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## A Trust Receipt Transaction: I

### Cover Page Footnote

Associate Professor of Law, Fordham University, School of Law. This article is limited to the common law phases of the trust receipt transaction. A subsequent installment will consider the pertinent provisions of the Uniform Trust Receipts Act.

# A TRUST RECEIPT TRANSACTION: I

GEORGE W. BACON†

THE principal activity in our industrial civilization is the production, processing, selling and consuming of goods. Economists of every school from red to black will concede, I presume, that the more rapidly and smoothly goods flow from producer to consumer the better for all concerned. So, too, lawyers of every school of legal philosophy from the neo-scholastic to the ultra-functionalist will probably admit that the social interest demands as little obstruction as possible to this journey.<sup>1</sup> In its humble way, the trust receipt transaction assists the uninterrupted transit of goods in trade from those who have a surplus to those who have need.

The trust receipt transaction is a device for furnishing security when goods are sold and delivered but payment is deferred. Were the distribution of goods from producer to consumer to depend upon cash transactions trade would soon become stagnant. The fact that trade in goods between producers, processors and distributors is almost wholly carried on credit or on some form of secured deferred payment, is well known and is one of the phenomena of this machine age. Indeed credit is also employed to an increasingly important extent in the last stage of the journey in which the goods pass from the hands of the retailer to those of the consumer. It is not the intention to consider in this article, however, the methods devised to secure deferred payment arrangements in retail sales. The discussion will rather center upon a transaction that often takes place in earlier stages of the journey from producer to consumer.<sup>2</sup>

## *The Business Problem*

Let us suppose that a tanner of leather desires to import a quantity of hides from Argentina. He is honest and his business is solvent but much of his capital is in stock, plant and machinery. His liquid funds are needed for payroll, taxes and other items of overhead. It may be

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† Associate Professor of Law, Fordham University, School of Law. This article is limited to the common law phases of the trust receipt transaction. A subsequent instalment will consider the pertinent provisions of the Uniform Trust Receipts Act.

1. It is pleasant to think that economists and lawyers will agree on something.
2. Trust receipt transactions are not used solely in the mercantile field. Stock brokers who have placed collateral with banks as security for loans frequently take out such collateral against trust receipts under an agreement to return securities of equivalent value at the end of the same day. When central banks such as the Federal Reserve discount the notes of other banks the notes may be secured by commercial paper as collateral. As this commercial paper matures it may be returned to the customer bank for collection against a trust receipt. It is not proposed to discuss such transactions in this paper.

the "off-season" during which he plans to fill out his stock for the active selling season ahead. Whatever the reasons may be our man requires the means to buy goods without putting up cash until later. He also needs to obtain immediate possession for the purpose of processing the goods with a view to passing them along the stream of trade when his work is done. If all goes well, as it probably will, the hides will be tanned and sold to a wholesaler, realizing enough to pay their cost and the cost of the tanning together with a small profit besides. Then, but not until then, can he expect with confidence to have cash in hand with which to pay the price of the hides.

There is also a jobber in the Argentine who has a stock of hides which he desires to sell. But he needs to sell for cash so that he may continue his operations among the cattle raisers of the Pampas.<sup>3</sup> How get these two together—the one who would buy on credit, the one who would sell for cash? It is evident that there is wanted a plan whereby (1) the seller can have cash for his goods as soon as he makes delivery (which he is ready to do at once), and whereby (2) the buyer may take possession so that he can process and sell the goods, (3) making payment from the proceeds of such sale. Payment is to be postponed and security is to be desired. What methods of carrying the sale of goods on credit or upon secured deferred payment lie at hand?

### *Credit and Other Deferred Payment Arrangements*

Credit in its simplest form is found when the goods are shipped to the buyer and an invoice-bill is forwarded by mail. The arrangement is similar to the familiar "charge account" in the retail trade. In both instances the only security on which the seller relies for the purchase money is the personal responsibility of the buyer. But this form of credit, though important, is not enough to satisfy business needs. Most men are honest and will pay their bills if they can but not all of them conduct their affairs efficiently nor does good fortune smile upon all those who do. Personal responsibility is a risky form of security, so ill-regarded that the word "security" is not commercially or legally used in such a connection; it is said that in such circumstances the creditor is "unsecured."

Devices to furnish the seller with a better class of security than the personal responsibility of the buyer have been developed since early times. Guaranty by responsible third persons might be offered but here

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3. "... shippers are constantly receiving commodities from farmers which they would not be able to buy if their capital were tied up in commodities on their way to market or held in storage awaiting shipment. In other words, some method of financing shippers is necessary if they are to continue to do business day in and day out." WELD, *THE MARKETING OF FARM PRODUCTS* (1916) 55.

again it is merely personal responsibility.<sup>4</sup> Pledges of collateral might be utilized but the use of such a form of purchase-money security in the sale of goods seems to be rare.<sup>5</sup> The most convenient and satisfactory form of security appears to be afforded by the very goods which are the subject matter of the sale.<sup>6</sup> The use of the goods themselves as security may be based upon the reservation in the seller of their possession (or control over their possession), or upon the reservation of a property interest, usually called the "title."<sup>7</sup>

### *Security Based on Possession*

Security depending upon the possession includes the unpaid seller's lien,<sup>8</sup> its extension in the doctrine of stoppage *in transitu*,<sup>9</sup> the "C.O.D." shipment<sup>10</sup> and shipment under a negotiable bill of lading to the order of the buyer which is retained by the seller.<sup>11</sup> Reserving possession under his lien may seem to be a satisfactory plan of security from the standpoint of a seller—except for this:—he may not get the purchase money promptly, may never get it from the buyer who turns out to be unable to pay when the time comes for payment. Then too, although payment is made eventually, there will be the cost of handling and storage in the interim between the time when delivery could have been made and the time when it actually is made. If the goods are destroyed while

4. This may take the form of a mere contract of guaranty or suretyship, or the assurer may give or endorse a negotiable note or draft payable to the seller. Besides the fact that personal responsibility is the only security there is the disadvantage that the credit standing of two persons must be investigated.

5. The collateral might, of course, be either paper collateral like stocks, bonds, etc., or collateral in the form of goods, other than those which are the subject matter of the sale, pledged or mortgaged to the seller. The chief disadvantage here is probably that buyers do not usually have collateral to offer, or if they do have such assets they need them for ready conversion into cash with which to meet sudden emergencies.

6. "For ultimate security, looking to a thing is generally ranked as superior to looking to a person." Isaacs, *The Economic Advantages and Disadvantages of the Various Methods of Selling Goods on Credit* (1923) 8 CORN. L. Q. 199, 204.

7. The seller may also reserve both the possession and the title. But then no question of security is properly involved. The transaction will be a "contract to sell", not a "sale". Both parties will have acquired and assumed only simple contract obligations, rights and duties. A contract to sell, may, however, ripen into a sale at which time the security problem may arise.

8. U. S. A. §§ 53 (1) (a), 54-56, N. Y. PERS. PROP. LAW (1911) §§ 134 (1) (a), 135-137. Throughout the footnotes of this article the following abbreviations will be used for the various uniform acts: U. S. A. for the Sales Act; U. C. S. A. for the Conditional Sales Act; U. T. R. A. for the Trusts Receipts Act; U. B. L. A. for the Bills of Lading Act; U. W. R. A. for the Warehouse Receipts Act; U. N. I. A. for the Negotiable Instruments Act.

9. U. S. A. §§ 53 (1) (b), 57-59, N. Y. PERS. PROP. LAW (1911) §§ 134 (1) (b), 138-140.

10. U. S. A. § 19, Rule 4 (2), N. Y. PERS. PROP. LAW (1911) § 100, Rule 4 (2).

11. U. S. A. § 20 (1), (3), N. Y. PERS. PROP. LAW (1911) § 101 (1), (3).

in his possession controversy may, and probably will, arise as to whether or not the title and risk of loss really had passed to the buyer, to be followed by expensive litigation. All such expenses must be added to the price of these or other goods. Most important of all, the goods are removed for a shorter or longer time from the stream of useful trade. The seller, having sold them, must not use them; the buyer, having bought them, cannot use them.<sup>12</sup>

The right to stop the goods in transit is closely limited and affords at best only a temporary security. As soon as the transit is ended or broken the security is lost.<sup>13</sup> Shipment under terms "collect on delivery" or equivalent terms, sufficiently protects the seller but is not suited to the needs of a buyer who wants immediate possession of the goods for processing and further trade and who wishes to pay for them out of the proceeds thereof. Receipt of the purchase money is also postponed for the time, which may be short or long, during which the goods are traveling. Shipment under a negotiable bill of lading to the buyer's order, the bill being forwarded by the seller through banks with a draft attached for collection, actually operates in much the same way as a "C.O.D." shipment and is open to the same practical objections.<sup>14</sup>

### *Security Based Upon "Title"*

Turning now to the methods of obtaining security based upon the reservation of a property interest in the goods we find the familiar "conditional sale," together with the plan of shipment under a negotiable bill of lading to the order of the seller. To these may be added the so-called "consignment for sale."<sup>15</sup> The conditional sale is suitable for the retail trade but is hardly feasible in a wholesale transaction which is expected to lead to further processing and to resale, especially when the seller and buyer are located at a distance from each other. In this case also payment of the purchase price is postponed, a disadvantage which

12. ". . . the actual interference with the possession or use of goods so as to withdraw them from the social stock while they are serving as security involves a very considerable social cost." Isaacs, *loc. cit. supra* note 6, at 209.

13. U. S. A. §§ 57, 58, N. Y. PERS. PROP. LAW (1911) §§ 138, 139. Nice questions arise as to whether or not the transit is ended or broken, leading again to litigation.

14. If a time draft is used, the security of the goods is lost as soon as the draft is accepted, for the bank is then bound to surrender the bill of lading to the buyer. U. B. L. A. § 41, N. Y. PERS. PROP. LAW (1911) § 227; 1 WILLISTON, SALES (2d ed. 1924) § 290. Thereafter the security is reduced to dependence on the personal responsibility of the buyer and his endorsers, if any.

15. A chattel mortgage is also possible but uncommon. The seller might transfer the title and immediately take back a chattel mortgage. The filing and foreclosure provisions of the chattel mortgage recording acts are about the same and about as burdensome as similar provisions under the conditional sales recording acts. Note 16, *infra*. Finally the goods might be deposited in escrow with some third person pending payment but such a plan verges on the fantastic.

the seller in our assumed situation desires to avoid. Furthermore the recording, reclaiming and resale provisions of the conditional sale recording acts are usually so burdensome as to necessitate adding material charges to the price.<sup>16</sup> Shipment under the negotiable bill of lading to the seller's order while technically different<sup>17</sup> from shipment under one to the buyer's order, the bill being retained by the seller, has the same practical objections.

The consignment for sale is not infrequently used in transactions between wholesalers and retailers. The true consignment is a bailment.<sup>18</sup> Although title is retained as in the conditional sale and possession delivered, the consignee is not bound to pay the price at all events; payment of the purchase money is postponed; and in the absence of negligence by the consignee, the risk of loss is in the consignor. The transaction is free from the burdens of the recording acts but has the two vital objections that the risk remains with the consignor and that immediate payment is not forthcoming. It clearly is not suited to the needs of the New York tanner and his Argentine dealer.<sup>19</sup>

### *A Trust Receipt Transaction*

None of the several methods which have been briefly reviewed will fulfill the three requirements above set out, *viz.*, immediate collection of the purchase price by the seller, right to take immediate possession by the buyer, and deferred payment by the buyer to be made out of funds acquired by further trade in the goods. There remains the trust receipt transaction, ideally planned to get over all the objections inherent in the other schemes. This calls for the intervention of the much maligned bankers, who it will be observed, do, after all, serve a useful social purpose.<sup>20</sup>

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16. Uniform Conditional Sales Act, *in toto* (in effect with certain divergent provisions in Alaska, Arizona, Delaware, New Jersey, New York, Pennsylvania, South Dakota, West Virginia, and Wisconsin. Acts similar in character have been adopted in other states).

17. U. S. A. § 20 (1), (2), N. Y. PERS. PROP. LAW (1911) § 101 (1), (2). The technical difference is that the seller reserves "the property", *i.e.*, a "security title" as well as reserving control over the possession.

18. If it is not a bailment then it is not truly a consignment for sale. *Harris v. Coe*, 71 Conn. 157, 41 Atl. 552 (1898). The drafting of the consignment contracts so ambiguously as to make it possible to "run with the hare or hold with the hounds," as interest may dictate, has been a fertile field for legal talent. But the courts have usually diagnosed the real intent of such instruments without difficulty. See *D. M. Ferry & Co. v. Hall*, 188 Ala. 178, 66 So. 104 (1914), L. R. A. 1918B 620. The same sort of skill has been employed in attempts to avoid the provisions of conditional sales acts. *Central Union Gas Co. v. Browning*, 210 N. Y. 10, 103 N. E. 822 (1913).

19. See further, Isaacs, *loc. cit. supra* note 6; McGill, *The Legal Advantages and Disadvantages of the Various Methods of Selling Goods on Credit* (1923) § CORR. L. Q. 210; VOLD, SALES (1931) 341.

20. The financing company, rather than a bank, is frequently employed in the auto-

The business events of the orthodox trust receipt transaction may come about in this way:<sup>21</sup> the tanner states the situation to his New York bank which thereupon furnishes him with a letter of credit<sup>22</sup> in consideration of his promise to sign a trust receipt when the goods arrive and are surrendered to him. This letter of credit the tanner forwards to the dealer in the Argentine with an order for the hides. The dealer ships the hides and, as instructed by the letter of credit, takes from the carrier bills of lading consigning the goods to the order of the tanner's New York bank. The seller then draws a draft on the New York bank, discounts the draft at his own bank in the Argentine, hands to the bank the bills of lading, pockets the cash and goes his way rejoicing. The discounting bank forwards the draft and shipping documents to the New York bank which in turn reimburses the Argentine bank and it is well content. Meanwhile the hides are leisurely rolling up from Buenos Aires.

What is the legal situation at this point? The seller has divested himself of title, risk of loss and all the other incidents of ownership.

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mobile trade. The financing company does not usually advance the whole of the purchase price to the manufacturer, perhaps 70% to 85%. It does not usually advance the money until the cars reach the retail dealer's city.

21. The details may vary but will not affect the substance of the transaction.

22. The form of a letter of credit is set out in *Moors v. Kidder*, 106 N. Y. 32, 33, 106 N. E. 818, 818 (1887), and in *Century Throwing Co. v. Muller*, 197 Fed. 252, 254 (C. C. A. 3d, 1912). Its essence is a promise to accept a draft to be drawn by the seller on condition that the bills of lading consign the goods to the order of the promisor. The letter in the *Century Throwing Company* case is as follows:

(*Vivanti Brothers* were the sellers; *Neuberger, Phillips Silk Co.* was the buyer; *Muller, Schall & Co.* the bankers).

"Messrs. Vivanti Bros., Yokohama.

Dear Sirs: We hereby open a credit in your favor for three thousand pounds Sterling for account of the *Neuberger, Phillips Silk Co.*, Paterson, New Jersey, to be used by your Drafts on Direction der Disconto Gesellschaft, London, at 4 or 6 months' sight for Invoice cost of Raw silk to New York. And we agree with yourselves as Drawers and with the Endorsers, and bona fide holders respectively of your drafts, that they will be duly accepted on presentation in London by Direction der Disconto Gesellschaft on receipt of due advice, provided they are drawn as aforesaid and accompanied by one Bill of Lading, insurance certificate and abstract of invoice (Original and Duplicate draft to be accompanied by one Bill of Lading and abstract of Invoice each). The other Bills of Lading are to be sent direct to Messrs. Muller, Schall & Co., New York, one of which with Consular Invoice by the Vessel carrying the goods. The bills of Lading have to be made out to the order of Muller, Schall & Co. The Marine Insurance on the shipments hereunder is cared for by the shippers. This Credit to be in force in Yokohama till June 1, 1910. Please fill up drafts as follows: 'Against Letter of Credit No. 6169. Dated New York, February 9, 1910.'

We are, Dear Sirs, Your obedient Servants,  
Muller, Schall & Co."

On the legal problems arising out of the obligations of the bank under the letter of credit, see Mead, *Documentary Letters of Credit* (1922) 22 COL. L. REV. 297 (with an appendix of forms); Finkelstein, *Performance of Conditions under a Letter of Credit* (1925) 25 COL. L. REV. 724; McCurdy, *Commercial Letters of Credit* (1922) 35 HARV. L. REV. 539, cont'd, *id.* at 715; McCurdy, *The Right of the Beneficiary under a Commercial Letter of Credit* (1924) 37 HARV. L. REV. 323; Llewellyn, *Some Advantages of Letters of Credit* (1929) 2 U. OF CHI. J. OF BUS. 1; FINKELSTEIN, *LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT* (1929); WARD, *AMERICAN COMMERCIAL CREDITS* (1922).



He has vested in the New York bank a security title; and has transferred to the tanner the risk of loss and perhaps other incidents of ownership. This is so under elementary principles of appropriation. It is a principle firmly embedded in the common law and in the Uniform Sales Act that the transfer of property interests in the sale of goods is founded upon *the intention of the parties involved in the sale*. This fundamental principle is of extreme importance in the transaction under discussion. It must never be lost sight of for a moment.

When the seller ships goods under bills of lading naming *the buyer* as consignee it has been held from early times that such action carries the implication that the seller's intention is to transfer the property to him.<sup>23</sup> It seems even more clear that when the seller at the request of the buyer and under the terms of the letter of credit ships goods under a bill of lading naming the New York bank as consignee that he indicates an intention to appropriate to the bank a property interest or "title" in the goods, if not earlier, then at the very latest when he discounts the draft and surrenders the shipping documents to the bank's correspondent in the Argentine. Both the assent of the buyer and that of the New York bank to such appropriation sufficiently appears in the terms of the letter of credit. The cases have quite uniformly held it to be so from the beginning of trust receipt litigation.<sup>24</sup> The writer has seen only one case in which the seller has sought to assert any rights over the goods at this stage of the transaction. In that case a seller attempted to regain possession of the goods after his buyer, being in financial difficulties, had rejected the shipment. The seller tendered the amount of its advances to the bank and demanded possession under the ingenious theory that he could assert an unpaid seller's lien and that the bank held possession merely as his agent. But his claim was denied.<sup>25</sup> At this point, there-

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23. 1 WILLISTON, SALES 634; VOLD, SALES (1931) § 104; U. S. A. §§ 18, 19, Rule 4 (2), N. Y. PERS. PROP. LAW (1911) §§ 99, 100, Rule 4 (2); cf. U. S. A. § 20 (4), N. Y. PERS. PROP. LAW (1911) § 101 (4); U. B. L. A. § 40; Robinson v. Pogue, 86 Ala. 257, 5 So. 685 (1889). But the implication is not conclusive. Wighton v. Bowley, 130 MASS. 252 (1881).

24. Farmers & Mechanics' Nat. Bank v. Logan, 74 N. Y. 568 (1878), and most of the cases cited hereafter. See also 1 WILLISTON, SALES § 286; VOLD, SALES (1931) § 112. Karl T. Frederick in his brilliant article *The Trust Receipt as Security* (1922) 22 COL. L. REV. 395, cont'd, *id.* at 546, traces the germ of the trust receipt doctrine back to a decision rendered by Judge Story in 1843 in Massachusetts, Fletcher v. Morey, Fed. Cas. No. 4,864 (C. C. Mass. 1843). Frederick and other writers, however, regard the Farmers Bank case above cited as probably the foundation case. LLEWELLYN, CASES AND MATERIALS ON SALES (1930) 763.

25. Centola v. Italian Discount & Trust Co., 135 Misc. 697, 238 N. Y. Supp. 245 (N. Y. City Ct. 1929). Nor are the goods subject to attachment by creditors of the seller. American Thresherman v. Citizens Bank of Anderson, 154 Wis. 366, 141 N. W. 210, 49 L. R. A. (N. S.) 644 (1913); Leinkauf Banking Co. v. Grell, 62 App. Div. 275, 70 N. Y. Supp. 1083 (1st Dep't 1901). Suppose, however, the New York bank refused to accept the draft. Could the Argentine bank claim any rights against the goods? If so, might not the seller pay off the Argentine bank and step into the latter's shoes?

fore, the seller has stepped out of the transaction so far as the ownership of the goods is concerned.<sup>26</sup>

### *The Bank's Interest*

It is stated above that the seller has appropriated to the New York bank a property interest in the goods. Just what label to attach to this interest has troubled the courts not a little. Indeed it seems the courts have, for the most part, rather studiously avoided defining this interest in terms of ownership and property.<sup>27</sup> This hesitancy may be due to the fact that the courts have taken a sympathetic view of the transaction from the start by recognizing its economic value<sup>28</sup> and have sought to avoid using terms which would compel them to declare it to be a conditional sale or a chattel mortgage, thus subjecting the bank to the law governing those transactions.

Sticklers for definition will look aghast at the trust receipt cases. Here are some of the contrasting, not to say conflicting, descriptions of the bank's interest: "absolute owner";<sup>29</sup> "not absolute owner" but "some kind or character of special property, claim, or lien . . . held only as security";<sup>30</sup> "ownership . . . conditional and not absolute";<sup>31</sup> "formal ownership";<sup>32</sup> "very likely . . . in the nature of a mortgage";<sup>33</sup> "owner

26. The seller, of course, remains liable to reimburse the discounting bank in the Argentine if the draft is not honored by the drawee New York bank. This liability is that of a drawer who becomes liable following non-acceptance by the drawee of a draft which has been discounted. But this does not affect the conclusion that he has parted with the property in the goods. U. N. I. A. § 61, N. Y. NEG. INST. LAW (1909) § 111.

27. One may not deride the courts for this when he recalls that the Reporters of the Restatement of the Law of Property of the American Law Institute have frankly stated that "the fact that the term 'property' has these various meanings makes it undesirable to attempt to frame a simple definition of the term . . ." RESTATEMENT, PROPERTY (Tent. Draft 1929) 9-10.

28. ". . . purposes so reasonable and productive of so good results." *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568, 579 (1878). "We can readily understand how the business of foreign importation by merchants, and especially by manufacturers, is facilitated and enlarged by making available to those of small means the credit of banking capital. The business of importation is thus extended, by not being confined to those concerns having large capital and established foreign credit." *Century Throwing Company v. Muller*, 197 Fed. 252, 258 (C. C. A. 3d, 1912). ". . . under which by a loan of credit a vast amount of business is rapidly and safely done." *In re Cattus*, 183 Fed. 733, 734 (C. C. A. 2d, 1910). Such statements are constantly met with in the cases.

29. *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 199, 100 N. E. 1025, 1026 (1913).

30. *Chase Nat. Bank v. Spokane County*, 125 Wash. 1, 215 Pac. 374, 377 (1923).

31. *W. T. Wilson Grain Co. v. Central Nat. Bank*, 139 S. W. 996, 999 (Tex. Civ. App. 1911) (bank discounting draft against bills of lading; although no trust receipt is involved in such cases, the bank's position is exactly the same as when a trust receipt is anticipated).

32. *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568, 583 (1878). In the same case it was said also that the buyer, though he "may have an interest in the property," is not the "general owner"; that the "property" vested in the bank (p. 582) but the transaction was not "intended to give permanent ownership" (p. 579) although the bank had "the legal title." (p. 579).

33. *Moors v. Kidder*, 106 N. Y. 32, 44, 12 N. E. 818, 821 (1887).

under a contract to sell and deliver" by which the bank "is bound to sell upon receipt of the purchase price";<sup>34</sup> (implying that it is different from an ordinary contract to sell and deliver). "Title" and "security title" are common labels affixed to the bank's interest in the goods.<sup>35</sup>

Whatever disagreement there may be in tagging the bank's property interest there is unanimity in holding that the bank has some kind of right of property in the goods for the purpose of security. The term "security title" seems to be as useful as any and is gradually acquiring a meaning in terms of the resulting rights, powers and obligations—a meaning which may at some future time permit of a precise definition. The right under a "security title" is at least a right against the goods as distinguished from a right against the person—a right to be enforced in property actions like trover and replevin as distinguished from a right to be enforced in a contract action for damages.

As between the New York bank and the tanner the former has a right against the goods until the transaction is closed by payment of its advances. Should the tanner repudiate his agreement to give a trust receipt when the goods arrive or should he then be insolvent it can hardly be doubted that the bank might dispose of the goods without further ado. So also, should the buyer default after the goods are surrendered to him the bank may retake possession from the tanner.<sup>36</sup> Presumably the bank would have the same rights in case of a commingling by the buyer as in the ordinary commingling cases.<sup>37</sup> The bank may assert its interest over subsequent lienors.<sup>38</sup> The bank has such a title that it may

34. *Drexel v. Pease*, 133 N. Y. 129, 136, 30 N. E. 732, 734 (1892), stating further that the bank was "owner" only "so far as necessary to secure him for the advances he made."

35. *Moors v. Wyman*, 146 Mass. 60, 15 N. E. 104 (1888). See cases cited in notes 29, 37, 38, 78, 80, 91. Cf. U. T. R. A. § 1 (11), N. Y. PERS. PROP. LAW (1934) § 51 (11).

36. As between the bank and the buyer this conclusion cannot be doubted. The rights of the buyer's creditors and of innocent purchasers will be considered hereafter. See p. 43, *infra*.

37. In *Peoples' Nat. Bank v. Mulholland*, 228 Mass. 152, 117 N. E. 46 (1917) the bank was permitted to assert a lien upon an identified fund accruing from the sale of a commingled lot containing the goods surrendered. The receipt provided that it was the duty of the trustees to keep the goods "separate and capable of identification." Query: Would it have made any difference if it had not so provided? Frederick has considered this and related problems at length in *The Trust Receipt as Security II* (1922) 22 COL. L. REV. 546, 554-558.

In many instances it is contemplated that the goods in the process of manufacture will be physically annexed to other goods. What then? Should the bank be regarded as a tenant in common to the extent of its interest?

Or suppose the goods are joined with others in the process of manufacture, although such was not contemplated by the bank. Would the accession cases apply? Cf. *Silbury v. McCoon*, 3 N. Y. 379 (1850); *Wetherbee v. Green*, 22 Mich. 311 (1871); see further Frederick, *loc. cit. supra* at 558-60.

38. *Century Throwing Co. v. Muller*, 197 Fed. 252 (C. C. A. 3d, 1912); but that a lienor for labor expended on the goods would have a superior lien is indicated in the case cited. See also *The Chemical Nat. Bank v. New York Dock Co.*, 203 App. Div. 103, 196 N. Y. Supp. 414 (1st Dep't 1922), *aff'd*, 236 N. Y. 560, 142 N. E. 283 (1923); cf. U. T. R. A. § 11, N. Y. PERS. PROP. LAW (1934) § 58-c.

sue the carrier for misdelivery.<sup>39</sup> It also has the power to confer upon a third person an absolute, complete and unqualified ownership by endorsing to such person the bills of lading, or after retaking by making a sale to such person. The cases generally agree, therefore, that the bank has a property interest in the goods which it may assert against the buyer and even against third parties,<sup>40</sup> whatever the interest may be called.

### *The Buyer's Interest*

It having been established that the bank has a security title in the goods a pertinent question promptly presents itself:—Has the buyer any interest in the goods? The buyer's interests have been considered only obliquely in the cases, which are chiefly concerned with controversies between the banks and third persons. Contests in which the buyer seeks to take the goods from the bank appear to be rare, but it should not be too hastily assumed from this that he has no right to do so under the proper circumstances. Lack of decided authority is probably due to the fact that banks act fairly and do not refuse to surrender the goods when they ought (for which another credit can be added to their score). The dearth of cases may also be due to a silent recognition by the banks that the buyer has, in law, interests in the goods which he may enforce.

It is stated above that the Argentine dealer has appropriated to the New York bank a property interest in the goods. But it also seems that he has, in addition, appropriated to the tanner some of the incidents of *ownership*. All hands agree, for example, that the risk of loss (a burden usually associated with ownership) is in the buyer.<sup>41</sup> This seems fair because the whole arrangement has been initiated for his benefit.<sup>42</sup> It may be, however, that the fact that the risk of loss is on the tanner

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39. *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727 (1887); *Forbes v. Boston & Lowell R. Co.*, 133 Mass. 154 (1882); *First Nat. Bank v. Shaw*, 61 N. Y. 283 (1874). If the tanner sells the goods to a sub-buyer, the bank can recover the proceeds of the sale from the sub-buyer, if the latter has not paid the tanner. *Thayer v. Dwight*, 114 U. S. 254 (1870); *Dows v. Kidder*, 84 N. Y. 121 (1881); *cf. Brown Bros. & Co. v. William Clark Co.*, 22 R. I. 36, 46 Atl. 239 (1900).

40. The claims of sub-purchasers from the buyer and of bankruptcy creditors will be considered hereafter. See p. 43 *et seq. infra*.

41. *Matter of McElheny*, 91 App. Div. 131, 86 N. Y. Supp. 326 (1st Dep't 1904). Dicta are common beginning with *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568 (1878).

42. The analogous rule under conditional sales and in cases in which the seller ships the goods under a "security bill of lading" will occur to the reader. U. C. S. A. § 27, N. Y. PERS. PROP. LAW (1922) § 80-g; U. S. A. § 22, N. Y. PERS. PROP. LAW (1919) § 103. See further Williston's exposition of the reasons why the risk of loss in security title cases should be on the buyer. 1 WILLISTON, SALES §§ 303-309. See *Standard Casing Co. v. California Casing Co.*, 233 N. Y. 413, 135 N. E. 834 (1922); *Glanzer v. J. K. Armsby Co.*, 100 Misc. 476, 165 N. Y. Supp. 1006 (Sup. Ct. 1917).

does not go to prove that he is a part-owner, for the risk may be separated from the ownership by agreement. The risk of loss is a burden, not a right. We now propose to urge that the tanner has rights against the bank which are based upon something more than contract.

Suppose the market should take a sudden jump and the New York bank should decide to sell the goods for its own account, although the buyer is ready to reimburse the bank or to sign the trust receipt when the goods reach New York. That the bank has the power to sell the goods and to convey an absolute and unqualified ownership to an innocent purchaser is clear, since it is in possession of valid bills of lading made out to its order.<sup>43</sup> If it did sell would the bank be liable only in contract? In the case of *Forty Sacks of Wool*, Lowell, C. J., remarked, *obiter*: "No doubt the buyer has an equitable title. If the bankers, for example, had sold the goods and indorsed the bill of lading to a stranger [the buyer], might have recovered of them whatever the goods were worth above the original cost."<sup>44</sup>

If the buyer has an "equitable title" then equitable remedies ought to be available. Judge Lowell's statement seems to mean that the tanner would have the right to demand an accounting in the case we have just supposed. If it is an accounting based upon equitable rights then it must be analogous to the right of the beneficiary of a constructive trust to have an accounting from his trustee. The old common law action of account was, of course, a legal action. It lay against a bailiff who had collected rents for the account of the lord of the manor and against servants who had sold goods of the master at his direction.<sup>45</sup> In such cases the claim of the plaintiff was not based upon an equitable title to the rents or proceeds of the sale. It was, however, based upon a fiduciary relationship rather than a contract relationship and it bears a strong resemblance to the equitable remedy of accounting. Startling as it may seem, we submit that a fiduciary relationship at this stage of the transaction—the goods are still at sea—exists between the New York bank and the tanner and that the benefit runs in favor of the latter. In the next stage, after the goods are surrendered to the tanner, the fiduciary duties run the other way, in favor of the bank.

If the New York bank has the title, as it does, it is a title held by it for its own protection and *at the same time for the ultimate benefit of the tanner*. The bank has not bought the goods to trade in them for a profit;<sup>46</sup> it does not propose to consume them or to use them in any way

43. U. S. A. §§ 32, 33, 38, N. Y. PERS. PROP. LAW (1935) §§ 113, 119, (1911) § 114; U. B. L. A. §§ 31, 32, 37-38, N. Y. PERS. PROP. LAW (1911) §§ 217, 218, 224-225.

44. 14 Fed. 643, 645 (C. C. Mass. 1882).

45. See 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1927) 426-427.

46. The bank would act *ultra vires* if it went into the business of selling goods for a profit.

For the proposition that the bank is not a buyer and seller of the goods see *In re Bett-*

whatsoever. It has merely taken title as a security pending expected reimbursement from the tanner. At the very beginning of the transaction the intention of all three parties is that the bank is to acquire the title from the seller for ultimate transfer to the buyer.<sup>47</sup> Has not the seller, therefore, deposited the title with the bank "in trust" for the buyer?<sup>48</sup> Why should it be so startling then to say that the buyer has an equitable title—that there exists a constructive trust? If the bank wrongfully disposes of the goods to the prejudice of the buyer it seems probable that it would be called upon to account to the tanner for any surplus received above the cost represented by the draft which the bank has paid.<sup>49</sup>

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man-Johnson Co., 250 Fed. 657, 662 (C. C. A. 6th, 1918). The bank makes no profit out of the transaction. It merely charges a modest commission for services rendered. See heading *It Is Not a Conditional Sale*, p. 36, *infra*.

That the bank is not a seller of the goods appears from the cases holding that it is not responsible to the buyer for the character or qualities of the goods. The buyer would have no rights against it for breach of either express warranties made by the seller nor for breach of implied warranties imposed by law. *Benecke v. Haebler*, 38 App. Div. 344, 58 N. Y. Supp. 16 (1st Dep't 1899), *aff'd*, 166 N. Y. 631, 60 N. E. 1107 (1901); *cf.* *Laudisi v. American Ex. Nat. Bank*, 239 N. Y. 234, 146 N. E. 347 (1924); *International Banking Corp. v. Irving Nat. Bank*, 274 Fed. 122, 125 (S. D. N. Y. 1921).

Nor is the bank liable if the seller upon a fraudulent bill of lading procures the buyer to pay a draft which is collected by a bank. The bank by discounting a draft with a bill of lading attached does not "become substituted for the vendor to such an extent that he assumes the obligations of his contract with the vendee." *Blaisdell, Jr. Co. v. Citizens' Nat. Bank*, 96 Tex. 626, 75 S. W. 292, 295 (1903), treating the transfer by the seller to the bank as an assignment. An assignee, as such, does not assume the obligations of the assignor. But *cf.* *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679 (1900); *Moors v. Bird*, 190 Mass. 400, 77 N. E. 643 (1906). The last two cases cited seem doubtful on principle. The bank is, however, obliged to honor the letter of credit by paying the draft even though the goods are defective. *O'Meara Co. v. National Park Bank*, 239 N. Y. 386, 146 N. E. 636, 39 A. L. R. 747 (1924). As between the bank and the buyer the transaction is not a joint adventure. *Irby v. Cage, Drew & Co., Ltd.*, 121 La. 615, 46 So. 670 (1908) *semble*.

47. *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568 (1878).

48. "It 'held the title in trust for [the buyer] after its own claim was satisfied.'" *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568, 583 (1878), quoting from *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283, 292 (1874).

49. "If [the bank] retakes the goods, and sells them for an amount in excess of the sum [due the bank] this excess belongs to the buyer or importer." *In re James, Inc.*, 30 F. (2d) 555 (C. C. A. 2d, 1929). See *Irby v. Cage, Drew & Co., Ltd.*, 121 La. 615, 46 So. 670, 671 (1908). Under the Uniform Conditional Sales Act § 21 [N. Y. PERS. PROP. LAW (1922) § 80-a] the seller may be obliged to account for the surplus remaining above the balance due from the buyer plus expenses after a retaking. *Cf.* N. Y. LIEN LAW (1909) § 204; *Davenport v. McChesney*, 86 N. Y. 242 (1881) (chattel mortgage).

But no such rule prevails when an unpaid seller resells under his lien, although the buyer indisputably has the title. *D'Aprile v. Turner-Looker Co.*, 239 N. Y. 427, 147 N. E. 15, 38 A. L. R. 1426 (1925). *Cardozo, J.*, in this case remarks: "Exemption from the duty to account for the excess is a curious anomaly in the statutory scheme." 239 N. Y. 427, 431, 147 N. E. 15, 16.

Under the Uniform Trust Receipts Act all doubts of the buyer's right to a surplus are cleared up. U. T. R. A. § 6 (3) (c), N. Y. PERS. PROP. LAW (1934) § 56 (3) (c).

Suppose now, that when the goods arrive, the tanner, being unexpectedly in funds, tenders reimbursement to the bank, which tender is refused. Would the remedy of specific performance be available? We hear a chorus of "Noes." True, the goods are not unique chattels, nevertheless equity has taken jurisdiction in more than one case when the chattels were not unique but when a fiduciary relation subsisted between the parties or when damages at law would not have been adequate.<sup>50</sup> Furthermore, the likeness of the chattel mortgage with its right of redemption in the mortgagor, which is now a legal right but one which originated in equity, cannot be ignored. The courts have rather carefully avoided reference to this likeness as they have not wished to bring the trust receipt transaction within the chattel mortgage recording acts.<sup>51</sup> Nevertheless the resemblance of the trust receipt transaction to the chattel mortgage is as that of one twin brother to the other. But to say that John looks exactly like James is not necessarily to say that John *is* James. The functionalists, and the courts have been functionalists when dealing with the trust receipt transaction, say that the relationship is

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50. In *Wood v. Rowcliff*, an English case, it was said: "The cases which have been referred to [cases involving unique chattels] are not the only class of cases in which this Court will entertain a suit for delivery up of specific chattels. For where a *fiduciary relation* subsists between the parties, whether it be the case of an agent or a trustee, or a broker, or whether the subject matter be stock, or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale by either party entrusted with the goods, or by a person claiming under him, through an alleged abuse of power." (italics inserted). 2, Ph. 382, 383, 41 Eng. Reprints 990, 991 (Ch. 1847). Cf. *Marvin v. Brooks*, 94 N. Y. 71 (1883); *Young v. Mercantile Trust Co.*, 140 Fed. 61, 63 (C. C. S. D. N. Y. 1905). That a fiduciary relationship exists between the bank and the buyer is urged above and that a refusal to surrender the goods after a tender of performance would be an abuse of the power given to the bank to use the title for its own protection seems clear. In this connection consider the old phrase that was used in the like case when the seller for like protection took a bill of lading in his own name when otherwise the title would have passed to the buyer, *i.e.*, the *jus disponendi*—power of disposal. Vold, in his interesting discussion of the seller's relation to the goods, suggests that the old phrase is to be preferred to the "reserves the property" used in the Uniform Sales Act, § 20 (2). VOLD, SALES (1931) 326 *et seq.* The phrase was used in the basic trust receipt case, *Farmers & Mechanics' Nat Bank v. Logan*, 74 N. Y. 568 (1878) and in *Moors v. Kidder*, 106 N. Y. 32 (1887). It meant that the seller had the power to dispose of the goods in case of the buyer's default, *i.e.*, a limited power. Compare, however, *Wait v. Baker*, 2 Ex. 1, 154 Eng. Reprints 380 (1848). But see *Mirabita v. Imperial Ottoman Bank*, L. R. 3 Ex. Div. 164 (1878), in which *Wait v. Baker* is explained.

*Damages not adequate remedy:* Even though the goods are not unique and may be procured in the market, if they can only be procured at a great distance or after long delay, specific performance has been granted. *Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co.*, 63 Md. 285 (1884); *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563 (1891). See further U. S. A. § 68, N. Y. PERS. PROP. LAW (1911) § 149 and Williston's comments thereon, 2 WILLISTON, SALES § 601 *et seq.*

51. But see *Moors v. Kidder*, 106 N. Y. 32, 44, 12 N. E. 818, 821 (1887): "very likely in the nature of a mortgage."

not a chattel mortgage relationship. Perhaps that is true, but it may be, nevertheless, a twin relationship, and it is.<sup>52</sup>

But no more of these heretical arguments proposing equitable remedies for the benefit of the tanner if the New York bank is recalcitrant. The above may be regarded as *discursus* for there is reason to believe the tanner has legal interests in the goods, enforceable in legal actions.

### *Divided Property Interests*

It is frequently, but not always clearly, indicated in the trust receipt cases that the bank's security title is not an absolute and unqualified ownership but that property interests also reside in the buyer. Professor Williston says: "The root of the difficulty is the failure to grasp the idea that more than one person can have a property right in the same goods. . . . It is too often apparently taken for granted that one party or the other must have title, and that the other can have only a contract right. . . ."<sup>53</sup>

That the seller has appropriated a property interest to the buyer as well as a security title to the bank is an inference to be drawn from such expressions as these: "not intended to give [the bank] the permanent ownership," the buyer "may have an interest in the property";<sup>54</sup> the bank is "not absolute owner";<sup>55</sup> "entire beneficial ownership [is] in the buyer,"<sup>56</sup> "residue of ownership" in the importer;<sup>57</sup> the buyer "was at liberty to meet its financial obligation to plaintiff at any time, and whenever it did so, the title to the goods was to pass absolutely to it. *This, it is true, is not expressed in the contract, but it necessarily follows that when the defendant [buyer] satisfied its indebtedness to the plaintiffs [bankers], they retained no vestige of claim to the goods or any part of them, in whatever form existing.*"<sup>58</sup> Such expressions very clearly indicate that the property interests in the goods are divided between the bank and the buyer, although it must be admitted they

52. How the courts have avoided declaring the relationship to be that of chattel mortgage and mortgagor will be considered at p. 39, *infra*.

53. 1 WILLISTON, SALES § 286b. See further, *id.* §§ 284, 286-287 *inc.* See also the brilliant analysis in VOLD, SALES (1931) §§ 105, 112; see note 70, *infra*. To the persuasive arguments of these great writers the writer owes the convictions he is about to express.

54. See *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568, 579, 581 (1878).

55. *Chase Nat. Bank v. Spokane County*, 125 Wash. 1, 215 Pac. 374, 377 (1923). But see *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 100 N. E. 1025 (1913), which says the bank is the "absolute owner."

56. *Centola v. Italian Discount & Trust Co.*, 135 Misc. 697, 704, 238 N. Y. Supp. 245, 252 (N. Y. City Ct. 1929).

57. *In re Richeimer*, 221 Fed. 16, 22 (C. C. A. 7th, 1915).

58. (*italics supplied*). *In re Bettman-Johnson Co.*, 250 Fed. 657, 663 (C. C. A. 6th, 1918). The importer "has a certain interest as yet indefinite in the property." *In re James, Inc.*, 30 F. (2d) 555, 557 (C. C. A. 2d, 1929). See *Mershon v. Wheeler*, 76 Wis. 502, 45 N. W. 95, 96 (1890).



are *obiter*. In at least one case, however, it was held the buyer had such a property as was subject to taxation.<sup>59</sup> The writer has found no other cases in which the point was actually decided. Neither has he found any in which it was held that the buyer did not have any property right which could be enforced against the bank.

The like cases in which a seller ships goods under a bill of lading<sup>60</sup> with the like purpose of security are indistinguishable in principle from the cases in which the bank pays or discounts a draft against the security of the goods represented by a bill of lading.<sup>61</sup> In an English case it was held that upon tender of the price the property in the goods vested in the buyer, although the tender was refused.<sup>62</sup> There seems to be little authority in American case law on this point but *dicta* are not uncommon.<sup>63</sup> If the property vests in the buyer upon a tender of the amount advanced by the bank then it inescapably follows that the buyer may sue in a property action such as replevin or trover, keeping his tender good.<sup>64</sup> If the buyer has a property interest in the goods a further consequence is that he may sell or assign it to others who

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59. Chase Nat. Bank v. Spokane County, 125 Wash. 1, 215 Pac. 374 (1923).

60. A "security bill of lading" is one by which the seller reserves "the property in the goods" under the provisions of U. S. A. § 20 (1), (2), N. Y. PERS. PROP. LAW (1911) § 101 (1), (2). It is a case in which but for the form of the bill title would have passed to the buyer.

61. At this stage of the transaction it will not matter whether the seller drew on the buyer, the bank discounting the draft with the expectation that the buyer would honor it immediately upon presentation, or whether the seller drew on the bank under a letter of credit. The legal position of the bank is exactly the same in either case.

62. Mirabita v. Imperial Ottoman Bank, L. R. 3 Ex. Div. 164 (1878).

63. See Walters v. Western & A. R. Co., 63 Fed. 391, 392 (C. C. N. D. Ga. 1894), *aff'd*, 66 Fed. 862 (C. C. A. 5th, 1894). To the effect that the bank acquires a special property in the goods which is subject to be divested upon payment of the draft, see American Nat. Bank v. Hendrickson, 123 Ala. 612, 26 So. 498, 499 (1899); Sather Banking Co. v. Hertwig, 23 Misc. 89, 90, 51 N. Y. Supp. 677, 678 (Sup. Ct. 1898); W. T. Wilson Grain Co. v. Central Nat. Bank, 139 S. W. 996, 999 (Tex. Civ. App. 1911). A very interesting case to the same effect is Rudin v. King-Richardson Co., 311 Ill. 513, 143 N. E. 198 (1924) in which it may not be dictum; it is not a clear cut case, however, as there seems to be some thought in the opinion that the title passed to the buyer in spite of the form of the bill of lading which consigned the goods to the seller. See also Banik v. Chicago, M. & St. P. Ry., 147 Minn. 175, 179 N. W. 899 (1920).

64. A bank might refuse to surrender the goods when they arrive upon the ground that the buyer had defaulted upon other and prior indebtedness. It would seem to follow from the above argument that it would have no right to do so if the buyer tendered payment of the advance on this transaction. If however, the parties enter into an agreement, when the trust receipt is signed and the goods are surrendered, that the banker may repossess the goods in case of default upon either the obligation arising out of this transaction or out of others, the case is different. Such provisions frequently appear. It has been held that in such a case the buyer is entitled to acquire the complete ownership only by complying with the stated condition that no indebtedness be outstanding. Sugarland Industries v. Old Colony Trust Co., 6 F. (2d) 203 (C. C. A. 5th, 1925), *cert. denied*, 269 U. S. 570 (1925). But *cf.* Drexel v. Pease, 133 N. Y. 129, 30 N. E. 732 (1892) in which it was held that the bank could not assert a general lien for other indebtedness over the

would acquire his right to divest the bank's title by tendering payment<sup>65</sup> and that his creditors may attach his interest after first paying off the bank. Such has been held to be the case under a conditional sale, a transaction which bears a striking similarity to the one under discussion.<sup>66</sup>

But the goods are about to arrive in New York so we pass on to the next stage. One day our leather tanner gets notice from the carrier that the hides are in port.<sup>67</sup> The sooner he gets them on shore the better, as demurrage charges are heavy.<sup>68</sup> But the carrier has authority under the bills of lading to deliver only to the New York bank or to its order. So the tanner goes to the bank and desires to have the bill of lading. The bank endorses it over to him but as he is not ready to pay the draft it takes back a trust receipt.

### *The Trust Receipt*

Trust receipts vary in their phrasing but in substance they contain: (1) an acknowledgement that the signer has received the bills of lading from the bank (hence "receipt"); (2) a statement of the purpose for which the goods are given into his possession; (3) a statement that the signer will hold the goods at his own expense "in trust" for the bank as its property until the goods are sold (hence "trust"); (4) a promise to take out insurance payable to the bank; (5) an undertaking that the signer will pay over to the bank the proceeds of any sale; (6) a declaration that the bank may cancel the trust and resume possession at any time in case of default.<sup>69</sup> The "purpose" clause may be limited to an

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proceeds of goods in which joint adventurers with the buyer had an interest, even though the trust receipt so provided, inasmuch as the joint adventurers were not parties to the agreement contained in the receipt. The case refers to the bank's relation to the goods as that of "owner under a contract to sell and deliver" but says the bank "is bound to sell upon receipt of the purchase price", implying that it is not like the ordinary contract to sell and deliver. The idea of divided property interests seems to be at the back of the court's mind.

The Uniform Trust Receipt Act, which will be discussed in a subsequent instalment, indicates that the bank may be a converter. § 6 (3) (c), N. Y. PERS. PROP. LAW (1934) § 56 (3) (c).

65. Cf. *Perkins v. Halpren*, 257 Pa. 402, 101 Atl. 741 (1917).

66. *Hervey v. Dimond*, 67 N. H. 342, 39 Atl. 331 (1893); cf. *H. G. Vogel Co. v. Wolff*, 156 App. Div. 584, 141 N. Y. Supp. 756 (1st Dep't 1913), *aff'd*, 209 N. Y. 568, 103 N. E. 1124 (1913).

67. The bill of lading will have contained a statement "to notify" the tanner and accordingly the carrier will notify him that the goods have arrived.

68. Demurrage is an allowance made to the owners of a vessel for detaining her in port longer than the specified time for unloading.

69. The form of the trust receipt used in *Century Throwing Co. v. Muller*, 197 Fed. 252, 254 (C. C. A. 3d, 1912) was as follows:

"Received from Messrs. Muller, Schall & Co. the merchandise specified in the Bill of

authority to make a sale to a named purchaser, or to store the goods and hand back warehouse receipts, or only to process, or to reship the goods and hand back the new bills of lading obtained. There is frequently a statement that the trustee may sell the goods, accounting for the proceeds to the bank. In any case, control over the possession of the goods is surrendered by endorsing the bills of lading to the tanner, or in blank, and delivering them to him.<sup>70</sup>

Lading per S.S. 'Inaba Maru' to N. Y. via Seattle.

F V

206/235

30 bales raw silk.

imported under the terms of their Letter of Credit No. 6169 issued for our account, together with Consular Invoice, Invoice and Insurance Policy; and in consideration thereof, we agree to hold the said merchandise, on storage, as the property of Messrs. Muller, Schall & Company, and subject to their order, with liberty to sell the same for cash, and in case of sale to pay over to them the proceeds as soon as received, to be held and applied by them against the acceptances of Direction der Disconto Gesellschaft, London, on our account under the terms of the said Letter of Credit and to the payment of any other liability or indebtedness of ours to Messrs. Muller, Schall & Company or to Direction der Disconto Gesellschaft, London, the intention being to protect and preserve unimpaired the title of the said Muller, Schall & Company to the said merchandise and the proceeds thereof. It is further agreed that the undersigned shall keep said merchandise insured against fire at its full value, loss, if any, payable to Messrs. Muller, Schall & Company, and that said Muller, Schall & Company shall not be chargeable with any storage, insurance premiums or other expenses incurred thereon, and that nothing in this Receipt contained shall impair or alter any of the provisions or obligations of the said Letter of Credit or of our agreement accepting the same.

"New York, 3/11/10.

"Neuberger-Phillips Co., by J. Neuberger, Pst."

70. Prof. Vold takes the position that while the buyer is in possession of the bill of lading and before he takes actual possession of the goods he may be said to have the *title*, in trust, however, for the bank to the extent of its advances and that the bank's interest at the moment is similar to an equitable lien or that of an equitable beneficiary of a trust. VOLD, SALES (1931) 348-349. This he calls the stage of technical trust. This position appears to be taken upon the ground that the acts of the parties belie the words of the trust receipt, which states the title to be in the bank, inasmuch as the buyer has the power through the negotiable bill of lading to cut off the bank's security by endorsing and delivering the bill to a *bona fide* purchaser for value. That the buyer, in possession of valid negotiable bills of lading indorsed to him, or in blank, has such a power cannot be denied. But we submit it does not follow that the title is in the buyer. The bank may be estopped to assert its title under the law relating to negotiable bills of lading, but as between the parties the agreement is that the title remains in the bank, in trust for the buyer. Suppose, too, the goods had been shipped under a straight bill of lading naming the bank as consignee and it endorses an order thereon to the carrier instructing it to deliver to the buyer. Or suppose a notice of the bank's interest is stamped upon a negotiable bill of lading. See p. 44, *infra*. In such cases the buyer's power to defeat the bank would be cut off. Is it to be said that there is then no stage of technical trust? The author referred to so concludes. VOLD, *op. cit. supra* at 364.

Prof. Vold further holds that when the buyer spends the negotiable bill of lading by obtaining possession of the goods from the carrier the title reverts to the bank in accordance with their agreement as evidenced by the trust receipt. VOLD, *op. cit. supra* at 350-351. This he calls the stage of limited agency. It seems to the writer that the cases hold the bank to be in possession of a security title throughout and that this is in conformity with the intention of all three parties to the transaction, seller, bank and buyer.

Furthermore it seems undesirable to use the term "limited agency" as it might lead one to the hasty conclusion that the buyer is only an agent, with no interest in the goods

If the buyer remains solvent and in due time reimburses the bank all will be sweetness and light.<sup>71</sup> But should the buyer become involved in bankruptcy proceedings, or should he violate the limited terms that may have been inserted in the trust receipt by selling and delivering the goods to innocent purchasers, ogres appear from all directions gibbering such sounds as "bailment," "pledge," "lien," "conditional sale," "chattel mortgage," "estoppel," "functional aspects" and "*stare decisis*." This bedlam arises from the attempt to fit, or to avoid fitting a transaction with a "purpose so reasonable and productive of so good results"<sup>72</sup> with the vestments of transactions differently conceived and differently carried through. That we have among us a transaction with an individuality of its own, legally entitled to be so clothed has, however, been steadily gaining ground for more than half a century in the common law. At long last it has been completely tailored by the Commissioners on Uniform State Laws in the Uniform Trust Receipts Act.<sup>73</sup> It is rather interesting to note that the legislature of the state of New York was the first to adopt the Act and that the Court of Appeals of that same state laid the basis for it in a decision announced fifty-seven years ago. This was the case of *Farmers & Mechanics' Nat. Bank v. Logan*,<sup>74</sup> which has been cited so frequently in the notes. The principal question in that case was whether or not the transaction constituted a pledge.

### *It Is Not a Pledge*

The *Farmers Bank Case* involved, not an importing transaction, but a domestic shipment of wheat from upstate New York to the City. No formal "trust receipt" was signed at all. But the transaction took the same course as the one assumed in this paper. The bank turned over to the buyer the bill of lading with a notice stamped upon it to the effect that the goods were "pledged" to the bank as security for the advance of the purchase money which it had paid to the seller and a statement that the wheat was put into the custody of the debtor "in trust" until its advances were paid. No express authority to sell was given. It may be that the object of giving the buyer control over the possession was merely to enable him to get the goods off the canal boat and into a warehouse. Nevertheless, he sold and delivered the goods to

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themselves, a conclusion that Prof. Vold would be the first to deny. See VOLD, *op. cit. supra* at 352-355. Also, if the title reverts to the bank it is more difficult to escape the conclusion that the transaction is, after all, a chattel mortgage. See heading *It Is Not a Chattel Mortgage*, p. 39, *infra*.

71. The bank will not, of course, object if the buyer reimburses it by funds acquired otherwise than by making a sale of goods.

72. *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568 (1878).

73. The terms of the Act will be discussed in a succeeding instalment.

74. 74 N. Y. 568 (1878); see also notes 24, 28, 32, 41, 47, 70.

a purchaser by a transaction on the Produce Exchange. The purchaser was found by the court to have had "constructive" notice of the bank's rights.<sup>75</sup> The bank sued the latter as a converter.

The defendant contended first, that the "trustee" was the owner; second, that the bank was only a lienor or a pledgee which had lost its lien by surrendering possession. Some suggestions also appear to have been made, but not pressed, that the bank was estopped. The court rejected all these contentions, declaring the title to be in the bank and gave judgment accordingly. The opinion is a masterly argument. The result seems hard on the defendant who had bought the wheat on the Produce Exchange relying upon possession in his vendor. But it is no harder than any case in which a person buys goods relying upon possession in his vendor only to later discover that they belong to someone else.

The court's holding that the bank, not the "trustee," was the owner, was made in spite of the fact that the parties used the word "pledged." Had it been a pledge the pledgee's lien would have been lost by the surrender of possession and could not have been subsequently asserted against the pledgor himself, much less against a purchaser from him.<sup>76</sup>

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75. See heading *Estoppel*, p. 47, *infra*.

76. *People's Nat. Bank v. Mulholland*, 224 Mass. 448, 113 N. E. 365 (1916) (construed transaction as bipartite). See heading *Bipartite Transaction is a Chattel Mortgage* p. 40, *infra*. But *cf.* same case on the second appeal when new facts were before the court: 228 Mass. 152, 117 N. E. 46 (1917); *In re James, Inc.*, 30 F. (2d) 555 (C. C. A. 2d, 1929); *Johanns v. Ficke*, 224 N. Y. 513, 121 N. E. 358 (1918). A lienor's interest may not be lost if the surrender is to the debtor for the purpose of making a sale as agent of the pledgee, the "agent" to account for the proceeds. *Kellogg v. Thompson*, 142 Mass. 76, 6 N. E. 860 (1886). This theory was probably not presented to the New York court which decided the *Farmers' Bank* case eight years earlier. Perhaps the intention of the parties in the latter case actually was that the buyer should sell the goods and reimburse the bank from the proceeds. But no authority to sell was expressed in terms. It is not straining credulity to infer it.

*In Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co.*, 239 U. S. 520 (1916), one X, being in possession of bills of lading covering goods that he owned, pledged the bills with the plaintiff bank and then withdrew them under a trust receipt which authorized X to warehouse the goods and to take out warehouse receipts in the "usual" form and required him to hand them to the bank. X took out negotiable receipts to his own order and pledged them with the defendant bank. It was assumed by the Court under the law of Louisiana, where the case arose, that a pledgee acquired title. The Court held that the Uniform Warehouse Receipts Act protected the second bank. §§ 40, 41, N. Y. GEN. BUS. LAW (1909) §§ 124, 125. What if X had sold or pledged the goods to an innocent purchaser or pledgee for value without exhibiting the warehouse receipts? On the principle of *Farmers & Mechanics' Nat. Bank v. Logan*, it would seem the bank could sue the innocent buyer or pledgee in conversion, assuming, as the court does, that the bank acquired title. This would be true only in case the trust receipt did not contain a power of sale. The receipt did contemplate a sale so the result would be correct in those jurisdictions which have a Factors' Act like the one in New York. N. Y. PERS. PROP. LAW (1915) § 43.

On an attempted creation or continuance of a pledge without delivery or retention of possession see U. T. R. A. § 3, N. Y. PERS. PROP. LAW (1934) § 53.

It is familiar learning that a pledgee has only a lien and that it is an encumbrance acquired from the owner. The pledgee does not become the owner; the debtor was the owner prior to the inception of the transaction and continues as the owner. As has been shown, the bank, in the transaction under discussion, took its interest from the seller in the Argentine, not from the tanner, and that it is the owner to the extent that it has a security title. In addition, prior to the inception of the transaction no sort of ownership existed in the tanner which he could have encumbered with a lien, although *by the transaction* he, as well as the bank, simultaneously acquired property interests. Thus the transaction is ruled out of the law of pledges and liens; so it was reasoned in the *Farmers Bank Case*.<sup>77</sup> The court rightly ignored the form of words used by the parties and looked to the substance of the transaction. The point that the trust receipt transaction does not create a pledge was firmly established by this case, a position that never has been seriously questioned since.<sup>78</sup> Drafting counsel will do well, nevertheless, to avoid such terms as "pledged," "hypothecated" and "lien."

The real battle in the trust receipt cases has been over the question as to whether or not the arrangement constitutes either a conditional sale or a chattel mortgage, since it has not been customary to record trust receipts. In one way or another, however, the recording acts and even the common law precedents governing conditional sales and chattel mortgages have quite generally been held not to apply.

### *It Is Not a Conditional Sale*

The easier problem to deal with is the question as to whether or not the transaction constitutes a conditional sale. It has previously been

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77. 74 N. Y. 568 (1878). But it was said in *Halliday v. Holgate*, L. R. 3 Ex. 299, 302 (1868): "There are three kinds of security: the first, a simple lien; the second, a mortgage passing the property out and out; the third, a security intermediate between a lien and a mortgage—viz., a pledge—where by contract a deposit of goods is made a security for a debt [or obligation], and *the right to the property vests in the pledgee so far as is necessary to secure the debt*. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest." (italics inserted).

How very much like the argument concerning the divided property rights in a trust receipt transaction this sounds! Even if we accept the above it is still true that the interest of the pledgee is derived from the debtor, who was the prior owner, which is not the case in the trust receipt transaction above considered. Cf. "A pledgee has merely a lien." "A radical distinction between a pledge and a mortgage is, that by a mortgage the general title is transferred to the mortgagee, subject to be divested by performance of the condition; but in case of a pledge, the pledgor retains the general title in himself, and parts with the possession for a special purpose." *Walker v. Staples*, 87 Mass. 34, 34 (1862).

78. *In re Cattus*, 183 Fed. 733 (C. C. A. 2d, 1910). In this case the trust receipt described the bank's interest in some clauses as "property" and in others as a pledge. The

emphasized that the New York bank is not a seller of the goods to its customer, the tanner.<sup>79</sup> This has been recognized by the courts in holding that the bank cannot be held liable for the character or quality of the goods. The bank does not aim to make a seller's profit by transferring the ownership to the buyer. It acts solely as a go-between by advancing the purchase price to the real seller for the benefit of the real buyer. It is not in the business of selling goods but in that of supplying funds.<sup>80</sup> Neither does our friend the tanner contract to pay the New York bank a sum "substantially equivalent to the value of the goods" as compensation for a bailment or leasing of the goods. He reimburses the bank for its advances on his behalf and compensates it for the banking service rendered by paying a commission of about one and one-half per cent. The transaction does not, therefore, fall within either branch of the definition of a conditional sale laid down in Section 1 of the Uniform Conditional Sales Act,<sup>81</sup> which substantially enacts the common law. There is ample authority to the effect that the transaction does not constitute a conditional sale.<sup>82</sup>

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court says (p. 735): "The purpose of the parties, describe the trust receipt as you will, was to keep the title to the goods in the bankers until their acceptances for the price of the goods was paid." See further, *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818 (1887) in which case the receipt recited that the goods "are hereby pledged and hypothecated to Baring Bros. as collateral security for the payment as above promised." The holding was in accord with *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568 (1878). ". . . it is quite obvious that the contract was in the nature of a mortgage and not of a pledge . . ." *In re Perlhefter*, 177 Fed. 299, 303 (S. D. N. Y. 1910).

The bank is "not a mortgagee or pledgee." *People's Nat. Bank v. Mulholland*, 228 Mass. 152, 155, 117 N. E. 46, 47 (1917), but compare earlier decision in the same case, 224 Mass. 448, 113 N. E. 365 (1916). See, however, *In re Carl Dernburg & Sons, Inc.*, 282 Fed. 816, 829 (C. C. A. 2d, 1922), in which a bipartite trust receipt transaction was found to be either a chattel mortgage or a pledge; if a pledge the bank lost its interest by surrender of possession; if a chattel mortgage because it was not filed. The bipartite transaction is to be distinguished from the *Farmers' Bank* case on the ground that the security interest of the bank is derived from the pledgor rather than from a third party. See heading *Bipartite Transaction Is a Chattel Mortgage* p. 40, *infra*.

Under the terms of the Uniform Trust Receipts Act the security interest of the bank may be derived from a pledge [§ 2 (b) (ii), N. Y. PERS. PROP. LAW (1934) § 52 (b) (ii)], in which case the bank has a "security title." U. T. R. A. § 1 (12), N. Y. PERS. PROP. LAW (1934) § 51 (12).

79. Pp. 27-28, *supra*; see note 46, *supra*.

80. See *In re James, Inc.*, 30 F. (2d) 555, 557 (C. C. A. 2d, 1929).

81. N. Y. PERS. PROP. LAW (1932) § 61.

82. *In re James, Inc.*, 30 F. (2d) 555 (C. C. A. 2d, 1929); *Charavay & Bodvin v. York Silk Mfg. Co.*, 170 Fed. 819 (C. C. S. D. N. Y. 1909); *Irby v. Cage, Drew & Co., Ltd.*, 121 La. 615, 46 So. 670 (1908); *Brown Bros. & Co. v. Billington*, 163 Pa. 76, 29 Atl. 904 (1894); see *In re E. Reboulin Fils & Co., Inc.*, 165 Fed. 245, 248 (D. N. J. 1908). At common law in Pennsylvania it appears that under a conditional sale the title was held to be in the vendee and therefore subject to the claims of his creditors. The court in *Brown Bros. & Co. v. Billington*, *supra*, held the transaction was a bailment for sale, "without any title or ownership of any kind in the bailee in any event." This goes too far. See heading *It Is Not a Consignment for Sale*, p. 42, *infra*. Even though the Uniform

But there is also authority to the effect that the transaction *does* constitute a conditional sale. An interesting situation has been presented in Connecticut. In an early case the claim was made that a trust receipt transaction was a chattel mortgage and that the bank lost its mortgage lien by surrendering possession to the mortgagor. But the transaction was construed by the court to be a conditional sale.<sup>83</sup> At that time in Connecticut, the seller's title under a conditional sale was valid without recording even though possession was in the buyer. Since then a statute has been adopted declaring conditional sales to be absolute except as between vendor and vendee, unless recorded.<sup>84</sup> In a recent case, although the particular transaction was recorded, the court indicated how the earlier authority might be avoided.<sup>85</sup>

Because of the broad wording of a local statute the federal Court of the Sixth Circuit held that the transaction was a conditional sale and void as against the buyer's creditors unless recorded.<sup>86</sup> This case serves

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Conditional Sales Act has since been adopted in Pennsylvania, the transaction probably will not be construed to be within the terms of the Act. *General Motors Acceptance Corp. v. Hartman*, 114 Pa. Super. 544, 174 Atl. 795 (1934).

83. *New Haven Wire Co. Cases (sub nom. Baring v. Galpin, Brown v. Galpin, Heidelbach v. Galpin)*, 57 Conn. 352, 18 Atl. 266 (1888). A dissenting opinion held that it was a chattel mortgage. This case is commented upon in *Charavay & Bodvin v. York Silk Mfg. Co.*, 170 Fed. 819, 822 (S.D.N.Y. 1909). In *Maxwell Motor Sales Co. v. Bankers' Mortgage & Securities Co.*, 195 Iowa 384, 192 N. W. 19 (1923) the transaction was construed to be a conditional sale.

84. CONN. GEN. STAT. (1930) §§ 4744-4746.

85. *Armstrong v. Greenwich Motors Corp.*, 116 Conn. 487, 165 Atl. 598 (1933). In the *New Haven Wire Co. Cases*, 57 Conn. 352, 18 Atl. 266 (1888) the agreement provided that upon payment of the advances title was to pass to the buyer and for that reason the court held that the transaction bore the distinguishing characteristics of a conditional sale. But in the *Armstrong* opinion it was said that the situation on the facts before the court more nearly resembled the ordinary consignment for sale because the trust receipt gave the buyer authority to sell and did not state that title was to pass to him upon payment of the advances. It is admitted the parties also contemplated in the case at bar that title should vest in the buyer if it paid the advances to the bank while still in possession. The distinction drawn is a neat one. Connecticut is not, apparently, going to admit that there are property interests in the buyer which he may enforce in a property action because in a bailment for sale the bailee has no property rights other than the right of possession. See heading *It is Not a Consignment for Sale*, p. 42, *infra*.

*Cf. Merschon v. Wheeler*, 76 Wis. 502, 45 N. W. 95 (1890); *Hamilton Nat. Bank v. McCallum*, 58 F. (2d) 912 (C. C. A. 8th, 1932) (a "contract of consignment"; banker protected; a transaction which appears to be, in part, at least, a bipartite transaction and therefore at common law a chattel mortgage; see dissenting opinion at p. 914); see heading *A Bipartite Transaction Is a Chattel Mortgage*, p. 40, *supra*.

86. *In re Bettmann-Johnson Co.*, 250 Fed. 657 (C. C. A. 6th, 1918). The case arose in Ohio. The legislature of Ohio has since adopted a statute specifically providing for trust receipt transactions. The filing provisions of the Uniform Trust Receipts Act are based upon the Ohio experience under this statute. OHIO GEN. CODE (Page, 1931) § 8568. See *Report of the Committee on Uniform Trust Receipts Act* (1934) 16 ACCEPTANCE BULL. No. 8, p. 2.



as a warning that the language of local statutes must be considered but it seems quite clear the transaction is not a conditional sale under the Uniform Conditional Sales Act nor at common law in most jurisdictions.<sup>87</sup>

### *It Is Not a Chattel Mortgage*

We have seen that the transaction when taking the course assumed is not a pledge and that it is not properly to be denominated a conditional sale. Another type of chattel security is the mortgage. The relation between the New York bank and the tanner is strikingly like that which exists between a chattel mortgagor and mortgagee. Indeed, were it not for the fact that by mortgage law a chattel mortgagee is defeated as against innocent purchasers, pledgees, or creditors of the mortgagor, unless he assumes possession or files a record, the writer believes that the trust receipt transaction would have been declared to be a chattel mortgage long ago, although he does not believe it necessarily is one. In other words, the courts have resorted to some astuteness to avoid declaring the transaction to be a mortgage.<sup>88</sup> A few of the case opinions admit that it is "very like" or "in the nature" of a mortgage.<sup>89</sup>

Why then is it not a mortgage? The reason which is given is that in the case of a true mortgage the title has, prior to the loan, been in the debtor, that it is conveyed by him to the mortgagee as security, and that it reverts to him upon payment of the loan under his equity of redemption. On the other hand, in the case under discussion the title is conveyed to the lender, *i.e.*, the bank, by a third person, *i.e.*, the seller, not by the debtor,<sup>90</sup> and never reverts to the one who first conveyed it. The

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See further *Industrial Finance Corp. v. Cappleman*, 284 Fed. 8 (C. C. A. 4th, 1922); *In re Draughn & Steele Motor Co.*, 49 F. (2d) 636 (D. Ky. 1931). In both these cases the result seems correct on the ground that the transactions were bipartite. See p 40, *infra*.

87. Query: When the receipt provides that the security interest is to cover other indebtedness in addition to the one arising from the letter of credit, is there any more reason to declare the transaction to be a conditional sale than when the receipt does not cover "other indebtedness"? It would seem that there is no distinction to be drawn. But *cf.* *New Haven Wire Co. Cases*, 57 Conn. 352, 18 Atl. 266, 52 L. R. A. 200 (1888); *Vaughan v. Massachusetts Hide Corp.*, 209 Fed. 667 (D. Mass. 1913).

88. Professor Williston states that it is in substance a chattel mortgage. 1 WILLISTON, SALES 654. So does Karl Frederick in his illuminating article *The Trust Receipt as Security* (1922) 22 COL. L. REV. 395. But both writers say that it is not an "ordinary chattel mortgage," which is true, of course.

89. *Moors v. Kidder*, 106 N. Y. 32, 44, 12 N. E. 818, 821 (1887); *In re Perlhefter*, 177 Fed. 299, 303 (S. D. N. Y. 1910).

90. *In re James, Inc.*, 30 F. (2d) 555 (C. C. A. 2d, 1929); *In re E. Reboulin Fils & Co.*, 165 Fed. 245 (D. N. J. 1908); *Charavay & Bodvin v. York Silk Mfg. Co.*, 170 Fed. 819 (C. C. S. D. N. Y. 1909). The opinion in the later case contains a review of the authorities.

Frederick, *loc. cit. supra.* note 88, pertinently points out that the title of a chattel mortgagee may be conveyed to him by a third person to secure the obligation of the debtor, and that in such case the title might not ever revert to such third person, but to the debtor, if the mortgagor subsequently conveyed his equity of redemption to the debtor.

argument follows the same course as the argument that it is not a pledge.

The argument has also been made that the transaction is not even within the *policy* of the chattel mortgage recording acts because those acts are designed "to prevent secret liens upon the property of persons who have had *prior* possession and ownership of the property."<sup>91</sup> But does not the policy of such acts go further? Do they not also design to protect those who *subsequently* rely upon the possession of the debtor? What of the policy of the conditional sales recording acts? In that situation the buyer has had neither prior possession nor ownership.

The distinction drawn between trust receipt transactions and chattel mortgage arrangements on the ground that the bank's title is derived from a person other than the debtor or obligor may appear to be technical but it is, nevertheless, a real one. If it be alleged that in substance there is no distinction then it will have to be said that in substance there is no difference between a conditional sale and a chattel mortgage. No one has ever mocked the courts for distinguishing between those two transactions so why should they be derided for doing so as between a trust receipt transaction and a chattel mortgage?

The truth is that the Security Club has admitted a new member, to join with those members of long standing, the lien, the pledge, the conditional sale, and the chattel mortgage. It is the trust receipt transaction, a transaction which, as we have said before, is differently conceived, differently carried through, and which serves different uses than the older members. But this truth has not been fully comprehended; make a minute change in the course of events and the transaction is declared to be a chattel mortgage.

### *A Bipartite Transaction Is a Chattel Mortgage*

Let us now change the facts of our importing arrangement a little. The tanner, instead of securing a letter of credit, orders the hides from the dealer in the Argentine stating that he will honor a draft against bills of lading. The dealer accordingly ships the hides, takes out bills of lading consigning the goods this time to the order of the tanner and draws a sight draft upon him. These documents are forwarded to the tanner instead of through the bank.<sup>92</sup> There is some question at this point as to whether or not the seller in the Argentine has evidenced an intention to transfer the property in the hides to the buyer. It seems reasonable to

91. *In re A. E. Fountain, Inc.*, 282 Fed. 816, 824 (C. C. A. 2d, 1922). Frederick, *loc. cit.* *supra* note 88, argues to the same effect. *Cf. Motor Bankers' Corp. v. C. I. T. Corp.*, 258 Mich. 301, 241 N. W. 911 (1932) in which the Michigan court declares what may have been a tripartite transaction to be a chattel mortgage.

92. If the seller should deliver the bills of lading to the Argentine bank which discounts the draft and the bank forwards the documents to the New York bank which re-discounts it, it seems clear that the seller has, in such an instance, vested the title in the Argentine

infer that he does not intend to do so until the draft is honored.<sup>93</sup> However that may be, it is sufficiently clear that when the draft is paid the seller intends to relinquish ownership to the buyer, and that he knows not the bank.

The tanner takes the bills of lading and the draft to the bank and requests the bank to advance sufficient money to meet the draft, against his undertaking to hold the goods "in trust" for it as security. The advance is made and a trust receipt is signed, reciting that the bank holds the title as security for reimbursement.

The objects of the tanner and of the bank are precisely the same as in the case we first assumed. The trust receipt is worded exactly as before. Functionally the transaction has the same purpose, *i.e.*, to finance the tanner so that he may process the goods and make payment out of the proceeds of a subsequent sale. The layman might be pardoned for supposing that the bank's rights against purchasers or creditors of the buyer are the same as before.<sup>94</sup> But he would be wrong.

The transaction is a chattel mortgage, and inasmuch as the mortgagee has surrendered possession without recording the arrangement, the transaction is invalid when attacked by innocent purchasers for value or by a trustee for creditors in bankruptcy proceedings.<sup>95</sup> The reason given is that

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bank as security, which in turn vests it in the New York bank. This is so in spite of the form of the bills of lading, which consign the goods to the order of the buyer. Hence, if the New York bank surrenders the bills of lading against a trust receipt the situation will be no different than as before. *In re E. Reboulin Fils & Co.*, 165 Fed. 245 (D. N. J. 1903). The security title is derived from a person other than the tanner. The situation when such a course is followed must be distinguished from the one now under discussion in which the documents are sent direct to the buyer.

93. The Uniform Sales Act is a little ambiguous on this point. Compare subdivisions 3 and 4 of § 20, N. Y. PERS. PROP. LAW (1911) § 101; also see U. B. L. A. § 40, N. Y. PERS. PROP. LAW (1911) § 226. In any event purchasers for value without notice of either the bills of lading or of the goods, are protected against any interest of the seller, provided there is delivery of either the bills of lading or of the goods. It is worthy of note that the sections above cited raise non-negotiable or "straight" bills of lading to the character of negotiable ones. See further 1 WILLISTON, SALES § 292.

94. As between the tanner and the bank the rights and obligations are obviously no different than in the case as originally assumed.

95. *In re A. E. Fountain, Inc.*, 282 Fed. 816 (C. C. A. 2d, 1922); *In re Sachs*, 30 F. (2d) 510 (C. C. A. 4th, 1929); *In re Draughn & Steele Motor Co.*, 49 F. (2d) 636 (E. D. Ky. 1931); N. Y. LIEN LAW (1911) § 230; *People's Nat. Bank v. Mulholland*, 224 Mass. 448, 113 N. E. 365 (1916), but on a rehearing of the same case new facts appeared, changing the result, 229 Mass. 152, 117 N. E. 46 (1917). *Cf. In re E. Reboulin Fils & Co.*, 165 Fed. 245 (D. N. J. 1908).

The bank would, however, prevail over assignees of the tanner since an assignee takes subject to deficiencies or equities in the assignor's title. As between the parties an unrecorded chattel mortgage is good and assignees of the tanner are in no better position than he is himself. *National Bank of Deposit v. Rogers*, 166 N. Y. 380, 59 N. E. 922 (1901). But a trustee in bankruptcy proceedings occupies a superior position to that of an ordinary assignee by virtue of the fact that he is placed in the position of a judgment creditor. BANKRUPTCY ACT § 47a (2), 36 STAT. 840 (1910), 11 U. S. C. A. § 75 (a) (2) (1927).

the bank's title is conveyed to it by the debtor himself. That being so the transaction is technically a chattel mortgage governed by chattel mortgage law. But as usual in the case law governing this remarkable arrangement there is conflicting authority.<sup>96</sup>

When the New York bank, as in the instance last considered, acquires its security interest directly from the tanner it is said to be a bipartite trust receipt transaction; on the other hand, when the interest is acquired from the Argentine seller, as first assumed, it is said to be a tripartite or "orthodox" trust receipt transaction.<sup>97</sup> In the latter case the majority of courts are inclined to distinguish it from a chattel mortgage as has been shown above; in the former the tendency is to declare it to be a chattel mortgage. As might be expected it is not always clear from the facts of a case whether the transaction as actually carried through is in one form or the other. This adds to the difficulties of analyzing a transaction already sufficiently supplied with complexities.<sup>98</sup>

### *It Is Not a Consignment for Sale*

The trust receipt frequently confers upon the buyer a power of sale. This feature has led a few courts to declare that the transaction is a consignment for sale—a mere bailment. Thus the recording acts are again avoided.<sup>99</sup> If this classification is correct then our whole argument that the buyer has vested property interests in the goods goes by the board.<sup>100</sup> By the general law a bailee for sale has merely possession as an agent

96. In *Holcomb & Hoke Mfg. Co. v. N. P. Dodge Co.*, 123 Neb. 142, 242 N. W. 367 (1932) a bipartite transaction was construed to be a bailment.

97. *VOLD, SALES* (1931) §§ 112, 117-118.

98. The point is not always noticed. A bipartite transaction seems to have been concluded in the case of *Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co.*, 239 U. S. 520 (1916). The Court, however, did not discuss the distinction. See note 76, *supra*. The case is commented upon in *In re A. E. Fountain Co., Inc.*, 282 Fed. 816, 825 (C. C. A. 2d, 1922). "One can put case after case of common occurrence in auto finance in which a lawyer must remain in doubt as to whether title had passed to the financier directly or had first passed *through the dealer*, with the resulting invalidity of the financier's interest." Notations of the Commissioners on the Proposed Uniform Trust Receipts Act (1934) 16 ACCEPTANCE BULL. No. 8, p. 4.

See *In re Alday Motor Co.*, 50 F. (2d) 228 (D. Tenn. 1930) (analyzed as bipartite); *Motor Bankers' Corp. v. C. I. T. Corp.*, 258 Mich. 301, 241 N. W. 911 (1932) (distinction not discussed); compare *Holcomb & Hoke Mfg. Co. v. N. P. Dodge Co.*, 123 Neb. 142, 242 N. W. 367 (1932) with *General Motors Acceptance Corp. v. Hupfer*, 113 Neb. 228, 202 N. W. 627 (1925).

99. *Hamilton Nat. Bank v. McCallum*, 58 F. (2d) 912 (C. C. A. 6th, 1932); *Armstrong v. Greenwich Motor Corp.*, 116 Conn. 487, 165 Atl. 598 (1933); *Holcomb & Hoke Mfg. Co. v. N. P. Dodge Co.*, 123 Neb. 142, 242 N. W. 367 (1932); *General Motors Acceptance Corp. v. Hupfer*, 113 Neb. 228, 202 N. W. 627 (1925); *Brown Bros. & Co. v. Billington*, 163 Pa. 76, 29 Atl. 904 (1894) (held not a conditional sale but a bailment). *Contra*: *Maxwell Motor Sales Corp. v. Bankers' Mortgage & Securities Co.*, 195 Iowa 384, 192 N. W. 19 (1923) (held not a bailment but a conditional sale).

100. See heading *Divided Property Interests*, p. 30, *supra*.

for the owner.<sup>101</sup> He is not bound to pay to his principal a sum equivalent to the value of the goods whether they are sold or not, nor does he bear the risk of loss, except the loss is due to his negligence.<sup>102</sup> If the bailor retakes the goods and sells them at a price higher than the price at which the agent was authorized to sell the agent would have no right to the "surplus." Nor would he be liable for a "deficiency," but in the trust receipt transaction the trustee clearly is liable for a deficiency.<sup>103</sup>

Variations in the law of a particular jurisdiction may justify the conclusion that the trust receipt transaction is merely a consignment for sale but it is submitted that it should not be so classified under the general law.<sup>104</sup>

### *Third Persons Without Notice*

So far in this paper the trust receipt plan of financing has been dealt with in contrast to the other types of security arrangements. Lurking in the background have been the creditors of the tanner, together with those who may have bought the goods from him while the transaction remained open. Were the transaction a conditional sale it would be void as to purchasers, pledgees, mortgagees or attaching creditors of the tanner by reason of the recording acts which prevail in many states.<sup>105</sup> So also if it were a chattel mortgage.<sup>106</sup> If the transaction were a pledge it would probably be ruled in most jurisdictions that the pledgee's lien is lost by the surrender of possession unless it were for some temporary purpose such as to permit the tanner to get the goods from the carrier and warehouse them.<sup>107</sup> If it were a mere consignment for sale, however, the owner would, at common law, prevail over attaching creditors and could even recover from buyers to whom an unauthorized sale had been made by the tanner.<sup>108</sup>

101. *In re Carpenter*, 125 Fed. 831 (N. D. N. Y. 1903); *D. M. Ferry & Co. v. Hall*, 188 Ala. 178, 66 So. 104 (1914); *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. 496 (1893); *cf. Norton v. Melick*, 97 Iowa 564, 66 N. W. 780 (1896).

102. Even a *del credere* agent only guarantees payment by any vendee to whom he may sell on credit. He does not undertake to pay if no sale is made. 1 WILLISTON, SALES 787-788; 2 MEEHEM, AGENCY (2d ed. 1914) 2136; *In re Taft*, 133 Fed. 511 (C. C. A. 6th, 1904).

103. *Charavay & Bodvin v. York Silk Mfg. Co.*, 170 Fed. 319 (C. C. S. D. N. Y. 1909).

104. The relation between the bank and the trustee is not that of joint adventurers. *Irby v. Cage, Drew & Co., Ltd.*, 121 La. 615, 46 So. 670 (1903).

105. U. C. S. A. § 5, N. Y. PERS. PROP. LAW (1922) § 65. The sections cited do not apply to conditional sales of goods for resale. The trust receipt may or may not authorize a sale by the trustee. The Act defines "purchaser" as including mortgagee and pledgee. U. C. S. A. § 1, N. Y. PERS. PROP. LAW (1932) § 61.

106. N. Y. LIEN LAW (1921) § 230. The chattel mortgage recording acts in the various states are not uniform in their provisions.

107. See heading *It Is Not a Pledge*, p. 34, *supra*, and footnotes thereto. *Cf. In re Shulman*, 206 Fed. 129, 133 (E. D. Pa. 1913).

108. 1 WILLISTON, SALES 787.

The weight of authority is, as we have seen, that the transaction is not one of those enumerated above, except in the case of the so-called bipartite arrangement, which is declared to be a chattel mortgage. What then, is the position of creditors of the tanner and of buyers from him in the standard tripartite form of the transaction?

Whatever terms the trust receipt may contain it is clear that should the tanner accomplish a sale to a purchaser by negotiating to him order bills of lading which have been endorsed to the tanner, or in blank, such a purchaser would prevail against the bank provided he was without notice of the bank's interest.<sup>109</sup> Nor would it matter whether such purchaser gave present value for the bills or took them in cancellation of an antecedent indebtedness.<sup>110</sup> The same result would follow if the tanner pledged or mortgaged the bills to a pledgee or mortgagee without notice.<sup>111</sup>

There is one way, however, by which it seems the bank could protect itself and that is the way which was adopted by the bank in the case of *Farmers & Mechanics' Nat. Bank v. Logan*.<sup>112</sup> When the bank, in that case, surrendered the bill of lading to its customer, a notice was stamped upon the face of the bill to the effect that the goods were pledged to the bank as security. Had the bill been endorsed and delivered by the trustee to another the endorsee would, of course, have notice of the bank's interest and could not occupy the position of a *bona fide* purchaser. Banks would do well, therefore, to adopt the same practice as was followed by the Farmers' Bank.

If the tanner has procured delivery of the hides from the carrier and the bills of lading have been taken up and cancelled, the law immediately becomes more complicated. A good deal will depend upon whether or not the terms of the trust receipt expressly, or by implication, confer upon the tanner a power of sale. Should the trust receipt give the tanner an unlimited authority to sell the goods, then under elementary principles of agency, he is enabled to confer a valid and unencumbered title upon a buyer. Although the tanner may have property

109. U. B. L. A. §§ 31, 32, 37, 38, N. Y. PERS. PROP. LAW (1911) §§ 217, 218, 224, 225. If the bank surrenders bills of lading to the tanner and instructs him to warehouse the goods and takes out warehouse receipts an interesting result may follow. An implied authority to take out negotiable warehouse receipts to his own order may be worked out with the consequence that the provisions of the Uniform Warehouse Receipts Act will protect a *bona fide* purchaser, pledgee or mortgagee of the warehouse receipts. *Commercial Nat. Bank v. Canal-Louisiana Bank*, 239 U. S. 520 (1916) discussed note 76 *supra*; *Arbuthnot, Latham & Co. v. Richheimer & Co.*, 139 La. 797, 72 So. 251 (1916); *In re Richheimer*, 221 Fed. 16 (C. C. A. 7th, 1915). Query: Is the implied authority clear? *Cf. Island Trading Co. v. Berg Bros., Inc.*, 239 N. Y. 229, 146 N. E. 345 (1924).

110. U. B. L. A. § 53 (1), N. Y. PERS. PROP. LAW (1935) § 239 (1); U. W. R. A. § 58 (1), N. Y. GEN. BUS. LAW (1909) § 142 (1).

111. "Purchaser" includes mortgagee and pledgee. See sections cited note 110, *supra*.

112. 74 N. Y. 568 (1878).

rights in the hides and thus occupy a position superior to an ordinary agent, the bank has indisputably authorized him to sell the goods and if he does so the bank's title is divested.<sup>113</sup> He is not, of course, enabled to make a valid pledge or mortgage of the goods under any principle of agency; nor could attaching creditors levy upon and sell the goods to which the bank has title even though it is merely a security title.<sup>114</sup>

It may happen, however, that the trust receipt gives only a limited authority, such as to sell to some designated person<sup>115</sup> or to sell upon some specified terms. Indeed it seems fair to say that the tanner is impliedly limited in nearly every case to a cash sale, or at most to one upon short credit terms, for the trust receipt will provide that the proceeds of any sale are to be handed to the bank to be applied to its advances. Thus a barter,<sup>116</sup> or a sale in cancellation of an indebtedness owed to his purchaser,<sup>117</sup> or a sale upon instalment terms spread over a long period of time seem not to be within his express or implied authority. Where, however, instalment sales are customary in the usual course of business of a trustee, authority to make such a sale would seem to be implied if the custom is known to the bank or ought to be known to it. Such is the usual course of business in the automobile trade for example, and it could hardly be claimed with a straight face that the bank was not aware of it.<sup>118</sup> The writer has found no trust receipt case in which the controversy is between the bank and a purchaser of the trustee's entire stock in trade, but in the consignment cases it has been held that such a bulk sale is not in the ordinary course of business and so not authorized.<sup>119</sup>

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113. *Canadian Bank of Commerce v. Baum*, 187 Pa. 48, 40 Atl. 975 (1898) *semble*.

114. See note 66, *supra*.

115. Limited authority to sell to a designated person apparently is uncommon, but in *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 100 N. E. 1025 (1913) such was the condition laid down by the banker. The case, however, was primarily concerned with the effect of an unauthorized negotiation of order bills of lading.

116. *Holton v. Smith*, 7 N. H. 446 (1835).

117. *Ohio Sav. Bank & Trust Co. v. Schneider*, 202 Iowa 938, 211 N. W. 248 (1926).

118. The trust receipt plan of financing the purchases by retail automobile dealers of a lot of cars has been used frequently in the last fifteen years. The finance company's trust receipt may not, however, give a power of sale to the dealer. Under some plans it is provided that the dealer has no right to sell until he has submitted to the finance company a satisfactory conditional sale contract with the retail buyer. Upon approval of this contract and assignment of it to the finance company the trust agreement is then cancelled or "released". Usually the dealer pays about 15% or 20% of the price in cash to the finance company. Among the automobile trust receipt cases are the following: *In re Schuttig*, 1 F. (2d) 443 (D. N. J. 1924); *In re James, Inc.*, 30 F. (2d) 555 (C. C. A. 2d, 1929); *Jordan v. Federal Trust Co.*, 296 Fed. 738 (D. Mass. 1924).

In the ordinary factors' cases at common law an unauthorized sale on credit has been upheld in a number of cases if such sales were commonly made in the factors' course of business. 1 WILLISTON, SALES § 317, notes.

119. *Romeo v. Martucci*, 72 Conn. 504, 45 Atl. 1, 47 L. R. A. 601 (1900).

*Application of the Factors' Acts*

Although the buyer, who is given a limited authority to sell goods to some named person or upon some specified terms, is not a factor in the ordinary sense, the Factors' Acts in those jurisdictions which have such legislation have an important bearing upon the matter now under discussion.<sup>120</sup> Although the provisions of such acts are not uniform it may be said that it is the policy of such legislation to make possession, under certain circumstances, "conclusive evidence of ownership to the extent necessary to protect a purchaser or a lender who acted in good faith and without notice. . . . The main circumstance is the act of the principal in employing an agent and entrusting him with the possession of merchandise *for the purpose of sale.*"<sup>121</sup> Under the Factors' Acts, therefore, if the entrusting was for the purpose of sale, even though the authority was limited and not general, a sale by the tanner to some one other than the named person or upon terms other than those designated would bind the bank, provided the purchaser gave present value and had no notice of the bank's interest.<sup>122</sup> Antecedent indebtedness, it should be noticed, is not value under the Factors' Act.<sup>123</sup> A pledge for present value is, however, within the Factors' Act<sup>124</sup> but the Act does not protect general creditors.<sup>125</sup>

120. N. Y. PERS. PROP. LAW (1915) § 43. For a general discussion of the Factors' Acts see 1 WILLISTON, SALES 728, 749. Factor's acts are in force in California, Maine, Maryland, Massachusetts, Montana, New York, North and South Dakota, Ohio, Pennsylvania and Rhode Island, and perhaps other states.

121. (*italics inserted*). *Freudenheim v. Gütter*, 201 N. Y. 94, 100, 94 N. E. 640, 642 (1911). N. Y. PERS. PROP. LAW (1915) § 43.

122. *New York Security & Trust Co. v. Lipman*, 157 N. Y. 551, 52 N. E. 595 (1899).

123. *Commercial Credit Corp. v. Northern Westchester Bank*, 256 N. Y. 482, 177 N. E. 12 (1931), but antecedent indebtedness is value under the Uniform Bills of Lading Act, Uniform Warehouse Receipts Act and Uniform Sales Act, and in some circumstances under the Uniform Trust Receipts Act, §§ 1 (15), 9 (1) (a), (b), (2) (b) (ii), N. Y. PERS. PROP. LAW (1934) §§ 51 (15), 58-a (1) (a), (b), (2) (b) (ii).

124. *Blydenstein v. New York Security & Trust Co.*, 67 Fed. 469 (C. C. A. 2d, 1895); *New York Security & Trust Co. v. Lipman*, 157 N. Y. 551, 52 N. E. 595 (1899); *International Trust Co. v. Webster Nat. Bank*, 258 Mass. 17, 154 N. E. 330, 49 A. L. R. 267 (1926). In considering the rights of a pledgee it must be carefully noted whether or not a power of sale was given. If it was not, the Factors' Act is not applicable. *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818 (1887).

At common law a factor with authority to sell could not make a valid pledge. *Allen v. St. Louis Bank*, 120 U. S. 20 (1887); *Century Throwing Co. v. Muller*, 197 Fed. 252 (C. C. A. 3d, 1912); 2 MECHEM, AGENCY (2d ed. 1914) § 2509. Cases are also collected in Note (1921) 14 A. L. R. 423.

125. *In re James, Inc.*, 30 F. (2d) 555 (C. C. A. 2d, 1929). The court says (p. 558): "A trustee [in bankruptcy] is not in the position of an innocent purchaser, mortgagee, or pledgee, and must take his title subject to all valid prior liens, claims, and equities . . . . Nor does the Factors' Act protect junior claimants, for it inures only to those acquiring valid liens on specific security."



*Estoppel*

Now for our last assumption. Let it be supposed that the trust receipt did not authorize a sale in any manner whatever. The bill of lading which was surrendered to the bank's customer in *Farmers & Mechanics' Nat. Bank v. Logan*<sup>126</sup> had a notice stamped upon it to the effect that the wheat was not to be diverted to any use until the bank's advances had been paid. It seems to be the fact that the defendant Logan never saw the bill and that he had no notice of the bank's interest. He bought the grain upon the Produce Exchange relying upon his vendor's physical possession. Logan took delivery and shipped the wheat abroad. Students who read this case for the first time nearly always appear to be shocked by the decision of the court, which gave judgment against Logan for conversion. They readily admit the fundamental principle that "one who has no title to chattels cannot transfer title [to another] unless he has the owner's authority or the owner is estopped."<sup>127</sup> They also concede that a security title was in the bank and that it gave no authority to sell, express or implied.<sup>128</sup> They argue vigorously that the Bank was estopped and for want of a better reason fall back upon that most enticing but most dangerous and unsound of maxims—"Where one of two innocent parties must suffer through the act or negligence of a third person, the loss should fall upon the one who by his conduct created the circumstances which enabled the third party to perpetrate the wrong or cause the loss."<sup>129</sup> Were that maxim to be accepted without limitation much of the law of property would suffer a seagoing change.

It is elementary that mere possession of chattels, if given for a legitimate purpose to the bailee, does not raise an estoppel.<sup>130</sup> If possession of the bills of lading, and through them of the goods, is given to the

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126. 74 N. Y. 568 (1878).

127. This familiar principle is referred to in the principal case and is quoted from *Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co.*, 239 U. S. 520, 524 (1916), a trust receipt case.

128. Perhaps this is a concession that should not be made. It seems not unlikely that the bank actually did contemplate a resale by Brown, the trustee. Why did it surrender the bill of lading to him in the first place? So that he could get the wheat off the canal boat and into a warehouse and thus avoid demurrage charges is probably one reason. But it did not require him to turn back the warehouse receipts. It probably knew that Brown was a trader and that he did not propose to grind the wheat into flour, by which time he might be in funds. How did it expect Brown to acquire the funds with which to meet the draft? Very probably by resale. There is a dearth of facts in the case along these lines. The point of implied authority does not appear to have been argued upon the appeal. Had it been and had the facts like those suggested above been presented, it is possible the result might have been different. If the result is open to criticism it would seem to be upon the ground that there was implied authority and not upon the ground of estoppel.

129. *Glass v. Continental Guaranty Corp.*, 81 Fla. 687, 88 So. 876, 879 (1921), in which the maxim was applied to a trust receipt case.

130. This rule was fully discussed and applied in *Century Throwing Co. v. Muller*, 197 Fed. 252 (C. C. A. 3d, 1912). It is interesting to note in connection with that case that

tanner for the limited purpose of enabling him to get the goods from the carrier and to warehouse them,<sup>131</sup> or to get them off ship and through the customs,<sup>132</sup> or to process them<sup>133</sup> it can hardly be doubted that it is given for a legitimate purpose. In such cases it may not be contemplated that the trustee is to obtain the funds with which to pay the bank's advances by selling the goods. It may be contemplated that he is to pay upon a day certain as when he signs a note or accepts a draft. When, however, the bank goes further and permits the trustee to put goods, which do not require processing, into his regular stock in trade but under instructions not to sell unless the bank approves we find diversity in the opinions. On strict principle there is nothing illegitimate in so doing. The New York Court of Appeals has consistently held that possession, together with authority to exhibit goods and to obtain offers, given to one who regularly deals in such goods does not, without more, raise an estoppel.<sup>134</sup>

It seems possible to make a distinction, on grounds of policy, between the case when goods are entrusted to a manufacturer or to a wholesale dealer and when they are entrusted to a retailer. In the former case the manufacturer or wholesaler usually markets his goods through jobbers, who might be expected to know that trust receipt or other security financing is quite common in the trade and therefore it might be argued they should be held to the maxim of *caveat emptor*.<sup>135</sup> When, however, goods are entrusted to a retailer who is authorized to exhibit them, or under such circumstances that the entruster should know that it is likely the retailer will exhibit them, the case is different. The retailer's visible possession and apparent ownership may lead the purchaser to a justifiable belief that he is the actual owner. The average purchaser would probably not be aware of the fact that retailers may engage in trust receipt or other security transactions. Some courts, have, in fact, taken a position contrary to the New York view and have protected the retail buyer.<sup>136</sup>

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were the Factors' Act in effect in New Jersey the result might have been different, as pointed out by Frederick, *loc. cit. supra* note 24. On estoppel generally see 1 WILLISTON, SALES 717-728.

131. *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568 (1878) (if that was the sole purpose, see note 127, *supra*).

132. *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818 (1887).

133. *Century Throwing Co. v. Muller*, 197 Fed. 252 (C. C. A. 3d, 1912).

134. *Utica Trust & Deposit Co. v. Decker*, 244 N. Y. 340, 155 N. E. 665 (1927); *Levi v. Booth*, 58 Md. 305 (1882). Compare *Smith v. Clews*, 105 N. Y. 283, 11 N. E. 632 (1887) with the same case on the second appeal in 114 N. Y. 190, 21 N. E. 160 (1889). These were not trust receipt cases but the principle would govern the trust receipt cases.

135. *Cf. New Haven Wire Co. Cases*, 57 Conn. 352, 386, 18 Atl. 266, 271 (1888): "It imposes upon the intending creditor the obligation to inquire into the character of that possession. . . ."

136. *Glass v. Continental Guaranty Corp.*, 81 Fla. 687, 88 So. 876, 25 A. L. R. 312

### *Conclusion*

It will appear from all the foregoing that the trust receipt transaction, although an excellent economic device, is full of trouble when looked at from the legal standpoint. The relationship of the bank and of the buyer to the goods is not fully settled. There has been difficulty in classifying it among the familiar types of security transactions. It looks like a pledge but it is not a pledge. It is not a conditional sale in one jurisdiction but it is in another. It is and it is not a chattel mortgage.<sup>137</sup> The bank may be estopped or it may not be estopped. Against a case cited for any point it is almost always possible to cite a case *contra*.

Rugged individualism has flourished in the precedents at common law. Now we have the New Deal, the Uniform Trust Receipts Act, seeking to regiment the courts so that the harried man of commerce will know what he may safely do. Perhaps the man of commerce will not protest, now that some one else is being regimented. How the Act brings order to the Trust Receipt Transaction will be discussed in a succeeding article.

### [To be concluded]

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(1921) (retail sale; dealer had given a trust receipt but it is not clear whether it was a bipartite or tripartite transaction); *Simons v. Northeastern Finance Corp.*, 271 Mass. 285, 171 N. E. 643 (1930) (retail sale; dealer had given a trust receipt but court held it not to be an orthodox trust receipt transaction). The court says, *id.* at 290, 171 N. E. at 645: "The apparent and ostensible powers of the Boulevard Company were its real powers, so far as the plaintiff was concerned." *Boice v. Finance & Guaranty Corp.*, 127 Va. 563, 102 S. E. 591 (1920) (chattel mortgage given by dealer and *recorded*; mortgagee estopped); *Finance Corp. of N. J. v. Jones*, 98 N. J. L. 165, 119 Atl. 171 (1922) (conditional sale, *recorded*; conditional vendor estopped against a purchaser from vendee in ordinary course of trade.)

137. Hamlet: Act III, Scene II.

*Hamlet*: Do you see yonder cloud that's almost in shape of a camel?

*Polonius*: By the Mass, and 'tis like a camel indeed.

*H.* Methinks it is like a weasel.

*P.* It is backed like a weasel.

*H.* Or like a whale?

*P.* Very like a whale.

*H.* Then I will come to my mother by and by. (*Aside*) They fool me to the top of my bent. (*Aloud*) I will come by and by.