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"Lawyers know life practically. A
bookish man should always have them
to converse with. They have what he wants."

Dr. Samuel Johnson

MICHIGAN LAND TITLE STANDARDS: 1978 SUPPLEMENT

by

Ralph Jossman

This year will see the publication of the first supplement to the third edition of the Michigan Land Title Standards. It had been proposed to issue this material in 1977, but the large number of Standards - 31 in all - that are being revised or added made it impracticable to do so. A few of the new standards were published in the State Bar Journal, some of which have had subsequent revision. This article will discuss the content of the new and revised standards that are being published, and set forth some of the considerations that have led to these changes. It is not, however, being offered as a substitute for the supplement itself. Lawyers who have the third edition of the standards are urged to obtain the supplement promptly, in order to keep their set up to date.

That portion of Chapter IV of the Standards which deals with the barring of dower has been expanded through reference to MCLA 702.74a, MSA 27.3178 (144a), which authorizes waiver of dower by written agreement or contract, executed either before or after marriage. Such agreements may relate not only to the real estate owned by the husband at the time of their execution, but to his after acquired property as well.

The right of a wife to release her dower rights to her husband was recognized as early as 1877 in Randall v Randall, 37 Mich 563. Her authority to do so was said, in Rhoades v Davis, 51 Mich 306, 16 NW 659 (1883), to be conferred by the statute permitting her to make contracts relating to her separate estate (MCLA 557.1, MSA 26.161). But our Supreme Court proved itself jealous of dower rights, requiring releases thereof to the husband to be supported by adequate consideration. It was observed by Justice Campbell in Jenne v Marble, 37 Mich 319, 322 (1877), that "Where a husband gets the advantage, it requires no great evidence to establish the invalidity of his bargain." Some of the cases requiring consideration for agreements to bar dower are Wright v Wright, 79 Mich 527, 44 NW 944 (1890); Bechtel v Barton, 147 Mich 318, 110 NW 935 (1907); In re Estate of Pulling, 93 Mich 274, 52 NW 1116 (1892).

MCLA 702.74a, MSA 27.3178 (144a), which took effect March 20, 1970, does not require consideration for an agreement to waive dower, but does require that there be fair disclosure of the husband's assets. It is, of course, true that some consideration for the waiver will usually be given, but the adequacy thereof will not be a basic problem for the title examiner. Reference to this statute has been added to Standard 4.11, dealing with the barring of dower by conveyance to the husband's successor in interest.

Standard 4.11-1, a newly added standard, deals expressly with the barring of dower by written contract, agreement, or waiver between spouses, pursuant to MCLA 702.74a, MSA 27.3178 (144a). It recognizes the effectiveness of such agreements. One of the answers discusses the situation where the waiver may have been procured without the required fair disclosure by the husband. In such instance, it is stated, dower rights could be asserted against a party taking title with notice of the fraud, but not against a purchaser for value who has relied upon the waiver.

Standard 6.10, entitled "Deed of Entireties Property by One Spouse to Another," has been elaborated. Conveyances of separate property between spouses were long since recognized in Burdeno v Amperse, 14 Mich 91 (1866), which found authority for conveyances from either spouse in the married woman's property statute, MCLA 557.1, MSA 26.161. Later, interspousal conveyance of entireties property was expressly authorized by 1927 PA 210, being MCLA 557.101, 557.102, MSA 26.201, 26.202, which states that it is declarative of the common law of the state as it stood before its adoption.

In an earlier decision, the Supreme Court had reached the same result. In Wilkinson v Kneeland, 125 Mich 261, 84 NW 42 (1900), the Court held that a wife could convey her entireties interest directly to her husband. Elson v Elson, 245 Mich 205, 222 NW 176 (1928) is to the same effect. It might be mentioned that although Elson v Elson was not submitted until October, 1928, more than one year after 1927 PA 210 took effect, the Supreme Court made no reference to that statute in reaching its decision. Instead, it relied on Wilkinson v Kneeland, supra, as being controlling.

Standard 6.10, ever since its original adoption more than 20 years ago, has recognized the effectiveness of a deed of entireties property between the spouses. The Title Standards Committee has felt, however, that a simple conveyance from wife to husband would not, of itself, operate to bar the inchoate dower right arising when he became the fee owner. Additional language being added to one of the answers to Standard 6.10 now makes it clear that in connection with interspousal deeds of entireties property, dower rights may be waived by a statement in the deed to such effect.

In Chapter VII, dealing with "Conveyances by Estate Fiduciaries and Titles Derived from Estate of Decedents," additional authorities have been added to Standard 7.1 and 7.2, relating to titles derived through intestate and testate decedents. References to the state taxes required to be paid before an estate can be closed now include the Michigan income tax, MCLA 206.451, MSA 7.557 (1451), and the single business tax, MCLA 208.98, MSA 7.558 (98).

In Standard 7.6, dealing with the powers of surviving or successor estate fiduciaries, reference has been made to MCLA 704.27a, MSA 27.3178 (278a), enacted by 1976 PA 262. The problems for this standard, as previously published, had treated non-residents, nominated as estate fiduciaries under a will, as being incapable of serving, because of the provisions of MCLA 704.27, MSA 27.3178 (278). The newly enacted section permits a non-resident person, otherwise competent to do so, to serve as an estate fiduciary under appointment by a Michigan court, if prior to qualification or within 30 days after ceasing to be a Michigan resident, such person files an instrument with the court designating a resident agent, approved by the court, to accept service of process in all actions or proceedings relating to the estate or his conduct as a fiduciary. A newly added comment sets forth that after the effective date of the 1976 statute, the non-residents referred to in the problems could have qualified as estate fiduciaries, and that MCLA 704.27, MSA 27.3178 (278) has been repealed.

It should be noted that while MSA 704.27a, MSA 27.3178 (278a) does authorize a non-resident to act as an estate fiduciary under appointment of a Michigan court, it does not confer any power upon a foreign fiduciary to deal with Michigan real estate in that capacity. Such a fiduciary is still without authority to sell Michigan land (see Standard 7.11) or to deal with mortgages covering it (see Standard 16.8).

Standard 7.12, entitled "Notices of Probate Hearing," has been adopted in order to assist counsel in resolving a conflict between certain language contained in the Probate Code and the provisions of Probate Court Rule 106. The Code provides that, in connection with petitions for the determination of heirs, notice of hearing shall be given by three publications. The cited Court Rule requires only one. The Title Standards Committee is of the opinion that, since the Michigan Supreme Court has constitutional authority to establish rules of judicial procedure (Mich. Constitution, 1963, Article VI, Sec. 5), it may promulgate rules which supersede statutory provisions to the contrary. As submitted, this standard applies to all matters in connection with an estate, including petitions for administration, claims hearings and accounts, on which notice is given in accordance with the Probate Court Rules, despite conflicting statutory provisions. Marketability of title derived through an estate is not adversely affected thereby.

Standard 8.3 is entitled "Deed by Trustee pursuant to a Power of Sale under a Disclosed Trust." The Standard itself states, inter alia, that a conveyance by a trustee under a disclosed trust does not vest marketable title of record in the grantee unless the declaring or creating instrument is of public record.

There is considerable opposition to the recording of trust agreements. This may arise from the desire of settlors to have their estate planning kept private, from reluctance to pay a substantial recording fee, or both. In some parts of the state, the practice has grown up of accepting recorded certificates of the settlor or the trustee as to the validity of the trust and the authority of the trustee to act. This practice has been called to the attention of the Title Standards Committee in the past. In the third edition of the Title Standards, a caveat was added to Standard 8.3, noting that it was being followed in some areas, and stating that the Committee neither approved nor disapproved of such practice.

The Standard and the caveat were not satisfactory to users of such certificates. The Probate and Trust Law Section requested that their use be approved, and its representatives met with the Committee for a discussion of the matter. The Committee is, however, still unwilling to specifically endorse the use of such certificates, and has enlarged the caveat to set forth the basis of its objections.

The Committee is aware that conveyance of marketable title under a deed from a trustee is not necessarily dependent upon recordation of the trust instrument. The Standard deals with marketable title of record. But, as set forth in the expanded caveat, the Committee "knows of no sure way whereby marketability of title may be determined other than by an examination of the complete trust agreement. Unless it is recorded, there can be no assurance of its continuing availability for that purpose."

There are some additional points which might be made. A trust which is not a valid one cannot be made so by a statement of either settlor or trustee that it is. A trust may have been terminated, in whole or part, by its own terms, so that the authority of the trustee to act has been limited or extinguished. Further, the mere statement by a trustee of its power to execute a conveyance is self-serving, and does not stand on any higher evidentiary basis than an effort to establish agency by the declarations of the alleged agent to such effect. Also, it could be argued that technically such affidavits or certificates do not fall within the purview of the affidavit statute, MCLA 565.451a, MSA 26.731a, or any other recording statute; but this objection could probably be met by attaching the affidavit or certificate to the trustee's deed as an exhibit.

The Title Standards Committee recognizes that there may be substantial reasons for wishing to withhold a trust agreement from record. It is not, however, willing to recede from the position which it has taken in the past. It has suggested to the Probate and Trust Law Section that if it is desired to authorize the use of certificates as to trustees' authority this should be done through appropriate legislation.

In the Chapter relating to mortgages, Section 16.26-1 has been added. This new standard deals with the effect of failure to record a deed on foreclosure by advertisement within 20 days after the sale. It sets out that the validity of the sale is not affected, but in such case the redemption period runs from the date of recording instead of the date of sale.

Standard 22.4, which, as first revised, was printed in the September, 1976 issue of the State Bar Journal, has undergone further change since the enactment of 1976 PA 292, effective October 25, 1976. The first revision was brought about by the decision in Dow v Michigan, 396 Mich 192, 240 NW2d 450 (1976), setting aside a sale of real estate for unpaid taxes amounting to less than \$50.00.

The premises involved in the Dow case were located in Grand Rapids (according to Dow v Michigan, 46 Mich App 101, 103, 207 NW2d 441 (1973)). They had been sold on land contract prior to the commencement of the tax sale proceedings. Notice of the sale was given by publication, pursuant to MCLA 211.63, 211.66, MSA 7.108, 7.111. While Kent County, where Grand Rapids is situated, has more than 400,000 inhabitants, publication was had in a village weekly whose circulation was 2,000. Sparta, where the paper was published, is ten miles from Grand Rapids, which was the residence of the vendor, and somewhat farther from Wyoming, Michigan, where the vendees lived.

Notwithstanding the provisions of MCLA 211.61a, MSA 7.106 as to mailing out notices of the tax sale, none were sent either to the vendor or to the vendees, who being husband and wife held their interest in entirety tenancy. Zeigen v Rossen, 200 Mich 328, 166 NW 886 (1918). A notice of the period within which right of redemption from the sale might be exercised, sent pursuant to MCLA 211.73c, MSA 7.119(2), was received by the vendee wife, but she did not disclose this to either her husband or the vendor.

After title to the property had been conveyed to the State, in accordance with MCLA 211.67, MSA 7.112, but before the State could sell the land, vendor and vendees joined in an action to have their title quieted. They claimed to have been deprived of their property in violation of the due process clause (US Const, Art XIV; Mich Const 1963, Art I, Sec 17). The Michigan Supreme Court held that the proceedings to enforce the tax lien were state action within the meaning of such clause, and that the notice of the sale given the plaintiffs was clearly inadequate. The Court thought that, so far as the publication was concerned, it constituted no notice whatever under the circumstances of the case. Also, no notices had been mailed to the vendor or the vendee husband. This operated to deprive the plaintiffs of any opportunity for a hearing before the vesting of title in the State. Title was ordered quieted in the vendor, subject to the interest of the vendees.

In reaching this result, the Court declined to apply the provisions of MCLA 211.431, MSA 7.661, which says that no action may be commenced to set aside a tax deed to the State after six months from the time when such deed was made. It was stated in a footnote (page 197) that the State could not use this statute to insulate itself if the procedure for the tax sale did not meet constitutional requirements.

Standard 22.4, as published in the third edition of the Title Standards, had provided that deeds of lands which had reverted to the State for unpaid taxes, executed by the department of natural resources (or the department of conservation) in connection with a sale, pursuant to MCLA 211.131, MSA 7.188, should be accepted as a basis of marketable title, subject to the limitations imposed by MCLA 211.67b, MSA 7.112(2), or contained in the deed. After the Dow case was decided, the Title Standards Committee revised this Standard, limiting its applicability to such deeds as were issued by the departments prior to April 1, 1976, the date of the decision. The change was prompted by apprehension that subsequent purchasers from the State might not be considered bona fide ones, as against former owners claiming to have been deprived of their lands without due process.

In an effort to meet some of the objections to the tax sale procedure involved in Dow v Michigan, the state legislature enacted 1976 PA 292, which revises the procedure for giving delinquent taxpayers notice that they are in danger of losing their property. This act also added MCLA 211.131e, MSA 7.190(3), which extends the redemption period for tax sales of 1975 and prior years. This section reads, in part, as follows:

"The redemption period on those lands deeded to the state pursuant to section 67a [MCLA 211.67a, MSA 7.112] on or after May 4, 1976 which have a state equalized valuation of \$1,000.00 or more shall be extended until owners of a significant property interest in the lands have been notified of a hearing before the department of treasury. Proof of notice to those persons and notice of the hearing shall be recorded with the register of deeds in the county in which the property is located." The section also provides for a hearing to show cause why the tax sale and the deed to the state should be cancelled. An additional period of 30 days after the hearing is provided for effecting redemption through payment of taxes pursuant to MSA 211.131c, MSA 7.190 (1), plus a penalty of 50% on the tax that was foreclosed. Redemption under this section revives all interests and liens, in the same manner as the deeds evidencing redemption dealt with in Standard 22.2.

It would seem that if the state makes a bona fide effort to give notice to interested parties of the sale and the right to a hearing, and there is neither cause shown for setting the sale aside, or redemption effected within the time prescribed by MSA 211.313c, MSA 7.190 (3), the state should be able to give good title to a purchaser. The Committee has not yet taken a categorical position on this point.

Also, the Title Standards Committee has revised Chapter XX of the Standards, dealing with Federal tax liens. This revision of the tax lien standards was discussed in some detail in an article by the writer appearing in the August, 1977 issue of the Michigan Real Property Review, so that extended treatment of it here seems unnecessary. It may be stated, however, that many standards and problems have been rewritten in the light of Adams v United States 420 Fed Supp 27 (SD NY, 1976), holding that a Federal tax lien became effective against third parties when filed for record in the proper office, without the necessity of further action by way of indexing on the part of the recording officer, and of 26 USCA 6323(f) (4), added by the Tax Reform Act of 1976, which reads as follows:

"The notice of lien referred to in subsection (a) shall not be treated as meeting the filing requirements under paragraph 1 unless the fact of filing is entered and recorded in a public index in the District office of the Internal Revenue Service for the district in which the property subject to the lien is situated."

Two new title Standards are being added to deal with certain tax liens created by the Tax Reform Act of 1976. One of these relates to the special lien for estate tax whose payment has been deferred under 26 USCA 6166 or 6166A. The other deals with the scope and relative priority of the special lien for additional estate tax attributable to the value of real property used in the operation of a farm or other closely held business.

Standards 20.7 and 20.9 have been deleted, although some of the material from the latter one has been retained in a comment to another Standard. The Standards in this chapter have been renumbered and rearranged. In addition, various small changes have been made in an effort to effect improvements in clarity and diction.

Standard 16.16, relating to foreclosure of mortgages by advertisement when there is a junior federal tax lien, has been revised to reflect the requirement that the notice of lien be both filed for record and indexed in the public tax lien index. In addition, some stylistic changes have been made in this standard and in Standard 16.15, dealing with foreclosures of this type in which the first publication took place prior to November 3, 1966.

The Title Standards Committee will be issuing further Standards in the future, as new legislation or judicial decisions make it advisable to do so. The Committee is also considering the adoption of Standards dealing with some new topics, among them descriptions. Members of the State Bar who wish to offer criticisms of existing standards or suggestions for new ones are urged to communicate with the Committee's chairman, Andrew Cooke, whose address is 701 Michigan National Bank Building, Battle Creek, Michigan 49014.

THE LEGISLATIVE SCENE

Committee on Legislation
Joseph H. Hollander, Chairman

Since the last issue of The Review, the Legislature took its traditional one-month Holiday recess. However, during the week before adjournment, seven bills of interest to the Section were introduced; and in the two weeks since the Legislature has reconvened, an additional eleven bills have been tossed in the hopper. Summaries of these bills are set forth below.

Several bills which may be of particular interest to section members have shown some movement since they were last mentioned here. Senate Bill 1020, which seeks to amend the consumer protection act by permitting the recision requirements established by the act to be furnished in a separate document, completed third reading and passed the Senate on January 31. House Bill 5681, which proposes certain amendments to the state landlord/tenant law (348 PA 1972) completed third reading and passed the House on December 13.

Finally, you may recall that House Bill 5313 sought to amend section 27 of the general property tax act by imposing a penalty on purchasers who failed to file copies of the purchase agreement or an affidavit of certain sales data with the local assessor. This bill passed the House and as of December 13 had reached third reading in the Senate. However, on January 25, the bill was referred back to the Senate Finance Committee. A related bill, House Bill 5417, seeks to amend the same section of the general property tax act by extending the starting date for the filing of such information to December 31, 1978. Several conferences were held on these bills. In addition, the Section's Council, at its January meeting, voted to oppose the mandatory filing requirement and had its views communicated to the Chairman of the Senate Finance Committee. As the dust settles, it appears that the final outcome will be as follows. House Bill 5417 will become the primary bill and will change the filing requirements from mandatory to permissive. The starting date will be extended to December 31, 1978. House Bill 5313 will stay in the Finance Committee for the remainder of the session unless additional amendments to the section are determined necessary in which event House Bill 5313 will again become the primary bill. In the meanwhile, the Senate amendments to House Bill 5417 have been concurred in by the House and the bill is expected to go to the Governor this week.

Action on Previously Reported Bills

- H. B. 4080: Presented to Governor on December 7. Approved by Governor - PA 268 - December 14.
- H. B. 4126: Laid over under the rules on December 1. Senate amendments 1-12, 14-19 & 21-63 concurred in, 13 & 20 non-concurred in on December 7. Referred to conference committee on December 8.
- H. B. 4173: Third reading with substitute on January 24. Passed on January 25. Committee on Finance on January 31.
- H. B. 4300: Second reading with substitute on December 7. Third reading with substitute on January 19. Passed on January 23. Committee on Corporations & Economic Development on January 24.

- H. B. 4323: Third reading with amendments on January 24. Passed on February 1. Laid over under the rules on February 2.
- H. B. 4786: Passed on December 6. Committee on Finance on December 7.
- H. B. 4845: Third reading with amendment on December 7. Passed on December 8. Committee on Judiciary on December 12.
- H. B. 4846: Third reading with substitute as amended on December 12. Defeated, motion given to reconsider on December 13. Vote reconsidered, amended, defeated on December 14. Motion given to reconsider on January 18. Passed on February 1.
- H. B. 4993: Second reading on December 13. Third reading on January 24. Passed on January 25. Committee on Judiciary on January 31.
- H. B. 5007: Second reading with amendments on January 17. Third reading with amendments on January 24.
- H. B. 5206: Committee on Judiciary on February 1.
- H. B. 5313: General orders with amendments on December 8. Third reading with amendments on December 13. Amended, amendment offered on January 24. Committee on Finance on January 25.
- H. B. 5417: Committee on Appropriations on December 5. Immediate passage, third reading, amendments offered on December 15. Amended on January 24. Amended and Passed on January 25. Laid over under the rules on January 31. Senate amendments concurred in as amended on February 1.
- H. B. 5463: Second reading on February 1.
- H. B. 5471: Passed on January 17. Ordered enrolled on January 17. Presented to Governor on January 30.
- H. B. 5681: Committee on Consumers on December 7. Third reading, Passed on December 13.
- S. B. 586: Third reading with amendments on December 12. Passed on December 13. Committee on Taxation on December 13.
- S. B. 1020: General orders with substitute on December 29. Third reading with substitute as amended on January 25. Passed on January 31. Committee on Consumers on January 31.

Newly Introduced Legislation

- H. B. 5789: The bill would amend the general property tax act by providing that beginning December 31, 1977, assessors not be permitted to consider expenditures made to comply with barrier-free design requirements in determining true cash value. (Introduced December 8, 1977, by Reps. Bennane, et al, and referred to the Committee on Taxation.)

- H. B. 5795: The bill would create a state fair credit reporting act. (Introduced December 8, 1977, by Rep. Vaughn and referred to the Committee on Consumers.)
- H. B. 5800: The bill would amend the general property tax act by providing that the owner of a homestead who is 65 years of age or older be exempt from the payment of taxes assessed for school purposes and by providing for the filing of a claim of exemption with the local assessor. (Introduced December 8, 1977, by Reps. Conlin, et al, and referred to the Committee on Taxation.)
- H. B. 5861: The bill would amend the farmland and open space preservation act by providing for the automatic discharge of the state's lien for repayment of tax credits after ten years has elapsed from the date of signing of the farmland development rights agreement. (Introduced January 18, 1978, by Rep. Burkhalter, and referred to the Committee on Taxation.)
- H. B. 5869: The bill would amend the general property tax act by prohibiting the assessor from increasing or decreasing an assessment "because the condition and maintenance of improvements to a property are above or below the average condition and maintenance of comparable properties." (Introduced January 19, 1978, by Rep. Geraldts, and referred to the Committee on Taxation.)
- H. B. 5876: The bill would provide statutory warranties on the sale of a new dwelling and establish a cause of action for the breach of such warranties. (Introduced January 19, 1978, by Reps. T. Brown and Mahalik, and referred to the Committee on Urban Affairs.)
- H. B. 5900: The bill seeks to amend the general property tax act by requiring that before including increased tax revenues in its budget the local taxing unit must advertise proposed increases in the tax rate and adopt a resolution or ordinance authorizing such increase. (Introduced January 19, 1978, by Reps. Mathieu, et al, and referred to the Committee on Taxation.)
- H. B. 5958: The bill seeks to amend sections 600.2528 and 600.2529 of the Michigan Compiled Laws by providing for appeals from the probate court to the circuit court. (Introduced February 1, 1978, by Rep. Cushingberry and referred to the Committee on Judiciary.)
- H. B. 5959: The bill would amend 1973 PA 186 by permitting one member of the tax tribunal to hear a case and three members of the tribunal to decide such cases. (Introduced February 1, 1978, by Reps. Trim, et al, and referred to the Committee on Taxation.)
- S. B. 1292: The bill would amend section 2027 of the state insurance code and add a new section 2027(a) which would prohibit discrimination in insuring residential dwellings and requiring reasonable underwriting criteria in connection therewith. (Introduced January 11, 1978, by Sens. Faxon, et al, and referred to the Committee on Commerce.)
- S. B. 1293: The bill would create a Michigan Residential Property Insurance Association and provide for the winding up of the Michigan Basic Property Insurance Association with respect to residential property insurance. (Introduced January 11, 1978, by Sens. Faxon, et al, and referred to the Committee on Commerce.)

- S. B. 1320: The bill would transfer the mobile home commission from the department of commerce to the department of licensing and regulation. (Introduced January 12, 1978, by Sens. Hertel and McCollough, and referred to the Committee on State Affairs.)
- S. B. 1321: The bill would transfer jurisdiction over the regulation of condominiums from the department of commerce to the department of licensing and regulation. (Introduced January 12, 1978, by Sens. Hertel and McCollough, and referred to the Committee on State Affairs.)
- S. B. 1349: The bill would amend 1967 PA 281 by revising the property tax credit for senior citizens. (Introduced January 23, 1978, by Sen. Huffman, and referred to the Committee on Finance.)

Federal Legislation, Federal Rulemaking, and Attorney General Opinions

None to report.

C A S E B R I E F S

Case Editor: Nicholas C. Batch
Assistant Professor, Law Area
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MORTGAGES

A mortgage given in 1957 contained neither an acceleration clause nor a provision for interest. Monthly payments stopped sometime in 1959 or 1960. In 1976, a mortgagor sued for discharge and the mortgagee's heirs sued to foreclose for defaulted payments. The mortgagor sought summary judgment in both actions claiming the mortgagee had signed a release of indebtedness in 1960, and pleading the 15 year statute of limitations as a bar to the foreclosure remedy. The mortgagee's heirs asserted the purported release was a forgery and did not release the mortgage debt. The mortgage was listed as an asset of the mortgagee's estate upon her death in 1968. Macomb Circuit Court granted the mortgagor summary judgment in both cases. This was error said the Michigan Court of Appeals. The questioned authenticity of the release raised a material issue of fact precluding judgment on the pleadings. Also, the statute of limitations only bars foreclosure for defaulted payments due prior to 15 years before suit was commenced. For debts falling due thereafter foreclosure remains available. Reversal and remand ordered. Degan v Estate of Alma Degan, No. 77-487 (MCA, Jan. 5, 1978).

Another mortgagor appealed a foreclosure judgment claiming Roscommon Circuit Court allowed the mortgagee bank to offset inadequate credit against the mortgage debt in releasing a portion of the mortgaged premises to a jointly liable mortgagor. This Michigan Court of Appeals agreed. It held the proper credit is the market value of the released parcel on the date of the release. After a review of the evidence, the trial court's appraisal was revised upward. Dusseau v Roscommon State Bank, No. 31561 (MCA, Jan. 5, 1978).

PREMISES LIABILITY

A recently published federal decision construed Michigan law relating to the duties of owners of dominant and servient tenements to third parties injured by conditions upon the easement. A fatal automobile accident at a highway railroad overpass was alleged to be caused by various unsafe conditions of the structure. The realty was owned by the railroad company subject to a highway easement. The important factor was control. Since the railroad lacked physical control over the highway portions of the structure, the court held the railroad was not liable to the estate of the motorist. On these facts, the owner of the easement has a duty to maintain the easement in a condition safe for third persons, not the owner of the servient estate. Kesserling v Chesapeake & Ohio Ry, 437 F Supp 267 (ED Mich 1977).

Two year old Nora Wallington was scalded by hot water from a bathtub tap in a single family residence rented by her parents. By her father as next friend, she sued the landlords. Her pleadings alleged a thermostat by-pass in the hot water heater was a latent danger of which the landlords were aware or should have been

aware, that her parents received no warning from the landlords and had no other notice of the danger, and that the danger and the landlord's failure to warn caused her injury. The trial court allowed defendant landlords summary judgment for failure of the complaint to state a cause of action. It found lacking any allegations of facts showing the landlords reserved any control of the premises. In the absence of a statutory duty or retention of control by the landlord, there is no duty to inspect or repair. On appeal, the Michigan Court of Appeals determined summary judgment was improper. It reversed and remanded, citing Prosser regarding exceptions to the rule applied by the trial court. There is a duty to disclose concealed dangerous conditions which are actually known to the landlord, or which a reasonable person would conclude from known facts. Wallington v Carry, No. 77-549 (MCA, Dec. 6, 1977).

EASEMENTS

A community antenna television system is a "public utility" within the meaning of the Subdivision Control Act of 1967 (MCLA 560.101 et seq; MSA 26.430 (101) et seq.), and is entitled to contract with other utilities to share poles within platted public utility easement reservations. White v Detroit Edison Co, No. 30308 (MCA, Dec. 22, 1977). [In a consolidated case, cable TV systems were held to be public utilities within the meaning of Const 1963, art 7, §25, requiring approval of irrevocable franchises by a three-fifths majority vote of electors within the granting city or village.]

ENVIRONMENTAL LAW

A petition to establish an existing natural watercourse as an intercounty drain under Chapter 21 of the Drain Code may be considered filed under Section 513 (MCLA 280.513; MSA 11.1513) rather than Section 541 (MCLA 280.541; MSA 11.1541) when control and regulation of the entire watercourse is not contemplated. Thus petitioners need not furnish a commitment or security to pay planning and engineering costs under Section 542 (MCLA 280.542; MSA 11.1542). Washtenaw County v Saline River Intercounty Drainage Board, No. 77-38 (MCA, Jan. 5, 1978).

A citizens' environmental interest group, bringing suit under the Michigan Environmental Protection Act (MCLA 691.1201 et seq; MSA 14.528 (201) et seq.), sought invalidation of Department of Natural Resources contracts with two firms involving private use of public trust lands. In rejecting the group's challenges, the Michigan Court of Appeals ruled: 1) an applicant for a DNR permit to use public trust lands has the burden of proving entitlement under statutory requirements; 2) no public hearing is required prior to granting such permits; 3) the appropriate standard for DNR to consider in such cases is whether the public trust will be impaired or substantially affected; 4) the consideration to be paid the state for such permits should be the fair, cash market value without reference to economic consequences to the applicant if the permit is denied. After ruling in favor of the defendants on all substantive issues, the Court of Appeals reversed the trial court's ruling that the MEPA does not allow awarding attorney fees. The statute was construed to authorize such awards "if the interests of justice require." The case was remanded to determine whether costs should be apportioned by this standard. Superior Public Rights, Inc v Department of Natural Resources, No. 28293 (MCA, Dec. 5, 1977).

CHAIRMAN'S REPORT

Maurice S. Binkow

A most Happy New Year to all Section members. I am pleased to report that the Section is healthy, expanding and solvent. Our Section membership for 1977-1978 consists of about 1,570 paid members as against about 1,330 at the end of last year, an increase of 18%.

As you are aware from the Review, we have been presenting a most interesting seminar schedule in conjunction with ICLE and will continue to do so. In March, we are presenting in Florida a program on all aspects of title and title insurance with Mr. John P. Turner, former General Counsel of Chicago Title Insurance Company. Subsequent programs will include construction contracts, zoning, governmental restraints including environmental restraints, land contracts and mortgage foreclosures, and our third annual summer conference at the Bay Valley Inn consisting of basic and advanced workshops in various aspects of real estate law. Under Dick Rabbideau's extremely competent leadership, our Seminar Committee has planned valuable Section programs consisting of specialized afternoon workshops in narrower but important areas of real estate practice (e.g., usury, tax appeals), and we intend to produce these programs in different Michigan cities.

Our Title Standards Committee has completed work and submitted for publication revised title standards as well as a whole new chapter on tax liens. These will be ready for the seminar on titles and title insurance and will be featured in a half-day portion of the program. They will be offered to members of the Bar who purchased the original title standards and returned the requisition card. Please do so at this time if you have not already returned your card. I am certain you will find the new title standards and particularly the chapter on federal and state tax liens to be valuable and informative.

Substantive committees of the Section are keeping abreast of latest developments in their areas of the law. The Mortgage and Mortgage Foreclosure Committee, under Gary Taback, is monitoring the proposed amendments to UCC Article IX concerning fixturation. Our zoning and governmental restraints committee, under new Chairman Stephen Bromberg, is monitoring proposed zoning legislation. The Council itself, in conjunction with Joe Hollander, Chairman of the Legislation Committee, is monitoring all legislation relating to real estate and is making recommendations and taking positions thereon. The Specialization Committee, under Chairman Pat Kaltenbach, has recommended to the Council and the Council has endorsed the concept of regulated self-designation as proposed by the Representative Assembly and opposes the concept of specialization apparently favored by the Supreme Court. Various of the other committees have been writing articles for the Review and participating in the seminar program.

Mention should also be made of Paul Ward's Committee on Standardized Real Estate Forms which is studying the feasibility of preparing and using State Bar approved forms. The Real Estate Titles, Taxes and Encumbrances Committee under John Baker has been reviewing the issue of bar-related title insurance. Council action on these important subjects will be reported in the next issue of the Review.

The Mechanic's Lien Committee is assisting the legislature and the various sponsors of different mechanic's lien legislation in revising and clarifying proposed statutes to make them less extreme and more acceptable to all interests. The Council has emphasized that it does not wish to endorse any one point of view but is willing to assist all of the parties in improving their various proposals and, if necessary, will oppose legislation which is unworkable or extreme. As a matter of fact, it now appears that Senate Bill 174 as presently proposed or the redraft thereof (which was not yet introduced at this writing) is so extreme and unworkable that the Council will recommend to the Bar that it vigorously oppose enactment unless substantial amendments are made to the proposed legislation. These amendments were previously negotiated between Bob Bolton, Chairman of our Mechanic's Lien Committee and the interests supporting the Bill, but at this writing have not been included in the redraft. We are requesting all interested members of the Section to take an interest in this important matter and we will include a full report in an early issue of the Review.

The foregoing are only some of the activities being carried on by our Committees and Section. I wish to particularly compliment the Council for its active participation and creative interest in the expanding Section activities. You will all remember that the Section is only four years old and already is one of the largest and most active in the State Bar. Last, but not least, I wish to express my appreciation and that of the Council to Mr. George Siedel, the Editor of our very fine Michigan Real Property Review, which is distinguished by the high quality of its articles as well as by its reports of current interest to members of the Section.

SECTION NEWS

Our thanks to the Title Standards Committee, which is chaired by Andrew Cooke, and to author Ralph Jossman for the article covering Michigan Land Title Standards revisions. Ralph has been a member of the Title Standards Committee since 1953 and chaired the Committee from 1956 to 1959. He has been a real Property Section Council member since 1973 and was Section Chairman in 1976-77. Ralph has also chaired the Committee on New Developments in Real Estate Practice of the Real Property, Probate and Trial Law Section, American Bar Association.

The Committee on Mortgages and Mortgage Foreclosures, under Chairman Gary A. Taback, is preparing articles for the April issue of the Review. The remaining issues in Volume 5 will be devoted to the following topics, followed by the names of the persons responsible for articles:

- June - Mechanic's Liens - Robert S. Bolton
- August - Titles, Taxes, Encumbrances - John R. Baker
- October - Leases, Cooperatives, Condominiums - William T. Myers
and
- Land Use and Land Sales - Stephen A. Bromberg
- December - Commercial Transactions and Syndications - Robert H. Janover

* * *

Nicholas C. Batch has been appointed Case Editor of the Review. As you will note in this issue, Nick does an outstanding job in selecting and briefing Michigan cases and federal decisions interpreting Michigan law. Please send suggestions and case materials for publication, especially Circuit Court decisions, directly to: Mr. Nicholas C. Batch, 246 North Twentieth Street, Battle Creek, Michigan 49015.

* * *

The Editor of the Review and other Council members have received numerous requests for back issues of the Review and the Council will be considering the possibility of reprinting selected issues at a future meeting. Until the Council acts on this matter, please send all requests for specific issues to: George J. Siedel, Editor, 2404 Vinewood Boulevard, Ann Arbor, Michigan 48104. If the Council decides to reprint articles, Professor Siedel will use the requests to select articles for re-publication.

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