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Purchase-Money Mortgages in Pennsylvania

COMMENTS

PURCHASE-MONEY MORTGAGES IN PENNSYLVANIA

The priority of purchase-money mortgages is settled law in Pennsylvania.[1] However, it is submitted that the determination of which mortgages fall within this protected class is not settled. The unresolved issue is whether purchase-money mortgages are limited to the vendor-vendee relationship or whether they extend to mortgages given directly to a third party as part of the same transaction in which the deed was delivered.

For example: *B* Buyer wishes to purchase property from *S* Seller. However, Buyer does not possess adequate capital to meet the purchase price. In an attempt to acquire the necessary funds Buyer visits the Friendly Finance Company. The officers agree to loan the money in return for a mortgage on the property. Simultaneously, Seller deeds the property to Buyer, Buyer executes a mortgage to the finance company and the finance company pays Seller the purchase price. During the interim between the execution of the deed and mortgage and the recording of the mortgage a valid judgment was rendered and properly recorded against Buyer.

Does this judgment lien take priority over the mortgage or is the mortgage a purchase-money mortgage and thereby prior to the lien by operation of law?

In illustrating the question and a possible answer, this comment will primarily concern itself with the Acts of 1820, 1915, 1927, and 1951 of the Pennsylvania Legislature and the cases decided thereunder.

The Act of 1820[2] provided that all mortgages should have priority according to the date of recording. However, § 1 of the act created an exception by providing:

> That no mortgage given for the purchase money of the land so mortgaged, shall be affected by the passage of this act, if the same be recorded within sixty days from the execution thereof.[3]

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1. Cake's Appeal, 23 Pa. 186 (1854); *In re* Deardorff, 17 F.2d 294 (1927); Parke v. Neeley, 90 Pa. 52 (1879); Case's Petition 27 Pa. D.&C. 391 (1936).

2. Act of 1820, March 28, P.L. 144.

3. *Id.* at § 1.

Under this act the Pennsylvania Supreme Court concluded:

> A purchase-money mortgage, however, may not always be in the name of the vendor, he may assign his right, and the security be taken in the name of the vendor, for the use of the assignee, or indeed, it may, under the operation of an assignment, legal or equitable, be taken in the name of another. It can only, however, be in the name of another by the act or deed of the vendor as no other than the vendor, or those representing him, can have title to purchase money as such.[4]

In a later case[5] a more liberal view was taken. Mr. Justice Green in his opinion agreed entirely with the learned court below in holding that where the purchaser gave at the same time with the deed a mortgage to secure the purchase money, although to one other than the vendor, the mortgagee was entitled to his lien for a purchase-money mortgage. The test is not whether the mortgage is given to the vendor for the purchase money, but whether it is to be used as purchase money.[6]

In answer to the contention that the act limited purchase-money mortgages to those given the vendor the court held that while the act probably contemplated cases where the mortgage was given to the seller of land, the words of the act were not restricted to such cases and its application to a third party would be a just and fair construction.[7]

Under the Act of 1820 the law became well settled that a third party could be a purchase-money mortgagee as well as the vendor,[8] provided all the acts of the parties appeared to be parts of a single transaction[9] and in its legal effect it was the same as though the

4. Albright v. Lafayette Bldg. & Sav. Ass'n, 102 Pa. 411, 417 (1883). Here the court concluded it was not necessary that a purchase-money mortgage be given to the seller, but rather could be executed to any nominee to whom the vendor assigned his right. At this point the court still required an affirmative act by the vendor whereby he assigned his right to receive the purchase money when delivered by the purchaser. See also Jeanes v. Hizer, 186 Pa. 523, 40 Atl. 785 (1898); Citizens' Bldg. & Loan Ass'n of Mount Pleasant v. Arvin, 207 Pa. 293, 56 Atl. 870 (1904); Hiser v. Hiser, 13 Montg. 49 (Pa. Com. Pl. 1896).

5. Commonwealth Title Ins. & Trust Co. v. Ellis, 192 Pa. 321, 43 Atl. 1034 (1879); Appeal of Campbell, 36 Pa. 247 (1860).

6. Commonwealth Title Ins. & Trust Co. v. Ellis, *supra* note 5.

7. *Id.* at 324, 43 Atl. at 1035.

8. Albright v. Lafayette Bldg. & Sav. Ass'n., *supra* note 4.

9. Lafayette Bldg. & Sav. Loan Ass'n. v. Erb, 5 Sadler 401 (Pa. 1887), 8 Atl. 62 (1887). Here the mortgage was dated three days after the deed, but delivered simultaneously with the deed and recorded within sixty days after its execution.

purchaser had executed a mortgage to the vendor for the purchase money and he had assigned it to the party advancing the money.[10]

In 1915 the legislature amended the Act of 1820 by an act entitled:

> An act . . . requiring purchase-money mortgages to be recorded within thirty days in order to have priority of lien.[11]

The amended section concerning purchase-money mortgages provided:

> No mortgage given by *purchaser* to *seller,* for any part of the purchase money of the land so mortgaged, shall be affected by the passage of this act if the same be recorded within thirty days from the execution thereof.[12] (Emphasis Supplied.)

The 1915 amendment to the 1820 Act not only reduced the grace period from 60 to 30 days but also indicated the legislature's agreement with the court in *Commonwealth Title Ins. & Trust Co. v. Ellis*[13] and expressly limited purchase-money mortgages to the seller-purchaser relationship.

In *Moore v. Oyer,*[14] a lower court decision, Judge Stewart stated:

> We have carefully read the authorities cited to us upon the subject of purchase-money mortgages prior to the passage of the Act of 28th of May, 1915, P.L. 631 . . . . Two changes were made by the amending act. The mortgage referred to must be given by *purchaser* to *seller,* and secondly, the time of recording was reduced from sixty to thirty days.[15] (Emphasis Supplied.)

Judge Stewart then concluded that only one of the mortgages claiming priority of lien could be a purchase-money mortgage and senior to the other two because, as required by the Act of 1915, it was the only mortgage given to the *vendor* of the property.

The court in *Case's Petition*[16] reviewed the Acts of 1820 and 1915 and concluded its analysis by holding:

> This [The Act of 1915] would appear to limit the benefit of the common-law rule to cases where the mortgage was

10. Commonwealth Title Ins. & Trust Co. v. Ellis, *supra* note 5; Appeal of Campbell, *supra* note 5; Jones, Mortgages § 586 (8th ed. 1928).

11. Act of 1915, May 28, P.L. 631.

12. *Id.* at § 1.

13. *Supra* note 5.

14. 21 North. 345 (Pa. Com. Pl. 1928).

15. *Id.* at 350-51.

16. 27 Pa. D.&C. 391 (1936).

> given by the *purchaser* to the *seller*. This limitation exists by statute in Maryland and Ohio: 23 Am. & Eng. Enc. Law 467.[17] (Emphasis Supplied.)

Martin's Estate, a superior court decision, was the first case in which this question was given appellate review.[18] The two mortgages in issue were executed in 1924. However, neither was given to the vendor of the property. Mr. Justice Rhodes, speaking for the court held neither to have the priority of a purchase-money mortgage:

> [A]lthough they may have been given for purchase-money, [neither] was protected by the Act of May 28, 1915, P.L. 631 § 1, because they were not given by *purchaser* to *seller*.[19] (Emphasis Supplied.)

It is important to note that the court did not conclude that the two mortgages were not purchase-money mortgages but rather that they were not protected by the lien priority provisions of the Act of 1915.

Twelve years after the Act of 1915 became effective the Act of 1927[20] was approved by the legislature. The act was entitled:

> [An act] . . . protecting the lien of mortgages by purchasers to sellers, if recorded within thirty days from the date of such mortgage.[21] (Emphasis Supplied.)

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17. *Id.* at 396. The courts of Maryland and Ohio in construing ambiguous statutes held that only between the vendor and purchaser could a purchase-money mortgage exist. Heuisler v. Nickum, 38 Md. 270 (1873); Stansell v. Roberts, 13 Ohio 148 (1844). The rationale being that as between the purchaser and a third party, money advanced is simply borrowed money and third parties are not in privity to the transaction of purchase and sale.

> Section 4 of article 66 of the Maryland Code Annot. provides: Whenever lands . . . are sold and conveyed and a mortgage . . . is given by the purchaser at the same time to secure the payment of the purchase money, . . . such mortgage . . . shall be preferred to any previous judgment . . . which may have been obtained against such purchaser . . . .

The court in Heuisler v. Nickum concluded that the statute was susceptible of two constructions, one including anyone the purchaser may choose to mortgage his interest in the land but "Such a construction is decidedly against the tenor of our decisions." Here just as in the Ohio case the court construed the statute in light of prior decisional law.

18. 135 Pa. Super. 136, 4 A.2d 551 (1939).

19. *Id.* at 142, 4 A.2d at 554-55.

20. Act of 1927, April 27, P.L. 440, PA. STAT. ANN. tit. 21, §662.

21. *Ibid.*

Section 1 of the act provided:

> Any mortgage, given by *purchaser* to *seller,* for any part of the purchase money of the land so mortgaged, shall have a lien from the time of delivery of said mortgage, provided the same be recorded within thirty days from the time of the mortgage.[22] (Emphasis Supplied.)

The 1927 Act repealed the Act of 1820 and the 1915 amendment. The only change effected by the passage of this act was to provide that the lien of purchase-money mortgages became effective as of the date of delivery rather than the date of the mortgage's execution.[23]

The Supreme Court of Pennsylvania did not receive an opportunity to review the third party purchase mortgage issue until 1931 in *Oransky v. Stepanavich.*[24]

Here the plaintiffs, a married couple, desired to purchase defendant's property but lacked the funds. A bank agreed to loan them the money in return for a promissory note provided the defendant-seller acted as surety. The property was deeded to plaintiffs as tenants by the entireties. Upon default the defendant, as surety, was forced to pay the balance of the note. He then received an assignment of the note from the bank and levied on the property. The defendant then *bought-in* the property at a sheriff's sale. The plaintiff-wife filed a petition repudiating any obligation on the note alleging that at the time the note was executed she was a minor. She further contended that by her repudiation of the note the obligation became the sole debt of her husband and that property held by the entireties could not be levied upon for the sole obligation of one spouse.

The Pennsylvania Supreme Court, quoting from *Kennedy v. Baker*[25] said:

> 'Where an infant executes a *purchase-money mortgage* to secure the purchase money for land conveyed to him by deed, he cannot after he comes of age affirm the deed and at the same time disaffirm the mortgage.' As we have already pointed out, there is no distinction between a purchase-money mortgage and a purchase-money judgment.[26] (Emphasis Supplied.)

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22. *Supra* note 20 at §2, PA. STAT. ANN. tit. 21, § 662.

23. The act also provided procedural rules for the Recorder of Deeds; however, there was no effect on the limited relationship placed on purchase-money mortgages and the seller-purchaser restriction was continued.

24. 304 Pa. 84, 155 Atl. 290 (1931).

25. 159 Pa. 146, 28 Atl. 252 (1893).

26. *Supra* note 24 at 91, 155 Atl. at 292.

The court subsequently concluded that the note executed by the plaintiff was a purchase-money obligation by providing:

> In Com. Title Ins. & Trust Co. v Ellis, 192 Pa. 321, 327, we said: 'The delivery of the deed to the mortgagor and of the mortgage to the mortgagee were concurrent and simultaneous acts, and the money for which the mortgage was given was in actual fact a part of the purchase money paid for the property, at the very time of the delivery of the deed.'[27]

Nowhere in the opinion did the court attempt to construe the provisions of the Act of 1927 which provided purchase-money mortgages were to be from the purchaser to the seller. The court derived its definition of purchase-money mortgages from the decisional law handed down prior to the Acts of 1915 and 1927.

The supreme court was given a second opportunity to determine the construction to be given § 1 of the Act of 1927.[28] The fact situation was practically indentical to the prior case except the wife asserted the incompetence of her husband at the time the bond and mortgage were executed rather than infancy as in the *Oransky*[29] case. The court held the mortgage to be a purchase-money mortgage notwithstanding the defense of incompetency of the husband and the fact the property was held by the entireties. In so holding the court cited *Oransky v. Stepanavich*[30] and *Commonwealth Title Ins. & Trust Co. v. Ellis,*[31] both of which were decided in light of the law prevailing under the Act of 1820.

The supreme court in both these cases based its opinion on case law decided under the Act of 1820 which contained no definition of purchase-money mortgages. Under the Act of 1820, as hereinbefore stated, the court concluded that the act probably contemplated cases where the mortgage was given to the seller of land. However, it further concluded that the words were not restricted to such cases; therefore, its application to a third party would be a just and fair construction.

In 1915 and 1927 the Pennsylvania legislature altered the law concerning purchase-money mortgages by embodying the words "purchaser to seller" in the acts and thereby qualified purchase-money mortgages. The subsequent cases decided under the two acts concluded that the words "purchaser to seller" restricted the purchase-

27. *Supra* note 24 at 90, 155 Atl. at 292.

28. General Casmir Pulaski Bldg. & Loan Ass'n v. Provident Trust Co. of Philadelphia, 338 Pa. 198, 12 A.2d 336 (1940).

29. *Supra* note 24.

30. *Ibid.*

31. *Supra* note 5.

money mortgage protected by the acts to those given to the vendor. However, the supreme court in the *Oransky*[32] and *General Casmir Pulaski Bldg. & Loan Ass'n.*[33] cases failed to refer to the Act of 1927. The court refused to interpret the definition presented by the act and failed to explain its applicability or lack of applicability to the two cases.

It is possible that the court did not believe the two cases squarely met the issue as to whether a purchase-money mortgage can be given to a third party under the Act of 1927. However, the two cases do aid in the development of a line of decisions which could be interpreted as consistent, and if so interpreted, may indicate the manner in which the supreme court will resolve this issue.

It is important to note that in both these cases the issue did not concern a conflict over priority of lien but rather, whether or not the obligation could be considered a purchase-money obligation in order to prevent the unjust enrichment of a party . In *Martin's Estate,*[34] the superior court did not say that the mortgages given the third party were not purchase-money mortgages but rather that they did not fall within the protection offered by the thirty day grace period for recording of such liens.

The last statutory enactment in this area was the LIEN PRIORITY LAW of 1951.[35] Section 2 of the act provides:

> Liens against real property shall have priority over each other on the following basis:
>
> (1) Purchase-money mortgages, from the time they are delivered to the *mortgagee,* if they are recorded within thirty days after their date; otherwise, from the time they are left for record.[36] (Emphasis Supplied.)

The Act of 1927 provided that any mortgage, given by *purchaser* to *seller* for purchase money would have a lien as of delivery if recorded within thirty days.[37]

Thus, the Act of 1951 uses the word mortgagee rather than seller as used in the Act of 1927. It has been indicated that this substitution of the word mortgagee for seller is at least a stronger reason for contending that the test is not whether the mortgage is given to the

32. *Supra* note 24.

33. *Supra* note 28.

34. *Supra* note 18.

35. Act of 1951, June 28, P.L. 927, PA. STAT. ANN. tit. 68, § 602.

36. *Id.* at § 2; PA. STAT. ANN. tit. 68, § 602.

37. Act of 1927, April 27, P.L. 440, PA. STAT. ANN. tit. 21, § 662.

vendor but whether it is given for purchase money.[38] It is important to note that the LIEN PRIORITY LAW[39] of 1951 repealed the 1927 act only insofar as the latter is inconsistent with and supplied by the former, which contains no definition of a purchase-money mortgage.[40] The primary purpose of the 1951 Act is clearly indicated by the title which provides:

> An act giving liens against real property priority over each other in point of time; fixing the time from which priorities extend; and imposing duties on the judges and certain courts and county officers and employes [sic].[41]

The basis for the statute was not to change the requirements for the lien but rather to alter the priority of the liens. The act set forth a uniform system of lien priority but in no manner altered nor does the title indicate it was intended to alter the prior requirements necessary to qualify one as a holder of any lien against real property. It would seem the 1927 Act remained in force, at least in that respect, since the definition of a purchase-money mortgage is neither inconsistent with nor supplied by the Act of 1951. Therefore, the question whether under the 1927 Act, a purchase-money mortgage could be given to a third party still exists under the 1951 Act, since it made no change in that respect.

It is submitted that the supreme court may separate purchase-money mortgages into two classes, one with priority of lien from delivery if recorded within thirty days of the date thereon, and a second class with priority only from the date of recording. The former would necessarily be given to the vendor and the latter to a third party. It may seem that the second class would not be a purchase-money mortgage because it conflicts with the very nature of a purchase-money mortgage. If this distinction is not drawn, inequitable results would necessarily follow from situations such as are present in the *Oransky*[42] and *General Casmir Pulaski Bldg. & Loan Ass'n.*[43] cases. The development of these two classes of purchase-money mortgages would resolve the ostensible inconsistency between the lower

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38. 12 U. OF PITT. L. REV. 148 (1951).

39. Act of 1951, June 28, P.L. 927, § 1, PA. STAT. ANN. tit. 68, § 601. "[T]he Act of 1951 repealed section 622 of Title 21, Deeds and Mortgages, in so far as it is inconsistent with or supplied by this act . . . "

40. 36 Am. Jur., Mortgages § 229. Purchase-money mortgages are defined as being "entitled to a preference as such over all other claims or liens arising through the mortgagor although they are prior in point of time."

41. *Supra* note 35.

42. *Supra* note 24.

43. *Supra* note 28.

court cases and the supreme court cases. However, it is possible that the supreme court may follow the great majority of courts that have extended the benefits of the purchase-money mortgage beyond the vendor to the third party.[44] Regardless of which analysis the court accepts as controlling in Pennsylvania, "wisdom [should] dictate the advisability of having a purchase-money mortgage executed directly to the grantor and the mortgage itself assigned by him to the ultimate holder."[45]

44. *In re* Sandler v. Freeny, 120 F.2d 881 (1941); Gautney v. Gautney, 253 Ala. 584, 46 So.2d 198 (1950); Faulkner County Bank & Trust Co. v. Vail, 173 Ark. 406, 293 S.W. 40 (1927); Federal Land Bank of Columbia v. Bank of Lenox, 192 Ga. 543, 16 S.E. 2d 9 (1941); Wermes v. McCowan, 286 Ill. App. 381, 3 N.E. 2d 720 (1936); *In re* Lewis' Estate, 230 Iowa 694, 298 N.W. 842 (1941); Hill v. Hill, 185 Kan. 389, 345 P.2d 1015 (1959); O'Halloran v. Marriage, 167 Minn. 443, 209 N.W. 271 (1926); Syracuse Sav. Loan Ass'n. v. Hass, 234 N.Y.S. 514, 134 Misc. 82 (1929); Smith Builders Supply, Inc. v. Rivenbark, 231 N.C. 213, 56 S.E. 2d 431 (1949); Ladd & Tilton Bank v. Mitchell, 93 Or. 668, 184 Pac. 282 (1919); Beck v. Elliott, 53 S.D. 138, 220 N.W. 448 (1928); Butler v. Thornburgh, 131 Ind. 237, 40 N.E. 514 (1895); Price v. Davis, 15 Ky. L. 120, 22 S.W. 316 (1893); Clark v. Munroe, 14 Mass. 350 (1817); Pearl v. Hervey, 70 Mo. 160 (1879); Adams v. Hill, 29 N.H. 202 (1854); New Jersey Bldg., Loan & Inv. Co. v. Bachelor, 54 N.J. Eq. 600, 35 Atl. 745 (1896); Cowardin v. Anderson, 78 Va. 88 (1883); Carey v. Boyle, 53 Wisc. 574, 11 N.W. 47 (1881).

45. LADNER ON CONVEYANCING IN PENNSYLVANIA § 9:33 (3rd ed. 1961).