

1889

# Chattel Morgages

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C O R N E L L U N I V E R S I T Y L A W S C H O O L

-----oOo-----

C H A T T E L M O R T G A G E S

as applied to

N E W Y O R K S T A T E

-----oOo-----

T H E S I S

by

OSSIAN GREGORY NOBLE

1889

A chattel mortgage as described in the various decisions of the courts of New York, may be said to be the present transfer of the title to personal property as security for the payment of a debt or for the performance of some specified condition. Such transfer of the title to be void in a case the debt is paid or the condition fulfilled within a specified time. But in case of default in the payment, or failure to perform the condition, the title is to become absolute, and the thing mortgaged is irredeemable at law though there may be a right to redeem in equity.

Under this definition any transfer of the title of personal property which is made as security for the payment of money, or is intended to secure the performance of any other condition, and which transfer of title is accompanied by a clause providing that it is to be void in case the condition is fulfilled, may be held to be a chattel mortgage.

For example, a bill of sale given to secure payment of money, and accompanied by a condition that upon such payment being made the sale should be void, has been held a chattel mortgage. (5 Johnson 258.) Also a bill of sale given on condition that if the vendee shall become liable on a certain debt he may sell the goods there in mentioned, and retain the amount that he was obliged to pay, and return any balance

to the vendor (4 Cowen 461). And a bill of sale absolute on its face but modified by parol agreement that the vendee was to sell the goods, and out of the proceeds pay a debt due him from the vendor, and turn over to the latter any balance, constitutes a good chattle mortgage. (31 N.Y. 542)

It appears that a chattle mortgage is considered in much the same light as a real estate mortgage was under the common law theory of mortgages. There must be a title in the mortgagor, and this title must be transferred conditionally to the mortgagee. The continued possession of the chattle by the mortgagor, after the execution of the mortgage, is not inconsistent with the existence of a valid mortgage, but the conditional transfer of the title is the decisive test showing whether the transaction constitutes a mortgage or not. If the title is not transferred by the mortgagor, but only the possession of the property in question, then the transfer if accompanied by an agreement that it is to be returned on the performance of some condition becomes merely a pledge. Whether the transaction amounts to a mortgage, or is only a pledge, is a question often raised. The distinction to be observed in such cases is that in the case of a chattle mortgage the full title to the property must be conditionally assigned, the condition being that the assignment becomes absolute on the failure to perform the requirements which accompany it, while in the case

of a pledge only the possession of the property passes to the pledgee, and he has nothing but a special property in the goods to detain them for his security.

The question also is sometimes raised, whether the facts of the case constitute a chattle mortgage, or a conditional sale. There seems to be no fixed rule by which this distinction is to be made, and the facts of the case appear to govern largely in each decision. In the case of *Saxton v Hitchcock*. 47 Barb. 220. A deed, absolute on its face but accompanied by an agreement to reconvey the premises on certain conditions, was under consideration. Although it was a question involving real estate the same condition of things might have arise in case of a bill of sale of chattels, and the following extract from the decision of the court might have been equally as applicable.

The court said: " To constitute a mortgage under such circumstances it must be made to appear from the instrument or otherwise that the transaction was originally intended as security for money, that it was in fact a loan of money. If there be a sale with an agreement to re-purchase within a given time it is not a mortgage, but what is usually termed a conditional sale. The distinction between a mortgage thus executed, and a conditional sale is very close, and often so nicely balanced that it is difficult to define the true character of instruments thus bearing so many features which

assimilate to each other. It may be observed that to ~~know~~<sup>no</sup> inconsiderable extent every case is dependent upon the peculiar circumstances by which it is surrounded, and in disposing of it we must look at the facts to determine what the parties actually intend by the transaction!

The agreement constituting the ~~chattel~~<sup>chattel</sup> mortgage may be made orally, or may be partly oral, and partly in ~~writing~~<sup>writing</sup>, or may be wholly written. An oral mortgage must be accompanied by the transfer of the possession of the ~~chattel~~<sup>chattel</sup> to be good, and there must be a clear understanding that the title also passes subject to defeasance otherwise the transaction will be simply a pledge. The transfer of possession in such cases would ~~probably~~<sup>probably</sup> be sufficient to avoid the requirements of the Statute of Frauds Which make a writing necessary in case there is a sale of goods to the value of fifty dollars or over unless possession is given or part of the purchase money is paid. An oral mortgage must also be of such a nature that it need not be filed. From the terms of the statute it would seem that the transfer of possession would make a mortgage of this sort good even though it could not be filed, and certainly if neither the rights of creditors nor of other mortgagees of purchasers in good faith intervene the mortgage would be good. Questions involving such mortgages could hardly arise unless between the mortgagor and mortgagee themselves.

Chattel mortgages may also be partly oral and partly written, as where a bill of sale is given, absolute on its face, but modified by an oral agreement to the effect that the goods shall be returned upon the performance of some condition. The only objection which could be made to such a transaction as this, which would affect it as a mortgage, would be as to filing, but it has been decided that the filing of the bill of sale in such cases is sufficient to satisfy the requirements of the statute. (Preston v Southwick. 42 Hun. 291)

Mortgages unless wholly reduced to writing can only be recognized by courts having equity powers. A lawcourt would require that the whole transaction be reduced to writing, and this is the form in which chattel mortgages usually appear.

When reduced to writing no particular form is necessary, and the document will be recognized as a mortgage even though its provisions are very informally expressed, provided it shows that certain duly described property has been assigned subject to the performance of some condition, and upon the performance of such condition the assignment is void. In law the conditional nature of the assignment must appear on the face of the instrument, while in equity it need not appear in the mortgage, but may be shown by other means.

The mortgage may admit the existence of a debt, or it may state that certain goods are assigned as security for the payment of money.

In case the mortgage admits the existence of a debt due from the mortgagor to the mortgagee, then the mortgagor is bound to pay the debt, since his admission of the debt is an implied promise to pay, and the mortgagee may proceed on the debt instead of the mortgage if he <sup>chose, and if</sup> ~~chose, or if~~ after foreclosure, and a fair sale of the property enough is not realized to satisfy the debt then the mortgagor is personally liable for the unpaid balance, ( 15 Wendall 218. 11 Wendall. 106). but if the mortgage merely declares that the goods were transferred to secure the payment of a certain sum of money then there is no personal liability since there is no admission of the existence of a debt. (3 N.Y. 264)

The debt secured may be either one that actually exists, and the exact amount of which is known, or the mortgage may be given to secure both the debt now in existence, and future advances. In the latter case the mortgage is given as a continuing security, and may be made for an amount largely in excess of any present debt with the expectation that the indebtedness will increase so as to equal, nearly if not quite, the amount named. To prevent suspicion the intention of the parties that the mortgage should be for future advances should be expressed in the instrument, more especially as such intention cannot be shown by parol evidence, nor established subsequently by parol agreement. The fact that the amount named in the mortgage ex-

ceeds the amount of the debt is not of itself any legal evidence that the mortgage is fraudulent. But if bad faith exists it would no doubt affect the validity of the mortgage. ~~But~~ (if) it is stated that the mortgage is given as a continuing security, <sup>no trouble</sup> can arise since then it would be apparent that the amount mentioned therein is intended only as a limit, and that the real debt which the mortgage secures is only whatever sum has already been advanced.

Besides a statement as to what the mortgage is given for, the instrument should contain a description of the property mortgaged. This may be incorporated into the mortgage, or may be a separate schedule accompanying it and referred to in it. In this case the two papers will be construed together. If ~~is~~ the separate schedule is in any <sup>way</sup> in conflict with the mortgage the latter of course governs. The description must be so definite that a third person with the mortgage itself, and such means of information as it suggests, to guide him may be able to identify the mortgaged property. "Parol proof of extrinsic circumstances may be given to apply a description to its subject matter, and if it appear that the description is in some respects erroneous those parts may be rejected, and what is left, if sufficient of itself, will alone be regarded." (18 Barb 201). If in the description a portion of the property is described improperly, or in such a way as to leave a doubt as to

the identification of the property the mortgage may be held to apply only to that part of the property as is clearly described, and that portion as to which there is doubt or error in the description may be held to be free from the lien of the mortgage.

In case there is a defect in the description which might render the mortgage invalid as against the property described, this defect may be cured by delivery of the property to the mortgagee, and such delivery renders the mortgage good from the date of delivery of the goods, but any rights of third parties which may have arisen before the delivery will be superior to the mortgage claim.

The sale of the goods is in form absolute, and the first part of the mortgage is in effect a bill of sale, but this is followed by a clause which declares that upon the fulfilment of a condition which is duly described the transfer of the title under the bill of sale is void. This sale absolute in form but with a defeasance clause attached is, as has been said sufficient to constitute a chattel mortgage but other clauses are sometimes put in. Such as a clause giving the right to take possession in case of default. This however is unnecessary as such right belongs to the mortgagee in the very nature of things. Power of sale is also given, and the mortgagee may have a clause inserted giving him the right to buy at the foreclosure sale in the same way as though he were not interested

therein. It is also usually provided that the mortgagee may take possession of the property to protect it from loss of damage. The mortgagor if he is not already bound to do so may also agree to pay any deficiency that there may be after the sale.

Any person who is competent to make a valid contract may make a valid chattel mortgage, and the same disabilities exist. So a mortgage made by an insane person would be void. The mortgage of an infant is voidable, and may be avoided by him at any time during his minority and at any reasonable time thereafter, either by express announcement of his intention, or by any act which by its nature evinces such an intention. ( 49 N.Y. 407) IT is also said that something more than mere acquiescence by the infant is required to constitute an affirmance. ( 69 N.Y. 553) Once duly ratified by the mortgagor after he has attained full age the mortgage of course becomes binding upon him. A married woman in this state may make a chattel mortgage on such personal property as she may own.

Partnership property may be mortgaged as security for partnership debts either by the firm or by one partner acting for the firm and using their names. One partner may make a chattel mortgage in his own name of partnership property as security for a firm debt, and if afterwards the other partner assents, the mortgage is good against the firm. (23 Hun 494)

Probably the firm could mortgage their property as security for the individual debts of any of the partners if they chose, and the mortgage would be good unless the rights of firm creditors were affected.

A partner may make a mortgage on his interest in the firm, but this is not a mortgage of any property belonging to the firm, but of the mortgagors interest in the property, and the lien of the mortgage cannot attach to any specific property until the mortgagors interest has been ascertained, and set apart, when it may attach to that interest. (7 Abbotts New Cases 273). A corporation may make a chattel mortgage on corporate property. The making of such a mortgage is subject to any statutory regulations which modify the charter of the particular corporation. The mortgage would usually be made by some officer of the corporation who was authorized by the corporation to make such instruments, and in making the mortgage he would be required to act strictly within the power delegated to him.

Any person may authorize another to act as his agent for the purpose of making and executing a chattel mortgage in his behalf.

In regard to what may be mortgaged, it may be said that any chattel which the mortgagor owns may be mortgaged by him, and also any interest in personal property which he may have,

and which is salable, even though such interest is only temporary. But property which the mortgagor has no present title to, though he may expect to acquire title in the future, is not subject to mortgage. So a farmer having the right to sow wheat on the land of another, and to have one half of the crop, might mortgage his interest in the land, and so create a lien on the use of the land which he has and the products therefrom, but he could not mortgage the crop before it had grown, ( 7 Howard Practice. 252) since in one case it would be mortgaging an interest which he has, while in the other case it would be mortgaging property he has not yet acquired.

A mortgage which covers property already owned, and also which attempts to cover property not yet acquired, is good as to the property already owned.

So long as the character of the property is clearly personal the only question is as to the ownership. Sometimes however there is a question whether the property is personal or real, as in the case of chattels placed by one person on the lands of another. The question then comes up whether the property in question has become affixed to the land or still retains its character as personalty. If it is decided that the property has become a fixture then it will have passed to the owner of the land, and there will be no interest which is subject to a chattel mortgage. The questions which such circum-

stances give rise to are generally governed by the intention of the parties as expressed either by their actions or by the agreements between them. Sometimes even after the intention of the parties is well understood the rights of third parties will change the nature of the property. A discussion of the law governing fixtures, <sup>or</sup> ~~of~~ distinguishing between a fixture and property which has not become fixed, is too extensive to be attempted in this connection.

The mortgage being duly made and executed, must be delivered to the mortgagee and accepted by him. This delivery <sup>may</sup> ~~must~~ be ~~delivered~~ directly to him, or to any <sup>one</sup> acting for him as his agent, and having authority to act in such a case, or it may be left with a third person and the delivery become complete when the mortgagee accepts it from that third person. Sometimes the mortgagor leaves the mortgage with the clerk to be recorded, and this if agreed to by the mortgagee is a good delivery. If the mortgage is made to several persons, and part of them accept, while the rest refuse to do so, the mortgage will still be good as to those that do accept.

After the mortgage has been duly made and delivered as above stated it, of course becomes binding upon the mortgagor in favor of the mortgagee, and this obligation of the mortgagor continues till the mortgage is paid or discharged.

To protect the rights of persons who might give credit

to the mortgagor supposing that his personal property was unincumbered, and also to protect those who might purchase the mortgaged chattel, or take it as security for a loan without knowledge of the prior incumbrance, and so suffer loss, chapter 279 of the Laws of 1833 was passed. This law with its subsequent amendments provides that " every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which shall not be accompanied by an immediate delivery and be followed by actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof be filed."

The mortgage is to be filed with the clerk of the town where the mortgagor actually resides at the time of the execution of the mortgage, or if he is not a resident of the state, then it is to be filed in the town where the property was situated when the mortgage was executed.

The law is modified to some extent as to mortgages on the property of railroads and also on boats.

As said before, the object of this statute is to prevent fraud upon creditors and subsequent purchasers and mortgagees in good faith. So failure to file does not affect the relations of the mortgagor and mortgagee. If the property is

delivered to the mortgagee at the time the mortgage is made then filing is unnecessary, but in such a case the whole of the property must be delivered. Failure to deliver all makes the mortgage void if not filed. The mortgage is usually filed at once, but failure to do this does not render it void. It may be filed sometime after its execution. IN that case however, the mortgage takes effect from the date of filing, and any rights of creditors or others, that may arise between the date of execution and the date of filing will come in ahead of the mortgage lien.

Knowledge on the part of a creditor of the existence of a mortgage, which is unfiled, is no bar to his setting up that the mortgage is void as to his claim under the statute, but a subsequent purchaser or mortgagee must act in good faith, and if he knows of the existence of the mortgage on the property he purchases, or accepts as security he cannot claim that the mortgage is void because unfiled. The right of a creditor to question the mortgage does not exist till judgment is obtained on the debt, but when that has been obtained the creditor may go back to the origin of the debt and show that at that time the mortgage was not duly filed, and hence that his debt would take precedence of the mortgage. (27 N.Y. 581)

Filing consists in leaving the mortgage or a copy thereof at the office of the town clerk and paying or tendering the proper fees.

It is then the duty of the clerk to indorse the time when the mortgage is received, and to number it. These however are only memoranda and do not constitute an essential part of the filing. Leaving the mortgage at the clerk's office when there was a vacancy in the office of town clerk, and having it put with the other mortgages on file has been held a good filing. (13 Barb 326.)

It is also required that the mortgage together with a statement of the interest of the mortgagee in the property thereby mortgaged must be re-filed at the expiration of one year from the date of the first filing, and also at the end of every succeeding period of one year, so long as the mortgage exists. And this re-filing must take place within the thirty days next preceeding the end of each year. If this is not done the mortgage will void as to creditors, mortgagees, and purchasers, exactly as if it had never been filed. And both the mortgage and the statement of the mortgagee's interest must be included in the re-filing in order to make it good.

Re-filing is unnecessary if the mortgagee takes possession of the property before the end of the year, and retains it. If the mortgagor defaults and the title of the mortgagee becomes absolute before the end of the year, and the mortgagee does not take possession of the mortgaged property during the year he must re-file his mortgage.

The claims of purchasers or mortgagees, which arose during any yearly period, do not take precedence over the prior mortgage if it is not properly re-filed. Such claims take precedence only when they accrue after the expiration of the year.

A creditor whose right has accrued during the year may take advantage of the failure to refile even though his debt was contracted while the mortgage was protected by a previous filing. ( 27 N.Y.583. )

If the mortgage is not re-filed at the end of the year, and remains so for some time, and is then filed it is to be treated as a new filing, and all rights accruing before this filing take precedence.

Possession has been spoken of as necessary <sup>or</sup> advantageous to the mortgagees interest. If possession is required it must, in order to be effective, be an actual possession. There must be a real and open ~~T~~ransfer of the property. This transfer may be to the mortgagee himself, or he may appoint some person to be his agent for the purpose of taking the property. ~~But~~ But the property must pass from the custody of the mortgagor, and pass into the control of the mortgagee. The mortgagee having taken possession must retain control of the property, and it must remain subject to his direction and authority, either in his own hands or the hands of someone acting for him. <sup>By</sup> the terms of the mortgage the possession may be at once

transferred to the mortgagee, or the mortgagor may be permitted to retain the property for a time. The mortgage may contain a clause, in the latter case, permitting the mortgagee to take the property at any time <sup>that</sup> ~~at~~ his own protection may require.

IF the mortgage permits the mortgagor to retain the property conditionally the mortgagee has no right to the possession until the condition is broken. IF the mortgagor attempts to dispose of the mortgaged property the mortgagee can then take possession under the clause which is usually inserted giving him the right to take possession to protect his interest and he may also do this when loss or injury is threatened to the property

Possession by the mortgagor may sometimes tend to show fraud in the whole transaction, and may render the mortgage void; as where the mortgagee permits the mortgagor to retain the goods and use them for his own profit. An example of this would be where the mortgagor retains a stock of mortgaged goods, and used them as he had done before the mortgage was made, selling them and applying the proceeds to his own use. If he had applied the payments to the reduction of the mortgage debt there would be no suspicion of fraud, but to apply the proceeds to his own use would be held fraudulent. ( 72 N.Y 424. )

If the mortgagor having the property in his possession mixes it, without the knowledge or consent of the mortgagee,

with other property of the same nature so that it cannot be identified the lien of the mortgage is said to attach to all the mass of property which includes the mortgaged goods, but if the property can be identified the lien remains thereon even though it has become mingled with other property. ( 9Barb 630 . )

The mortgaged goods may be purchased, and in such a case the purchaser takes subject to the lien of the mortgage if the mortgage has been duly filed. IF it is un-filed and the purchaser buys in ignorance of the mortgage there is no lien that affects him. The purchaser does not become personally liable for the mortgage debt unless he expressly assumes it.

The mortgaged goods may be made security for a second mortgage. In this case the first mortgage is a superior lien and must be first satisfied.

The mortgagee may assign his mortgage and if he does so the assignee acquires the same rights that the original mortgagee had.

The mortgagor when the mortgage becomes due may pay the amount due and so end the debt and the mortgage . I<sub>N</sub> case of this fortunate termination of the transaction the mortgagor is entitled to his property free from all lien. If the mortgage has been filed the discharge may be recorded also, as provided for by chapter 171 Laws of 1879 which says, that when the mortgagor shall present at the office where the mortgage is

filed, a certificate from the mortgagee, or holder ~~holder~~ of the mortgage, stating that the mortgage is paid or satisfied, the recorder or clerk must file the certificate and write " Discharged" and the date opposite the entry of such mortgage in the record.

If however the mortgagor fails to pay the whole debt on the day when the mortgage is due, the legal title becomes absolute in the mortgagee, and there remains to the mortgagor only an equity of redemption.

The mortgagee then has a right to obtain possession of the goods by legal process if they are not already under his control, or if they cannot be obtained by more peaceable measures. If ~~tendure~~<sup>er</sup> of payment is made after the conditions of the mortgage are broken such ~~tendure~~<sup>er</sup> does nothing towards re-vesting the title in the mortgagor. (69 N.Y.69 38 How Prac. 296) The mortgagee may however ~~accept~~ such a tender, and if he does so he releases his claim on the mortgaged property, and waives the rights which the mortgagors default gave him. Upon vesting of the title of the mortgaged property in the mortgagee the debt is deemed satisfied. If there is a sale and the property does not realize enough to pay the debt the mortgagor may be personally liable for the balance unpaid.

The equity of redemption which remains to the mortgagor after default can only be extinguished by a valid sale which

is fair and in good faith. ( 38 How Prac.296.)69 N.Y. 69)

As soon as this sale is made the mortgagors interest is gone for ever.

In most mortgages the right is given the mortgagee to sell the mortgaged property upon default. If he do this and upon the sale of a part of the property enough is realized to pay the claim, he has no right to sell more, and the part unsold is free from any claim, and goes back to the mortgagor. If it is necessary to foreclose it may be done either in a court of equity, (38 N.Y. 336 ) or under the provision of the Code of Civil Procedure sections 1737 -1741.

