

**[J-239-2003]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

ZYGMONT A. PINES, COURT ADMINISTRATOR OF PENNSYLVANIA AND ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS,	:	No. 48 EAP 2003
	:	
	:	Assumption of Plenary Jurisdiction
	:	Pursuant to 42 Pa.C.S. § 726
	:	
Petitioners,	:	
	:	
v.	:	
	:	
TERRANCE FARRELL, RECORDER OF DEEDS FOR THE COUNTY OF CHESTER,	:	
	:	
	:	
Respondent,	:	
	:	
CITY OF PHILADELPHIA, Intervenor.	:	SUBMITTED: November 7, 2003

**DISSENTING OPINION**

**MR. JUSTICE EAKIN**

**DECIDED: April 28, 2004**

Although I agree with my colleagues' conclusion that § 3502(a) of the Judicial Code authorizes the Court Administrator to promulgate a regulation interpreting the term "property transfer," I believe the regulation's characterization of mortgages,<sup>1</sup> mortgage assignments, releases, and satisfactions, as "property transfers" for purposes of 42 Pa.C.S. § 3733(a.1)(1)(v) is not in accord with the law. Thus, I offer my dissent.

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<sup>1</sup> Section 3733(a.1)(1)(v) specifically subjects mortgages to the increased fee; my objection is thus limited to the assignment, release, or satisfaction of a mortgage.

There is ample authority that in Pennsylvania, although a mortgage involves a conveyance, such a conveyance functions as a lien. “A mortgage, although in form a conveyance of title, is only security for the payment of money or the performance of another collateral contract.” Mancine v. Concord-Liberty Savings and Loan Association, 445 A.2d 744, 747 (Pa. Super. 1982) (emphasis added); see also McIntyre v. Velte, 25 A. 739 (Pa. 1893); Wilson v. Shoenberger’s Executors, 31 Pa. 295 (1858); Atiyeh v. Bear, 690 A.2d 1245, 1251 (Pa. Super. 1997). “A mortgage, as between the parties, is a conveyance so far as necessary to render the instrument effective as a security, but only to that extent.” Eldredge v. Eldredge, 194 A. 306, 310 (Pa. Super. 1937) (citing Beaver County B. & L. Ass’n. v. Winowich, 187 A. 481 and 921 (Pa. 1936); Harper v. Consolidated Rubber Co., 131 A. 356 (Pa. 1925)); see also North American Properties, Ltd. v. Pocono Farms Lot Owners Ass’n., 489 F.Supp. 452, 457 (D.C. Pa. 1980) (“The theory in [Pennsylvania] has always been that a mortgage is merely collateral for the payment of some primary obligation....”), affirmed, 633 F.2d 211 (3d Cir. 1980); In re White’s Estate, 185 A. 589 (Pa. 1936) (mortgage is treated only as security for payment of debt).

“Pennsylvania subscribes to the lien theory of mortgages, i.e., a mortgage does not transfer title to the mortgagee; rather it constitutes a lien on the mortgagor’s interest, thereby securing the mortgagee’s loan.” General Credit Co. v. Cleck, 609 A.2d 553, 556-57 (Pa. Super. 1992) (citing In re City of Philadelphia, 63 A.2d 42 (Pa. 1949)) (emphasis added). As a lien, a mortgage vests no estate, but is a mere incident of the debt. Day v. Ostergard, 21 A.2d 586, 588 (Pa. Super. 1941) (citing Tryon v. Munson, 77 Pa. 250 (1875)). The whole purpose of recording a mortgage is to provide notice of the person or entity that encumbers the title to the mortgaged property which is the

security for the debt. Ladner on Conveyancing in Pennsylvania § 18.02 (4<sup>th</sup> ed. 1979) (citing Salter v. Reed, 15 Pa. 260, 263 (1850)).

As a mortgage is merely a lien, not a transfer of property, a fortiori the release, assignment, or satisfaction of a mortgage cannot be a transfer of property. These documents are not transfers of property in any true sense; they merely deal with an obligation secured by a mortgage. This is clear from the very names of the actions themselves, for one does not “satisfy” a transfer, or “release” a transfer; one satisfies, assigns, or releases an obligation. As these actions transfer no property, they should not be subject to § 3733(a.1)(1)(v)’s fee.

Section 3733(a.1)(1)(v) lists three taxable items only: “deed, mortgage or property transfer.” As a release, assignment, or satisfaction of a mortgage is not itself a mortgage, it can only be taxed if it is a “property transfer.” If a mortgage had to be enumerated separately in order to be assessed the fee, (i.e., the legislature felt mortgages are not clearly a part of “property transfers” within the meaning of this section) it follows that the lesser related documents referencing mortgages, such as assignments, releases, and satisfactions, must also be specifically named in order to be taxed. They could have been enumerated, for they are hardly uncommon documents, but they were not. The legislature’s language, listing but three taxable categories, cannot and should not be broadened by regulatory definitional pronouncements.

Accordingly, I respectfully offer this dissent.

Mr. Justice Saylor joins this Dissenting Opinion.