MICHIGAN REAL PROPERTY REVIEW

REAL PROPERTY LAW SECTION

STATE BAR OF MICHIGAN

Vol. 5, No. 2 April, 1978

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CONTENTS

	Page
Fixtures, Filings and Real Estate Mortgages Under the 1972 Amendments to the UCC by Asher Rabinowitz and Stanley B. Bernstein	2
The Legislative Scene by Joseph H. Hollander	10
Case Briefs by Nicholas C. Batch	14
Section News	17

"When we mean to build
We first survey the plot, then draw the model:
And when we see the figures of the house,
Then must we rate the cost of the erection:
Which if we find outweighs ability
What do we then, but draw anew the model
In fewer offices; or at least
Desist to build at all."
Shakespeare, King Henry IV

FIXTURES, FILINGS AND REAL ESTATE MORTGAGES UNDER THE 1972 AMENDMENTS TO THE UCC

by

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Honigman, Miller, Schwartz and Cohn

I. INTRODUCTION

The 1972 amendments to the Uniform Commercial Code make significant changes in Article 9 on secured transactions.[1] This article will outline briefly the major changes made by the 1972 amendments. Next, the present Code provisions governing fixtures will be reviewed. Then the effect of the new priority rules concerning fixtures and the new forms and methods for filing as to fixtures will be covered.

II. MAJOR CHANGES MADE BY THE AMENDMENTS

If adopted, the 1972 amendments would significantly alter the present Code. First, the provisions regarding multi-state transactions have been rewritten. The old Code provisions have been altered so that persistent problems regarding perfection and reperfection of security interests in automobiles and other types of vehicles covered by certificate of title laws would be eliminated. In essence, the new law provides for reperfection within 4 months in the new state in order for the secured creditor to protect his rights.[2]

Secondly, a new section would be added to the Code dealing with the priorities between consignors of goods and a secured party having a blanket lien on inventory. The new section permits the consignor to prevail if he takes the steps outlined in the section, which include filing of a financing statement and notification of the secured party.[3]

The section on proceeds of accounts receivable has been rewritten and clarified. The major area of rewriting relates to the right of a secured party to obtain cash proceeds in the event of insolvency proceedings involving the debtor.[4]

The section covering most priorities has been rewritten to simplify the priority rules. Moreover, the section now provides a clear answer as to the priority between inventory and accounts receivable financers.[5]

A transition article has also been added which, although it does not track the suggested unofficial provisions of the 1972 Code Amendments, does provide the parties to a continuing secured transaction perfected prior to the effective date of Substitute Senate Bill No. 1168 with a simple method of choosing whether or not the pre-amended Code provisions would still govern the transaction after such effective date. In effect, the pre-amended Code provisions continue to govern unless the parties file a continuation statement stating that the Substitute Senate Bill No. 1168 provisions shall govern the transaction.[6]

Finally, the section on priorities between fixture financers and other real estate encumbrancers and owners has been completely changed and almost entirely rewritten.[7] The purpose of the rewriting was twofold: (i) to attempt in part to define fixtures, and (ii) to provide for priority for certain construction mortgage lending.

In changing the rules of priority for fixtures, the amendments also created a new type of filing which will be required of such financers. This filing is specifically called a "fixture filing."[8] In summary, it requires the fixture financer, in order to perfect and obtain priority, to file a financing statement in the mortgage records.

The remainder of this article will be devoted to a detailed analysis of the present law under the 1962 Code as to fixture priorities versus the proposed 1972 amendments and the details of the new proposed fixture filing provisions.

III. PRESENT LAW WITH REGARD TO FIXTURE PRIORITIES

The area of conflicts between fixture financers and owners or encumbrancers of real estate is limited. Unless a chattel is deemed a fixture (an elusive concept at times), the conflict will never occur. If the item of property is a pure chattel, other sections of the Code govern, and real estate encumbrancers and owners can only obtain priority and perfection under the Code, not the real estate laws. Conversely, if the chattel becomes so incorporated into the real estate as to lose its character as a chattel for purposes of financing, then the Code is inapplicable. It is only in this intermediate class of property, part chattel, part real estate, that conflict arises, and the new Code amendments are designed to solve this.

However, in this limited area, the conflicts were felt to be very real. For many real estate lawyers to quote the official reasons for the 1972 changes "the Code provisions [on fixture priorities] seem to be extreme." This section did not define fixtures, but did acknowledge the validity of an encumbrance of fixtures created under the applicable real estate law, i.e., through a mortgage or land contract. The essence of the existing priority rule in 9-313(2) is that a security interest which attaches before goods become fixtures takes priority over almost all persons claiming an interest in real estate. By contrast, under 9-313(3), a security interest which attaches to goods after they become fixtures is only valid against persons who take an interest in the real estate after the attachment, but is invalid against prior recorded real estate interests.[9] Note here that no financing statement need be filed for the fixture financer to take priority over the subsequent real estate encumbrancer. Technically, only attachment is required. As a practical matter, this means that the secured party need only to have given value to and have a written agreement signed by the debtor who has rights in the collateral.[10]

Certain exceptions were permitted to this priority rule for real estate interests under 9-313(4). A subsequent purchaser or judgment creditor with a lien was given priority if the interest was taken in the real estate before the fixture security interest was perfected by filing, and if the person with the subsequent real estate interest had no knowledge of the prior fixture interest.

In addition, an attempt was made to give construction mortgagees priority, if the subsequent advance was made or contracted for by the mortgagee without knowledge of the fixture interest and before it was perfected. This ambiguous provision did not clearly afford priority to construction mortgagees over the fixture financer. This ambiguity was one of the primary reasons for the change in the law wrought by the 1972 amendments to 9-313.[11]

Furthermore, under Michigan law as it presently exists, the only requirement as far as fixtures is concerned is that the filing be in the office where a mortgage is recorded, not that the filing be in the mortgage records.[12] Indeed, there appears to be no practical way to file a financing statement in the mortgage records under existing law.

Finally, the whole problem of the interest of a party not the owner of record, such as a tenant, land contract vendee, or a contractor, is completely ignored under present Section 9-313. The new amendments address this problem and state rules of priority therefor.

IV. THE 1972 AMENDMENTS TO 9-313 - "PRIORITY OF SECURITY INTERESTS IN FIXTURES"

The new amendments attempt, both by inclusion and exclusion, to create a partial definition of fixtures, which was lacking under the old law. The classical concepts of a fixture were: permanent annexation to land, adaptation to the use of the realty, and intention of the parties.[13] The new section adds a further feature by defining fixtures as goods that "become so related to the particular real estate" that an interest in them arises under the real estate law.[14] However, the new section eliminates from the definition of fixture (if they were ever defined as fixtures to begin with) readily removable factory and office equipment, as well as readily-removable replacements of domestic appliances which are consumer goods, such as stoves, refrigerators and dishwashers.[15]

Like its predecessor, new 9-313(2) prohibits the creation of a security interest in so-called accessions to the real estate, like bricks, glass, metal work, etc.[16] Similarly, the new section does not prevent the creation of encumbrances pursuant to real estate law.[17] Thus, as a practical matter, the mortgage itself can create a security interest in fixtures.

The essence of the priority rules under the new fixture section requires the secured party to perfect his interest through a fixture filing in the real estate records just like a mortgage. If it has done so, it takes priority over subsequent real estate encumbrancers or owners of record based on the long-acknowledged rule of conveyancing that first to record wins.[18] Moreover, a purchase money fixture financer who perfects through a fixture filing takes priority over earlier real estate interests other than construction mortgagees.[19] Furthermore, to avoid problems with the trustee in bankruptcy, under Section 60(a) of the Bankruptcy Act, a fixture financer, even if he has not made a fixture filing, but has otherwise perfected his interest, e.g., by filing as though the item were a piece of equipment, still takes priority.[20]

Construction mortgagees are given priority over a purchase money security interest and indeed over all other security interests in fixtures, except for readily-removable factory or office machines or readily-removable replacements of domestic appliances (not the originally-installed items) which are consumer goods, unless the construction mortgagee has consented to the creation of the

interest of the fixture financer or permits the debtor to remove such goods. Finally, to the extent that a permanent mortgagee "refinances" a construction mortgagee, it would receive the same priority as the construction mortgagee.[21]

In situations where the debtor is not the record owner or in possession nor has a recorded interest in the real estate, no priority can be obtained for his secured party.[22] Where, however, the debtor is not the owner but has a recorded interest in the real estate (e.g., the vendee under a recorded land contract or a memorandum thereof) or is in possession (for example, a tenant), the secured party is also given priority, whether he has perfected or not, if the debtor has the right to remove the goods or the prior owner or encumbrancer consents or disclaims interest therein. If no such consent or disclaimer is present in the situation, then the general priority rules of 9-313, including the catch-all provision of 9-313(7), control.[23]

V. FIXTURE FILINGS

In order to obtain a perfected interest in fixtures which has any real priority as a practical matter, the fixture financer must make a filing in the real estate records called a "fixture filing." Under the new amendments to the 1962 Code to be adopted in Michigan, this filing would be permitted without the usual formal requirements of witnessing and notarization necessary for recording mortgages.[24] The Register of Deeds would be required to index the fixture financing statements in the mortgage records by liber and page. The form of the financing statement proposed is relatively simple, and would merely require a description of the real estate, and the checking of an appropriate box. The filing of this form would automatically create a fixture filing.[25]

About the only other substantive change made to existing real estate law by the new Article 9 fixture provisions relates to construction mortgages and their refinancing. Not only are they defined in 9-313(1)(c), but they must be so denominated in writing to obtain the priority afforded over purchase money security interests in fixtures.

In other words, these mortgages should be called "construction mortgages," or, if they represent a refinancing of one, then "refinancing of construction mortgage," or in some other simple way indicate the nature of such mortgages.

VI. CONCLUSION

The changes wrought by the new amendments to the Code are significant. Those affected by the amendments to 9-313 on fixtures substantially alter existing real estate law. They were meant to and should encourage construction mortgage lending. They simplify and clarify the provisions regarding conflicts between fixture financers and real estate encumbrancers and other parties of interest. They represent a step in the right direction.

FOOTNOTES

1. The Michigan version of the 1972 Official Text amending the Uniform Commercial Code is contained in Substitute for Senate Bill No. 1168 which was approved by the Corporations and Economic Development Committee of the State Senate on February 23, 1978. It seems likely, given the approval by the Committee, that the Bill will become law and take effect on January 1, 1979. All references to the 1972 Official Text shall be identified hereinafter as "1972 Code Amendments Section . . .", and such references shall be constructed simultaneously and equally to apply to the parallel sections in the Michigan version of these 1972 Code Amendments unless the Michigan version is materially different in which case it shall be identified as "Substitute Senate Bill No. 1168 Section . . ."

2. See 1972 Code Amendments Section 9-103(2).

3. See 1972 Code Amendments Section 9-114. Furthermore, there are special provisions for filing as to consigned goods and leases of chattels contained in 1972 Code Amendments Section 9-408.

4. See 1972 Code Amendments Section 9-306(4).

5. See 1972 Code Amendments Section 9-312(3).

6. See Substitute Senate Bill No. 1168 Section 11-102. Until Substitute Senate Bill No. 1168 is enacted and becomes effective on January 1, 1979, counsel for the Secured Party should consider drafting a provision of any security agreement covering a new transaction entered into before January 1, 1979 providing that at the option of the Secured Party, the 1972 Code Amendments shall govern the transaction from and after the effective date of their adoption. To facilitate this contractual provision, the Secured Party and Debtor should execute a "continuation statement" which the Secured Party may then file should he choose to be covered by the new 1972 Code Amendments after they become effective.

7. See 1972 Code Amendments Section 9-313.

8. 1972 Code Amendments Section 9-313(1)(b).

9. Present Section 9-313(3) provides as follows:

    "A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures."

   Section 9-313(4) of the present statute provides:

    "The security interests described in subsections (2) and (3) do not take priority over

    (a) a subsequent purchaser for value of any interest in the real estate; or

(b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or

(c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings is obtained or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section."

10. See present Section 9-204.

11. "Even supporters of Article 9 and of its fixture provision came to recognize that there were some ambiguities in Section 9-313, particularly in its application to construction mortgages, . . ." See the Commissioners' reasons for 1972 change.

12. The present Code, in Section 9-110, provides that any description of personal property or real estate is sufficient, if it reasonably identifies what is described. The description need not be specific, i.e., in the case of real estate the legal description of the property is not necessary. A common street address will suffice. Moreover, the present provision filing as to fixtures merely states that the filing must be made "in the office where a mortgage on real estate . . . would be . . . recorded."

    Section 9-401(1)(b). Clearly, given the divisions in the registers of deeds offices into a chattel (UCC) side and a real estate side, filing financing statement for fixtures on the chattel side would still be in compliance, since that is "the office where a mortgage on real estate" is recorded.

13. See, e.g., In Re Slum Clearance, etc., 332 Mich 485, 494 (1952). See, generally, Note, Article 9 Priorities, 62 Cornell L Rev 834, 918-27 (1977) (contains general discussion of fixture priorities rules under the 1962 Code and the 1972 Code Amendments).

14. 1972 Code Amendments Section 9-313(1)(a).

15. But see Sears Roebuck & Co. v Detroit Federal Savings & Loan Ass'n, 79 Mich App 378 (1977), where the court held that original installations of domestic appliances were inventory in the hands of a developer, who was using them to furnish condominiums to be sold to third parties. Compare 1972 Code Amendments Section 9-313(4)(c) and Official Comment 4(d) thereto, where such items as originally installed domestic appliances can be covered by a construction mortgage and therefore be fixtures if the same are fixtures under the same real estate law.

16. Compare the present statute, Section 9-313(1) with the 1972 Code Amendments Section 9-313(2). The language is not quite the same, but the theory is the same.

17. Compare the existing statutory language in Section 9-313(1) with the new language in 1972 Code Amendments Section 9-313(3). Although slightly different, the result seems the same.

18. See Official Comments, Section 3(b) to the 1972 Code Amendments Section 9-313.

19. See 1972 Code Amendments Section 9-313(4)(a). Some examples of the effect of the various priority rules under 1972 Code Amendments Section 9-313 may help to illustrate its effects:

Example #1

(a) On January 2, 1980, Debtor grants Bank a mortgage on his residence, a "resale" house which he purchased on that date. Mortgage is recorded on January 3, 1980.

(b) On January 5, 1980, Debtor contracts to buy a new furnace to replace the old one from Furnace Company for $500 down and $2,000 payable over three years. The $2,000 note is secured by a security interest in the furnace.

(c) On January 7, 1980, Furnace Company installs the furnace.

(d) On January 28, 1980, Furnace Company enters a "fixtures filing" in the real estate records where the real estate is located.

(e) On January 30, 1980, Bank forecloses against Debtor, and claims a prior lien to Furnace Company on the furnace.

Who wins?

Bank: Furnace Company failed to file "fixture filing" within ten days after furnace became a "fixture," i.e., installed or "affixed" to the real estate.

Example #2

(a) On January 2, 1980, Debtor buys a new furnace to replace the old one in his house from Furnace Company on a retail installment contract. The note is secured by a security interest in the furnace.

(b) On January 7, 1980, Debtor grants Finance Company a second mortgage on his house and uses the proceeds to join the local country club.

(c) On January 10, 1980, the second mortgage is properly recorded and it covers all fixtures, now or hereafter acquired, including the heating system, etc.

(d) On January 11, 1980, Furnace Company installs the furnace and files a fixture filing in the real estate records where the real estate is located.

(e) On January 7, 1981, Finance Company forecloses and claims a prior lien to the Furnace Company.

Who wins?

Finance Company: The ten day grace period does not apply against "subsequent encumbrances." The first-to-file rule determines priority.

Example #3

(a) On January 2, 1980, Mortgage Company makes a $2,000,000 construction mortgage loan to Developer Company to build an office building. The mortgage is recorded on January 3, 1980, and covers the real estate and fixtures, including carpeting.

(b) The loan agreement provides that the last $500,000 will be disbursed for "tenant improvements" if an 80% occupancy level is achieved at the office building.

(c) On December 1, 1982, Developer purchases carpeting to boost rentals and gives a security interest to Carpet Company to secure payment of the balance.

(d) On December 15, 1982, Carpet Company lays in the carpeting, and files a fixture filing.

(e) On March 1, 1983, Mortgage Company funds the last $500,000, now that the 90% occupancy level is attained.

(f) On March 31, 1983, Mortgage Company assigns the mortgage to End Lender.

(g) On March 1, 1984, End Lender forecloses and claims priorities to Carpet Company.

Who wins?

Probably End Lender: Assume "carpeting" is "fixture." End Lender has rights of Mortgage Company, and Mortgage Company made last advance under construction loan terms . . . Fixture Financer (Carpet Company) is subordinate unless it can successfully argue that the final advance was too remote from recording date.

20. See Official Comments, Section 3(c), to 1972 Code Amendments Section 9-313.

21. 1972 Code Amendments Section 9-313(6).

22. This is not exactly spelled out in 1972 Code Amendments Section 9-313, but is the clear implication of the requirement that the Debtor be the owner of record, or have some record interest in or be in possession of the real estate.

23. Under this catch-all provision all such fixture interests are subordinate to the real estate owner or encumbrancer.

24. Substitute for Senate Bill No. 1168, Section 9-402(9).

25. Substitute for Senate Bill No. 1168, Section 9-402(3), which sets forth the approved form of financing statement and permits such filings to be filed by merely checking the appropriate box.

THE LEGISLATIVE SCENE

Committee on Legislation
Joseph H. Hollander, Chairman

The Legislature has just reconvened after its Easter recess; however, a number of bills of interest to the Section were the subject of action prior to the recess. Of particular importance are the amendments to the Condominium Act contained in H.B. 4126. This bill was signed into law by the Governor on March 14, 1978, as Public Act No. 59 of 1978.

H.B. 5141, a bill which deserves watching and that is self-described as the "Truth-in-Renting Act" completed second reading on March 16. This is the first activity on the bill since it was introduced last July. A bill which would permit townships to maintain private roads upon the petition of 51 percent of the owners along the road cleared the House and is awaiting the Governor's signature (S.B. 778).

Also worthy of particular note is H.B. 5463 which would permit banks to make second mortgage loans. This bill moved quickly through the House and has now been referred to the Senate Committee on Corporations and Economic Development.

Finally, S.B. 1168 which contains amendments to Article 9 of the UCC passed the Senate as an amended substitute bill and has been referred to the House Committee on Economic Development and Energy.

Action On Previously Reported Bills

H.B. 4126: Enrolled on February 22, 1978, and signed into law by the Governor on March 14, 1978, as PA 59.

H.B. 4300: Completed third reading with a substitute as amended on March 8 and passed the House on March 13. Referred to Senate Committee on Taxation.

H.B. 4323: Was enrolled on February 6, 1978, and was approved by the Governor on February 24, 1978, as PA 27.

H.B. 4591: Completed second reading on March 22.

H.B. 4592-94: Completed second reading with substitutes on March 22.

H.B. 4606: As amended was ordered enrolled on February 23, and was signed into law by the Governor on February 24, 1978, as PA 38.

H.B. 4910: Passed the House on February 27 and referred to the Senate Committee on State Affairs.

H.B. 5007: Defeated on March 9 with notice given to reconsider.

H.B. 5010: Referred back to Committee on Conservation, Environment and Recreation on March 8.

H.B. 5141: Completed second reading with substitute on March 16.

H.B. 5330: Passed the House on February 13, 1978, and referred to the Senate Committee on Municipalities and Elections.

H.B. 5414: Completed second reading on March 20.

H.B. 5417: Signed into law by the Governor on February 21, 1978, as PA 25.

H.B. 5435: Presented to the Governor on February 23 and signed into law on February 24, 1978, as PA 37.

H.B. 5463: Passed the House on March 8 and referred to the Senate Committee on Corporations and Economic Development.

H.B. 5466: Ordered enrolled on March 16 and presented to the Governor on March 23.

S.B. 9: General orders with substitute on February 27.

S.B. 189: Passed the Senate on March 9 and referred to the House Committee on Taxation.

S.B. 778: Conference report adopted on March 21 and ordered enrolled on March 23.

S.B. 1168: Third reading with substitute as amended on March 8. Passed the Senate on March 9 and referred to the House Committee on Economic Development and Energy.

S.B. 1194: Rereferred to the Committee on Corporations and Economic Development on March 14.

S.B. 1195: General orders with amendments on February 23, and rereferred to the Committee on Corporations and Economic Development on March 1.

Newly Introduced Legislation

H.B. 6033: The bill would require the installation of automatic smoke detection systems in multiple residential structures, etc. (Introduced on February 9, 1978, by Reps. Harrison and Young and referred to the Committee on Urban Affairs.)

H.B. 6057: The bill would amend MCLA 45.1 and would repeal 1974 PA 160 by permitting a referendum to adjust county lines, if a city or village is located in two or more counties. (Introduced on February 16, 1978, by Rep. Owen and referred to the committee on Towns and Counties.)

H.B. 6118: The bill would amend the Subdivision Control Act by requiring the making and recording of surveys of unplatted parcels before sale of such parcels. (Introduced on March 2, 1978, by Reps. Conroy, et al., and referred to the Committee on Towns and Counties.)

H.B. 6144: The bill would amend the Subdivision Control Act by redefining "subdivide" to permit municipalities to divide odd shaped lots and sell them to contiguous property owners. (Introduced March 9, 1978, by Rep. Symons and referred to the Committee on Towns and Counties.)

H.B. 6153: The bill would amend MCLA 18.13 by requiring that all contracts entered into by the State for the construction, alteration, repair, or rebuilding of a state building or other state work contain a clause granting employment priority to Michigan residents in the work force of the contractor and his subcontractors. (Introduced on March 9, 1978, by Rep. Mahalak and referred to the Committee on Urban Affairs.)

H.B. 6157: The bill would amend the revised Judicature Act by increasing the jurisdictional amount of Small Claims Division to $900. (Introduced on March 9, 1978, by Reps. Bennett, et al., and referred to the Committee on Judiciary.)

H.B. 6162: The bill would amend the State Building Authority Act by requiring that all construction contracts contain a clause granting employment priority to Michigan residents in the work force of the contractor and the subcontractors. (Introduced on March 13, 1978, by Rep. Mahalak and referred to the Committee on Urban Affairs.)

H.B. 6182: Seeks to amend MCLA 45.1 and repeal 1974 PA 160 by permitting residents of a city located in two or more counties to determine in which county the entire city should be located. (Introduced on March 16, 1978, by Reps. Smith and Mueller and referred to the Committee on Towns and Counties.)

H.B. 6193-94: These bills would prohibit wage assignments of an employee's earnings absent employer consent or specific authorization by law. (Introduced on March 21, 1978, by Rep. Cushingberry and referred to the Committee on Labor.)

H.B. 6202: The bill would amend 1956 PA 40 by providing for advance notice of drainage assessments and for termination of proposed projects by local governmental units or persons in certain cases. (Introduced on March 22, 1978, by Reps. Scott, et al., and referred to the Committee on Drainage.)

H.B. 6203: The bill would amend 1969 PA 235 by permitting local government regulation of parking areas on private property. (Introduced on March 23, 1978, by Rep. Legel and referred to the Committee on Public Safety.)

H.B. 6232: Amends 1895 PA 3 by permitting villages to exempt property of senior citizens. (Introduced on March 23, 1978, by Rep. Fessler and referred to the Committee on Taxation.)

S.B. 1379: The bill would generally amend the Revenue Bond Act. (Introduced on February 8, 1978, by Sens. DeSana, et al., and referred to the Committee on Corporations and Economic Development.)

S.B. 1383: The bill would amend 1943 PA 202 by exempting from the requirements of the Municipal Finance Act the issuance of bonds up to $250,000. (Introduced on February 13, 1978, by Sens. McCollough, et al., and referred to the Committee on Corporations and Economic Development.)

S.B. 1387: The bill would amend the General Revenue Act by exempting senior citizens with household incomes of less than $10,000 from the payment of property taxes. (Introduced on February 13, 1978, by Sens. McCollough, et al., and referred to the Committee on Finance.)

S.B. 1428: The bill would amend 1976 PA 225 by giving handicappers the same right as the elderly regarding the deferment of the payment of special assessments. (Introduced on March 7, 1978, by Sens. Toepp, et al., and referred to the Committee on Finance.)

S.B. 1456: The bill would amend the General Revenue Act by permitting the appeal of an assessment by appraisal. (Introduced on March 23, 1978, by Sens. Wellborn and DeMaso and referred to the Committee on Finance.)

Federal Legislation

None to report.

Federal Rule Making

None to report.

Attorney General Opinion

None to report.

CASE BRIEFS

Case Editor: Nicholas C. Batch
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MECHANIC'S LIENS

A contractor was dealing directly with an owner of a building project. The contractor recorded a lien statement within 90 days after furnishing the last labor or materials. But no notice of intent to claim a lien was ever served on the owner. The trial court held this omission invalidated the lien. The Michigan Court of Appeals reversed saying the owner has notice of the claims of those with whom he contracted directly. The trial court also threw out the lien for untimely service of the sworn statement of account. It was served just before suit was filed and a year after work was finished. The Court of Appeals reversed holding there is no particular time requirement for serving the sworn statement, provided it precedes filing suit to foreclose the lien. P.H.I. Construction Co. v Riverview Commons Associates, No. 31480 (MCA, Jan. 4, 1978).

A contractor creditor signed a lien waiver agreeing to waive "any and all claims or right of lien which the undersigned now have or may have hereafter." This was held insufficient to make unavailable a lien for subsequently performed work. Sturgis Savings and Loan Ass'n v Italian Village, Inc., No. 30652 (MCA, Mar. 6, 1978).

Michigan's mechanic's lien act withstood a constitutional challenge on due process grounds in Williams & Works, Inc. v Springfield Corp., No. 26617 (MCA, Feb. 22, 1978).

MORTGAGES

While a mortgage was in default, the mortgaged house was completely destroyed by fire. The assignee of the mortgagee then commenced foreclosure proceedings and "bid in" the $13,000 mortgage debt plus $961 in costs and fees. Six months later, an insurer issued an $18,000 check to the mortgagors and mortgagee-assignee as joint payees. The mortgage made losses payable to the mortgagee. Litigation was commenced to determine allocation of the insurance money. The Michigan Supreme Court said the right to the proceeds vested at the time of the fire and the foreclosure sale extinguished the mortgage debt. But to avoid a windfall to the mortgagors and to prevent unfairness to the mortgagee-assignee who surrendered the mortgage debt for worthless property, the Court set aside the foreclosure, cancelled the associated costs and fees, ordered the mortgage debt paid from the insurance proceeds and the remainder paid to the mortgagors. Chief Justice Kavanagh dissented saying the mortgagors should receive the entire proceeds, thus promoting certainty for mortgagors, encouraging bidding at foreclosure sales, and discouraging fraud. Smith v General Mortgage Corp., No. 59699 (MSC, Jan. 23, 1978).

A party assuming a mortgage obligation is barred from asserting illegality in the mortgage consideration as a defense to liability under the mortgage. Michigan Wineries v Johnson, No. 58966 (MSC, Feb. 27, 1978).

An ambiguous subordination clause in a recorded mortgage constructively notifies subsequent mortgagees of whatever facts reasonable inquiry concerning the clause would reveal. American Federal Savings & Loan Ass'n v Orenstein, No. 77-2223 (MCA, Feb. 7, 1978).

There is no right to a jury trial in an action seeking to impose a constructive trust on real estate. Robair v Dahl, No. 29551 (MCA, Jan. 4, 1978).

LAND CONTRACTS
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Land contract vendees failed to insure the premises for the benefit of the vendor as the contract required. The vendor procured insurance and added the premiums to the principal balance as the contract allowed. The vendor's insurance covered only the vendor's interest. After a fire loss, the insurer paid the vendor her contract balance. The vendees sued the insurer on a third party beneficiary theory. Reversing the trial court, the Michigan Court of Appeals ruled there was no intent to benefit the vendees, thus they acquired no rights under the insurance contract. Wilson v Fireman's Ins. Co., No. 77-395 (MCA, Jan. 23, 1978).

PREMISES LIABILITY
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A landlord was sued by two tenants alleging failure of a duty to repair. A jury instruction indicated the landlord would be liable for a defect existing when the tenancy begins only if it was not apparent to the tenant and if the landlord knew or should have known of it. This was error where the Michigan Housing Law is applicable. The statute requires the owner to keep dwellings in good repair. MCLA 125.471; MSA 5.2843. This abrogates the common law rule stated in the erroneous instruction. The landlord has a duty to repair all defects of which he knew or should have known. Raatikka v Jones, No. 31509 (MCA, Feb. 22, 1978).

ZONING
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The Village of Holly had an ordinance which empowered its board of zoning appeals to grant a special use permit to change one non-conforming use to another provided "the proposed use is equally appropriate or more appropriate to the district than the existing non-conforming use." Applicants for such a change argued the "existing non-conforming use" referred only to the time the ordinance was adopted. The Michigan Court of Appeals disagreed. Use at the time of enactment is relevant. But also to be considered are interruptions in that use, reasons for such interruptions, expansions or contractions in the use, intentions of the user in making changes, partial or total abandonments, and actions of the municipality. Each case turns on its own unique facts. Village of Holly v Gromak, No. 77-1886 (MCA, Feb. 5, 1978).

Who has standing to appeal variances granted to expand non-conforming uses? "Aggrieved" parties do, according to statute (MCLA 125.590; MSA 5.2940). However being a "proper and necessary party to any action for review" does not alone make a party "aggrieved." It is necessary to show "special damages not common to other property owners similarly situated...." According to the Michigan Court of Appeals, this requirement was not satisfied by a college board of trustees alleging it was a potential purchaser (or condemnor) of the affected property and would suffer "irreparable injury" by paying a higher price for the property if it were improved. The Court ruled a "financial interest in throttling the development of neighboring properties" is not worthy of legal protection when the development does not interfere with use of property owned by the objecting party. Western Michigan University v Brink, No. 29839 (MCA, Feb. 6, 1978).

A ten acre "primitive campground" catering to itinerant motorcyclists has been held a legitimate use under an ordinance authorizing "any generally recognized mercantile business." Doubts concerning undefined ordinance terms should be resolved in favor of the property owner. The township involved was sparsely populated. More than half of it was public land on which camping was allowed. A more metropolitan area might dictate a different determination, the Court cautioned. Peacock Twp v Panetta, No. 77-2010 (MCA, Mar. 7, 1978).

SECTION NEWS

Our thanks to Gary A. Taback, the Chairman of the Committee on Mortgages and Mortgage Foreclosures, for arranging for the preparation of the lead article in this issue.

The two authors are well qualified to write on the Article 9 amendments, and have done an excellent job in summarizing a complex topic. Asher Rabinowitz holds undergraduate and law degrees from New York University where he was Phi Beta Kappa and Research Editor of the N.Y.U. Law Review. He is the Reporter for the Michigan Law Revision Commission to the Michigan State Legislature on Revisions to Article 9 of the Uniform Commercial Code. Stanley B. Bernstein holds a Ph.D. degree from Harvard University and a J.D. degree from Rutgers University and was elected to Phi Beta Kappa. He has served as Assistant Professor of Law at the University of Toledo and as Adjunct Professor of Law at Wayne State University.

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The quotation on the cover was supplied by Ralph Jossman.

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The following notice was submitted by Patrick Kaltenbach on behalf of the Committee on Seminars, Workshops, and Meetings:

THIRD ANNUAL SUMMER CONFERENCE

The third annual summer conference of the Real Property Law Section will be held July 13, 14, and 15, 1978, at Bay Valley Inn, Bay City, Michigan.

Discussion at the conference will be directed to understanding and negotiating a land transaction from acquisition to syndication.

Dick Rabbideau, Chairman of the Section's Committee on Seminars, Workshops, and Meetings, reports that speakers at the conference will be asked to view a land acquisition and development from the viewpoints of a land owner, a land developer, and a financial institution. Emphasis will be placed on negotiating among the parties various documents to be used in connection with such land acquisition and development.

Further details relating to the summer conference will be reported in the Review. Also, watch for special summer conference mailings to all Section members. Information concerning accommodations, recreational opportunities, and course registration forms will be included in the mailings.

If you don't receive the mailings or you desire additional information, please contact: Richard Rabbideau, 35th Floor, 400 Renaissance Center, Detroit, Michigan 48243 (313) 568-6966, or C. Patrick Kaltenbach, 8th Floor, Second National Bank Building, Saginaw, Michigan 48607 (517) 753-3461.