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1. MORTGAGE ON GOODS AND CHATTELS—NO AUTHORITY, COUNTY RECORDER TO RECORD—SECTION 8563 G. C.
2. COUNTY RECORDERS MAY NOT RECORD MORTGAGES ON PERSONAL PROPERTY ONLY—DUTIES AS TO FILING MORTGAGES REMAIN UNCHANGED.

SYLLABUS:

1. The authority of a county recorder to record a mortgage on goods and chattels, given by Section 8563 of the General Code, as it existed prior to 1943, has been taken away entirely by amendments to this section in 1943 and 1945 (120 O.L. 700 and 121 O.L. 374.)

2. County recorders may not record mortgages on personal property only, but their duties with respect to filing such mortgages remain unchanged.

Columbus, Ohio, March 14, 1949

Hon. Frank T. Cullitan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“There is submitted herewith for your consideration and written opinion, a request of the County Recorder, in a letter reading as follows:

‘For many years Section 8563 of the General Code, read (in part) as follows:

“If the party depositing the instrument desires to have it recorded, the officer must record it at the expense of the person making the request, in a book to be provided by the county. * * *”

‘Upon the authority of the above law, any person might record any kind of chattel mortgage. Obviously, there is need for this kind of service since it gives added protection, makes for certainty, removes the possibility of the filed instrument being stolen or removed, and does away with the possibility of any additions or alterations.

‘More recently, Section 8563 has been amended and since September 28, 1943 the law has read (in part) as follows:

“A mortgage upon both real and personal property (but not upon personal property alone,) or a true copy thereof, may be deposited with the county recorder with the request that the same be recorded, in which case the county recorder must record it at the expense of the person making the request * * *”

‘The inquiry in which the county recorders are interested, is this:

‘(1) Does Section 8563 as it now stands, prohibit the *recording* of any chattel mortgage other than one upon real *and* personal property?’

‘(2) Is it still proper for a county Recorder to continue the well established practice of recording a mortgage upon chattels alone, when so requested?’

“Undoubtedly the recorder uses the word ‘recording’ to mean not only the filing of the chattel mortgage but also spreading the entire contents thereof on the book in his office. The main question to be considered is, whether or not a recorder may spread the entire contents of a mortgage upon chattels alone, on a book in his office, when so requested, and if so, what charge shall he make therefor?”

Section 8560 of the General Code, provides that a chattel mortgage or true copy thereof, must be deposited with the county recorder, as directed in the next succeeding sections.

Section 8561 of the General Code, provides that the instruments mentioned in the next preceding section must be deposited with the county recorder in the county in which the mortgagor resides and in which the property is situated.

Section 8562, General Code, requires that the county recorder endorse the instrument and enter it in the *chattel mortgage index*, which shall contain various data. It also requires the county recorder to *file* the instrument in his office, unless it has been deposited for recording under Section 8563, General Code.

In none of the above sections is the word “recording” used, except when it refers to Section 8563.

Section 8563 prior to its amendment in 1945, provided that if the party depositing the instrument desires to have it recorded, the officer must record it.

The word “instrument” in this latter section undoubtedly referred to the instrument described in the aforementioned statutes, and meant

any instrument which is a mortgage or conveyance intended to operate as a chattel mortgage on goods or chattels as set out in Section 8560, and those which must be filed under Section 8562. There was a mandatory duty imposed on the county recorder to record these instruments if he was so requested. Section 8563 was amended in 1945. In place of the word "instrument", the section specifically refers to a "mortgage on real and personal property (but not upon personal property alone)" which may be deposited with the county recorder, accompanied by a request that the same be recorded in a book to be known as the chattel mortgage record.

Therefore, according to the present law, the county recorder is to keep two separate books, one to be called the "chattel mortgage index" and the other, the "chattel mortgage record."

The question thus presented is whether the legislature intended by its enactment in 1945 of Section 8563, to restrict the types of chattel mortgages that may be recorded. Previously, any type of chattel mortgage had to be recorded on request. Is Section 8563, as it presently exists, meant to pertain exclusively to chattel mortgages on real and personal property, or did the legislature merely intend to enact this section as a special procedure relating only to this type of mortgage, not intending thereby to destroy the mandatory requirement that permitted the recording of chattel mortgages on personal property alone when the county recorder was so requested?

The first recording statute was the statute of enrollments. This was passed to prevent certain mischief in regard to secret bargain and sale. It is true that this particular act failed in its purposes, due in part to the Statute of Uses, but it initiated a system that was to continue throughout the history of law. This was an enrollment statute and the word "enrollment" is generally considered synonymous with recording in contemplation of law. The Century Dictionary defines the word "recording", as an authentic or official copy of any writing or an account of any facts and proceedings, whether public or private, usually entered in a book for preservation.

In contradistinction to recording, filing a paper according to modern usage consists of placing it in the custody of the public official by the party charged with the duty and the making of the proper endorsement by the officer. The word carries with it the idea of permanent preserva-

tion of the thing so delivered and received, that it may become part of the public record. It is not synonymous with deposited, which is merely a naked bailment. Bouvier's Law Dictionary.

It will be noted that in the present act the legislature has been careful to preserve the above distinction so far as clear verbiage renders it possible. The county recorder must keep a chattel mortgage *record* for instruments *recorded* under Section 8563, while he is required to keep a chattel mortgage *index* for those instruments *filed* under preceding sections. This requirement or duty imposed on such recorder should provide in itself a touchstone in determining legislative intent. This distinction is further emphasized in Section 8565, General Code, where the two separate types of deposits are mentioned. In fact, in Section 8563, that part of the section in parenthesis which says "(but not on personal property alone,)" would make the foregoing part of the sentence exclusive. Since there is no later provision for recording chattel mortgages in personal property alone, it must remain exclusive.

For the above reasons, it is my opinion that the legislature intended that only recording of chattel mortgages on real and personal property is permitted.

What will be the result of this opinion? Does it remove entirely, the protection formerly offered? In my opinion, it does not. Both the creditor and the purchaser are protected adequately by the filing system. The mortgage, or a true copy thereof, must be deposited with the recorder. The mortgage, or a true copy thereof, is open for inspection to all interested persons. The index is so kept that the names of all parties and the security the mortgage represents are cross-indexed and cross-referenced as to filing number and the amount of the security. This, in my opinion is sufficient information. The mere name of the party in the index puts the creditor or purchaser on notice. The possibility of such instrument being altered or stolen is slight, because the cross-index and cross-reference upon which both the names of the parties and the amount of security covered by the mortgage must be entered, a thief or a forger would have to steal or alter both the mortgage itself and the cards or papers which make up the index. Since the mortgage or a true copy thereof must be deposited with the county recorder, and the file is to be kept in said recorder's office under the supervision and control of a public official performing a public duty in a position of trust, little access could be had to such information except under the supervision of

such public official, whose duty it is to keep such records in a safe place and free from the evils mentioned.

Therefore, in specific answer to your question, I am of the opinion that Section 8563, General Code, as it now exists, prohibits the recording of any chattel mortgage other than one upon real and personal property.

The answer to your second question must be in the negative since the filing and recording of an instrument for which the law makes no provision must be without legal effect. It would serve no purpose as to notice, and by the reasoning set forth above is prohibited by statute.

From an examination of Section 2757, General Code, it will be noticed that types of instruments that may be recorded are set forth. Subsequent sections specifically name other types of instruments that may be recorded or filed. Neither in Section 2757 nor in any other section of the Code is it stated that chattel mortgages on personal property alone may be recorded. There is no provision for a miscellaneous file that might possibly authorize such a practice. Therefore, any such practice is without legal effect and as a result is unauthorized.

Respectfully,

HERBERT S. DUFFY,
Attorney General.