IN THE COURT OF APPEALS OF MARYLAND

Misc. No. 20

September Term, 2010

Zvi Guttman, Trustee, *et. al.*,

Appellants

v.

Wells Fargo Bank, N.A., *et. al.*,

Appellees

Certified Questions from the United States Bankruptcy Court

for the District of Maryland (Baltimore Division)

(The Honorable Nancy V. Alquist)

Brief of the Appellees Spruce Financial Group, LLC, MetLife Home Loans Navy Federal Credit Union, and Wells Fargo Bank, N.A.

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STATEMENT OF THE CASE

The consolidated cases were selected by the United States Bankruptcy Court as representative of "[n]umerous adversary proceedings" brought by various trustees to invalidate a large amount of secured debt. The four consolidated cases, alone, represent $891,500 of secured debt.

The Appellees accept the recitation of the appellants, with the exception of footnote 1, which argues the operation of a federal statute.

STATEMENT OF THE QUESTIONS PRESENTED

1. Where a deed of trust is recorded without an affidavit of consideration as required by Md. Code Ann. Real Property Section 4-106, is the defect cured by the application of Md. Code Ann. Real Property Section 4-109 if there is no judicial challenge to the validity of the deed of trust within six months?

2. Where a deed of trust is recorded with an affidavit of consideration wrongly identifying the borrower as the affiant, is the defect cured by the application of Md. Code Ann. Real Property Section 4-109 if there is no judicial challenge to the validity of the deed of trust within six months?

3. Where a deed of trust is recorded with an affidavit of consideration of affidavit [*sic*] printed but containing no information on [*sic*] attestation, is the defect cured by the application of Md. Code Ann. Real Property Section 4-109 if there is no judicial challenge to the validity of the deed of trust within six months?

4. Where a deed of trust is recorded with an affidavit of consideration with a form affidavit that contains no identification of an affiant, is the defect cured by the application of Md. Code Ann. Real Property Section 4-109 if there is no judicial challenge to the validity of the deed of trust within six months?

STATEMENT OF FACTS

The Appellees accept the statement of facts of the Appellants.

ARGUMENT

I. Maryland's Curative Act remedies a deed of trust lacking the affidavit of consideration.

A. Summary of argument.

Maryland's curative acts have operated through history on a wide range of defects, including affidavits of consideration in mortgages and deeds of trust. During the pre-modern era of curative acts, dating from the early 1800's, yearly legislation looked backward to cure defects in already recorded instruments.

The year 1972 marked the beginning of the modern era of Maryland curative legislation. A sweeping revision of the real property code gave birth to a prospective curative act. The modern curative act resolves defects that are not immediately challenged in court, and has dispensed with the yearly legislation that marked the pre-modern period. The modern curative act expanded the scope of its ancient predecessors to cure the complete absence of affidavits of consideration.

The Appellants argue against the plain and unambiguous language of the modern curative act. Their arguments are premised on 35 year old *obiter dictum* which they falsely anoint with the chrism of binding precedent.

The Appellees advocate for an affirmative response to each of the four certified questions. This brief will discuss the pre-modern case law governing affidavits of consideration, followed by a discussion of the plain language in the modern curative statute. It will then lay bare the central fallacy of the Appellants' position, which relies on pre-modern concepts that no longer limit operation of the modern curative statute.

B. The pre-modern curative statutes did not save lien instruments lacking the affidavit of consideration.

The Maryland legislature has long exercised its power to retroactively cure or confirm conveyances defectively acknowledged or executed. *Grove v. Todd*, 41 Md. 633, 641 (1875) ("[t]hat the legislature may, in proper cases, by retroactive legislation, cure or confirm conveyances…we entertain no doubt."). The authority of the legislature to pass curative acts is supported by the precedent of this Court. *Wingert v. Zeigler*, 91 Md. 318, 46 A. 1074, 1077 (1900) ("…and the power to pass such [curative] laws has been sustained over and over again by this court and its predecessors.").

Through the 1971 legislative session, Maryland's practice was to pass yearly retrospective curative acts. The last of the retrospective acts cured, among other things, conveyances "…in which the certificate of acknowledgment or affidavit of consideration **is not in the prescribed form**, or on which the affidavit of agency, when the affidavit of consideration is made by an agent, is not endorsed upon said mortgage or deed of trust…" Md. Ann. Code art 21, §99

(1971) [*emphasis supplied*]. The pre-modern curative acts made no attempt to cure documents where the affidavit of consideration is missing.

C. The pre-modern cases dealt harshly with missing affidavits of consideration.

Mortgages lacking affidavits of consideration in the pre-modern era were routinely invalidated. In *Cockey v. Milne's Lessee*, 16 Md. 200 (1860), this Court invalidated an instrument completely lacking an affidavit of consideration. The plaintiff took title through a sheriff's sale conducted on his attachment of the property. He then sued for possession. The defendant alleged, among other things, that the attachment and sale were subject to a prior mortgage. The plaintiff attacked the mortgage as defective, alleging the absence of an acknowledgment and the absence of an affidavit of consideration.

The Court held that the lack of the affidavit "…is fatal to the mortgage." *Id.* at 203. Plain and unambiguous language in the real property code required that this Court "…give no other construction to the language of the Act of Assembly." *Id.* at 207. There was no discussion of a curative statute. A document missing the affidavit of consideration simply had no legislative cure at this early date. The absence of an affidavit of consideration rendered a mortgage defective, as a matter of law. See, e.g., *Groh v. Cohen*, 158 Md. 638, 149 A. 459 (1930) (a fictitious affidavit of consideration, even in statutory form "is just as ineffective as if it had been omitted.")

In 1936, lawyers Hyman Ginsburg and Isidore Ginsburg published an 1182 page treatise on Maryland mortgage and lien law. They summarized the controlling Maryland law on missing affidavits of consideration:

> If the affidavit (of consideration) is lacking or if the affidavit is bad, the mortgage is bad, the mortgage will, as a general rule, have no effect except as between the parties.

H. Ginsburg and I. Ginsburg, *Mortgages and Other Liens in Maryland* 56 (1936). They clearly identify two defects—an affidavit that is missing ("is lacking"), and an affidavit that is improperly completed ("the affidavit is bad"). This was still the state of Maryland law when their treatise was cited thirty-nine years later, in *Pagenhardt v. Walsh*, 250 Md. 333, 243 A.2d 494 (1969).

In *Pagenhardt,* the court reviewed a trial court decision that had invalidated a mortgage for the absence of an affidavit of consideration. In connection with a mortgage loan granted to a bakery, the notary actually stood in front of the bank's vice president and asked whether the consideration was true and *bona fide*. Upon the vice president's affirmative response, the notary affixed his notary seal, but neglected to insert the vice president's name in the affidavit of consideration. The notary was "thinking that it would be typed in by the attorney" responsible for recording the instrument. *Id.* at 334, 243 A.2d at 495. The money was then disbursed to the bakery.

The bakery defaulted on the loan, and the instrument was foreclosed. The bakery's bankruptcy trustee filed exceptions in the foreclosure action. The lower court granted the exceptions and ruled the mortgage was invalid. The foreclosure sale was set aside and title to the real property was vested in the bankruptcy trustee.

On appeal, the court was asked to determine "whether the omission of [the bank vice president's] name in what would otherwise have been a valid affidavit is equivalent to the omission of the affidavit, which would invalidate the mortgage…" *Id.* at 336, 243 A.2d at 496. The court cited the 1936 Ginsburgs' treatise as a correct statement of applicable Maryland law, and that "[i]f the

affidavit (of consideration) is lacking or if the affidavit is bad, the mortgage is bad…"*Id.* at 335, 243 A.2d at 496. There is no discussion of a curative statute in the case. Maryland's curative statute did not yet extend to missing affidavits of consideration.

The court's discussion then traced the prior Maryland decisions invalidating instruments with missing or falsified affidavits of consideration, and the cases discussing affidavits that substantially comply with affidavit requirement. The Court concluded, as follows:

> From our review of the Maryland cases, we come to the reluctant but inevitable conclusion that the result reached by the lower court was correct on this point: reluctant because there is not in this case any suggestion of a fraudulent transfer for a pretended consideration which the Act was intended to prevent; and inevitable, because the earlier cases leave us no alternative…

Id. at 338, 243 A.2d at 497-498. This result was compelled by the absence of a statutory cure for a missing affidavit. Testimony in the lower court demonstrated the *bona fides* of the transaction. But this was not enough to remove the dead hand of precedent from the mortgage instrument. It would require an act of the Legislature in 1972.

D. The pre-modern cases were more forgiving of incomplete or mistaken affidavits of consideration.

The court has avoided declaring instruments defective if the consideration was actually paid, but the affidavit of consideration is incomplete or inexact. The analysis rests on the notion of substantial compliance with the purposes of the recording statute, which is to prevent frauds on third-parties.

In *Marlow v. McCubbin*, 40 Md. 132 (1864), a mortgage was alleged to be a sham created to defeat a judgment lien. The mortgage's affidavit of consideration

was attacked for lacking the single word "true" in its recitation. This Court held that "…it has never been decided there must be an *exact* and *literal* following or incorporation of the *words* of the statute in the affidavit or otherwise it will be insufficient. On the contrary a substantial compliance…is all that is required." [*emphasis in original*] *Id.* at 137.

In *Govane v. Sun Mortgage Co.*, 156 Md. 401, 144 A. 486 (1929), a mortgage was attacked because the affidavit of consideration stated an amount approximately $1,500 higher than the actual amount loaned. The attacking party argued that the failure to be exact constituted a falsehood. The lower court agreed, and ruled the affidavit "is not an affidavit such as is required by the Code." *Id.* at 406, 144 A. 488.

The Court of Appeals reversed after restating the issue. The reformulated query asked not whether the sum stated is correct, to the penny, but "[d]oes the consideration sworn to represent an indebtedness which the mortgagor in good faith acknowledges and intends to pay?" *Id.* The trial testimony supported an affirmative answer to this question. The trial court's ruling was reversed and remanded, with direction to enter an order affirming the validity of the mortgage. Where a literal interpretation of the statute would have invalidated the deed, the court found substantial compliance sufficed.

In *Sandler v. Freeny*, 120 F.2d. 881 (4th Cir. 1941), J. Soper divined this same interpretation of Maryland law where the amount of the debt was set out in the disputed mortgage, but not in an affidavit of consideration. The facts of the case demonstrated no intentional misstatement of fact, and so the document was deemed valid. There was no discussion of a curative act because cure for a missing affidavit of consideration was not yet part of Maryland's statutory scheme.

The line of cases finding that substantial compliance satisfies the recording statutes ends with the recent decision in *Ameriquest v. Paramount Mortgage Serv.*, 415 Md. 656, 4 A.3d 934 (2010), where this Court held that the funding of a mortgage, if completed prior to recording, will save an affidavit of consideration that may not have been factually correct when made.

E. Affidavits that are demonstrably false have never been protected.

Maryland law has never saved mortgage documents where the affidavit of consideration is present, in form, but is proven to be fraudulently stated. In *Kline v. Inland Rubber*, 194 Md. 122, 69 A.2d 774 (1949), a series of inter-family transactions resulted in the lower court invalidating a deed of trust created to shield a family asset from creditors. This Court ruled that the affidavit of consideration was given to conceal the purpose and effect of the mortgage, "on its face given for a fictitious debt. *Id.* at 138, 69 A.2d at 780. The trial court was affirmed.

Similarly, in *Plitt v. Stevan*, 223 Md. 178, 162 A.2d 762 (1960), a mortgage was invalidated because its affidavit of consideration, while correct in form, stated a debt 100% higher than the actual loan. The Court found the higher amount was intended by the parties to conceal a usurious interest rate. This meant that the recited consideration was not *bona fide.*

The certified questions come to this court upon the pending motions to dismiss filed in four adversary proceedings. There is no factual record, only the allegations of the adversary complaints. In each case, the bankruptcy trustees have alleged only that the affidavits of consideration are either missing, or incomplete. Appellants App. at 3, 82, 100, 152. There are no allegations in any of the adversary cases that the considerations were not actually disbursed, or that

the instruments were executed for fraudulent means. The court is thus in the same posture as Judge Singley, in *Pagenhardt.* Like Judge Singley, the court must assume that the underlying transactions are *bona fide*. But unlike Judge Singley, the court should not be reluctant to declare the true intent of the modern curative statute, and the cure for missing affidavits of consideration.

F. The modern Curative Act of 1972 does remedy the absence of the affidavit of consideration.

1. The modern statute is the result of a careful reorganization of the real property code.

In 1972, the Maryland legislature adopted a prospective curative act as part of a larger reorganization of the real property code. This Court concisely summarized that reorganization in *Ameriquest v. Paramount Mortgage Serv.*, 415 Md. at 670, 4 A.3d at 942-943, as follows:

> The present "curative act" was enacted in 1972 when the General Assembly reorganized the real property law of Maryland [footnote omitted]. The legislative history of this statute includes an eight page "REPORT" filed with the Department of Legislative Reference by the code Revision Committee of the Maryland State Bar Association's Section of Real Property, Planning and Zoning law, in which the Committee notes that proposed Section 4-109 "eliminates the need for the annual Curative Act." When the present curative act was first codified in §4-109 of Article 21, the "COMMENT" that preceded Subtitle 1 of Title IV of this article included the following statement:
>
> > Section 4-109 will eliminate the necessity of annual curative acts. The Curative Acts were contained in §§96 through 100 of former Article 21. These Curative Acts related to formal deficiencies in an instrument such as those deficiencies set forth in §4-109. Since these formal requisites will, except with respect to the affidavit of consideration or disbursements and acknowledgments,

> no longer be applicable in Maryland, it will no longer be necessary to require the General Assembly to pass a formal curative act every year. With respect to formal deficiencies in instruments recorded before the effective date of the statute, these will be considered to be waived unless they are attacked within six months after the effective date of the statute. With respect to any instrument recorded after the effective date of the statute, any formal defect must be attacked within six months after recordation.

The Code Revision Committee also disclosed that "[t]his statute is the product of more than two years of intensive study."[1] Prior to this reorganization, the Committee observed that "[t]here are few fields of Maryland law whose statutory framework is more archaic, disorganized, cumbersome and illogical."

The last incarnation of the retrospective curative statute, passed in 1971, had this to say about affidavits of consideration:

> All deeds, mortgages…which may have been **executed**, **acknowledged** or **recorded** in the State subsequent to the passage of the act of the general assembly of Maryland passed at its January Session, 1858, Chapter 208, which may not have been acknowledged according to the laws existing at the time of said acknowledgment or which may not have been acknowledged before a proper officer, or in which the certificate of acknowledgment **or affidavit of consideration is**

[1] Maryland State Bar Association Section of Real Property, Planning and Zoning Law, *Comments of the Code Revision Committee of the Section of Real Property, Planning and Law of the MSBA*, Md. Y3 Re 28:2/A/973 (1972). Within these archived comments that contain the "REPORT" is the Maryland State Bar Association's "Transactions" newsletter. The newsletter includes a summary report from the Code Revision Committee. The report discloses that among the many changes under consideration were those outlined in a memorandum prepared by committee member Shale Stiller. Mr. Stiller suggested "additional provisions to be included in the Curative Laws."

> **not in the prescribed form**…shall be and the same are hereby made valid…[*emphasis supplied*]

Md. Ann. Code art 21, § 99 (1971). Consistent with all prior versions, it made no reference to a missing affidavit of consideration. Prior to July 1, 1971, a mortgage lacking the affidavit of consideration could find no cure in any statutory provision.

The revised code, for the first time, made reference to missing affidavits of consideration:

> Unless the formal requisites of any instrument recorded before January 1, 1973, are challenged in a judicial proceeding commenced by July 1, 1973, the failure to comply with any such formal requisites shall have no effect. Such formal requisites are: …**lack of or improper acknowledgment or affidavit of consideration**…[*emphasis supplied*]

Md. Ann. Code art 21, § 4-109 (1972).

In 2010, the "failure to name any trustee in a deed of trust" was added to the category of formalities that that are remedied by the passage of time. 2010 Md. Laws, Chap. 322, 323. Otherwise, the present statute is the same as the first modern curative statute. The phrase "lack of or improper" has remained constant since 1972.

2. <u>Addition of the word "lack" to §4-109(c)(4) is consistent with language recited in prior cases</u>.

The construction of the modern curative statute "…reveals itself through the statute's very words." *Price v. State,* 378 Md. 378, 387, 835 A.2d 1221, 1226 (2003). Here, the phrase "lack of or improper" combines two discrete concepts

discussed in prior case law and treatises. The two concepts are not new to Maryland law, only their joinder in the curative statute. Judge Singley's reluctance to rule in favor of validating the instrument in *Pagenhardt* was precisely because the two concepts were not yet joined in the curative statute.

The adjective "improper" in the modern §4-109(c)(4) incorporated the concept already found in the pre-modern statutory language "not in the prescribed form." The word is defined as something that is not accordant with fact, truth, or right procedure. *Websters Third New International Dictionary* 1137 (1993). Use of this adjective did not depart from or add to concepts embraced in all prior retrospective curative statutes. This aspect of the modern curative statute is consistent with all of its preceding enactments.

The Legislature's addition of the word "lack" was a marked change from all prior curative statutes. This cannot be viewed as a random choice. It also cannot be ignored as "surplusage, superfluous, meaningless or nugatory." *Montgomery County v. Buckman*, 333 Md. 516, 523-524, 636 A.2d 448 (1993).[2]

The use of "lack" mirrors the 1936 treatise language recited in the *Pagenhardt* decision, stating that "[i]f the affidavit (of consideration) is lacking or if the affidavit is bad ….the mortgage will, as a general rule, have no effect except as between the parties." If the 1936 passage is compared closely to §4-109(c)(4), the pre-modern phrase "is lacking or if the affidavit is bad" is contextually identical to the modern "lack of or improper." The Legislature simply took a defect that had existed outside the bounds of any pre-modern curative statute, and included a remedy for that defect in the modern curative statute.

In stark contrast, the Appellants offer no explanation for the appearance of the word "lack" in the 1972 legislation. The Appellants simply ask the court to

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[2] The Appellees incorporate by reference the statutory construction arguments made by the other Appellees and *Amici*.

skip it, and to then read it out of the statute entirely. But the party asking the court "to ignore the plain language of [a] statute bears an 'exceptionally heavy' burden." *Dep't of Econ. and Emp't Dev. v. Taylor*, 108 Md. App. 250, 267, 671 A.2d 523, 532 (1996) (quoting *Union Bank v. Wolas*, 502 U.S. 151, 156 (1991)). It is a burden that has not been met by the Appellants.

3. Common usage and ordinary meaning dictate that"lack" acts on the phrase "affidavit of consideration."

The court does not have to look beyond "[o]rdinary, popular understanding of the English language" to interpret the provision. *Kortobi v. Kass*, 410 Md. 168, 177, 978 A.2d 247, 252 (2009). Courts may also consult the dictionary when the legislature does not define a statutory term. *Heartwood 88, Inc. v. Montgomery Cnty.*, 156 Md. App. 333, 359, 846 A.2d 1096, 1111 (2004). Application of common rules of grammer and ordinary dictionary definitions also provide a common sense answer to the Certified Questions.

The word "lack" is both a noun and a verb describing a deficiency or absence. As a noun ("a lack"), it describes a state of absence.[3] As a verb ("lacking"), it acts to modify an object. In the modern curative statute, the word appears as a noun, joined in a disjunctive phrase with the adjective "improper."

The Appellants tacitly concede that the adjective "improper" acts on all four formal defects described in §4-109(c)(4). They do not contest that the provision is properly applied to cure "…improper acknowledgment or affidavit of consideration, agency, or disbursement." In fact, the provision cannot be reasonably read any other way. If "improper" is read to act only on the noun

[3] The fact or state of being wanting or deficient (ex. a lack of evidence); Something that is lacking or is needed. *Websters Third New International Dictionary* 1261 (1993).

"acknowledgment," then the remaining three formalities will exist in a vacuum. No cure is possible for the remaining formalities, under the Appellants' interpretation.

The Appellants ignore operation of the conjunction "or" which joins the noun "a lack" with the adjective "improper."[4] The resulting disjunctive phrase "a lack of or improper" must be read to apply cure to two discrete defects for each of the four listed document formalities. *Ticer v. Ticer*, 63 Md. App. 729, 737, 493 A.2d 1105, 1110 (1985) ("It will be presumed that the legislature understood the meaning of the words it used, and that it intended to use them…and it will be presumed that the legislature used the words in their ordinary and common meaning."). The provision thus applies cure if an affidavit of consideration is completely missing, and it applies cure if an affidavit of consideration is present but incorrectly completed.

This conclusion does not change if the word "lack" is deemed a verb in §4-109(c)(4). Verbs can be used in a sentence to act on an object, or they may have no object. This distinction marks a verb as transitive, or intransitive.

A transitive verb is followed by an object. In the following examples, the verb acts on the object, "affidavit":

- I sign the affidavit.
- I read the affidavit.

An intransitive verb is not immediately followed by an object. In the following examples, the noun "affidavit" has been removed:

- I sign.
- I read.

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[4] Used as a function word to indicate an alternative (ex., coffee or tea, sink or swim). *Websters Third New International Dictionary* 1261 (1993).

In the modern curative statute, if "lack" is deemed a transitive verb, it is followed by two objects, the nouns "acknowledgment" and "affidavit of consideration." The provision cannot be reasonably read to deny any link between the transitive verb "lack" and the noun "affidavit of consideration." If read this way, the noun "affidavit of consideration" and the remaining formalities would exist with no preceding verb or adjective. The provision would then cure nothing, as the defect in the affidavit of consideration and the remaining formalities would remain unidentified.

II. The *obiter dictum* of *Layton v. Petrick* has not ripened with age to become binding precedent.

The Appellants lean heavily on Judge Singley's prose in *Layton v. Petrick,* 277 Md. 412, 355 A.2d 466 (1976). The Appellants argue that thirty-five years of legislative silence after the publication of one sentence of *obiter dictum* constitutes evidence of legislative intent. The Appellants urge that this *dictum* must be further honored as "recognition" by this court that "the curative statute does not save instruments that completely lack an affidavit of consideration." Appellants Br. at 15. The Appellants ignore both settled rules against reliance on *dictum*, and the true meaning of the embedded authorities cited within that *dictum*.

In *Layton v. Petrick,* the parties were the original lessors and lessees under a recorded lease. One of the parties to the lease challenged the formalities in the document within six months of recording, and so the court concluded:

> [i]n any event, the new curative act, §4-109, is by its term not applicable…we think that the rights and responsibilities of the parties to the lease do not hinge entirely on the curative act.

277 Md. at 426, 355 A.2d at 468. It is with this predication that Judge Singley wrote the deeply flawed sentence that grounds so much of the Appellants' brief:

> While none of our cases may flatly so hold, see, however, *Adams v. Avirett*, 252 Md. 566, 568250 A.2d 891 (1969); Note, Absolute Necessity of Acknowledging a Deed of Gift in Maryland, 12 Md. L. Rev. 166, 173 (1951), which is palpably clear that the thrust of the present curative act, now Code (1974), Real Property Article §4-109(c)(1) and (4) is directed at a defective acknowledgment, and not at the complete lack of an acknowledgment of consideration or disbursement.

277 Md. at 426, 355 A.2d at 468.

Citation within this sentence to the *Adams v. Avirett*, 252 Md. 566, 568, 250 A.2d 891 (1969) makes little sense. It is a case published prior to adoption of the modern prospective curative statute, and it necessarily had nothing to say about §4-109(c)(4) and the word "lack." The facts and law of the *Adams* case also had little to do with the issues then before Judge Singley.

In *Adams,* the court opined on a case involving the original parties to the instrument, which remained viable as an equitable lien. Before it's analysis, the court stated that:

> [w]e find it unnecessary to discuss or consider whether the acknowledgment was merely defective or was void or the effect of the Curative Act of 1967 because, assuming for the purpose of decision, that the acknowledgment was, as the Adamses contend, entirely null and void and the deed of trust therefore completely unacknowledged and that the acknowledgment was not a defective acknowledgment validated by the Curative Act, we find that the deed of trust created an equitable lien fully valid as far as Albee and the Adamses are concerned.

252 Md. at 568, 250 A.2d 892. The court merely summarized the argument of one party, and then dismissed it as irrelevant to adjudication of the case. It is not even *dictum*, but merely a restatement of one side's contention. This lends no weight to Judge Singley's prose as a statement of law.

It is also a matter of common sense that Judge Singley's use of the word "thrust," which means nothing more than a "tendency pushing or driving force," *Websters Third New International Dictionary* 2386 (1993), does not limit or annul other elements contained in the modern curative statute. A declaration that the statute has the tendency to cure affidavits that are incomplete does not negative the additional language of §4-109(c)(4), which includes the word "lack."

Judge Singley's citation to the 1951 Maryland Law Review article is equally unavailing to the Appellants in this case. The article discussed whether the 1947 curative statute could save an instrument that was both unrecorded and unacknowledged at the time the curative statute was passed. The author's opinions about whether the 1947 statute cured the absence of an acknowledgement were ambivalent, leading to his conclusion that the answer to the question was "debatable":

> Turning to the second problem, whether the Curative Act [of 1947] will cure a total lack of acknowledgment, the situation is more complicated. The pertinent Maryland Act covers deeds…"which may not have been acknowledged according to the laws existing at the time of said acknowledgments", and then goes on to enumerate certain acts which would not fully comply with the formal requirements of an acknowledgment. It is doubtful but still debatable whether these words could be held to be indicative of a legislative intent to cure a complete lack of acknowledgment.

Absolute Necessity of Acknowledging a Deed of Gift in Maryland, 12 Md. L. Rev. 166, 172 (1951).

The 1947 provision did not contain the word "lack." But even without this word, the author believed the proposition to be "debatable." This is certainly not the unequivocal statement of law which the Appellants wish to extrapolate from Judge Singley's *obiter dictum*. By citing to *Layton v. Petrick,* the Appellants have failed to heed Judge Moylan's admonition against "giving persuasive weight to

every hurried word that may appear in the course of an opinion." *State v. Wilson*, 106 Md. App. 24, 37, 664 A.2d 1, 7 (1995), *cert. denied*, 340 Md. 502, 667 A.2d 342, *rev'd on other grounds*, 519 U.S. 408 (1997).

But the law review author did demonstrate some degree of foresight in 1951. From his review of curative acts, generally, he described the exact premise from which the Appellees now argue:

> It was once contended that curative acts could cure only immaterial, formal defects and that where the statute required an acknowledgment to pass title, an act which cured a material defect in an acknowledgment would be unconstitutional since its effect would be to divest title from one and vest it in another. But the more reasonable view and the majority view is that such defects may properly be cured by statute. The prevailing thought is that curative acts should be construed liberally. Maryland is in accord with this and has construed its Curative Acts to be capable of curing rather material defects. Considering the power of the Legislature to cure, by Curative Acts, defects in the taking and certification of acknowledgments, there seems to be no reason why the Legislature cannot cure any defect whatsoever.

12 Md. Law Rev. at 172.

Twenty three years later, during the 1971 legislative session, the General Assembly adopted a statutory cure for one additional defect-- the complete absence of any of the four formalities listed in §4-109(c)(4). Three years later, Maryland's intermediate appellate court validated the common sense operation of the modern statute, in *Berean Bible Chapel, Inc. v. Ponzillo*, 28 Md. App. 596, 346 A.2d 702 (1975).

In *Berean* a foreclosure purchaser filed exceptions in the lower court to a ratified foreclosure sale. The purchaser sought to vacate the sale, alleging that the trustee could not pass good and marketable title. The foreclosure purchaser

believed that "a lack of acknowledgment or affidavit of consideration" rendered the foreclosed mortgage invalid.

Judge Gilbert spoke for the court of special appeals. He acknowledged the existence of the *Pagenhardt* opinion, and Judge Singley's analysis of the pre-modern case law dealing with curative statutes. In particular, Judge Gilbert noted the pre-modern rule, as stated in the 1936 Ginsburg treatise, that "[i]f the affidavit (of consideration) is lacking or if the affidavit is bad, the mortgage will, as a general rule, have no effect except as between the parties." *Id.* at 598, 346 A.2d at 704.

Judge Gilbert acknowledged further that if the Court of Special Appeals were bound by the *Pagenhardt* decision, "…the mortgage in the instant case, except as between the parties, would be a nullity with respect to subsequent creditors without actual knowledge, were it not for the curative provisions of Real Prop. Art. §4-109." *Id.* at 599, 346 A.2d 704. This sentence marks the clear break between the case law interpreting the pre-modern curative statutes, and the case law now glossing the modern curative statute.

In a concise analysis that is instructive for this court, Judge Gilbert noted that a curative act may legitimately address any matter that the legislature could have enacted or abolished, in the first instance. *Id.* at 601, 346 A.2d at 705. He then reasoned, as follows:

> When we apply the 'test' to the case now before us, we observe that the legislature could have required or not required an affidavit of consideration or an acknowledgment. Certainly, there is no constitutional requirement that deeds or mortgages be sworn to in order to be valid. The purpose of the acknowledgment or affidavit is to protect, insofar as possible, the rights of subsequent creditors from sham mortgages and at the same time assure that the mortgage is bona fide. The acknowledgment also protects a property owner, to some extent, from a possible fictitious mortgage. In any event, the oath or affidavit could, should the legislature desire, be eliminated

> just as has been done with the necessity of a 'seal.' The General Assembly may also validly shorten the time in which subsequent creditors without notice, may act against property because the statute of limitations confers no vested rights [citation omitted].
>
> Inasmuch as the legislature could have abolished the legal requirement of acknowledgment and affidavit and could have shortened the statute of limitations, so long as no one's substantive rights were impaired, it could and did validly enact the curative provisions of the Real Property Article.

Id. at 601, 346 A.2d at 705-706.

Judge Gilbert held that the six month period for challenging the recorded instrument had run a full fifteen months before the foreclosure sale. As a result, application of the modern curative statute meant that the defective formalities could no longer be challenged. The lower court's order denying the exceptions to the foreclosure sale was thus affirmed. The lack of an affidavit of consideration in the foreclosed instrument could not, as a matter of law, defeat good and marketable title. *Id.* at 602, 346 A.2d at 706.

The General Assembly has continued to expand the reach of the curative statute. During the 2010 session, the "failure to name any trustee in a deed of trust" was added to the list of defective formalities cured by the passage of time. 2010 Md. Laws, Chap. 322, 323.

CONCLUSION

The Appellees contend that the complete absence of an affidavit of consideration is cured by operation of §4-109(c)(4). The Appellees urge the court to answer "yes" to Certified Question #1. It necessarily follows that the statute will cure any missing element of an incomplete or mistaken affidavit. That would include an affidavit of consideration that wrongly identifies "the

borrower as affiant," as described in Certified Question #2. It also follows that the broad scope of the statute will address the presence of an incomplete pre-printed form affidavit, as described in Certified Question #3, and the affidavit that does not identify the affiant, as described in Certified Question #4. The Appellees urge an affirmative answer to each Certified Question.

STATUTES AND RULES

THE ANNOTATED CODE OF THE PUBLIC GENERAL LAWS OF MARYLAND 1957

1971 Cumulative Supplement

Prepared by the Editorial Staff of the Publishers

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Effective Date of Statutes

See Md. Const., Article XVI, § 2

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1971

§ 99. Validation of certain acknowledgments or deeds not properly witnessed or sealed or made before bonus tax paid.

All deeds, mortgages, releases, bonds of conveyances, bills of sale, chattel mortgages and all other conveyances, of real or personal property, or of any interest therein or agreements relating thereto which may have been executed, acknowledged or recorded in the State subsequent to the passage of the act of the General Assembly of Maryland passed at its January Session, 1858, Chapter 208, which may not have been acknowledged according to the laws existing at the time of said acknowledgment, or which may not have been acknowledged before a proper officer, or in which the certificate of acknowledgment or affidavit of consideration is not in the prescribed form, or on which the affidavit of agency, when the affidavit of consideration is made by an agent, is not endorsed upon said mortgage or deed of trust provided there is recorded among the land records of the city or county where the land lies, either prior to or after said mortgage or deed of trust, a certificate by the mortgagee or beneficiary under a deed of trust certifying that said agent if [is] in fact such agent and duly authorized to make such affidavit, or in which the official character of the officer taking the acknowledgment is not set out in the body of the certificate, or has not been certified to as required by law, or deeds of trust executed and recorded prior to July 1, 1971, in which the affidavit of disbursement of loan was not in the prescribed form, or was inadvertently omitted, or in which the conveyance has not been witnessed to or sealed by an individual or corporation as required by law, or any deed heretofore made to or from a corporation prior to the payment of the bonus tax which was afterwards paid, shall be and the same are hereby made valid, to all intents and purposes as if the conveyances and agreements had been acknowledged, certified to, witnessed and sealed according to law; providing the said deeds, mortgages, bonds of conveyances, bills of sale and other conveyances and agreements are in other respects in conformity with the laws; provided, further, that nothing in this section shall affect the interest of bona fide purchasers or creditors without notice, who may have become so previous to July 1, 1971. (An. Code, 1951, § 107; 1939, § 103; 1924, § 87; 1912, § 85; 1904, § 83; 1888, § 82; 1888, ch. 485; 1890, ch. 120; 1900, ch. 3; 1904, chs. 123, 258; 1906, chs. 1, 342, 516, 783; 1908, ch. 259; 1910, ch. 588, p. 64; 1912, ch. 85; 1914, ch. 259; 1916, ch. 151, § 1; 1918, ch. 396, § 1; 1920, ch. 54, § 1; 1922, ch. 544, § 1; 1924, ch. 431, § 85; 1927, ch. 590, § 87; 1929, ch. 546, § 87; 1931, ch. 312, § 87; 1933, ch. 50, § 87; 1935, ch. 472, § 87; 1939, ch. 44, § 87; 1941, ch. 141, § 103; 1943, ch. 50, § 103; 1945, ch. 168, § 103; 1947, ch. 12, § 103; 1949, ch. 159, § 103; 1951, ch. 420, § 103; 1952, ch. 57; 1953, ch. 61; 1954, ch. 47; 1955, ch. 401; 1956, ch. 51; 1957, ch. 127; 1959, ch. 187; 1961, ch. 38; 1964, ch. 181; 1967, ch. 228; 1969, ch. 138; 1970, ch. 137; 1971, ch. 479.)

Effect of amendments. — The 1967 amendment added, following "not in the prescribed form" near the middle of the section, "or on which the affidavit of

CERTIFICATE OF COMPLIANCE AND SERVICE

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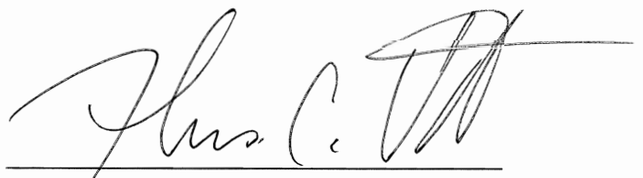

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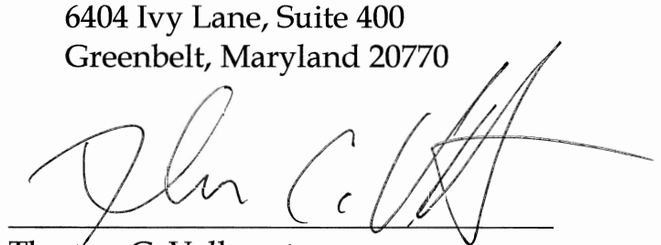

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