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THE MORTGAGE; ITS ORIGIN AND HISTORY—PRINCIPLES PRESIDING OVER ITS APPLICATION TO REAL AND PERSONAL PROPERTY—REMEDIES.

ORIGIN AND HISTORY.

It may be said of mortgages, as of many pretended modern inventions, that they owe their origin more to the suggestive wants of men in civilized life, than to the creative genius of any particular individual, age or nation. They were not a subject for invention, but followed as a necessity in the wake of civilization. The fluctuations of trade, the necessity of credit, and the consequent sudden demand for money in a moment of great commercial embarrassment would naturally suggest the idea of a mortgage as the most facile means of raising it, at the same time affording to the lender a perfect security, easy of transfer, which may itself in turn render to him the same service that it did to the original mortgagor.

Among the early races of men, loans or favors on property, must have been by way of pledge rather than by means of a mortgage,

for having no knowledge of letters or stability of abode there would of course be no security without actual possession. The first record of a mortgage is to be found in the sacred writings. Mortgages of a peculiar nature are said to have been used by the Jews, from whom, according to some writers, the notion of mortgaging lands had origin. From the Jews the idea of a mortgage is supposed to have passed to the Greeks and Romans, and from them engrafted upon the Common Law of England.

In the Roman Law there were two sorts of transfer of property as security for debts, namely the *pignus* and the *hypotheca*. The pignus or pledge, was where anything was pledged as a security for money lent, and the possession thereof was passed to the creditor, upon the condition of returning it to the owner when the debt was paid. The *hypotheca*, was when the thing pledged was not delivered to the creditor, but remained in possession of the debtor; it closely corresponded with our present idea of a mortgage.

The civil law made little distinction between mortgages of real and mortgages of personal property whether pledged or hypothecated. The debt was in all cases regarded as the principal, the mortgage as an incident, and until sentence of foreclosure, the ownership of the debtor was not displaced. It is contended by some common law writers that the present notion of a mortgage and its redemption was strictly founded on the common law doctrine of conditions. The general features of the present and civil law of mortgages are so similar that we cannot resist the conclusion, that one was borrowed from the other, however hardy the arguments put forth by national egotism or professional prejudice.

The introduction of the feudal system into England by William of Normandy, was a memorable epoch in the history of the English law. That military institution the nature of which is such as to exclude any idea of a mortgage, soon absorbed all the real property of the kingdom. It was not until the ascension of Henry the third that licenses were granted for the free alienation of land; it soon became a maxim of the law, "that the purity of a fee-simple imported a power of disposing of it as the owner pleased," there were two ways of mortgaging lands introduced, which Littleton

distinguishes by the names of the *vadium vivum* and *vadium mortuum*.

The *vadium vivum*, which is said to have derived its name from the fact that neither debt or estate were lost, consisted of a feoffment to the creditor until out of the rents and profits he had satisfied his debt, the creditor took actual possession of the estate, and received the rents and applied them from time to time in the liquidation of the debt, the same as a tenant by *elegit*.

The *vadium mortuum*, so called because if not redeemed at the stipulated time, it was dead to the debtor; that is, if the lands were not redeemed upon the day that payment became due, the lands were absolutely forfeited to the creditor.

It is easy to see that these mortgages were not compatible with the interests of a commercial people, or the progressive spirit of freedom; they were a forced and unconscionable advantage to the wealthy barons, who were always striving to extend their landed estates, and agrievous oppression upon the needy and unfortunate.

The English Court of Chancery by a bold innovation, but acting *in personam* upon the conscience of the party, declared according to the manifest intent of the parties, that the land was a mere security for the payment of the debt, that the mortgagee held the estate (though forfeited at law) as a trust, and that the mortgagor might within a reasonable time by the payment of the debt and all equitable charges, recover his legal estate in the land. There was too much of ethics in this new doctrine, to meet the ready assent of the severe and unyielding expounders of the common law, and they did not fail upon all occasions to express their disapprobation. But the right of redemption was steadily upheld, and at last firmly established. Kent, in his Commentaries, declares the establishment of the equity of redemption, to be the triumph of equitable principles over technical rules, and with more than professional enthusiasm, quotes from Pope's Messiah:—

"Returning justice lifts aloft her scale."

It soon became a maxim that "the right of redemption could not be restricted," the court in all cases looked for the intent, and if they could discover a loan to be the foundation of a transaction,

which laid hold upon the earth as a security for its fulfilment, they declared the instrument to be a mortgage, no matter how covered with legal solemnities and forms. All covenants that the conveyance is to become absolute at the happening of any contingency, are considered as oppressive and illegal; even a covenant that the mortgagee shall have an absolute conveyance upon paying a further sum, is void. Any and all covenants on the part of the mortgagor to pay anything beyond principal and interest, or for any collateral advantage to the mortgagor, are contrary to sound policy, and void; for equity is a part of the law and cannot be provided against.

The right of redemption is not confined to the mortgagor or to his heirs and legal representatives or subsequent incumbrancers, but extends to all persons having any legal interest whatever in the premises as against the mortgagor, but a mere personal claim which gives no actual vested interest in, or does not create a charge upon the land, will not be a sufficient ground upon which to claim the right to redeem. While the law regards the right of redemption as sacred, and watches all infringement or restrictions of it with a jealous eye, yet it will not allow the mortgagee to be harrassed by every stranger who may claim a possible interest in the land. In order to redeem, the mortgagor must pay all that is equitably due as incident to the debt.

PRINCIPLES PRESIDING OVER ITS APPLICATION TO REAL AND PERSONAL PROPERTY—REAL ESTATE.

The history of the law of mortgages is confined mostly to tracing the introduction, continuance, and peculiarities of the equity of redemption. The rights of the mortgagee and mortgagor are dependent upon its controlling influence.

All persons capable of contracting, may execute a valid mortgage, and it is liable to be defeated by anything that would avoid a contract. All property, real or personal, corporeal or incorporeal, movable or immovable, may be the subject of a mortgage; even property which cannot be sold may be the subject of a mortgage, as in the case of lands held adversely. The principles presiding over its application to real and personal property, are few and of direct application; yet

in the actual administration of the law, there arise many refined distinctions, other principles interfering, when both are modified to prevent injustice.

A mortgage of real estate is *in form*, a grant of an estate in fee as security for money lent or contracted to be paid at a certain time, on condition that if the debt shall be discharged according to the contract, the grant shall be void, otherwise to remain in full force. A mortgage may also be collateral to, and as security for the performance of any legal engagement other than the payment of money.

In England, the mortgage conveys the legal estate or title to the land, the estate of the mortgagor according to authority amounts to nothing more than a tenancy—the mortgagee may maintain ejectment against him; but in this country, at least in this State,[1] the mortgagor is regarded with far more favor: the mortgage is treated as a conveyance in fee so far as it is necessary for the security of the mortgagor—as to all other purposes it is an estate in the mortgagor, and may be purchased, conveyed, and levied upon, and regarded in all respects as his legal estate. The mortgage is a mere burden or charge upon the estate, and when satisfied, leaves the estate in the hands of the mortgagor the same as before the execution of the mortgage. It is said the estate of a mortgagor consists simply of an equity of redemption; it is an equity of redemption and more,—that name rather indicates the procceding that he has to pursue to remove the incumbrance than as a definition of his estate. The mortgage is in effect a power of attorney to the mortgagee, authorizing him upon non-performance of the conditions mentioned, to sell and convey the premises. The interest of the mortgagee, is therefore, a mere chattel interest; though the mortgage purports to convey an estate in fee-simple, the interest conveyed is so intangible that it cannot be reached upon execution, and upon his decease, it passed with the rest of his personal estate to his executors.

If there be absolute danger that the security may be impaired, the court will interfere to protect the mortgagee against loss, by granting an injunction to stay waste, or other remedy to preserve his security. The mortgage is, throughout, regarded as a mere secu-

[1] New York.

rity and attaches to the debt into whosever hands the debt may be transferred, while a conveyance or assignment of the mortgage without the debt creates no right in the purchaser, and he can maintain no action upon it.

Upon the breach of the conditions of a mortgage the respective rights and interests of the parties are changed; the legal estate of mortg gor becomes forfeited.

The difficulty with which the courts have been beset in defining the situation of a mortgagee after forfeiture of the mortgage, with respect to his mortgage, is curious. In Doug. 279, 82, Lord Mansfield, says "He is not properly a tenant at will to the mortgagee, he is like a tenant at will." In 1 Term R. 381, Ashurst J., says "a mortgagor is as much, if not more like a receiver than a tenant at will, in truth he is not either," and again, "mortgagors and mortgagees are characters as well known, and their rights, powers, and interests as well settled as any in the law." In 5 B. & A. 604, it is said "a mortgagor is a tenant within the strictest definition of that word," whilst in 8 B. & C., case of *Doe* vs. *Robey*, Lord Tenderdon says "the mortgagor is not in the situation of a tenant at all, or at all events he is more like a tenant at sufferance."

We are relieved of all difficulty in this State;[1] the statutes provide, that no action of ejectment can be bro ght by a mortgagee. This statute is held not to affect the estate of a mortgagee who has legally obtained possession. The law holds a mortgagee in possession to the fiduciary character, duties, and responsibility of a trustee, and compels him to account to the mortgagor as though the mortgagor were his cestui qui trust.

Much of the difficulty in establishing a uniform rule, grows out of the fact that a mortgage has been differently considered in courts of equity and courts of law. In the former it is merely a security for money, in the latter it has been considered as a conveyance upon condition. There is such manifest justice in the equitable doctrine and all its incidents, that it must ultimately prevail.

[1] New York.

A conditional sale with a right to re-purchase very nearly resembles a mortgage. If the debt remains, the transaction is a mortgage; but if the debt is extinguished by mutual agreement, and the grantors have a right to a reconveyance on refunding within a given time, it is held to be a conditional sale. In all cases of doubt the courts incline towards a mortgage.

A formal conveyance may by extrinsic evidence be shown to be a mortgage, yet a formal mortgage may not by the same means be shown to have been intended for a conditional sale. In one case, the proof raises an equity consistent with the writing, which in the other would contradict it.

EQUITABLE MORTGAGES.

A deposit of title deeds by way of security is held to be evidence of a valid agreement for a mortgage, and amounts to an equitable mortgage. These mortgages had their origin in an age when writing was seldom used, and when title deeds were considered the great muniments of title; after the passage of the statute of frauds, the courts were very reluctant to uphold them, as they were supposed to conflict with the statute of frauds. The courts have always been disinclined to hold them valid, and have upon all occasions regretted their validity. Most writers upon the law agree with the courts in this respect. Coote, an able writer upon the law of mortgage, introduces arguments to show, that they never were valid, but that the creditor extorted payment by a sort of legal duress or clog upon the alienation of the land by the depositor. In some states these mortgages are held to be within the statute of frauds and void.

There is another sort of equitable mortgage, or rather resulting trust, which occurs in favor of the vendor of land, who retains in equity a lien upon the land for the amount of the purchase money unpaid. This lien is wholly independent of any possession on the vendor's part, it attaches to the estate as a trust, whether it be actually conveyed, or only contracted to be conveyed. The same objection has been taken to this, as to mortgages by deposit of title deeds, but whatever may have been the original force of such an objection, the doctrine is now too firmly established to be shaken by

a mere theoretical doubt. Courts of equity proceed upon the ground, that the trust being raised by implication is not within the purview of the statute, but is excepted from it.

PERSONAL PROPERTY.

The rules of law governing real and personal mortgages are much the same, varied as to the latter only so far as the temporary character of the subject mortgaged, and the necessities of commerce require.

A mortgage of chattels, like other contracts, requires the assent of both parties to give it complete legal effect. No particular form of words is necessary, neither need it be in writing, for as between the parties to it, the ordinary rules of contract and construction apply; but when the rights of third persons, without knowledge of the mortgage, are to be prejudiced, there must be a strict compliance with the statute. Indeed, most of the law relating to chattel mortgages is founded upon statute. All the States have statutes modifying the common law, and regulating the use of these mortgages.

When a bill of sale is made with a condition that the vendor is to retain a lien for the purchase-money, if he part with his possession his lien is lost, he has no interest in the thing unless it is expressly stipulated or covenanted that he shall have a mortgage upon it. There must be some defeasance or condition so definitely expressed as to enable creditors, not parties, to ascertain the true character and meaning of the contract, with a good degree of certainty.

A mortgage of chattels in some respects resembles a pledge, but is easily distinguished from it. The title of a pledger is merely possessory, and his right to it is destroyed whenever he parts with the possession. A mortgage may be good without delivery, the general property passes to the mortgagee, subject to be redeemed within the time stipulated. The mortgagor having no equity of redemption unless expressly stipulated for, or unless in case of fraud, the Court of Chancery might interfere to prevent injustice. In the case of a pledge the general property does not pass, but remains in the pawnor, the pawnor having only a special property or lien; though the pledger may not redeem at the time limited, yet it retains the character of a pledge still.

In this State[1] every chattel mortgage is void as against *bona fide* creditors, subsequent purchasers and mortgagees, unless the mortgage is accompanied by an immediate delivery, and followed by an actual and continued change of possession of the thing mortgaged, or unless a copy of the mortgage be filed according to the particular directions and provisions of the statute.

The varied enactments in the different States in reference to personal mortgages all have for their general object, the prevention of fraud by prohibiting a party from holding property upon which credit may be obtained, while it is in fact covered by a secret trust.

As between mortgagor and mortgagee, a mortgage for personal property is valid, though there be no delivery of the property or filing of the mortgage, and it will be valid as to all third persons having notice. If the mortgage be filed in the clerk's office, that amounts to constructive notice to all the world. An insertion in the mortgage of a power of sale, and paying the debt out of the proceeds, does not prevent the mortgagee from gaining an absolute title at law upon breach of condition.

It has been made a question whether a mortgage can be made a continuing security or lien upon a stock of goods, the mortgagor continuing his business buying and selling: it is now definitely settled that such a mortgage is not valid as to subsequently acquired property, and as to the goods sold in the ordinary course of business from day to day, that the mortgagor acts as the agent of the mortgagee. In a very recent case in this State[1] it was held that a mortgage covering goods in a store "or which might be substituted in the place of such articles as might be sold in the course of business," was void upon its face as against creditors, as creating a trust for the use of the mortgagor in violation of the statute. The whole instrument was held to be vitiated by the illegal trust, and conveyed no interest to the mortgagee whatever.

REMEDIES.

The right of foreclosure and redemption are reciprocal: the right to foreclose survives to all parties who succeed to the mortgagee, and the right to redeem will be strictly enforced against them, as against the original mortgagee.

[1] New York.

By the common law a creditor who takes a mortgage to secure a debt by bond or otherwise, has three remedies, all or either of which he is at liberty to pursue until the debt is satisfied. He may bring an action of debt upon the bond, or he may put himself in possession of the rents and profits by ejectment, or he may foreclose the equity of redemption and sell the land to satisfy the debt. If there be no bond accompanying the mortgage or covenant in the mortgage (since none is implied), the remedy of the creditor is confined to the land. If real and personal property are included in the same mortgage, the personal property must be sold first to satisfy the debt.

The statutes of this State[1] have modified and improved the common law modes of proceeding to enforce a mortgage. If the mortgagee sue upon his bond or covenant, all other proceedings must be suspended, if judgment be obtained, the mortgagee cannot file a bill of foreclosure until he has exhausted his remedy against the property of the defendant in the judgment by the return of the execution unsatisfied, and shows that the defendant has no other than the mortgaged premises whereof to satisfy the judgment. If the mortgage be foreclosed by action, it is attended with this advantage, that if the proceeds arising from the sale are insufficient to pay the mortgaged debt, the court has the power to issue execution immediately against the mortgagor for the balance. And if the mortgage debt be secured by the obligation of any other person than the mortgagor, he may be made a party to the action, and execution issue against him in the same manner as against the mortgagor.

If the mortgage contain a power of sale, and it appear that default in some condition of such mortgage shall have occured, by which the power of sale became operative, and that no action at law (or suit in equity) has been instituted, or that if such action (or suit) has been commenced, that the same has been discontinued, or that if a judgment has been obtained, that execution has been returned unsatisfied, and that such power of sale has been duly registered or recorded, then the mortgagee may have the premises sold by advertisement. The statute is special and particular in its provisions, and like all statutory authority, must be strictly pursued.

[1] New York.