MICHIGAN
LAW REVISION COMMISSION

ELEVENTH ANNUAL REPORT

1976

MICHIGAN LAW REVISION COMMISSION

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Tom Downs, Vice Chairman
David Lebenbom
Harold S. Sawyer

Ex-Officio Members:

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MICHIGAN LAW REVISION COMMISSION
Eleventh Annual Report to the Legislature

To the Members of the Michigan Legislature:

The Law Revision Commission hereby presents its eleventh annual report pursuant to Section 14(e) of Act No. 412 of the Public Acts of 1965.

The Commission, created by Section 12 of that Act, consists of the chairman and ranking minority members of the Committees on Judiciary of the Senate and the House of Representatives, the Director of the Legislative Service Bureau, being the five ex-officio members, and four members appointed by the Legislative Council. Terms of appointed Commissioners are staggered. The Legislative Council designates the Chairman of the Commission.

The members of the Commission during 1976 were Senator Basil W. Brown of Highland Park, Senator Donald E. Bishop of Rochester, Representative Paul A. Rosenbaum of Battle Creek, Representative William R. Bryant, Jr. of Grosse Point Farms, A.E. Reyhons, Director of the Legislative Service Bureau, as ex-officio members; Tom Downs, Jason L. Honigman, David Lebenbom, and Harold S. Sawyer, as appointed members. The Legislative Council appointed Jason L. Honigman Chairman and Tom Downs Vice Chairman of the Commission. Professor Jerold Israel of the University of Michigan Law School served as Executive Secretary.

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reform.

2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers and the public generally as to defects and anachronisms in the law.

4. To recommend, from time to time, such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal into harmony with modern conditions.

The problems to which the Commission directs it studies are largely identified by a study of statute and case law of Michigan and legal literature by the Commission members and Executive Secretary. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

The Commission's efforts during the past year have been devoted primarily to three areas. First, the Commission met with legislative committees to secure disposition of some 14 bills under Committee consideration upon recommendation of the Commission. Several of these bills were enacted into law. Meetings with legislative members have also focused upon possible subjects for future study. Second, the Commission examined various recent proposals for suggested legislation advanced by various groups. These included the 1976 and 1977 volumes on suggested state legislation issued by the Council of State Governments, the latest available report (1975) of the National Conference of Commissioners on Uniform State Laws, and the Law Revision Commission Reports of various jurisdictions within and without the United States (e.g., California, New York, and British Columbia). Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others. From the topics suggested by the various law revision reports and its review of Michigan developments, the Commission selected the following for immediate study and report:

(1) Construction Debt Act

(2) Marital Agreements

(3) Unlawful Assessments

(4) Plat Changes

(5) Eliminating References to Abolished Courts

Recommendations and proposed statutes have been prepared on the above subjects and accompany this report.

In addition to the new recommendations contained in this report, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1976:

(1) Multiple Party Deposits ("Statutory Joint Account Act") -- See Recommendations of 1966 Annual Report, p. 18.

(2) Elimination of Appointment of Appraisers In Probate Court -- Former H.B. 4863, before House Committee on Judiciary; former S.B. 1111, before Senate Committee on Judiciary. See Recommendations of 1972 Annual Report, p. 65.

(3) Condemnation Procedures Act -- Former H.B. 4867, before House Committee on Judiciary; former S.B. 1108, before Senate Committee on Judiciary. During a previous legislative session this bill passed the Senate. A substitute bill, with substantial revisions, was proposed before the House Committee after extensive hearings. The Commission cooperated with various objecting groups in drafting the substitute bill. See Recommendations of 1968 Annual Report, p. 11.

(4) Amendments to Telephone and Messenger Service Company Act -- Former S.B. 1113, passed the Senate in 1976 and before the House Committee on Public Utilities; also former H.B. 4989, before the House Committee on Public Utilities. See Recommendations of 1973 Annual Report, p. 48.

(5) Trial of Divorce Actions -- Former H.B. 4902, before the House Committee on Judiciary; S.B. 1107, before Senate Committee on Judiciary. See Recommendations of 1974 Annual Report, p. 8.

(6) Amendments to the Uniform Commercial Code -- Former S.B. 1456, before the Senate Committee on Corporations and Economic Developments. See Recommendations of 1975 Annual Report, Special Supplement.

(7) Administrative Procedures: Hearings Officers in Contested Cases -- Former S.B. 1454, before the Senate Committee on Judiciary. See Recommendations of 1975 Annual Report, p. 9.

(8) Technical Revisions of the Code of Criminal Procedure (Eliminating References to Abolished Courts) -- Former S.B. 1457, passed Senate in 1976 and before House Committee on Judiciary. See Recommendations of 1975 Annual Report, p. 24.

(9) Deferred Damage Payments for Injuries to the Person -- Former S.B. 1452, before the Senate Committee on Judiciary.

Topics on the current study agenda of the Commission are:

(1) Punitive Damages
(2) Commercial Real Estate Leasing
(3) Eliminating Statutory References to Justice of the Peace and Other Abolished Courts
(4) Court Costs
(5) Non-Profit Corporation Act
(6) Special Property Assessments
(7) Class Action Suits
(8) Debtor Exemption Provisions
(9) Enforcement of Administrative Agency Subpoenas

The Commission continues to operate with its sole staff member, the part time Executive Secretary, whose offices are in the University of Michigan Law School, Ann Arbor, Michigan 48109. The use of consultants has made it possible to expedite a large volume of work and at the same time give the Commission the advantage of expert assistance at relatively low cost. Faculty members of several law schools in Michigan continue to cooperate with the Commission in accepting specific research assignments.

The Legislative Service Bureau has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau, who acts as Secretary to the Commission, continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some case amendments thereto by the Legislature:

1967 Legislative Session

Subject	Commission Report	Act No.
Powers of Appointment	1966, p. 11	224
Interstate and International Judicial Procedures	1966, p. 25	178
Dean Man's Statute	1966, p. 29	263
Corporation Use of Assumed Names	1966, p. 36	138
Stockholder Action Without Meeting	1966, p. 41	201
Original Jurisdiction of Court of Appeals	1966, p. 43	65

1968 Legislative Session

Jury Selection	1967, p. 23	326
Emancipation of Minors	1967, p. 50	293
Guardian ad Litem	1967, p. 53	292
Possibilities of Reverter and Right of Entry	1966, p. 22	13
Corporations as Partners	1966, p. 34	288
Stockholder Approval of Mortgaging Assets	1966, p. 39	287

1969 Legislative Session

Administrative Procedures Act	1967, p. 11	306
Access to Adjoining Property	1968, p. 21	55
Antenuptial Agreements	1968, p. 27	139
Notice of Tax Assessments	1968, p. 30	115
Anatomical Gifts	1968, p. 39	189
Recognition of Acknowledgments	1968, p. 61	57
Dead Man's Statute Amendment	1968, p. 29	63
Venue Act	1968, p. 19	333

1970 Legislative Session

Subject	Commission Report	Act No.
Appeals from Probate Court Act	1968, p. 32	143
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships Act	1969, p. 44	90
Warranties in Sales of Art Act	1969, p. 47	121
Minor Students Capacity to Borrow Act	1969, p. 51	107
Circuit Court Commission Power of Magistrates Act	1969, p. 62	238

1971 Legislative Session

Revision of Grounds for Divorce	1970, p. 7	75
Civil Verdicts by 5 of 6 Jurors in Retained Municipal Courts	1970, p. 40	158
Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

1972 Legislative Session

Business Corporation Act	1970, Supp.	284
Summary Proceedings for Possession of Premises	1970, p. 16	120
Interest on Judgments Act	1969, p. 64	135
Constitutional Amendment re Juries of 12	1969, p. 65	HJR "M"

1973 Legislative Session

Technical Amendments to Business Corporation Act	1973, p. 8	98
Execution and Levy in Proceedings Supplementary to Judgment	1970, p. 51	96

1974 Legislative Session

Subject	Commission Report	Act No.
Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Model Choice of Forum Act	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic Relations Cases	1972, p. 53	90
Technical Amendments to the General Corporations Act	1973, p. 38	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
1974 Technical Amendments to the Business Corporation Act	1974, p. 30	303
Attachment Fees Act	1968, p. 23	306
Amendment of "Dead Man's" Statute	1972, p. 70	305
Contribution Among Joint Tort-feasors Act	1968, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Elimination of Pre-judgment Garnishment	1972, p. 7	371

1975 Legislative Session

Amendment of Hit-Run Provisions to Provide Specific Penalty	1973, p. 54	170
Uniform Child Custody Jurisdiction Act	1969, p. 22	297
Insurance Policy in Lieu of Bond Act	1972, p. 59	290
Uniform Disposition of Community Property Rights At Death Act	1973, p. 50	289
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 30	288

1976 Legislative Session

Due Process in Replevin Actions	1972, p. 7	79
Qualifications of Fiduciaries	1966, p. 32	262
Revision of Revised Judicature Act Venue Provisions	1975, p. 20	375
Durable Family Power of Attorney	1975, p. 18	376

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Jason L. Honigman, Chairman
Tom Down, Vice Chairman
David Lebenbom
Harold S. Sawyer

Ex-Officio Members
Sen. Basil W. Brown
Sen. Donald E. Bishop
Rep. Paul A. Rosenbaum
Rep. William R. Bryant, Jr.
A.E. Reyhons, Secretary

Date: December 20, 1976

RECOMMENDATIONS RE CONSTRUCTION DEBT ACT TO REPLACE MECHANICS LIENS

The mechanics lien laws of this State are predicated upon complex statutory provisions (M.C.L. §§570.1-570.30). Although these statutes have a long history of judicial interpretation, there is still much confusion and ambiguity which generates considerable litigation involving the validity, priorities, enforcement and disposition of mechanics lien claims. In a report of the Real Property Section of the State Bar of Michigan released on August 27, 1976, it is stated that the Mechanics Lien Act is "a phase of real property law which has been the source of more uncertainty, contradictory and confusing decisions, and wasted effort, than any other single statutory procedure." Currently, serious question has been raised as to the constitutionality of mechanics lien laws since in a sense they involve taking of property without judicial determination. Lower court decisions have been made on each side of that issue but there is as yet no definitive determination of that issue at either the state or federal level.

The establishment of a valid mechanics lien as well as its enforcement is hedged with many legal technical requirements which the courts have strictly construed. For the lien claimant, the creation of the lien and its enforcement is a veritable obstacle course strewn with pitfalls, uncertain of achievement, subject to interminable delays, expensive litigation and haphazard results when it is contested, as it usually is, by the owner, the mortgagee or another lien claimant.

For the owner, the emergence of unexpected lien claimants may becloud his title, delay completion of his building and embroil him in time consuming and expensive litigation. Moreover, it is no defense to an owner that he has paid the general contractor when a valid mechanics lien claim is made by a subcontractor.

For the construction loan mortgagee, relying as he does on the record title as proof that his mortgage is a first lien on the property, the emergence of unrecorded mechanics

lien claimants make questionable his security and involve him in costly litigation for which the law does not reimburse him. Moreover, the legal remedies available to him are often inadequate to prevent substantial loss in the event of the mortgagor's default particularly where construction of the building has not been completed. As a result, many banks and mortgage lenders are reluctant to finance construction mortgages and when they do, they require payment of heavy fees and high interest charges to compensate for the risks entailed.

As a consequence of these very considerable obstacles to construction financing arising out of the mechanics lien laws, construction lenders have attempted to shift the risk and burden to the title insurer and have taken the position that construction financing cannot go forward unless the title insurer is willing to unconditionally insure the lender's priority over any mechanics lien claimants. However, in view of many serious losses which have been suffered by title companies in Michigan upon issuance of such insurance, title companies have only been willing to insure construction mortgages upon a limited basis at high charges and with severe restrictions which often make construction lending unacceptable to many financial institutions. The problem is particularly acute at this time when the most prolific source of construction lending, namely the Real Estate Investment Trusts (REIT), is generally no longer available. As a result, the availability of construction funds in this state is more limited than the needs of the construction industry warrant.

It is clear that the mechanics lien laws of today have proven unsatisfactory and ineffective for all segments of the real estate construction industry and have probably been a constricting element of its growth. It has long been recognized that this area of the law sorely needs re-examination and re-evaluation in order to arrive at a fair and viable means for protecting the rights and interests of all parts of that industry.

To deal with this problem realistically, we must first look at the underlying rationale of mechanics lien laws. Mechanics lien laws have their origin in the early history

of our country. Their primary aim was to protect the artisan laborer by securing payment for the services he rendered. By granting him a lien on the product of his work effort, he was assured a likelihood of payment from a slow-paying or impecunious owner.

In modern times, however, the need of construction workers for enforcement of mechanics lien rights has diminished to the point where it is rarely, if ever, used as a means to assure payment to the construction laborer. The laborer is hired by the general contractor or subcontractor. Since he is generally paid weekly or biweekly and is usually protected both by state and federal wage and hours laws and by union requirements as well, he has little, if any, occasion to look to the expensive and time consuming procedures of mechanics lien rights to assure payment of his wages. In reality it is only the businessman who sells services or materials who looks to the mechanics lien laws to secure payment from his debtors.

But even the businessman, typically the general contractor or subcontractor who supplies services or materials, normally places little reliance on the mechanics lien laws to assure payment. In the construction of public buildings for governmental agencies, as well as in the building of highways and bridges, mechanics lien laws are inapplicable since no mechanics lien rights are available against public property. In the construction of large industrial buildings, mechanics lien rights are rarely asserted since the owner's financial credit generally affords adequate assurance for payment of construction costs.

In the erection of commercial buildings such as shopping centers and apartment buildings, mechanics lien rights are normally not asserted since they are usually built by developers whose personal credit as well as use of construction financing are relied upon for payment of the cost of construction. This is likewise true in large measure in the construction of single homes since a major portion are built by developers of large tracts with similar financial viability.

Often, too, the subcontractor is precluded from claiming mechanics lien rights because of the insistence of the general contractor for waiver of such rights as a condition of making the contract award to the subcontractor or as a condition of continuance of ongoing business relationships.

When construction financing is obtained, a construction loan mortgage is generally entered into which is structured to be a first lien on the property superior to any mechanics lien claimants. The mortgage is recorded before the commencement of construction so that its lien rights can become superior to all mechanics lien claimants. When the construction financing mechanism is used, which is frequently the case in large building projects, mechanics lien rights rarely add significant protection for the contractors and material suppliers.

Thus in the major areas of the real estate construction industry, the need for mechanics lien protection is of limited scope and its actual use is the exception rather than the rule. To the extent that mechanics lien rights are asserted, they are too often ineffective and disappointing to all segments of the industry.

Attempts heretofore made to cure the inefficacy of mechanics lien laws have been doomed to failure by the inherent nature of such rights which necessarily require strict legal limitations. The important need of protecting title to real property requires that any derogation of title of a nonconsensual nature, such as the mechanics lien, be strictly limited in origin and scope. These limitations necessarily require strict adherence if the owner's title is to be adequately protected. Such legal technicalities inevitably result in ambiguity, confusion and the likelihood of the inordinate delays and expense of litigation. Mechanics lien laws as presently structured are a bane to the construction industry and the judicial system and unless they are deemed indispensable to the functioning of that industry, they should be terminated.

Let us see then whether mechanics lien laws are indispensable. In commercial transactions other than in the construction field, a purveyor of goods, materials or services gains no automatic lien rights as a matter of law. He either relies solely on the credit of the buyer or else he bargains for some form of guaranty or security. A seller of steel for manufacturing processing gains no automatic lien rights as a matter of law. Why then should lien rights accrue when steel is sold for use in a construction project? Why should a loan of money to buy real property result in no lien to the lender unless the parties have agreed in writing to the execution of a mortgage on the property while the contractor who builds a building on that property automatically gains mechanics lien rights without the consent of the owner?

From the standpoint of fairness and logic, whether on philosophical, moral or economic grounds, there appears no reasonable justification for the creation of mechanics lien rights on real property without consent of the owner. Since it is deemed both fair and expedient to carry on all other commerce and industry without legally imposed automatic lien rights, it should be equally so in the real estate construction field. Creation of liens in this field should be based upon agreement of the parties as it is in all other transactions of commerce and industry. Absent such agreement, the purveyor of materials and services in the real estate construction field should be subjected to the same problems of credit and security as are faced by the seller of merchandise and services in all other commercial transactions.

Thus, the basic principal for revision of the law in this field should be predicated on the fundamental concept that no lien should be imposed on real estate without consent of the owner. To the extent that contractors, subcontractors or material suppliers in the construction industry wish the protection of lien rights or any other security, they should of course be free to bargain for it as part of their initial contractual arrangements. Effective security rights can then be granted to them by mutual consent of the parties in interest.

To achieve the requisite clarity and certainty in this area of the law, we believe that any lien rights by way of an encumbrance on real property should be predicated primarily on the well established rules of law applicable to real estate mortgages. Accordingly, the proposed bill abolishes the present mechanics lien laws and provides for consensual security arrangements through construction loan mortgages and the creation of security for construction debts only to the extent they are agreed to by the parties.

The proposed bill abolishes mechanics liens. It leaves contractors and materialmen free to enter into any contractual arrangement for sale of their goods and services with such form of guaranty or security as is mutually agreed upon. To aid the construction industry in formulating another viable form of security for payment, a new form of instrument designated a construction debt certificate is created. Such certificate is to be issued pursuant to authority in a construction loan mortgage specifically designated as a construction debt mortgage.

The construction debt mortgage is basically the present type of construction loan mortgage with specific right given to the mortgagor to create construction debt certificates. The rights of the mortgagee are enhanced by expedited foreclosure proceedings which permit early completion of property under construction.

Two kinds of construction debt mortgages are provided for, namely, the funded mortgage and the unfunded mortgage. The funded mortgage is basically the mortgage presently known as a construction loan mortgage which is often used in the course of construction of large projects. Under the terms of such mortgage or the lending agreement executed simultaneously therewith, the mortgagee agrees to loan money to the mortgagor to be released at designated intervals during the course of construction.

By the terms of the funded mortgage, the mortgagor can be given authority to issue mortgage debt certificates which in substance are an assignment to a designated payee, pre-

sumably a contractor or materialman, of the right to receive the funds which the mortgagee has agreed to advance during the course of construction. The payee in turn can assign his rights under the mortgage debt certificate in whole or in part to others. Thus the holders of the construction debt certificates will have not only the contractual promise to pay by the purchaser of the materials or services, but in addition, an assignment of the mortgagee's promise to pay. Since the mortgagee is generally a financial institution of substantial means, its obligation to pay will be a valuable form of guaranty of payment.

Where construction financing is not desired or available, the purveyor of goods can seek security through the means of an unfunded construction debt mortgage which could be a first lien or encumbrance on the property. In an unfunded mortgage, the mortgagor executes and records a construction debt mortgage in a designated sum as an encumbrance against his property. The mortgagor can issue construction debt certificates thereunder in like manner as in the case of the funded mortgage. The mortgagee in the unfunded mortgage is designated as a trustee for the holders of the construction debt certificates. In the event of nonpayment by the mortgagor, the holder of the construction debt certificate would have the right to require the trustee to foreclose the mortgage and distribute the proceeds of the sale of the property to the holders of the construction debt certificates.

The proposed bill should prove beneficial to every segment of the real estate construction industry. From the standpoint of the owner, his ownership title will be secure without the intrusion of inchoate mechanics lien rights. He can no longer be caught by surprise by the unexpected emergence of lien claimants who cloud his title, seek duplicity of payment and cause delays in construction and the heavy expense of litigation incident thereto. The high cost of fees to the title companies for continuous monitoring of mechanics lien claims and insuring against loss therefrom will be largely eliminated.

From the standpoint of the mortgagee construction lender, he can rely on the priority of his mortgage lien without fear

of defeat by mechanics lien claimants whose existence was unknown at the time he loaned the money. By liberalization of the foreclosure rules applicable to construction loan mortgages, he will be more readily protected against loss in the event of default.

From the standpoint of the contractor or materialman, he will know in advance that he cannot rely on lien rights that in current practice are largely illusory but must look either to the credit of the owner or contractor who bargains for his products or services or else insist upon some form of guaranty or security such as the proposed construction debt certificate. While the construction debt certificate under a funded mortgage will not constitute an encumbrance against the property, it will be an assignment of the construction loan proceeds to the contractor or subcontractor. In the case of the unfunded mortgage, the holder of the construction debt certificate will have the beneficial interest in a mortgage which is an encumbrance on the property. The use of the construction debt certificates should prove to be a useful tool in supplying a viable form of security for payment in the construction industry.

By enactment of this bill, the enforcement of payment problems in the construction industry will be largely equated with all other commerce and industry. The pitfalls of mechanics lien laws which have ill served the real estate construction industry will thereby be eliminated. As to the specific provisions of the bill, our additional comments appear separately under each section.

The proposed bill follows:

A bill to provide for the creation of construction debt certificates to secure payment for obligations incurred in the construction and development of real property and to provide for the creation and foreclosure of construction debt mortgages and to repeal the mechanics lien law, being Act No. 179 of the Public Acts of 1891, as amended, being sections 570.1 to 570.30 of the Compiled Laws of 1970.

SEC. 1. THIS ACT SHALL BE KNOWN AND MAY BE CITED AS THE "CONSTRUCTION DEBT ACT."

SEC. 2. AS USED HEREIN THE FOLLOWING DEFINITIONS SHALL BE APPLICABLE UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "PROPERTY" IS ANY INTEREST IN REAL ESTATE, INCLUDING LEASEHOLD RIGHTS AND EASEMENTS AND THE LAND, BUILDINGS AND APPURTENANCES THEREON ENCUMBERED BY A CONSTRUCTION DEBT MORTGAGE.

Comment: Wherever the term "property" is used in this act, it is intended that it should cover all of the property that is encumbered by the particular mortgage.

(b) "CONSTRUCTION DEBT MORTGAGE" IS A MORTGAGE ON PROPERTY GOVERNED BY THE TERMS OF THIS ACT.

Comment: The term "construction debt mortgage" is used as a word of art to denote mortgages that are governed by the terms of this act as a result of compliance with Section 3.

(c) "CONSTRUCTION DEBT CERTIFICATE" IS A WRITTEN INSTRUMENT ASSIGNING TO A DESIGNATED PAYEE THE RIGHT TO RECEIVE FUNDS DISTRIBUTABLE BY A MORTGAGEE UNDER A CONSTRUCTION DEBT MORTGAGE AS PROVIDED IN SECTIONS 5 AND 6.

Comment: A "construction debt certificate" as used in this act refers to the rights created pursuant to the terms of this act under an instrument separate from the mortgage pursuant to Sections 5 and 6 which entitles a designated person to receive specified sums distributable by a mortgagee under a construction debt mortgage.

(d) "HOLDER OF A CONSTRUCTION DEBT CERTIFICATE" IS ANYONE ENTITLED TO RECEIVE FUNDS UNDER A CONSTRUCTION DEBT CERTIFICATE OR ANY ASSIGNMENT THEREOF.

Comment: The "holder of a construction debt certificate" is the person designated as a payee of funds to be distributed under a construction debt certificate or the assignee of such payee or his successor in interest.

(e) "FUNDED MORTGAGE" IS A CONSTRUCTION DEBT MORTGAGE IN WHICH THE MORTGAGEE HAS FURNISHED OR UNDERTAKEN TO FURNISH THE FUNDS SECURED BY THE MORTGAGE.

Comment: A "funded mortgage" is a mortgage for construction financing commonly referred to as a construction loan mortgage whereby the mortgagee agrees to distribute designated sums of money to the mortgagor generally at specified dates or stages of the construction project. When executed in compliance with Section 3, it is designated as a construction debt mortgage.

(f) "UNFUNDED MORTGAGE" IS A CONSTRUCTION DEBT MORTGAGE IN WHICH THE MORTGAGOR HAS UNDERTAKEN TO FURNISH THE FUNDS SECURED BY THE MORTGAGE.

Comment: An "unfunded mortgage" as herein defined is not currently in general use, although presumably it could be created under present law. The intent of this provision is to create a vehicle which can afford a specific type of security to contractors and material suppliers by giving them a mortgage which creates an encumbrance on the property to be held in the name of a mortgagee who acts as trustee for the holders of the construction debt certificates.

Generally a bank or trust company would likely be designated mortgagee. Thus the owner could agree that the general contractor and those claiming under him should receive a construction debt certificate secured by a mortgage on the property wherein the mortgagee is trustee in behalf of the holders of the construction debt certificates to assure payment of the owner's indebtedness to them. Upon failure of the owner to make the payments provided for in the mortgage, the mortgagee would have the right to foreclose under the provisions of this act and divide the proceeds for the benefit of the holders of construction debt certificates.

An unfunded mortgage could also be useful in granting protection to contractors and material suppliers in the form of a second mortgage where the funds to be supplied by the first mortgage are insufficient to complete the construction.

(g) "CONSTRUCTION OF PROPERTY" IS THE ERECTION, ALTERATION, REPAIR OR ADDITION OF PROPERTY OR ANY PORTION THEREOF, INCLUDING BUILDINGS, LAND IMPROVEMENTS, STREETS, ALLEYS, PARKING AREAS, WATER, SEWER AND DRAINAGE FACILITIES,

AND ALL MACHINERY, EQUIPMENT, APPLIANCES, FLOOR COVERING, CARPETING, WINDOW SHADES, DRAPES, STORM WINDOWS, SCREENS AND OTHER APPURTENANCES USED IN CONNECTION WITH THE PROPERTY AND THE COST OF ALL LAND, PROPERTY, MATERIALS, LABOR AND OTHER RELATED SERVICES AND CHARGES INCIDENT THERETO, INCLUDING ZONING, ARCHITECTURAL WORK, SURVEYING, ENGINEERING, LEGAL, ACCOUNTING AND SECURITY SERVICES, RENTAL PAYMENTS, INTEREST AND MORTGAGE FEES INCIDENT TO THE FOREGOING.

Comment: The term "construction of property" as used in the act is a word of art to include all types of costs involved in the construction and development of real estate.

(h) "DELIVER" OR "DELIVERY" OF ANY WRITTEN INSTRUMENT SHALL REQUIRE PERSONAL SERVICE, OR IN THE ALTERNATIVE, MAILING BY REGISTERED OR CERTIFIED MAIL WITH RETURN RECEIPT REQUESTED, ADDRESSED TO THE ADDRESSEE AT HIS LAST KNOWN PLACE OF BUSINESS WITH POSTAGE FULLY PREPAID.

Comment: The term "deliver" and "delivery" appear in subsections 6(3) and 6(4).

SEC. 3. IF AN OWNER OF PROPERTY SHALL EXECUTE A MORTGAGE SECURING PAYMENT OF INDEBTEDNESS IN THE SUM OF $50,000 OR MORE INCURRED OR TO BE INCURRED IN THE CON-

STRUCTION OF PROPERTY OR THE BORROWING OF FUNDS FOR THAT PURPOSE, SUCH MORTGAGE SHALL BE GOVERNED BY THE TERMS OF THIS ACT IF IT CONTAINS LANGUAGE SUBSTANTIALLY STATING THAT "THIS IS A CONSTRUCTION DEBT MORTGAGE."

Comment: The sum of $50,000 is the minimum amount for which a construction debt mortgage to be covered by this act can be executed. The aim of this limitation is to preclude the possibility of misuse of the benefits of this act to the detriment of the small home owner in the course of building his home, or its repair or remodelling or in the purchase of household appliances to be incorporated in the home. The minimum requirement of $50,000 of indebtedness is intended to make the construction debt mortgage available only in large transactions where it is more likely that the property owner will be sophisticated enough to understand the commitment he is making in encumbrancing his property with such a mortgage.

Since a funded mortgage is generally executed in advance of the disbursement of money by the construction lender, it is specified that the indebtedness need not already have been incurred at the time of execution of the mortgage.

The requirement of use of the term "construction debt mortgage" is intended to assure that the parties understand that it is a word of art which makes applicable the provisions of this act.

SEC. 4. (1) THE RIGHTS OF A MORTGAGOR AND MORTGAGEE UNDER A CONSTRUCTION DEBT MORTGAGE SHALL BE THE SAME AS UNDER ANY OTHER REAL ESTATE MORTGAGE EXCEPT AS OTHERWISE PROVIDED IN THIS ACT OR IN THE MORTGAGE INSTRUMENT TO THE EXTENT PERMISSIBLE BY LAW.

Comment: This section makes applicable the general rules of law relating to real estate mortgages, except as modified by the specific terms of the act. It also recognizes the present rule that, absent any limitations of law, any mortgage instrument can include provisions which vary from the general rules of law applicable to mortgages.

(2) A CONSTRUCTION DEBT MORTGAGE SHALL BE A PRIOR ENCUMBRANCE AS AGAINST ANY CLAIM OF TITLE OR ENCUMBRANCE CREATED OR RECORDED SUBSEQUENT TO THE RECORDING OF SUCH MORTGAGE. SUCH PRIORITY OF ENCUMBRANCE SHALL INCLUDE ALL SUMS DISBURSED BY THE MORTGAGEE BOTH BEFORE AND AFTER THE DATE OF RECORDING OF THE MORTGAGE INSTRUMENT UP TO THE FULL FACE AMOUNT OF SUCH MORTGAGE, PLUS THE COST OF PERFORMANCE OF ANY OTHER OBLIGATIONS THEREUNDER, INCLUDING INTEREST AND THE COST OF COMPLETION OF CONSTRUCTION OF PROPERTY IF THE MORTGAGOR IS SO OBLIGATED.

Comment: Under present law a construction loan mortgage is subordinate to mechanics lien claims and claimants under title or encumbrances created subsequent to the mortgage to the extent that funds have not been disbursed under the mortgage at the time the lien or encumbrance was created. By the terms of the proposed provisions, however, this law will be changed to give full priority to the construction lender even as to funds disbursed by him subsequent to the creation of the new encumbrance. Thus the mortgagee will be free to continue to disburse funds pursuant to his commitment without need for continuing title search and title insurance costs to protect him against subsequent encumbrances. Likewise if a mortgagor who is obligated to complete the construction fails to do so, the mortgagee will be free to advance the funds required for that purpose with the assurance that such advances will also be covered by his mortgage in full priority to the subsequent encumbrances.

Of course, the priority afforded under this section is not absolute. The construction debt mortgage must also fall within one of the special provisions of the Federal Tax Lien Act of 1966, as amended, in order to obtain priority over a filed federal tax lien. Internal Revenue Code of 1954, Section 6323(c)(3) and (4). Ordinarily, as to the cash advances, a construction debt mortgage would have priority over a filed tax lien, even if the advances were non-obligatory. As to non-cash advances, such as interest, a search of title might still be required in the appropriate place every forty-five (45) days in order to assure the mortgagee that no federal tax liens have been filed. Internal Revenue Code of 1954, Section 6323(d).

SEC. 5. (1) UPON AUTHORITY GRANTED IN THE CONSTRUCTION DEBT MORTGAGE OR ANY AMENDMENT THERETO, THE MORTGAGOR MAY CREATE ONE OR MORE CONSTRUCTION DEBT CERTIFICATES. A CONSTRUCTION DEBT CERTIFICATE SHALL BE CREATED BY A WRITTEN INSTRUMENT BEARING THE SIGNATURE OF THE MORTGAGOR WHICH ASSIGNS TO A DESIGNATED PAYEE ALL OR ANY PORTION OF THE MORTGAGOR'S RIGHT TO RECEIVE FUNDS UNDER A FUNDED MORTGAGE OR THE MORTGAGEE'S RIGHT TO RECEIVE FUNDS UNDER AN UNFUNDED MORTGAGE.

Comment: A funded mortgage is basically similar to the construction loan mortgage presently used, except for the insertion of the right of the mortgagor to create a construction debt certificate and the statement required under Section 3 that "this is a construction debt mortgage." Typically the mortgage or a loan agreement executed simultaneously therewith will spell out how much money is to be advanced and at what stages of construction. The mortgagor can presently assign all or any of the funds which he is to receive under a construction loan mortgage. He will similarly be able to do so by the execution of a construction debt certificate. In the case of an unfunded mortgage, the mortgagor assigns to the payee the right to a share of the funds to be received by the mortgagee from the mortgagor.

(2) A CONSTRUCTION DEBT CERTIFICATE CREATES NO LIEN, ENCUMBRANCE, RIGHT, CLAIM OR INTEREST IN OR TO THE MORTGAGE OR THE PROPERTY. UNDER A FUNDED MORTGAGE, THE HOLDER OF A CONSTRUCTION DEBT CERTIFICATE MAY ENFORCE IT AS A CONTRACTUAL OBLIGATION OF THE MORTGAGEE. IN AN UNFUNDED MORTGAGE, THE MORTGAGEE SHALL BE DEEMED A TRUSTEE FOR ALL HOLDERS OF CONSTRUCTION DEBT CERTIFICATES AND THE MORTGAGEE ALONE SHALL BE ENTITLED TO FORECLOSE THE MORTGAGE AND DISTRIBUTE THE PROCEEDS FROM THE SALE THEREOF TO THE HOLDERS OF CONSTRUCTION DEBT CERTIFICATES.

Comment: The execution of a construction debt certificate will have no effect on the title to the property or the mortgage, nor will it be any kind of lien or encumbrance thereon. In the funded mortgage, the only right of enforcement available to the holder of a construction debt certificate is the right to bring a contractual suit against the mortgagee, except that unless otherwise agreed upon he would retain his claim against the person with whom he contracted for the services or materials. In an unfunded mortgage, the holder of the construction debt certificate cannot look to the mortgagee for payment of any sums not received from the mortgagor but he can require the mortgagee to enforce the obligations of the mortgagor by foreclosure of the mortgage.

(3) A CONSTRUCTION DEBT CERTIFICATE IS NOT A NEGOTIABLE INSTRUMENT NOR IS IT A SECURITY INTEREST UNDER THE PROVISIONS OF CHAPTER 9 OF THE UNIFORM COMMERCIAL CODE.

Comment: Since the construction debt certificate under a funded mortgage is not a negotiable instrument, defenses available to the mortgagee as against the mortgagor or any

prior assignor of the construction debt certificate may be available against the holder of the construction debt certificate. In the case of the unfunded mortgage, the holder of the mortgage debt certificate who seeks to enforce his rights may be subject to defenses available to the mortgagor or any prior holder. Since the construction debt certificate is not a security interest under the Uniform Commercial Code, the provisions thereof as to documentation and recording are, of course, inapplicable.

(4) AFTER ISSUANCE OF A CONSTRUCTION DEBT CERTIFICATE, NEITHER THE MORTGAGOR NOR THE MORTGAGEE SHALL MODIFY THE RIGHT TO PAYMENT THEREUNDER WITHOUT THE WRITTEN CONSENT OF THE HOLDER OF A CONSTRUCTION DEBT CERTIFICATE ADVERSELY AFFECTED THEREBY.

Comment: When the mortgagor has executed a construction debt certificate he has thereby assigned his right to receive from the mortgagee the designated funds. Having done so, he can no longer change the mortgagee's contractual obligations as to payment even with the mortgagee's consent unless he also has the consent of the holders of the construction debt certificates who would be adversely affected thereby.

(5) ANY DISBURSEMENT BY THE MORTGAGEE MADE IN THE GOOD FAITH BELIEF THAT IT IS A PROPER DISBURSEMENT UNDER THE TERMS OF THE MORTGAGE INSTRUMENT SHALL BE BINDING ON THE MORTGAGOR AND THE HOLDERS OF ALL CONSTRUCTION DEBT CERTIFICATES AS A VALID DISBURSEMENT PURSUANT TO THE TERMS OF THE MORTGAGE.

Comment: Disbursement of construction funds are generally conditioned upon completion of a designated stage of construction. Disputes may arise between the owner and the contractor or the contractor and his subcontractor as to whether the work performed met the state of completion or quality requirements of the contract. If the mortgagee were to disburse funds to the holder of a construction debt certificate he might well be subject to a risk of added liability absent the exculpatory clause of this subsection. The right to make disbursements in good faith should relieve the mortgagee of any fear of added liability which might otherwise deter his willingness to undertake construction financing.

Where a disputed situation does arise, the mortgagee can relieve himself of liability by filing an interpleader action whereby he deposits the funds in court to be disbursed in accordance with the court's adjudication. To protect himself against costs and legal expenses of an interpleader action, the mortgagee may well insert a right of renumeration in the mortgage instrument.

SEC. 6. (1) THE MORTGAGEE SHALL PAY TO THE HOLDER OF A CONSTRUCTION DEBT CERTIFICATE ALL PAYMENTS PROVIDED FOR THEREIN EXCEPT PAYMENTS WHICH ARE PROPERLY WITHHELD PURSUANT TO THE TERMS OF THE MORTGAGE INSTRUMENT OR THE CONSTRUCTION DEBT CERTIFICATE; PROVIDED, HOWEVER, THAT AS TO AN UNFUNDED MORTGAGE, THE MORTGAGEE SHALL NOT BE REQUIRED TO PAY IF THE FUNDS TO BE PAID WERE NOT RECEIVED FROM THE MORTGAGOR.

Comment: Normally the mortgage or lending agreement under a funded mortgage will provide that the funds are to be paid to the mortgagor upon completion of a designated stage of construction. If this requirement has not been adhered to, the mortgagee would not be required to pay the mortgagor or the holder of the construction debt certificate.

Since the mortgagee under an unfunded mortgage is only a trustee for the benefit of the holders of construction debt certificates, he is not required to pay any funds which have not been received from the mortgagor.

(2) A HOLDER OF A CONSTRUCTION DEBT CERTIFICATE MAY ASSIGN HIS RIGHTS THEREIN IN WHOLE OR IN PART BY A WRITTEN INSTRUMENT.

Comment: Each holder of a construction debt certificate may assign his rights to others in whole or in part. Thus, a general contractor who is the holder of a $1,000,000 construction debt certificate could assign the right to receive $20,000 to each of 50 of his subcontractors or materialmen with specific allocations of sums payable to each on a specified date or event within the terms of the mortgage and loan agreement. In turn, each assignee can assign all or any portion of his right to funds under a construction debt certificate.

(3) NEITHER THE INSTRUMENT CREATING THE CONSTRUCTION DEBT CERTIFICATE NOR ANY ASSIGNMENT THEREOF SHALL BE BINDING ON THE MORTGAGEE UNLESS AND UNTIL DELIVERY TO HIM OF A WRITTEN NOTICE THEREOF BY WAY OF THE ORIGINAL INSTRUMENT OR A PHOTOSTATIC COPY THEREOF. WITHIN TEN (10) DAYS AFTER REQUEST BY THE MORTGAGEE, THE MORTGAGOR SHALL DELIVER TO HIM A WRITTEN ACKNOWLEDGMENT AS TO THE VALIDITY OF ANY CONSTRUCTION DEBT CERTIFICATES OR ANY ASSIGNMENT THEREOF OF WHICH THE MORTGAGEE HAS RECEIVED NOTICE.

Comment: The mortgagee's liability for payment to the holder of a construction debt certificate arises only if and when he has received written notice of the instrument creating the construction debt certificate and any assignment thereof in the form of an original or photostatic (xerox type) copy of

the instrument. A mortgagee who has reason to question the validity of any construction debt certificate or assignment thereof can require acknowledgment by the mortgagor.

(4) WITHIN TEN (10) DAYS AFTER DELIVERY OF A WRITTEN REQUEST BY THE HOLDER OF A CONSTRUCTION DEBT CERTIFICATE OR SUCH FURTHER TIME AS IS REQUIRED TO OBTAIN A RESPONSE FROM THE MORTGAGOR UNDER SUBSECTION (3) OF THIS SECTION, THE MORTGAGEE SHALL DELIVER TO SUCH HOLDER A WRITTEN RESPONSE SETTING FORTH WHETHER UNDER FACTS PRESENTLY KNOWN TO THE MORTGAGEE, HE WILL CLAIM ANY DEFENSE, AND THE NATURE THEREOF, TO PAYMENT OF THE SUMS CLAIMED BY SUCH HOLDER. OTHER THAN CLAIMS ASSERTED BY THE MORTGAGEE IN SUCH RESPONSE, THE MORTGAGEE SHALL BE BARRED FROM ASSERTING ANY DEFENSE BASED ON FACTS THEN KNOWN TO HIM.

Comment: The provision for acknowledgment by the mortgagee as to his knowledge of any outstanding defenses is intended to give assurance to the holder of a construction debt certificate that to the mortgagee's best knowledge, the holder has a valid claim against the funds to be advanced under the mortgage. Such assurance should increase the willingness of the holder to rely on the certificate as a source of payment. Thus, in the event that the mortgagor had previously issued a construction debt certificate for the same payment and it was known to the mortgagee he would have to advise the inquiring holder thereof. Likewise, if the mortgagee knew of a dispute as to the right to receive payments within the terms of the mortgage instrument, he would be required to so inform the holder in his response. Of course, if the payment was conditioned upon performance of construction at a later date, the response of the mortgagee need not address itself to that as a possible

future defense. When the mortgagee has within the 10 day period requested the mortgagor for acknowledgment of validity of the construction debt certificate or any assignment thereof, the 10 day period would be extended until receipt of such response.

SEC. 7. A CONSTRUCTION DEBT MORTGAGE MAY BE FORECLOSED IN LIKE MANNER AS OTHER MORTGAGES OR BY COMPLAINT IN A CIVIL ACTION STATING THAT RELIEF IS SOUGHT UNDER THIS ACT. SECTIONS 7 AND 8 SHALL BE APPLICABLE ONLY TO PROCEEDINGS SEEKING RELIEF UNDER THIS ACT.

Comment: A construction debt mortgage may be foreclosed in like manner as other real estate mortgages by suit in the circuit court or through foreclosure by advertisement. To avail himself of the rights set forth in Sections 7 and 8, however, the plaintiff must specifically state in his complaint filed in the circuit court that he seeks relief under this act. Where federal jurisdiction is available, a similar suit could be filed there. Since the holders of construction debt certificates have no title to or encumbrance on the property, they should not be made parties to the foreclosure action.

(1) IN A FORECLOSURE HEREUNDER, THE MORTGAGEE MAY PETITION THE COURT FOR APPOINTMENT OF A RECEIVER FOR THE PROPERTY ENCUMBERED BY THE MORTGAGE. SUCH PETITION SHALL BE HEARD AS A MOTION AND A RECEIVER SHALL BE APPOINTED AS A MATTER OF RIGHT UPON A FINDING BY THE COURT THAT THE MORTGAGOR IS IN DEFAULT. SUCH RECEIVER SHALL BE THE MORTGAGEE OR HIS DESIGNEE BUT THE MORTGAGEE SHALL BE RESPONSIBLE FOR ALL ACTIONS OF HIS DESIGNEE. THE RECEIVER SHALL BE ENTITLED TO POSSESSION OF THE PROPERTY AND UNLESS

OTHERWISE DESIGNATED BY THE COURT, THE RECEIVER SHALL HAVE ALL POWERS GENERALLY EXERCISED BY A RECEIVER IN A COURT OF EQUITY, INCLUDING THE RIGHT TO BE COMPENSATED FOR HIS SERVICES AND THE SERVICES OF HIS AGENTS AND ATTORNEYS IN SUCH REASONABLE SUMS AS SHALL BE APPROVED BY THE COURT.

Comment: The likelihood of serious damage to the property and its economic viability in the event completion of construction is significantly delayed impels the early appointment of a receiver. To protect the mortgagee's investment in the property, it is imperative that he be given immediate possession in the event of default so that he may take the necessary steps to preserve the property by its maintenance, completion or other disposition. By applying the procedural rules applicable to motions, early hearing and resolution of the right to possession and appointment of a receiver is mandated.

The court is given no discretion but must appoint a receiver upon proof that the mortgagor is in default. Motion proceedings being summary in nature, proof of the mortgagor's default can be submitted to the court by affidavit. If the factual statements of an affidavit are contradicated by a counter-affidavit, the court can require additional supporting affidavits or other proofs, including in its discretion the taking of testimony in open court. Such a receiver will have the powers generally exercised by a receiver in a court of equity and such additional powers as the circumstances warrant to be granted by the court.

(2) UPON APPROVAL BY THE COURT, THE RECEIVER MAY COMPLETE ALL OR ANY PART OF THE CONSTRUCTION OF PROPERTY ENCUMBERED BY THE MORTGAGE AND MAY ADVANCE OR BORROW FUNDS FOR THAT PURPOSE.

Comment: If the receiver determines that completion of the property is essential for the protection of the construction debt mortgage, he should seek specific court approval for such action, including authorization to borrow or advance funds for such purpose. It would be prudent indeed for the receiver to seek instructions from the court as to the performance of his duties at each significant stage of the proceedings.

(3) FUNDS EXPENDED BY THE RECEIVER, INCLUDING HIS FEES AND HIS ATTORNEY'S FEES, SHALL BE PAID FROM THE PROCEEDS OF THE SALE OF THE PROPERTY IN PRIORITY TO ANY OTHER SUMS OWING UNDER THE CONSTRUCTION DEBT MORTGAGE OR ANY LIENS OR ENCUMBRANCES SUBORDINATE THERETO.

Comment: All funds expended by the receiver, including funds advanced or borrowed by him, must be repaid from the proceeds of the sale of the property or from any other available sources in priority to any other sums owing under the construction debt mortgage.

SEC. 8. (1) UPON AUTHORITY OF THE COURT, THE RECEIVER MAY AT ANY TIME DURING THE PENDENCY OF THE PROCEEDINGS SELL THE PROPERTY UNDER FORECLOSURE BY PUBLIC OR PRIVATE SALE FOR CASH OR UPON TERMS AND IN SUCH MANNER AS SHALL BE DESIGNATED BY THE COURT. SUCH SALE SHALL BECOME FINAL UPON ENTRY OF AN ORDER OF CONFIRMATION. IN THE ABSENCE OF TIMELY APPEAL FROM THE ORDER OF CONFIRMATION, NO SUBSEQUENT APPEAL SHALL QUESTION THE TITLE OF THE PURCHASER. THE PROCEEDS OF THE SALE OF THE PROPERTY SHALL BE DISTRIBUTED TO THE PARTIES IN THE ORDER OF PRIORITY OF THEIR RIGHTS OR ENCUMBRANCES ON THE PROPERTY.

Comment: Upon motion to the court, authority can be granted to a receiver to sell the property at any time during the pendency of proceedings. The provisions of other statutes for advertisement and time intervals for holding of a foreclosure sale are not applicable under this act.

After a sale is held, it is necessary to bring before the court by motion the entry of an order of confirmation. Presumably a sale held in accordance with the court's instructions will be confirmed absent a showing of unfairness relating to the price or method of sale.

Upon the order of confirmation being entered, the sale becomes final unless it is appealed in a timely fashion. As set forth in subsection (6), the appeal to the court of appeals would have to be by leave since all orders other than the final judgment are interlocutory orders.

If there are any liens or encumbrances on the property having priority to the construction debt mortgage, the sale of the property would be made subject to the prior encumbrances. None of the proceeds of the sale of the property would be payable to the mortgagor unless there were sufficient funds to pay in full the indebtedness under the construction debt mortgage and any rights or encumbrance subordinate thereto.

(2) THE MORTGAGEE MAY PURCHASE THE PROPERTY UNDER FORECLOSURE AND MAY APPLY ON THE PURCHASE PRICE ANY SUMS WHICH WOULD BE PAYABLE TO HIM FROM THE PROCEEDS OF THE SALE OF THE PROPERTY.

Comment: If permissible under the court's order of sale, the mortgagee may purchase the property under foreclosure at private sale without any attempt at a public offering. Of course the price to be paid by the mortgagee as purchaser or by any other purchaser would be expected to be

the best price obtainable in the market place. Presumably the court would require some showing that a reasonable effort has been made to sell the property at the best obtainable price. In many cases, however, it is likely that the property will not be worth the mortgage balance. In that event, and assuming that the mortgagor is not seeking a deficiency judgment against the mortgagee, he is likely to accept the property in payment of the full unpaid balance of the mortgage. In such event, the delay of looking for another purchaser or holding of a public sale could well be eliminated if authorized by the court.

(3) SALE BY THE RECEIVER SHALL CONVEY ALL RIGHTS OF OWNERSHIP IN THE PROPERTY, EXCEPT FOR ANY LIENS, ENCUMBRANCES, EASEMENTS, LEASES OR OWNERSHIP RIGHTS WHICH HAVE A PRIORITY SUPERIOR TO THE MORTGAGE UNDER FORECLOSURE.

Comment: The title conveyed by the receiver cannot be any greater than the title interest of the mortgagor at the time the mortgage was created. Thus, if the construction debt mortgage is a second mortgage, the purchaser of the property would acquire title to the property subject, however, to the first mortgage encumbrance. See Comment under subsection (1).

(4) THE OWNER OR ANY PERSONS CLAIMING UNDER HIM SHALL HAVE NO RIGHT OF REDEMPTION IN THE EVENT THE PROPERTY IS SOLD BY THE RECEIVER AS HEREIN PROVIDED.

Comment: In chancery foreclosures under present law, the mortgagor retains a right of redemption for a period of 6 months after date of sale. Such hiatus in ownership creates difficulties in resolving completion of construction. To alleviate that problem, it is proposed that the right of redemption be eliminated. As a practical matter, the owner will make every effort to realize some equity for his ownership interest. If within a reasonably short period he is unable to do so, it would seem that the only substantive interest to be protected is that of the mortgagee. Towards that end, completion of construction should be sought as early as possible by granting to the purchaser the right of immediate possession and ownership. The elimination of the right of redemption serves that end.

(5) UPON COMPLETION OF THE SALE, THE RECEIVER SHALL FILE A FINAL ACCOUNTING FOR APPROVAL BY THE COURT AND THE COURT SHALL ENTER A FINAL JUDGMENT DIRECTING THE DISTRIBUTION OF ALL FUNDS OR OTHER ASSETS HELD BY THE RECEIVER AND ADJUDICATE THE RIGHTS, IF ANY, TO A DEFICIENCY JUDGMENT AGAINST ANY OF THE PARTIES.

Comment: Upon completion of the sale of the property under foreclosure, the receiver should prepare and file his final accounting with the court. Upon approval of the final accounting, the court should enter a final judgment directing the distribution of all funds held by the receiver and also make a determination as to any deficiency judgment to be rendered against any of the parties. It is only this final judgment which is appealable as a matter of right since as set forth in subsection (6) hereof, all other orders of the court are deemed interlocutory orders for the purpose of determining the right to appeal. See Comment under subsection (6).

(6) OTHER THAN THE FINAL JUDGMENT SET FORTH IN SUBSECTION (5) HEREOF, ALL OTHER ORDERS ENTERED IN THE PROCEEDINGS SHALL BE DEEMED INTERLOCUTORY ORDERS FOR PURPOSES OF DETERMINING ANY RIGHT TO APPEAL THEREFROM.

Comment: The purpose of making interlocutory all orders other than the final judgment is to avoid unnecessary delays in the processing of the foreclosure. By designating all other orders, including the orders requiring the sale of the property and the confirmation of the sale, to be deemed interlocutory orders for purposes of appeal, they become appealable only upon leave granted by the court of appeals. There is thus provided a summary procedure for a determination as to whether there is some merit to the appeal. If leave to appeal is granted, then the delays incident to the processing of the appeal will become unavoidable.

(7) THE PROVISIONS OF OTHER FORECLOSURE LAWS IN CONFLICT WITH THIS ACT SHALL BE INAPPLICABLE TO FORECLOSURE HEREUNDER

Comment: The present foreclosure laws require notices to be advertised and various procedures to be taken in connection with a foreclosure sale. In addition, they grant a 6 month right of redemption to the mortgagor. These provisions will no longer be applicable to a foreclosure brought specifically under this act.

SEC. 9. IF AN INSTRUMENT ASSIGNING THE MORTGAGEE'S INTEREST IN A CONSTRUCTION DEBT MORTGAGE, A PROVISION MAY BE INCORPORATED SUBSTANTIALLY STATING THAT "THIS MORTGAGE SHALL HEREAFTER NOT BE DEEMED A CONSTRUCTION DEBT MORTGAGE." UPON THE EXECUTION OF SUCH ASSIGNMENT, SECTIONS 7 AND 8 OF THIS ACT SHALL CEASE TO BE APPLICABLE TO SUCH MORTGAGE.

Comment: This section is intended to encompass those construction debt mortgages which are sought to be converted into the permanent or end mortgage. In construction loan mortgage financing, it is often feasible to convert the construction loan mortgage into an end mortgage at such time as construction of the project has been completed. At that point, the construction loan lender is paid by the proceeds of the end loan mortgage and the end loan mortgagee may choose to take an assignment of the construction debt mortgage rather than cause a new mortgage to be executed. Use of the existing mortgage may serve to protect the end loan mortgagee against possible liens or encumbrances which may have accrued subsequent to the execution of the construction debt mortgage.

SEC. 10. ACT NO. 179 OF THE PUBLIC ACTS OF 1891, AS AMENDED, BEING SECTIONS 570.1 TO 570.30 OF THE COMPILED LAWS OF 1970, IS REPEALED, EXCEPT AS TO CONTRACTS MADE AND ENTERED INTO BEFORE THE EFFECTIVE DATE OF THIS ACT.

Comment: The entire mechanics lien act is repealed, except as to rights to liens which accrue under contracts entered into before the effective date of the Act. Mechanics lien rights arising under contracts entered into prior to the effective date of this act will continue to be enforceable.

RECOMMENDATION RE MARITAL AGREEMENTS

The present law of Michigan relating to agreements between husband and wife covering property and support rights is governed by a statute which was enacted in 1969 [P.A. 139; M.C.L. §702.74a]. This statute was enacted pursuant to a recommendation of the Commission made in its Annual Report of 1968, at page 27. Under this statute, marital agreements relating to the disposition of property on death may be entered into between spouses at any time before or after marriage with the basic requirement that there be fair disclosure and an absence of fraud or duress. Marital agreements relating to support and property settlements in contemplation of divorce may under present law only be entered into after marriage and at a time when the spouses have already separated. In addition there must be fair disclosure and an absence of fraud and duress.

Our courts have for many years held that as a matter of public policy contracts between spouses relating to support or property settlement applicable upon divorce violate public policy if they are entered into before marriage or while the parties are still living together. That concept of public policy has changed with the years until today there appears no overriding public policy which should preclude premarital agreements relating to support or property settlements in the event of divorce. The same conclusion is applicable to agreements entered into while the spouses are still living together. See the Study Report (Appendix A, infra), authored by Assistant Dean Barbara Klarman of Wayne State Law School, discussing recent developments in this area in more detail.

It thus is our recommendation that the law be amended to validate contracts between spouses for property and support rights upon divorce where the contract was entered into prior to marriage as well as where the contract was entered into during the marriage. The requirements of full disclosure and absence of fraud and duress should still be requisite.

However, an additional protective requirement as to marital agreements appears warranted. Marital agreements may be expected to be fair and equitable when entered into after full disclosure of all relevant facts and in the absence of fraud or duress. It is a fact of life, however, that with the passage of time and the occurrence of unforeseen or unexpected events, circumstances may change to make enforcement of the agreement grossly unfair to one of the spouses. Such things as changes in health or ability to earn a livelihood may vitiate a basic assumption which motivated the terms of the agreement at the time it was entered into. Likewise a drastic change in the economic circumstances of one or the other of the spouses could cause such substantial change in circumstances as to demonstrate that the enforcement of the agreement would be clearly unfair as to one of the spouses.

While subsequent change of circumstances normally does not warrant a modification of a commercial contract, it is another matter when dealing with marital agreements which inherently encompass moral, emotional, social and public policy considerations. In the process of expanding the rights of spouses to contract between themselves as to the disposition of their support and property rights, it seems altogether fitting that recognition should be given to the special nature of the marital relationship which warrants a re-examination of the fairness of marital agreements where the facts and circumstances upon which it was predicated have materially changed. It is therefore proposed that a marital agreement which relates to support or property rights upon death or divorce should nonetheless be subject to further revision to achieve fairness and equity in the event of a significant change of circumstances.

Because the Probate Code deals with agreements relating to inheritance, it is believed more fitting that that portion of the present act, being subsection (2) of section 702.74a which deals with marital agreements in contemplation of divorce should be incorporated in the divorce statute. Accordingly, the proposed recommendation is expressed in two

bills, one amending the Probate Code to recognize a "changed circumstances" modification authority for antenuptial agreements in contemplation of death and the other amending the divorce law to recognize the legality of antenuptial agreements relating to divorce settlements (also including a "changed circumstances" modification authority).

The proposed bills follow:

PROBATE AMENDMENT

A bill to amend section 1 of Chapter 2 of Act No. 288 of the Public Acts of 1939, entitled "the probate code," as amended, being sections 702.1 to 702.117 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 1 of Chapter 2 of Act No. 288 of the Public Acts of 1939, as amended, being section 702.74a of the Compiled Laws of 1970, is amended to read as follows:

Sec. 74a. ~~(1)~~ The right of election of a surviving spouse to inherit in an intestate estate, or to elect to take against a will, the right to dower and the rights of

the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure and in the absence of fraud or duress. Unless an agreement provides to the contrary, a written waiver of all rights in the property or estate of a present or prospective spouse is a waiver of all rights to an elective share, dower, homestead allowance, exempt property and family allowance by each spouse in the property of the other and an irrevocable renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the agreement or waiver. IF, HOWEVER, SINCE EXECUTION OF THE AGREEMENT THERE HAS BEEN A CHANGE OF CIRCUMSTANCES WHICH WOULD MAKE THE ENFORCEMENT OF THE AGREEMENT UNFAIR OR INEQUITABLE, SUCH MODIFICATION THEREOF SHALL BE MADE BY A COURT OF EQUITY AS FAIRNESS SHALL REQUIRE.

~~(2) A binding contract as to support or property settlement or both may be entered into by a husband and wife after marriage but in anticipation of divorce, if~~

~~the parties have therefore separated; there has been fair disclosure and the agreement was not executed under fraud or duress. The agreement shall not release either party of a legal duty to support their minor children. Unless the agreement provides to the contrary, it shall have the same effect as an agreement of waiver provided for in subsection (1).~~

DIVORCE AMENDMENT

A bill to amend Chapter 84 of the Revised Statutes of 1846, entitled "Of Divorce," as amended, being sections 552.1 - 552.46 of the Compiled Laws of 1970, by adding section 8a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Chapter 84 of the Revised Statutes of 1846, entitled "Of Divorce," being sections 552.1 - 552.46 of the Compiled Laws of 1970, is amended by adding section 8a to read as follows:

Sec. 8a. A BINDING CONTRACT AS TO ALIMONY, SUPPORT OR PROPERTY SETTLEMENT MAY BE ENTERED INTO BY A HUSBAND AND WIFE BEFORE OR AFTER MARRIAGE BUT IN ANTICIPATION OF DIVORCE, IF THERE HAS BEEN FAIR DISCLOSURE AND THE AGREEMENT WAS NOT EXECUTED UNDER FRAUD OR DURESS. THE AGREEMENT SHALL NOT RELEASE ANY PARTY OF THE LEGAL DUTY TO SUPPORT THEIR MINOR CHILDREN. UNLESS AN AGREEMENT PROVIDES TO THE CONTRARY, A WRITTEN WAIVER OF ALL RIGHTS IN THE PROPERTY OR ESTATE OF A PRESENT OR PROSPECTIVE SPOUSE IS A WAIVER OF ALL RIGHTS TO AN ELECTIVE SHARE, DOWER, HOMESTEAD ALLOWANCE, EXEMPT PROPERTY AND FAMILY ALLOWANCE BY EACH SPOUSE IN THE PROPERTY OF THE OTHER AND AN IRREVOCABLE RENUNCIATION BY EACH OF ALL BENEFITS WHICH WOULD OTHERWISE PASS TO HIM FROM THE OTHER BY INTESTATE SUCCESSION OR BY VIRTUE OF THE PROVISIONS OF ANY WILL EXECUTED BEFORE THE AGREEMENT OR WAIVER. IF, HOWEVER, SINCE EXECUTION OF THE AGREEMENT THERE HAS BEEN A CHANGE OF CIRCUMSTANCES WHICH WOULD MAKE ENFORCEMENT OF THE AGREEMENT UNFAIR OR INEQUITABLE, SUCH MODIFICATION THEREOF SHALL BE MADE BY A COURT OF EQUITY AS FAIRNESS SHALL REQUIRE.

RECOMMENDATION RE UNLAWFUL ASSESSMENTS

In its 1972 (7th Annual) Report, page 33, this Commission recommended that suits be brought in the circuit courts to correct excessive property assessments instead of using the then existing procedures requiring appeal to the State Tax Commission. This recommendation was discarded by the Legislature when it assigned such appeals to the Michigan Tax Tribunal upon its creation pursuant to Act No. 186 of the Public Acts of 1973, being sections 205.701 to 205.779 of the Compiled Laws of 1970. Since that time it has become clear that the Tax Tribunal is unable to cope with the case load of assessment appeals.

In the recent Report of the Administrative Law Commission appointed by the Governor, it is stated:

> "The Michigan Tax Tribunal is currently so overloaded that it is approximately 5 years behind in the determination of cases arising under property taxes alone."

The Administrative Law Commission thereupon recommended that appeals be taken in the alternative either to the Michigan Tax Tribunal or to the circuit courts. By permitting suits to be brought in the circuit courts where the property is located, the workload would be spread and the delays attendant to an appeal to the Tax Tribunal would at least partially be alleviated.

Inasmuch as the determination of lawful assessments requires a judicial type hearing, including the weighing of evidence and the application of valid principles of law, we agree that the determination of the validity of property assessments should be left to the circuit courts as an alternative to the Tax Tribunal. Of course, in view of the expenditures incident to court litigation, disputes involving larger sums are more likely to be taken to the circuit while the typical home owners are more likely to use the Tax Tribunal procedures for informal hearings.

While we fully agree with the conclusion of the Administrative Law Commission that alternative circuit court jurisdiction should be made available in these cases, we believe that their recommendations for amendments to the General Property Tax Act are inadequate to assure the intended results. We believe that the statutory amendments should more specifically delineate the nature of the circuit court hearings.

Furthermore, we believe that the statute should provide that such suits should be heard by the circuit judge without a jury. The likelihood of expeditious disposition by the courts is greatly enhanced by the elimination of the need for jury trials. Moreover, in such cases, it is to be expected that a circuit judge can more effectively weigh the testimony of experts in the determination of property values.

Additional comments appear under the individual sections of the proposed bill.

The proposed bill follows:

SUIT FOR RECOVERY OF UNLAWFUL ASSESSMENTS

A bill to amend sections 53 and 53b of Act No. 206 of the Public Acts of 1893, entitled as amended "the general property tax act," section 53 as amended by Act No. 226 of the Public Acts of 1972, being sections 211.53 and 211.53b of the Compiled Laws of 1970; to add a new section 153; and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 53 and 53b of Act No. 206 of the Public Acts of 1893, section 53 as amended by Act No. 226 of the Public Acts of 1972, being sections 211.53 and 211.53b of the Compiled Laws of 1970, are amended, and section 153 is added, to read as follows:

Sec. 53. Any person may pay the taxes or special assessments, or any one of the several taxes or special assessments, on any parcel or description of land, or on any undivided share thereof, and the treasurer shall note across the face of the receipt in ink any portion of the taxes or special assessments remaining unpaid. A person may protect any tax or special assessment which is paid

~~within 60 days of such payment, whether levied on personal or real property to the treasurer, specifying in writing, signed by him, the grounds of the protest, and the treasurer shall minute the fact of the protest on the tax roll.~~ ~~The person may, within 30 days after such protest, sue the township or city for the amount paid, and recover, if the tax or special assessment is shown to be illegal for the reason shown in the protest.~~ WITHIN 60 DAYS AFTER TIMELY PAYMENT OF A TAX OR SPECIAL ASSESSMENT, WHETHER LEVIED ON PERSONAL OR REAL PROPERTY, A PERSON WHO HAS COMPLIED WITH SECTION 153 OF THIS ACT MAY SUE THE TOWNSHIP, CITY OR COUNTY TO WHOM THE TAX WAS PAID FOR RECOVERY OF THE TAX OR SPECIAL ASSESSMENT OR ANY PORTION THEREOF ARISING FROM A CLAIM OF UNLAWFUL ASSESSMENT AS PROVIDED IN SECTION 53B. ~~In cities where, by special provision, state and county taxes are collected by the county treasurer, suits for the recovery of state and county taxes only shall be brought against the county, and any such suit against a county for the recovery of taxes or special assessments so paid to the county treasurer shall proceed in all respects as provided herein for suits~~

~~against townships:~~ When payment of the taxes or special assessments on any parcel or description of land or on any undivided share thereof, is made to any city, village, township, or county treasurer, the treasurer shall place or cause to be placed upon the face of the receipt the following certificate: "I hereby certify that application was made to pay all taxes and special assessments due and payable at this office on the description shown in this receipt except .....

.....

(Signed)..... Treas."

Any person owning an undivided share or other part or parcel of real property assessed in 1 description may pay on the part thus owned, by paying an amount having the same relation to the whole tax or special assessment as the value of the part on which payment is made has to the values of the whole parcel; the application to pay the taxes or special assessments on any part of any parcel or description of land shall be accompanied by a statement from the assessing officer of the township or city in which the lands are situated showing the valuation of the part and of the several parts of the parcel or description of land, and it shall be

the duty of the assessing officer to make the valuations and furnish a statement at the request of any person who presents to the assessing officer a correct description and division of the parcel or description of land to be divided. The person making the payment shall accurately describe the part or share on which he makes payment, and the receipt given, and the record of the receiving officer shall show the description, and by whom paid; and in case of the sale of the remaining part, or share for nonpayment of taxes or special assessments, he may purchase the same in like manner as any disinterested person could. Any person having a lien on property may, after 30 days from the time the tax is payable, pay the taxes thereon, and the same may be added to his lien and recovered with the rate of interest borne by the lien. A tenant of real estate may pay the taxes thereon and deduct the same from his rent, unless there is an agreement to the contrary. Such payment may be made to the township treasurer while the tax roll is in his hands, or afterwards to the county treasurer. The receipt given shall be evidence of such payment. Every such receipt shall be deemed to include the foregoing certificate, and unless otherwise noted thereon, shall be construed as an application to pay all taxes and

special assessments assessed against the property described therein and then due and payable at the office of the treasurer issuing such receipt.

Any person owning either the mineral rights or surface rights in property, but not both, which rights are authorized under this act to be separately assessed may pay on the rights so owned as herein authorized for the payment upon an undivided share in such property except that the state geologist or his authorized deputy, instead of the local assessing officer, shall furnish a statement showing the valuation upon the mineral rights.

If a part of any parcel of real property is acquired for highway purposes, it shall be separately assessed and the assessing officer shall make the allocation of the taxes or special assessments between the part so acquired and the remainder as may be deemed by the assessing officer to be in conformity with standard assessment practices. Upon the payment of the taxes or assessments attributable thereto, the part or parcel of real property so acquired shall be removed from the tax rolls. The acceptance by the city, village, township, or county

treasurer of such payment shall not affect, prejudice, or destroy any tax lien on the remainder of the parcel of real property from which the part is taken.

Comment: The amendments in this section become requisite in order to conform with the provisions herein contained to be included in sections 53b and 153.

Sec. 53b. ~~As an alternative to section 53, whenever there has been a clerical error or a mutual mistake of fact relative to the correct assessment figures, the rate of taxation or the mathematical computation relating to the assessing of taxes, and the error or mutual mistake is verified by the local assessing officer, and approved by the board of review at a meeting held only for such purpose on Tuesday following the second Monday in December. The board of review shall file an affidavit relative to the error or mutual mistake with the proper officials who are involved with the assessment figures, rate of taxation or mathematical computation and all official records relative thereto shall be corrected. Where such error or mutual mistake results in an overpayment or underpayment, the~~

~~rebate shall be made to the taxpayer or the taxpayer notified and payment made within 30 days of such notice. A correction under this section may be made in the year in which the error was made or in the following year only.~~

Comment: It is proposed that section 53b be deleted, since it has but limited application and relates to unusual circumstances which should not require any different procedures than those set forth in section 53 and the amended section 53b.

(1) A SUIT FOR REFUND OF TAXES OR SPECIAL ASSESSMENTS UNDER SECTION 53 SHALL BE BROUGHT IN THE CIRCUIT COURT FOR THE COUNTY IN WHICH THE REAL OR PERSONAL PROPERTY OR ANY PART THEREOF IS LOCATED. THE SUIT SHALL BE TRIED BY THE CIRCUIT JUDGE WITHOUT A JURY.

Comment: The suit provided hereunder will be a civil action to be tried in like manner as all other civil suits. Being an action for a money judgment, it will by its nature be an action at law to be tried by a judge without a jury. Jurisdictional dollar limitations for a circuit court action will not be applicable since jurisdiction for such actions is expressly provided by this statute. By like token, the district courts will have no jurisdiction in any suit for refund of property taxes.

(2) IN DETERMINING THE LAWFUL ASSESSMENT, THE COURT SHALL FIRST DETERMINE THE TRUE CASH VALUE OF THE PROPERTY ON THE ASSESSMENT DATE. THE TRUE CASH VALUE SHALL THEREUPON BE ADJUSTED BY APPLYING A PERCENTAGE FACTOR EQUAL TO THE RATIO OF THE AVERAGE LEVEL OF ASSESSMENTS IN RELATION TO TRUE CASH VALUES IN THE ASSESSMENT DISTRICT. TO THE SUM SO DETERMINED, THE COURT SHALL APPLY A PERCENTAGE ADJUSTMENT EQUAL TO THE EQUALIZATION FACTOR WHICH IS UNIFORMALLY APPLIED IN THE ASSESSMENT DISTRICT FOR THE YEAR IN QUESTION. THE RESULTING SUM SHALL BE DEEMED THE LAWFUL ASSESSMENT EXCEPT THAT SUCH SUM SHALL IN NO EVENT EXCEED 50% OF THE TRUE CASH VALUE OF THE PROPERTY ON THE ASSESSMENT DATE.

Comment: The procedures herein set forth for the determination of a lawful assessment are basically the present requirements of law as set forth in the Tax Tribunal Act [M.C.L. §205.737(1)].

(3) THE LAWFUL TAX SHALL BE ARRIVED AT BY APPLYING THE TAX RATE TO THE LAWFUL ASSESSMENT AS DETERMINED BY THE COURT. IF THE TAXES COLLECTED EXCEED THE AMOUNT OWING FOR LAWFUL TAXES, JUDGMENT SHALL BE ENTERED AGAINST THE GOVERNMENTAL UNIT TO WHOM PAYMENT WAS MADE IN THE AMOUNT

OF THE EXCESS PAYMENT PLUS INTEREST AT 7% PER YEAR FROM THE DATE OF PAYMENT TO THE DATE OF JUDGMENT. THE JUDGMENT SO ENTERED SHALL BEAR INTEREST AT 7% PER YEAR FROM THE DATE OF JUDGMENT TO THE DATE OF PAYMENT.

Comment: Judgments are to be entered against the governmental unit to whom the payment was made. Thus if the city treasurer receives the money and pursuant to statutory authorization distributes it to a school district, the judgment will nonetheless be against the city. The city in turn has its own statutory remedies for recovery of funds from the school district. See M.C.L. §211.254.

(4) IN THE PRESENTATION OF PROOFS, PLAINTIFF SHALL HAVE THE BURDEN OF PROOF IN ESTABLISHING THE TRUE CASH VALUE OF HIS PROPERTY AND DEFENDANTS SHALL HAVE THE BURDEN OF PROOF IN ESTABLISHING THE RATIO OF THE AVERAGE LEVEL OF ASSESSMENTS IN RELATION TO TRUE CASH VALUES IN THE ASSESSMENT DISTRICT AND THE EQUALIZATION FACTOR WHICH WAS UNIFORMALLY APPLIED IN THE ASSESSMENT DISTRICT FOR THE YEAR.

Comment: A like provision is presently set forth in the Tax Tribunal Act [M.C.L. §205.737(1)]. To support his burden of proof, plaintiff must normally produce expert testimony as to the true cash value of his property on the assessment date. The term "true cash value" has been equated by the courts as being interchangeable with the "fair market value" of the property. See CAF Investment Company v. Michigan State Tax Commission, 392 Mich. 442 (1974). See also M.C.L. §211.27.

Of course, in the field of real estate there are often wide disagreements between experts as to fair market value of the property. The court would then presumably be justified in finding any value not lower than the lowest valuation presented by an expert witness nor higher than the highest valuation presented by an expert witness. See In re Civic Center, 335 Mich. 528 (1953) and In re Widening of Michigan Ave., 298 Mich. 614 (1941).

(5) IF SUBSEQUENT TO THE BRINGING OF SUIT PLAINTIFF HAS PAID ADDITIONAL TAXES AS A RESULT OF UNLAWFUL ASSESSMENTS ON THE SAME PROPERTY FOR THE SAME OR SUBSEQUENT YEARS, PLAINTIFF MAY AMEND HIS COMPLAINT BEFORE TRIAL TO JOIN ALL OF HIS CLAIMS FOR REFUND BY REASON OF PAYMENTS BASED ON THE UNLAWFUL ASSESSMENTS AND THE LIMITATION OF 60 DAYS FOR BRINGING SUIT UNDER SECTION 53 SHALL NOT APPLY AS TO SUCH PAYMENTS.

Comment: Real property taxes are often paid in 2 parts. Suits for refund would have to be commenced within 60 days of payment of the first part. When the second part is paid it would not be necessary to amend the complaint within 60 days thereafter since such amendment could be made at any time before trial. The same would hold true as to payments in subsequent years if it is claimed that the assessment was excessive and claim for refund is sought by amending the pending suit at any time before trial. The purpose of this provision is among other things to avoid a multiplicity of suits to arrive at a determination of the proper valuation of the same property. Of course any variations in value from year to year may properly become an issue in the case. See similar provision in the Tax Tribunal Act [M.C.L. §207.737(2)].

Sec. 153. ANY TAXPAYER, PROPERTY OWNER, ASSESSING OFFICER OR UNIT OF GOVERNMENT OR ANY OTHER PERSON HAVING AN INTEREST IN THE PROPERTY WHO IS AGGRIEVED BY ANY ASSESSMENT UPON REAL OR PERSONAL PROPERTY SHALL FIRST APPEAL TO THE BOARD OF REVIEW OF THE GOVERNMENTAL UNIT UPON WHOSE ASSESSMENT ROLL THE SAME WAS MADE AND MAY THEREAFTER APPEAL THE DECISION OF THE BOARD OF REVIEW TO THE MICHIGAN TAX TRIBUNAL IN ACCORDANCE WITH ACT NO. 186 OF THE PUBLIC ACTS OF 1973, AS AMENDED, BEING SECTIONS 205.701 to 205.779 OF THE COMPILED LAWS OF 1970, OR IN THE ALTERNATIVE, MAY PROCEED UNDER SECTIONS 53 AND 53B OF THIS ACT, BEING SECTIONS 211.53 AND 211.54 OF THE COMPILED LAWS OF 1970.

Comment: This section is inserted to replace the provisions of present sections 152 and 152a, which were effectively made obsolete by the enactment of the Tax Tribunal Act.

The taxpayer who objects to any assessment as being excessive must first appeal to the Board of Review as at present. After doing so, he has the choice of either proceeding by appeal to the Tax Tribunal or by appealing to the circuit court in the manner set forth in sections 53 and 53b. The option to the taxpayer of going either to the tax tribunal or to the circuit court would be very similar to that available under the federal income tax laws.

Section 2. Sections 152 and 152a of the general property tax act, being sections 211.152 and 211.152a of the Compiled Laws of 1970, are hereby repealed.

Comment: These sections are repealed since they relate to proceedings before the State Tax Commission which have been nullified by the enactment of the Tax Tribunal Act. Moreover, they are inapplicable in view of the changes proposed herein by the provisions of section 153 and the amendments to sections 53 and 53b.

RECOMMENDATION RE PLAT CHANGES

The present provisions regarding changes in plats are contained in Sections 221-229 of the Subdivision Control Act of 1967 (M.C.L. §§570.221-229). These provisions were derived in part from the 1929 Plat Act. As a result of changes in procedure since the adoption of the 1929 Act, and ambiguities presented by consolidation of separate provisions in the 1967 codification, there is need for technical amendments of the provisions on plat changes. An analysis of the current provisions by Professor Roger Cunningham of the University of Michigan Law School suggested three basic changes: (1) eliminating the ambiguous division and the disparate standards created by distinguishing between the "amendment" of a plat by changing its dimensions and the "alteration" or "revision" of the plat by doing the same; (2) eliminating the inconsistency between the provision authorizing a single proprietor to request a plat change and the provision requiring that 2/3 of the owners petition for such a change; (3) clarifying the language regarding the effect of a complete or partial vacation of public rights in streets and alleys shown on a recorded plat. In addition, consistent with the general policy of employing (so far as functional) a single form of civil procedure, the petition process for plat changes should be brought within the procedures governing civil actions generally, as specified in the R.J.A. and General Court Rules. Each of these changes is described more fully below.

I. Eliminating the distinction between amendment and revision

Section 560.221, and many of the succeeding sections, assume but do not define a difference between "amendment" of a recorded plat "by a change in a dimension which results in changing the size or shape of any part of the plat," and "correction," "alteration," or "revision" of "all or any part of a recorded plat." As Professor Cunningham has noted, "the language of the 1967 Act provision leaves room for litigation as to the difference between 'amending' and 'vacating, correcting or revising' a recorded plat. None of these terms are defined in the Subdivision Control Act of 1967, and [under section 222] the persons who may seek to 'vacate,

correct, alter or revise a recorded plat or any part of it,' are not identical with those who may seek to 'amend a recorded plat.'" R. Cunningham, Public Control of Land Subdivision in Michigan: Description and Critique, 66 Mich.L. Rev. 1, 75 (1967). The suggested revision of §560.221 uses only the terms "vacate," "correct," and "revise" to describe the kinds of changes the circuit court may authorize pursuant to §§560.221-560.229. The word "revise" is intended to comprise all changes other than "vacation" or "correction," and thus to include "amendment" and "alteration."

The elimination of the distinction between "amendment" and "revision" of the plat requires that a choice be made between different standards currently used to describe attendant procedures. Thus, in Section 560.222, the standard for petitioning for amendment does not make reference to petitions by the municipality, while the standard for vacating, correcting, or revising does refer to the municipality. The broader standard is used in the amendment of Section 560.222, and it thus will apply to all forms of change.[1]

Similarly, under Section 560.229(1), if the court orders amendment, an amended plat must be prepared in the form required for final plats and five copies must be sent to the state treasurer with the plat captioned as an "amended plat." Section 560.229(2), on the other hand, provides that if a plat is corrected or altered, a new plat must be made and filed as provided for final plats. No mention is made as to the number of copies or sending the copies to the treasurer, but these procedures are part of the process applicable to preparing a final plat for recording. See M.C.L. §§560.131-560.143. The proposed redraft of Section 560.229 largely follows the language of Section 560.229(1), rather than 560.229(2), and makes that language applicable to all corrections and revisions.

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1 The reference to the municipality petitioning when it deems such action "advisable in the interests of the welfare, health, or safety of its citizens" is dropped as unnecessary. The court will, of course, consider community interest in exercising its discretion.

II. Eliminating the inconsistency between the two provisions on standing to petition

Section 560.222(2) provides:

> (2) To vacate, correct, alter or revise a recorded plat or any part of it, the proprietor of a subdivision or any lot in a subdivision; the governing body of a municipality which considers it necessary or advisable in the interests of the welfare, health or safety of its citizens; 2/3 of the proprietors collectively, of lands in the subdivision, and who also own 2/3 by area of the lands may apply to the appropriate circuit court.

The first clause of subdivision (2) of Section 560.222 appears to authorize any owner of a single lot in a subdivision to apply to the appropriate circuit court to change the recorded plat. However, the Michigan Court of Appeals in Feldman v. Monroe Township Board, 51 Mich.App. 752, 216 N.W. 2d 628 (1974), lv.den. 391 Mich. 837 (1974), erroneously construed Section 560.222(2) so as to preclude such a petition, as a result of the internal inconsistency in that provision that was introduced in the 1967 codification. Feldman held that the first clause of §560.222(2) has no legal effect because it is in conflict with the third clause of §560.222(2), which provides that "2/3 of the proprietors collectively of lands in the subdivision, and who also own 2/3 by area of the lands may apply to the appropriate circuit court" to change a recorded plat. The Feldman opinion concluded that, "it would appear unlikely that the Legislature would have added this clause only to have it negated by the first one," and that the third clause is controlling on the question of "standing" to apply for vacation, correction, alteration, or revision of a recorded plat. As is pointed out in the subsequent opinion of Judge Smith in In re Vacation of the Plat of Britton Estate, 226 N.W.2d 526 (Ct.App. 1975), the Feldman holding is based on an erroneous reading of the legislative history of Section 560.222(2). The first clause in §560.222(2) is derived with minor changes from §60 of the 1929 Plat Act;

under this section, the court had discretion to grant or deny an application for revision or vacation of a recorded plat. The third clause of §560.222(2), on the other hand, was derived from §63 of the 1929 Plat Act, which purported to require the circuit court to "order that the plat or part thereof be vacated or altered, corrected or revised as prayed in the petition" whenever the petition "is signed by at least 2/3 of the proprietors of lands and premises in such plat or part thereof * * * and who also own collectively at least 2/3 by area of the lands and premises therein." As Judge Smith pointed out in Britton Estate, the Michigan Supreme Court "indicated on several occasions it would be unconstitutional to require the circuit court to grant the relief prayed for simply because the 2/3 requirement had been met. * * * When the [Subdivision Control] act [of 1967] was written the 2/3 language was taken out of old §63 and put into the section governing standing. Then, probably because the Supreme Court regarded it as unconstitutional, the provision making it mandatory that the court grant the relief prayed for was eliminated. However, due to an oversight the 2/3 language was left in the statute. Perhaps * * * the Legislature meant to shift the burden of proof when the 2/3 requirement was met. However, the Legislature left out any mention of what significance the 2/3 requirement would have."

As Judge Smith noted, it seems clear that the Legislature did not intend to impose the 2/3 requirement as a prerequisite to standing to apply for vacation, correction, revision, or alteration of a recorded plat. In eliminating the inconsistency between the two clauses of Section 560.222 (2) a choice should be made between deleting the reference to petitions by 2/3 of the proprietors or retaining that reference and shifting the burden of persuasion in such cases to persons opposing the proposed changes in the plat. The latter alternative seems inappropriate. The court clearly can consider the strength of proprietor support in exercising its limited discretion, and the formal shifting of the burden of persuasion is unlikely to be viewed as a significant procedural step, particularly as it relates to the limitations on revision stated in Section 560.226. Accordingly, the proposed amendment of Section 560.222 deletes the 2/3's reference and clearly authorizes a complaint requesting vacation, correction, or revision to be filed by the owner of any lot in the subdivision or any person claiming under him.

III. Revision of M.C.L. §560.227

Section 560.227 deals with the affect of a complete or partial vacation of public rights in streets and alleys shown on a recorded plat. It now provides:

> "Sec. 227. The part vacated, if it is a lot, shall vest in the rightful proprietor; and if it is a street or alley, shall be attached to the lot or ground included in the plat and bordering on the street or alley. If the land included in the plat on opposite sides of such street or alley is owned by different proprietors, then the title of the street or alley, shall vest in the proprietor owning the property on each side thereof to the center of the street or alley, except when a part of 1 or both sides of a street or alley is vacated, then the part vacated shall be attached to and in any future legal description of the lot be a part of the title thereof vested in the proprietor of the lot included in the plat adjoining the same."

This provision creates some confusion by mixing the treatment of the lot and street or alley in the same sentence, and then treating a variety of different situations involving the street or alley in the second sentence. Proposed Section 260.227a attempts to restate the same substantive standards in a more understandable form.

IV. Incorporating standard civil procedure

The current provision adopts a petition procedure that apparently is unique to the changing of plats. The procedure includes special provisions relating to notification that are largely incorporated in Sections 560.224-560.225. These sections provide:

"Sec. 224(1). At least 20 days before the hearing of the application, the petitioner shall give notice of the pendency of the petition and of the time when the application will be made:

(a) By publishing the notice once each week for 3 successive weeks in a newspaper printed or circulated in the county in which the subdivision is located.

(b) By posting the notice in 3 of the most public places in the municipality in which the subdivision is situated.

(c) By mailing a copy of the notice by first class mail to those persons shown by the latest available assessor's records to be the owners of each lot or parcel of land included within or abutting the lands described in the petition.

(2) The notice shall contain the dimensions sought to be changed or a description of the property sought to be vacated, corrected or revised."

"Sec. 225. At least 20 days before the hearing of the application, personal service or service by registered or certified mail shall be made upon the following:

(a) The presiding officer of the municipality in which the land is situated and on the chairman of the planning commission, if there is one, but they need not be so served if the municipality is the petitioner.

(b) The state treasurer, who shall also be made a party to the proceedings.

(c) The drain commissioner and the chairman of the board of road commissioners having jurisdiction in any of the land included in the plat.

(d) Each public utility which is known to the petitioner to have installations or equipment in the subdivision, or has a recorded easement or franchise rights which will be affected by the proceedings.

(e) The director of the department of state highways if any of the subdivision includes or borders a state highway or federal aid road.

The proposed amendment would substitute §560.224a which would treat the action to vacate, correct, or revise a plat as a traditional civil suit under the R.J.A. and Court Rules. It would require joinder of the various parties noted in current §560.225 as well as owners of each parcel within or abutting the plat. Service would be provided in the ordinary fashion rather than through the special posting and publishing requirements of current Section 560.224.

Other sections also are changed to accomodate the traditional form of civil action -- e.g., the reference in §560.221 to a "petition" is changed to "complaint." Similarly, in §560.228, the reference to a charge of $1.00 per sheet by the clerk of the court is deleted, since record fees applicable in civil suits generally would apply.

The proposed bill follows:

SUIT FOR VACATION, CORRECTION,
OR REVISION OF A RECORDED PLAT

A bill to amend Sections 221, 222, 223, 226, 228 and 229 of Act No. 288 of the Public Acts of 1967, entitled "An act to regulate the subdivision of land; to promote the public health, safety and general welfare; to further the orderly layout and use of land; to require that the land be suitable for building sites and public improvements, and that there be adequate drainage thereof; to provide for proper ingress and egress to lots; to promote proper surveying and monumenting of land subdivided and conveyed by accurate legal descriptions; to provide for the approvals to be obtained by subdividers prior to the recording and filing of plats; to establish the procedure for vacating, correcting and revising plats; to control residential building development within floodplain areas; to provide for reserving easements for utilities in vacated streets and alleys; to provide for the filing of amended plats; to provide for the making of assessors plats; to provide penalties for the violation of the provisions of this act; and to repeal certain acts and parts of acts," being Sections 560.221, 560.222, 560.223, 560.226, 560.228 and 560.229 of the Compiled Laws of 1970; to add sections 224a and 227a; and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. Sections 221, 222, 223, 226, and 229 of Act No. 288 of the Public Acts of 1967, being Sections 560.221, 560.222, 560.223, 560.226, 560.228 and 560.229 of the Compiled Laws of 1970 are amended, and Sections 224a and 227a are added, to read as follows:

Sec. 221. The circuit court may, as provided in Sections 222 to 229, VACATE, CORRECT, OR REVISE ALL OR ANY PART OF A RECORDED PLAT.

~~(a) Order a recorded plat to be amended by a change in a dimension which results in changing the size or shape of any part of the plat.~~

~~(b) The circuit court may vacate, correct, alter or revise all or any part of a recorded plat.~~

Sec. 222. ~~(1)~~ To amend a recorded plat, the proprietor of the subdivision or any lot in the subdivision may apply to the appropriate circuit court.

~~(2)~~ To vacate, correct, ~~alter~~ or revise a recorded plat or any part of it, ~~the proprietor of a subdivision or any lot in a subdivision; the governing body of a municipality which considers it necessary or advisable in the interests of the welfare, health, or safety of its citizens; 2/3 of the proprietors collectively of lands in the subdivision, and who also owns 2/3 by area of the lands may apply to the appropriate circuit court~~ A COMPLAINT SHALL BE FILED IN THE CIRCUIT COURT BY (1) THE OWNER OF ANY LOT IN THE SUBDIVISION, OR ANY PERSON OF RECORD CLAIMING UNDER HIM, OR (2) THE GOVERNING BODY OF THE MUNICIPALITY IN WHICH THE SUBDIVISION COVERED BY THE PLAT IS LOCATED.

Sec. 223. "~~(1)~~ The ~~petition to the circuit court~~ COMPLAINT shall set forth:

(a) THE PART OR PARTS, IF ANY, SOUGHT TO BE VACATED, AND ANY OTHER CORRECTION OR REVISION OF THE PLAT SOUGHT BY PLAINTIFF.

(b) THE PLAINTIFF'S REASONS FOR SEEKING SUCH VACATION, CORRECTION, OR REVISION.

~~(a) The petitioner's reasons and the particular circumstances of the case;~~

~~(b) The dimensions to be changed or the part of the plat to be vacated, corrected or revised;~~

~~(e) The names of the persons to be particularly affected thereby; and the extent of their interests.~~

~~(2) The petition shall be filed with the clerk of the court at least 30 days previous to the sitting of the court to which the petitioner intends to make an application."~~

SEC. 224a. THE PLAINTIFF SHALL JOIN AS PARTIES DEFENDANT EACH OF THE FOLLOWING:

(a) THE OWNERS OF RECORD TITLE OF EACH LOT OR PARCEL OF LAND INCLUDED WITH OR ABUTTING THE PLAT, AND PERSONS OF RECORD CLAIMING UNDER THOSE OWNERS.

(b) THE MUNICIPALITY IN WHICH THE SUBDIVISION COVERED BY THE PLAT IS LOCATED.

(c) THE STATE TREASURER.

(d) THE DRAIN COMMISSIONER AND THE CHAIRMAN OF THE BOARD OF ROAD COMMISSIONERS HAVING JURISDICTION OF ANY OF THE LAND INCLUDED IN THE PLAT.

(e) EACH PUBLIC UTILITY WHICH IS KNOWN TO THE PLAINTIFF TO HAVE INSTALLATIONS OR EQUIPMENT IN THE SUBDIVISION OR HAS A RECORDED EASEMENT OR FRANCHISE RIGHTS WHICH WOULD BE AFFECTED BY THE PROCEEDINGS.

(f) THE STATE HIGHWAY COMMISSIONER IF ANY OF THE SUBDIVISION INCLUDES OR BORDERS A STATE HIGHWAY OR FEDERAL AID ROAD.

Sec. 226. UPON TRIAL AND HEARING OF THE ACTION, ~~After requiring proof that the required notices have been given and after hearing all interested parties,~~ the court may order ~~dimensional changes to be made in a recorded plat, or may order~~ a recorded plat or any part of it to be vacated, corrected, or revised, with the following exceptions:

(a) No part of a state highway or federal aid road may be vacated, corrected or revised except by the department of state highways.

(b) No part of a county road may be vacated, corrected or revised except by the county road commission having jurisdiction.

(c) No part of a street or alley under the jurisdiction of a city or village and no part of any public walkway, park or public square or any other land dedicated to the public may be vacated, corrected or revised under the provisions of this section except by both a resolution or other legislative enactment duly adopted by the governing body of the municipality and by court order.

(d) Any JUDGMENT ~~order~~ under this section vacating, correcting or revising any highway, road, street or other land dedicated to the public and being used by any public

utility for public utility purposes shall reserve an easement therein for the use of public utilities, and may reserve an easement in other cases.

SEC. 227a. TITLE TO ANY PART OF THE PLAT VACATED BY THE COURT'S JUDGMENT, OTHER THAN A STREET OR ALLEY, SHALL VEST IN THE RIGHTFUL PROPRIETOR OF SUCH PART. TITLE TO A STREET OR ALLEY THE FULL WIDTH OF WHICH IS VACATED BY THE COURT'S JUDGMENT SHALL VEST IN THE RIGHTFUL PROPRIETORS OF THE LOTS, WITHIN THE SUBDIVISION COVERED BY THE PLAT, ABUTTING THE STREET OR ALLEY. IF THE LOTS ABUTTING THE VACATED STREET OR ALLEY ON BOTH SIDES BELONG TO THE SAME PROPRIETOR, TITLE TO THE VACATED STREET OR ALLEY SHALL VEST IN THAT PROPRIETOR; IF THE LOTS ON OPPOSITE SIDES OF THE VACATED STREET OR ALLEY BELONG TO DIFFERENT PROPRIETORS, TITLE UP TO THE CENTER LINE OF THE VACATED STREET OR ALLEY SHALL VEST IN THE RESPECTIVE PROPRIETORS OF THE ABUTTING LOTS ON EACH SIDE. IF ONLY PART OF THE WIDTH OF A STREET OR ALLEY, NOT EXTENDING BEYOND THE CENTER LINE, IS VACATED, TITLE TO THE VACATED PART OF THE STREET OR ALLEY SHALL VEST IN THE PROPRIETOR OF THE LOTS ABUTTING THE SAME. WHENEVER TITLE TO ANY PART OF A VACATED STREET OR ALLEY VESTS IN AN ABUTTING PROPRIETOR, ANY FUTURE LEGAL DESCRIPTION OF THE ABUTTING LOT OR LOTS SHALL INCLUDE SUCH PART OF THE VACATED STREET OR ALLEY.

Sec. 228. Within 30 days AFTER ENTRY OF JUDGMENT ~~the applieant~~ for ~~the~~ vacation, CORRECTION, or revision OF A PLAT, PLAINTIFF shall record SUCH JUDGMENT in the office of the register of deeds ~~the order amending, vacating, correcting, or revising the plat.~~ The register of deeds shall place on the original plat the date, liber, and page of the record of the court's JUDGMENT. ~~order. A certified copy of the record shall first be given to the applieant by the clerk of the court, for which the clerk is entitled to receive the sum of $1.00 per sheet.~~

Sec. 229. ~~(1)~~ ~~If the court orders a change in any of~~ the dimensions ~~of a recorded plat, the change shall be set forth in an amended plat made by a surveyor of the affected part of the recorded plat as required by this act for final plats. Five true copies of the amended plat shall be filed with the state treasurer, accompanied by the filing and recording fee and certified copy of the judgment. The existing caption of the plat shall include the words "amended plat of." The filing and recording fee shall be the same as for a final plat.~~

(1) IF THE COURT ORDERS A PLAT TO BE VACATED, CORRECTED, OR REVISED IN WHOLE OR IN PART, THE COURT SHALL ALSO DIRECT PLAINTIFF TO PREPARE, IN THE FORM REQUIRED BY THIS ACT FOR A FINAL PLAT, EITHER (i) A NEW PLAT OF THE PART OF THE SUBDIVISION AFFECTED BY THE JUDGMENT, OR (ii) A NEW PLAT OF THE ENTIRE SUBDIVISION IF THE COURT'S JUDGMENT AFFECTS A MAJOR PART OF THE SUBDIVISION.

~~(2) If the court orders a recorded plat, or any part of it to be corrected, altered or revised, a new plat shall be made and filed as required by this act for final plats. The filing and recording fee shall be the same as for a final plat.~~

(2) FIVE TRUE COPIES OF THE NEW PLAT, ACCOMPANIED BY A COPY OF THE COURT'S JUDGMENT, SHALL BE FILED WITH THE STATE TREASURER. THE CAPTION OF THE NEW PLAT SHALL INCLUDE A STATEMENT THAT IT IS A CORRECTED OR REVISED PLAT OF ALL OR PART OF THE SAME SUBDIVISION COVERED BY THE ORIGINAL PLAT.

(3) After the state treasurer has examined the NEW OR AMENDED plat for compliance with the court judgment and the provisions of this act for the making and filing of ORIGINAL final plats, and has approved the NEW OR AMENDED plat as made, he shall distribute 1 copy each to the register of deeds, clerk of the municipality, county treasurer, and county road commissioner. One copy shall be filed in the office of the state treasurer.

(4) FEES FOR RECORDING AND FILING DOCUMENTS AS REQUIRED BY THIS SECTION SHALL BE THE SAME AS FOR AN ORIGINAL FINAL PLAT.

Sec. 2. Sections 224, 225 and 227 of Act No. 288 of the Public Acts of 1967, being Sections 560.224, 560.225 and 560.227 of the Compiled Laws of 1970 are repealed.

RECOMMENDATION RE AMENDMENTS OF VARIOUS ACTS TO DELETE REFERENCES TO ABOLISHED COURTS

This is the third in a series of Commission proposals designed to remove references to abolished courts, particularly the position of justice of the peace, which was abolished in 1969 (M.C.L. §600.9921) pursuant to the constitutional mandate of Article VI, Section 26 of the Michigan Court. The Technical Amendments to the R.J.A. (P.A. 297 of 1974) deleted such references in the Revised Judicature Act. The currently pending bill on Technical Amendments to the Code of Criminal Procedure (see p. 25 of the 10th Annual Report, 1975) would do the same in another major Act that contains numerous outdated references to the justice court. The proposal presented here starts the task of deleting references to the justice court in a series of less significant Acts that contain only occasional references to the justice court. Once again, the process of eliminating the outdated references cannot always be handled by simply deleting the reference. In some instances, a reference to current courts, that have assumed the former jurisdiction of the justice court, must be substituted. In other instances, the current reference is not to the justice court itself, but to offenses cognizable before that court; here again, a new standard for the describing the appropriate level of the offense must be substituted. (See 10th Annual Report at p. 37).

The various acts to be amended treat the following subjects: Care, Order, and Preservation of Governmental Property (p. 75 infra); Bureau of Criminal Identification (p. 81 infra); Enforcement of Township By-Laws (p. 89 infra); Hearings on Revocation of Public Recreation Hall Licenses by Township Boards (p. 91 infra); Charter Township Ordinances (p. 96 infra); Powers and Duties of Sheriffs (p. 98 infra); Village Ordinances (I) (p. 100 infra); Village Ordinances (II) (p. 109 infra); Fourth Class Cities (p. 111 infra); Home Rule Cities Act (p. 128 infra); and Election Law Amendments (p. 136 infra). Separate bills are proposed for each of these areas.

The proposed bills follow:

AMENDMENT OF CARE, ORDER, AND PRESERVATION OF PROPERTY ACT

A bill to amend sections 3 and 4 of Act No. 80 of the Public Acts of 1905, entitled "An act to authorize and empower the board of state auditors, the board of control, board of trustees or governing board of certain state institutions, to make, prescribe and enforce rules and regulations for the care, order and preservation of building or property dedicated and appropriated to the public use and the conduct of those coming upon the property thereof; to prescribe penalties for a violation thereof and to repeal all acts or parts of acts inconsistent with the provisions of this act," being sections 19.143 and 19.144 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 3 and 4 of Act No. 80 of the Public Acts of 1905, being sections 19.143 and 19.144 of the Compiled Laws of 1970 are amended to read as follows:

Sec. 2. Every person duly appointed or chosen by any of the said boards to act in the capacity of superintendent, policeman, watchman, marshal, deputy marshal, guard or attendant, shall be vested with the general authority of

sheriffs, relative to the arrest and custody of offenders against rules and regulations prescribed by said boards or any provisions of this act, and shall have authority to apprehend and arrest, and it shall be the duty of such officer or appointee to arrest without warrant any person found violating any rules which shall have been made or prescribed by the respective board relative to trespasses upon property, good order, the preservation of property, or the mutilation or destruction or injury to property in any manner whatsoever. It shall be the duty of said officers or appointees to make complaint against offenders of any provision of this act, or the rules and regulations of their respective board, before ~~any justice of the peace or police justice of the township or city, or any justice of the peace of the county within the limits of which the institution is located, and any justice of the peace, police justice or judge of the recorder's court, before whom complaint is made, is hereby authorized to take cognizance, hear, try and determine such matters, and pass sentence upon offenders in accordance with law~~ THAT COURT IN WHICH PROSECUTION FOR A MISDEMEANOR MAY BE INITIATED.

Comment: The Care, Order, and Preservation of Property Act (P.A. 1905, No. 80) empowers various specified state boards (e.g., the state board of education, the board of trustees of the Kalamazoo state hospital) to make and enforce rules and regulations for the care, order, and preservation of state property within their control. Section 3, which would be amended, builds upon sections 1 and 2 of the Act. Section 1 authorizes the specified state boards to appoint security personnel to protect the property within their control. Under Section 2 of the Act, various specified acts of destruction and mischief committed on the property are made misdemeanors (e.g., littering, destroying trees, disorderly conduct). Section 2 also makes it a misdemeanor to "openly and willfully refuse" to conform to the "rules, regulations, and orders" specified by the specified boards.

Section 3 grants arrest authority to the security personnel specified in Section 1, and provides for prosecution and trial of the misdemeanors specified in Section 2. The proposed amendment would change only that provision in Section 3 that specifies the court before which the security personnel are to file complaint against persons who commit the misdemeanors specified in Section 2. The current provision describes the appropriate court for filing the complaint as: the "justice of the peace or police justice of the township or city, or any justice of the peace of the county within the limits of which the institution is located." This description if, of course, inconsistent with our current court structure. Both justice courts and police courts have been abolished. See M.C.L. §600.9921. The subject matter jurisdiction and the territorial jurisdiction of those courts have been transfered to three courts: the district court, the

Recorder's Court of Detroit, and the municipal courts.[1] It would require an unnecessarily lengthy provision to identify the particular court before which the complaint should be filed for a violation committed upon the premises of an institution located in a particular area.[2] Accordingly, security personnel are directed simply to

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1 M.C.L. §600.8311(c) gives district courts jurisdiction of misdemeanors punishable by fine or imprisonment not exceeding 1 year, or both. M.C.L. §730.551 similarly gives municipal courts jurisdiction over misdemeanors punishable by a fine or imprisonment for not more than 1 year or both. M.C.L. §762.11 gives the Recorder's Court jurisdiction over all misdemeanors except those cognizable by the police court or justice of the peace, but other acts give the Recorder's Court jurisdiction over offenses formerly triable before the police court and justice of the peace court. See M.C.L. §725.10. Thus the Recorder's Court also has full jurisdiction with respect to misdemeanors.

2 The district court has jurisdiction is misdemeanor prosecutions committed in areas outside of Detroit and those judicial districts not served by municipal courts. Venue as to the particular branch of the district court is tied to whether the violation in question occurred in the county, district, or political subdivision in which the judge sits, depending on whether the district is of the first, second, or third class. See M.C.L. §600.8312. If an offense is committed within 1 mile of the boundary separating that county, district, or political subdivision, venue is further expanded. See M.C.L. §600.8312(4). The Recorder's Court of Detroit has territorial jurisdiction over offenses committed within the corporate limits of the city of Detroit. M.C.L. §726.11. The municipal courts have territorial jurisdiction over offenses committed within the limits of the municipality in which the court sits. M.C.L. §730.551. They also have jurisdiction for offenses committed outside the city where the judicial district, as specified in the district court act, includes territory beyond the municipality, and the district is served by a municipal court. M.C.L. §600.9928.

file the complaint with "that court in which prosecution for a misdemeanor may be initiated." While general, this reference should be sufficient. The key to the provision is the establishment of the security personnel's authority (and obligation) to file the complaint, not the designation of the particular court. Since the offense involved is made a misdemeanor under Section 2, the complaint obviously would be filed in the local court which tries misdemeanors.

The current section also provides that the designated courts shall "take cognizance, hear, try, . . . and pass sentence upon offenders." Such a provision is not needed since the provisions granting the district court, Recorder's Court, and municipal courts jurisdiction as to all misdemeanor offenses would encompass the misdemeanors included in this Act.

Sec. 4. The members of each of the above named boards and all other persons HAVING JURISDICTION OR POWER OF CONTROL OVER THE PROPERTY SPECIFIED IN SECTION 1 OF THIS ACT are also hereby given authority to make complaint, before ~~such justice of the peace or police justice as is referred to in section 3 of this act;~~ THAT COURT IN WHICH PROSECUTION FOR A MISDEMEANOR MAY BE INITIATED, against any person or persons who it is believed has wilfully violated any law, rule or regulation pertaining to the property or building over which they have any jurisdiction

or power of control. ~~and the proceedings pertaining to the arrest and punishment of offenders shall be in the manner hereinbefore prescribed.~~

Comment: This section is Section 4 of the Care, Order, and Preservation of Property Act, P.A. 1905, No. 80. While Section 3 directs security personnel to file complaints for misdemeanors specified in Section 2, Section 4 authorizes board members and "all other persons" to file similar complaints. The proposed amendment makes three changes in Section 4. First, it eliminates certain ambiguous phrasing in the current provision. The current statute refers to the filing of complaints by "all other persons," but does not initially indicate whether this reference is to the public generally or only to other persons with power of control over the state property referred to in the Act. The correctness of the latter interpretation is indicated by the section's later reference to property over which "they" (i.e., the boards and "all other persons") "having jurisdiction or power of control." That interpretation is also supported by the function of the provision. The public generally already has the right to make complaints in misdemeanor cases, M.C.L. §774.4. The function of the provision is to note especially the authority to file complaints for Section 2 violations by those persons with primary responsibility as to the property specified in Section 2. In order to avoid any confusion as to the reference to "all other persons," the amendment adds to that phrase the modifying language used later in the current provision. The amended reference would be to "all other persons" having "jurisdiction or power of control" over the property specified.

Second, for the reasons delineated in the comment to Section 3, the language identifying the court before which the complaint should be made has also been changed. The reference would now be to "that court in which prosecution for a misdemeanor may be initiated" rather than to the local justice of the peace.

Third, the last clause of Section 4 provides that the "proceedings pertaining to arrest and punishment of offenders shall be in the manner hereinbefore prescribed." It is assumed that the reference to previously described arrest authority does not grant the state board members the special authority to make warrantless misdemeanor arrests that is granted to the security personnel specified in Section 2. The board members lack the training of the security personnel, who are granted broader arrest authority than citizens generally. (A private person may make a warrantless arrest only for a felony. M.C.L. §764.16). The reference in the last clause to the "proceedings pertaining to arrest" thus is appropriately read as referring to general arrest procedures that would follow upon the complaint filed by the board members. In light of the general provisions in the Code of Criminal Procedure governing arrest procedures on misdemeanor complaints, there is no need to retain a special provision for arrests on complaints filed pursuant to this section. For similar reasons, a separate provision also is not needed with respect to sentencing procedures. Thus, the last clause is deleted entirely under the proposed amendment, just as a similar clause is deleted in Section 3.

AMENDMENT RELATING TO THE BUREAU OF CRIMINAL IDENTIFICATION

A bill to amend Sections 2 and 3 of Act No. 289 of the Public Acts of 1925, entitled "An act to create a bureau of criminal identification, records and statistics within the department of public safety; to provide for a director thereof; to prescribe his duties; to require peace officers, persons in charge of certain institutions and others, to make reports respecting crimes and criminals to such bureau and

to provide a penalty for violation of the provision thereof," being Sections 28.242 and 28.243 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 2 and 3 of Act No. 289 of the Public Acts of 1925, being Sections 28.242 and 28.243 of the Compiled Laws of 1970 are amended to read as follows:

Sec. 2. The director of such bureau shall procure and file for record, photographs, pictures, descriptions, finger prints, measurements and such other information as may be pertinent, of all persons who have been or may hereafter be convicted WITHIN THE STATE of a felony or of ~~a misdemeanor not cognizable by a justice of the peace~~ A MISDEMEANOR FOR WHICH THE MAXIMUM POSSIBLE PENALTY EXCEEDS 92 DAYS IN JAIL OR A FINE OF $500.00 OR BOTH ~~within the state~~ and also of all well known and habitual criminals wheresoever the same may be procured. The director of such bureau shall collect information concerning the number and nature of offenses known to have been committed in this state, of the legal steps taken in connection therewith from the inception of

the complaint to the final discharge of the defendant, and such other information as may be useful in the study of crime and the administration of justice; this information to comprise only such crimes, legal steps, and information as the director of the bureau may designate. The information so collected shall include such data as may be required by the United States department of justice at Washington under its national system of crime reporting. It shall be the duty of the director to provide all reporting officials with forms and instructions which specify in detail the nature of the information required, the time it is to be forwarded, the method of classifying, and such other matters as shall facilitate its collection and compilation. The director shall also cooperate with and assist sheriffs, chiefs of police and other law officers in the establishment of a complete state system of criminal identification and in obtaining finger prints and other means of identification of all persons arrested on a complaint of felony or of ~~a misdemeanor not cognizable by a justice of the peace~~ A MISDEMEANOR FOR WHICH THE MAXIMUM POSSIBLE PENALTY EXCEEDS 92 DAYS IN JAIL OR A FINE OF $500.00 OR BOTH. He shall also file for record

the finger print impressions of all persons confined in any workhouse, jail, reformatory, penitentiary or other penal institution.

Comment: Public Act 289 of 1925 establishes a bureau of criminal identification and directs the bureau to keep specified records. Section 2 requires the bureau to keep fingerprints and other data obtained from persons who have been arrested or convicted on charges of committing a crime of a specified level of seriousness. That level encompasses felonies and "misdemeanors not cognizable before a justice of the peace." The misdemeanor jurisdiction formerly exercised by justices of the peace is now exercised by district and municipal courts. The dividing line cannot be restated as excluding the misdemeanor not cognizable before those courts, however, because they have far more expansive jurisdiction than did justices of the peace. If the reference were made to "misdemeanors not cognizable before a district or municipal court," the provision would exclude misdemeanors in the six month and one year category as well as those in the 90 day category which formerly were tried before the justices of the peace.

The proposed amendment accordingly replaces the phrase "misdemeanor not cognizable by a justice of the peace" with a reference to misdemeanors punishable by a sentence that exceeds the highest level misdemeanor that formerly was within the jurisdiction of the justice of the peace. The line of separation is drawn at possible imprisonment exceeding 92 days or a fine exceeding $500.00. This line of demarcation is not exactly that which marked the outer limits of the justice of the peace jurisdiction at the time of its expiration, but the line does reflect the basic dividing line between so-called "J.P." and "non-J.P." misdemeanors. Originally, an offense was cognizable by a justice of the peace if punishable by no more than 90 days in jail or a fine of $100.00 or both. See M.C.L. §774.1. The maximum fine for many of these "90-day" (or "J.P.") misdemeanors was later changed to $500.00, as was the maximum for ordinance violations. (The jurisdictional limit

for municipal courts was changed accordingly, but no change was made for justice courts because they had been abolished. See 10th Annual Report, p. 38; M.C.L. §§41.183, 730.551). Accordingly, the proposed amendment would use a $500.00 fine limit rather than a $100.00 limit. The $500.00 limit also has been used in subsequent changes in the Code of Criminal Procedure which draw the same basic line of distinction as Section 2 of P.A. 289. See M.C.L. §§764.90; 765.20.

The proposed amendment states the maximum jail sentence at 92 days, rather than 90 days, because we still have several misdemeanors that are punishable by sentences of 3 months. See, e.g., M.C.L. §462.20 (failure to file reports required of common carriers); M.C.L. §287.286 (public servant failure to comply with requirements of act relating to livestock loss); M.C.L. §340.966 (school official violation of school code). With the right combination of months, the sentences for these offenses could exceed 90 days (92 days is the maximum). These misdemeanors clearly belong in the same general category as the 90 day offenses.

Sec. 3. It is hereby made the duty of the sheriffs of the several counties of this state, chiefs of police of the cities, and village marshals, immediately upon the arrest of any person for a felony or ~~of a misdemeanor not cognizable by a justice of the peace;~~ FOR A MISDEMEANOR FOR WHICH THE MAXIMUM POSSIBLE PENALTY EXCEEDS 92 DAYS IN JAIL OR A FINE OF $500.00, OR BOTH, to take his fingerprints, in duplicate, 1 set of fingerprints, according to the fingerprint system of identification established by the director of said bureau and on forms furnished by him, and 1 set of fingerprints according to the fingerprint system of identification

established by the director of the federal bureau of investigation at Washington, D.C., on forms furnished by him, and forward the same, together with such other descriptions and information as may be required to such bureaus for filing and classification. Should any person accused thereafter be released without a charge made against him, it shall be the mandatory duty of the official taking or holding any accused's fingerprints, arrest card and description to return same forthwith without the necessity of a request therefor. If not so returned, the accused so released shall have the absolute right to demand and receive such return at any time after such release and without need to petition for court action. Should any accused thereafter be found not guilty of the offense charged against him, the arrest card, the fingerprints and description shall be returned to him by a court order signed by the trial court and directed to the official holding same, which order shall issue automatically upon such finding of not guilty without the necessity of request therefor. If for any reason such order of return shall not issue upon a finding of not guilty, the accused shall have the

absolute right to such return, upon request, at any time after such acquittal. Should such order of return be refused such acquitted, the accused shall have the right to petition the circuit court of the county wherein the original charge was made for a preemptory writ of mandamus to require issuance of such order of return. It is hereby made the duty of the clerk of any court, the arresting officer, or such other official as the director may designate, to immediately advise the director of the bureau and the director of the federal bureau of investigation the final disposition of the arrest for which the accused was fingerprinted. The director shall compare the fingerprints and description received with those already on file in the bureau and if he finds that the person arrested has a criminal record or is a fugitive from justice, he shall at once inform the arresting officer of such fact. It shall be the duty of every police department, sheriff, constable, or other police agency; of clerks, justices, or other appropriate official for all criminal courts; of prosecuting, probation and parole officers; of every head of a department, board, commission, bureau or

institution of the state or any political subdivision thereof, having to do directly or indirectly with crime or criminals; or of any other person who by reason of his office is qualified to furnish the data required, to render to the director the information required in conformity with Section 2 hereof: Provided, That where the sheriff or other county officer is designated by the director as the person to whom the information is to be reported, it shall be the duty of the appropriate officials to report such information to him. The county officer so designated shall compile this information in such manner as the director may determine and forward a consolidated report to the director.

The provisions of this section requiring the return of the fingerprints, arrest card and description shall not apply (1) where the person arrested has any prior conviction excepting misdemeanor traffic offenses or (2) where the person arrested was charged with the commission or attempted commission, with or against a child under the age of 16, of the crime of rape, sodomy, gross indecency, or indecent liberties unless a judge of any court of record, excepting the probate court, by express order entered of record, orders the return.

Comment: Section 3 of P.A. 289 of 1925 establishes the duty of all law enforcement officials to furnish the director of the bureau of criminal identification with the fingerprints of persons arrested for certain offenses. Included among the crimes for which fingerprints must be taken are misdemeanors "not cognizable by a justice of the peace." For the reasons set out in the comment to Section 2, "misdemeanor not cognizable by a justice of the peace" would be changed to read "misdemeanor for which the maximum possible penalty exceeds 92 days in jail or a fine of $500.00 or both."

AMENDMENT RELATING TO ENFORCEMENT OF TOWNSHIP BY-LAWS

A bill to amend Section 5 of Chapter 16 of the Revised Statutes of 1846, being Section 41.5 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 5 of Chapter 16 of the Revised Statutes of 1846, being Section 41.5 of the Compiled Laws of 1970, is amended to read as follows:

Sec. 5. They may annex to such orders and by-laws suitable penalties, not exceeding 10 dollars for any 1 breach thereof, to be recovered by complaint before ~~any justice of the peace of the township or county~~ where the

~~offense shall have been committed~~ THE COURT IN WHICH PROSECUTION FOR A VIOLATION OF A TOWNSHIP ORDINANCE MAY BE INSTITUTED UNDER SECTION 3 OF ACT NO. 246 OF THE PUBLIC ACTS OF 1945, AS AMENDED, BEING SECTION 41.183 OF THE MICHIGAN COMPILED LAWS.

Comment: This section is Section 5 of Chapter 16 of the Revised Statutes of 1846. This Chapter establishes the powers and duties of townships. Section 4 of the Chapter provides that townships may adopt orders and by-laws "for directing and managing the prudential affairs of the township." Section 5 provides for a penalty, not to exceed $10.00, for breach of these orders and by-laws. Section 5 directs that penalties for violation of these orders and by-laws be recovered by a complaint before a "justice of the peace of the township or county where the offense shall have been committed." The proposed amendment substitutes a cross-reference to "the court in which prosecution for a violation of a township ordinance may be instituted" and cites the provision designating that court.

The power formerly exercised by the justice of the peace in enforcing township ordinances is now granted to district courts [M.C.L. §600.9922] and to municipal courts [M.C.L. §600.9928(2)].[3] It is assumed that the authority to enforce township by-laws and orders should be distributed in the same manner as authority to enforce township ordinances. Accordingly, the proposed amendment would replace the reference to justices of the peace by a cross-reference to the provision (M.C.L. §41.183) specifying that district or municipal court that has jurisdiction to enforce a particular township's

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3 (Recorder's Court of Detroit also exercises authority of the type formerly exercised by justices of the peace, but there are no townships within its jurisdiction).

ordinances. M.C.L. §41.183 directs that township ordinance prosecutions be instituted either in a municipal court or the district court, depending on the location of the township. M.C.L. §41.183(2) provides that if the township lies within a judicial district served by a municipal court, then the prosecution may be initiated in a municipal court.[4] M.C.L. §41.183(3) provides that if the township lies within a judicial district served by the district court, then the prosecution shall be instituted in that division of the district court serving that district.

AMENDMENT RELATING TO HEARINGS ON REVOCATION OF PUBLIC RECREATION HALL LICENSES BY TOWNSHIP BOARDS

A bill to amend Section 4a of Act No. 53 of the Public Acts of 1921, entitled "An act to regulate the establishment, maintenance and conducting of public billiard and pool rooms, dance-halls, bowling alleys and soft-drink emporiums outside of incorporated cities and villages; to

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4 M.C.L. §600.9928(1) provides that the district court shall not function in any district whose cities retaining municipal courts contain more than 50% of the population of the district. In these areas, the municipal courts serve the entire district, including any townships located therein. M.C.L. §600.9928(3). The provision does not indicate which municipal court is to be selected for enforcement of township ordinances if the judicial district contains more than one municipal court, but this does not appear to present any problems in the remaining municipal courts. See, e.g., M.C.L. §600.8123(3) (45th district).

provide for the issuance of permits for such places; to prescribe the powers and duties of township boards with relation thereto; and to prescribe the penalty for violation of the provisions hereof," being Section 41.504a of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 4a of Act No. 53 of the Public Acts of 1921, being sections 41.504a of the Compiled Laws of 1970, is amended to read as follows:

Sec. 4a. Every such license shall be revoked for any of the following causes:

(1) That intoxicating liquors are either sold or drunk on the premises, or that persons under the influence of intoxicating liquors are permitted to frequent, be in, or remain on said premises;

(2) That gambling in any form is permitted in or about said premises;

(3) That such places are frequented habitually by persons of low repute, or that the place is conducted in such a manner as to be generally reputed in the

immediate vicinity thereof to be immoral and a menace to the morals and good citizenship of the community.

In either of the foregoing cases the township board shall revoke said license and give notice of such revocation to the holder. For the purpose of enforcing these provisions for revocation the township board may act on its own initiative, or on complaint of any resident. When such revocation is sought, the township clerk shall give a written notice to the licensee personally, or by leaving the same with his agent or employee at his place of business, in which notice shall be stated the charges made against him for which revocation of his license is sought; the time and place at which he may appear to defend against such charges, which time shall be not sooner than 3 full days from the serving of said notice. For such hearing the township board may subpoena witnesses in the same manner as such witnesses are now subpoenaed in criminal cases ~~in justice court~~. Such hearings need not follow the strict legal requirement of court trials. If, after an impartial and unbiased investigation, the township board is convinced that the charges have been sustained, it shall revoke the license. If a township board desires the services of the prosecuting

attorney at such hearing, it is herein made the duty of the prosecuting attorney to attend and assist in the conduct of such hearing. If the township board shall determine that such license shall be revoked, the township clerk shall personally notify the licensee, or his agent or employee in charge of his place, in writing, and the said license shall be revoked from and after midnight of the said day.

Comment: This section is Section 4a of Act No. 53 of the Public Acts of 1921. That Act regulates the establishment and maintenance of recreation halls (e.g., billiard rooms, bowling alleys) outside of incorporated villages and cities. Section 1 of the act provides for the issuance of permits to establish such halls, and sections 4 and 4a deal with renewal and revocation of that permit. Section 4a provides, in particular, that at a hearing to consider revocation, "the township board may subpoena witnesses in the same manner as such witnesses are now subpoenaed in criminal cases in justice court." The proposed amendment eliminates the reference to the now abolished justice court. The amendment would retain the basic objective of the current provision by making the subpoena authority co-extensive with that of courts now exercising the criminal jurisdiction formerly exercised by justices of the peace. However, there is no need to substitute a reference to these courts since all courts now have the same basic sub-

poena authority in criminal cases.[5] Accordingly, the amendment merely refers to the subpoena authority in "criminal" cases.

It should be noted that, in changing Section 4a to refer to subpoena authority in criminal cases generally, the subpoena power of the township board will be enlarged. The justice court's subpoena power was limited to witnesses within the county or outside the county but within 30 miles of the place of trial. See M.C.L. §600.7001, repealed by the R.J.A. Technical Amendments Act (No. 297 of 1974). The current courts, including the district and municipal courts, are not subject to such a territorial limitation and the township board would now have equally broad subpoena authority.

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5 M.C.L. §600.1455(1) grants all courts of record the same power "to issue process of subpoena." The district court is a court of record, M.C.L. §600.8101, and accordingly now has the same subpoena authority in criminal cases as does the circuit court and Recorder's Court of Detroit (also courts of record). M.C.L. §730.551, which extended municipal court jurisdiction to include all misdemeanors punishable by not more than 1 year imprisonment, also empowers municipal courts to issue all lawful writs and process which are necessary and proper to carry into effect their jurisdiction. This is not as specific a reference to the scope of subpoena authority as is that included in M.C.L. §600.1455(1). However, this incompleteness in municipal court subpoena power will be rectified by the proposed §764.1a (see 10th Annual Report, pp. 33-34), which provides that municipal courts will be governed by the statutes and rules applicable to district courts with regard to issuance of subpoenas, and thereby will make M.C.L. §600.1455(1) applicable also to municipal courts.

AMENDMENT RELATING TO CHARTER TOWNSHIPS

A bill to amend Section 21 of Act No. 359 of the Public Acts of 1947, entitled "An act to authorize the incorporation of charter townships; to provide a municipal charter therefor; and to prescribe the powers and functions thereof," being Section 42.21 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 21 of Act 140.359 of the Public Acts of 1947, being Section 40.21 of the Compiled Laws of 1970 is amended to read as follows:

Sec. 21. The township board shall provide in each ordinance for the punishment of those who violate its provisions. No punishment for the violation of any township ordinance shall exceed a fine of $100.00 or imprisonment for 90 days, or both in the discretion of the court. ~~All fines collected for the violation of the ordinances of a charter township shall belong to such township and shall be paid into the township treasury on or before the first Monday of the month next following receipt thereof by any justice of the peace or other judicial officer.~~

Comment: This section is Section 21 of Act No. 359 of the Public Acts of 1947. That Act authorizes the incorporation of charter townships and prescribes their powers and functions. Section 15 grants the township board the power to enact ordinances. Section 21 provides, inter alia, that all fines collected for ordinance violations "shall be paid into the township treasury on or before the first Monday of the month next following receipt thereof by any justice of the peace or other judicial officer." This provision is no longer applicable in light of the abolition of the office of justice of the peace and the new provisions governing disposition of fines collected in the district court.

Ordinance violation prosecutions for charter townships are now prosecuted in the district court. (Former justice court jurisdiction was also granted to the Recorder's Court of Detroit and the municipal courts, but no charter townships currently fall under the jurisdiction of either of these courts). The distribution of fines collected in the district court, including fines collected for ordinance violations, is governed by a separate provision in the R.J.A., M.C.L. §600.8379. Indeed, where the charter township lies within a judicial district of the first or second class, the disposition of fines under M.C.L. §600.8379 is contrary to the disposition prescribed in Section 21. In that situation, M.C.L. §600.8379 grants the charter townships only 1/3 of the fines imposed for the violation of its ordinance, while the county in which the township is located receives 2/3 of the fine. See M.C.L. §600.8379(c). Since only the district court deals with charter township ordinance violations and there already is a provision governing disposition of fines collected in that court, the entire sentence relating to disposition of fines would be deleted under the proposed amendment.

AMENDMENT RELATING TO THE POWERS AND DUTIES OF SHERIFFS

A bill to amend Section 1 of Act No. 2 of the Public Acts of 1967, entitled "An act to enlarge the powers and duties of sheriffs, under and deputy sheriffs," being Section 51.221 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 1 of Act No. 2 of the Public Acts of 1967, being Section 51.221 of the Compiled Laws of 1970, is amended to read as follows:

Sec. 1. That any sheriff, under sheriff, or deputy sheriff, of any county of this state, may and shall hereafter be fully authorized to serve or execute any and all process, civil or criminal, ~~issued, or which may by law be issued by any justice of the peace,~~ and to have and to exercise all the powers and duties of constables; and for such services they shall be entitled to the same fees as are now, or may be allowed by law to constables in like cases.

Comment: This section is Section 1 of Public Act No. 2 of 1967. That act defines powers and duties of sheriffs, under sheriffs, and deputy sheriffs. It authorizes sheriffs, under sheriffs, and deputy sheriffs to serve and execute all process, civil or criminal, issued, "or which may by law be issued by any justice of the peace." The proposed amendment deletes the latter phrase so that the statute simply refers to serving and executing process issued by any court.

There is no need to substitute a new phrase for the current reference to process issued by justices of the peace. Under various provisions in the Michigan Compiled Laws, sheriffs now have the authority to serve process issued by any court in the state, including all of the courts that exercise the authority formerly exercised by the justice of the peace. M.C.L. §600.1801 provides that a sheriff, under sheriff or deputy sheriff shall serve any process delivered to him that is issued by a court of record. This provision encompasses both the district court and Recorder's Court. It does not extend to municipal courts, since the municipal courts are not courts of record. However, other provisions, discussed below, should provide proper coverage for municipal court process.

In civil cases, M.C.L. §600.6502 provides that in matters relating to service and enforcement of "writs, subpoenas and other civil process," the municipal courts shall be governed by statutes and supreme court rules applicable to district courts. This would tie municipal court authority to M.C.L. §600.1801, noted supra. It would also tie municipal court authority to M.C.L. §600.8321, a separate provision which authorizes service of district court civil process by a sheriff, deputy sheriff or a court officer appointed for that purpose.

Service of municipal court process in criminal cases is controlled by three provisions in the Code of Criminal Procedure. Proposed section 766.3 of the amendments to the Code of Criminal Procedure (see 10th Annual Report, p. 65), provides that the magistrate (including municipal

judges) shall issue a felony warrant "directed to the sheriff, chief of police, constable or any other peace officer of the county." Proposed §774.4 of the amendments to the Code of Criminal Procedure (see 10th Annual Report, pp. 94-97) empowers magistrates to issue warrants for misdemeanors and to direct their enforcement by peace officers generally, which would include the sheriff and his various deputies. Finally, proposed §764.1a would tie criminal process authority of the municipal courts to that of the district court, and this provision would incorporate M.C.L. §600.1801 on the criminal side.

AMENDMENTS RELATING TO THE ENFORCEMENT OF VILLAGE ORDINANCES (I)

A bill to amend Sections 6, 7, 9, and 10 of Chapter 6 of Act No. 3 of 1895, entitled "An act to provide for the incorporation of villages; to define their powers and duties; to define the powers and duties of the municipal finance commission with regard thereto; to define the application of this act and provide for its amendment by villages subject thereto; and to validate prior amendments and certain prior actions taken and bonds issued by villages," being Sections 66.6, 66.7, 66.9 and 66.10 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 6, 7, 9 and 10 of Chapter 6 of Act No. 3 of 1895, being sections 66.6, 66.7, 66.9 and 66.10 of the Compiled Laws of 1970 are amended to read as follows:

Sec. 6. Prosecutions for violation of the ordinance shall be commenced within 2 years after the commission of the offense, and shall be brought ~~within the village, or the township in which the village, or some part thereof, is located~~ IN THE DISTRICT OR MUNICIPAL COURT IN THAT JUDICIAL DISTRICT IN WHICH THE VILLAGE IS LOCATED. ~~Any justice of the peace of the village or of the township in which the village or some part of it, is situated,~~ THAT COURT shall have the authority to hear, try and determine all causes and suits arising under the ordinances of the village, and to inflict punishment for violations thereof as provided in the ordinances.

Comment: This section is Section 6 of Chapter VI of Act No. 3 of the Public Acts of 1895. That Act provides for the incorporation of villages and defines their powers and duties. Chapter VI of the Act deals with ordinances. Sections 1 and 2 provide that a village may pass ordinances and that the maximum penalty for an ordinance violation shall not exceed a fine of $100.00 or imprisonment of 90 days or both. Section 6 provides that prosecutions for ordinance violations shall be brought before the justice of the peace located within the village or the township which contains the village. The pro-

posed amendment would delete the references to the justice of the peace and direct that the prosecution be brought before the district or municipal court of the judicial district in which the township is located.

The ordinance violation jurisdiction formerly granted to the justice of the peace is now granted to the district courts by M.C.L. §600.9922 and to municipal courts, where still existing, by M.C.L. §600.9928(2). The state is divided into judicial districts by M.C.L. §600.8101. In those districts served by a district court, the village ordinance violation would be brought in that court. In those districts in which a municipal court remains, the village within that district will be serviced by the local municipal court. See, e.g., M.C.L. §600.8121(17). See also M.C.L. §600.9928(3). The proposed amendment accordingly directs that the prosecution be brought before that court -- municipal or district -- that is located in the judicial district in which the village is located.

The proposed amendment does not seek to distinguish between different divisions of the district court within a single district. That issue is treated, in part, in M.C.L. §600.8312, which provides that in districts of the third class, venue in prosecutions for village ordinance violations shall be in the local political subdivision, if the court sits there. In those districts that are served by a municipal court and also contain villages, the village will be within the jurisdiction of a particular municipal court.

Sec. 7. Whenever a penalty shall be incurred for the violation of any ordinance, and no provision shall be made for the imprisonment of the offender upon conviction thereof, such penalty may be recovered in ~~an action of debt or in assumpsit~~ A CIVIL ACTION. And when a corporation shall incur a penalty for the violation of any such

ordinance, the same shall be sued for in ~~1 of the actions aforesaid~~ A CIVIL ACTION. Prosecutions for violations of the ordinances of the village may, in all cases except against corporations, be commenced by warrant for the arrest of the offender. Such warrants shall be in the name of the people of the state of Michigan, and shall set forth the substance of the offense complained of; and be substantially in the form and be issued upon complaint made, as provided by law in ~~criminal cases cognizable by justices of the peace~~ MISDEMEANOR CASES. And the proceedings relating to the arrest and custody of the accused during the pendency of the suit, the pleadings and all proceedings upon the trial of the cause and in procuring the attendance and testimony of witnesses, and in the rendition of judgments and the execution thereof shall, except as otherwise provided by this act, be governed by and conform as nearly as may be, to the provisions of law regulating proceedings in ~~criminal causes cognizable by justices of the peace~~ MISDEMEANOR CASES.

Comment: Section 7 provides that warrants may be used in arresting violators of village ordinances and provides for the manner of arrest, custody, and court proceedings against the offender. Section 7 requires that both the warrant and the subsequent proceedings conform substantially to the form and procedure used in "criminal cases [causes] cognizable by a justice of the peace."

The proposed amendment replaces the phrases "criminal cases [causes] cognizable by a justice of the peace" with the phrase "misdemeanor cases." Criminal cases cognizable by justices of the peace formerly were misdemeanor offenses punishable by 90 days imprisonment or $100.00 fine, or both. Under the proposed revision of the Code of Criminal Procedure, the procedures for warrant issuance, arrest, custody, and court proceedings would be the same for all "misdemeanors" (i.e., those punishable by 90 days imprisonment and those punishable by imprisonment exceeding 90 days but less than one year).[6] (See 10th Annual Report, pp. 37-42). Moreover, the procedures for issuing warrants and for all other matters of criminal jurisdiction would be governed by the same rules for both the district and municipal courts (see 10th Annual Report, pp. 33-35, 93-97). Accordingly, the proposed amendment to Section 7 simply refers to misdemeanors and does not distinguish between the level of the misdemanor or the court before which the misdemeanor is tried.

Under the proposed amendment, the phrase "an action of debt or assumpsit" in the first sentence of Section 7, and the cross-reference to it in the second sentence, is replaced by the phrase "a civil action." The forms of action (e.g., assumpsit, replevin) have been abolished by GRC 1963, 110.3 and GRC 1963, 12. The latter rule provides: "There shall be 1 form of action to be known as a civil action."

Sec. 9. It shall not be necessary in any suit, proceeding, or prosecution for the violation of any ordinance, to state or set forth such ordinance, or any of the pro-

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6 The proposed technical amendments to the Code of Criminal Procedure (10th Annual Report, p. 24) would add a definition of "misdemeanor" that would limit that term to offenses punishable by one year imprisonment or less. This definition would be carried over to Section 7 since Section 7 refers to procedures governed by the Criminal Procedure Code.

visions thereof, in any complaint, warrant, process or pleading therein; but the same shall be deemed sufficiently set forth or stated by reciting its title and the date of its passage, adoption or approval.

And it shall be a sufficient statement of the cause of action in any such complaint or warrant, to set forth substantially, and with reasonable certainty, as to time and place, the act or offense complained of, and to allege the same to be in violation of an ordinance of the village, referring thereto by its title, and the date of its passage, adoption, or approval. In all prosecutions for violations of the ordinances of the village, either party may require a trial by jury.

Such jury, except when other provision is made, shall consist of 6 persons. ~~and~~ IN suits commenced by warrant, THE JURY shall be selected and summoned as in ~~criminal cases cognizable by justices of the peace; and, in suits commenced by summons, as in civil cases triable before such magistrate.~~ MISDEMEANOR CASES BEFORE THE COURT IN WHICH THE PROSECUTION FOR THE VILLAGE ORDINANCE VIOLATION IS BROUGHT. IN CIVIL ACTIONS TO RECOVER PENALTIES FOR THE VILLAGE ORDINANCE

VIOLATION THE JURY SHALL BE SELECTED AND SUMMONED AS IN OTHER CIVIL ACTIONS BEFORE THE COURT IN WHICH THE SUIT IS BROUGHT. No inhabitant of the village shall be incompetent to serve as a juror in any cause in which the village is a party or interested, on account merely of such interest as he may have, in common with the inhabitants of the village, in the results of the suit.

Comment: Section 9 provides that in village ordinance violation prosecutions either party may demand a trial by a jury consisting of 6 persons. The section further provides that "in suits commenced by warrant" the jury shall be selected and summoned "as in criminal cases cognizable by justices of the peace," and "in suits commenced by summons," the jury shall be selected and summoned "as in civil cases triable before such magistrate." The proposed amendment substitutes new cross-references for both types of suits.

The cross-reference to "criminal cases cognizable by a justice of the peace" is replaced by a cross-reference to "misdemeanor cases before the court in which prosecution for the village ordinance violation is brought."[7] The reference to the particular court "in which the prosecution . . . is brought" is necessary because jury selection and summoning is treated differently in the municipal and district courts. See M.C.L. §600.1301 et seq. (governing juries for the district court) and M.C.L. §730.401 et seq. (governing juries for municipal courts). As noted in the commentary to Section 6 of this Act, prosecution will be brought in a municipal or district court depending upon which court serves the judicial district in which the village is located.

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7 For the reasons set out in the comment to the proposed amendment of Section 7 of this Act (M.C.L. §66.7), the reference is to "misdemeanor cases" generally rather than just to those misdemeanors formerly cognizable before a justice of the peace.

The current reference to "suits commenced by summons" is deleted in favor of the phrase "in civil actions to recover penalties for the village ordinance violation." When this section originally was enacted, the summons was only used in civil actions; the current reference to "suits commenced by summons" accordingly referred only to actions in debt or assumpsit against violators of ordinances for which no provision for imprisonment was made. See the commentary on Section 7, supra, and Section 10, infra. However, M.C.L. §764.9a now provides that a summons may be used as an alternative to an arrest warrant in initiating a "criminal" prosecution for a violation of a village ordinance.[8] In order to avoid any ambiguity in the use of the term "summons," reference is now made to "civil actions to recover penalties for the village ordinance violation." As under the current provision, the jury selection process prescribed would be that used generally in civil actions in the particular court in which the suit is filed. Again, this may be either a district court or municipal court, depending upon the location of the village.

Sec. 10. Any person convicted of a violation of any ordinance of the village in a suit commenced by warrant as aforesaid, may remove the judgment and proceedings into

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8 The provisions in M.C.L. §66.9 dealing with criminal suits commenced by warrant have not been changed to refer also to suits commenced by a summons issued pursuant to §764.9a. The Criminal Procedure Code does not make a cross-reference to the alternative of a §764.9a summons in its sections referring to prosecution by warrant, and there is no basis for creating a stylistic exception here. It is generally understood that, in light of §764.9a, provisions applicable to prosecutions initiated by a warrant apply also to "criminal" prosecutions initiated by a summons.

the circuit court for the county in which the village is located, by appeal ~~or writ of certiorari;~~ and the time for such appeal or removal, and the proceedings therefor, and the bond or security to be given thereon and the proceedings disposition of the cause in the circuit court, shall be the same as IN MISDEMEANOR CASES on appeal ~~and certiorari in criminal cases cognizable by justices of the peace;~~ FROM THE COURT WHICH TRIED THE VILLAGE ORDINANCE VIOLATION; and in suits to which the village may be a party, brought to recover any penalty for such violation, either party may appeal from the judgment or remove the proceedings by certiorari into the circuit court, and the like proceedings shall be had therefor and thereon, and the like bond or security shall be given as in cases of appeal ~~and certiorari~~ in civil ~~cases tried before justices of the peace;~~ ACTIONS BEFORE THE COURT WHICH TRIED THE VILLAGE ORDINANCE VIOLATION, except that the village shall not be required to give any bond or security thereon.

Comment: Section 10 prescribes the manner of appeal from suits brought to enforce a village ordinance. It provides that in suits commenced by warrant, the procedures for appeal and certiorari are the same as those in "criminal cases cognizable by justices of the peace." It further provides that in suits brought to recover a penalty for a village ordinance violation, the procedures for appeal and certiorari are the same as those in "civil cases tried before justices of the peace."

Under the proposed amendment, the cross-reference to "criminal cases cognizable by a justice of the peace" is replaced by a cross-reference to "misdemeanor cases before the court which tried the village ordinance violation." The cross-reference to civil cases "tried before the justice of the peace" is replaced by a cross-reference to "civil actions before the court which tried the ordinance violation." In both instances, the provision must refer to the particular court before which the action was tried because either a district court or municipal court could be involved (see M.C.L. §66.6) and appeals from the two courts are treated differently. See M.C.L. §§600.8341 and 600.8342 (governing appeals from district courts) and M.C.L. §§730.106, 730.136, 730.532, 774.34, 774.35, 774.38, 774.43 and 774.44 (governing appeals from municipal courts). Reference to "certiorari" is also eliminated since that writ is no longer used to obtain appellate review. It is sufficient to refer only to "appeals."

AMENDMENT RELATING TO THE ENFORCEMENT OF VILLAGE ORDINANCES (II)

A bill to amend Section 22a of Act No. 278 of the Public Acts of 1909, entitled as amended "An act to provide for the incorporation of villages and for revising and amending their charters; to provide for the levy and collection of taxes, borrowing of money, and issuance of bonds and other evidences of indebtedness; and to validate bonds issued and obligations previously incurred," being Section 78.22 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 22a of Act No. 278 of the Public Acts of 1909, being Section 78.22a of the Compiled Laws of 1970, is amended to read as follows:

Sec. 22a. ~~A village having at least 1 full time police officer may provide by ordinance for the part time employment for a salary in lieu of fees of 1 or more of the justices of the peace of the township in which such village is located, who need not be a resident of the village,~~ to THE DISTRICT OR MUNICIPAL COURT IN THAT JUDICIAL DISTRICT IN WHICH THE VILLAGE IS LOCATED SHALL hear and determine all cases involving violation of village ordinances.

Comment: Act No. 278 of the Public Acts of 1909 provides for the incorporation of villages and sets forth the governmental authority of villages incorporated under that Act. This incorporation provision exist apart from the incorporation provisions of P.A. No. 3, 1895 and an opinion of the Attorney General suggests that the provisions of that Act relating to the incorporation, powers and duties of villages have no application to villages incorporated under this Act, unless the charter indicates otherwise. Op. Atty. Gen. 1928-30, p. 89. Accordingly, the proposed amendment does not rely upon Section 6 of P.A. No. 3, 1895 (M.C.L. §66.6), but provides for an alteration of the provision in much the same manner as the proposed alteration of Section 6 (discussed at p. 101 supra).

AMENDMENTS RELATING TO AUTHORITY OF FOURTH CLASS CITIES

A bill to amend Sections 1, 5, 10, and 11 of Chapter V, Sections 25 and 38 of Chapter VII, Sections 17 and 18 of Chapter VIII, Sections 5, 9, 11, 12 and 16 of Chapter X of Act No. 215 of the Public Acts of 1895, entitled "An act to provide for the incorporation of cities of the fourth class; to provide for the vacation of the incorporation thereof, to define the powers and duties of such cities and the powers and duties of the municipal finance commission with regard thereto; to define the application of this act and provide for its amendment by cities subject thereto, and to validate such prior amendments and certain prior actions taken and bonds issued by such cities," being Sections 85.1, 85.5, 85.10, 85.11, 87.25, 87.38, 88.17, 88.18, 90.5, 90.9, 90.11, 90.12 and 90.16 of the Compiled Laws of 1970, and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 1, 5, 10, and 11 of Chapter V, Sections 25 and 38 of Chapter VII, Sections 17 and 18 of Chapter VIII, Sections 5, 9, 11, 12 and 16 of Chapter X of Act No. 215 of the Public Acts of 1895, being Sections 85.1, 85.5, 85.10, 85.11, 87.25, 87.38, 88.17, 88.18, 90.5, 90.9, 90.11, 90.12 and 90.16 of the Compiled Laws of 1970 are amended to read as follows:

Chapter V

Sec. 1. In cities incorporated under this act the following city officers, namely, a mayor, city clerk, AND city treasurer; ~~and 2 justices of the peace;~~ shall be elected by the qualified voters of the whole city.

Sec. 5. At the first election held in any city incorporated under this act, ~~2 justices of the peace shall be elected; also~~ 2 aldermen in each ward SHALL BE ELECTED, but in cities re-incorporated under this act, the aldermen elected under the former corporation, shall continue in office for the term for which they were elected; and, at such first election, such number of altermen only shall be elected, as with those continuing in office as aforesaid, shall make the requisite number of aldermen as required by

this act, and the terms of the aldermen first elected as aforesaid, shall be so arranged that 1 alderman for each ward shall be elected annually thereafter. In all such cities re-incorporated under the provisions of this act, the then existing justices of the peace shall hold their offices until the fourth day of July next after such first election, and no longer, and at such first election 2 justices of the peace shall be elected, 1 for the term of 2 years and 1 for the term of 4 years from the fourth day of July next thereafter, and the term for which each is elected shall be designated upon the ballots cast for him, and biennially thereafter 1 justice of the peace shall be elected for a term of 4 years: Provided, That whenever any city re-incorporated under this act shall at the time of such re-incorporation have but 2 justices of the peace, whether elected by wards, districts, or by the city at large, such justices shall hold their respective offices until the expiration of the term for which they were respectively elected, and thereafter their successors shall be elected for the term of 4 years as provided in this act.

Sec. 10. Justices of the peace elected in any city shall take and file an oath of office with the county clerk of the county in which the city is located within the same time and in the same manner as in cases of justices of the peace elected in townships. All other officers elected or appointed in the city, shall, within 10 days after receiving notice of their election or appointment, take and subscribe the oath of office prescribed by the constitution of the state and file the same with the city clerk.

Sec. 11. Every justice of the peace, within the time limited for filing his official oath, shall file with the county clerk, mentioned in the preceding section, the security for the performance of the duties of his office, required by law in the case of justices of the peace elected in townships; except that said official bond or security may be executed in presence of, and be approved by the mayor; and in case he shall enter upon the execution of the duties of his office before having filed his official oath and bond or security and such other bond or security to the city as may be required by law or by any ordinance or resolution of the council, he shall be liable to the same penalties as are provided in cases of justices of the peace

~~elected in townships; and~~ Every ~~other~~ officer elected or appointed in the city before entering upon the duties of his office and within the time prescribed for filing his official oath, shall file with the city clerk such bond or security as may be required by law or by any ordinance or requirement of the council, and with such sureties as shall be approved by the council, for the due performance of the duties of his office, except that the bond or security of the clerk shall be deposited with the city treasurer.

Comment: Act No. 214 of the Public Acts of 1895 sets forth the organization and authority of fourth class cities. Chapter V of that Act deals with the selection of city officers. The proposed Act would amend Sections 1, 5, 10, and 11 of that Chapter. Section 1 lists the officers to be elected, and the proposed amendment would delete the references therein to justices of the peace. Section 5 governs the procedures for election, and the proposed amendment deletes those provisions governing the election of justices of the peace. Section 10 prescribes the oath to be taken by various officers, and the proposed amendment deletes references to oath to be taken by justices of the peace. Section 11 prescribes the posting of bond or security, and the proposed amendment here again deletes all references to justices of the peace.

Chapter VII

Sec. 25. The constables of the city shall obey all lawful orders of the mayor, AND aldermen ~~and any justice of the peace exercising jurisdiction in causes for breaches of the~~

~~ordinances of the city;~~ and shall discharge all duties required of them by any ordinance, resolution or regulation of the council, and for any neglect or refusal to perform any such duty required of him every constable shall be subject to a penalty of not less than 5 nor more than 50 dollars. Every constable, before entering upon the duties of his office, shall give such bonds for the performance of the duties of his office, as may be required and approved by the council, and file the same with the city clerk.

Sec. 38. The mayor shall receive such annual salary as the council may determine and aldermen may each receive such salary as may be prescribed by the council. The city marshal, clerk, treasurer, city attorney, and engineer of the fire department shall each receive such annual salary as the council shall determine by ordinance. ~~Justices of the peace;~~ Constables and officers serving process and making arrests, may, when engaged in causes and proceedings for violations of the ordinances of the city, charge and receive such fees as are allowed to those officers for like services by the general laws of the state. All other officers

elected or appointed in the city, shall, except as herein otherwise provided, receive such compensation as the council shall determine.

Comment: Chapter VII of Act No. 215 on fourth class cities prescribes the duties and salaries of officers of the city, including the now abolished position of justice of the peace. Section 25 specifies the obligation of constables to obey the orders of various officials including the justice of the peace. The proposed amendment deletes the reference to the justice of the peace. Substitution of a reference to the judges now exercising the jurisdiction formerly exercised by the justice of the peace (the municipal or district court judge) would be inappropriate. The district court judge, for example, does not have the same special relationship to the city as did the justice of the peace. Moreover, the authority of the district court judge to direct all peace officers (including constables to enforce warrants, etc. is clearly established under various provisions of the Code of Criminal Procedure. See, e.g., M.C.L. §§766.3, 774.4 (warrants directed to officers).

Section 38 refers to the annual salary of various city officials, and here again the reference to the justice of the peace would be deleted.

Chapter VIII

Sec. 17. Any person appointed to office by the council by authority of this act, may be removed therefrom by a vote of the majority of the aldermen elect; and the council may remove from office any alderman by a concurring vote of 2/3 of all the aldermen elect. In case of elective officers other than aldermen ~~and justices of the peace~~, provision shall be made, by ordinance, for preferring charges against

such officers and trying the same; and no removal of an elective officer, other than an alderman, shall be made except by a 2/3 vote of all the aldermen elect and unless a charge in writing is preferred and an opportunity given to make a defense thereto.

Sec. 18. To enable the council to investigate charges against any officer, or such other matters as they may deem proper to investigate, the mayor~~, or any justice of the peace of the city,~~ is empowered, at the request of the council, to issue subpoenas or process by warrant, to compel the attendance of persons and the production of books and papers, before the council or any committee thereof.

Comment: Chapter VIII of Act No. 215 refers, inter alia, to the removal of city officers. The proposed amendments to Sections 17 and 18 would merely delete the reference to justices of the peace in those provisions. The provisions would not apply to the judicial officers who have replaced the justice of the peace since their term of office is controlled by separate provisions dealing with the district and municipal courts.

Chapter X

Sec. 5. Such warrant shall be in the name of the people of the state of Michigan, and shall set forth

the substance of the offense complained of, and be substantially of the form, and be issued upon complaint made, as provided by law in ~~criminal cases cognizable by justices of the peace~~ MISDEMEANOR CASES.

Comment: Chapter X deals with the enforcement of ordinances. Section 5 provides that the warrants issued for ordinance violations shall be issued in substantially the same form as in complaints "in criminal cases cognizable by justices of the peace." This cross-reference is deleted and a more appropriate current cross-reference is substituted. As noted in the discussion of M.C.L. §28.242, see pp. 82-85 supra, the appropriate current counterpart of the "criminal case cognizable before the justice" is the misdemeanor punishable by a sentence not exceeding 92 days or fine not exceeding $500. However, with respect to warrants, the same procedure and form is employed under the Criminal Procedure Code for both the J.P. misdemeanor and the more serious misdemeanor (i.e., any offense punishable by no more than one year imprisonment). (See 10th Annual Report, pp. 37-42, discussing §§774.1a and 774.4 of the Code of Criminal Procedure). Accordingly, the substitute cross-reference is to procedures employed in all "misdemeanor cases," rather than just to misdemeanors of the 90 day variety.[9]

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9 This cross-reference to all misdemeanors also is more suitable in light of the fact that ordinance violations under P.A. 215 may carry penalties exceeding the traditional limit on justice of the peace jurisdiction. Under M.C.L. §89.2, ordinances passed by fourth class cities may bear a maximum jail term of six months. Such ordinance violations formerly were triable at the circuit court level. See M.C.L. §90.16.

Sec. 9. All process issued in any prosecution or proceeding for the violation of any ordinance of the city, shall be directed to the city marshal, or to any constable of the city or county, and may be executed in any part of the state, by said officers or any other officer authorized by law to serve process. ~~issued by justices of the peace.~~

Comment: Section 9 of Chapter X provides that all process issued in proceedings for violations of city ordinances may be executed by officers "authorized by law to serve process issued by the justice of the peace." Under the proposed amendment, reference to the justice of the peace would be deleted, so that the provision simply would authorize service by any officer authorized by law to serve process. Process for city ordinance violations are now issued by the district or municipal court. See proposed amendment to M.C.L. §90.16, pp. 124-26 infra. Under various sections, any officer "authorized by law to serve process" may serve process for the district or municipal courts; there is no specially limited group of eligible persons as there may have been with process issued by justices of the peace.[10]

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10 The group of persons authorized to serve process for the municipal and district courts are as broad as those applicable to any court of the state. M.C.L. §§600.8321 and 600.6502, read together, give the district or municipal court general authority to appoint a court officer for the purpose of serving civil process. The provisions governing execution of process in criminal cases (i.e., arrest warrants) apply to all courts, including municipal and district courts (see pp. 65 and 94-97 of the 10th Annual Report).

Sec. 11. In all prosecutions for violations of the ordinances of the city, either party may require a trial by jury. Such jury, except when other provision is made, shall consist of 6 persons; ~~and~~. In suits commenced by warrant, THE JURY shall be selected and summoned as in ~~criminal cases cognizable by justices of the peace; and in suits commenced by summons as in civil causes triable before such magistrates~~ MISDEMEANOR CASES BEFORE THE COURT IN WHICH THE PROSECUTION IS BROUGHT. IN CIVIL ACTIONS TO RECOVER PENALTIES FOR THE CITY ORDINANCE VIOLATION, THE JURY SHALL BE SELECTED AND SUMMONED AS IN OTHER CIVIL ACTIONS BEFORE THE COURT IN WHICH THE SUIT IS BROUGHT.

Comment: Section 11 of Chapter X provides that in ordinance violation prosecutions either party may demand a jury consisting of 6 persons. It further provides that "in suits commenced by warrant" the jury shall be selected and summoned "as in criminal cases cognizable by justices of the peace" and "in suits commenced by summons," the jury shall be selected and summoned "as in civil cases before such magistrate." The proposed amendments would delete the references to jury procedures in justice court and substitute appropriate cross-references to current procedures in the district and municipal courts.

The cross-reference to "criminal cases cognizable by a justice of the peace" is replaced by a cross-reference to "misdemeanor cases[11] before the court in which

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11 The reference is to "misdemeanor cases" generally rather than to misdemeanors "punishable by a maximum of 92 days imprisonment or $500.00 fine" because the same jury trial procedure is used for all misdemeanors tried before a particular court.

the prosecution is brought." The substituted cross-reference is to the particular court in which the prosecution is brought, rather than to all misdemeanor cases generally, because the jury selection and summoning is treated differently in the municipal and district courts. See M.C.L. §600.1301 et seq. (governing juries for the district court) and M.C.L. §730.401 et seq. (governing juries for municipal courts).

The current J.P. reference to "suits commenced by summons" is replaced by a reference to "civil actions before the court in which suit is brought." As noted in the commentary on the proposed amendment of M.C.L. §66.9, the summons originally was used only in civil actions, but now may be used in criminal cases as well. Accordingly, the division between civil and criminal jury trial procedures now requires a reference specifically to "civil cases." (See p. 107 supra discussing a similar amendment with reference to village ordinance cases).

Sec. 12. Any party convicted of a violation of any ordinance of the city, in a suit commenced by warrant, as aforesaid, may remove the judgment and proceedings into the circuit court for the county in which the city is located, by appeal or writ of certiorari; and the proceedings therefor and the bond or security to be given thereon, and the proceedings and disposition of the cause in the circuit court, shall be the same as IN MISDEMEANOR CASES on appeal ~~and certiorari in criminal causes cognizable by justices of the peace;~~ FROM THE COURT WHICH TRIED THE CITY ORDINANCE VIOLATION; and in suits to which the city shall be party, brought to recover any penalty or forfeiture for such

violations, either party may appeal from the judgment, or remove the proceedings, by certiorari, into the circuit court, and the like proceedings shall be had therefore and thereon, and the like bond or security shall be given as in cases of appeal ~~and certiorari~~ in civil ~~causes, tried before justices of the peace~~ ACTIONS BEFORE THE COURT WHICH TRIED THE CITY ORDINANCE VIOLATION, except that the city shall not be required to give any bond or security therein. The Circuit court to which the cause shall be appealed ~~or removed by certiorari~~ shall also take judicial notice of the ordinances of the city, and the resolutions of the council, and of the provisions thereof.

Comment: Section 12 of Chapter X prescribes the manner of appeal from an adverse judgment in a suit seeking to enforce a city ordinance. It provides that in suits commenced by warrant, the procedures for appeal and certiorari are the same as those in "criminal cases cognizable by justices of the peace." It further provides that in suits brought to recover a penalty for a city ordinance violation, the procedures for appeal and certiorari are the same as those in "civil causes, tried before justices of the peace." Under the proposed amendment, the references to appeals from J.P. court are deleted and replaced with references to analogous appeal procedure relating to the particular current court (district or municipal) that rendered the judgment.

The cross-reference to "criminal causes cognizable by justices of the peace" is replaced by a cross-reference to "misdemeanor cases on appeal from the court which tried the city ordinance violation." The cross-reference to "civil causes, tried before justices of the peace" is replaced by a cross-reference to "civil actions before the

court which tried the city ordinance violation." In both instances, the provision must refer in general to that court before which the action was tried because either a district court or a municipal court could be involved and appeals from the two courts are treated differently. See M.C.L. §§600.9341 and 600.8342 (governing appeals from district courts) and M.C.L. §§730.106, 730.136 and 730.532 and proposed §774.34, 774.35, 774.38, 774.43 and 774.44 (see 10th Annual Report, pp. 99-104) (governing appeals from municipal courts). A similar recommendation regarding appeals in village ordinance cases is discussed at pp. 108-09 supra.

Sec. 16. The ~~circuit court of the county~~ DISTRICT OR MUNICIPAL COURT OF THE JUDICIAL DISTRICT in which any city incorporated under this act is located, shall have jurisdiction to hear, try and determine all causes arising under the ordinances of the city for violations thereof. ~~when the fine or forfeiture imposed shall exceed 100 dollars, or where the offender may be imprisoned for a term exceeding 3 months.~~ The proceedings in the ~~circuit court~~ DISTRICT OR MUNICIPAL COURT in all such cases, shall be the same as in prosecutions to recover penalties and forfeitures, and to punish violations of the criminal laws of the state; and the general laws of the state regulating prosecutions in ~~criminal~~ MISDEMEANOR cases, and to recover penalties shall apply.

Comment: Sections 16 and 17 of Chapter X allocate jurisdiction for the enforcement of ordinances in fourth class cities. Section 16 currently provides that the circuit court shall have jurisdiction in all ordinance violation cases in which the penalty shall exceed a $100.00 fine or a prison term of 3 months. (Under M.C.L. §89.2, the penalty for a violation of an ordinance of a fourth class city may include a fine up to $500.00 and imprisonment up to 6 months). Section 17 currently provides that the justice of the peace shall have jurisdiction in all ordinance violation cases where the penalty shall not exceed a $100.00 fine or a prison term of 3 months.

Jurisdiction as to 3 month offenses, formerly exercised by the justice of the peace, is now granted to the district courts by M.C.L. §600.9922 and to the municipal court by M.C.L. §600.9928(2). But both of these courts also have jurisdiction over all offenses that bear punishment up to one year -- i.e., their jurisdiction also encompasses the more serious ordinance violations granted to the circuit court under Section 16. Indeed, M.C.L. §600.8311(b) gives the district court jurisdiction over all ordinance violations, without regard to the term of imprisonment or fine, and thus seems to override directly Section 16.[12] The proposed amendment would acknowledge the current pattern by providing for district and municipal court jurisdiction over all fourth class city ordinance violations.

The particular division of the district court (or the particular municipal court) to exercise jurisdiction is designated in the proposed amendment simply as that court of the local judicial district in which the city is located. This designation is similar to the designation

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12 See, also M.C.L. §730.551 extending municipal court jurisdiction to "all misdemeanors and offenses arising under the laws of this state . . . punishable by a fine or imprisonment for not more than 1 year, or both." The underlying policy of M.C.L. §730.551 was to bring municipal court jurisdiction in line with district court jurisdiction under M.C.L. §600.8311. The reference to "offenses" probably includes ordinance violations, cf. M.C.L. §600.8311 (b), and therefore also supercedes the provisions of current Section 16.

used in the proposed amendment of Section 66.6 and is explained in the commentary at pp. 101-02 supra. The designation could not encompass both a district and a municipal court since municipal courts remain only in judicial districts that do not also contain district courts, see M.C.L. §§600.8111 through 600.8163. Some districts do contain more than one municipal court, but the ordinance violation obviously would then be prosecuted in the municipal court of the city whose ordinance is violated. A special notation as to this requirement seems unnecessary in light of the provisions in the acts establishing the particular municipal courts and M.C.L. §600.9928(3).

Section 2. Section 8 of Chapter V, Section 36 of Chapter VII and Section 17 of Chapter X, of Act No. 215 of the Public Acts of 1895, being sections 85.8, 87.36 and 90.17 of the Compiled Laws of 1970 are repealed.

Comment: Section 8 of Chapter V provides:

> Sec. 8. Justices of the peace not elected to fill vacancies shall enter upon the duties of their offices on the fourth day of July next after their election. In all other cases officers shall enter upon the duties of their offices on the second Monday of April each year, unless therein otherwise provided for.

This provision obviously has no continuing relevance after the abolition of the office of justice of the peace. See also p. 141 infra.

Section 36 of Chapter VII provides:

> Sec. 36. Every justice of the peace of the city shall account on oath to the council, for all such moneys, goods, wares, and property, as shall remain unclaimed in his office; and shall make such disposition thereof as shall be prescribed by law.

Again, this provision has no continuing relevance. The accounting procedures of district courts and municipal courts are governed by the internal rules applicable to these courts. Control of seized and unclaimed property is treated in a series of provisions applicable to all courts. See M.C.L. §780.655; §§434.171-174; §28.401-406 and local ordinances. See, e.g., Detroit Ordinance, title 4, ch. 21, §28.

Section 17 of Chapter X provides:

> Sec. 17. The justice of the peace of the city shall have jurisdiction in all cases mentioned in the preceding section when the fine or forfeiture imposed shall not exceed 100 dollars, or when the offender may be imprisoned for a term not exceeding 3 months.

This provision no longer is needed since the proposed amendment of Section 16 would recognize the jurisdiction of the courts replacing the justice court (the district court and municipal court) in all ordinance enforcement cases.

AMENDMENT TO THE
HOME RULE CITIES ACT

A bill to amend Sections 29, 30, 31 and 33 of Act No. 279 of 1909 entitled "An act to provide for the incorporation of cities and for revising and amending their charters," being Sections 117.29, 117.30, 117.31 and 117.33 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 29, 30, 31 and 33 of Act No. 279 of 1909, being Sections 117.29, 117.30, 117.31 and 117.33 of the Compiled Laws of 1970 are amended to read as follows:

Sec. 29. ~~In each new city organized under this act, there shall be elected, until otherwise provided by law, 1 justice of the peace who shall have and exercise the same jurisdiction and powers in all civil and criminal matters, causes, suits and proceedings, and shall perform the same duties in all respects, so far as occasion may require, as are or may be conferred upon or required of justices of the peace in townships under the general laws~

~~of the state.~~ -He ~~shall also~~ THE DISTRICT COURT, A MUNICIPAL COURT, THE TRAFFIC AND ORDINANCE DIVISION OF RECORDER'S COURT OF THE CITY OF DETROIT, THE COMMON PLEAS COURT OR THE CIRCUIT COURT SHALL have authority, AS PROVIDED BY LAW, to hear, try and determine ~~all~~ suits and prosecutions for the recovery and enforcing of fines, penalties and forfeitures imposed by the charter and ordinances of the city, and to punish offenders for the violation of such charter and ordinances, as IS PRESCRIBED AND DIRECTED in such charter or ordinances ~~prescribed and directed~~.

Comment: This provision is Section 29 of the Home Rule Cities Act, P.A. 1909, No. 279. Section 29 provides that a justice of the peace elected in each home rule city, shall have jurisdiction over all violations of the city's charter or ordinances. The proposed amendment would delete the reference to justices of the peace and substitute a reference to the courts now having jurisdiction in suits brought under ordinances. The function of the amendment is similar to that of the amendments proposed in the corresponding provisions on the enforcement of ordinances by villages and cities of the fourth class. Special difficulties are presented in amending Section 29, however, since the home rule cities include Detroit, and ordinance violation jurisdiction in Detroit is vested in various special courts.

The Recorder's Court of Detroit has jurisdiction over former justice of the peace offenses, including ordinance violations, by virtue of M.C.L. §725.10 and M.C.L. §726.22.[13] The Recorder's Court jurisdiction is limited to "criminal" enforcement, however. Civil enforcement, which is particularly significant for certain ordinances (e.g., local income tax), is brought in the Common Pleas court. Moreover, if the amount involved exceeds the Common Pleas Court's limit, civil enforcement could be brought in the circuit court.[14]

Rather than attempt to detail these variations in Section 29, the proposed amendment merely notes that jurisdiction may be in the "district court, municipal court, Traffic and Ordinance Division of the Recorder's Court of Detroit, the Common Pleas Court or the Circuit Court, as provided by law." Thus, no attempt is made to designate the particular court having jurisdiction for ordinances of a particular city. Rather the reader must refer to the statutes establishing the jurisdiction of the particular court to try particular types of city ordinance violation cases. See, e.g., M.C.L. §600.8311 (district courts); §§730.551, 600.9928 (municipal courts); §726.22 (Recorder's Court); §728.1 (Common Pleas Court). Not all of these provisions refer specifically to ordinance violations, but all are sufficiently broadly stated to encompass such violations, either in "civil actions" to collect fees, taxes, etc. or in "criminal" actions for enforcement.

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13 M.C.L. §725.10 gave Recorder's Court jurisdiction over all police court offenses. The police court had earlier been given jurisdiction over all justice of the peace offenses by Section 10 of P.A. 1885, No. 161. M.C.L. §726.22 directly grants to the Recorder's Court jurisdiction over all ordinances and regulations of common council, but it does not mention charter violations.

14 Although the civil jurisdiction of district and municipal courts is also limited, the possibility of circuit court enforcement was not included in the provisions on village, townships, or fourth class city ordinances since such municipalities presumably would not have ordinances that would produce such high amounts in controversy.

Sec. 30. ~~The proceedings in all suits and actions before said justice and in the exercise of the powers and duties conferred upon and required of him shall be according to and be governed by the general laws applicable to justices' courts and to the proceedings before such courts; and in~~ IN all suits and prosecutions arising under the charter and ordinances of such city, the right of appeal ~~or certiorari from said courts~~ to the circuit court of the county, or to any court having jurisdiction, shall be allowed to the parties, or any or either of them, and the same recognizance or bond shall be given, as is or may be required by law ~~in case of appeal or certiorari from justices' courts~~ in analogous cases ON APPEAL FROM THE PARTICULAR COURT THAT TRIED THE CITY ORDINANCE VIOLATION.

Comment: Section 30 of the Home Rule Cities Act initially provides that the powers and duties of the justice of the peace shall be governed by the general laws applicable to justice courts. This provision is no longer applicable and would be deleted under the proposed amendment.

Section 30 further provides that in all prosecutions arising under the charter and ordinances of a city, the right to appeal and certiorari shall be allowed to both parties and the same recognizance or bond shall be given, as in "appeals or certiorari from justice courts in analogous cases." This provision is modified to refer to current practice. Initially reference to review by certiorari is deleted. Secondly, the right to appeal is

described as equivalent to that provided "in analogous cases on appeal from the particular court that tried the city ordinance violation." A more detailed explanation of the right of appeal cannot be included since a full statement of the variations available would be too lengthy for the purpose of this provision. Appeals from the municipal court, for example, will be by trial de novo in the circuit court, while appeals from the district court will be to the circuit court, but on the record. Appeals from civil enforcement of ordinance violations in the Common Pleas court would be to the circuit court while appeals from civil enforcement in circuit court cases (where the amount involved exceeds the limit of Common Pleas jurisdiction) would be to the Court of Appeals. The reference to "analogous" cases is retained as opposed to the dual reference to "civil cases" and "misdemeanor cases" used in the similar provision for appeals in cases of ordinance violations of villages or cities of the fourth class. (See pp. 108, 122 supra). A reference to "misdemeanor cases" might be confusing as applied to the Recorder's Court since misdemeanor cases tried in that court may be appealed directly to the Court of Appeals, while ordinance violations, which are tried in the Traffic and Ordinance Division, are appealed to the circuit court.

Sec. 31. ~~Such justice of the peace shall enter in the docket kept by him the title of all suits and prosecutions commenced or prosecuted before him for violations of the charter and ordinances of the city; and all the proceedings and the judgments rendered in such cause and the items of all costs taxed or allowed therein; and also the amounts and dates of payment of all~~

~~fines, penalties and forfeitures, moneys and costs received by him on account of such suit or proceeding. Such docket shall be submitted by the justice at all reasonable times to the examination of any person desiring to examine the same and shall be produced by the justice to the common council of the city whenever required.~~ All fines, penalties, forfeitures and moneys collected or received by such justice BY THE DISTRICT COURT for or on account of violations of any provisions of the charter or ordinances of the city, shall be paid ~~over by such justice of the city treasurer on or before the first day of the next month after the collection or receipt thereof; and the justice shall take the receipt of the city treasurer therefor and file the same with the city clerk.~~ DISTRIBUTED BY THE DISTRICT COURT IN ACCORDANCE WITH THE PROVISIONS OF SECTION 8379 OF ACT NO. 236 OF THE PUBLIC ACTS OF 1961, AS AMENDED, BEING SECTION 600.8379 OF THE MICHIGAN COMPILED LAWS. ALL FINES COLLECTED OR RECEIVED BY A MUNICIPAL COURT, OR THE RECORDER'S COURT OF DETROIT, FOR OR ON ACCOUNT OF VIOLATIONS OF ANY PROVISIONS OF THE CHARTER OR ORDINANCES OF THE CITY SHALL BE PAID OVER TO THE CITY TREASURER.

Comment: Section 31 of the Home Rule Cities Act initially provides that the justice of the peace shall enter into the docket the proceedings and judgments of all suits for violations of the charter or ordinances and also enter the amount of money received by him on account of such suits. It further provides that the docket shall be available for public inspection. These provisions are no longer needed in light of the abolition of the justice court by M.C.L. §600.9921. Docket procedures for the district, municipal and the Recorder's Court of Detroit are governed by court rule and general statutes. See, e.g., M.C.L. §730.15, Dist. Ct. Rules 510 and 522.

Section 31 further provides that all "fines, penalties, forfeitures and other moneys" received by the justice of the peace "for or on account" of charter or ordinance violations shall be paid to the city treasurer. In light of subsequent enactments, this provision cannot be carried over to the various courts, noted in Section 29, that now have ordinance violation jurisdiction. The distribution of fines now varies with the court involved. When the case is heard before a district court in a judicial district of the first or second class, the city may receive only 1/3 of the fines collected in charter or ordinance suits, while the county in which the city is located is given 2/3 of the fines, M.C.L. §600.8379(c). There are no similar provisions for the municipal and recorder's court. Here the former practice prevails, as provided in this section.[15] Accordingly, the

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15 There are other sections in the Michigan Compiled Laws that also indicate that distribution of all ordinance violation moneys from the municipal and Recorder's Court should be to the city treasurer. Thus, M.C.L. §726.25, applicable to Recorder's Court, provides that the city attorney shall collect all fines and penalties imposed for ordinance violations and pay this money to the city treasurer. M.C.L. §730.110 provides that the clerk of the municipal court shall pay over all moneys collected by the court to the authorities of the city or county as directed by law. However, M.C.L. §730.110 is part of the Justice Courts in Cities Act and does not apply to most of the existing municipal courts. The Uniform Municipal Court Act, M.C.L. §730.501, et seq., which applies to all municipal courts, contains no provision for distribution of money collected by the court.

language of Section 31 is revised so that a cross-reference is made to M.C.L. §600.8379 when the fines are collected by the district court, while total distribution to the city is directed when the fines are collected by a municipal court or the Recorder's Court of Detroit.

The proposed amendment would refer only to "fines." Where civil enforcement is used, all moneys collected presumably would go to the city as the plaintiff, without regard to the court involved. (Thus, M.C.L. §600.8379 refers only to fines with respect to the district court, which has both civil and criminal jurisdiction). Whether actions to collect "penalties" (or "forfeitures") are always viewed as civil and not as "criminal enforcement" to collect "fines" is unclear. See M.C.L. §66.7 and §90.11 at pp. 102, 121 supra. Accordingly, the issue is left open, and the amended version of Section 31 contains no reference to the treatment of "penalties" and "forfeitures" in ordinance actions brought in district court (or municipal courts or Recorder's Court).

Sec. 33. The provisions of the general law applying to the election, qualification and compensation of ~~justices of the peace and~~ constables in townships shall apply to the ~~justice of the peace and~~ constables above provided for except that in the first instance they shall be elected at the first election at which other city officers are chosen and the first incumbents shall hold office only until the next regular election for such officers as fixed by the state law. ~~Provided, That the charter of any city may provide for placing any such justice of the peace on a~~

~~salary instead of on a fee basis; and for the election of 2 such justices instead of 1.~~

Comment: Section 33 provides that the general statutory provisions governing the election and remuneration of township justices of the peace and constables should apply also to those justices and constables employed by cities under this Act. The proposed amendment deletes the reference to justices of the peace. The justice court has been abolished and the Section 33 provision has no bearing upon the election or remuneration of the currently existing courts. While the Home Rule Cities Act provides for the establishment of municipal courts in lieu of the former city justice of the peace, the relevant provision (M.C.L. §117.28) also provides separately for the election and compensation of the judge of such municipal courts.

ELECTION LAW AMENDMENTS

A bill to amend Sections 367 and 369 of Chapter XVI, and Section 426a of Chapter XIXA of Act No. 116 of the Public Acts of 1954, entitled the "Michigan Election Law," being Sections 168.367, 168.369 and 168.426a of the Compiled Laws of 1970; and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 367 and 369 of Chapter XVI and Section 426a of Chapter XIXA of Act No. 116 of the Public

Acts of 1954, being Sections 168.367, 168.369 and 168.426a of the Compiled Laws of 1970 are amended to read as follows:

Sec. 367. Resignation of any township officer shall be in writing, signed by the officer resigning, and addressed to the township board, and shall be delivered to and filed by the township clerk~~;~~. ~~and when a justice of the peace resigns, such clerk shall immediately transmit a copy of such resignation certified by him to the county clerk.~~

Sec. 369. The governor shall remove ~~all justices of the peace and~~ all township officers chosen by the electors of any township, when he shall be satisfied from sufficient evidence submitted to him, as hereinafter provided, that such officer has been guilty of official misconduct, or of wilful neglect of duty, or of extortion, or habitual drunkenness, or has been convicted of being drunk, or whenever it shall appear by a certified copy of the judgment of a court of record of this state that such officer, after his election or appointment, shall have been convicted of a felony; but the governor shall take no action upon any such charges made to him against any such officer until the same shall have been exhibited to him in writing, verified by the affidavit

of the party making them, that he believes the charges to be true. But no such officer shall be removed for such misconduct or neglect until charges thereof shall have been exhibited to the governor as above provided and a copy of the same served on such officer and an opportunity given him of being heard in his defense: Provided, That the service of such charges upon the person or persons complained against shall be made by handing to such person or persons a copy of such charges, together with all affidavits or exhibits which may be attached to the original petition if such person or persons can be found; and if not, by leaving a copy at the last place of residence of such person or persons, with some person of suitable age, if such person can be found; and if not, by posting it in some conspicuous place upon his last known place of residence. No officer who has been removed in accordance with the provisions of this section shall be eligible to election or appointment to any office for a period of 3 years from the date of such removal.

Sec. 426a. In every city having a municipal court of record ~~with state criminal jurisdiction above that cognizable~~

~~by justices of the peace;~~ and having a population of 1,000,000 or more, candidates for the office of a judge of such court shall be nominated at the August primary for state offices and elected at the general election • in even years, beginning with the year 1966.

Comment: These provisions are all part of Act No. 116 of the Public Acts of 1954, the general election law act. Section 367 provides for the method of resignation of township officers, and the reference to justice of the peace is deleted. Resignations by municipal judges or district court judges would not be governed by this provision, which applies only to township officers. Section 369 refers to procedures to be followed by the governor in removing township officers. Again, the reference to justice of the peace would be deleted.

Section 426a provides for the election of "judges of municipal courts of record with state criminal jurisdiction above that of a justice of the peace" in cities having a population of 1 million. The reference is to Recorder's Court of Detroit, the only municipal court of record. The phrase referring to "criminal jurisdiction above that of the justice of the peace" is deleted. All municipal courts now have greater jurisdiction than that formerly exercised by the justice of the peace. See M.C.L. §730.551.

Section 2. Sections 324 of Chapter XIV and 366 of Chapter XVI of Act No. 116 of the Public Acts of 1954, being sections 138.324 and 138.366 of the Compiled Laws of 1970 are repealed.

Comment: The first section to be repealed, Section 324, provides:

> Sec. 324. In all justice courts created by any local or special acts, or by charter provision of any city, or by any general law of the state, which provides for 1 justice of the peace only who receives a salary paid by the county in lieu of fees, additional justices of the peace may be provided for in the manner following:
>
> 1. The board of supervisors of the county in which said justices exercise jurisdiction may, by resolution adopted by a majority vote of all the members-elect, provide for 1 or more additional justices of the peace as the said board shall deem proper. Such additional justices of the peace shall possess the same qualifications as is required by the law governing said justices of the peace. The board of supervisors may designate the amount of time such justices of the peace shall devote to the duties of their office, and shall fix the compensation to be paid said justices of the peace which shall be in lieu of all fees.
>
> 2. Such additional justices of the peace shall be subject to and be governed by all the provisions of the law under which said justice court is created. They shall be disqualified to hear any case in which they have advised or counseled any person connected with such case brought before said justice court.
>
> 3. Any appointment of an additional justice of the peace as provided for in this act shall be made in the manner provided by law for filling a vacancy in such justice court: Provided, however, That if such additional justice of the peace shall be provided for within 90 days of the next general election to be held in the county or city affected, then such justice of the peace shall be nominated and elected in the manner provided by the law governing such justice court.

> 4. Any justice of the peace appointed or elected as herein provided shall exercise like jurisdiction and powers as is provided by the law governing said justice court.

This provision no longer has any significance. Theoretically, provisions governing the election of justices may have a bearing on municipal courts since there are cross-references to the election of justices in some of the Municipal Court Acts. Thus, Section 508 of the Uniform Municipal Court Act (M.C.L. §730.508) provides that the "qualifications, terms of office, time, [and] manner of election" of municipal courts is "governed by the provisions of existing laws relating to justices of the peace in such cities," except where inconsistent with this Act.[16] In fact, the provisions applicable to justices of the peace in cities add little to the current provisions relating to municipal courts. The provisions relating to justice courts in fourth class cities are very general. See M.C.L. §§85.1, 85.5, 85.8, discussed at pp. 112-15 supra. The Home Rules Cities Act does contain more detailed provisions governing the election of justices (by cross-reference to the provisions governing elections of township justices), M.C.L. §117.33 (pp. 135-36 supra), but that Act has a special election provision for municipal courts. See M.C.L. §117.28. As the Court of Appeals noted in Ball v. Thomas, 1 Mich.App. 1 (1963), under M.C.L. §730.508 (as well as M.C.L. §117.28), the time and manner of electing municipal judges is left largely to determination by the charters of the particular cities. Certainly the procedure for appointment contained in M.C.L. §168.324 should not be applicable to a municipal court, as opposed to a justice court. That procedure vests appointment authority in the county board of supervisors, and it would be inappropriate to have the county board

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16 The Municipal Courts in Cities Act (M.C.L. §730.101) also refers to existing acts as to the justices of the peace in cities. See M.C.L. §730.103. However, that Act applies only to cities already having more than 1 justice of the peace, and Section 324 applies only to courts for which only one justice is provided by charter. Moreover, the provisions in M.C.L. §730.101 et seq. governing elections are far more detailed than the very general provisions relating to justices in cities.

determine the size of the municipal court where all other aspects of that court are subject to municipal determination. Cf. M.C.L. §730.102 (Municipal Courts in Cities Act) (providing for appointment by "legislative body of such city" to fill vacancies). Accordingly, M.C.L. §168.324 will be repealed under the proposed bill.

The second section to be repealed, M.C.L. §168.366 applies only to the township justices, a position that has been abolished and has no current relevance to either municipal or district courts with respect to the matters covered in that section. M.C.L. §168.366 provides:

> Sec. 366. Each justice of the peace, before he enters upon the duties of his office and within the time limited by law for filing his official oath, shall execute, in the presence of the supervisor of his township, or of the county clerk, with 1 or more sufficient sureties to be approved of by such supervisor or county clerk, an instrument in writing in the amount of $1,000.00, or such greater amount but not exceeding $3,000.00, as may be determined by the township board of the township from which said justice of the peace if elected or appointed, by which such justice and his sureties shall jointly and severally agree to pay to each and every person entitled hereto all such sums of money as such justice shall become liable to pay, for or on account of any money which may come into his hands as a justice of the peace, upon demand thereof made by such person, his agent or attorney, and such bond and his oath of office shall be filed with the county clerk.

STUDY REPORT--AGREEMENTS IN CONTEMPLATION OF DIVORCE

Barbara Klarman*

In 1969, upon recommendation of the Michigan Law Revision Commission,[1] the Michigan Legislature enacted a statute providing for the validity and enforceability of certain agreements dealing with the division of property interests and support obligations between spouses.[2] The statute covered both antenuptial and postnuptial agreements made in contemplation of death and postnuptial agreements made in anticipation of divorce, but only where the parties had already separated. By its silence, the Legislature left intact the common law which invalidates virtually all antenuptial agreements dealing with property and support rights made in contemplation of divorce,[3] as well as similar postnuptial agreements made before separation.

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1 3 Mich.L.Rev. Comm. Annual Rep. 27 (1968) ("Recommendation Relating to Antenuptial and Marital Agreements").

2 Mich. Comp. Laws Ann. §702.74a (Supp. 1975). Section 74a was added to Act No. 288 of the Public Acts of 1939 ("the probate code") by Act No. 139 of the Public Acts of 1969 (effective March 20, 1970). A copy of the statute is attached hereto as Appendix A.

3 Scherba v. Scherba, 340 Mich. 288, 65 N.W.2d 758 (1954); In re Muxlow's Estate, 367 Mich. 133, 116 N.W.2d 43 (1962).

The question remains whether all such agreements in contemplation of divorce, whenever made, shall continue to be held invalid as against public policy. To consider this question, this report will review the law in Michigan as it presently exists, the law in other jurisdictions, the policy considerations which bear on this problem, together with recommendations.

THE LAW IN MICHIGAN

The prior Study Report requested by the Michigan Law Revision Commission on antenuptial agreements contains a detailed review of the Michigan law on most of the matters discussed herein.[4] The courts in Michigan have abided by the general common law with respect to agreements providing for property settlement or alimony in the event of divorce. Thus, except where those agreements were made as a means of resolving an imminent divorce proceeding, they were and continue to be considered void as against public policy.[5] However, the Michigan courts have been willing to use agreements in contemplation of death as a guide in determining property division upon divorce.[6] Although the Michigan courts have not yet considered this issue, it is possible that an agreement in contemplation of divorce might likewise be used as such a guide, even if the agreement itself is unenforceable.[7]

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4 3 Mich. L. Rev. Comm. Annual Report 67 (1968) (Study Report, "Antenuptial Agreements in Michigan").

5 Id. at 72.

6 Scherba v. Scherba, supra note 3.

7 Other jurisdictions have taken this view. In Strandberg v. Strandberg, 33 Wis.2d 204, 147 N.W.2d 349 (1967), the Wisconsin Supreme Court held that although an antenuptial agreement contemplating divorce is void, it can be admitted into evidence and used as a guide to determine the equities of a property division.

Thus, it appears that if an agreement in contemplation of divorce is fair and is made without fraud or undue influence and upon full disclosure, it stands a reasonable likelihood of being the de facto basis for a divorce settlement. The uncertainties inherent in this statement can be somewhat unnerving to parties attempting to plan for the possibility of divorce. Presumably, they would prefer more predictability than a "reasonable likelihood" and would find it useful to know what "fair" actually is.

Therefore the question becomes whether there are sufficient policy considerations to justify the continuation of virtually complete discretionary authority in the equity courts to decide property and alimony questions upon divorce, even where the parties have agreed to the contrary. Phrased another way, the question is whether the State is warranted in maintaining extreme limitations over how, when, and under what circumstances parties to a divorce may privately settle their own property interests, especially where the State has abdicated its supervisory role in the preservation of marriage per se through the enactment of no-fault divorce.[8]

THE LAW IN OTHER JURISDICTIONS

Under prevailing law in the United States, agreements made in contemplation of divorce are considered void as against public policy.[9] While numerous reasons have been given for this rule,[10] it is commonly asserted that because the state has an interest in every marriage, it is against public policy to enforce agreements that provide for or

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8 Mich. Comp. Laws Ann. §552.6 (Supp. 1965) (originally enacted as Public Act No. 75 of 1971).

9 See 2 A. Lindey, Separation Agreements and Ante-Nuptial Contracts, 90-27 (rev. ed. 1967) (hereinafter cited as Lindey).

10 See excellent discussion in Gamble, Antenuptial Contracts, 26 U. Miami L. Rev. 692, 704-705 (1972) (hereinafter cited as Gamble).

facilitate their dissolution.[11] Underlying this rationale is a fear that if a spouse can obtain financial benefit in the event of divorce, he or she may thus be encouraged to seek a divorce, and possibly leave the other spouse to be supported by the state. The rule has become so firmly entrenched in American legal thought that many courts have refused even to reconsider it or its underlying rationale.[12] Moreover, the rule has been so strictly construed as to void provisions that even consider divorce as a possibility, regardless of the circumstances surrounding the execution of the agreement.[13]

In contrast to the rule invalidating agreements in contemplation of divorce is the rule favoring agreements in contemplation of death. In virtually every jurisdiction, prospective or present spouses may contractually determine division of their property in the event of the death of one of the parties.[14] Such agreements are favored as allegedly promoting marital tranquility,[15] and are generally enforced if the parties have made a full disclosure of their assets and if the contract was not the product of fraud, duress, or undue influence.[16] The public policy reasons which have

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11 See, e.g., Fricke v. Fricke, 257 Wis. 124, 126, 42 N.W. 2d 500, 501 (1950).

12 E.g., Werlein v. Werlein, 27 Wis.2d 237, 241, 133 N.W. 2d 820, 822 (1965).

13 For example, the majority in Fricke v. Fricke, supra note 11, held that "under no circumstances may the parties contemplating marriage recognize divorce as a possibility . . . and make financial provision for that contingency." 257 Wis. at 133, 42 N.W.2d at 504.

14 See 2 Lindey, supra note 9, at 9-26.

15 See, e.g., Seuss v. Schukat, 358 I11. 27, 192 N.E. 668, 671 (1934).

16 See, e.g., Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962).

caused courts to void agreements contemplating divorce are not usually even considered with respect to agreement contemplating death. The courts instead focus on the spouses' interests in the preservation of their respective estates and on their understandable desire to avoid disputes concerning property.[17]

One of the earliest decisions recognizing the similarity between contracts contemplating death and those contemplating divorce was the dissent in Fricke v. Fricke.[18] That opinion held that both types of contracts should be enforceable under the same rules, provided only that the agreement in contemplation of divorce not be in fact an inducement to dissolution of the marriage. This opinion recognized that parties might enter such agreements for proper reasons, and that the agreements should at least not be met with a presumption of invalidity.[19]

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17 See Weinstein, Antenuptial Agreements--What The Law Now Says, 62 Ill. B.J. 604, 605 (1974).

18 257 Wis. at 129, 42 N.W.2d at 502 (1950).

19 In some jurisdictions such agreements can be admitted into evidence and considered by the divorce court in determining the equities of a property division. E.g., Strandberg v. Strandberg, 33 Wis.2d 204, 147 N.W.2d 349 (1967). However, the agreements per se are unenforceable, and the extent to which their provisions will be incorporated in the final decree rests within the court's discretion.

The Michigan Supreme Court has taken a similar position. In Scherba v. Scherba, 340 Mich. 228, 65 N.W.2d 758 (1954), the court held that the provisions of an antenuptial contract in contemplation of death may be used as a guide in determining an equit ble property division upon termination of the

It was not until the early 1970s that other courts began to reconsider the common law rule against agreements made in contemplation of divorce.[20] In Posner v. Posner,[21] the Supreme Court of Florida faced the issue squarely and determined that antenuptial agreements settling alimony and property rights upon divorce should not be held void ab initio as contrary to public policy. The court held that if the safeguards applied to antenuptial agreements in contemplation of death were applied to similar agreements in contemplation of divorce, and if the divorce was prosecuted in good faith and upon proper grounds, the antenuptial agreement would be valid and enforceable. The court adopted the same three-alternative test which had been applied to antenuptial contracts contemplating death in earlier Florida decisions.[22] For the agreement to be enforceable, there must be (1) a fair and equitable provision for the wife, or (2) a full disclosure to the prospective wife of the prospective husband's worth, or (3) general knowledge by the prospective wife of the prospective husband's worth.[23] In addition, the court held that on a showing of changed circumstances, such ante-

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20 While a 1960 Oklahoma case, Hudson v. Hudson, 350 P.2d 596 (Okla. 1960), enforced an antenuptial contract in which each spouse waived alimony rights upon divorce, the decision met with virtual non-acceptance, even by courts within the same jurisdiction. See Gamble, supra note 10, at 715. Indeed, jurisdictions considering Hudson have specially noted that the court in that case did not overrule the older majority rule, but merely ignored it. See Norris v. Norris, 174 N.W.2d 368 (Iowa 1970).

21 233 So.2d 381 (Fla. 1970), rev'd on other grounds, 257 So.2d 530 (Fla. 1972).

22 Del Vecchio v. Del Vecchio, supra note 16.

23 Id. at 20. Florida courts have apparently not considered the equities to the husband in these cases.

nuptial contracts are subject to the same modification provisions as are applied to all support orders in divorce proceedings.[24]

Although the Florida courts have taken the lead in re-evaluating the old common law rule, other states have recently begun to follow. In Volid v. Volid,[25] an Illinois appellate court held that public policy is not violated by permitting "older persons"[26] to anticipate prior to marriage the possibility of divorce, and to establish their rights by contract in case the marriage should be dissolved. As with antenuptial contracts contemplating death,

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24 Fla. Stat. Ann. §61.14 (Supp. 1975). This statute provides for modification of support provisions incidental to a divorce, based on a showing of changed circumstances by either party.

It should also be noted that Posner left open the question of whether a wife can waive all rights to alimony, temporary and permanent. The court's broad holding indicates that this is possible, so long as the disclosure requirements are met, and the agreement is free from fraud, duress, and overreaching. It is now clear, however, that a husband cannot conclusively abrogate by antenuptial contract his obligation to pay temporary alimony. The Florida courts view such an agreement as unenforceable because it seeks to relieve the husband of his legal duty to support his wife during marriage. Belcher v. Belcher, 271 So.2d 7 (Fla. 1972). The question of whether a spouse can waive all rights to permanent alimony, however, still remains open.

25 6 Ill.App.3d 386, 286 N.E.2d 42 (1972).

26 It is unclear how this holding would relate to "younger persons," if at all.

the court held that the contract contemplating divorce just be entered into with full knowledge and without fraud, duress, or coercion.[27]

The State of Oregon has also retreated from strict application of the old common law rule, although under somewhat different terms. In Unander v. Unander,[28] the court stated that antenuptial agreements providing for a partial or complete waiver of alimony will be enforced, unless such enforcement deprives a spouse of support that he or she cannot otherwise secure. The court also required that the agreement be fairly made upon a full disclosure of each party's assets. Finally, the court accepted the Florida approach[29] that if the circumstances of the parties change, the court can modify the alimony provision just as it can modify a decree based on a separation agreement that includes a support provision.

Reform in this area has taken place in community property jurisdictions as well. In Buettner v. Buettner,[30] the Nevada Supreme Court declared that antenuptial contracts settling alimony and property rights on divorce

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27 A subsequent decision, Eule v. Eule, 24 Ill.App.3d 83, 320 N.E.2d 506 (1974), approved the Volid position, but emphasized that the provisions of an antenuptial contract must be "fair and equitable" in order to be enforced. 24 Ill.App.3d at 88, 320 N.E.2d at 510. The Eule court also held that a wife cannot waive all rights to temporary alimony by antenuptial contract, as the husband's support duties continue until final termination of the marriage. Accord, Belcher v. Belcher, supra note 24.

28 506 P.2d 719 (Ore. 1973).

29 See Posner v. Posner, supra note 21.

30 89 Nev. 39, 505 P.2d 600 (1973).

are not void as against public policy. However, the court retained equitable power to refuse to enforce an antenuptial contract on the grounds that the contract is unconscionable or obtained through fraud, misrepresentation, material nondisclosure, or duress. Yet, as the court noted, this rule represents no departure from established law since such power is exercised generally in all contract litigation.

California, another community property state, has also begun a retreat from the rule prohibiting contracts in contemplation of divorce.[31] In In re Marriage of Higgason, the California Supreme Court had stated:

> [A]n agreement must be made in contemplation that the marriage relation will continue until the parties are separated by death. Contracts which facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy.[32]

This language was expressly disapproved in Dawley v. Dawley,[33] where the California Supreme Court recently enforced an antenuptial contract in which the parties agreed that their respective earnings and other property acquired during the marriage would be held as separate property. The agreement by its terms did not expressly provide for divorce, but surrounding circumstances[34] clearly indicated that the parties

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31 10 Cal.3d 476, 110 Cal.Rptr. 897, 516 P.2d 289 (1973).

32 10 Cal.3d at 485, 516 P.2d at 295.

33 2 Fam. L. Rep. 2588 (Cal. S.Ct. June 29, 1976).

34 When the agreement was made, the wife was pregnant, unmarried, and in danger of losing her job as a schoolteacher because of her situation. The husband was also encouraged to enter into the agreement because the wife had threatened to institute a paternity suit against him, thus creating adverse publicity and jeopardizing his job.

did not contemplate a lasting marriage. The court rejected the wife's contention that the agreement violated public policy because it implied an early divorce. The court stated that the objective language of the contract itself controls and that an agreement violates public policy "only insofar as its terms encourage or promote dissolution."[35]

Although all of the above decisions concern antenuptial agreements, the same considerations appear to exist in connection with postnuptial agreements which provide for settlement of rights upon divorce, but which do not contemplate an imminent separation. The leading example comes from Arizona, a community property state. In 1969, the Arizona Supreme Court first held that a married couple may divide their present and prospective property by postnuptial agreement, even prior to an imminent separation or divorce. In re Harber's Estate.[36] In accord with Florida and Illinois,[37] this decision required that the agreement be free from fraud, coercion, and undue influence, and that the wife must act with full knowledge of the property involved and her rights therein. However, it imposed the additional limitation that the settlement be fair and equitable.[38]

In 1975, an Arizona appellate court, in Spector v. Spector,[39] indicated that these same policy considerations apply to antenuptial agreements. On the basis of Harber's Estate, the court held that before marriage, parties can contractually settle their rights to present or future property, whether or not the property is community or separate. Once the court determined that applicable

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35 Dawley v. Dawley, supra note 33.

36 104 Ariz. 79, 449 P.2d 7 (1969).

37 Posner v. Posner, supra note 21; Volid v. Volid, supra note 25.

38 Accord, Eule v. Eule, supra note 27.

39 23 Ariz. App. 131, 531 P.2d 176 (1975).

statutes do not prohibit prospective abrogation of rights to community property, it found "no reason why an antenuptial contract should be accorded different legal treatment than a postnuptial contract."[40]

In Capps v. Capps II,[41] the Virginia Supreme Court did not repudiate entirely the old common law rule, but held that postnuptial agreements specifying property rights in the event of divorce are not contrary to public policy unless they are collusive or actually facilitate a separation or divorce.[42] Applying this rule, the Capps court enforced an agreement which provided that if either party instituted an action for divorce or separate maintenance, the wife would surrender her interest in the marital home, and the husband would assume all mortgage obligations. The court held that the agreement did not facilitate divorce or separation, but instead tended to promote continuation of the marriage. It is unclear how the court reached this conclusion since the husband filed for divorce and it was apparently in his financial interest to do so. Nevertheless, the court appeared to reject the traditional assumption[43] that agreements providing one spouse with pecuniary benefits in the event of divorce are necessarily destructive of the marriage relation.

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40 23 Ariz. App. at 138, 531 P.2d at 183.

41 2 Fam. L. Rep. 2086 (Va. S.Ct. December 1, 1975).

42 It appears that the court meant that such an agreement will be more closely scrutinized in light of surrounding circumstances in order to determine whether the agreement itself caused the dissolution. This position sharply contrasts with that taken by the California court in Dawley v. Dawley, supra note 33, where the court stated that it will consider only the objective language of the agreement itself.

43 See Gamble, supra note 10, at 705.

It is thus clear that the law regarding agreements in contemplation of divorce is in a state of flux. Research indicates that changes in the rules regarding such agreements have not come about by statute,[44] but rather by judicial decisions which have repudiated the old common law approach in at least several states. It might also be noted that a disproportionate number of community property jurisdictions now permit the enforcement of agreements in contemplation of divorce, which may be attributable to the increased economic equality of marital partners under the community property regimes.[45]

As noted above, those jurisdictions which enforce such agreements do not do so without limitation.[46] It is often expressly required that the agreement be free from fraud and undue influence. While this rule generally applies to all contractual litigation, the express requirement of it indicates judicial recognition of the increased opportunities for fraud and coercion that exist in the confidential relationship between present or prospective spouses. The existence of this confidential relationship has also given rise in some jurisdictions to the requirement that complete disclosure must precede the making of an enforceable contract.

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44 Even the Uniform Marriage and Divorce Act does not deal with contracts in contemplation of divorce.

45 While it is beyond the scope of this article to review the law in all jurisdictions, it does appear that a greater proportion of community property states have adopted the new approach.

46 This information has been compiled by jurisdiction in Appendix B attached hereto and appears in the same order as discussed in the text.

While judicial recognition of the enforceability of agreements in contemplation of divorce may assist individuals in planning realistically for the future, the end result of such planning is by no means certain. In some states, the contractual provisions may be modified if either party demonstrates that circumstances have changed since the agreement was made. In others, the courts will refuse to enforce any provision that deprives a spouse of necessary support. The most significant limitation is the requirement in some jurisdictions that the agreement be "fair and equitable." It is virtually impossible to predetermine what a court may consider a "fair" provision, and this amorphous standard thus handicaps individuals in their future planning.

Despite such limitations, these decisions have taken significant steps in the development of domestic relations and contract law. The traditional view still prevails in most jurisdictions: contracts that contemplate dissolution of the marriage by divorce are generally void as against public policy. The new trend, however, indicates a thoughtful analysis of the old common law rule rather than blind adherence to stare decisis.

POLICY CONSIDERATIONS

This portion of the report will review the policy considerations which underlie both the older common law doctrine and the newer modifications. The common law rule invalidated all antenuptial as well as virtually all postnuptial agreements in contemplation of divorce where the agreement was entered into prior to the breakdown of the marriage relationship, particularly where the parties had not separated from each other.[47] A wide variety of policy reasons have been offered in support of this rule. These reasons are often confusing, and sometimes even contradictory. For example, many courts have said that such agreements violate the sanctity of the marriage relationship by making

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47 See 1 Lindey, supra note 9, §4-1.

it economically advantageous for one party to the marriage to seek divorce.[48] But, on the other hand, other courts have noted that a disadvantageous agreement, if valid, could improperly force a party to endure an insufferable marriage rather than court economic disaster by pursuing divorce.[49]

The generally unstated assumptions which underly these comments are that society has an interest in the preservation or termination of marriage relationships and that the present refusal of most courts to enforce these marital agreements has a salutory effect on the underlying relationships. It is not at all clear that these assumptions are valid. Indeed, courts have not undertaken much self-criticism of the process by which they determine property and support rights in general, and whether their present practices, whatever they are, might not also have major but unrecognized and unevaluated effects in the continuation or termination of marriage relationships. This point will be discussed further on.

Other policy reasons given by courts for refusing to enforce these agreements include such technical niceties as a failure of consideration. The marriage itself was thought by some to be the consideration and upon its dissolution, it no longer could support the agreement.[50] Again the decisions make little effort

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48 See, e.g., Fricke v. Fricke, supra note 11. See also Gamble, supra note 10, at 705; Note, Modern Theory and Practice of Antenuptial Agreements, 5 John Marshall J. 179, 201 (1971) (hereinafter cited as 5 John Marshall J.).

49 See Sanders v. Sanders, 40 Tenn. App. 20, 288 S.W.2d 473 (1956).

50 York v. Ferner, 59 Iowa 487, 13 N.W. 630 (1882). See also 5 John Marshall J., supra note 48.

to evaluate whether the doctrine of consideration, developed primarily in commercial transactions, should be applied to marital agreements and, if so, how.[51]

Other courts have referred to society's continuing interest in the financial support of its citizens. Thus, they have refused to enforce these agreements where to do so would render one of the spouses a ward of the state.[52] These courts take the position that it is preferable to impose upon a comparatively financially able spouse the duty to maintain or support his or her ex-spouse than to make the support of this person the obligation of society as a whole. The obvious inequities of this position in circumstances, such as a marriage of very short duration, reveal the often shallow, self-serving reasoning behind this policy.

It might also be argued that society has a duty to guarantee the rights of a dependent spouse even after the termination of the marriage, their private agreements, notwithstanding. Although such concerns are usually voiced in favor of wives, occasionally the courts require

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51 The Michigan cases have addressed the consideration issue only with respect to agreements in contemplation of death, and have held that marriage itself is sufficient consideration for either spouse's waiver of an interest in the other's estate. See 3 Mich. L. Rev. Comm. Annual Rep. 67, 71 (1968). The question remains whether the same rule would apply if the current statute is amended to authorize agreements in contemplation of divorce.

52 For example, the Supreme Court of Oregon has held that antenuptial agreements concerning alimony will be enforced "unless enforcement deprives a spouse of support that he or she cannot otherwise secure." Unander v. Unander, supra note 28, at 721.

a dependent husband to be provided for.[53] This argument derives from the fact that the rearing of children and the maintenance of the home require a substantial commitment of time and effort on the part of one or both of the spouses. If this commitment were made disproportionately by one spouse, it may be maintained that the state should protect that spouse from financial need, even after divorce. This policy supposedly insures the continued willingness of marital partners to undertake the financially dependent but socially necessary functions of child-rearing and home-making.[54] Whether this argument is consistent with current statistics regarding the number and percentage of married women who work outside the home and whether it is consistent with the policy in favor of enforcement of marital agreements in contemplation of death are matters that will also be discussed further on.

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53 In In re Marriage of Higgason, supra note 31, the California Supreme Court held invalid an antenuptial agreement in which a wealthy 73-year-old woman and a 48-year-old waiter of little means waived their mutual rights to support. The court noted that the husband had become totally disabled after the agreement was made, and that the wife was able to provide support for the husband. Whether or not support duties continued after dissolution of the marriage was held to be a question for the court alone. 10 Cal.3d at 488, 516 P.2d at 297.

54 Bartke, Community Property Law Reform in the United States and in Canada--A Comparison and Critique, 50 Tul. L. Rev. 213, 262 (1976). Professor Bartke argues much more generally for a system of marital property that will guarantee the non-income-producing wife an equal role in the ownership, management and control of the family property. He believes that nothing less than the preservation of the nuclear family is at stake.

Whatever the stated reasons are for refusing to enforce agreements in the event of divorce, the underlying reasons always seem to hinge on the notion that such agreements are inherently unfair. They do not take into consideration the traditional division of labor in the average household whereby the wife, even if she works outside the home, foregoes substantial occupational advancement and, consequently, suffers a reduced earning capacity into the future.[55] They do not take into account the disproportionate bargaining strength of the parties to the contract, especially where one spouse is significantly more affluent than the other. They also do not take into account the furation of the marriage and the change of circumstances that might occur during that time[56] as well as the kind and substance of contribution which the spouses have made to the relationship and to the accumulation of property.

Courts of equity, of course, do attempt to deal with these considerations when determining property and support rights upon divorce. Some of them have accordingly expressly stated that they would not permit parties by private agreement to divest the equity courts of this discretionary jurisdiction.[57]

On the other hand, persuasive policy arguments can be made to support the enforcement of marital agreements in contemplation of divorce. The freedom of individuals to plan for the future with some degree of certainty should not be lightly abrogated by the state. Today when more than one out of three marriages end in divorce,[58] a party would be almost foolhardy not to recognize the risk that he or she is taking when entering into a marriage relationship.

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55 See 5 John Marshall J., supra note 48, at 187.

56 One eminent authority in the field of domestic relations has argued that the real reason for invalidating agreements in contemplation of divorce is that although the provisions may be fair when made, they may be unfair when the divorce or separation occurs. H. Clar, Law of Domestic Relations, 28-29 (1968)

57 See Gamble, supra note 10, at 705.

58 See U.S. Dep't of Commerce, Statistical Abstract of the United States 67 (96th ed. 1975).

Although it is probably impossible to state accurately the kinds of people who would attempt to use marital agreements, one informal study found that most of them were older people, who were entering into a second marriage. These people had children or other financial obligations from the previous marriage which they felt obliged to secure before starting a new relationship.[59] Other people likely to use these agreements include spouses of relatively equal earning power who wish to preserve their own assets for their respective estates in the event of either divorce or death. And finally, the most traditional use of the marital agreements is where spouses and their respective families wish to preserve inherited estates intact for their own family descendents.[60] Thus the question arises as to whether these people should continue to be deprived of their freedom to make such plans in the event of divorce.

The question of fairness itself is one which must be considered candidly on both sides of this issue. Divorce courts have not been universally acclaimed for the fairness with which they divide property and provide support. In fact, the arbitrariness of some of these proceedings has caused many to wonder whether individuals could not by agreement do at least as good a job, if not substantially better.

When courts suggest that the traditional rule promotes the maintenance of marriage, one must inquire whether jurisdictions like Michigan which provide no-fault divorce have not virtually abdicated their interest in the maintenance of marriages in which one or both of the parties no longer desire to remain.[61] There is also the real question whether the state has an overriding interest in requiring former spouses to support each other so that they do not become a charge on the public, and if so, to what limitations it should be subject.

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59 Gamble, supra note 10, at 730.

60 E.g., Del Vecchio v. Del Vecchio, supra note 16. See also 5 John Marshall J., supra note 48, at 200.

61 It has also been noted that where no minor children are involved, and where the spouses can function independently in society, the state has little interest in the continuation of the marriage. Volid v. Volid, 6 Ill. App.3d 386, 391, 286 N.E.2d 42, 46 (1972).

Reviewing and analyzing all of these sometimes competing policy positions is a very troubling and inconclusive exercise. It might be argued that the extent of the conflict in these policies reveals a need to overhaul completely the marital property system and to consider alternatives such as community property. However, as noted above, community property jurisdictions which grant, in theory at least, the greatest equality to the marriage partners with respect to the ownership and control of their property still do not uniformly favor the enforcement of agreements in contemplation of divorce.

Without attempting to evaluate the entire body of marital property law, the question remains whether the policy arguments on either side of this issue are clearly more convincing. The present examination of the cases and commentators does not reveal a definite answer to this question. Rather, it appears that very unfair results have been obtained in divorce proceedings, irrespective of whether or not the jurisdictions involved enforce these marital agreements. Our legal system appears to be the least effective when it attempts to deal most comprehensively and/or fairly with matters of domestic concern. Marriage is not strictly a commercial venture but does contain without question major financial aspects. People who live and work together and raise a family are highly tied to each other in economic as well as emotional and social ways. How these economic expectations should best be protected by society is really what is at issue.

Although neither the combined arguments for or against agreements in contemplation of divorce are overwhelmingly superior, consistency with other laws dealing with similar matters is itself a significant value. The Michigan statute on agreements in contemplation of death should thus be reviewed from this perspective. The question is whether the policies with respect to a surviving spouse's rights should be substantially different from those with respect to a divorced spouse's rights. The old argument regarding the preservation of marriage are of no persuasive effect in a state like Michigan which provides for no-fault divorce

and tolerates a divorce rate of greater than thirty-three percent.[62] The interest of the state in requiring former spouses to support each other so that they do not become wards of society is again no greater in the event of death, where it is not required, than in the event of divorce, where it is. In short, there seems to be no policy argument which outweighs the value of consistency in the treatment of these marital contracts, regardless of whether the marriage terminates by death or by divorce.

Planning for the division of property and support obligations upon termination of a marriage should not turn upon technical refinements, such as consideration,[63] or the distinction between alimony and property division.[64] Rather it should be hedged with real protections so that the parties are required to have entered the agreement freely, without coercion, fraud or duress, and with a full and fair understanding of the nature of their partner's assets and the kinds of interests which they are giving up by virtue of the agreement.

Complicated statutes have been proposed which set forth in detail the relative duties of the parties to inquire into and to disclose the nature of their personal assets and which create presumptions and burdens of proof

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62 See U.S. Dep't of Commerce, Statistical Abstract of the United States, supra note 58, at 68.

63 See supra note 51.

64 The distinctions between alimony and property division which have been developed in some cases appear to be distinctions without a difference. (See excellent discussion in Gamble, supra note 10, at 708). If a party is ordered to pay substantial alimony, there is probably no need for property division in that the alimony might well serve the same purpose.

It might also be noted that the present Michigan statute authorizing agreements in contemplation of death deals with support and property without distinction. Mich. Comp. Laws Ann. §702.74a (Supp. 1975).

in the event of litigation.[65] This approach can be unduly burdensome and may not guarantee the equitable results it attempts. To overcome this problem, an agreement could be drafted to include sufficient recitals to show the scope of the information to which the parties were privy.

Although the present Michigan law does not include every limitation or provision that other jurisdictions require, it does contain the major protections of fair disclosure and absence of fraud and duress.[66] If broadened to cover agreements in contemplation of divorce, whenever executed, it would adequately safeguard the interests of the persons who choose this means of planning for their future.

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65 See Gamble, supra note 10, at 733. Gamble proposes separate statutes for agreements stipulating property rights and those stipulating alimony rights. Under both provisions, however, each spouse must be represented by independent counsel, there must be a listing of each spouse's interest in specified types of property, and the agreement must be acknowledged before a notary public. Compliance with these provisions raises an irrebuttable presumption of full disclosure, and a further presumption of validity. Noncompliance raises no presumption, and the contesting spouse has the burden of proving material concealment, misrepresentation, or fraud. With respect to alimony, an unreasonable provision, or no provision at all, has no effect upon enforceability or burden of proof.

66 Mich. Comp. Laws Ann. §702.74a (Supp. 1975).

CONCLUSION AND RECOMMENDATIONS

Based on the foregoing, the author recommends that the present Michigan statute[67] be amended to authorize agreements in contemplation of divorce whenever executed under the same terms and conditions as are applied to agreements in contemplation of death. Such an amendment will allow individuals to plan realistically for the future, with the certainty that their agreements will be enforced so long as they have made a fair disclosure of their assets and the agreements are not the product of fraud or duress.

As noted above, some jurisdictions which enforce these agreements attach additional limitations to them.[68] Thus, some states still evidence a broad interest in the support of the waiving spouse. As a result, they permit judicial modification of the agreement whenever there is a showing of changed circumstances.[69] Others hold the agreement unenforceable if it deprives a spouse of support that he or she cannot otherwise secure.[70]

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67 Id.

68 See Appendix B, attached hereto.

69 Posner v. Posner, supra note 21; Unander v. Unander, supra note 28.

70 Unander v. Unander, supra note 28.

Following this view, the proposed amended statute could authorize the courts to set aside an agreement, but only to the extent of assuring some minimal standard of support for each of the spouses. If properly defined, this power would limit the uncertainty with which spouses would be faced upon divorce. The standard of support could be defined as subsistence (welfare level), middle income, or the style to which the spouse has become accustomed. The minimum standard depends upon the level at which public policy would deem it necessary for the courts to intervene.

Under current Michigan law, however, no such restrictions are placed upon agreements that contemplate dissolution of the marriage by death. Since the State has no apparent greater interest in the support of a divorced spouse than in the support of a surviving spouse, it is unwarranted to place greater restrictions upon agreements that contemplate divorce as opposed to death. Viewing consistency as a major deciding factor on this issue, it is recommended that agreements in contemplation of divorce should be authorized under the same terms and conditions as presently apply to agreements in contemplation of death, and that subsequent changes in the law should be based on a reasoned evaluation of both the similarities and differences inherent in these two situations.

APPENDIX A

702.74a Surviving spouse; waiver of rights; support and property settlement agreements, support of minor children

Sec. 74a. (1) The right of election of a surviving spouse to inherit in an intestate estate, or to elect to take against a will, the right to dower and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure and in the absence of fraud or duress. Unless an agreement provides to the contrary, a written waiver of all rights in the property or estate of a present or prospective spouse is a waiver of all rights to an elective share, dower, homestead allowance, exempt property and family allowance by each spouse in the property of the other and an irrevocable renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the agreement or waiver.

(2) A binding contract as to support or property settlement or both may be entered into by a husband and wife after marriage but in anticipation of divorce, if the parties have theretofore separated, there has been fair disclosure and the agreement was not executed under fraud or duress. The agreement shall not release either party of a legal duty to support their minor children. Unless the agreement provides to the contrary, it shall have the same effect as an agreement of waiver as provided for in subsection (1).

APPENDIX B
Express Limitations Placed On
Contracts In Contemplation Of Divorce
By Jurisdictions Recognizing Their Enforceability

LIMITATION	JURISDICTION						
	Fla.	Ill.	Ore.	Nev.	Cal.	Ariz.	Va.
Absence of Fraud or Duress	X	X	X	X		X	
Divorce Must be Prosecuted in Good Faith	X						X
Fair and Equitable Provisions	X*	X				X	
Full Disclosure	X*	X	X	X		X	
General Knowledge of Other Spouse's Assets	X*						
Modification on Changed Circumstances	X		X				
No Waiver of Temporary Alimony	X	X					
Enforcement Must Not Deprive Spouse of Necessary Support			X				
Unconscionable Contract Not Enforceable				X			
Terms of Contract Must Not Encourage Divorce					X		X**

*alternative requirement

**court looks to external circumstances as well as objective language in order to determine whether or not the contract encouraged divorce.