rule 146. Comment period expires February 28, 1977.

Attorney General Opinions

None to report.

In addition to the foregoing the following Public Acts are set forth in full as a service to the members of the Section.

Act No. 262
Public Acts of 1976
Approved by Governor
October 1, 1976

AN ACT to amend chapter 4 of Act No. 288 of the Public Acts of 1939, entitled as amended "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the probate courts of this state; the powers and duties of such courts, and the judges and other officers thereof; the statutes of descent and distribution of property, and the statutes governing the probating of estates of decedents, disappeared persons and wards, change of name of adults, the adoption

of children and the jurisdiction of the juvenile division of the probate courts; to prescribe the manner and time within which claims against estates and other actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in actions and proceedings in said courts; appeals from said courts; and to provide remedies and penalties for the violation of this act," as amended, being sections 704.1 to 704.60 of the Compiled Laws of 1970, by adding section 27a; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

Section 1. Chapter 4 of Act No. 288 of the Public Acts of 1939, as amended, being sections 704.1 to 704.60 of the Compiled Laws of 1970, is amended by adding section 27a to read as follows:

Chapter 4

Sec. 27a. (1) Except as otherwise provided by law, an individual is qualified to serve as a fiduciary under a testamentary trust or appointment of a court of record of this state if the individual is a citizen of the United States, at least 18 years of age, of sound mind, and either of the following:

(a) A resident of this state.

(b) A nonresident of this state who, before qualification or within 30 days after ceasing to be a resident, files an instrument with the court designating a resident agent approved by the court to accept service of process in all actions or proceedings with respect to the estate or his conduct as a fiduciary.

(2) Except as otherwise provided by law, a corporation which is authorized by law to act as a fiduciary in this state is qualified to serve as a fiduciary under a testamentary trust or appointment of a court of record of this state.

Section 2. Section 27 of chapter 4 of Act No. 288 of the Public Acts of 1939, being section 704.27 of the Compiled Laws of 1970, is repealed.

This act is ordered to take immediate effect.

Act No. 293
Public Acts of 1976
Approved by Governor
October 26, 1976

AN ACT to amend section 27 of Act No. 206 of the Public Acts of 1893, entitled as amended "An act to provide for the assessment of property and the levy and collection of taxes thereon, and for the collection of taxes levied; making such taxes a lien on the lands taxed, establishing and continuing the lien, providing for the sale and conveyance of lands delinquent for taxes, and for the inspection and disposition of lands bid off to the state and not redeemed or purchased; to provide for the establishment of a delinquent tax revolving fund and the borrowing of money by counties and the issuance of notes; to define and limit the jurisdiction of the courts in proceedings in connection therewith; to limit the time within which actions may be brought; to prescribe certain limitations with respect to rates of taxation; to provide penalties for the violation of this act; and to repeal certain acts and parts of acts in anywise contravening any of the provisions of this act," as amended by Act No. 109 of the Public Acts of 1973, being section 211.27 of the Compiled Laws of 1970.

The People of the State of Michigan enact:

Section 1. Section 27 of Act No. 206 of the Public Acts of 1893, as amended by Act No. 109 of the Public Acts of 1973 being section 211.27 of the Compiled Laws of 1970, is amended to read as follows:

Sec. 27. "Cash value," means the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtaintd for the property at private sale, and not at forced or auction sale. Any sale or other disposition by the state or any agency or political subdivision of lands acquired for delinquent taxes or any appraisal made in connection therewith shall not be considered as controlling evidence of true cash value for assessment purposes. In determining the value the assessor shall also consider the advantages and disadvantages of location, quality of soil, zoning, existing use, present economic income of structures, including farm structures and present economic income of land when the land is being farmed or otherwise put to income producing use, quantity and value of standing timber, water power and privileges, mines, minerals, quarries, or other valuable deposits known to be available therein and their value.

The assessor, beginning December 31, 1976, shall not consider expenditures for normal repairs and maintenance in determining the true cash value of property for assessment purposes. In no event shall the amount excluded exceed $4,000.00 each year for not to exceed 3 consecutive years. The following repairs shall be considered normal maintenance if they are not part of a structural addition:

(a) Outside painting.

(b) Repairing or replacing siding, roof, porches and steps, or sidewalks and drives.

(c) Repainting, repairing or replacing existing masonry.

(d) Replacement of awnings.

(e) Add or replace gutters and downspouts.

(f) Replace storm windows or doors.

(g) Insulation or weatherstripping.

(h) Complete rewiring.

(i) Replacing plumbing and light fixtures.

(j) New furnace replacing one of the same type or replacing oil or gas burner.

(k) Plaster repairs, inside painting, or other redecorating.

(l) New ceiling, wall, or floor surfacing.

(m) Removing partitions to enlarge rooms.

(n) Replace automatic hot water heater.

(o) Replacing dated interior woodwork.

Beginning December 31, 1977, a city or township assessor, a county equalization department or the state tax commission before utilizing real estate sales data on real property purchases, including purchases by land contract, for the purpose of determining assessments or in making sales ratio studies for the purpose of assessing or equalizing assessments shall exclude from the sales data the following amounts to the extent that the amounts are included in the real property purchase price and are so identified in the real estate sales data or certified to the assessor as provided in subdivision (d):

(a) Amounts paid for obtaining financing of the purchase price of the property or the last conveyance of the property.

(b) Amounts attributable to personal property which were included in the purchase price of the property in the last conveyance of the property.

(c) Amounts paid for surveying the property pursuant to the last conveyance of the property. The legislature may require local units of government, including school districts, to submit reports of revenue lost under subdivisions (a) and (b) and this subdivision so that the state may reimburse those units for that lost revenue.

(d) On or after December 31, 1977, the purchaser of real property, including a purchaser by land contract, shall file with the assessor of the city or township in which the property is located 2 certified copies of the purchase agreement or of an affidavit showing the sales data pertaining to the real property transaction. The purchase agreement or affidavit shall show the purchase price of the property and shall identify the amount, if any, included in the purchase price for each item listed in subdivisions (a) to (c) of this paragraph. One copy shall be forwarded by the assessor to the county equalization department.

Except as hereinafter provided, property shall be assessed at 50% of its true cash value in accordance with article 9, section 3 of the state constitution of 1963.

Assessment of property, as required in this act, shall be inapplicable to the assessment of property subject to the levy of ad valorem taxes within voted tax limitation increases to pay principal and interest on limited tax bonds issued by any governmental unit, including a county, township, community college district, or school district prior to January 1, 1964, if the assessment required to be made under this act would be less than the assessment as state equalized prevailing on the property at the time of the issuance of the bonds. This inapplicability shall continue until levy of taxes to pay principal and interest on the bonds shall no longer be required. The assessment of property required by this act shall be applicable for all other purposes.

Section 2. This amendatory act shall be known as the Mathieu-Gast home improvement act of 1976.

Act No. 300
Public Acts of 1976
Approved by Governor
October 27, 1976

AN ACT to amend section 2918 of Act No. 236 of the Public Acts of 1961, entitled as amended "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such

courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil and criminal actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act," being section 600.2918 of the Compiled Laws of 1970.

The People of the State of Michigan enact:

Section 1. Section 2918 of Act No. 236 of the Public Acts of 1961, being section 600.2918 of the Compiled Laws of 1970, is amended to read as follows:

Sec. 2918. (1) Any person who is ejected or put out of any lands or tenements in a forcible and unlawful manner, or being out is afterwards held and kept out, by force, if he prevails, is entitled to recover 3 times the amount of his actual damages or $200.00, whichever is greater, in addition to recovering possession.

(2) Any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner, lessor, licensor, or their agents ahall be entitled to recover the amount of his actual damages or $200.00, whichever is greater, for each occurrence and, where possession has been lost, to recover possession. Unlawful interference with a possessory interest shall include:

(a) The use of force or threat of force.

(b) The removal, retention, or destruction of personal property of the possessor.

(c) A change, alteration, or addition to the locks or other security devices on the property without forthwith providing keys or other unlocking devices to the person in possession.

(d) The boarding of the premises which prevents or deters entry.

(e) The removal of doors, windows, or locks.

(f) Causing, by action or omission, the termination or interruption of a service procured by the tenant or which the landlord is under an existing duty to furnish, which service is so essential that its termination or interruption would constitute constructive eviction, including heat, running water, hot water, electric, or gas service.

(g) Introduction of noise, odor or other nuisance.

(3) The provisions of subsection (2) shall not apply where the owner, lessor, licensor, or their agents can establish that he:

(a) Acted pursuant to court order or

(b) Interfered temporarily with possession only as necessary to make needed repairs or inspection and only as provided by law or

(c) Believed in good faith the tenant had abandoned the premises, and after diligent inquiry had reason to believe the tenant does not intend to return, and current rent is not paid.

(4) A person who has lost possession or whose possessory interest has been unlawfully interfered with may, if that person does not peacefully regain possession, bring an action for possession pursuant to section 5714(1)(d) of this act or bring a claim for injunctive relief in the appropriate circuit court. A claim for damages pursuant to this section may be joined with the claims for possession and for injunctive relief or may be brought in a separate action.

(5) The provisions of this section may not be waived.

(6) An action to regain possession of the premises under this section shall be commenced within 90 days from the time the cause of action arises or becomes known to the plaintiff. An action for damages under this section shall be commenced within 1 year from the time the cause of action arises or becomes known to the plaintiff.

Section 2. This amendatory act shall not take effect until March 1, 1977.

This act is ordered to take immediate effect.

CASE BRIEFS

Committee on Significant Legal Decisions
Maurice A. Merritt, Chairman

North Cherokee Village Membership v Joseph and Nancy Murphy v Gary and Margaret Peters, MCA Docket No. 23165

Deed restrictions prohibit house trailers in subdivision. Defendants situated "double-wide" mobile home on their land in subdivision. Certificate of title denominated it as "trailer coach, double-wide." These two sections were placed on a concrete block foundation and bolted together, and have dimensions of 44 feet by 24 feet, has three bedrooms, two baths, dining room, living room and kitchen, and is equipped with gas, electric, water and sewer connections.

Lower court issued injunction commanding defendant-appellants to remove or raze the structure.

Court of Appeals, under date of October 18, 1976, held - Reversed and remanded for rescission of Injunction. "Once appellants' planned landscaping of the property and erection of a carport are completed, their modular unit should closely resemble a conventionally built home."

Boles, et al v Michigan State Highway Commission, MCA Docket No. 26273 - October 20, 1976.

Plaintiffs, owners of residential lots in Lakepointe Village Subdivision #1, Plymouth Township, brought a class action to enjoin defendant from constructing a highway over ten residential lots in said subdivision because proposed use of the purchased lots violated valid deed restrictions, a claimed property right limiting use to single family dwellings. Defendant contended that plaintiffs have an adequate remedy at law for damages for their property rights in the Court of Claims, and a disproportionate injury to defendant because of severe economic consequences to the people of Michigan.

Held - Defendants should have employed eminent domain first to acquire plaintiffs' property rights (residential deed restrictions). An injunction is an appropriate method of securing plaintiffs' constitutional property rights. Affirmed - Wayne County Circuit Court.

Michigan Conference v Comm. of Natural Resources, 70 MA 85 (July 19, 1976)

Plaintiff owns land which completely surrounds a 103.7 acre lake which has no inlet, but has one outlet, a creek which flows northward to the AuSable River. The land on both sides of this creek to the M-72 bridge is also owned by plaintiff. Plaintiff's use of the lake and a childrens' camp was being interfered with by fishermen. Plaintiff constructed a foot bridge across the creek in order to complete a hiking trail around the lake. This prevented fishermen from canoeing up the creek to the lake. County Prosecutor informed plaintiff that said bridge was in violation of MCLA 281.735-6 (MSA 11.455-6) and 1963 Constitution, Article 7, Section 12, and that he would institute legal action unless it was removed.

Trial court granted declaratory judgment, declaring said lake a non-navigable body of water privately owned by plaintiff, and that portion of the creek between the lake and the M-72 highway bridge also non-navigable and private. Trial court also granted a permanent injunction barring all persons, including general public, from trespassing on lake and on that portion of the creek to the M-72 bridge.

Held - Affirmed. The navigability of a lake is not necessarily determined by the navigability of its outlet creek. The exclusive ownership by plaintiff of the land on both sides of the creek determined the non-navigability of this portion of the creek.

Capaldi Contracting v City of Fraser, 70 MA 227

Appeal from Macomb - R. R. Cashen, J.
Before: M. J. Kelly, P.J., and Bronson and W. R. Peterson, J.J.
Opinion: M. J. Kelly, P.J.

Plaintiffs own land presently used as an airport, for which they paid $10,000 per acre. This land is suitable for residential development, but at time of purchase residential zoned land was selling for from $2,500 to $6,000 per acre. Defendant included said "airport" land in its special assessment (sewer and water improvements) district, and urged upon the court that plaintiffs' land could benefit by the improvements if the land is measured by its available potential, not its immediate use.

Trial court ordered the airport land stricken from the special assessment tax rolls.

Held - Affirmed. "Were we to hold that the assessment would stand or fall on its relationship to increase of value for residential purposes, we would put in the hands of assessing authorities a weapon particularly adaptable for abuse."

Nichols, et ux and Kempf, et ux v Ann Arbor Federal Savings & Loan Association (two suits, consolidated) Docket Nos. 25528 and 25529, Decided January 5, 1977.

Appeal from Livingston - Paul R. Mahinske, J.
Before: M. F. Cavanagh, P.J. and R. M. Maher and W. R. Beasley, J.J.
Opinion: R. M. Maher, J.

Plaintiffs Nichols owned property on which defendant Ann Arbor Federal held a mortgage. The mortgage contained a due-on-sale clause that accelerated the entire mortgage debt if there was a change in ownership in the property. The Nichols sold the property to plaintiffs Kempf, and defendant accelerated the mortgage debt. When defendant commenced foreclosure, both plaintiffs brought actions to enjoin the foreclosure. The trial court held the due-on-sale clause was unenforceable as an unreasonable restraint on alienation and the injunction issued. Defendant appeals.

Issues: 1. Does a due-on-sale clause constitute a restraint on alienation? 2. If a due-on-sale clause is viewed as a restraint, will it automatically be upheld as a reasonable restraint?

Held - 1. A due-on-sale clause will be treated as a restraint on alienation. 2. Only when it is shown that a transfer increases the possibility of waste or impairment of security will a due-on-sale clause be enforced. Enforcement in every instance would constitute an unreasonable restraint on alienation. Affirmed.

SECTION NEWS

The lead articles in the February and August issues of the Review highlight the work of the Title Standards Committee. Our thanks to Chairman Andrew Cooke for his excellent article on recent title standards developments and to Professor Olin L. Browder for permission to reprint his letter to Mr. Cooke.

The April issue will include lead articles prepared by the Committee on Real Estate Titles, Taxes and Encumbrances, under Chairman John R. Baker, and the Committee on Mortgages and Mortgage Foreclosures, under Chairman Gary A. Tabock.

* * *

The following report is from Section Chairman Ralph Jossman:

As we start a new year, it seems appropriate to state briefly some of the things which we have programmed for the months ahead.

The Section publication, now renamed the Michigan Real Estate Review, will appear regularly at two month intervals.

The Committee on Seminars, Workshops and Meetings is working closely with the Institute for Continuing Legal Education in sponsoring a number of institutes. The Section will also sponsor a summer meeting at Bay Valley. Plans are being made for a program to be given in connection with the annual State Bar meeting in September.

This year brings us a new legislature at Lansing and new administration in Washington. The Committee on Legislation is arranging to keep the Section Council abreast of newly introduced legislation. It is also proposed to furnish information as to progress of bills in the legislature and of their enactment.

Section Committees are studying various matters, among them the mechanic's lien and mortgage foreclosure statutes. It is hoped to effect some improvement in Michigan real estate statutes.

Procedures for reporting judicial decisions to our members have been improved.

A special committee is being set up to study the advisability of standardizing forms used in Michigan Conveyancing. Section members who would be interested in serving on this committee should communicate with the undersigned at 729 Neff Road, Grosse Pointe, Michigan 48230.

We want to be of service to our members. If you have problems or suggestions, the Section Council will be glad to consider them.

Best wishes for a happy and prosperous 1977.

Ralph Jossman, Section Chairman

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* * *

The following announcements are directed to members of the Committee on Mortgages and Mortgage Foreclosures, Real Property Law Section:

John R. Mann, who was recently appointed a District Judge, has resigned as Chairman of the Section Committee on Mortgages and Mortgage Foreclosure. He is being replaced by Gary A. Taback, who had been serving as Vice-Chairman. Mr. Taback's address is 1100 Fisher Building, Detroit, Michigan 48202.

Hudson Mead, whose address is 2650 Guardian Building, Detroit, Michigan 48226, is the new Vice-Chairman.

Judge Mann is continuing as a member of the Committee. His new address is 44th District Court, 211 Williams Street, Royal Oak, Michigan 48068.

* * *

Each issue of the Review will include a report from Mr. Richard E. Rabbideau, Chairman of the Committee on Seminars, Workshops and Meetings. Dick's report for February follows:

The Committee on Seminars, Workshops and Meetings, in cooperation with the Institute of Continuing Legal Education, has designed a one-day course on the subject of "Commercial Leasing," to be held at the Michigan Inn in Southfield on Friday, March 4, 1977, and at the Hospitality Motor Inn in Grand Rapids on Tuesday, March 29. The course will be conducted by a faculty made up of members of the Real Property Law Section.

In late May and early June, a course will be presented on the subject of "Creditors' Rights in Real Estate Transactions." The course will be presented on Thursday, May 26 at the Michigan Inn in Southfield; Friday, June 3, 1977 at the Park Place Motor Inn in Traverse City; and Friday, June 24, 1977 at the Pantlind Hotel in Grand Rapids. At the date of this report, the course has been designed and the faculty is being selected. Features of the course which will be of particular interest to members of the Section will be an intensive examination of current bankruptcy law and practice in Michigan, the rights of commercial landlords, rent assignments, and current developments in the foreclosure of mortgages and mechanics' liens.

The Committee is in the process of preparing a program for the Annual Meeting of the Section to be held at the Bay Valley Inn July 14 through 17, 1977. The program will consist of an "Update" of law and practice designed particularly for real estate practitioners, and is expected to involve presentations on current developments in legislation and case law.

Dates and locations have also been selected for the third course to be jointly sponsored by the Section and ICLE in 1977. This course will deal with the subject of the rights of residential landlords and tenants, and will be presented on July 28, 1977 at the Detroit Plaza (Renaissance Center), on August 11, 1977 at the Pantlind Hotel in Grand Rapids, and on Wednesday, August 24, 1977 at the Michigan Inn in Southfield.

The Committee is also at work on the design of a program for the Annual Meeting of the State Bar of Michigan in September, 1977, and the fourth Section - ICLE sponsored course of the year, planned for fall or early winter. At present, the fourth course is expected to deal with the subject of developments in zoning and land use regulation.

Except for the course on Commercial Leasing, all dates and locations are tentative at this time. Watch for ICLE news collections for confirmation.

Suggestions for topics and speakers are most welcome.

* * *

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