

1936

A Trust Receipt Transaction: II

George W. Bacon

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

George W. Bacon, *A Trust Receipt Transaction: II*, 5 Fordham L. Rev. 240 (1936).

Available at: <https://ir.lawnet.fordham.edu/flr/vol5/iss2/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

A Trust Receipt Transaction: II

Cover Page Footnote

Associate Professor of Law, Fordham University, School of Law.

A TRUST RECEIPT TRANSACTION: II

GEORGE W. BACON†

*The Uniform Trust Receipts Act*¹

THE trust receipt method of financing the importation of goods from abroad spread with considerable rapidity due to the increase in foreign trade after the turn of the century and, on the whole, was regarded with favor by the courts. Throughout the same period it was also used to some extent in domestic trade. In the 1920's its advantages, which have been indicated in the preceding instalment of this paper, attracted attention in the field of automobile finance as the growth of the finance company method of carrying through the sale of cars to dealers and then to purchasers went on apace. There then became discernible a disposition in the courts to look less approvingly upon the transaction.² Added to the conflicting decisions as to the nature of the

† Associate Professor of Law, Fordham University, School of Law.

1. The preceding instalment of this article dealt with some of the common law phases of the trust receipt transaction. (1936) 5 *FORDHAM L. REV.* 17. The effect of the Uniform Trust Receipts Act upon transactions between stockbrokers and banks and between member banks and Federal Reserve Banks will not be discussed in this paper although the Uniform Act covers trust receipt transactions involving commercial paper and other collateral such as stocks and bonds. [§ 1 *et seq.*, wherever the term "Instrument" is used, N. Y. PERS. PROP. LAW (1934) § 51 (5) *et seq.*]. The discussion hereafter will be limited to transactions involving goods and documents of title representing goods, such as bills of lading, warehouse receipts and dock warrants, in which the trust receipt is used as a method of security financing.

The business operations in trust receipt financing are outlined in (1936) 5 *FORDHAM L. REV.* 17 *et seq.*, wherein a typical situation is described. A form of trust receipt is set out in that issue at p. 32, n69.

Some confusion is caused by the use of the term "trust receipts." Some digests classify cases and articles dealing with trust receipts under the heading of "Trusts" along with cases and articles in which the trust of equity jurisprudence is involved. Although there might be some aspects of the transaction that could be considered to be within the equity doctrine (see *id.* at 27-29), the law relating to trust receipt transactions is a branch of the commercial law and should be classified under Sales, Pledges and other titles dealing with security transactions. The Uniform Act provides: "The use of the word 'trustee' herein shall not be interpreted or construed to imply the existence of a trust or any right or duty of a trustee in the sense of equity jurisprudence other than as provided by this article." N. Y. PERS. PROP. LAW (1934) § 51 (14). See also, *Davis v. Aetna Acceptance Co.*, 293 U. S. 328 (1934); 1 *BOGERT, TRUSTS AND TRUSTEES* (1935) § 38.

2. "The majority of cases in which the validity of the unrecorded security interest was tested up to 1929, held the financing agency's interest valid as against the dealer's creditors or his trustee in bankruptcy, but invalid as against a bona fide purchaser from the dealer in regular course of trade. Since 1930, the decisions have tended definitely to deny validity even as against creditors. The courts show strong objections to the *secrecy* of the financing agency's interest." Notations of the Commissioners on Uniform State Laws, *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS* (1933) 246.

transaction—whether it was in essence a conditional sale, a chattel mortgage, a mere bailment or none of these—came decisions that seized upon the mere formal accident that the title got into the buyer before it got into the bank as a reason for declaring it to be an unrecorded chattel mortgage.³ Hence the Commissioners on Uniform State Laws, with the purpose of securing uniformity within a state as well as among the states and in order to adjust the conflicting interests of all parties concerned with a measure of fairness toward all, fashioned and offered to the legislatures the Uniform Trust Receipts Act.⁴

3. See preceding instalment of this article, (1936) 5 *FORDHAM L. REV.* 17, 40-42.

4. The Uniform Trust Receipts Act as adopted by the Legislature of New York became law on May 12, 1934, effective July 1, 1934, and is to be found in the New York Personal Property Law, Sections 50-58-1. The text of the Act, together with the Report of the drafting committee to the National Conference of Commissioners on Uniform State Laws, is printed in the *Acceptance Bulletin of the American Acceptance Council*. 16 *ACCEPTANCE BULLETIN* (August, 1934) No. 8. The bulletin also contains the notations of the commission on the proposed Act.

The Act passed through numerous revisions before it was finally accepted by the National Conference of Commissioners on Uniform State Laws. The seventh tentative draft was finally adopted by the Conference in 1933 with some changes. The evolution of the Act may be followed through the annual Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, annual volumes of the years 1925, 1926, 1927, 1929, 1930, 1931, 1933. Prof. Karl N. Llewellyn of Columbia University School of Law was the draftsman of the Act.

The Legislature of New York made two changes in the text of the Uniform Act as adopted by the National Conference by adding the words "or documents" after the word "instruments" in section 2 (1) (b) and in section 8 (1), after the word "instruments" in both places where the latter word is used in that subdivision. *N. Y. PERS. PROP. LAW* (1934) §§ 52 (1) (b), 58 (1); see 9 *UNIFORM LAWS ANN.* (Supp. 1935) 180-183; *infra* p. 251; note 41 *infra*.

The Act has been adopted in Illinois. *ILL. REV. STAT.* (Cahill, 1935) §§ 13-34. An excellent article by Prof. George Bogert, the draftsman of the Uniform Conditional Sales Act, appears in (1935) 3 *U. OF CHI. L. REV.* 26, entitled "The Effect of the Trust Receipts Act," with special reference to the Illinois Act which differs in some respects from the Uniform Act.

The Act has also been adopted in Indiana (Laws 1935, c. 206), in Oregon (Laws 1935, c. 224), and in California, (Laws 1935, c. 716). The addition of the words "or documents" as noted above was also made by the four states besides New York which have adopted the Act. See note 40, *infra*.

Legislative notes upon the Act appear in (1934) 4 *BROOKLYN L. REV.* 100; (1935) 4 *FORDHAM L. REV.* 108; (1934) 9 *ST. JOHN'S L. REV.* 254; (1934) 82 *U. OF PA. L. REV.* 270; (1934) 20 *VA. L. REV.* 689.

Connecticut has adopted a statute regulating trust receipts which has some features in common with the Uniform Act. Laws 1935, c. 230, *CONN. GEN. STAT.* (Supp. 1935) § 1574c. Ohio has had a statute regulating filing of trust receipts of "readily marketable staples" since 1925. *OHIO GEN. CODE* (Page, 1931) § 8568. The filing provisions of the Uniform Act are based upon the Ohio experience under this statute. Report of the Committee on Uniform Trust Receipts Act, *HANDBOOK* (1933) 243.

The Uniform Trust Receipts Act will hereafter be cited as "U.T.R.A.," and the Handbooks simply as "HANDBOOK."

When one first reads the Uniform Trust Receipts Act he may not feel inspired to write a sonnet in its praise as did Keats upon first looking into Chapman's Homer. The reader may indeed recoil in some dismay from its intricate provisions. But let him pause and consider the common law distinctions that hampered and harried bankers and business men who were trying to promote trade with a minimum of red tape and expense. Let him consider the useful function that the transaction fulfils and that should be preserved. Let him sort out the interests of financing agents, of buyers of raw materials for manufacturing consumers' goods, of middlemen who distribute processed goods to retailers, of innocent buyers without notice and finally of creditors, all of which interests are to be provided for and adjusted according to merit. Let him consider how to shut out from the benefits of the Act those who will seek its cover for transactions that experience has dictated had better be left to the existing law of pledges, of conditional sales and chattel mortgages. Then let him read the Act again, with real attention, keeping its objects in mind and he will be apt to reverse his first impression. Complicated the Act is, and complicated it must be since it deals with one of the most involved transactions of our commercial life.

It is always dangerous to attempt to restate the substance of any statute and it is especially hazardous to attempt it with this one, which is, perhaps, as difficult to analyze as any to be found upon the books. But we have already rushed in where angels fear to tread, so an effort will be made to analyze the Act with the hope that the student and practitioner will be assisted in some small measure.

Transactions Which Are Excluded

It is the object of the Act to encourage and protect the trust receipt method of financing the sale of goods in their journey from producer to retailer. It is in this field of commerce that the transaction has been proven over the course of fifty years to be well adapted to serve the needs of business. On the other hand it is the object of the Act to preserve with little change the established law of pledges, of conditional sales, of chattel mortgages and of consignments for sale to the fields of trade in which those transactions function best. These objects are accomplished by closely limiting the definition of a trust receipt transaction, by an exact definition of the term "entruster" and by a declaration of the purposes for which possession must be given to or left with the "trustee." Three typical transactions which are thus excluded from the Act follow as illustrations:

1. The Extremeline Auto Agency negotiates on deferred payment terms the sale of a truck which it owns to the Corner Grocery Company, intended by the latter for use in delivering groceries. The parties

execute a document which is denominated a "trust receipt" and which provides that possession is given to the Company "in trust", title to remain with the Agency, and other phraseology common to trust receipts.⁵ This is not a trust receipt transaction. It is not within the Act for at least two reasons. The Agency is not an *entruster* because it is in the business of selling goods for profit and as against the buyer it had the general ownership at the outset of the transaction; it is not merely financing the transaction as a third party.⁶ In addition, possession is not given to the Company for any of the prescribed *purposes*. To constitute a valid trust receipt transaction possession of the goods or of documents representing the goods must be given to the trustee for the purpose of further trade in the goods or documents.⁷ Even if, at the outset of the transaction, a finance company held title to the truck as security for an advance which it had made to the manufacturer on behalf of the Agency, thus being in the position of a lender, and the "trust receipt" ran to the finance company as the title holder it would still not be within the Act. Possession is not entrusted to the Grocery Company for the purpose of selling the truck or otherwise dealing with it in a manner preliminary to its sale. The transaction would be a conditional sale under the Uniform Conditional Sales Act.⁸

2. Mr. Micawber, in need of money as always, agrees to pledge his Model T Ford to William Lender for a loan but wishes to retain possession. Under the impression that he can protect himself against the numerous and rapacious creditors of Micawber by resorting to the Act, Lender procures Micawber to sign an agreement which they entitle a "trust receipt" and which recites that title is to be in Lender until his advances are repaid, that he may cancel the "trust" and take

5. A form of trust receipt appears in the preceding instalment, (1936) 5 *FORDHAM L. REV.* 17, 32, n69.

6. "Entruster" means the person who has or directly or by agent takes a security interest in goods, documents or instruments under a trust receipt transaction, and any successor in interest of such person. A person in the business of selling goods or instruments for profit, who at the outset of the transaction has, as against the buyer, general property in such goods or instruments, and who sells the same to the buyer on credit, retaining title or other security interest under a purchase money mortgage or conditional sales contract or otherwise, is excluded." U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (3).

7. "A transaction shall not be deemed a trust receipt transaction unless the possession of the trustee thereunder is for a purpose substantially equivalent to any one of the following:

(a) in the case of goods, documents or instruments, for the purpose of selling or exchanging them, or of procuring their sale or exchange; or

(b) in the case of goods or documents, for the purpose of manufacturing or processing the goods delivered or covered by the documents, with the purpose of ultimate sale, or for the purpose of loading, unloading, storing, shipping, transshipping or otherwise dealing with them in a manner preliminary to or necessary to their sale. . . ." U.T.R.A. § 2 (3), N. Y. PERS. PROP. LAW (1934) § 52 (3).

8. Uniform Conditional Sales Act § 1, N. Y. PERS. PROP. LAW (1922) § 61.

possession at any time, *etc.* Although Lender may be an entruster who "takes a security interest in goods,"⁹ which interest is "derived from the trustee,"¹⁰ it is not within the Act because it is not a *trust receipt transaction*. The possession of Micawber is not for one of the defined purposes.¹¹ Even if Lender had authorized a sale the result still would be the same as neither Lender nor any third person delivered to Micawber the goods in question and no documents of title were involved. With one exception, which involves the use of documents of title and which will be discussed later,¹² the Act requires a *delivery* by the entruster or a third person (such as a seller) of the goods or documents to the trustee.¹³ The arrangement between Micawber and Lender should be construed either as a chattel mortgage or an equitable pledge, probably the former.¹⁴

3. The Smooth Silk Company forwards goods to Factor Brothers to

9. See note 6, *supra*.

10. "The security interest of the entruster may be derived from the trustee or from another person, and by pledge or by transfer of title or otherwise." U.T.R.A. § 2 (1), N. Y. PERS. PROP. LAW (1934) § 52 (1) (b) (ii).

11. See note 7, *supra*.

12. *Infra* p. 251.

13. "What constitutes trust receipt transaction and trust receipt. 1. A trust receipt transaction within the meaning of this act is any transaction to which an entruster and a trustee are parties, for one of the purposes set forth in Subsection 3, whereby

(a) The entruster or any third person *delivers* to the trustee goods, documents or instruments in which the entruster (i) prior to the transaction has, or for new value (ii) by the transaction acquires or (iii) as the result thereof is to acquire promptly, a security interest. . . ." U. T. R. A. § 2, N. Y. PERS. PROP. LAW (1934) § 52. (italics inserted.)

14. For a variation of the transaction which might possibly bring the parties within the Act see note 45, *infra* and p. 268, *infra*. Certain pledges, under which possession is temporarily left with or given to the pledgor are entitled to a limited protection under the Act and will be discussed later, *infra* p. 267.

A transaction analogous to the one above will be found in *In re A. E. Fountain, Inc.*, 282 Fed. 816 (C. C. A. 2d, 1922). The dealer pledged to a bank, in return for a loan, 3000 dolls which he owned and had in stock and gave a writing in the form of a trust receipt which contained a liberty of sale. "As a result of the transaction" the bank acquired a security interest as a lender. Even so it would not be within the Act because the goods were not delivered to the borrower by the entruster or any third person in bringing about the purported trust receipt transaction. See note 13, *supra*. It is submitted that the result in *In re A. E. Fountain, Inc.*, *supra* would be the same today, *i.e.*, it would be held to be an unrecorded chattel mortgage and void as against the trustee in bankruptcy. However, the case might possibly be considered a pledge and to fall under section 3 of the Act in that the lender would be protected for ten days. See *infra* p. 268. N. Y. PERS. PROP. LAW (1934) § 53. Apparently the facts of the Fountain case would constitute a trust receipt transaction under a provision inserted in the Illinois statute. See Bogert, *supra* note 4, at 28.

It should be noticed that two cases were discussed in the above cited opinion. The first one concerned the dolls. The second one, *In re Carl Dernberg & Sons, Inc.*, which was also held on the facts before the court to be an unrecorded chattel mortgage would, however, be a trust receipt transaction within the Act. See *infra* p. 247.

be sold on commission by the latter at prices fixed by the Company, the Brothers to account to the Company from time to time and being expected to return any unsold goods. The Brothers sign a document containing much of the phraseology of the usual trust receipt. Although the purpose of delivering possession to Factor Brothers is within the terms of the Act it specifically excludes "transactions of bailment or consignment in which the title of the bailor or consignor is not retained to secure an indebtedness to him of the bailee or consignee."¹⁵ Tests that have been applied by the courts in order to distinguish between conditional sales and bailments will be helpful here.¹⁶

Ordinary chattel mortgages and true conditional sales therefore, even though an effort is made to conceal them under the terminology of trust receipts, are not entitled to the protection of the Act because (1) the holder of the security interest is not an entruster, or because (2) he or some third person did not deliver the goods or documents representing them to the borrower or vendee, or because (3) the purpose of the borrower's or vendee's possession is not that delimited. Consignments for sale masquerading as trust receipt transactions are likewise excluded.

Transactions Clearly Included

It is hardly necessary to say that the common form of tripartite trust receipt transaction which was upheld at common law is within the Act. However, for the sake of completeness in analysis and because an interesting point arises in connection with it, the case of *Farmers Bank v. Logan* will be presented.¹⁷ There are four different types of cases which are defined to be trust receipt transactions, of which that case represents one type. Always provided that the possession of the trustee is for one of the purposes delimited¹⁸ it is a trust receipt transaction if:

(A) ". . . the entruster or any third person delivers to the trustee goods [or] documents . . . in which the entruster prior to the transaction has . . . a security interest. . . ."¹⁹

In *Farmers Bank v. Logan* the seller in Buffalo shipped wheat by canal boat destined for one Brown of New York. The seller took out order bills of lading naming the Bank as consignee, the Bank having discounted a draft drawn upon Brown. This put title in the Bank for

15. U.T.R.A. § 15, N. Y. PERS. PROP. LAW (1934) § 58-g. Another reason why the Silk Company case would not be a trust receipt transaction is because the Company would not be an "entruster." See note 6, *supra*.

16. *General Electric Co. v. Martin*, 99 W. Va. 519, 130 S. E. 299 (1925), is a good case containing a review of the authorities and reaching the conclusion that the transaction before the court was a consignment.

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

18. See note 7, *supra*.

19. U.T.R.A. § 2 (1) (a) (i), N. Y. PERS. PROP. LAW (1934) § 52 (1) (a) (i).

its security.²⁰ The papers were delivered to the Bank which then forwarded them to its correspondent in New York City with a notice stamped upon the bill of lading addressed to Brown stating that the wheat was "pledged" to the Bank as security for payment of the draft and that the wheat was put into his custody, in trust, for that purpose, not to be diverted until the draft was paid. When it reached New York City the bill of lading was delivered to Brown, who, of course, by accepting it agreed to that stipulation. As between the Bank and Brown it can be said the transaction was then concluded, hence it was a case in which the entruster delivered *documents* to the trustee in which, prior to the transaction, the entruster had a security interest. There seems little question that, as required by the Act, the purpose of the transaction was to enable Brown to unload and store the wheat "in a manner preliminary to or necessary" to its sale.²¹

So far it seems to be a trust receipt transaction *but* it would not be such under the Act because Brown did not "sign and deliver" a written trust receipt or a written agreement to give such a receipt.²² Under the modern practice this would have been done, however, and the transaction would then be within the Act. It is rather startling, nevertheless, to discover that the leading case at common law of a valid tripartite transaction would not, on its exact facts, be within the Act.²³

20. See preceding instalment, heading *The Bank's Interest*, (1936) 5 FORDHAM L. REV. 17, 24.

21. U.T.R.A. § 2 (3) (b), N. Y. PERS. PROP. LAW (1934) § 52 (3) (b), quoted in note 7, *supra*.

22. U.T.R.A. § 2 (1) (b) ". . . provided that the delivery [of goods or documents by the entruster or a third person to the trustee] . . . either (i) be against the signing and delivery by the trustee of a writing designating the goods, documents or instruments concerned, and reciting that a security interest therein remains in or will remain in, or has passed to or will pass to, the entruster, or (ii) be pursuant to a prior or concurrent written and signed agreement of the trustee to give such a writing." N. Y. PERS. PROP. LAW (1934) § 52 (1) (b). See also *id.* § 2; U.T.R.A. § 4, N. Y. PERS. PROP. LAW (1934) § 54, quoted in note 36, *infra*.

23. The object of the sections cited in the note above is stated by the Commissioners to be to protect the trustee "from alleged oral agreements limiting his rights." HANDBOOK (1933) 251. They will also simplify proof, of course. In the Farmers Bank case the bill of lading will be on file in the carrier's office and can be procured, so both parties would, in fact, be protected by written proof of their agreement. Hence it could be urged that, bearing the objects of the statutory provision in mind, the transaction substantially complied with the Act and that the technical absence of a trust receipt or of a written contract to give one could be disregarded. But should a strict compliance with the Act be required, then, on a like case today the Bank would be deprived of the protection of the Act and the result of the case would be different on that ground alone. Banks or lenders cannot, of course, increase their rights by resorting to the exact procedure in the Farmers Bank case in the hope of avoiding limitations placed by the Act upon their rights as against creditors and purchasers. Failure to comply with the Act, on the contrary, will deprive the entruster as against third persons of even those rights conferred upon him by the Act.

The subdivision of the Act quoted above includes not only the orthodox tripartite transaction but also a bipartite transaction which would not have been valid at common law in most jurisdictions. To illustrate:

Goods which he owns are pledged by a dealer in return for a loan and possession is given to the pledgee. Subsequently the dealer obtains redelivery against a written trust receipt in order to sell or exchange the goods. In this instance *goods*, instead of documents, are delivered to the trustee in which the entruster, prior to the transaction, had a security interest and delivery was made for one of the designated purposes.²⁴ This appears to modify the common law of pledge in that, on these exact facts, a pledgee out of possession (now an "entruster" under the Act) is given an extended measure of protection against creditors and trustees in bankruptcy,²⁵ against subsequent pledgees of the same goods and against purchasers who take the goods in satisfaction of debts owed by the trustee.²⁶ Purchasers in good faith and without actual notice, however, would take free of the entruster's interest just as at common law, provided they bought the goods for cash or on credit, even though the transaction was filed as provided by the Act.²⁷

Security Interest Acquired by the Transaction

A second type of trust receipt transaction is provided for in order to get over any difficulties that might exist under the case law if, by chance, the title should happen to get into the trustee before the financing operations were completed and before he signed a trust receipt. In such a case at common law the courts were inclined, or felt compelled, to declare the transaction to be either a pledge invalid against creditors for lack of possession in the pledgee or an unrecorded chattel mortgage.²⁸ This type is one in which

(B) ". . . *the entruster or any third person delivers to the trustee goods, [or] documents . . . in which the entruster . . . for new value by the transaction acquires . . . a security interest . . .*"²⁹ It will be observed that this subdivision differs from (A) previously discussed in

24. See note 7, *supra*. See further U.T.R.A. § 14, N. Y. PERS. PROP. LAW (1934) § 58-f. Professor Bogert gives a like illustration as within the Act. Bogert, *supra* note 4, at 28.

25. See heading *Creditors of the Trustee*, p. 262, *infra*.

26. See heading *Purchasers not Buyers in the Ordinary Course*, p. 260, *infra*.

27. See heading *Buyers in the Ordinary Course of Trade*, p. 255, *infra*.

At common law a pledgee's interest was not always lost if he returned possession to the borrower for the purpose of sale, the "agent" to account for the proceeds. *Kellogg v. Thompson*, 142 Mass. 76, 6 N. E. 860 (1886).

28. See preceding instalment, (1936) 5 FORDEHAM L. REV. 17, 40. For a case see *People's Nat. Bank v. Mulholland*, 224 Mass. 448, 113 N. E. 365 (1916). On a rehearing of the same case new facts appeared, changing the result, 228 Mass. 152, 117 N. E. 46 (1917). *Cf. In re E. Reboulin Fils & Co.*, 165 Fed. 245 (D. N. J. 1908).

29. U.T.R.A. § 2 (1) (a) (ii), N. Y. PERS. PROP. LAW (1934) § 52 (1) (a) (ii).

that (1) *new value* must be given by the entruster at the time he acquires his security interest and (2) that his interest is acquired *by* the transaction and had not existed prior thereto. To illustrate:

The seller, filling an order from a buyer, ships goods under order bills of lading in which the buyer is named as consignee. The effect of such a shipment under the Uniform Sales Act is to put title in the buyer, but by retaining the bills the seller reserves the right to possession as against the buyer.³⁰ The seller then draws a draft on the buyer for the price and sends both the draft and the bills of lading through banks for collection. The banks acquire no interest in the goods, of course, as they are acting merely as agents for the sole purpose of collecting the draft. When the documents reach the buyer's city, however, he enters into a trust receipt agreement with the collecting bank which advances the funds to meet the purchase-money draft.³¹ In this event it is submitted that the bank acquires its security interest "by the transaction" and for *new value*.³² Possession being given to the buyer for the proper purposes it is a trust receipt transaction.

The same result might be reached in another way in which the party financing the transaction would have no connection whatsoever with the seller. Let it be supposed that in the case just described a finance company intervenes by furnishing the money to meet the seller's draft, simultaneously taking a trust receipt from the buyer who is put in possession of the documents for the proper purposes. This also appears to be a transaction in which a third person, the seller (by its agent the bank), delivers documents to the trustee and by which the entruster, for new value, acquires a security interest "by the transaction". In practice the bank would probably handle the whole matter in gross, calling upon the finance company for the funds to meet the draft, remitting to the seller and procuring the buyer to execute the trust receipt in favor of the finance company as entruster.³³ Depending on the order of events

30. UNIFORM SALES ACT § 20 (3), N. Y. PERS. PROP. LAW (1911) § 101 (3).

31. *People's Nat. Bank v. Mulholland*, 228 Mass. 152, 117 N. E. 46 (1917), was such a case. Compare *In re E. Reboulin Fils & Co.*, 165 Fed. 245 (D. N. J. 1908). This was a case in which some bills of lading were drawn to the order of the buyer and some merely "to order" and endorsed in blank by the shipper. However, all the bills were delivered by the seller to the bank, which accepted drafts. It was there held that the bank acquired title when the bills were delivered to it.

32. "'New value' includes new advances or loans made, or new obligations incurred, or the release or surrender of a valid and existing security interest, or the release of a claim to proceeds under Section 10; but 'new value' shall not be construed to include extension or renewals of existing obligations of the trustee, nor obligations substituted for such existing obligations." U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 351 (7).

33. This was the method followed in *In re James, Inc.*, 30 F. (2d) 555 (C. C. A. 2d, 1929). In that case, however, it may be inferred from the facts that the bills of lading were taken to the seller's order, hence title never passed to the buyer but passed directly

such a case might be either one in which the interest of the financing agent is acquired "by the transaction" or perhaps it might fall under the next subdivision to be discussed; but in any event it would be clearly within the Act.

Security Interest to be Acquired Promptly

The third type of transaction provided for is the one in which

(C) ". . . the entruster or any third person delivers to the trustee goods [or] documents . . . in which the entruster . . . for new value . . . as a result [of the transaction] is to acquire promptly, a security interest. . . ." ³⁴

This seems to be covered by the situation which would exist in the case last considered if the finance company should furnish funds to the collecting bank in order to meet the seller's draft a day or so before the buyer executed the trust receipt. The writer believes it would also be illustrated by cases like *Moors v. Kidder*.³⁵ In that case a banker, on August 3, furnished one Swain with a letter of credit against a writing executed by Swain in which he agreed to pledge to the banker all the property to be later purchased with the letter of credit. On the date when the transaction was concluded no security interest passed to the bank, of course, as no goods had yet been shipped or otherwise identified as the subject matter of the pledge. But as soon as the letter of credit was sent abroad and the seller shipped the goods a security interest was to, and did, vest in the banker. Swain's written agreement would be equivalent to giving a trust receipt under the terms of the Act;³⁶ the banker gave new value in that he incurred a new obligation by issuing the letter of credit;³⁷ a pledge is included in the definition of security

from the seller to the finance company thus bringing it under (A), the first type of trust receipt transaction discussed above.

34. U.T.R.A. § 2 (1) (a) (iii), N. Y. PERS. PROP. LAW (1934) § 52 (1) (a) (iii).

35. 106 N. Y. 32 (1887).

36. "Contract to give trust receipt. 1. A contract to give a trust receipt, if in writing and signed by the trustee, shall, with reference to goods, documents or instruments thereafter delivered by the entruster to the trustee in reliance on such contract, be equivalent in all respects to a trust receipt.

"2. Such a contract shall as to such goods, documents, or instruments be specifically enforceable against the trustee; but this subsection shall not enlarge the scope of the entruster's rights against creditors of the trustee as limited by this act." U.T.R.A. § 4, N. Y. PERS. PROP. LAW (1934) § 54.

37. U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (definition of "New Value") quoted in full, note 32, *supra*.

interest³⁸ and the banker subsequently, in reliance on the contract, delivered to Swain the shipping documents representing the goods.³⁹

The Added Type of Transaction

The form of the Act as approved by the Conference of Commissioners on Uniform State Laws provided for the three types of transactions discussed as (A), (B), and (C). These three types comprised the only ones involving goods or documents which were entitled to the full protection of the Act, although a limited protection was also accorded to certain pledge arrangements which did not come within the definition of a trust receipt transaction.⁴⁰ These three types of transactions would seem to provide for nearly every contingency that might arise calling for the financing by a third person of the purchase of goods in the im-

38. "Security interest" means a property interest in goods, documents or instruments, limited in extent to securing performance of some obligation of the trustee or of some third person to the entruster, and includes the interest of a pledgee, and title, whether or not expressed to be absolute, whenever such title is in substance taken or retained for security only." U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (12).

39. See note 36, *supra*. When the documents were delivered to Swain on Nov. 18 he then signed a trust receipt. But it is submitted that under the Act the trust receipt transaction really took place on Aug. 3 and that the facts bring the case within the type of transaction under discussion rather than under (A), the type first discussed.

It may be objected, however, that the Banker did not acquire the security interest *promptly* after the contract was signed; that the type of transaction provided for in (C) is illustrated only by cases such as first suggested under that symbol, *i.e.*, where the finance company gave its new value a day or two before the trust receipt was executed by the retail dealer in automobiles. If that be so *Moors v. Kidder*, 106 N. Y. 32 (1887), could still be put under (A) on the theory that the transaction was concluded on Nov. 18 when Swain signed the trust receipt, the banker having acquired his security interest prior to that time.

This discussion suggests another type of case: Assume that a bank issues an open letter of credit by which it undertakes to finance imports of goods which may be made by its customer, X, at any time during the next five years, unless revoked. X signs a contract by which he undertakes to execute trust receipts for each lot of goods as received. The arrangement still being in effect in the fifth year, the seller ships a lot of goods under bills of lading to the order of the banker and discounts a draft under the open letter of credit. The bills are delivered to X but before he signs a trust receipt he files a petition in bankruptcy. It would still, apparently, be a case contemplated by the policy of the Act but it would not be under (A) as the security interest was not acquired prior to the transaction (if the transaction be regarded as having taken place five years before when the agreement was signed); it would not be under (B) as the security interest was not acquired by the transaction, *i.e.*, simultaneously therewith; nor would it be under (C), the security interest not being acquired *promptly* as a result of the transaction. It is suggested, however, that it would be covered by Section 4, quoted in full in note 36, *supra*. Section 4 would not seem to be applicable, however, if the seller shipped the goods directly to the buyer by making him consignee of the bills of lading which are then sent to him. Section 4 requires the delivery to be made by the *entruster* and does not include a delivery by a third person such as the seller, as does Section 2.

40. *Infra*, p. 267.

mediate course of transfer from producer to wholesaler to retailer. It was in that field of trade that experience had shown that the trust receipt method of financing fulfilled a business need. It was in that field of trade that freedom from the burdensome filing and foreclosure requirements of conditional sales and chattel mortgages seemed desirable.

A fourth type of transaction, however, has been provided by the addition of the two words "or documents" to one of the subdivisions of the Uniform Act, an addition which has been made by every legislature which has so far adopted it.⁴¹ The subdivision is as follows:

(D) ". . . *the entruster gives new value in reliance upon the transfer by the trustee to such entruster of a security interest in instruments or documents which are actually exhibited to such entruster, or to his agent in that behalf, at a place of business of either entruster or agent, but possession of which is retained by the trustee. . . .*"⁴²

No doubt it was believed that in adding the words "or documents", thus including bills of lading and warehouse receipts, the objects of the Act were being carried out. But the purpose of the Commissioners was stated to be to "limit the effectiveness of the transaction to the case of new acquisitions by the dealer."⁴³ In most instances in which a dealer

41. As it stood when adopted by the Conference of Commissioners on Uniform State Laws the subdivision of Section 2 quoted in the text applied only to "instruments," *i.e.*, securities such as stocks and bonds exhibited by a stockbroker to his banker in connection with obtaining loans for stock brokerage operations in Wall Street. It appears that the words "or documents" were omitted by accident from the draft offered for adoption to the Conference. Hence the words were intended by the drafting committee to be included in the section. The draftsman suggests that "while the text is adequate as it stands, the reinsertion of the words 'or documents' in the places mentioned would further the general purposes of simplifying business procedure and freeing it from technicality and doubt." HANDBOOK (1933) 255.

42. U.T.R.A. § 2 (1) (b), N. Y. PERS. PROP. LAW (1934) § 52 (1) (b). The Uniform Act omits "or documents".

43. Notations of the Commissioners: "Hence, the Act leaves the existing law of chattel mortgages and conditional sale unchanged, except in peculiar cases which need special coverage. (a) Sec. 1, 'Entruster,' excludes any true seller from the operation of the Act, and limits the definition of 'Security Interest,' in that section. Thus any true conditional sale is outside this Act. (b) Sec. 2 (3) by limiting the purposes of a trust receipt transaction, excludes the ordinary chattel mortgage, even when made by a dealer. (c) Sec. 2 (1) and Sec. 1, 'New Value,' limit the effectiveness of the transaction to the case of *new acquisitions by the dealer*, as to which the new possession cannot be expected to mislead his creditors, or to the turning back of security *already* pledged, while Sec. 14 limits the financier's protection to new value given as part of the transaction. (d) Finally, Sec. 3 makes it clear that the purposes of the Act cannot be defeated by masking what in substance would be an unrecorded chattel mortgage under the form of agreement to pledge or 'equitable pledge.'

"The Act accepts the desirability of protecting the new financing of a dealer's incoming stock (or the release of security to a pledgor) while allowing possession to be in the dealer

in goods is in possession of a bill of lading or warehouse receipt it will be a case in which the goods are indeed in course of transfer from producer to wholesaler to retailer,—in which the object of the transaction is to finance new acquisitions by the trustee. But it might, on the other hand, be a case in which the holder of the documents which are exhibited to the lender is a dealer who has already paid for the goods. In that event he may desire the loan for the purpose of purchasing new goods. If that is so it may be urged that the transaction still comes within the functional perspective of the Act. On the other hand the dealer may desire the loan for the purpose of providing for his payroll or for the purpose of sending his wife and daughter on a trip to Europe. Nevertheless, provided possession is left with him for the delimited purposes, it would seem to be a valid trust receipt transaction if he exhibited to the entruster a document of title, obtained a loan and executed a trust receipt. The seemingly innocuous addition of the words "or documents" to this section may, therefore, have opened the door to a method of avoiding the chattel mortgage law and for defeating creditors in a way that never was intended.

Two cases may be put, one being within the theory of the Act and one apparently not:

1. A seller of goods ships under bills of lading naming the buyer as consignee. The bills of lading are sent directly to the buyer along with a draft for the price. The buyer exhibits the bills to a bank and simultaneously obtains a loan with which to meet the draft, signing a trust receipt. This is within the purposes of the Act since the loan enables him to pay for new acquisitions. It is submitted, however, that such a transaction was already provided for in the subdivision quoted under (B) *supra*,⁴⁴ in that it is one in which a third person (the seller) delivered documents to the trustee as a consequence of which the entruster, for new value, by the trust receipt transaction acquired a security interest. This is not using the Act as a cover for an ordinary chattel mortgage.

A Masquerading Chattel Mortgage

2. A dealer in second hand cars, having several in "dead storage", decides to put them up as collateral for a loan. By the simple device of driving them to a warehouse and bailing them to the warehouseman the dealer procures a warehouse receipt which he exhibits to the lender, on the faith of which he obtains a loan in return for a trust receipt. To be sure possession must be left with him for the purpose of sale but

(or pledgor of securities) for legitimate purposes looking toward realization or substitution of the security. This accords both with business practice and business needs." HANDBOOK (1933) 249. (italics in original.)

44. *Supra* p. 247.

there is no requirement that the sale by the trustee must be in immediate prospect. This seems to be a transaction that ought to be construed as a chattel mortgage,⁴⁵ but it appears to be within the terms of the Act.⁴⁶

It may be answered that it is hardly worth while to go to the trouble of warehousing the goods and incurring warehouse charges just for the purpose of avoiding the chattel mortgage recording act. It is also true, as a practical matter, that the lender will in nearly every instance retain possession of the documents for his own protection. But many and devious have been the methods used to circumvent creditors. Furthermore the entruster's interest, when acquired by a valid trust receipt transaction, is good against creditors of the trustee for thirty days without compliance with the filing provisions of the Act.⁴⁷ If experience shows that any unwarranted advantage is taken of this part of the Act perhaps it can be remedied by adding some such provision as: "Provided that, in the case of documents, the new value is given for the purpose of financing the purchase of the goods represented by the documents." The courts, however, will doubtless construe the Act in the light of its purposes and can be depended upon to defeat attempts to use it as a cover for ordinary chattel mortgage transactions which are not primarily concerned with financing the transfer of goods in the course of trade from producer to wholesaler to retailer, especially if such an attempt carries the badge of fraud. It should also be noticed that the filing provisions of the Act are limited to trust receipt transactions relating to the financing of *acquisitions of goods by a dealer*. This reinforces the conclusion that the statute is not intended to cover an ordinary mortgage which is set up in the language of trust receipts. The filing provisions, which are somewhat unusual, will be described hereafter.

The Importance of New Value

It will not have escaped notice that in all the types of transactions provided for by the Act the entruster must have furnished *new value* in

45. Or suppose that Micawber in the illustration put *supra* p. 243 first warehoused his car and procured a receipt which he exhibited to Lender and then executed a trust receipt containing a power of sale. He might in fact have a customer in view and merely want the loan to carry him along until he effected the sale. Would it be a valid trust receipt transaction?

46. It might be thought that U.T.R.A. § 15 excludes such a transaction [N. Y. PERS PROP. LAW (1934) § 58-g] but that section appears to apply only when the trustee is a "fiduciary" handling investments or finances of the *entruster*. The section reads:

"This article shall not apply to single transactions of legal or equitable pledge, not constituting a course of business, whether such transactions be unaccompanied by delivery of possession, or involve constructive delivery, or delivery or redelivery, actual or constructive, so far as such transactions involve only an entruster who is an individual natural person, and a trustee entrusted as a fiduciary with handling investments or finances of the entruster . . ." (*italics inserted*).

47. P. 262, *infra*.

return for his interest, except in the one case in which his security interest in the goods or documents existed prior to the trust receipt transaction, in which case merely *value* is sufficient.⁴⁸ New value is defined as follows:

“ ‘*New value*’ includes new advances or loans made, or new obligations incurred, or the release or surrender of a valid and existing security interest, or the release of a claim to proceeds under Section 10; but ‘*new value*’ shall not be construed to include extensions or renewals of existing obligations of the trustee, nor obligations substituted for such existing obligations.”⁴⁹

Trust receipts executed in the past have frequently provided that the goods are to secure not only the new advances made by the entruster as a part of the transaction but also are to secure any other indebtedness of the trustee to the entruster previously existing or thereafter to be created. By the Act, however, such a provision is made invalid as against purchasers of the goods or creditors of the trustee. The entruster's interest is limited to the new value given as a part of the transaction, again with the exception that his interest may extend to any obligation for which the goods or documents were security prior to the transaction.⁵⁰ New value is likewise important in its effect upon the rights of third persons who take the goods from the trustee by purchase, mortgage or pledge, as will hereafter appear.

Purchasers of Negotiable Documents from the Trustee

When documents like bills of lading or warehouse receipts are delivered to or left with the trustee under a trust receipt transaction they are pretty likely to be negotiable in form. It is the modern case law that if the trustee should, without authority, negotiate such documents to a purchaser in good faith and for value such purchaser would take free of the entruster's interest.⁵¹ The Act continues this protection *even though the trust receipt transaction has been filed*; filing does not constitute constructive notice to such purchasers.⁵² In this instance *new value* given by the buyer is *not* a requisite. Thus the Act preserves unimpaired the provisions of the Uniform Sales Act, the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act.⁵³

48. For an illustration of the exceptional case, see (A), p. 245, *supra*.

49. U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (7).

50. See (A), p. 245, *supra*. U.T.R.A. § 14, N. Y. PERS. PROP. LAW (1934) § 58-f. And see HANDBOOK (1927) 609, 611.

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

52. U.T.R.A. § 9 (1) (a), N. Y. PERS. PROP. LAW (1934) § 58-a (1) (a). This subdivision requires value but not new value. For a definition of value see U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51. It includes antecedent indebtedness.

53. UNIFORM SALES ACT §§ 33, 34, 38, N. Y. PERS. PROP. LAW (1935) §§ 113, 114, 119;

It sometimes happens that the trustee who is in possession of bills of lading under a trust receipt transaction secures the goods from the carrier and warehouses them, taking out warehouse receipts to his own order. Then, acting beyond the authority given in the trust receipt, he negotiates the substituted documents to a pledgee or purchaser without notice, and for value. In this case also the endorsee of the warehouse receipt is protected regardless of filing and again *new value* is not required.⁵⁴ A few of the cases heretofore reported reached the same result upon the theory that, under the facts before the court, authority to take out such substituted documents could be implied, hence it was held that the trustee was "entrusted" with the negotiable warehouse receipts and that the endorsee was protected by the provisions of the Uniform Warehouse Receipts Act.⁵⁵ Under the Act, however, it is not necessary to look for such implied authority. The Act, it may be said, supplies the authority.⁵⁶

Buyers in the Ordinary Course of Trade

When the trustee under a trust receipt transaction makes a sale of the goods, or of non-negotiable documents representing the goods, the buyer is also given extended protection as against the entruster, but not quite as much under all circumstances as when order or bearer documents are negotiated to him. Two important facts in such a case are to be looked for, first, whether or not the trustee had liberty of sale, and secondly, whether or not the buyer gave *new value*. If the trustee had *in fact* a liberty of sale and his buyer acted in good faith, without notice and paid *new value*, then, under the Act, he is a "buyer in the ordinary course of trade" and again takes free of the entruster's interest *regardless of filing*.⁵⁷ Furthermore any limitation placed by the entruster upon the trustee's liberty of sale, which is not actually known

UNIFORM BILLS OF LADING ACT §§ 31, 32, 38, N. Y. PERS. PROP. LAW (1911) §§ 217, 218, 224; UNIFORM WAREHOUSE RECEIPTS ACT §§ 40, 41, 47, N. Y. PERS. PROP. LAW (1929) §§ 124, 125, 131. Under all these acts antecedent indebtedness is value.

54. U.T.R.A. § 9 (1) (b), N. Y. PERS. PROP. LAW (1934) § 58-a (1) (b). This section of the Act would apply even in a case in which the entruster or a third person (such as the seller) delivered to or left with the trustee non-negotiable documents or merely the goods themselves.

55. *Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank and Trust Co.*, 239 U. S. 520 (1916); *In re Richheimer*, 221 Fed. 16 (C. C. A. 7th, 1915).

56. "The Act proceeds on the theory that the entruster . . . is entitled to protection *only against honest insolvency* of the trustee. Dishonest action of the trustee is a credit risk, and bona fide purchasers are to be protected against the entruster who has taken that risk by entrusting." HANDBOOK (1933) 241.

57. U.T.R.A. § 9 (2) (a) (i), (ii), N. Y. PERS. PROP. LAW (1934) § 58-a (a) (i), (ii) (definition of "buyer in the ordinary course of trade"); U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (1) (a mortgagee is not included). See also U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (7) (definition of "new value").

to the buyer, is without effect. Thus if the entruster authorizes a sale only for cash but the trustee negotiates a sale on credit the title of the credit buyer will be protected.⁵⁸ The Act, therefore, as to a buyer in the ordinary course of trade conforms to the rule under the Factor's Act in New York,⁵⁹ even though a record of the transaction has been filed.

Liberty of Sale as Matter of Law

It has been assumed in the preceding paragraph that the buyer bought from a trustee who had, in fact, a liberty of sale. Most trust receipts executed in the past have provided that the trustee may sell the goods. It is by making a sale that the trustee is usually expected to obtain the funds with which to reimburse the financing agent for its advances. Now and then, however, a case is met with in which the trustee is prohibited from making a sale.⁶⁰ In other cases he is allowed to exhibit the goods for the purpose of obtaining offers from prospective buyers but with the limitation that such offers are to be submitted to the financing agent for approval before a sale is authorized.⁶¹ In both of these cases there is no liberty of sale in fact. This being so the Factor's Act would not protect a buyer if the trustee sold in violation of his instructions nor would the possession by the trustee raise an estoppel.⁶² The New York Court of Appeals has consistently held that possession, even when coupled with authority to exhibit goods and to obtain offers,

58. U.T.R.A. § 9 (2) (a) (ii), N. Y. PERS. PROP. LAW (1934) § 58-a (2) (a) (ii). But see U.T.R.A. § 9 (3), N. Y. PERS. PROP. LAW (1934) § 58-a (3), which provides that although the purchase of goods or documents (non-negotiable for instance) on credit terms constitutes new value, the entruster is entitled to any debt owed by the buyer to the trustee arising out of the purchase and any security given therefor. Such a credit purchaser, however, may assert against the entruster who claims the debt or security any set-off or defense that would have been valid against the trustee which accrued to the purchaser before he had actual notice of the entruster's interest. This subdivision will be important if the trustee becomes bankrupt and it appears to prefer the entruster over general creditors to this specific asset of the bankrupt's estate. See *Entruster's Right to Proceeds*, *infra* p. 263.

59. N. Y. PERS. PROP. LAW (1915) § 43. It is to be noticed, however, that under the Uniform Trust Receipts Act pledgees are not "buyers in the ordinary course of trade" even though such pledgees give new value. Under the Factor's Act a pledgee is protected if he makes a loan in return for a pledge of the goods which have been entrusted to another who is given a power of sale. *Freudenheim v. Gütter*, 201 N. Y. 94, 94 N. E. 640 (1911). Under the Uniform Trust Receipts Act a pledgee of the trustee will prevail against the entruster in some circumstances but is subordinated to the latter's interest in others, as will hereafter appear. *Infra* p. 260.

60. *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568 (1878); *Glass v. Continental Guaranty Corp.*, 81 Fla. 687, 88 So. 876 (1921) *semble*.

61. Such was the case as to the General Motors trust receipts in *In re James, Inc.*, 30 F. (2d) 555 (C. C. A. 2d, 1929).

62. *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568 (1878). See also the preceding instalment, (1936) 5 FORDHAM L. REV. 17, 47.

given to one who regularly deals in such goods does not, without more, estop the title holder.⁶³

It is the policy of the Uniform Trust Receipts Act, however, to protect the entruster "*only against honest insolvency of the trustee*. Dishonest action of the trustee is a credit risk, and bona fide purchasers are to be protected against the entruster who has taken that risk by entrusting."⁶⁴ To carry out this policy it is provided:

"If the entruster consents to the placing of goods subject to a trust receipt transaction in the trustee's stock in trade or in his sales or exhibition rooms, or allows such goods to be so placed or kept, such consent or allowance shall have like effect as granting the trustee liberty of sale."⁶⁵

This section, therefore, effects a change in the common law rule in New York, not only when a trust receipt is actually executed but also, as will next appear, when the parties attempt to evade the Act by resorting to a chattel mortgage which is filed of record. This may be illustrated by a leading New York case.

*Utica Trust & Deposit Co. v. Decker*⁶⁶

Four automobiles had been shipped to a retail dealer. For the purpose of obtaining the money with which to pay for the cars the dealer gave to the plaintiff bank a note secured by a chattel mortgage which transferred title to the bank. By the terms of the mortgage it was provided that the dealer was not to sell any of the cars nor to use them for other than exhibition purposes until a release was given by the bank.⁶⁷ The mortgage was filed. With the fund received from the bank the dealer paid for the cars. Subsequently the dealer sold one of the cars to the defendant who paid new value without actual notice of the existence of the mortgage. The court held that the bank could foreclose the mortgage and sell the car to satisfy the mortgage debt remaining unpaid.

It is submitted that under the Uniform Trust Receipts Act the defendant in the *Utica* case would be protected. The transaction was in

63. *Utica Trust & Deposit Co. v. Decker*, 244 N. Y. 340, 155 N. E. 665 (1927). 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). *Accord*: *Levi v. Booth*, 58 Md. 305 (1882). These were not trust receipt cases but there is no reason to believe the principle would not govern the trust receipt cases at common law. *Contra*: *Glass v. Continental Guaranty Corp.*, 81 Fla. 687, 88 So. 876 (1921); *Clark v. Flynn*, 120 Misc. 474, 199 N. Y. Supp. 583 (Sup. Ct. 1923); *Handy v. C. I. T. Corp.*, 197 N. E. 641 (Mass. 1935).

64. HANDBOOK (1933) 249 (italics in original); see also *id.* at 252.

65. U.T.R.A. § 9 (2) (c), N. Y. PERS. PROP. LAW (1934) § 58-a (2) (c).

66. 244 N. Y. 340, 155 N. E. 665 (1927).

67. Such a provision is frequently inserted in agreements between finance companies and automobile dealers.

substance a trust receipt transaction. It was a case in which the bank gave new value and by the transaction acquired a security interest in goods which had been delivered to the trustee by a third person.⁶⁸ But it was also within the terms of the chattel mortgage recording act.⁶⁹ Therefore it would seem that the bank could take its choice of the two statutes. That is true up to a point.

If it chooses to comply with the chattel mortgage recording act the bank would have the protection of that law in all respects but one, that one being that the defendant, who was a buyer in the ordinary course of trade as defined by the Uniform Trust Receipts Act, is entitled to the protection of that Act in any event. The applicable sections justifying this conclusion are set out in full in the footnote.⁷⁰ The dealer in the *Utica* case was allowed to exhibit the goods in his sales room and so, as a matter of law, under the Act, he had liberty of sale in spite of the express prohibition in the chattel mortgage agreement. It is just such cases that the Act is intended to cover for the protection of the innocent purchaser who gives new value.⁷¹

68. (B), p. 245, *supra*; if not that then it surely falls under (C), p. 249, *supra*.

69. N. Y. LIEN LAW (1911) § 230 *et seq.*

70. "As to any transaction falling within the provisions both of this article and of any other law requiring filing or recording, the entruster shall not be required to comply with both, but by complying with the provisions of either at his election may have the protection given by the law complied with; *except that buyers in the ordinary course of trade as described in Subsection 2 of Section 9 [58-a], and lienors as described in Section 11 [58-c], shall be protected as therein provided, although compliance of the entruster be with the filing or recording requirements of another law.*" U.T.R.A. § 16, N. Y. PERS. PROP. LAW (1934) § 58-h (italics inserted).

"Subsection 2 of Section 9" referred to in the foregoing is the one which contains the liberty of sale provisions quoted in the text and which defines the rights of the buyer in the ordinary course of trade.

"Notwithstanding the provisions of any general or special law, the provisions of this article shall control excepting as to trust receipts and pledge transactions entered into before this article, as hereby added, takes effect." N. Y. PERS. PROP. LAW (1934) § 59-1. This section is not in the Uniform Act as adopted by the Commissioners, but has been added by all the states which have adopted the Act.

71. "It frees him (as do the majority of decisions) from being affected by any restriction placed on the trustee's power of sale, unless the purchaser has notice of the restriction. . . . It frees him (as do the majority of decisions) from any prohibition placed by the entruster on sale by the trustee, wherever the entruster has allowed the goods to be placed in the trustee's stock in trade or sales room. . . . And those protections are extended equally to cases where the entruster chooses to comply with some other applicable statute *e.g.*, the chattel mortgage regulations." HANDBOOK (1933) 252.

See also the forceful language of the Court of Appeals on the policy of the Factor's Act in *Freudenheim v. Gütter*, 201 N. Y. 94, 94 N. E. 640 (1911). The Trust Receipts Act goes one step further than the Factor's Act toward abrogating the harsh, if logically sound, rule of the common law that the true owner can reclaim his property even though his agent had possession and was apparently the actual owner as a dealer in such goods.

It should be observed, however, that when a *general* owner of goods, as distinguished

It is still possible, however, for the entruster to effectively prohibit the trustee from making any disposition of the goods without the approval of the entruster. The entruster could, for example, require the trustee to store the goods in a public warehouse and turn back the receipts. In such case, of course, it could not be said that the entruster had allowed the trustee to place the goods in the trustee's stock in trade or in his sales or exhibition rooms. But even in such a case the entruster will have to take the risk that the trustee might obtain negotiable documents running to his own order and then negotiate them to an innocent purchaser for new value or in cancellation of an indebtedness.⁷² There will, of course, be borderline cases not involving negotiable documents in which it will be a close question as to whether or not the entruster has allowed the trustee to place the goods in his stock in trade.⁷³

from an entruster, entrusts possession to a dealer in such goods for the sole purpose of obtaining offers, the rule remains the same as before. The Act will not affect *Smith v. Clews*, 105 N. Y. 283, 11 N. E. 632 (1887), nor *Green v. Wachs*, 254 N. Y. 437, 173 N. E. 575 (1930).

72. See heading *Purchasers of Negotiable Documents*, p. 254, *supra*.

73. For example: In *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568 (1878), discussed as to other points at p. 245, *supra*, the entrusting bank gave to the trustee the bills of lading with a notice stamped upon their face that the wheat represented by the bills was entrusted to him but was not to be diverted to any use until its advances had been paid. The object of putting the trustee, Brown, in possession was apparently to get the goods into storage and thus avoid the carrier's demurrage charges. Brown was a trader on the New York Produce Exchange and he obtained samples of the wheat in question which he exhibited upon the Exchange. Relying upon his possession the defendant Logan bought the wheat and shipped it abroad. Presumably the wheat was in warehouses. Assuming that negotiable warehouse receipts were not obtained by Brown and negotiated to Logan but that he transferred non-negotiable receipts to Logan, what would be the latter's position under the Act?

A trader of goods upon the Produce Exchange, if he *has* any stock in trade as he well might be regarded to have, would necessarily keep it in public warehouses. Did the Bank then allow him to place the goods in his stock in trade? It would seem that any person who is engaged in trade, whether it be selling automobiles in a retail showroom, tanning leather in a tannery, or buying and selling upon a commodity exchange, has a stock in trade. (Brown was not acting merely as a broker). The court held in the Logan case that the bank was not estopped and that Logan had constructive notice of the limitation upon the bills of lading. Under the Act, however, "No limitation placed by the entruster on the liberty of sale granted to the trustee shall affect a buyer in the ordinary course of trade, unless the limitation is actually known to the latter." U.T.R.A. § 9 (2) (a) (ii), N. Y. PERS. PROP. LAW (1934) § 58-a (2) (a) (ii). Even if it is said that this subdivision would not be applicable for the reason that it assumes a limited power of sale actually granted, yet it is the object of the Act to abrogate the theory of constructive notice even when there is a filing, so far as buyers for new value are concerned. It would seem that Logan, therefore, ought not to be charged with constructive notice of the contents of the bills of lading. Then the question is reduced to the one asked at the opening of this paragraph. The writer submits that Logan was within the policy of the Act, which is to

Purchasers Not Buyers in the Ordinary Course of Trade

Although buyers from the trustee who give new value are protected under almost all circumstances, this is not true as to the persons who are classified by the Act as "purchasers other than buyers in the ordinary course of trade."⁷⁴ Such purchasers include pledgees of the trustee, mortgagees, buyers of the goods who do not give new value, (*e.g.*, those who take title from the trustee in cancellation of a debt), and transferees of the trustee in bulk sale transactions. If the entruster has complied with the filing provisions of the Act at the outset of the trust receipt transaction he is fully protected against the interest of such purchasers, pledgees and mortgagees. But if there is a delay in filing the situation is somewhat complicated. It will be best to deal with the matter in detail:

1. *Transferees in bulk.* As to such persons the entruster is protected in any event for a period of thirty days after he has delivered the goods or documents to the trustee. But if filing is delayed for more than thirty days and the bulk sale is thereafter made before any filing takes place the transferee takes free of the entruster's interest provided he also takes delivery of the goods. If the bulk sale takes place after filing, no matter how long delayed, the transferee in bulk is deemed to have notice of the entruster's interest.⁷⁵ As to transferees in bulk it matters not whether new value or merely value is the consideration for the bulk sale.

2. *A pledgee or mortgagee of the trustee.* Two situations are possible as to such a person.

(a) He gives *new* value by making a new loan, or undertaking a new obligation, *within* thirty days from the time the entruster delivered the goods or documents to the trustee. In such a case, if the entruster has not complied with the filing provisions, the pledgee or mortgagee takes free of the entruster's interest provided he has received delivery of the goods or documents which were pledged or mortgaged to him without notice of the entruster's interest.⁷⁶

(b) He either gives *new* value, or accepts the goods or documents

protect purchasers from the trustee who give new value. See further the preceding installment, (1936) 5 FORDHAM L. REV. 17, 47, n128.

The liens of carriers, warehousemen and third persons who have expended labor upon the goods may be maintained against the entruster regardless of filing. The entruster, however, is not personally liable for the debt secured by the lien. U.T.R.A. § 11, N. Y. PERS. PROP. LAW (1934) § 58-c. *Contra*: Century Throwing Co. v. Muller, 197 Fed. 252 (C. C. A. 3d, 1912) *semble*.

74. U.T.R.A. § 9 (2) (b), N. Y. PERS. PROP. LAW (1934) § 58-a (2) (b); see also, definition of "purchasers", U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (11).

75. U.T.R.A. § 9 (2) (b) (ii), N. Y. PERS. PROP. LAW (1934) § 58-a (2) (b) (ii). The unique filing provisions of the Act will be described later. P. 264, *infra*.

76. U.T.R.A. § 9 (2) (b) (i), N. Y. PERS. PROP. LAW (1934) § 58-a (2) (b) (i).

which were pledged or mortgaged to him in cancellation of a debt or as security therefor, *after* the thirty day period has expired. In that event he takes free of the entruster's interest only if the pledge or mortgage is made before the filing provisions have been complied with, again provided he has taken delivery and is without notice. But whenever he deals with the trustee after the entruster has filed he is subordinated to the entruster's interest.⁷⁷

3. *Buyers of non-negotiable documents, or of the goods, who in either case take title in cancellation of a debt.* Since such buyers do not give new value they are protected only if the transaction is entered into after the thirty day period has expired and before the filing provisions have been complied with. For the thirty day period the entruster is protected regardless of filing as against such purchasers.⁷⁸

The theory of the foregoing provisions is that in the ordinary case the purposes of the trust receipt transaction will have been fulfilled within thirty days, *i.e.*, the goods will have been sold, stored, transshipped, *etc.* During that short period the entruster ought to have protection, even without filing, as against persons who do not give new value. As between such persons and the entruster the equities favor the entruster who has actually financed the acquisition of the goods which have been added to the trustee's estate. Therefore, this temporary protection cannot be regarded as unfair. But in the absence of filing the entruster is subordinated to mortgagees and pledgees who have relied upon the possession of the trustee and have given *new* value *within* the thirty day period. This also seems fair and is consistent with the policy of the Act to cast upon the entruster the risk of dishonest dealing on the part of his trustee as to those persons who are actually out of pocket because of the trustee's dishonest action.⁷⁹ If, however, the transaction is likely to take more than thirty days before it is closed out, as when the goods require processing, the entruster has the duty to comply with the filing provisions if he would be protected against third persons who thereafter deal with the trustee on the faith of his possession of the goods or of non-negotiable documents, whether they give new value or not.⁸⁰

77. U.T.R.A. § 9 (2) (b) (ii), N. Y. PERS. PROP. LAW (1934) § 58-a (2) (b) (ii).

78. *Ibid.* The subdivision mentions only purchasers of "goods" but it seems clear that purchasers of non-negotiable documents are included.

In the three types of transactions in which the entruster or a third person (such as the seller) delivers goods or documents to the trustee the thirty day period is figured from the date of the delivery. In the case in which documents are exhibited by the trustee to the entruster the thirty days are figured from the time when the documents are shown to the entruster or from the time he gives new value, whichever is prior. U.T.R.A. § 7, N. Y. PERS. PROP. LAW. (1934) § 57.

79. *Supra* p. 257.

80. "After filing no pledgee, mortgagee or transferee in bulk can take free of the entruster's interest. The reason is clear: All of these are persons whose business it is to look up the status of any trustee with whom they are dealing." HANDBOOK (1933) 253.

Creditors of the Trustee

At common law the entruster's interest under a valid trust receipt transaction was held to be superior to the interest of attaching creditors of the trustee and to that of receivers and trustees in bankruptcy, even though the transaction was not filed as a conditional sale or chattel mortgage, with which security arrangements the trust receipt transaction has points of similarity.⁸¹ This ruling did not seem to be altogether in accord with the spirit of the existing recording acts and has now been modified by the Uniform Trust Receipts Act. The entruster's interest, to the extent of the new value he has given as a part of the trust receipt transaction, is still valid without any filing for a period of thirty days after delivery by the entruster or any third person to the trustee of the goods or documents involved in the transaction. That is also true as to his interest in the case first described as a trust receipt transaction in which the entruster's security interest existed prior to the transaction.⁸²

If, however, the thirty day period has expired a creditor who thereafter acquires a lien upon the goods by attachment, levy or other legal process, and before the filing provisions have been complied with, will prevail over the entruster provided the creditor is without notice of the entruster's interest.⁸³ Compliance with the filing provisions at any time, however, will cut off the rights of such lien creditors who *thereafter* levy upon or attach the goods, the filing being deemed to be constructive notice.⁸⁴ It should be added that the taking of possession by the entruster has the effect of filing as long as he remains in possession.⁸⁵

An interesting provision is the one regulating the position of trustees in bankruptcy and like representatives of the creditors of an insolvent trustee. If the thirty day filing period has expired and no filing has as yet taken place "(i) an assignee for the benefit of creditors, from the time of assignment, or (ii) a receiver in equity from the time of his appointment, or (iii) a trustee in bankruptcy or judicial insolvency proceedings from the time of filing of the petition in bankruptcy or judicial insolvency by or against the trustee, shall, on behalf of all creditors, stand in the position of a lien creditor without notice, without reference to whether he personally has or has not, in fact, notice of the

81. See preceding instalment, (1936) 5 *FORDHAM L. REV.* 17, 36-42.

82. U.T.R.A. §§ 7, 8, 14, N. Y. PERS. PROP. LAW (1934) §§ 57, 58, 58-f. See heading *Importance of New Value*, p. 253; heading (A), p. 245 and note 78, all *supra*.

83. U.T.R.A. §§ 1, 8 (2), N. Y. PERS. PROP. LAW (1934) §§ 51 (6), 58 (2).

84. U.T.R.A. § 7, N. Y. PERS. PROP. LAW (1934) § 57.

85. U.T.R.A. § 7 (2), N. Y. PERS. PROP. LAW (1934) § 57 (2). Placing tags upon the goods or posting conspicuous notices in the trustee's place of business is equivalent to taking possession. U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (9) (definition of "possession").

entruster's interest" provided *any one* of the creditors had no notice.⁸⁶ That is to say, such a representative, in such circumstances, can hold the goods or documents as part of the assets of the estate in defiance of the entruster.

Entruster's Right to Proceeds

After goods or documents have been delivered to, or documents left with, the trustee it will frequently happen that the trustee will more or less promptly dispose of the goods or documents. Should bankruptcy proceedings thereafter be initiated the entruster may, under certain circumstances, occupy a preferred position as to the proceeds of the goods or documents remaining in the trustee's estate. The entruster is entitled to this preferential position as against an assignee, equity receiver or bankruptcy trustee only if his security interest "was valid at the time of disposition by the trustee."⁸⁷ This requirement seems to be fulfilled if the disposition is made after the entruster has complied with the filing provisions, or, in the absence of such compliance, then only if the disposition was made within thirty days after the goods or documents were delivered to the trustee or the documents were exhibited by the latter to the entruster.⁸⁸ A further limitation placed upon the entruster's right to proceeds is that the terms of the trust receipt transaction must have prohibited any disposition of the goods, or if the trust receipt contained a liberty of sale then the trustee must have been under a duty to account for the proceeds. With these limitations in mind the entruster's right to proceeds if the trustee defaults may be illustrated as follows:

1. The trustee has sold the goods or documents on credit terms to a buyer. In such event the entruster is subrogated to the debt owed by the purchaser to the trustee. He is also subrogated to any security given by the buyer to the trustee.⁸⁹

2. The trustee sold the goods or documents for cash and went into

86. U.T.R.A. § 8 (3) (b), N. Y. PERS. PROP. LAW (1934) § 58 (3) (b).

87. U.T.R.A. § 10, N. Y. PERS. PROP. LAW (1934) § 58-b.

88. See heading *Creditors of the Trustee*, p. 262, *supra*, and footnotes thereto. If more than thirty days have expired and the disposition of the goods or documents by the trustee thereafter takes place but before the assignment for the benefit of creditors, filing of the petition in bankruptcy or appointment of the receiver in equity, it might be argued that the entruster's interest in the goods was still valid, its validity not yet having been attacked. However, it seems to be the policy of the Act to give the entruster his superior protection only for the period of thirty days and that after such a period he ought to be compelled to file. "The Act works to the interest of general creditors . . . by making any failure to comply with the Act redound to the benefit of the representatives of general creditors." (italics in original) HANDBOOK (1933) 255. See also U.T.R.A. § 14, N. Y. PERS. PROP. LAW (1934) § 58-f.

89. U.T.R.A. § 10 (a), N. Y. PERS. PROP. LAW (1934) § 58-b (a).

bankruptcy within ten days after receiving the proceeds of the sale. The entruster is a preferred creditor to the amount or value of such proceeds whether they are identifiable or not.⁹⁰

3. The trustee, having a liberty of sale and being under a duty to account, sells the goods or documents for cash which he expends in buying other goods. If the goods so purchased are still part of the assets of the trustee's estate the entruster is entitled to them. But if the entruster has knowledge that such proceeds exist and has not demanded an accounting within ten days after acquiring such knowledge he is deemed to have waived the duty of the trustee to account.⁹¹

It will appear from the foregoing discussion of the rights of creditors of the trustee and of the entruster's right to proceeds in certain events that the entruster is given extensive protection for a period of thirty days after the goods or documents have been delivered to the trustee. These rights he had at common law for an unlimited period under a valid trust receipt transaction although perhaps the common law did not go so far in the case of unidentifiable proceeds. The Act, however, has limited the entruster's rights by requiring compliance with the filing provisions if he would be safe after thirty days. It remains to be considered what are these filing provisions.

Filing

The filing requirements of the Act are rather unique. The reader may have assumed whenever reference to "compliance with the filing provisions" has been made that, as in the case of chattel mortgages and conditional sales, each transaction must be individually filed. But that is not the case. One notice filed with the Secretary of State which is signed by the entruster and by the trustee giving their respective business addresses and which announces that they are undertaking or contemplating trust receipt transactions with reference to the acquisition by the trustee of silk (or coffee or automobiles, *i.e.*, designating the kind of goods), constitutes a sufficient filing as to all transactions concluded between them for a year following the date of filing. The notice also constitutes filing as to all transactions concluded within thirty days prior to such date. Refiling within the year of a like notice extends the entruster's existing security interest for another twelve months and covers new transactions as well.⁹²

90. U.T.R.A. § 10 (b), N. Y. PERS. PROP. LAW (1934) § 58-b (b). This subdivision also provides that the entruster is entitled to the amount or value of such proceeds if he demands an accounting within ten days of the disposition of the goods or documents by the trustee even though no bankruptcy proceedings have been instituted.

91. U.T.R.A. § 10 (c), N. Y. PERS. PROP. LAW (1934) § 58-b (c). The common law aspects of the entruster's right to proceeds are discussed very thoroughly by Frederick, *The Trust Receipt as Security II* (1922) 22 COL. L. REV. 546, 554-558.

92. U.T.R.A. § 13, N. Y. PERS. PROP. LAW (1934) § 58-e. If the entruster takes posses-

Although this method is unusual it seems to be adequate. Buyers from the trustee who pay cash for the goods or who buy on credit are given protection against the entruster whether there has been a filing or not; prospective creditors, mortgagees, and pledgees of the trustee and persons who propose to take from him in cancellation of indebtedness can learn from the record that merchandise he has on hand cannot be relied upon and then make further investigation. "All of these are persons whose business it is to look up the status of any trustee with whom they are dealing."⁹³

Entruster and Trustee

At common law there may have been some doubt as to the rights between the parties to a trust receipt transaction due to the conflicting definitions of the entruster's interest.⁹⁴ These doubts have been fully resolved by the Act. The entruster, until the secured debt has been satisfied, has a property interest in the goods or documents limited in extent to securing performance of the trustee's obligation even though the terms of the agreement express his interest as that of absolute ownership.⁹⁵ It therefore follows that upon timely performance by the trustee of his obligations he automatically becomes the absolute owner. It also appears by reasonable inference from the Act that the trustee has a property interest in the goods which he may assert against the entruster in an action for conversion should the entruster wrongfully take possession before default or refuse to surrender possession upon a tender of due performance by the trustee.⁹⁶

Should the trustee default while he is still in possession of the goods or documents, the entruster may take possession without legal process, whenever that is possible without committing a breach of the peace.⁹⁷ An entruster who has taken possession from the trustee holds the goods with the rights and duties of a pledgee but he may, following a default, sell the goods or documents after giving the trustee five days notice. An entruster after default and notice may make the sale at a public or private sale. He may himself become a purchaser at a public sale.

sion, that is equivalent to filing as long as he remains in possession. U.T.R.A. § 7 (2), N. Y. PERS. PROP. LAW (1934) § 57 (2). Placing tags upon the goods or posting conspicuous notices in the trustee's place of business is deemed constructive possession. U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (9) (definition of "possession").

93. HANDBOOK (1933) 253; see note 80, *supra*.

94. See the preceding instalment of this article, (1936) 5 FORDHAM L. REV. 17, 24-32.

95. U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (12) (definition of "security interest"). This definition is quoted in full in note 38, *supra*.

96. U.T.R.A. § 6 (3) (c), N. Y. PERS. PROP. LAW (1934) § 56 (3) (c). See also the case put in the previous installment, (1936) 5 FORDHAM L. REV. 17, 29, and discussion thereon, *id.* at 31.

97. U.T.R.A. § 6 (2), N. Y. PERS. PROP. LAW (1934) § 56 (2).

He must, however, account to the trustee for any surplus obtained above the debt secured by the goods or documents. The trustee would be liable, of course, to make up any deficiency.⁹⁸

Style or Model Goods

The statute, therefore, protects the trustee from a total forfeiture of his interest. Furthermore, any terms in the trust receipt, or in a contract to give a trust receipt, which contemplate a forfeiture are invalid except in one instance. This is when the subject matter of the transaction consists of goods, or documents representing goods which are manufactured by "style or model", such as womens' hats for example. In this instance the trust receipt may contain a provision permitting the forfeiture of the trustee's interest upon default at the election of the entruster. Style and model goods, of course are apt to depreciate rapidly in value at the close of a season or if, overnight, the whim of the feminine public takes a new direction. In the case of such goods there is always the risk that by the time the trustee's performance is due, styles may have changed or the model be outmoded. If the trust receipt covering a transaction in such goods provides for a forfeiture of the trustee's interest and the entruster chooses to exercise his option he is not then bound to sell, but if he does sell he need not account for any surplus as he is then selling on his own account and not for the purpose of foreclosing his security interest. In that event, however, he must cancel at least eighty percent of the trustee's remaining indebtedness.⁹⁹

Of course, if the goods have depreciated in value the entruster will not care to exercise his option but will choose to sell on his debtor's account and sue for the actual deficiency. Should it happen that the goods have increased, or are likely to increase, in value he will probably prefer to exercise the option so that he can pocket any surplus over the indebted-

98. U.T.R.A. § 6 (3) (a), (b), N. Y. PERS. PROP. LAW (1934) § 56 (3) (a), (b). The analogy to the unpaid seller's right of resale under a lien is rather close here, and cases dealing with the fairness and good faith of the unpaid seller's action in reselling the goods will probably be in point. See UNIFORM SALES ACT § 60, N. Y. PERS. PROP. LAW (1911) § 141. Two points of difference should be noted: (1) Under the Uniform Sales Act notice is not a requisite; (2) The unpaid seller does not have to account for a surplus. *D'Aprile v. Turner-Looker Co.*, 239 N. Y. 427, 147 N. E. 15 (1925).

99. U.T.R.A. § 6 (5), N. Y. PERS. PROP. LAW (1934) § 56 (5). Inasmuch as opinions might differ as to the interpretation of this subdivision it is here quoted in full: "5. As to articles manufactured by style or model, the terms of the trust receipt may provide for forfeiture of the trustee's interest, at the election of the entruster, in the event of the trustee's default, against cancellation of the trustee's then remaining indebtedness; provided that in the case of the original maturity of such an indebtedness there must be cancelled not less than 80% of the purchase price to the trustee, or of the original indebtedness, whichever is greater; or, in the case of a first renewal, not less than 70%, or in the case of a second or further renewal, not less than 60%."

ness which he obtains at a sale. In the event that he does exercise the option and his calculations miscarry, in that after holding for a sale on his own account the bottom falls from under the market, he can at the most only recover from the debtor twenty percent of the remaining indebtedness.

Just what type of goods are "manufactured by style or model" is not very clear. A great many types of goods are now style or model goods. Automobiles are produced in annual models; modernistic furniture is style goods. Indeed in a broad sense nearly all manufactured articles which are advertised and sold under trade names might be called style or model goods. Yet the market price of most of such goods remains fairly stable over many months, even years. It seems to be intended that the one case in which the trustee may be subjected to a forfeiture is an exceptional case. Therefore it is submitted that "style or model" goods should be construed to mean only those which may be expected to be popular for a short season, after which they are likely to drop out of the market or to considerably depreciate in value due to the changing fancy of the buying public. An analogy to the Uniform Sales Act provision relating to the seller's action for the price may be suggested. As a general rule under that statute the seller may sue for the purchase price, as distinguished from an action for damages for breach of contract, only when title has passed to the buyer. But one of the exceptions is that he may sue for the price if the goods cannot readily be resold in the seller's regular market for a reasonable amount.¹⁰⁰

Whatever construction may be given to this "style and model" section of the Act, it is only as to such goods that the parties may provide by the terms of the original agreement for a forfeiture of the trustee's interest. After default on his obligation, however, the trustee may surrender his interest to the entruster in any case and on any terms.¹⁰¹ Finally, should the entruster wrongfully retake or wrongfully sell, a purchaser in good faith from him will acquire a title free from the trustee's interest even though the entruster's act constituted a conversion as against the trustee. The purchaser from the trustee in this instance is not required to give new value but merely value.¹⁰²

Incomplete Pledge Transactions

Now that the discussion as to what constitutes a trust receipt transaction and the analysis of the rights of all the interested parties connected with it has been brought to a close, it might be supposed that

100. UNIFORM SALES ACT § 63, N. Y. PERS. PROP. LAW (1911) § 144; *Illustrated Postal Card & Novelty Co. v. Holt*, 85 Conn. 140, 81 Atl. 1061 (1912).

101. U.T.R.A. § 16 (4), N. Y. PERS. PROP. LAW (1934) § 56 (4).

102. U.T.R.A. § 6 (3) (c), N. Y. PERS. PROP. LAW (1934) § 56 (3) (c).

nothing further remains to be considered. But such is not the case for the reason that the Act contains some important provisions affecting transactions which may, or may not, involve the purchase-money financing of goods in the course of trade from producer to wholesaler to retailer.¹⁰³ Even though such transactions are not trust receipt transactions, a part of the law governing them is to be found in the Uniform Trust Receipts Act. These are attempted pledges or agreements to pledge not accompanied by possession in the pledgee. An instance of an incomplete pledge which seems to be within the policy of the statute may now be given:

Goods are delivered by a seller to a buyer on ten days credit. The buyer then agrees to pledge the goods to a bank in return for a loan of money with which he intends to pay the seller. If he signs a trust receipt then it will be a trust receipt transaction provided he is left in possession for the proper purposes.¹⁰⁴ But suppose there is merely a verbal agreement to pledge or suppose that possession is not left with the pledgor for any of the delimited purposes. Under either supposition there would not be a trust receipt transaction but only an incomplete pledge.¹⁰⁵ At common law the transaction would be invalid as against purchasers in good faith and for value from the pledgor in possession.¹⁰⁶ Yet this transaction is so like a regular trust receipt transaction that it is not surprising to find it provided for in the Act as will shortly appear. On the other hand, it is submitted that the following instance would not be within the policy of the statute:

Mr. Micawber agrees to pledge his car to William Lender in return for a loan. It is agreed verbally or in writing that the car is pledged to Lender, that Lender may take possession at any time he deems himself insecure and that Micawber will not sell or encumber the car without the express permission of Lender. Reasons have already been given why this is not a trust receipt transaction.¹⁰⁷ Inasmuch as the parties

¹⁰³ One case which did not involve purchase-money financing but which is a trust receipt transaction under the Act has been suggested at p. 247, *supra*. Another case which might possibly be considered to be within the Act, although doubtfully so, is discussed at p. 252, *supra*.

¹⁰⁴ That is, a third person delivers goods to the trustee in which, for new value, the entruster by the transaction acquires a security interest. See p. 247, *supra*. See heading *Security Interest Acquired by the Transaction*, p. 247, *supra*. For the proper purposes see note 7, *supra*.

¹⁰⁵ By definition a trust receipt transaction requires a writing [note 22, *supra*] and possession must be left with the trustee for one of the delimited purposes [note 7, *supra*].

¹⁰⁶ "Transfer of possession to the pledgee is necessary to create a valid pledge and the possession must be actual, not merely constructive, unless from the nature of the case the property is not susceptible of manual delivery and possession." *Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 211, 100 N. E. 806, 809 (1912).

¹⁰⁷ P. 244, *supra*.

do not agree that Lender is to have the title it would seem that they have attempted to create a pledge. Now let it be assumed that within ten days after this agreement is made an attaching creditor without notice levies upon the car. The creditor's attorney might be more than a little surprised to learn that the common law relating to an attempted pledge, without transfer of possession to the pledgee, has been modified by the Uniform Trust Receipts Act. What, he might inquire, has this to do with trust receipts? It has nothing to do with the purchase-money financing of goods in the course of trade; the parties did not even contemplate a trust receipt transaction; nevertheless the writer is driven to the conclusion that such a case is within the unlimited provisions of the Act now to be summarized.¹⁰⁸

Provisions of the Act

A pledgee who gives new value in return for the pledge can defend his lien against creditors, either with or without notice, for a period of ten days from the time the new value is given, even though the pledgor remains in possession.¹⁰⁹ In both of the cases just suggested, therefore, the pledgee is protected against attaching creditors for that brief period. If the pledge, however, is given as security for an antecedent debt or obligation owed by the pledgor to the pledgee, and in the case of new value given by the pledgee after the ten day period has expired, the pledgee must take possession in order to protect his lien from creditors without notice.¹¹⁰ In any case, however, purchasers from the pledgor, who are without notice, take free of the pledgee's lien during or after the ten day period, unless prior to the purchase the pledgee has perfected the pledge by taking possession.¹¹¹

The final provision to be considered is that relating to a redelivery of possession by a pledgee to the pledgor before the pledge has been redeemed. If a person holding "a pledgee's or other security interest" in goods, by an agreement not amounting to a trust receipt transaction,

108. Prof. Bogert in his discussion of the Act suggests that Section 15 may possibly qualify the pledge provisions. Bogert, *supra* note 4, at 37. The writer agrees with him that this is doubtful. The applicable part of the section is quoted note 46, *supra*.

109. U.T.R.A. § 3 (1) (a), N. Y. PERS. PROP. LAW (1934) § 53 (1) (a).

110. U.T.R.A. § 3 (1) (b), N. Y. PERS. PROP. LAW (1934) § 53 (1) (b). Possession is defined to include such constructive possession as placing tags upon the goods or the posting of signs in conspicuous places so as to indicate to third persons that the "entruster" has an interest in the goods. U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (9). But an "entruster" is defined in the same section as a person who has or takes a security interest under a trust receipt transaction. These pledges are not trust receipt transactions, hence, *query*: Can the pledgee take such constructive possession? Probably.

111. U.T.R.A. § 3 (2), N. Y. PERS. PROP. LAW (1934) § 51 (2). By definition "purchasers" includes pledgees and mortgagees. U.T.R.A. § 1, N. Y. PERS. PROP. LAW (1934) § 51 (11).

delivers possession for a temporary and limited purpose to the one holding the title or beneficial interest the security holder is again protected against attaching creditors for the brief period of ten days.¹¹² The pledgee's surrender of possession for the purpose of enabling the pledgor to make a sale, or procure repairs may be given as examples.

It will be noticed that the italicized words quoted from the Act in the preceding paragraph include a chattel mortgagee. If a chattel mortgagee has neither filed under the chattel mortgage recording act nor taken possession he is protected against attaching creditors without notice for a period of ten days should he redeliver the goods to the mortgagor for a temporary and limited purpose. This part of the Act, therefore, has an important effect both upon the common law of pledges and upon unfiled chattel mortgages.

Conclusion

The Uniform Trust Receipts Act is a very complicated statute. The Commissioners who drafted it had to consider and make just provision not only for the immediate parties, but also for third persons in all categories who subsequently become concerned with the transaction. Complexity could not be avoided. But most of the doubts, most of the purely formal technicalities and most of the inconsistencies that existed in the case-law have been swept away. If the injunction of the legislature, to so interpret and construe the Act as to effectuate its general purpose "to make uniform the law of the states" is obeyed, as it will be, the adoption of the Act will represent a distinct gain to the business community.¹¹³

The Act recognizes the trust receipt transaction as an independent form of security transaction separate and apart from the familiar pledge, chattel mortgage and conditional sale.

It gives to the entruster who finances the purchase of goods in the course of trade from producer to retailer adequate protection against insolvency of the trustee, while at the same time, it throws upon the entruster the risk of dishonest dealing by his borrower.

It gives to pledgees and mortgagees, whose business it is to investigate, a better chance to ascertain the true situation than they had at common law without burdening the entruster with expensive filing.

It gives to good faith purchasers for new value who rely upon the

112. U.T.R.A. § 3 (3), N. Y. PERS. PROP. LAW (1934) § 53 (3). Compare as to the common law rule *Helburn-Thompson Co. v. All Americas Merc. Corp.*, 180 App. Div. 167, 167 N. Y. Supp. 711 (1st Dep't 1917), *aff'd*, 223 N. Y. 675, 119 N. E. 1048 (1918) and *Kellogg v. Thompson*, 142 Mass. 76, 6 N. E. 860 (1886). See N. Y. LIEN LAW (1909) § 184 with respect to the garage keeper's lien, and *In re Carter*, 21 F. (2d) 587 (W. D. N. Y. 1927).

113. U.T.R.A. § 18, N. Y. PERS. PROP. LAW (1934) § 58-j.

trustee's possession greater protection in some cases than they had at common law without lessening that protection in any case.

In its proper field it should facilitate and make more safe the trade in goods, to the general benefit of the business community and of the public.