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Mortgages

Clinton DeWitt

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Obviously only fundamental principles of contract law were involved. The lessor had committed himself to a stipulated sale price which was the consideration to the lessee for the immediate payment of the forfeiture. Thus the forfeiture provision of this lease amounted to a simple bilateral executory contract.

MARSHALL I. NURENBERG

MORTGAGES

Action in Ejectment Based on Mortgage: Statute Of Limitation Not Tolloed by Partial Payment on Note

Eastwood v. Capel,¹ was an action instituted by plaintiffs in the court of common pleas for the recovery of realty which had been mortgaged as security for a promissory note held by plaintiffs. Defendant claimed that the statute of limitation barred the action and asked that the title to the premises be quieted in him. The facts were not in dispute. The action was begun on August 3, 1953. At that time nearly 21 years had elapsed since the last credit on the note, (August 6, 1932) and hence an action thereon was barred by the 15 year statute of limitation.² Likewise, the 21 year statute of limitation³ barred an action on the mortgage if the due date of the note, December 13, 1926, should control. Plaintiffs claimed, however, that the credit on the note on August 6, 1932, also tolled the statute as to the mortgage, and that the new period of 21 years had not yet elapsed when the ejectment action was instituted on August 3, 1953. In support of this view, plaintiff relied on Revised Code section 2305.08, which, in part, provides that when payment is made on a promissory note the statute of limitation is tolled and an action may be brought within the stated limitation after such payment. Defendant contended, however, that while this is true as to an action on the note, this section does not apply to the action in ejectment. The trial court rendered judgment for defendant but this was reversed by the court of appeals and judgment was entered for plaintiffs.

Reversing the latter judgment and affirming that of the trial court, the Supreme Court held that by its express terms the toll statute (Revised Code section 2305.08) is restricted in its effect to the 15 year statute of limitation and does not apply to or in any way affect the 21 year statute.

¹ 164 Ohio St. 506, 132 N.E.2d 202 (1956)

² OHIO REV. CODE § 2305.06.

³ OHIO REV. CODE § 2305.04.

Moreover, it was pointed out that even if the toll statute were held applicable, the maximum extension would be fifteen years and this would still fall six years short of permitting the ejectment action to be brought.

*Marshalling Liens: Priorities as Between a Mortgage
Defectively Executed and Subsequent Mortgages
Properly Executed*

Citizens Nat'l Bank v. Denison,⁴ was a proceeding for the foreclosure of a mortgage and the marshalling of liens. The controversy involved rights among creditors with mortgage liens and did not involve any dispute between the mortgagees and the makers of these mortgages.

It has long been the rule in Ohio that a defectively executed mortgage is not a legal mortgage but only an equitable one and, although recorded, does not establish a lien superior to that of a properly executed mortgage which is recorded subsequently.⁵ In the earlier cases, the defect in the mortgage plainly appeared on the face of the instrument; in the present case the defect was disclosed by evidence from another source.

The mortgages of the plaintiff-bank and that of the defendant Graham were properly executed in conformity with the provisions of Revised Code section 5301.01, but these were recorded subsequent to the mortgage of the defendant Citizens Budget Company. The sole question was whether the latter mortgage was defective and therefore not fit to be recorded. Although this mortgage on its face appeared to be a properly executed one, evidence was introduced showing that such was not the fact.⁶ The mortgagor, Denison, and his wife signed the mortgage but the notary public did not actually witness the signing by Mrs. Denison of her name, nor did she acknowledge her signature or signing to him either in person or otherwise then or afterwards. Denison himself executed the mortgage after he saw that it had been signed by his wife, then delivered it to an actual witness of his and her signatures and thereafter acknowledged his signature over the telephone to the notary public, who thereupon affixed his name both as witness and acknowledging officer.

It was urged by the budget company that where the mortgage is ap-

⁴ 165 Ohio St. 89, 133 N.E.2d 329 (1956). The case is discussed in full at 7 WEST. RES. L. REV. 492 (1956).

⁵ *Amick v. Woodworth*, 58 Ohio St. 86, 50 N.E. 437 (1898); *White v. Denman*, 1 Ohio St. 110 (1853); *Coshocton Nat'l Bank v. Hagans*, 40 Ohio App. 190, 178 N.E. 330 (1931).

⁶ It has been held that a mortgage apparently duly executed and recorded carries with it a presumption of validity, and in order to destroy its effect as a mortgage, it must be shown to be defective by the contestors, and by a preponderance of the evidence. *Coshocton Nat'l Bank v. Hagans*, 40 Ohio App. 190, 178 N.E. 330 (1931).

parently regular, with witnesses to the signatures and acknowledgment before a notary public, and it is properly recorded, it cannot be challenged by contradictory testimony of the parties and the notary public. The court of common pleas and the court of appeals approved this view and held that the mortgage of the budget company was superior to that of the bank and of Graham.

Reversing the judgment of the court of appeals, the Supreme Court held that the mortgage of the budget company was not a legal mortgage within the purview of Revised Code section 5301.01, that it was not fit for record, and that the subsequent legal mortgages of the bank and of Graham were entitled to priority over it in the distribution of the proceeds of the judicial sale of the premises.

It is now perfectly clear in Ohio that the general rule that a defectively executed but recorded mortgage does not establish a lien superior to a subsequent mortgage properly executed and recorded, is not confined only to instances in which the instrument is defective on its face, but is applicable also to other situations in which, by extrinsic evidence, the defective condition of the conveyance is disclosed.

Enforcement of Deficiency Judgment Against Building Containing Dwelling Units and Storerooms

Glaros v. Cleveland Trust Co.,⁷ was an action involving the construction of the statute⁸ which provides, in substance, that any judgment for money rendered upon any indebtedness which is secured by a mortgage on real property upon which there has been located a *dwelling or dwellings for not more than two families* and which has been used in whole or in part as a home by the person who executed such mortgage, shall be unenforceable as to any deficiency remaining due thereon *after the expiration of two years* from the date of the confirmation of a judicial sale of such property.

Plaintiff's petition alleged that in June, 1950, he had on deposit with the bank \$740 which the bank then appropriated to its own use as a set off against a judgment it had recovered against the plaintiff on February 5, 1940, upon which there was a balance due of \$5,244.82. In its cross-petition the bank alleged that the plaintiff had no property sufficient to satisfy that judgment but that he had an equitable interest in certain real estate held in trust for him, and prayed that plaintiff's petition be dismissed and that the equitable interest in that real estate be sold and the proceeds applied to the payment of the bank's judgment.

⁷ 164 Ohio St. 511, 132 N.E. 2d 220 (1956)

⁸ OHIO REV. CODE § 2329.08.