1-1-1970

Real Property (1969 Annual Survey of Michigan Law)

John E. Mogk
Wayne State University, j.mogk@wayne.edu

Brian M. Barkey
Wayne State University

REAL PROPERTY

JOHN E. MOGK†
BRIAN M. BARKEY††

I. INTRODUCTION

Over 65 cases were decided by Michigan courts during the Survey period dealing with some aspect of property law. Most of these cases raise property questions which are only incidental to nonproperty issues and, as a result, will not be discussed in this article. Similarly, those cases which have no precedential value, restate old law, or confirm an established trend are not considered worthy of discussion. Accordingly, in our judgment, only 16 property cases decided during the Survey period merit protracted attention.

II. HOUSING CODE ENFORCEMENT

In *City of Saginaw v. Budd*,[1] the city, acting pursuant to an ordinance which made a public nuisance of all buildings or structures which are dangerous to human life or constitute a hazard to safety or health or public welfare "by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment . . . ," sought an order directing the demolition of a house and garage declared by the Inspectors' Division of the city to be a public nuisance. Defendant contended that the ordinance lacked definable standards, and challenged its constitutionality as an improper exercise of the police power of the municipality, and as an improper delegation of legislative authority to an administrative official without precise standards to guide his actions. The court of appeals affirmed the circuit court's finding that the ordinance was valid on the basis that the terms "by reason of inadequate maintenance, dilapidation" could scarely be made more specific,[2] but the supreme court reversed, in a split decision, three judges

† Professor of Law, Wayne State University. B.B.A. 1961, J.D. 1964, University of Michigan.Dp.C.L. 1965, University of Stockholm.—ED.

†† Senior Member, Wayne Law Review. B.A. 1967, Western Michigan University; J.D. 1970, Wayne State University.—ED.

1. 381 Mich. 173, 160 N.W.2d 906 (1968).

2. City of Saginaw v. Budd, 3 Mich. App. 681, 143 N.W.2d 608 (1966), *rev'd*, 381 Mich. 173, 160 N.W.2d 906 (1968).

dissenting, stating that "the ordinance discloses that there was an improper delegation . . . greater . . . than delegations we have passed judgment upon and have declared unconstitutional in previous opinions."[3]

The three cases relied upon by the majority in reaching its holding provide questionable support for invalidating the Saginaw ordinance. In *Osius v. City of St. Clair Shores*,[4] the placement of gas stations in a certain zoned area of the city was subject to the exclusive discretion of the Zoning Board of Appeals. The court noted in striking down the ordinance that "such an ordinance becomes an open door to favoritism and discrimination, a ready tool for the suppression of competition through the granting of authority to one and the withholding from another."[5] Similarly, in *Hoyt Brothers, Inc. v. City of Grand Rapids*,[6] the court overturned a grant of power to the city manager to license charitable solicitation, where his only guidelines were whether he felt that the charity was worthy and whether the solicitor was responsible. The court found insufficient criteria for the city manager to follow in determining what was a worthy charity and what was a responsible person. In the third case cited, *O'Brien v. State Highway Commissioner*,[7] the court refused to uphold a statute giving the state highway commissioner power to regulate roadside advertising devices and requiring removal upon his determination that a sign had a detrimental effect on the public safety, health, morals, and welfare.

The majority's facile adoption in *Budd* of the holdings in these cases without carefully analyzing their underlying rationale seems to have resulted in the disregard of the ordinance's requirement that the building be not only (1) inadequately maintained, dilapidated, obsolete, or abandoned, but that it be also (2) hazardous to safety, health, or public welfare because of this condition. Reading clause (2) as delimiting clause (1) would seem to provide a sufficiently defined building maintenance standard to be enforceable. Past Michigan cases also bring into question the majority holding.

3. 381 Mich. 173, 178, 160 N.W.2d 906, 908 (1968).
4. 344 Mich. 693, 75 N.W.2d 25 (1956).
5. *Id.* at 700, 75 N.W. 2d at 27.
6. 260 Mich. 447, 245 N.W. 509 (1932).
7. 375 Mich. 545, 134 N.W.2d 700 (1965).

A literal reading of *Budd* would seem to invalidate the statutory abatement of fire hazards under the Fire Prevention Act,[8] which withstood constitutional attack in *Commissioner of State Police v. Anderson*.[9] There, under a statute which gives the state police commissioner power to order abatement where he finds that a building, "by reason of want of repairs . . . or by reason of age or dilapidated condition . . . may cause an otherwise preventable fire . . . ," the court found the building to be old and dilapidated but refused to order its razing because it was not also hazardous to the public. *Anderson* would seem to provide support for upholding the ordinance in *Budd*. Moreover, cases from other jurisdictions, as well,[10] suggest that statutory schemes which are guided by the necessity of danger to the public health, safety, and welfare are sufficiently definite to weather constitutional challenge.[11]

The validity of a legislative grant of power to a public official or an administrative body is often said to depend upon the nature of the matter to be regulated.[12] Michigan authority exists for

8. MICH. COMP. LAWS ANN. §§ 29.1-.25 (1967). This case would also suggest the constitutional infirmity of part of the Dangerous Building Act, which defines a dangerous building to be: "Whenever a building or structure used or intended to be used for dwelling purposes, because of dilapidation, decay, damage or faulty construction or arrangement or otherwise, is unsanitary or unfit for human habitation or is in a condition that is likely to cause sickness or disease when so determined by the health officer, or is likely to work injury to the health, safety or general welfare of those living within." *Id.* § 125.539(h) (Supp. 1970).

9. 344 Mich. 90, 73 N.W.2d 280 (1955).

10. Papaioanu v. Commissioners of Rehoboth, 25 Del. Ch. 327, 20 A.2d 447 (Ch. 1941); Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957); Oursler v. Board of Zoning Appeals, 204 Md. 397, 104 A.2d 568 (1954); Burnam v. Board of Zoning Appeals, 333 Mass. 114, 128 N.E.2d 772 (1955); Sellors v. Concord, 329 Mass. 259, 107 N.E.2d 784 (1952); Mirschel v. Weissenberger, 277 App. Div. 1039, 100 N.Y.S.2d 452 (2d Dep't 1950); Maxwell v. Klaess, 192 Misc. 939, 82 N.Y.S.2d 588 (Sup. Ct. Nassau County 1948); State *ex rel.* Saveland Holding Corp., v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955). In each of these cases, the preamble or part of the statute in question refered to the public health, safety, and welfare as the guiding principle, which the courts in turn construed this to temper the exercise of the rest of the statute.

11. *See* Annots., 92 A.L.R. 400 (1934) (validity of statute or ordinance vesting discretion in public officials without prescribing rule of action); 54 A.L.R. 1104 (1928) (same); 12 A.L.R. 1435 (1921) (attack on validity of a zoning statute, ordinance or regulation on ground of improper delegation of authority to board or officer).

The constitutional power of state legislatures over the abatement of nuisances is outlined in Lawton v. Steele, 152 U.S. 133 (1894). *See also* Annot., 14 A.L.R.2d 73 (1950) (constitutional rights of owner as against destruction of building by public authorities).

12. Annot., 12 A.L.R. 1435 (1921) (validity of statute or ordinance vesting discretion in public officials without prescribing a rule of action).

relaxing the requirement of specific guidelines where the subject matter of the regulation and its standard will permit less rigidity. For example, the requirement that "good cause" be shown for the revocation of a broker's license has been held to require no further specificity.[13] A broker's conduct which would constitute good cause is thought to be commonly understood. The definition of "public nuisance" as a condition which constitutes "a hazard to safety or health, or public welfare, by reason of inadequate maintenance, dilapidation, obsolesence, or abandonment," would seem to evoke a similar common understanding. The use of the term "public nuisance" itself, as is contained in the Saginaw ordinance, has had the effect of curing an otherwise unconstitutionally vague statute[14] in another jurisdiction.

III. ZONING

A zoning ordinance must have a reasonable connection with public health, safety, and welfare to limit a private property owner's use of his land,[15] or the ordinance is unconstitutional and void.[16] The supreme court, in the leading case of *Brae Burn, Inc. v. City of Bloomfield Hills*,[17] annunciated the refusal of Michigan courts to act as a superzoning board and emphasized the doubtful propriety of frequent judicial review of zoning cases, which the court saw as inconsistent with the separation of judicial and administrative powers.

---

13. G.F. Redmond & Co. v. Michigan Sec. Comm'n, 222 Mich. 1, 192 N.W. 688 (1923).

14. *See* Phillips Petrolium Co. v. Anderson, 74 So. 2d 544 (Fla. 1954).

15. Padover v. Township of Farmington, 374 Mich. 622, 132 N.W.2d 687 (1965); Roll v. City of Troy, 370 Mich. 94, 120 N.W.2d 804 (1963); Christine Bldg. Co. v. City of Troy, 367 Mich. 508, 116 N.W.2d 816 (1962); Bzovi v. City of Livonia, 350 Mich. 489, 87 N.W.2d 110 (1958); McHugh v. City of Dearborn, 348 Mich. 311, 83 N.W.2d 222 (1957); Bassey v. City of Huntington Woods, 344 Mich. 701, 74 N.W.2d 897 (1956); Penning v. Owens, 340 Mich. 355, 65 N.W.2d 831 (1954).

16. Legislation bearing no relation to the public health, safety, and welfare goes beyond the constitutional police power of the state. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). A zoning ordinance which deprives the landowner of any use for which his land is suited is invalid as confiscatory and violates the due process and equal protection clauses. Alderton v. City of Saginaw, 367 Mich. 28, 116 N.W.2d 53 (1962); Burrell v. City of Midland, 365 Mich. 136, 111 N.W.2d 884 (1961); Long v. City of Highland Park, 329 Mich. 146, 45 N.W.2d 10 (1950); Brandau v. City of Grosse Pointe Park, 5 Mich. App. 297, 146 N.W.2d 695 (1966).

17. 350 Mich. 425, 86 N.W.2d 166 (1957).

In *Brae Burn* the supreme court seemed to require that more than a debatable question of an ordinance's reasonableness be raised before court review would be appropriate. Perhaps more importantly, the court evidenced the attitude that no significant justicable issue is presented in the ordinary case involving merely an unwise zoning plan, as opposed to a zoning plan which is completely unreasonable and thus confiscatory.[18] After the *Brae Burn* test was annunciated, however, the court became reluctant to follow its standard—a fact that led one practitioner to declare the test impliedly overruled.[19] By the early 1960's the court seemed to be acting once again as a superzoning board.[20]

Cases decided by the three divisions of the court of appeals during the Survey period indicate an attitude which harks back to the stricter standard of *Brae Burn*. In *Kraus v. City of Royal Oak*,[21] the plaintiff attacked a zoning ordinance by showing that existing circumstances made the logical use of his property conflict with its single-family residential zoning classification. He argued that the mixed character of the neighborhood, nearby busy highways, a substantial disparity in value between the desired use and the zoned use, the presence of nearby railroad tracks, and the consequent withdrawal of FHA financing for proposed housing made application of the zoning ordinance unreasonable. The court of appeals, second division, however, upheld the ordinance, noting that in order to sustain an attack on a zoning ordinance, proof of the disparity in value must be "accompanied by other factors which clearly affect the public health, safety or general welfare of the people."[22] The court noted further that plaintiff had failed "to adequately cope with most of the public interest considerations which . . . prompted the adoption of the zoning ordinance."[23] In

18. Andrews, *What Ever Happened to the Brae Burn Rule?*, 43 MICH. ST. B.J. 34 (March 1964).

19. *Id.*

20. No Michigan case presented with this issue invalidated a local ordinance on the basis of the *Brae Burn* rule from 1961 until 1963. Smith v. Village of Wood Creek Farms, 371 Mich. 127, 123 N.W.2d 210 (1963); Roll v. City of Troy, 370 Mich. 94, 120 N.W.2d 899 (1963); Christine Bldg. Co. v. City of Troy, 367 Mich. 508, 116 N.W.2d 816 (1962); Alderton v. City of Saginaw, 367 Mich. 28, 116 N.W.2d 53 (1962); Wenner v. City of Southfield, 365 Mich. 563, 113 N.W.2d 918 (1962); Burrell v. City of Midland, 365 Mich. 136, 111 N.W.2d 884 (1961).

21. 11 Mich. App. 183, 160 N.W.2d 769 (1968).

22. *Id.* at 191, 160 N.W.2d at 772.

23. *Id.* at 191, 160 N.W.2d at 772-73.

Yale Development Co. v. City of Portage,[24] the court of appeals, third division, found that adjacent busy roads, the difficulty in obtaining financing for the property as zoned, the lack of demand for the property as zoned, and a substantial disparity in the value of the property with and without the zoning restriction presented no more than a debatable question. The court of appeals, first division, used the strictest approach, however, in *Brandau v. City of Grosse Pointe Park*.[25] The plaintiffs claimed that because the surrounding land was zoned for an inconsistent use, the value of their land was destroyed as zoned. The court held that this did not "conclusively [establish] that [the plaintiffs] could not reasonably use their property as zoned."[26] The court suggested that in order to have standing to raise the issue, the plaintiff must have attempted to use or sell his property for the zoned use or have shown that attempts to do so would be useless. In the four other cases in which the courts of appeals discussed the validity of the application of a zoning ordinance, they uniformly upheld the ordinances.[27]

The above cases indicate that the various divisions of the court of appeals may be developing a stricter standard with regard to overturning the proposed application of a zoning ordinance.[28] The implication for the practitioner is that he may no longer enjoy the same success in attacking local zoning ordinances in the courts. His most effective avenue for relief may be increasingly with the local legislature which adopted the plan or the local zoning board of appeals which implements it.

The Michigan Supreme Court, on the other hand, in *Biske v.*

24. 11 Mich. App. 83, 160 N.W.2d 604 (1968).

25. 15 Mich. App. 689, 167 N.W.2d 366 (1969).

26. *Id.* at 692, 167 N.W.2d at 367.

27. Shackett v. Township of Highland, 15 Mich. App. 543, 166 N.W.2d 821 (1969) (ordinance which barred trailer parks may still be reasonable); Bihlmire v. Lake Township, 16 Mich. App. 633, 168 N.W.2d 437 (1969) (township has standing to enforce a valid zoning ordinance); Rottman v. Township of Waterford, 13 Mich. App. 271, 164 N.W.2d 409 (1968) (fact that no vacant land was zoned for use as a trailer park not unreasonable because other land was zoned for a trailer park and actually so used); Nosal v. City of Lansing, 14 Mich. App. 733, 165 N.W.2d 926 (1968) (plaintiff failed to rebut presumption of reasonableness).

28. For example, compare the weight given to the fact that the FHA had refused to finance develpment of the property as zoned in Wenner v. City of Southfield, 365 Mich. 563, 113 N.W.2d 918 (1962); Burrell v. City of Midland, 365 Mich. 136, 111 N.W.2d 884 (1961), with the weight given the same factor in the Survey cases of Kraus v. City of Royal Oak, 11 Mich. App. 183, 160 N.W.2d 769 (1968); Yale Dev. Co. v. City of Portage, 11 Mich. App. 83, 160 N.W.2d 604 (1968).

City of Troy,[29] upheld plaintiff's attack on a zoning ordinance because the court found that the ordinance had no substantial relation to present public welfare. The ordinance was adopted by the city pursuant to an elaborate master plan which anticipated dramatic future growth. Plaintiff alleged that his right to the free use of his property could not be restricted by such speculative standards. The supreme court, reversing the court of appeals, second division, held that the reasonableness of a zoning ordinance must be tested with respect to existing facts and conditions, "not some condition which might exist in the future."[30]

Although there is a recognized difference between the function of a zoning ordinance in a settled and developed urban area and that in a growing suburban area,[31] the Michigan Supreme Court has closely regulated city planners by consistently invalidating zoning ordinances enacted to limit residential lot size and population density in rapidly developing areas.[32] The court has stressed the connection between the ordinance and present public welfare in spite of statutes which seem to authorize such future planning[33] and the reasoning of dissenting judges and cases in other jurisdictions which have allowed much more extreme measures to stand.[34]

It has been argued that planning in a rapidly growing urban area cannot be judged by the standards used to determine the reasonableness of zoning ordinances in settled areas.[35] Such an approach is unrealistic and has the practical effect of frustrating all

29. 381 Mich. 611, 166 N.W.2d 453 (1969), *rev'g* 6 Mich. App. 546, 149 N.W.2d 899 (1967).

30. *Id.* at 617, 166 N.W.2d at 457.

31. Note, *Zoning: Permissible Purposes*, 50 COLUM. L. REV. 202 (1950); Comment, *Building Size, Shape, and Placement Regulations: Bulk Control Zoning Reexamined*, 60 YALE L.J. 506 (1951); 62 MICH. L. REV. 131 (1963).

32. Padover v. Township of Farmington, 374 Mich. 622, 132 N.W.2d 687 (1965); Roll v. City of Troy, 370 Mich. 94, 120 N.W.2d 804 (1963); Christine Bldg. Co. v. City of Troy, 367 Mich. 508, 116 N.W.2d 816 (1962); Frischkorn Constr. Co. v. Redford Township Bldg. Inspector, 315 Mich. 556, 24 N.W.2d 209 (1946); Senefsky v. City of Huntington Woods, 307 Mich. 728, 12 N.W.2d 387 (1943).

33. MICH. COMP. LAWS ANN. §§ 125.37, .581 (1967).

34. Dilliard v. Village of North Hills, 279 App. Div. 969, 94 N.Y.S.2d 715 (2d Dep't 1950) (two-acre minimum lot size upheld); Thompson v. City of Carrollton, 211 S.W.2d 970 (Tex. Civ. App. 1948).

35. Padover v. Township of Farmington, 374 Mich. 622, 641-43, 132 N.W.2d 687, 696-98 (1965) (concurring opinion); Biske v. City of Troy, 6 Mich. App. 546, 149 N.W.2d 899 (1967).

city planning. On the other hand, however, the danger of a rule which allows speculative planning without regard to present conditions is equally clear. "[T]he hapless property owner waits, pays taxes and hopes that either the anticipated development will come shortly or that the zoning authority will release to some extent its griphold of his property right."[36] The defect which may exist in the court's approach in *Biske* is that when the connection between an ordinance and the public need is examined in cases involving long range plans, it cannot be judged by the same reasonableness test which was formulated to deal with the constitutionality of urban zoning. One must look at what the city is empowered to do and to what the ordinance is designed to accomplish in determining the reasonableness of the ordinance.[37] Although community planners require an initial indulgence, they must make realistic projections based upon existing facts, since such facts, in turn, will be analyzed by the courts in judging the reasonableness of their projections.

IV. LANDLORD & TENANT

The court of appeals decided five cases covering the landlord-tenant relationship, three of which are of special interest.[38] In *Newkirk v. Millman Brothers, Inc.*,[39] the parties in 1959 entered into a fifteen-year lease at a monthly rental of $800. In 1963 the parties allegedly amended the lease to reduce rent payments to $600 per month. Thereafter, the reduced payments were accepted by plaintiff until 1967 when he returned two $600 rent checks covering May and June and sued for the original contract rent for those two months. The trial court, without deciding whether plaintiff had actually promised to reduce the rent, held that any such promise would be unenforceable for lack of consideration. The court of appeals reversed, holding that defendant's undertaking to remain in possession of the premises (which undertaking was not an expressed part of the original lease) constituted sufficient consideration to support such a promise by plaintiff.

36. Biske v. City of Troy, 381 Mich. 611, 617, 166 N.W.2d 453, 458 (1969).

37. Padover v. Township of Farmington, 374 Mich. 622, 641, 132 N.W.2d 687, 696 (1965).

38. Two cases are not discussed because of the essentially factual nature of the issues presented. Clouse v. Nuffer, 13 Mich. App. 640, 164 N.W.2d 737 (1968); Frandora Realty, Inc. v. Grinnel Bros., Inc., 15 Mich. App. 217, 166 N.W.2d 511 (1968).

39. 16 Mich. App. 306, 167 N.W.2d 854 (1969).

This case is the third in a series of recent cases dealing with the enforceability of agreements to reduce rent during the term of a lease. The majority of jurisdictions, following classic contract principles, refuse to uphold modifications of a lease based upon a subsequent expressed undertaking by the lessee to stay in possession upon the rationale that such modifications are not supported by consideration.[40] A substantial minority of jurisdictions, on the other hand, led by the 1897 case of *Hyman v. Jockey Club Wine, Liquor & Cigar Co.*,[41] adopt the opposing view. Early treatise writers[42] criticized *Hyman* on the ground that it was misleading in failing to distinguish between a situation where the lessee, in the absence of a prior undertaking, affirmatively promises to stay in actual possession of the leased premises and where he merely promises to forego breaching the lease. Theoretically, in the absence of an expressed agreement, the lessee has no affirmative duty to occupy the premises; his only duty is to pay the agreed rent. His undertaking to specifically occupy the premises, therefore, constitutes a new independent commitment which provides sufficient consideration to support the lessor's promise of a rent reduction. Michigan follows *Hyman*. Thus, in *Eisenberg v. C.F. Battenfeld Oil Co.*,[43] where the lessee found the business operated under a ten-year lease inadequate to pay the stipulated rent, the court enforced the lessor's agreement to reduce the rent for the balance of the term. According to the court, consideration for the agreement could be found in the promise of the lessee to continue to occupy the premises (citing *Hyman*). The court of appeals has recently affirmed this position in *Minor-Dietiker v. Mary Jane Stores*[44] and *Green v. Millman Brothers, Inc.*,[45] although in the latter case the court held that the lessee's promise not to vacate did not constitute new consideration, in light of the lessee's original undertaking to operate 100 percent of the leased premises. Despite the criticism that such a distinction verges on the metaphysical and that the alleged consideration is rarely

40. *See* Annots., 93 A.L.R. 1404, 1406 (1934); 46 A.L.R. 1518 (1927); 43 A.L.R. 1451 (1926).

41. 9 Colo. App. 299, 48 P. 671 (1897).

42. 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 890, at 547 (3d ed. 1939).

43. 251 Mich. 654, 232 N.W. 386 (1930).

44. 2 Mich. App. 585, 141 N.W.2d 342 (1966).

45. 7 Mich. App. 450, 151 N.W.2d 860 (1967).

actually bargained for,[46] the principal case affirms Michigan's acceptance of the minority view.

Several cases in other jurisdictions reach the same result but on different grounds. In those instances in which the lessee will be forced out of business unless the rent is reduced, courts have enforced a lessor's promise to lower the rent when it is made to induce the lessee to continue in business.[47] The Michigan legislature by statute has supported enforcement of such promises in those instances involving a written agreement in providing that "[a]n agreement shall not be invalid because of the absence of consideration where it is represented by a writing."[48]

In *Paisley v. United Parcel Service, Inc.*,[49] a truck owned by defendant, United Parcel Service, Inc., struck plaintiff's daughter as it was being driven across a gas station parking lot. The defendant filed a third party complaint against the owner of the gas station, Gulf Oil Corporation, and its lessee, Holtz, seeking contribution from them as joint tortfeasors. United alleged that Gulf knew children played in the parking lot and that this represented a nuisance for which the owner of leased property could be liable even though he exercised no control over the lessee's use of the property. The court of appeals denied United's request for contribution, holding that Gulf would be liable only for dangerous conditions existing at the time the lease was executed, a circumstance that must be alleged to impose liability against Gulf.

In order to hold the owner of leased property liable for damages incurred upon his land, plaintiff must show that the owner has control over the premises or, under the holding of *Bluemer v. Saginaw Central Oil & Gas Service, Inc.*,[50] that the injurious instrumentality existed and constituted a nuisance at the time the lease was executed. In *Bluemer* the requirement that the dangerous condition exist at the time of execution is implicit while in *Paisley* it is expressed. Nuisance has been characterized as "the great grab bag, the dust bin, of the law."[51] Equitably, there would seem to be

46. Bartke & Callahan, *Real and Personal Property. 1968 Ann. Survey of Mich. Law*, 15 WAYNE L. REV. 397, 411 (1968).

47. Parrish v. Haynes, 62 F.2d 105 (5th Cir. 1932) (dictum); William Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650 (1934).

48. MICH. COMP. LAWS ANN. § 566.1 (1967).

49. 14 Mich. App. 301, 165 N.W.2d 299 (1968).

50. 356 Mich. 399, 96 N.W.2d 90 (1959).

51. Awad v. McColgan, 357 Mich. 386, 389, 98 N.W.2d 571, 573 (1959).

justification for limiting its application to dangerous conditions which the defendant had a direct opportunity to control or eliminate. By limiting the scope of the lessor's liability for nuisances arising from the use of the premises to damage caused by inherently dangerous conditions of the property existing at the time of execution of the lease, the effect of *Bluemer* and cases following its holding, including *Paisley*, has been to strike a balance between a policy against allowing a landowner to insulate himself from liability for an inherently dangerous condition and one against permitting recovery from a lessor when he is essentially blameless.

The third landlord-tenant case of interest decided by the court of appeals was *Hull v. Detroit Equipment Installation, Inc.*[52] Suit was brought against the lessor to recover increased sewage charges assessed by the City of Keego Harbor which were occasioned by the plaintiff's use of the premises as a laundromat. The lease was silent on the question of who would bear increased sewage charges. The court held the lessee liable for the increased charges, reasoning that because such an increase was due to the lessee's increased use of the land, it would be senseless to require the lessor to pay for the lessee's success. The court relied almost exclusively on cases which have dealt with liability for increased tax assessments due to the lessee's improvments in the leasehold. The general rule with regard to the payment of taxes on leased property, where the lease is silent on the issue, is that the lessor is liable.[53] The justification for the rule is that one who receives the rents and profits from land should bear the correlative tax burden. The court in the principal case cited *Wycoff v. Gavriloff Motors, Inc.*,[54] as establishing the controlling exception to this principle—that the burden of taxes on "removable" improvements is on the lessee. In determining whether improvments are removable, courts have established the guideline that, if the improvement primarily benefits the lessee and is in furtherance of the purposes of the lease, the improvements are considered the personal property of the lessee and "removable" by him rather than a "permanent fixture" which will revert to the lessor.[55] Two other relevant considerations often weighed are: the length of the term of

52. 12 Mich. App. 532, 163 N.W.2d 271 (1968).
53. Annots., 86 A.L.R.2d 663 (1962); 73 A.L.R. 824 (1931).
54. 362 Mich. 582, 107 N.W.2d 820 (1961).
55. 3A G. THOMPSON, THE LAW OF REAL PROPERTY § 1377 (4th ed. 1959).

the lease and whether the lessee is compensated for the improvement on the leased property. The principal case appears to be the first in Michigan to expand this concept to cases where the increased taxes are due to the lessee's increased *use* of the land. The closest case factually is a New York case, *New York University v. American Book Co.*,[56] where the defendant-lessee was held liable for water assessments which were levied by the city according to actual consumption. The principal case finds analogous support in the rationale underlying the improvement cases—the benefit upon which the tax is based enures to the lessee and, therefore, in the absence of agreement otherwise, he should bear the increased tax obligation as well.

Michigan was moved into the forefront of housing legislation by new landlord-tenant legislation which took effect in 1968.[57] Basically, the legislation provides for expanded personal rights of action by the tenant under the housing code, grants the tenant previously unavailable defenses in the landlord's action for possession, and imposes a statutory warranty of habitability upon leases for a term of less than one year. This Survey article will not attempt an extended discussion of the new law since it is adequately discussed in a comment published in volume 15, issue number two of the *Wayne Law Review*.[58]

V. FORECLOSURE

The proper exercise of the right of redemption in connection with foreclosure under a land contract was examined by the court during the Survey period. In *Gordon Grossman Building Co. v. Elliot*,[59] defendant and her husband, vendees under a land contract with plaintiff, defaulted in their payments and in November 1966 plaintiff obtained a judgment of foreclosure. The property was sold to plaintiff at a commissioner's sale in December 1966, and in February 1967 an order confirming the sale was entered. Defendant

56. 197 N.Y. 294, 90 N.E. 819 (1910).

57. MICH. COMP. LAWS ANN. §§ 125.401-.519, 554.139, 660.5634, .5637, .5646, .5670 (Supp. 1968). Also enacted in the same legislative session were laws dealing with public housing. *Id.* §§ 125.644(a)-(b), .649-.655 (Supp. 1968).

58. Comment, *The New Michigan Landlord-Tenant Law: Partial Answer to a Perplexing Problem*, 15 WAYNE L. REV. 836 (1969).

59. 11 Mich. App. 620, 162 N.W.2d 107, *motion for leave to appeal granted*, 381 Mich. 773 (1968).

alleged that thereafter, during the period of redemption, she made arrangements to sell the property. In connection with the sale, a financing bank approved the issuance of a mortgage to defendant's vendee two weeks before the expiration of the redemption period and asked that the defendant obtain a warranty deed from plaintiff in order to "facilitate" the handling of the mortgage. A warranty deed was prepared by defendant and forwarded to plaintiff's attorney with the request that plaintiff deliver it to the bank to be held in escrow pending disbursement of sufficient funds to cover plaintiff's interest. Plaintiff's attorney refused to comply on the basis that such an arrangement lacked the necessary tender to effectuate redemption. As a result, defendant's period of redemption expired. The court of appeals upheld the trial court's order directing plaintiff to deliver the deed to defendant on the basis that defendant had made sufficient legal tender.

Although the rule with respect to tenders is often harshly stated to require an unconditional offer coupled with actual, present ability to pay,[60] as early as 1902 the rule was described as flexible.[61] An unconditional offer, however, requires something more than a mere statement that "arrangements have been completed to raise the money necessary."[62] In this connection, several Michigan cases have held that requesting a deed at the time of tender makes the tender defective.[63] Further, the rule has been held unsatisfied by a mere showing that the vendee has an apparent ability to pay—his ability must be actual and present.[64] Measured against previous cases in this area, the principal case would seem to follow a more relaxed requirement. The court has apparently balanced what is, in its judgment, a remote possibility that plaintiff will not forthwith receive full payment for its interest in the property against the burden, and possible forfeiture, which may result to defendant if her resale is not facilitated. The court observed that in the context of the principal case plaintiff's requirement of strict tender does not

60. Kaiser v. Weber, 301 Mich. 609, 4 N.W.2d 29 (1942); Chase v. Welsh, 45 Mich. 345, 7 N.W. 895 (1881).

61. Niederhauser v. Detroit Citizens' St. Ry., 131 Mich. 550, 91 N.W. 1028 (1902).

62. Kaiser v. Weber, 301 Mich. 609, 613, 4 N.W.2d 29, 30 (1942).

63. *Id*; *cf.* Johnson v. Cranage, 45 Mich. 14, 7 N.W. 188 (1880).

64. Duiven v. Brakesman, 356 Mich. 1, 95 N.W.2d 868 (1959); Friedman v. Winshall, 343 Mich. 647, 73 N.W.2d 248 (1950); Niederhauser v. Detroit Citizens' St. Ry., 131 Mich. 500, 91 N.W. 1028 (1902).

recognize "the commercial exigencies of the day and particularly does not reflect land contract custom and usage."[65]

A vendee under a land contract, in attempting to realize full value with respect to his redemption right, may be required to convey legal title to a subsequent purchaser, rather than his mere contractual interest. Consider, for example, a situation where the vendee's period of redemption is about to run, as in the principal case, or where the vendee's rights under the land contract are nonassignable.[66] A subsequent purchaser and his prospective mortgagee will be loath to deliver the purchase price to the vendee without complete assurance that a deed conveying legal title to the property will be delivered in return. Under an escrow arrangement the subsequent sale is facilitated by the assurance that the vendor of the land contract cannot revoke the deed at will[67] or its delivery on grounds inconsistent with the arrangement.[68] Without financing realized in connection with the subsequent sale, the vendee may be effectively precluded from exercising his right of redemption.

If the escrow period does not exceed the period of redemption and the escrow agent is responsible, delivery of a deed to an escrow agent upon the understanding that it will be conveyed to the vendee in return for full payment of the vendor's interest would seem to impose no significant detriment to the vendor. The vendor retains legal title under such an arrangement,[69] until the escrow conditions are met (full payment of the vendor's interest, prior to termination

65. Gordon Grossman Bldg. Co. v. Elliot, 11 Mich. App. 620, 625, 162 N.W.2d 107, 109 (1968).

66. Generally, such restrictions upon an absolute estate are void as retraints on alienation because they are repugnant to the grant and violation of the restriction effects only the vendee's interest. Lantis v. Cook, 342 Mich. 347, 69 N.W.2d 849 (1955). In the case of land contracts, however, the vendor may validly provide that the vendee's interest shall not be assignable without his consent to protect his security. Sloman v. Cutler, 258 Mich. 372, 242 N.W. 735 (1932). Generally, this restriction is valid only between the vendor and vendee. Its breach may be raised by the vendor. Vande Vooren v. McCall, 360 Mich. 199, 103 N.W.2d 350 (1960). It is valid only while the vendor retains an interest. Lotesky v. Davis, 355 Mich. 536, 94 N.W.2d 796 (1959); *see* Annot., 148 A.L.R. 1361 (1944). *See generally* Annot., 42 A.L.R.2d 1243 (1955).

67. Ripley v. Lucas, 267 Mich. 682, 255 N.W. 356 (1934).

68. McIntyre v. McIntyre, 147 Mich. 365, 110 N.W. 960 (1907).

69. Frankiewicz v. Konwinski, 246 Mich. 473, 224 N.W. 368 (1929); Muirhead v. McCullough, 234 Mich. 52, 207 N.W. 886 (1926); 8 G. THOMPSON, THE LAW OF REAL PROPERTY § 4244, at 143 (4th ed. 1963); 4 H. TIFFANY, THE LAW OF REAL PROPERTY § 1053, at 244 (3d ed. 1939).

of the escrow arrangement). However, if the vendor's interest exceeds in value the vendee's resale price, the vendee clearly should be required to satisfy the rule with regard to the difference before the vendor is required to enter into the escrow arrangement.

It has been noted that a realistic right to redemption is one of the safeguards against potential hardship "and miscarriage of justice which may result from the vendor bidding in the property for less than its real value and then holding the purchaser for the deficiency which is thus fixed at an exhorbitant figure."[70] To require the vendee in the context of the principal case to tender the full purchase price as a condition to the vendor's delivery of his deed into escrow would seem to be commercially unreasonable.

Another foreclosure case decided during the Survey period is *Dumas v. Helm*.[71] The defendant purchased property on a land contract and on several occasions fell behind in payments. The court of appeals noted that plaintiff had instituted several circuit court commissioner's forfeiture actions and a forfeiture action in the circuit court itself, but each time the defendant had been allowed to make up the payments. Although the land contract had an acceleration clause which the vendor pressed in the action, the circuit court had ruled that the defendant, notwithstanding the acceleration clause, could make up the defaulted installment payments and denied the plaintiff's foreclosure. On appeal, the court of appeals held that the circuit court had no discretion to deny enforcement of an acceleration clause properly invoked, and ordered the entry of a judgment of foreclosure. The defendant, the court observed, could obtain equitable relief through the exercise of his right of redemption.

This decision, in part, involved the construction of section 3110 of the Revised Judicature Act,[72] requiring that a complaint for foreclosure be dismissed where the vendee brings into court the principal and interest due in situations where "there is due any interest or any portion or installment of the principal and there are any other portions or installments to become due subsequently

70. Durfee & Duffy, *Foreclosure of Land Contracts in Michigan: Equitable Suit and Summary Proceedings*, 7 MICH. ST. B.J. 166, 183 (1928).

71. 15 Mich. App. 148, 166 N.W.2d 306 (1968).

72. MICH. COMP. LAWS ANN. § 600.3110 (1968).

. . . ." The Committee Comment to section 3110 states that the effect of the above quoted clause makes the section inapplicable in the face of a properly invoked acceleration clause. The court adopts this interpretation. Absent the operation of section 3110, defendant's default is governed by Michigan contract law, which enforces acceleration clauses,[73] even though there are Michigan decisions specifically holding that such clauses constitute a form of penalty.[74] In conformity with past precedent the court accurately observed that the circuit court has never been held to possess judicial discretion where an acceleration clause is properly raised,[75] unless default has been induced by the unconscionable conduct of the vendor or is the result of a good faith dispute as to liability.[76] The facts of the principal case might be viewed as persuasive support for those advocating the enforcement of acceleration clauses; the vendees had defaulted and suffered foreclosure at least four times in four years.

VI. EMINENT DOMAIN

Two cases during the Survey period concerned the construction of the public utilities condemnation statute in light of the revised approach to condemnation contained in the 1963 Michigan Constitution, which, *inter alia*, changed a condemnation suit from an inquisitorial to an adversary proceeding. In *Detroit Edison Co. v. Zoner*,[77] defendant appealed the denial by the probate court of his

73. Young v. Zavitz, 365 Mich. 354, 112 N.W.2d 493 (1961); Brody v. Crozier, 242 Mich. 660, 219 N.W. 643 (1928); Jaarde v. Van Ommen, 265 Mich. 673, 252 N.W. 485 (1934); Rathje v. Siegel, 243 Mich. 376, 220 N.W. 658 (1928); Wilcox v. Allen, 36 Mich. 160 (1877).

74. Rathje v. Siegel, 243 Mich. 376, 220 N.W. 658 (1928); Wilcox v. Allen, 36 Mich. 160, 169 (1877); ("This clause is in the nature of a forefeiture or penalty. Its object is to punish for a willful neglect of a clear duty . . ."). The overwhelming majority of jurisdictions enforce acceleration clauses, but do not regard them as a penalty. Federal Land Bank v. Wilmarth, 218 Iowa 339, 252 N.W. 507 (1934); Graf v. Hope Bldg. Corp., 254 N.Y. 1, 171 N.E. 884 (1930); Luke v. Patterson, 192 Okla. 631, 139 P.2d 175 (1943); Fant v.Thomas, 131 Va. 38, 108 S.E. 847 (1929).

75. Brody v. Crozier, 242 Mich. 660, 219 N.W.2d 643 (1928); Larson v. Pittman, 3 Mich. App. 348, 142 N.W.2d 479 (1966).

76. Jaarda v. Van Ommen, 265 Mich. 673, 252 N.W. 485 (1934) (unconscionable conduct of a vendor); Rathje v. Siegel, 243 Mich. 376, 220 N.W. 658 (1928) (good faith dispute as to amount due); Wilcox v. Allen, 36 Mich. 160 (1877) (good faith dispute as to amount due).

77. 12 Mich. App. 612, 163 N.W.2d 496 (1968). This case also presentd a substantial issue concerning the parole evidence rule, the discussion of which was deemed inappropriate here.

request for a formal pretrial conference. The second division of the court of appeals determined that Michigan General Court Rule 301.1, requiring a pretrial conference in every "contested civil action," did not generally apply to probate court proceedings.[78] This decision would seem to conflict with the first division's holding in *State Highway Commissioner v. Lindow*,[79] that under a statute permitting the condemnation proceeding to be brought in either circuit court or probate court,[80] a condemnation suit is "contested civil action" within rule 301.1. The first division based its decision upon the nature and function of a pretrial conference, in light of the new adversary nature of condemnation cases generally, without distinguishing between those cases brought in circuit and in probate court. Although the Comment to General Court Rule 301.1 would make the rule inapplicable to condemnation cases, it would do so on the basis that such cases are inquisitorial proceedings.[81] The principal case limits the holding in *State Highway Commissioner v. Lindow* to those condemnation cases brought in circuit court. The court may have been influenced, in part, by the apparent use by defendant of the pretrial objection as a makeweight. According to the court, an informal pretrial conference was held (perhaps one without the requirements of General Court Rule 301.1) and the defendant failed to demonstrate that he was prejudiced by its informal nature. The growing role of the probate court as an adversary tribunal, the changed complexion of condemnation cases, and the function of pretrial conferences to facilitate court administration seems to militate against the second division's decision in the principal case. Clearly, there is no distinguishing

78. MICH. GEN. CT. R. 301 (1963) provides: "In every contested civil action the court shall direct the attorneys for the parties to appear before it for a conference . . . ."

79. 4 Mich. App. 496, 145 N.W.2d 223 (1966).

80. The *Lindow* case did not specify the statute under which that case was brought but it appears that under either MICH. COMP. LAWS ANN. § 224.12 (1967) (the provision under which both state and county road commissioners proceed) or MICH. COMP. LAWS ANN. § 213.177 (1967) (the general condemnation statute) a petition may be filed in either "the circuit court or the probate court of the county . . . ."

81. "A condemnation proceeding constitutes an inquest and not a 'contested' action; therefore, Rule 301 would not apply to condemnation cases. . . . The purpose of the pretrial conference is to arrive at a conclusion which will *control* the subsequent hearing, but the pretrial conference cannot accomplish this purpose in a condemnation case since the court does not control the condemnation hearing in the same sense that it controls a civil action." MICH. GEN. CT. R. 301, Committee Notes at 5 (1963).

characteristic between condemnation cases brought in circuit court and those in probate court which would warrant a double standard. By following the lead of *State Highway Commissioner v. Lindow* and holding that a probate court condemnation proceeding is a "contested civil action," rule 301.1 could be held to apply to the probate court through General Court Rule 11.2.[82] Although it found defendant had not been prejudiced in the action because an informal pretrial conference had been held, the court still might have adopted a requirement of future pretrial conferences while denying the defendant's appeal in the principal case.[83]

In *Chamberlin v. Detroit Edison Co.*[84] the plaintiff challenged a condemnation proceeding under the public utilities condemnation statute[85] on the basis that the statute was unconstitutional in light of the requirements of the 1963 Constitution. The case required the court of appeals, second division, to review the basic changes in condemnation proceedings made by the 1963 Constitution—the elimination of the condemnation "jury" and the change in the nature of the proceeding from an inquisitorial to an adversary action.[86] The construction of General Court Rule 516.5[87] and the supreme court's attempt to remold the old condemnation statutes so as to conform to the constitutional mandate, controlled the disposition of the case. The plaintiff argued that the General Court Rules were not applicable to the probate court. Adopting a posture

82. MICH. GEN. CT. R. 11.2 (1963) provides: "Rules which are by their terms applicable to other courts shall apply to those courts."

83. *Cf.* State Highway Comm'n v. Gulf Oil Corp., 377 Mich. 309, 140 N.W.2d 500 (1966).

84. 14 Mich. App. 565, 165 N.W.2d 845 (1968).

85. MICH. COMP. LAWS ANN. §§ 486.251-.254 (1967). Under this statute three commissioners appointed by the probate court determine both necessity and compensation, and it was enacted at a time when the condemnation jury or commission decided both law and fact.

86. MICH. CONST. art. X, § 2 (1963) provides: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner proscribed by law. Compensation shall be determined in proceedings in a court of record."

Mich. Const. art. XIII, § 1 (1908) provided: "Private property shall not be taken by the police nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law." Article XIII, section 2 provided that the jury or commissioners determine both necessity and compensation.

87. MICH. GEN. CT. R. 516.5 (1963) provides: "Judges of courts of record in which condemnation prceedings have been instituted shall advise the jury or commissioners on questions of law and admissibility of evidence."

seemingly inconsistent with its position in *Detroit Edison v. Zoner*, the court ruled that the application of rule 11.2 made rule 516.5 applicable to the probate court.[88] The court further held that the proceeding was adversary and satisfied the court of record requirement of the constitution and that the question of necessity (decided by the jury under the new procedure)[89] was properly one for court review. Under the public utilities condemnation statute and under the 1963 Constitution, the court stated, the plaintiff was not constitutionally entitled to a jury trial, as was suggested by *State Highway Commissioner v. Drouillard*.[90] Thus, the court reasoned that the right to trial by jury was constitutionally imposed only insofar as it existed at common law. Since it had never existed in Michigan condemnation cases independent of a specific constitutional or statutory provision,[91] the court held that it was not required by the new constitution. The right to trial by jury, the court commented, was never given absolutely in condemnation cases—the old constitutional provision expressly provided for disposition by a three-man commission.

The decisions discussed here represent a departure from recent holdings which involve a mere declaration by the court that condemnation proceedings are now adversary or a suggestion to the trial court that the judge and the jury should begin to perform their traditional functions.[92] In light of these cases, practitioners may be

88. However, an easy distingishing point is that both Rules 11.2 and 516.5 (the court of record rule) are stated in terms of the *court* in which a case is heard. While the pretrial conference rule is stated in terms of the nature of the action, it underscores the reluctance of this same division of the court of appeals to exercise the same sort of vigor in adapting the old statutory procedure to the new constitution in the area of pretrial conferences. A comparison of this case with *Zoner* makes very plausible the suggestion that the second division considered the objection in *Zoner* to be a makeweight.

89. *Compare* Mich. Const., art. XIII, § 2 (1908), *with* MICH. CONST. art. X, § 2 (1963).

90. 6 Mich. App. 605, 149 N.W.2d 903 (1967).

91. It is suggested that the absence of a jury in condemnation cases can be explained on the basis that they were historically inquisitorial. The result of this observation, however, is only that the legislature or the court is guilty of inconsistent judgment by not providing for jury trials by statute or court rule if the purpose of the 1963 Constitution and court rule 516.5 were intended to make the procedure adversary in the classical sense.

92. *E.g.*, United States v. Certain Parcels of Land in Ingham County, 233 F. Supp. 544 (W.D. Mich. 1964); Gregory Marina, Inc. v. City of Detroit, 378 Mich. 364, 144 N.W.2d 503 (1966); State Highway Comm'r v. Gulf Oil Corp. 377 Mich. 309, 140 N.W.2d 500 (1966); State Highway Comm'r v. Snell, 8 Mich. App. 299, 154 N.W.2d 631 (1967); State Highway Comm'r v. Lindow, 4 Mich. App. 496, 145 N.W.2d 223 (1966); State Bd. of Educ. v. von Zellen, 1 Mich. App. 147, 134 N.W.2d 828 (1965).

well advised to follow first the new provision of the constitution and court rule 516.5 and only as a last resort to rely upon the condemnation statute itself.

VII. RECIPROCAL NEGATIVE EASEMENTS

Two cases involving reciprocal negative easements (also referred to as mutual equitable servitudes)[93] were decided during the Survey period. In *Doxtator-Nash Civic Association v. Cherry Hill Professional Building, Inc.*,[94] plaintiffs sought an injunction ordering the removal of a parking lot constructed by defendants on certain lots (136, 137, 138, and 139) of the Doxtator & Nash Fort Dearborn Subdivision. Plaintiffs maintained that the lots were burdened with a reciprocal negative easement limiting their use exclusively to residential use and claimed, *inter alia*, the benefit of the alleged burden as owners of neighboring lots purportedly involved in a general development plan with defendants' lots. The court held that, although plaintiffs' lots may have been a part of a general development plan, defendants' lots were never affected by the plan and thus never burdened by the alleged use restriction.

In reaching its holding, the court first dismissed any consideration that an expressed restriction may have been imposed upon defendants' lots. The subdivision containing both plaintiffs' and defendants' lots was originally platted and recorded by the owners (Kornofskys) in 1919. Between the platting date and April 14, 1920, the Kornofskys conveyed a certain portion of the subdivision to the Nashes, Fullers, and Whites, intermediate grantees between the Kornofskys and plaintiffs. The record reflects no use restrictions in this conveyance. On April 14, 1920, the Nashes, Fullers, and Whites conveyed all or a substantial portion of their interest in the subdivision to the Doxtators,[95] also intermediate grantees between the Kornofskys and plaintiffs. This conveyance contained the use restriction upon which plaintiffs relied. On August 16, 1921 the Kornofskys conveyed the allegedly burdened lots (134 to 139) to defendants' precedessor in title, Ann Raffel. The conveyance was by warranty deed "free from all encumbrances whatever."

93. 7 G. THOMPSON, THE LAW OF REAL PROPERTY § 3163 (4th ed. 1962); Annots., 144 A.L.R. 916 (1943); 60 A.L.R. 1216 (1929).

94. 12 Mich. App. 468, 163 N.W.2d 262 (1968).

95. Lots 136, 137, 138, and 139 were expressly excluded from this conveyance.

A reciprocal negative easement will arise in the context of the principal case if both plaintiffs' and defendants' lots were part of a general plan of development formulated by a common grantor (Kornofskys). The plan must have been known, however, to the first grantee whose lots were burdened.[96] Conceptually, when, pursuant to a general plan, the first grantee's lot is restricted, a similar restriction is implied with respect to the grantor's remaining land involved in the plan.[97] The restriction is enforceable by the original grantees and their successors of lots benefited by the plan against grantees of the burdened lots and their successors who took title to the lots with notice of the restriction.[98] The notice condition may be satisfied by actual, record or inquiry notice.[99] There would seem to be no dispute in Michigan or other jurisdictions that reciprocal negative easements must originate from a common grantor.[100] For example, in Michigan an agreement by two owners of a subdivision to restrict the land of a third owner has been held ineffective.[101] In the principal case there is no grantor common to plaintiffs and defendants who, pursuant to a general plan of development, conveyed to plaintiffs' and defendants' respective predecessors in title the burdened and benefited land in question. Plaintiffs and

96. Lanski v. Montealegre, 361 Mich. 44, 104 N.W.2d 772 (1960); Cook v. Bandeen, 356 Mich. 328, 96 N.W.2d 743 (1959); Saari v. Silvers, 319 Mich. 591, 30 N.W.2d 286 (1948); Denhardt v. DeRoo, 295 Mich. 223, 294 N.W. 163 (1940); Signaigo v. Regun, 234 Mich. 246, 207 N.W. 799 (1926); Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317 (1911).

97. Sandborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925). *See also* Library Neighborhood Ass'n v. Goosen, 229 Mich. 89, 201 N.W. 219 (1924); 7 G. THOMPSON, THE LAW OF REAL PROPERTY § 3163 (4th ed. 1962); Annot., 144 A.L.R. 916 (1943).

98. Buckley v. Roman Catholic Archbishop, 339 Mich. 398, 63 N.W.2d 655 (1954); Saari v. Silvers, 319 Mich. 591, 30 N.W.2d 286 (1948); Nerrerter v. Little, 258 Mich. 462, 243 N.W. 25 (1932); French v. White Star Refining Co., 229 Mich. 474, 201 N.W. 444 (1924); Harley v. Zack, 217 Mich. 549, 187 N.W. 533 (1922); McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771 (1921); *cf.* Denhardt v. DeRoo, 295 Mich. 223, 294 N.W. 163 (1940).

99. *See* cases cited in note 98 *supra.*

100. Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925). According to *Sandborn,* the leading case, a reciprocal negative easement arises every time a person sells land which is located close to land which he retains and he restricts the land sold to the benefit of the land retained. The only safeguards placed upon such easements by *Sandborn* is that the restrictions must originate from a common grantor and can never be given retroactive effect. This was later limited somewhat by Denhardt v. DeRoo, 295 Mich. 223, 294 N.W. 163 (1940), which held that in order to establish such a restriction where it does not appear in the title involved (such as where a grantor who owns two lots sells one with restrictions and later one without restrictions) the plaintiff must show a scheme of restrictions or a common plan originating from the common grantor.

101. Gulfview Improvement Ass'n v. Uznis, 342 Mich. 128, 68 N.W.2d 785 (1955).

defendants had a common grantor, the Kornofskys, but the Kornofskys did not originate the general plan upon which plaintiffs relied. The plan was developed by the Nashes, Fullers, and Whites who were not common to defendants and formed no link in defendant's chain of title.

A second reciprocal negative easement case decided during the Survey period was *Clark v. Murphy*.[102] James Murphy, as owner, platted a subdivision of 495 lots on May 19, 1925. Thereafter, he entered into numerous land contracts, which were unrecorded and contained various restrictions, only one of which is particularly relevant to the case:[103] "Clause 4 'No building of more than two apartments shall be erected on less than 60 feet of frontage, except lots nos. 134, 135, 136 and 137.'" Subsequently, 69 deeds containing clause 4, among other restrictions, were issued by James Murphy in execution of the land contracts. Murphy died in 1934 devising all of his interest in the remaining lots in the subdivision to his sons, of whom the defendants are heirs. The sons and their heirs issued 354 additional deeds in the subdivision containing an amended clause 4 which eliminated the 60 feet of frontage condition for construction of buildings of more than two apartments and flatly prohibited their construction. They issued an additional 72 deeds subjecting the conveyances to restrictions of record. Defendants owned certain lots in the subdivision which were never conveyed away and certain lots which had been recovered through default on the land contracts. Plaintiffs maintained that these lots were subject to the absolute prohibition against buildings containing more than two apartments, as provided in amended clause 4. In an undistinguished opinion, the court held that the defendants' lots were not burdened with a reciprocal negative easement prohibiting structures containing more than two apartments.

The originator of the subdivision, James Murphy, adopted a

102. 16 Mich. App. 299, 167 N.W.2d 860 (1969).

103. A second restriction discussed in the case provided: "Clause 6. That all plans of buildings shall be first submitted to the vendors for written approval and no construction work shall be begun until said approval had [sic] been received in writing." *Id.* at 300, 167 N.W.2d at 861. An earlier clause included in the deeds issued by the common grantor provided: "For a period of 15 years from and after this date [sometime before May 23, 1934] all plans of buildings shall first be submitted to the parties of the first part or their successors in title for written approval and no construction work shall be begun until said approval has been received in writing." *Id.* at 301, 167 N.W.2d at 861.

general plan of development which imposed upon his first grantees an expressed burden to provide 60 feet of frontage for apartment buildings, resulting in a similar reciprocal implied restriction on all of his remaining lots.[104] This restriction would not, however, prevent the defendants from constructing apartment buildings on the land retained or reacquired, so long as they abided by the 60 foot frontage requirement. Plaintiffs maintained that defendants' modification of the original clause 4 to completely prohibit buildings of more than two apartments coupled with the issuance of 354 additional deeds containing the modification itself constituted a second general plan of development, giving rise to a new reciprocal negative easement on lands defendants held or reacquired. The court rejected this notion, apparently upon the trial judge's factual determination that no new plan was created.

One interesting question presented by the decision is whether the change in restrictions by the grantor's heirs negates the original "common plan." It is often stated that, while strict uniformity is not required,[105] too many random variations in an alleged common plan tend to negate the inference that one was intended.[106] Although the actions of the heirs cannot affect the original grantor's intent, they can affect execution of the plan. The extent to which an effective plan must be executed, however, is obscure.[107] In the no man's land between strict uniformity and too many random variations the court is without further guidance. Moreover, court decisions often reflect individual attitudes on property restrictions generally.

The question might be raised as to what is the significance of a common plan? In addition to its use as a requirement giving rise to a reciprocal negative easement, a common plan is required by some cases to prove that the restriction in a given deed was intended to run with the land rather than to take the status of a personal obligation extinguished upon subsequent transfer by the grantee.[108] A

104. *See* discussion in text at note 97 *supra*.

105. Lanski v. Montealegre, 361 Mich. 44, 104 N.W.2d 772 (1960); Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317 (1911).

106. Denhardt v. DeRoo, 295 Mich. 223, 294 N.W. 163 (1940); Kiskadden v. Berman, 244 Mich. 473, 221 N.W. 632 (1928); 7 G. THOMPSON, THE LAW OF REAL PROPERTY § 3163 (4th ed. 1962); Annot., 4 A.L.R.2d 1364 (1949) (omission from deed of a restrictive covenant imposed by general plan of subdivision).

107. 7 G. THOMPSON, THE LAW OF REAL PROPERTY § 3163 (4th ed. 1962).

108. Buckley v. Roman Catholic Archbishop, 339 Mich. 398, 63 N.W.2d 655 (1954);

few cases require a common plan to prove intent to restrict a lot where it is alleged that the restriction was omitted inadvertently.[109] Some cases have cited the appearance of a common plan as a means of giving notice to a grantee that the lot which he purchased may be similarly restricted.[110]

When the common plan requirement was first proposed in Michigan in 1909, it was interpreted by the court as a bill for the enforcement of an equitable contract.[111] The systematic imposition of these equitable restrictions grew to be called reciprocal negative easements.[112] The court's rationale seems to have been, in part, that grantees needed a property principle which would balance their bargaining position with that of the grantor's. This rationale would not appear to require that a common plan which is clearly articulated be strictly maintained from its inception to be enforceable against the grantor or his successors.

VIII. STATUTE OF FRAUDS

Two Survey cases, *Aetna Mortgage Co. v. Dembs*[113] and *Miller Glass Co. v. Kushmaul*,[114] offer an interesting review of Michigan statute of frauds as applied to real estate transactions. In the former case, a prospective mortgagor of a condominium and apartment

---

Library Neighborhood Ass'n v. Goosen, 229 Mich. 89, 201 N.W. 219 (1924). *See also* Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317 (1911) (a general plan maintained from inception and relied upon by all in interest gives rise to an easement that runs with the land); Stott v. Avery, 156 Mich. 674, 121 N.W. 825 (1909)) (treats it like a bill to specifically enforce an equitable contract).

109. Buckley v. Roman Catholic Archbishop, 339 Mich. 398, 63 N.W.2d 655 (1954); Kiskadden v. Berman, 244 Mich. 473, 221 N.W. 632 (1928); Frink v. Hughes, 133 Mich. 63, 94 N.W. 601 (1903); Harris v. Roraback, 137 Mich. 292, 100 N.W. 391 (1904).

110. Nerrerter v.Little, 258 Mich. 462, 243 N.W. 25 (1932); French v. White Star Refining Co., 229 Mich. 474, 201 N.W. 444 (1924); McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771 (1921).

111. Stott v. Avery, 156 Mich. 674, 683-84, 121 N.W. 825, 829 (1909):

> We understand the bill of complaint and the brief to proceed upon the theory, not that a binding contract was entered into between these parties which was enforceable by an action at law, but that the representations, conduct, and actions by the defendants and their predecessors before and since the making of the contract burdened them and their remaining lands with an equitable obligation . . . .

112. Although the landmark case of Sandborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925), is often given credit for coining the phrase "reciprocal negative easement," it originated with Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317 (1911).

113. 13 Mich. App. 686, 164 N.W.2d 771 (1968).

114. 13 Mich. App. 346, 164 N.W.2d 390 (1968).

complex agreed in a written memorandum to pay a one percent brokerage fee to plaintiff Aetna Mortgage Co., a mortgage broker, to locate a willing lender. Aetna contacted Detroit Federal Savings and Loan Association, which agreed, pursuant to an executed loan agreement with the mortgagor, to loan the project funds. Upon learning of the completed loan transaction, Aetna demanded a one percent "finders fee" from Detroit Federal (which was not a party to the written memorandum), alleging an oral agreement with Detroit Federal for the "finders fee." The trial court granted summary judgment in favor of defendant Detroit Federal and the court of appeals affirmed on the ground that the alleged oral agreement violated the statute of frauds, notwithstanding full performance by Aetna of its alleged obligation.

In *Miller Glass Co. v. Kushmaul*, defendant, a sole proprietor, and his wife allegedly agreed orally in 1960 to convey all of the property which they owned and which was being used in his business to a corporation formed to take over the business. Elzinga & Volkers, Inc., claimed to have purchased all of the outstanding shares of stock of the corporation in 1966 relying upon the representation that the property in question was an asset of the corporation and on behalf of the corporation sought specific performance of the alleged 1960 oral agreement. The trial court denied summary judgment to plaintiff, and the court of appeals remanded to the trial court for a determination of whether plaintiff had fully performed an obligation which would remove the alleged oral agreement to convey an interest in real property from the statute of frauds.

Although both *Aetna Mortgage Co.* and *Miller Glass Co.* involve the operation of the statute of frauds (and the effect of one party's performance on the statute), the two cases are not governed by the same operative provisions. *Miller Glass Co.* is governed by the classic provision covering the sale of any interest in land,[115] whereas *Aetna Mortgage* is governed by the broker's commission provision, a relatively new addition to the statute. Soon after it was passed the broker's commission provision was given a stricter

115. MICH. COMP. LAWS ANN. § 566.107 (1967) provides: "Every contract . . . for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the . . . sale is to be made. . . ."

interpretation with respect to the effect of performance on its operation than had been applied to its classic counterpart.[116] The court in *Paul v. Graham*[117] noted that unlike sales contracts, broker's commission contracts are usually the subject of suit only after one party has fully performed. Enforcing the alleged oral agreement on the basis that it has been fully performed on one side would defeat the statute of frauds in every case. This rationale has led Michigan courts to rule unanimously that once an agreement is void under the broker's commission provision, recovery would not be allowed under any other theory.[118] The Revised Judicature Act adopts a consistent scheme by preserving specific performance relief in cases involving part performance of agreements for the sale of an interest in land, but providing no similar relief with respect to agreements involving broker's commissions.[119]

It is generally recognized, however, that the purpose of the broker's commission provision is to protect a landowner against the unfounded or fraudulent claims of brokers. As a result, most jurisdictions have applied the provision only in the broker-landowner setting.[120] Until *Aetna Mortgage*, Michigan appeared to concur in this view. In this regard, *Smith v. Starke*[121] formulated a two part

116. *Id.* § 566.132 provides:

> In the following cases specified in this section, every agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized . . . .
>
> . . . .
>
> 5. Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate . . . .

117. 193 Mich. 447, 160 N.W. 616 (1916).

118. Ekelman v. Freeman, 350 Mich. 665, 87 N.W.2d 157 (1957); Krause v. Boraks, 341 Mich. 149, 67 N.W.2d 202 (1954); Jaynes v. Petoskey, 309 Mich. 32, 14 N.W.2d 566 (1944); Mead v. Rehm, 256 Mich. 488, 239 N.W. 858 (1932); Wilcox v. Dyer-Jenison-Barry Land Co., 217 Mich. 35, 185 N.W. 776 (1921); Purdy v. Law, 212 Mich. 275, 180 N.W. 251 (1920); Smith v. Starke, 196 Mich. 311, 162 N.W. 998 (1917); Judy v. Lentz, 6 Mich. App. 511, 149 N.W.2d 478 (1967); Gustafson v. Bud Clark, Inc., 5 Mich. App. 118, 145 N.W.2d 858 (1966).

119. MICH. COMP. LAWS ANN. § 566.110 (1967) provides: "Nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements, in cases of part performance of such agreements." Chapter 80 includes MICH. COMP. LAWS ANN. §§ 566.101-.110 (1967). Chapter 81, which contains the broker's commission statute, includes MICH. COMP. LAWS ANN. §§ 566.131-.136 (1967).

120. Cases are collected in Annots., 44 A.L.R.2d 741 (1955); 64 A.L.R. 1423 (1930).

121. 196 Mich. 311, 162 N.W. 998 (1917).

inquiry: (1) whether the disputed payment can be legitimately characterized as a "commission" and (2) whether the legislature could reasonably be said to have intended the provision to cover the relationship before the court. In *Smith*, the court noted that because the statute was stated in terms of "agreements" rather than in terms of relationships, as is characteristic of broker's commission statutes of some other states,[122] its application to commissions in connection with real estate transactions was unlimited. This view, however, was rejected in *Thompson v. Carey's Real Estate*,[123] where a real estate broker was not allowed to use the statute as a defense to his employee's suit to enforce an oral promise to pay a commission in connection with the sale of certain land. In spite of the unlimited wording of the statute (the basis for the holding in *Smith*), the court restricted its application to relationships which it felt that the legislature reasonably intended to regulate. Accordingly, *Thompson* found the simple employer-employee relationship was not within the ambit of the statute. This construction was later approved and applied to an oral agreement between brokers to divide a commission.[124] Similarly, in *Summers v. Hoffman*,[125] where the statute was pleaded as a defense in a suit to collect part of the proceeds from the sale of land, the subject of a joint venture, the court noted that even though the payment was "compensation to a factor or other agent" and thus in the nature of a commission, the statute was inapplicable since the parties were in a fiduciary relationship which was otherwise clearly defined and regulated. The net effect of these cases would seem to have limited the statute in Michigan to the apparent legislative purpose of protecting landowners from the unfounded claims of brokers.[126] The court in *Aetna Mortgage* has expanded the

122. *See* Annots., 44 A.L.R.2d 741 (1955); 64 A.L.R. 1423 (1930).

123. 335 Mich. 474, 56 N.W.2d 255 (1953).

124. Beznos v. Borisoff 339 Mich. 12, 62 N.W.2d 461 (1954).

125. 341 Mich. 686, 69 N.W.2d 198 (1955).

126. The legislative intent has been variously stated. Ekelman v. Freeman, 350 Mich. 665, 87 N.W.2d 157 (1957) (to protect landowners against unfounded and fraudulent claims by brokers and also because requirement of a writing is expedient); Summers v. Hoffman, 341 Mich. 686, 69 N.W.2d 198 (1955) (that the legislature intended this statute to apply only to agreements by an agent or broker); Thompson v. Carey's Real Estate, 335 Mich. 474, 56 N.W.2d 255 (1953) (to protect property owners from the fraudulent or unfounded claims of brokers); Stephenson v. Golden, 279 Mich. 710, 276 N.W. 849 (1937) (to prevent fraud); Purdy v. Law, 212 Mich. 275, 180 N.W. 251 (1920) (parole depends for its veracity on the memory of interested witnesses); Bagaeff v. Prokopek, 212 Mich. 265, 180 N.W. 427 (1920)

application of the broker's commission statute, but in doing so, has not clearly utilized the two part *Smith* inquiry. Although characterizing the "finders fee" as a commission would seem to be justified, application of the statute to a mortgagee-mortgage broker relationship in light of the purpose of the broker's commission provision, as interpreted by Michigan decisions, is questionable. Clearly a professional mortgagee is not as subject to the unfounded claims of mortgage brokers as an individual landowner. *Aetna Mortgage* did present a fact situation closer to the conventional landowner-broker relationship than any other nonconventional relationship which has been before Michigan courts, a circumstance which apparently swayed the court.

IX. CONCLUSION

Michigan appellate courts made no startling pronouncements with respect to the law of real property during the Survey period. For the most part traditional property concepts were unequivocally confirmed, consistent with the courts' past practices. Some flexibility, however, was experienced in dealing with the foreclosure of land contracts and the allocation of charges under the landlord-tenant relationship. In striking down a provision in the City of Saginaw housing code, the supreme court in a questionable decision may have created more problems than it has cured. On balance, the body of real property law which existed in Michigan in 1968 remains intact through 1969.

(intended to cut off method of collection, broker could procure a note for the amount of his commission and the note would be enforceable). In Summers v. Hoffman, 341 Mich. 686, 69 N.W.2d 198 (1955), the court pointed to the fact that the rights, duties, and liabilities of joint venturers were already well-defined as evidence that the legislature did not intend this statute to further regulate the relationship.