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## MORTGAGES-ASSIGNMENT OF RENTS AND PROFITS-NEW MICHIGAN STATUTORY TREATMENT

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MORTGAGES—ASSIGNMENT OF RENTS AND PROFITS—NEW MICHIGAN STATUTORY TREATMENT—The Michigan legislature recently approved an act which affects the validity of assignments of rents in or in connection with mortgages on industrial or commercial property.<sup>1</sup> To understand the impact of the new legislation, it is necessary to refer to the general mortgage law of Michigan. In particular, a similar act passed in 1925 relating to trust mortgages is an aid in construing the new act.

An 1843 Michigan statute<sup>2</sup> provided that no action of ejectment could be maintained by a mortgagee until the redemption date following the foreclosure sale of the mortgaged property; the effect was to convert Michigan into a "lien" state. In *Hazeltine v. Granger*,<sup>3</sup> the court held that this "no-ejectment" statute prevented a court of equity from appointing a receiver to collect rents and profits from the mortgaged premises prior to foreclosure, even though there was an express assignment of the rents and profits in the mortgage to take effect upon default. In 1925 the legislature made an exception to the rule by providing that assignments of rents and profits are valid when made in or in connection with a trust mortgage.<sup>4</sup> The new act of 1953 goes further and permits the assignment of rents in or in connection with any mortgage on industrial or commercial property that accrue under leases existing at the execution of the mortgage. The language of the new act is very similar to that of the 1925 act, an unfortunate circumstance in that the court has already pointed out how poorly the 1925 act is drafted.<sup>5</sup>

It seems clear that only mortgages executed after October 2, 1953<sup>6</sup> will have the benefit of the new act, since the act begins with the word "hereafter," as does the 1925 act, which led the court to limit that act to mortgages made subsequent to its effective date.<sup>7</sup> Only rents, and not business profits,<sup>8</sup> may be

<sup>1</sup> Mich. Pub. Acts (1953) No. 210, Mich. Stat. Ann. (1953 Cum. Supp.) §26.1137(1) et seq.

<sup>2</sup> Mich. Comp. Laws (1948) §629.54.

<sup>3</sup> 44 Mich. 503, 7 N.W. 74 (1880).

<sup>4</sup> Mich. Pub. Acts (1925) No. 228, Mich. Comp. Laws (1948) §554.211 et seq. See 31 MICH. L. REV. 1124 (1933) for a discussion of the 1925 act.

<sup>5</sup> In *Security Trust Co. v. Sloman*, 252 Mich. 266 at 273, 233 N.W. 216 (1930), the court remarked: "The act is not perfectly drafted nor entirely complete." It was necessary to amend the 1925 act in 1933 to define the meaning of "trust mortgage" after the court had muddled the task. Mich. Pub. Acts (1933) No. 55, Mich. Comp. Laws (1948) §554.213. See *Equitable Trust Co. v. Milton Realty Co.*, 261 Mich. 571, 246 N.W. 500 (1933); 31 MICH. L. REV. 1124 at 1130 (1933).

<sup>6</sup> This is the effective date of the new act.

<sup>7</sup> *Nusbaum v. Shapero*, 249 Mich. 252, 228 N.W. 785 (1930). See *Central Trust Co. v. Wolf*, 262 Mich. 209, 247 N.W. 159 (1933), in which the court held that an extension of time for payment, with an increase in the amount of the loan and incorporation of the provisions of the prior mortgage was a new agreement made subsequent to the effective date of the 1925 act, the act therefore being applicable.

<sup>8</sup> The 1925 act provided for the assignment of "rents and profits." In *Detroit Trust*

validly assigned, and only those rents that accrue under a lease or leases existing at the time the mortgage is executed.<sup>9</sup> The assignment is binding on the mortgagor upon default, and on the occupiers of the premises upon the filing of a notice of default in the proper office and service of the notice on the occupiers.<sup>10</sup> The assignment, in the absence of express limitations, will entitle the mortgagee to the rents assigned until any deficiency in the mortgage debt is paid or until the redemption date after foreclosure, whichever occurs first.<sup>11</sup> If there is a sub-lease or sub-leases existing at the time of the execution of the mortgage, the court will probably hold that the mortgagee, upon default and the giving of proper notice, is entitled to the rents accruing under the sub-lease or sub-leases rather than the rent running from the sub-lessor to the mortgagor.<sup>12</sup> One interesting problem arises out of the fact that the new act provides that the assignment is to be a "good and valid assignment"<sup>13</sup> from the date of the recording of the mortgage. Why use this point in time? The recording statutes are for the purpose of giving notice to subsequent bona fide purchasers.<sup>14</sup> If the mortgage is not recorded, it is still a valid mortgage as to those having actual notice of it, but apparently the assignment of rents clause would be invalid as to everyone.

The unpolished attempt to indicate the types of mortgages that come under the act reads: "Hereafter, in or in connection with any mortgage on commercial or industrial property other than an apartment building with less than 6 apartments or any family residence to secure notes, bonds or other fixed obligations. . . ."<sup>15</sup> The most obvious ground for litigation is the uncertainty of the meaning of "commercial or industrial property." Does this include a farm? What about mortgages on buildings which have commercial facilities on the ground floor but living quarters in the upper floors?<sup>16</sup> Does the quoted language make

Co. v. Detroit City Service Co., 262 Mich. 14, 247 N.W. 76 (1933), the court discusses the meaning of "rents and profits" as used in the 1925 act, and concludes that profits derived from a business are not assignable under the statute. The problem is not present in the new act, since it applies only to the assignment of "rents."

<sup>9</sup> It is difficult to understand why the act is limited to leases existing at the time the mortgage is executed. A property owner wishing to borrow money in order to construct commercial facilities with the intent to lease them is unable to assign in a mortgage the rents that will accrue under the prospective leases. Such an assignment, if possible, would certainly be an added factor in attracting investment capital.

<sup>10</sup> It is not necessary to serve any notice of default upon the mortgagor in order to bind him if he is not occupying the premises. *Abrin v. Equitable Trust Co.*, 271 Mich. 535, 261 N.W. 85 (1935).

<sup>11</sup> *Security Trust Co. v. Sloman*, note 6 supra.

<sup>12</sup> *Abrin v. Equitable Trust Co.*, note 11 supra.

<sup>13</sup> Query, what is the distinction between "good" and "valid"? And if there is no legal distinction, why use both terms?

<sup>14</sup> Mich. Comp. Laws (1948) §565.29.

<sup>15</sup> Mich. Pub. Acts (1953) No. 210, §1, Mich. Stat. Ann. (1953 Cum. Supp.) §26.1137(1).

<sup>16</sup> The new act provides that it shall be lawful to assign "the rents, or any portion thereof . . .," which seems to indicate that the rents accruing from the leases of the commercial facilities may be assigned even though the rents from the living quarters may not.

an exception of apartment buildings having less than six apartments and an exception of family residences, or does it just except the apartment buildings with the "or" before "family residence" acting as a disjunctive with "commercial or industrial property"? Common sense and the policy of the state of protecting mortgagors dictate that family residences are an exception, but there is the possibility that some lawyer will attempt to persuade the court to adopt the alternate construction. And what is the import of the use of the term "fixed obligation"? Does the term mean something different from the ordinary mortgage debt and thereby limit the operation of the act? A further area of difficulty is found in the limitation of the act to "assignment of rents to accrue under the lease or leases existing at the time of such mortgage. . . ." <sup>17</sup> To avoid this limitation it might be possible to execute a new mortgage with the same terms after the making of a new lease.<sup>18</sup> Related to the new act is a tendency of the Michigan court to allow assignment of rents and profits in connection with any mortgage, independent of any statute, if such assignment is made subsequent to the execution of the mortgage and for a good consideration, such as forbearance of the mortgagee from institution of foreclosure proceedings.<sup>19</sup> Should the number of mortgage defaults increase in the future, the new act will be the source of much litigation over these and myriad other problems.

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<sup>17</sup> Mich. Pub. Acts (1953) No. 210, §2; Mich. Stat. Ann. (1953 Cum. Supp.) §26.1137(2).

<sup>18</sup> See *Central Trust Co. v. Wolf*, 262 Mich. 209, 247 N.W. 159 (1933).

<sup>19</sup> See *Massachusetts Mutual Life Ins. Co. v. Ruetter*, 268 Mich. 175, 225 N.W. 754 (1934); *Mutual Benefit Life Ins. Co. v. Wetsman*, 277 Mich. 322, 269 N.W. 189 (1936); *Massachusetts Mutual Life Ins. Co. v. Sutton*, 278 Mich. 457, 270 N.W. 748 (1936); *Fox v. Detroit Trust Co.*, 285 Mich. 669, 281 N.W. 399 (1938).