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SYLLABUS:

1. A mortgage upon both real and personal property, when presented for recording pursuant to the provisions of Section 8563, General Code, should be indexed in the chattel mortgage index specifically provided for by that section. Further indexing in the index for filed chattel mortgages is not required.

2. A mortgage upon both real and personal property when presented for recording in accordance with the provisions of Section 8563, General Code, must be recorded in a book to be provided by the county known as the chattel mortgage record.

3. Section 8572, General Code, does not provide specifically as to the amount the recorder shall charge for recording an instrument in the chattel mortgage record and for indexing the same in the chattel mortgage index required to be maintained by Section 8563, General Code. However, by virtue of the provisions of said Section 8572, General Code,

the recorder is authorized to charge for services not specifically provided for, but which he is required to perform in connection with recording and indexing, the fees as are allowed by law for like services.

4. When a mortgage upon both real and personal property contains the sworn statement contemplated by Section 8546, General Code, and is presented for recording in the real estate mortgage records, the recorder is required to record said mortgage therein in its entirety. The fact that said sworn statement must also be recorded in the chattel mortgage record does not authorize its omission from either record.

Columbus, Ohio, September 11, 1944

Hon. Richard E. Hole, Prosecuting Attorney
Greenville, Ohio

Dear Sir:

Your request for my opinion reads:

“In the event a combined real and personal property mortgage is presented to the County Recorder under provisions of Section 8563 of the General Code of Ohio, how should the same be indexed and recorded.

Questions arising in the mind of our County Recorder are as follows:

1. Should the same be indexed in the regular chattel mortgage index and if so, should the regular charge of 30c be made therefor?
2. Should the same be indexed and recorded ‘in a book to be provided by the county to be known as the chattel mortgage record’? If so, what charge should be made for same?
3. Should the same be indexed in the real estate abstract and also recorded as a real estate mortgage? If so what charge should be made for same?
4. Is it only necessary to record the names of the parties to the mortgage, the affidavit of the mortgagee and the reference to the volume and page of the real estate mortgage in the chattel mortgage record? If this be true is it necessary that the real estate mortgage record likewise contain the affidavit of claim?”

Section 8563, General Code, above referred to, and other sections dealing with chattel mortgages, were recently amended by the 95th General Assembly. However, before setting forth the provisions of said section it

might be well to consider the language of Section 8562, General Code, as also amended, which reads as follows:

“The county recorder upon receiving *such instrument* shall endorse thereon the time of receiving it and its consecutive number, and enter in a book or on cards, (which shall be known as the chattel mortgage index) to be provided by the county, the names of all parties thereto, alphabetically arranged, with the number of the instrument, its date, the date on which it was so received, and the amount secured thereby as set forth in the sworn statement to be furnished therewith, which entry must be repeated, alphabetically, under the name of every party thereto. He also shall file the instrument in his office to be there kept for the inspection of all persons interested, unless deposited for recording under section 8563, General Code. In case said instrument is presented for refileing the officer receiving the same shall file, handle, number, index and treat it as an original filing. When any chattel mortgage so filed is refiled or, when a chattel mortgage, whether filed or recorded, is cancelled the date of such refileing or cancellation must be entered upon the margin of such chattel mortgage index opposite the original entry if not refiled; or opposite the last entry, if refiled.”

(Emphasis added.)

Reference to Section 8560, General Code, discloses that the words “such instrument” above emphasized, mean, “A mortgage, or conveyance intended to operate as a mortgage, of goods and chattels”.

By virtue of Section 8563, General Code, as amended, a mortgage upon goods and chattels may be recorded. Said section reads as follows:

“A mortgage upon both real and personal property (but not upon personal property only) 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 *in a book to be provided by the county* to be known as the chattel mortgage record; *provided that if such instrument* or the original of which such instrument is a true copy *is or shall have been also deposited with the county recorder for recording as a real estate mortgage, he shall accept and index such instrument as a chattel mortgage as provided in section 8562, General Code,* but in lieu of recording the entire contents thereof in the chattel mortgage record he shall record therein the names of all parties thereto, together with the sworn statement furnished therewith as required by section 8564 General Code and a reference to the volume and page at which the same is recorded as a real estate mortgage, and such recording shall constitute sufficient recording thereof for the purposes of this section.

The county recorders shall maintain a chattel mortgage index for chattel mortgages recorded under this section separate from the index for chattel mortgages filed or refiled.

Any mortgage upon both real and personal property filed with the county recorder before the effective date of this section, or a true copy thereof may be deposited for recording under this section.

When any chattel mortgage heretofore or hereafter filed shall be recorded the county recorder shall enter upon the margin of the chattel mortgage index opposite the original entry a notation that such mortgage has been withdrawn from filing for the purposes of recording. Such withdrawal and recording shall be without prejudice to the lien and rights of the mortgage obtained as a result of such filing.

Chattel mortgages recorded in accordance with the provisions of this section may be assigned, released and satisfied in the manner provided in sections 8546 to 8556, General Code, which sections shall also apply to such chattel mortgages. An assignment, release or satisfaction of such instrument as a mortgage upon the real property therein described shall operate also as an assignment, release or satisfaction of the mortgage upon the chattel property unless otherwise expressed.

The provisions of section 8565, General Code, shall not apply to chattel mortgages recorded as provided in this section. Such mortgages shall be subject to and governed by the provisions of section 8546-2, General Code.”

(Emphasis added.)

With the foregoing in mind, I turn now to your first and second questions which I believe it might be well to consider together instead of separately. As I view it, from an analysis of the above quoted legislation, the mortgagee in a chattel mortgage meeting the requirements of said Section 8563 has several courses that he may pursue, viz.:

(1) Present the mortgage for what might be termed as partial recording which, however, “shall constitute sufficient recording thereof for the purposes of this section”. In such event it is manifest that the instrument must also be or have been presented for recording as a real estate mortgage.

(2) Present the mortgage for what might be termed as complete recording. It is clear this may be done if said mortgage has not previously been offered for recording as a mortgage on real estate. But whether such right exists under any and all circumstances need not here be decided.

Furthermore, whether such a situation would ordinarily come about because of the fact that partial recording is authorized under the circumstances above noted, is of little moment.

(3) Notwithstanding that the document meets the requirements of said Section 8563, present it for *filing* only in the manner specified by Section 8562, *supra*. That it may thereafter be temporarily withdrawn for recording without impairing the validity of the lien is now no longer the subject of debate.

(4) Present the document for filing in addition to offering for recording. The frequency with which a mortgagee follows this procedure is also of little moment.

Reverting to your first question it is to be observed that reference is made to the "regular chattel mortgage index". By this language I assume you have in mind the index for chattel mortgages presented for *filing*.

Some difficulty is experienced in construing the legislation under consideration because of the provision in said Section 8563 that the recorder shall "index such instrument as a chattel mortgage *as provided in Section 8562, General Code*". The meaning that I ascribe to this language is that said Section 8562 should be resorted to for the purpose of determining the *manner* of indexing, *viz.*, precisely what detail shall be carried or set forth in the so-called "separate" index for recorded documents. Said language does not mean the *place* where indexed.

It might be mentioned that prior to the amending of Section 8563 it would appear that the recorder maintained only one index. A mortgage presented for filing *or recording* seemingly was required to be indexed therein. But in view of the plain and unmistakable language of the second paragraph of Section 8563, *supra*, I do not see how any question can now arise as to where the document should be indexed. Certainly a document presented for recording only must be noted in this separate index. I can find no basis for any assumption that in addition it must be noted in the so-called regular index. However, if the document is presented for *filing and recording*, then the recorder would no doubt be warranted in charging the thirty cent fee authorized by Section 8572, General Code, the provisions of which will be quoted in full at a later point.

We now come to the matter of the book to be provided by the county known as "the chattel mortgage record". Former Section 8563 providing for the recording of chattel mortgages contained these words "in a book to be provided by the county". The same language is employed in the section as amended, supplemented however by the following, viz., "to be known as the chattel mortgage record". Clearly, therefore, this is the book wherein chattel mortgages are to be *recorded*. However, in your second question you refer to mortgages to be "*indexed* and recorded" therein. I do not know whether I have grasped the point relative to which you wish to be advised. I trust, however, the remarks that follow may be of some assistance to you. I have heretofore made reference to the "separate" index for recorded chattel mortgages. As previously suggested, I construe the word "separate" to mean an index for recorded documents distinct from that for filed mortgages. Whether such index for the first mentioned documents forms part of the volume or book wherein actual recording takes place is of no consequence. In those counties wherein the number of mortgages presented for recording is likely to be small I can imagine some advantage might result from combining the mortgage record book with the index. However, an index book is frequently utilized for several volumes and therefore when the extent of business is such as to make this course advisable, good judgment would dictate it should be followed. It remains for your county recorder to adopt the plan that he deems appropriate and will best serve the public.

Your second question further deals with the charge for mortgages presented for recording. I feel that the law with respect thereto has been clarified. In this connection I deem it advisable to quote former Section 8572, General Code, viz.:

"For services in respect to chattel mortgages, or instruments for conditional sales, as provided in this chapter, the officer shall be entitled to receive the following fees: For filing each instrument or copy, six cents; for searching each paper, six cents; for making the entries upon the filing of an instrument, six cents for each party thereto; for recording such instrument, ten cents per hundred words; for recording any affidavit, credit or statement added to an instrument between the time of its record and refile, twenty-five cents; and the like fees for certified copies of such instrument, or copies, as are allowed by law to county recorders for like services."

Seemingly a mortgage presented for recording under former Section

8563 was also required to be indexed. Since there was no provision for a separate index; presumably the only place it could be noted was in the chattel mortgage index for filed documents. Precisely what charge the recorder was authorized to make for recording, and more especially for indexing, I need not here decide.

As now in force and effect, Section 8572, General Code, reads as follows:

“For services in respect to chattel mortgages, or instruments for conditional sales or other instruments, as provided in this chapter, the county recorder shall be entitled to receive the following fees: For *filing* each instrument or copy, (whether on the original filing or refiling) thirty cents; for attaching to any filed instrument after the filing thereof any sworn statement, credit, assignment or any other document, twenty-five cents; and the like fees for certified copies of any instrument, or copies and *for services not herein provided for, as are allowed by law to county recorders for like services.*”

(Emphasis added.)

The former piecemeal charge, viz., for filing, searching the paper and indexing the names of the parties has been dispensed with and a charge of thirty cents is now authorized for “filing.” The word “filing” has a meaning that is clearly distinguishable from “recording” but I deem it of no importance to comment in any detail with regard thereto. While it may be true that the recorder is still required to search each paper and index it under the name of each party, and it matters not as to the number of parties, the fee is a fixed amount in each instance. The same procedure is to be followed with respect to instruments presented for recording excepting that the indexing takes place in the separate index for recorded documents. But in view of the fact that there exists this distinction between filing and recording, I can not interpret said Section 8572 as permitting the recorder to make a thirty cent charge for indexing a chattel mortgage that is presented for recording only. I am of the view that because of the wording “for services not herein provided for” other statutory enactments must be looked to in order to ascertain the amount of the recorder’s charges. It is provided by Section 2778, General Code, as follows:

“For the services hereinafter specified, the recorder shall charge and collect the fees provided in this and the next following section. For recording mortgage, deed of conveyance, power of

attorney or other instrument of writing, twelve cents for each hundred words actually written, typewritten or printed on the records and for indexing it, five cents for each grantor and each grantee therein; for certifying copy from the record, twelve cents for each hundred words. The fees in this section provided shall be paid upon the presentation of the respective instruments for record or upon the application for any certified copy of the record."

It is my opinion that this section is controlling with respect to all charges for indexing and recording mortgages of the nature mentioned in said Section 8563. This conclusion is buttressed by the fact that the general tenor of the section seems to be to treat recorded chattel mortgages as having a similarity to mortgages on real estate only. It is stated in the section they may be assigned, released and satisfied "in the manner provided in Sections 8546 to 8556, General Code".

In connection with your third question I feel it must again be borne in mind that a person who holds a mortgage upon both real estate and personal property is certainly under no legal obligation to have the same recorded as a real estate mortgage unless he so elects. I can imagine a situation wherein the mortgagee may not care to resort to the real estate provided the mortgagor, in the case of an installment note, for example, makes payment of each installment as and when due. In other words as long as payment is made in accordance with the terms of the note the mortgagee might regard his mortgage on the chattels as adequate security. Consequently he may not care to have the document recorded as a mortgage on the real estate until some contingency develops that may impair his principal security. But certainly that fact would not subsequently preclude him from having it recorded in said real estate mortgage records. It seems to me that Section 8563 clearly contemplates such a situation when it provides that *if* such instrument is or shall be deposited for recording as a mortgage on real estate, then only a partial recording would be necessary to comply with the terms of the statute. I do not believe it is for the recorder to determine arbitrarily that a mortgage should be indexed in the real estate abstract. If not presented for recording as a real estate mortgage it would seem to follow there would be no basis for indexing it in the real estate mortgage records.

I come now to your last question. As you have indicated, under certain circumstances, it is only necessary to record the mortgage in part

and this partial recording includes the sworn statement required by Section 8564, General Code.

I am mindful of course of the fact that if a document has been previously recorded in the real estate mortgage records or is presented for recording at the same time as a real estate and chattel mortgage, there will be a duplication of the recording of the sworn statement. However, I do not feel this can be avoided. When a party presents an instrument to the recorder for recording as a real estate mortgage, if it is properly executed and witnessed and meets any other test to determine if it is in fact a mortgage, then it is clearly his duty to record the instrument. The mere fact that the document contains matter which is not essential to its validity certainly does not justify the recorder in omitting to record the same in full at his discretion or upon request of the mortgagee. Suppose, for example, a mortgage on real estate contained a provision to the effect that in the event the mortgagor failed to pay the taxes thereon as and when due, then the mortgagee may pay the same and charge such amount against the mortgagor. The inclusion or omission of such a provision would have no bearing upon the validity of the document. But could it be argued that because the mortgagee had decided this provision of the mortgage need not be recorded he could thereupon instruct the recorder to omit it? The law contemplates no such situation. Therefore, the mere fact that the document presented for recording as a real estate mortgage contains the affidavit required by Section 8564, General Code, irrespective of whether also offered for recording as a chattel mortgage, would not justify the recorder in failing to record such document in its entirety. The fact remains that mortgages upon real estate are recorded in one set of records and chattel mortgages in another.

Summarizing my views, therefore, with regard to the several matters presented by your inquiry, it is my opinion as follows:

1. A mortgage upon both real and personal property, when presented for recording pursuant to the provisions of Section 8563, General Code, should be indexed in the chattel mortgage index specifically provided for by that section. Further indexing in the index for filed chattel mortgages is not required.
2. A mortgage upon both real and personal property when presented

for recording in accordance with the provisions of Section 8563, General Code, must be recorded in a book to be provided by the county known as the chattel mortgage record.

3. Section 8572, General Code, does not provide specifically as to the amount the recorder shall charge for recording an instrument in the chattel mortgage record and for indexing the same in the chattel mortgage index required to be maintained by Section 8563, General Code. However, by virtue of the provisions of said Section 8572, General Code, the recorder is authorized to charge for services not specifically provided for, but which he is required to perform in connection with recording and indexing, the fees as are allowed by law for like services.

4. When a mortgage upon both real and personal property contains the sworn statement contemplated by Section 8546, General Code, and is presented for recording in the real estate mortgage records, the recorder is required to record said mortgage therein in its entirety. The fact that said sworn statement must also be recorded in the chattel mortgage record does not authorize its omission from either record.

Respectfully,

THOMAS J. HERBERT

Attorney General