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The Uniform Trust Receipt Act

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It is to be here noted that the jurisdiction of the Small Claims Court is not at all mandatory, but is merely a supersedure to the established practice in the municipal court. If the claimant elects to avail himself of the benefits which the Small Claims Court has to offer, he of necessity makes certain concessions. By proceeding under this title the plaintiff waives a jury trial [36] and all rights to appeal except on issues of substantive law.[37] The defendant,[38] nevertheless, is not precluded from demanding a jury trial. In fact, the summons informs him that if, in good faith, he feels that certain issues of fact may merit it, he may secure such a trial by paying a jury fee of $6.00 and by filing an undertaking [39] or posting cash to the amount of fifty dollars. This, he is informed, is to secure to the plaintiff any costs which may be awarded him.[40]

The court may in its discretion remand any small claim to another part of the municipal term and proceed to try it there according to the prevailing rules of practice and procedure.[41] In that event the plaintiff will be deemed to have waived nothing in the Small Claims part.[42]

This then, is the present situation of the New York City Small Claims Courts. How far these tribunals will alleviate the ills that beset our body judicial cannot now be accurately foretold. Surely the legislature has correctly diagnosed the major ailments and has left a group of physicians who are closely observing the patient's convalescence and who stand by ready to administer further restoratives if found necessary.

CARL E. ALPER.

THE UNIFORM TRUST RECEIPT ACT.—The Uniform Trust Receipt Act [1] was enacted in New York State on May 14, 1934, and went into effect on July 1, 1934. As a result of this, New York became the first state of the Union to adopt this Act. The statute as it has been adopted is in form a duplicate of the eighth tentative draft of the Committee on Uniform Trust Receipts Act of the National Conference of Commissioners of Uniform State Laws and

[36] *Supra* note 6, §184.
[37] *Id.* §185.
[38] Or any interested party other than the plaintiff.
[39] *Supra* note 14, Rule XI, "The undertaking to be filed * * * shall be in the form prescribed by Rules 26 and 27 of the N. Y. C. P. A."
[40] *Supra* note 6, §184. Where defendant demands a jury trial, plaintiff must be notified of that fact. *Supra* note 14, Rule XII.
[41] *Id.* §183.
[42] *Id.* §184.

[1] N. Y. CONSOLIDATED LAWS OF 1934, c. 574, now §§50-58L of N. Y. PERSONAL PROPERTY LAW.

Procedure,[2] which was approved by resolution of the American Bar Association.[3]

The primary purpose of this article is to convey to the reader an interpretation of the Uniform Trust Receipt Act as it now exists, as part of the consolidated laws of New York State. However, in making this survey and study of the Act, the writer has found that an understanding of the history, origin and legal nature of the trust receipt agreement is an indispensable factor in reaching any careful and intelligent determination as to legal effects of this statute. It is therefore with this vital consideration in view that the writer deviates from his main purpose in presenting a survey of the history, origin and legal nature of the trust receipt agreement.

A typical situation involving a trust receipt is found where a bank advances money to enable a buyer, who has no ready funds, to purchase goods. The bank takes the bill of lading for the goods in its own name, but thereafter surrenders it to the buyer under a type of agreement known as a trust receipt. This agreement usually states that the title shall remain in the bank, while the goods shall be placed in the possession of the buyer to be disposed of or warehoused by him. Such of the proceeds are paid to the bank as will repay it (the bank) for the sums advanced by it under this agreement, to the buyer, together with its customary charge or commission. The agreement usually includes a provision whereby the buyer agrees to store and fully insure the goods so purchased and to deliver the storage and insurance papers to the bank. Another familiar provision usually found in these agreements gives the bank the right to cancel the trust at any time and repossess itself of the goods, or of the proceeds of the sale of the goods. This device of security was first utilized in importing, although in recent years it has been extended to mercantile financing of dealers in machinery, automobiles and the like. The bank usually extends the purchase price[4] on behalf of the buyer or importer. The bank takes legal title and not merely the interest of a pledgee, nor does the bank lose its interest by releasing possession of the goods to the buyer for the purpose of processing, shipping, manufacture or even sale.[5]

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[2] For comparison see c. 574 of Consolidated Laws of New York, 1934, for the act as adopted and see "Handbook of the National Conferences of Commissioners of UNIFORM STATE LAWS AND PROCEDURE" (1933) pp. 256-270. The draftsman of the act was Professor Karl N. Llewellyn.

[3] "Report of the President to the American Bar Association," pp. 122-123 of HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS AND PROCEDURE.

[4] The bank need not pay the purchase price but may instead accept a bill of exchange drawn upon it, or may issue a letter of credit to the borrower's seller, in any event, however, the bank becoming personally liable.

[5] This is a copy of the actual trust receipt agreement signed by the parties in the case of *In re* Cattus, 183 Fed. Rep. 733. The only difference is that wherever "bank" is used by this writer, the actual agreement states the name of the agent for the bank.

John M. Zane, of the Chicago Illinois Bar, in his discussion of the ancient Greek case of *Zenothenis* v. *Demon* [6] places the origin of the trust receipt far back to the classical times of Demosthenes, the Greek orator. This type of contract in all its essential elements has continued through the ages and up to the present time as a very important phase of credit in importing transactions.

The earliest cited case which seems to resemble the trust receipt situation was decided by Judge Story in 1843.[7] In this case the bankrupt had borrowed money from the plaintiffs to be used in the purchase of goods. Under agreement between the parties, the property so purchased was to be pledged as security for the loan, the bankrupt to hold the bills of lading for the plaintiffs' account. This action was in equity to establish a lien on the property. Judge Story decided for plaintiffs, holding "the agreement is binding upon the property in the hands of the assignee, fit to be enforced in the present

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"Received from.....through their representative .....(bank).....of New York, the following goods and merchandise their property specified in the bill of lading per..... Shipped by.....and in consideration thereof, we hereby agree to hold said goods in trust for the above named bankers, and as their property, with liberty to sell the same for their account, and in case of sale to give.....(bank).....the name of the purchasers, and to hand them the avails, as soon as received, as security for due provision and for the acceptance of the said bankers, on our account, noted at foot; and we further pledge to them said goods and the proceeds of such as security for the payment of any and every other indebtedness of ours to the aforesaid bankers, whether matured or unmatured, according to its terms. In case the above mentioned goods are sold we agree to store and fully insure the same, and hand the storage and insurance papers to.....bank..... It is also agreed that.....(bank)..... may at will cancel this trust at any time, and repossess themselves of their said property in whatever condition it may then be, or of the proceeds of such of the same as may then have been sold, wherever the said goods or proceeds may then be found, and in the event of any insolvency, suspension, or failure, or assignment for benefit of creditors on our part, or of the non-fulfillment of any obligation, or of the non-payment, either at maturity or upon previous demand by the said .....(bank)....., of any acceptance made for us under said credit or any other credit issued by.....(bank)....., on our account, or of any indebtedness on our part to either of them, all obligations, acceptances, indebtedness and liabilities whatsoever shall thereupon (with or without notice) mature and become due and payable.

"We further agree to keep said property fully insured against fire, payable in case of loss to.....(bank)....., we to pay any expenses incurred thereon, the intention of this arrangement being to protect and preserve unimpaired their lien on said property as security for any and all obligations on our part then outstanding."

See *In re* James, Inc. (C. C. A. 1929), 30 F. (2d) 555 for example of copy used in domestic transactions.

[6] Zane, *A Modern Instance of Zenothenis v. Damon* (1925) 23 MICH. L. REV. 339; KARL FREDERICK, ESQ., THE TRUST RECEIPT AS SECURITY, pp. 30-38.

[7] Fletcher v. Morey, 2 Story 555 (C. C. 1843).

suit." [8] The case also held that this so-called trust receipt would be valid as against all persons except *bona fide* purchasers for valuable consideration and without notice. *Barry* v. *Boninger*,[9] decided in 1877, seems to be the earliest reported case which uses the term "trust receipt." The transaction involves an importation (which was the first and most common form of enterprise to utilize the trust receipt) and the substance of the agreement resembles those now used. The decision of the court held the property of the goods to be in the bankers under the letters of credit and the trust receipt.

Other forms of chattel security, besides the trust receipt, are the pledge, conditional sale and the mortgage. Though resembling in some of its features each of these popular security devices, it does not conform to any of these types of security, but is itself an independent form of security. Nor can those who utilize the trust receipt be satisfied by the use of any of these other security devices.

Let us first compare the trust receipt with the conditional sales agreement to which it bears a marked resemblance. A conditional sale as defined by the Uniform Sales Act [10] is

"(1) Any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to rest in the buyer at a subsequent time upon the payment of a part or all of the price, or upon the performance of any other condition or the happening of any contingency; or

"(2) Any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract." From our understanding of the nature of the trust receipt agreement it is not very difficult to see how closely these two agreements resemble each other. Legal title, in both cases, is in the one who has extended the credit. Possession, in both cases, is usually delivered to the debtor (called the buyer in trust receipt cases). Again, in both instances, title by stipulation is passed to the buyer only upon the payment of the agreed amount. Risk of loss is usually on the buyer.[11] And, while it is not infre-

[8] *Id.* at 570. Other early cases which develop the essential principle of the trust receipt doctrine are: Dows v. National Exchange Bank of Milwaukee, 91 U. S. 618 (Sup. Ct. 1875); Mechanics and Traders' Bank v. Farmers and Mechanics' National Bank, 60 N. Y. 40 (1875). In this case the court held that even if the importer should sell and deliver the goods to an innocent purchaser for value, without paying the proceeds to the bank, the bank would still be entitled to the goods as against the *bona fide* purchaser.

[9] 46 Md. 59 (1877).

[10] N. Y. PERSONAL PROPERTY LAW §61.

[11] *In re* McElheny, 91 App. Div. 131, 86 N. Y. Supp. 326 (1st Dept. 1904). Here the court said, "the burden of loss in shipment is upon the one who has contracted with the banker * * *."

quent that the buyer in the case of a trust receipt agreement may sell before payment, yet the buyer in the conditional sales contract may, too, upon consent of the one who holds legal title, sell his interest. Some courts have even construed trust receipts to be conditional sales.[12] Yet upon close analysis distinctions between the two can be readily seen, and the courts have held the trust receipt not to fall within the recording acts.[13] The chief distinction is that, although there is a retention of title in the banker, it fundamentally is not a selling transaction and was never intended by the parties to be such. The holder of the trust receipt does not sell the goods to the importer or trader but merely lends him credit and advances the money for his account. The bank has ownership merely for security—a limited security interest.[14] Another distinction is that in a conditional sale, possession cannot be retaken until a default; whereas under the trust receipt the holder usually has the power to reclaim possession of the goods at any time.[15]

We now consider the trust receipt and the chattel mortgage. The chattel mortgage is a recognized form of security usually transferring the general property of the goods or security title to a creditor for the purpose of securing a debt. In both trust receipt and chattel mortgage, upon the payment of the money owed, the ownership will be transferred to the true owner. Possession, in both cases, is usually in the debtor. There is definite authority in some states that a trust receipt is a chattel mortgage.[16] Professor Williston[17]

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[12] *In re* Ford-Rennie Leather Co., 2 F. (2d) 750 (1924). In New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266 (1888), the majority of the court held the agreement to be a conditional sales agreement, while the dissenting opinion, written by Judge Carpenter, argued that this agreement was a mortgage.

In re Bettman-Johnson Co., 250 Fed. 657 (C. C. A. 6th, 1918). Here although the holder the trust receipt was defeated on the grounds that the trust agreement was a conditional sale, yet the court makes a distinction between the trust receipt and the conditional sale, saying, on page 664, "In a trust receipt transaction the banker acquires the title for a particular customer—the importer —by advancing the purchase price for him to the foreign vendor without expectation of reward other than an almost nominal commission for the services rendered. The vendor in the ordinary conditional sales contract is other than a banker and has by the expenditure of his fund acquired the ownership of the article sold, without reference to any particular purchaser, and contemplates an actual profit to himself in its disposal.

See also authorities cited in (1929) 29 COL. L. REV. 545, n. 31.

[13] Commercial Credit Corp. v. Northern Westchester Bank, 256 N. Y. 482, 177 N. E. 12 (1931). In this case the Court of Appeals held that neither the chattel mortgage nor conditional sale recording acts were applicable to trust receipts.

[14] Drexel v. Pease, 133 N. Y. 129, 36 N. E. 732 (1892).

[15] WHITNEY, LAW OF SALES (2d ed. 1934) §133.

[16] General Motors Acceptance Corp. v. Boddecker, 274 S. W. 1016 (Civ. App. of Texas 1925); *In re* Shuttig, 1 F. (2d) 443 (1924). *Contra: In re* Ford-Rennie Leather Co., 2 F. (2d) 750 (D. Del. 1924).

[17] Williston, *Progress of the Law* (1919-1920) 34 HARV. L. REV. 741, 759. Prof. Williston here places his distinction merely on the basis of business expediency.

seems to consider the trust receipt transaction as a form of chattel mortgage stating that the only reason for not requiring filing or recording is because it would be better to leave unprotected such persons who may be deceived by apparent ownership in the importer, rather than to hamper a form of business so necessary and vital to the progress of the commercial world by calling it a mortgage and hence requiring filing. But the rule, generally, and in New York, is that the trust receipt is not a chattel mortgage but an independent form of security agreement.[18] The distinction is clearly made by Karl Frederich[19] and is based on the fact that in the case of a chattel mortgage *title usually comes to the mortgagee from the mortgagor,* whereas, in the case of trust receipt *title comes to the bank from a third person other than the importer or domestic buyer.*[20]

Nor can we correctly call the trust receipt a common law pledge transaction. A pledge depends upon continued possession of the property in the one secured and when possession is lost, the pledge is extinguished.[21] Briefly stated "no possession, no lien." However, it is also true that the delivery of possession back to the owner for a temporary use will not destroy the pledge.[22] But in the trust receipt device the bank does not want possession of the goods. It wants *title* for its protection and the trust receipt has usually been held not a pledge.[23] *In re Cattus,*[24] the court said, "the purpose of

[18] *In re* Cattus, 183 Fed. 733 (C. C. A. 2d, 1910); *In re* Shulman, 206 Fed. 129 (D. C. 1913); *In re* Fountain, 282 Fed. 816 (C. C. A. 2d, 1922); *In re* James, Inc., 30 F. (2d) 555 (C. C. A. 2d, 1929).

[19] KARL T. FREDERICH, THE TRUST RECEIPT AS SECURITY (1922) 17-23. Although Mr. Frederich admits that generically the trust receipt is a chattel mortgage yet he says that it should not be so classed. His reasons for this are based on the magnitude and volume of the trust receipt business in commerce and the fact that were we to call this a mortgage and require filing, the burden and expense would be enormous and the delay and hampering caused by filing necessity, would result in rendering the use of the trust receipt vastly impractical and destroying its utility.

[20] *Supra* note 17; *In re* James—In this case the court's opinion states that the essential element of the trust receipt is that title comes to the lender directly from a third person. *In re* Fountain, 282 Fed. 816, 827 (C. C. A. 2d, 1922), it was held (and this decision is in accord with Frederich's viewpoint) that "it makes no difference whether the bills of lading run directly to the banker or whether they run to the seller's order and are endorsed to the banker, so long as title is not allowed to pass to the person for whose benefit the transaction is undertaken until the bank has acquired its interest."

[21] Black v. Bogert, 65 N. Y. 601 (1875); Homes v. Crane, 2 Pick. 607 (Mass. ——); Whitaker v. Sumner, 20 Pick. 399 (Mass. ——).

[22] Britton v. Harvey, 16 So. 747, 47 La. Ann. 259 (1895); Rose v. Coble, 61 N. C. 517 (1868); *In re* New York Transportation Co., 276 Fed. 145 (D. Del. 1921); Marx v. Marx, 223 Ky. 339 (1928). But see Blue v. Herkimer National Bank, 20 F. (2d) 256 (C. C. A. 2d, 1929), in which the court held that if too much control for his benefit is left in the pledgor upon redelivery the pledge may be invalidated.

[23] *In re Richeimer,* 221 Fed. 16 (C. C. A. 6th, 1915); Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818 (1887); *In re* James, 30 F. (2d) 551 (C. C. A. 2d, 1929). However, see Hanna, *Trust Receipts* (1924) 29 COL. L. REV. 545, 548, for the view that fundamentally the trust receipt is a pledge.

[24] 183 Fed. 733 (C. C. A. 2d, 1910).

the parties, describe the trust receipt as you will, was to keep the title to the goods in the bankers until their acceptances for the price of the goods are paid."

At this time we come to the discussion of the common law doctrine of trust receipts. Our question now is, what legal relationship is created by the trust receipt transaction. It is proper to note at this time, that the litigation which has arisen is infrequently a controversy between the banker and the customer. As between these two parties, the contract itself is sufficiently clear to establish their respective rights and has led to no real difficulties. The conflict is usually between the banker who has advanced credit or money and the creditors of the buyer (importer or dealer) who has become insolvent before payment to the banker. Between these two parties who is entitled to the goods (or the proceeds, if a sale of the goods has been made)? That is why most of the litigation in these cases has arisen in the federal courts (under the Federal Bankruptcy Laws) in a contest between the banker and the receiver or trustee for the benefit of creditors of the bankrupt buyer.

The general tenor of the decisions in the federal courts has been to uphold the rights of the banker and to allow him to recover the goods or the proceeds [25] thereof as against the trustee in bankruptcy for the benefit of creditors.[26] The basis of these decisions is on the theory that the title to the goods remains in the banker under the terms of the contract until payment of the proceeds. Another important reason assigned, is that it would be "inequitable" to the banker to hold otherwise, and further, that the continuance of this well-established and useful commercial custom depends upon this protection of the bankers.

It is worth while to quote from the opinion in one of these cases. In *Charaway* v. *York Silk Co.*,[27] the court said:

"It is not necessary to find in the nomenclature of security relations a category in which to place this one. It is governed by the contract of the parties, and the contract will only be disturbed by the courts for illegality." And in the same case: "We see nothing in the evidence in this case that shows any conduct or act on the part of the plaintiffs by which they would be estopped to assert their title and ownership to the goods in question, so far as the same

[25] Generally, the bank may recover the proceeds of the sale when they can be identified. Also, if the buyer has sold under power of sale and the purchase price not yet collected, the banker may notify the purchaser of his rights thereto and collect from the purchaser who will be liable for the bank for a refusal to do so. Thayer v. Dwight, 104 Mass. 254 (1870); Dows v. Kidder, 84 N. Y. 121 (1881); for a full discussion of the creditors' rights to the proceeds see FREDERICH, THE TRUST RECEIPT AS SECURITY, pp. 73-85.

[26] Century Throwing Co. v. Muller, 197 Fed. 252 (C. C. A. 3d, 1912); *In re* Killion Manufacturing Co., 215 Fed. 82 (C. C. A. 3d, 1914); *In re* Cattus, 183 Fed. 733 (C. C. A. 2d, 1910); Charavay and Bodvin v. York Silk M'f'g Co., 170 Fed. 819 (C. C. S. D. 1909).

[27] 170 Fed. 819 (C. S. D. 1909).

would serve to protect them in respect to the liability incurred by them for the acceptances made in the purchase of such goods. To hold otherwise would be to strike down a *bona fide* and honest transaction of great commercial benefit and advantage and founded upon a well-recognized custom by which banking credit is efficiently mobilized for manufacturers and importers of small means."

In two important cases, the federal courts refused to uphold the banker. *In re Garcewich,*[28] the first of these cases, the federal court assigned as its reason for not upholding the trust receipt transaction the fact that the sale was by a manufacturer to one of his customers who gave back a trust receipt to the manufacturer. This was on the theory that *title must come to the creditor from a third person.* In the second of these cases, *In re Liberty Co.,*[29] the trust receipt was poorly drawn and the court held that the trust receipt was nothing more than an unrecorded mortgage or "secret lien."

We now come to several later federal cases, an analysis of which tends to exemplify how the trust receipt transaction is misunderstood. In 1895, the case of *Blydenstein* v. *New York Sec. and Tr. Co.*[30] was decided. The facts show that a foreign firm having a branch in New York delivered bills of lading of goods, shipped to themselves in New York to a banker in London who is the plaintiff in the action. These bills of lading were later delivered to the New York branch of the foreign firm under a trust receipt giving power of sale. The New York branch warehoused the goods and delivered the negotiable warehouse receipts to the defendant as security for a present loan. The debtor firm then became insolvent. Had this been a true trust receipt transaction, plaintiff would have been upheld. But it was not such a transaction, for title of the bank to the proceeds come from the debtor himself so that it was really a chattel mortgage and the defendant was upheld on the basis of the Factors Act. *In re Shuttig,*[31] the court again upheld a similar transaction to be nothing more than a chattel mortgage which should have been recorded to protect the bank's interest.[32] In *Jordan* v.

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[28] 115 Fed. 87 (C. C. A. 2d, 1902).

[29] 152 Fed. 844 (D. C. S. D. 1907).

[30] 67 Fed. 469 (C. C. A. 2d, 1895). The same principle was upheld in the case of *In re* Carl Dernberg and Sons, Inc.

[31] 1 F. (2d) 443 (D. C. D. N. J. 1924).

[32] The basis of the court's reasoning is the distinction made by Mr. Frederich in his article *The Trust Receipt as Security,* between a true trust receipt and a chattel mortgage. Frederich says, "The distinction is one that exists in fact—it is real and is clear-cut and workable. This ground of differentiation is the fact that title does not pass to the bank from the importer but rather from a third person. The importer has never held the legal title. He has arranged a purchase money mortgage to the banker, who makes the loan, without himself appearing in the chain of title. No one is deceived by the fact that the bank has acquired a security title which is unrecorded, because there is no 'retention of possession' by the importer. He has never had either possession or title."

Federal Trust Co.,[33] the courts again held a trust receipt to be invalid and ineffectual as against the trustee in bankruptcy. Here the goods had been delivered to a "so-called public warehouse" which was really a storage house of the buyer and again the court on the basis of Mr. Frederich's distinction held it to be a chattel mortgage and not a true trust receipt.

One more important federal decision must be considered, the case of *In re James, Inc.* (1929).[34] This case considers as settled the rule that for a valid trust receipt to exist, title must necessarily come from a third person other than the buyer; and that the use of the trust receipt is equally proper for domestic transactions as well as importation situations. The case is also authority for the rule that where a true trust receipt exists, with a power of sale in the buyer, the Factors' Act will be a protection, not to a trustee in bankruptcy but only to a subsequent *bona fide* purchaser for value or a specific lienor.

In the sister states of the Union, we find a great deal of judicial confusion and diversity of holdings as to the true concept of the trust receipt transaction. Some cases have held the trust receipt to be a conditional sale.[35] Others have held it to be a bailment but good against general creditors.[36] Still others have construed it to be a chattel mortgage.[37] In New York the courts have held that title is in the banker as against the theory that he has a mere lien.[38] The New York courts have also held that the chattel mortgage and conditional sale recording acts are inapplicable to trust receipts.[39] The logical result of this last ruling is that they recognize the trust receipt as an *independent* security device. In Massachusetts[40] and Wisconsin,[41] the courts have similarly held title to be in the banker, but have held the transaction to be a conditional sale. In Pennsylvania,[42] the court held the trust receipt to be a bailment.

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[33] Jordan v. Fed. Trust Co., 296 Fed. 738 (D. Mass. 1924).

[34] 30 F. (2d) 555 (C. C. A. 2d, 1929), *rev'g* District Court's decision in 30 F. (2d) 551, holding that some of the trust receipts were chattel mortgages and others were conditional sales contracts.

[35] New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266 (1889); Ohio Savings Bank and Trust Co. v. Schneider, 202 Iowa 938, 211 N. W. 248 (1926).

[36] Brown Bros. v. Billington, 163 Pa. St. 76, 29 Atl. 904 (1894).

[37] General Motors Acceptance Corp v. Boddeker, 274 S. W. 1016 (Texas 1925); Mohr v. First National Bank, 69 Cal. App. 756, 232 Pac. 748 (1924).

[38] Farmers and Mechanics Bank v. Logan, 74 N. Y. 568 (1878); Moors v. Kidder, 106 N. Y. 32 (1887). True, in these cases the court does not call the agreement a trust receipt, yet it was analogous to such an agreement.

[39] Commercial Credit Corp. v. Northern Westchester Bank, 256 N. Y. 482, 177 N. E. 12 (1931).

[40] Moors v. Wyman, 146 Mass. 60, 15 N. E. 104 (1888); Moors v. Drury, 186 Mass. 424, 71 N. E. 810 (1904).

[41] Mersbon v. Moore, 76 Wis. 502, 45 N. W. 28 (1890).

[42] *Supra* note 36.

As we have previously stated, apparently New York upholds the banker's title except as it might conflict with the Factors' Act.[43] That is: where the banker has entrusted the goods to the buyer with authority to sell or pledge, the innocent purchaser for value will be protected as against the banker even though there be a limitation on the power to sell or pledge which has been violated by the buyer. For the purpose of protecting a purchaser, under this Act, the buyer (agent) will be deemed to be the true owner of the goods. But, it is also proper to note here that the Factors' Act is applicable only where the purchaser had no notice that the one from whom he purchased was not the true owner.[44]

Similarly, in those states where the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act have been adopted, and where the subject matter of the trust receipt agreement is a negotiable bill of lading or negotiable warehouse receipt, a *bona fide* purchaser or pledgee of the receipt will acquire good title, even though there existed a limitation on the authority of the agent.[45] New York is one of the states which has adopted these two statutes.[46]

Primarily, the purpose of the Uniform Trust Receipt Act is to clarify the confusion which has resulted from the diverse judicial views relating to this greatly misunderstood business practice. The legislators realized that only through uniform legislation could we expect the development of a logical, symmetrical trust receipt doctrine. We may observe such an attempt in Section 6, Uniform Chattel Mortgage Act[47] (not at this writing adopted in any state), which treats the trust receipt as a mortgage and requires the filing thereof, in the same way as a chattel mortgage. But this is obviously unsatisfactory, for it leaves untouched trust receipts given for pledges of choses in action. The only direct legislation on trust receipts is the Ohio Statute.[48] However, though the filing requirements are satisfactory yet it is limited to importing transactions and one or two isolated situations of domestic business. The act as adopted in New York (and made part of the Personal Property Law of this state) applies equally to security interests in documents, goods or instru-

[43] N. Y. PERSONAL PROP. LAW §43.

[44] Canales v. Earl, 168 N. Y. Supp. (Mun. Ct., N. Y. C., 1918).

[45] Roland M. Baker Co. v. Brown, 214 Mass. 196, 100 N. E. 1025 (1913).

[46] UNIFORM BILLS OF LADING ACT, now §§187-241 of the N. Y. PERSONAL PROPERTY LAW; UNIFORM WAREHOUSE RECEIPTS ACT, now §§90-143 of the N. Y. GENERAL BUSINESS LAW.

[47] HANDBOOK OF THE NATIONAL CONFERENCES OF COMMISSIONERS ON UNIFORM STATE LAWS (1926).

[48] §8568 (as amended in 1925) of Ohio General Code. The only domestic transactions covered by the Statute are sales of "readily marketable staple goods wherever purchased." The statute provides for the filing of an affidavit concerning the trust receipt, which will protect the entruster's (bank) interest as against all creditors of the signer (buyer) except purchasers or mortgagees in good faith and for value. Filing under this section is deemed to be notice of the entruster's rights for three years.

ments.[49] Under Section 52, a trust receipt transaction includes any arrangement between an entruster [50] and a trustee [51] whereby:

(a) a lender holding a security interest in goods or documents delivers such goods or documents to the borrower against a written trust receipt or written agreement to give a trust receipt;

(b) a lender advances value [52] in reliance upon the transaction to such lender of a security interest in documents actually shown to the lender but retained by the borrower against a written trust receipt or written agreement to give a trust receipt. The security interest of the entruster may be derived *from the trustee directly or from any other person* [53] and by pledge or by transfer of title or otherwise. The trust receipt agreement should be in writing and signed by the trustee [54] but need not be in any particular form to be valid. To be valid as a trust receipt the possession of the trustee must be for one of three purposes:

(1) for purpose of sale or exchange;

(2) in case of goods to be manufactured or processed with the view of ultimate sale or for unloading, storing, shipping and the like in a manner necessary or preliminary to their sale.

(3) in case of instruments for the purpose of delivery to a principal under whom the trustee is holding them, or for consummation of some transaction involving delivery to a depositary or registrar, or for their presentation, collection, or renewal.[55]

It is important to note, with reference to the above matter, that under the statute, title may come to the bank or entruster from either

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[49] N. Y. PERSONAL PROPERTY LAW §52.

[50] §51, subd. 1, N. Y. Personal Property Law defines entruster as: "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."

[51] *Id.* §51, subd. 14, defines trustee as: "the person having or taking possession of goods, documents or instruments under a trust receipt transaction, and any successor in interest of such person. The use of the words 'trustee' 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."

[52] *Id.* §51, subd. 15, defines value as: "any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, and whether against the transferor or against another person, constitutes value where goods, documents, or instruments are taken either in satisfaction thereof or as security therefor."

[53] §52, subd. 1.

[54] *Id.* §52, subd. 2.

[55] *Id.* §52, subd. 3.

the trustee or a third person. Under the common law rule as established, if the importer or domestic buyer happened to get title into himself before the execution of the trust receipt agreement, the courts would construe the agreement to be an unrecorded chattel mortgage and hence void against the trustee in bankruptcy.[56] The result of this section is to do away with what has sometimes been called "an artificial distinction" and will lead to the enforcement of the agreement, with accord to the real intent of the parties. The Act also excludes chattel mortgage situations and conditional sale contracts except in peculiar and rare cases.[57]

Section 53 of the Personal Property Law relates to attempted pledges of property when not accompanied by delivery of possession to the pledgee and applies to cases which do not fall within the category of trust receipts. Such a pledge is valid as against creditors of the pledgor, only to this extent:

(a) if the pledgee has given new value [58] in reliance thereon, it shall be valid against all creditors with or without notice for ten days;

(b) if no new value has been given or if the ten-day period in the case of new value has lapsed, the pledge shall be valid as against lien creditors without notice *only as of the time the pledgee takes possession.* The result of this Section is to defeat any possibility of masking what in substance would be an unrecorded chattel mortgage under the form of an agreement to pledge or "equitable pledge." It also tends to exclude the use of agreements to pledge, dated back more than four months in order to fraudulently obtain a preferred position in an insolvent estate.

Section 54 of the Personal Property Law makes a contract to give a trust receipt, followed by delivery of the goods, documents or instruments equivalent to a trust receipt provided that the contract be in writing and signed by the trustee and under Section 55 any agreement between trustee and entruster shall be valid except as it provides for forfeiture of the trustee's interest in any way except as provided by Section 56, subdivision 5.

Under the common law there was no limitation on the entruster's right to retake the goods from the trustee or to sell the goods himself. But Section 55 and Section 56 limit this right. The limitations thereon are as follows:

(1) The entruster may retake on default or where the trust receipt agreement gives him the right.[59] To recover possession

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[56] *Supra* note 33.

[57] §51, subd. 1; §52, subd. 3, N. Y. PERSONAL PROP. LAW.

[58] *Id.* §51, subd. 7.

[59] *Id.* §56, subd. 1.

thusly, the entruster may even take possession without legal process, whenever that is possible without breach of the peace.[60]

(2) The surrender of trustee's interest shall be valid on any terms upon which the parties may, after default, agree.[61]

(3) After entruster has regained possession upon default he may serve or send notice to trustee of his intention to sell, at least five days before the sale. The sale may be public or private and if the sale is public the entruster may himself become the purchaser. The proceeds shall be applied in the following order:

(a) to payment of the expenses of the sale;

(b) to payment of expenses of storage and retaking;

(c) to the satisfaction of the balance due from the trustee; and any balance over and above shall be paid to trustee. If there is any deficiency, the trustee shall be personally liable therefor.

Even though the entruster shall become liable to the trustee for conversion, in not following the statutory requirements for the sale, yet a purchaser for value and in good faith from an entruster in possession takes good title.[62] There is yet a further limitation upon the right of entruster who has retaken possession to sell, and that is in the case of articles manufactured by style or model.[63] All in all, the statute provides a direct and effective foreclosure procedure, and preserves to the trustee an equity of redemption where none was provided for under the common law of trust receipts. As a result, the trustee has a right to redeem, and in addition there is a strong possibility of a greater price being realized on foreclosure.

The theory of the legislators was to afford to the entruster protection against the honest and *bona fide* insolvency of the trustee for that is the true purpose of the trust receipt. Yet at the same time, they carried in mind that *bona fide* purchasers should be protected in case of dishonest action on the part of the trustee. For, dishonesty of the trustee is a credit risk and the one who has placed the confidence in a dishonest person should bear the full risk, rather than the innocent purchaser. This is based on the common law doctrine of equitable estoppel that where one of two innocent persons must suffer loss from the wrongful act of a third person such loss shall be borne by him, who has placed the third person in the position which enabled him to do the wrongful act causing the loss. And this is fair as to the entruster for he usually permits the transaction only after personal investigation, knowledge and judgment of the prospective borrower. How far these principles have been carried out is now to be seen.

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[60] *Id.* §56, subd. 2.
[61] *Id.* §56, subd. 4.
[62] *Id.* §56, subd. 3 (c).
[63] *Id.* §56, subd. 5.

If the entruster files within the period of thirty days, after the delivery of the goods, documents or instruments, his security interest in documents or goods will generally be protected against all persons.[64] If he should fail to file during the thirty-day period but should file subsequently, his interest will be valid as of the time of filing.[65] The taking (by the entruster) of possession of goods, documents or instruments, shall have the same effect from time of taking possession as filing.[66] As a result of this, there is no possibility of defeating general creditors by belated filing or taking back possession under an unfiled trust receipt. Even should the entruster fail to file, his interest against all creditors of the trustee, with or without notice, would be protected for thirty days after the delivery of the goods, documents or instruments.[67]

However, as to lien creditors who become such after the thirty-day period, and without notice, and before filing, the entruster's interest will be void.[68] The section also serves to give a trustee or receiver in bankruptcy the same preferred position as occupied by lien creditors [69] unless the entruster has filed or taken possession. The general effect of this section is to prevent a person's getting an unfair and fraudulent preference over a lien creditor, or permitting one to unfairly or fraudulently exhaust and deplete the trustee's assets. This is done by requiring as a condition precedent that the entruster file or have possession and thereby tends to assure honesty in the transaction. It is a direct blow to "secret liens."

A very important provision is the one which protects the *bona fide* purchaser for value and without notice of a negotiable instrument or document held by the trustee subject to a trust receipt.[70] Nor will filing be deemed notice to one who is otherwise a holder in due course. The obvious reason for this rule is in keeping with the principle of the Negotiable Instruments Law that there be free circulation of a negotiable instrument and this can only be obtained by giving the fullest protection to the purchaser of such an instrument. Generally, the entruster's interest is valid against purchasers even though there be no filing.

Where the trustee has been given liberty of sale [71] and sells to

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[64] *Id.* §57, subd. 1 (a).
[65] *Id.* §57, subd. 1 (b).
[66] *Id.* §57, subd. 2.
[67] *Id.* §58, subd. 1.
[68] *Id.* §58, subd. 2.
[69] *Id.* §58, subd. 2 (b) (iii).
[70] *Id.* §58-a, subd. 1 (a).
[71] "The consent of the entruster to placing of goods subject to a trust receipt transaction in the trustee's stock in trade or in his sales or exhibit room, or allows such goods to be so placed or kept, such consent or allowance shall have the effect of granting the trustee liberty of sale." Under the common law, even though the entruster consented to release the goods to a dealer who exhibited them in his show room with other goods of like nature, it was still held not to be apparent authority to sell. See Utica Trust and

a *buyer in the ordinary course of trade,*[72] the buyer will get good title and that is so whether the thirty-day period has elapsed or not, and irrespective of the fact that filing has been accomplished.[73] Further, even if there be a limitation on the liberty of sale, the buyer in the course of trade is still protected *unless it can be shown that he actually knew of this limitation.*[74] We think the correctness and fairness of these rules need not be questioned.

But if a purchaser be not a buyer in the ordinary course of trade, he will get good title when, in good faith and without notice of the entruster's interest and before filing, he:

(a) gives new value before the thirty-day period has elapsed, or

(b) gives value after said period and in addition obtains delivery of goods.[75]

Section 58-b regulates the rights of the entruster to receive the proceeds of a sale, where the trustee had no liberty of sale or where he, having liberty of sale, has failed to give account to the entruster of the proceeds. At common law, the rules relating thereto were very indefinite and uncertain.[76]

Section 58-c alters the common law rule. At common law the entruster was protected against the specific lien of a warehouseman, or processer,[77] but under this section, whether the entruster has filed or not, the specific lienor who deals with the goods preparatory to their sale, shall be entitled to his lien for the debt due him. This does not include the lien of a landlord nor does it personally obligate the entruster for the debt.[78]

The mere fact that the entruster has given a liberty of sale to the trustee, is insufficient to hold said entruster responsible as principal or as vendor under any sale or contract to sell made by the trustee.[79]

Before the passage of this Act, no filing requirements for trust receipts existed, except in those jurisdictions where the trust receipt was held to fall into the category of a conditional sale or chattel mortgage. Filing in these jurisdictions was required only because the laws of those jurisdictions required the filing of the conditional sales agreement and chattel mortgages. But no state or jurisdiction which recognized the trust receipt as an independent security device, required filing as a condition precedent to validity. Under the Uni-

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Deposit Co. v. Decker, 244 N. Y. 340, 155 N. E. 665 (1927). It was to remedy this situation that the above quoted section was included in the Act.

[72] *Id.* §50, subd. 1.
[73] *Id.* §58-a, subd. 2 (a) (i).
[74] *Id.* §58-a, subd. 2 (b).
[75] *Id.* §58-a, subd. 2 (b).
[76] See KARL FREDERICH, ESQ., THE TRUST RECEIPT AS SECURITY, c. 7.
[77] Century Throwing Co. v. Muller, 197 Fed. 252 (C. C. A. 3d, 1912).
[78] N. Y. PERSONAL PROP. LAW §58-c.
[79] *Id.* §58-d.

form Act now being considered, provision is made for the filing of trust receipt transactions. To see what constitutes filing under the Act, we must consult Section 58-e. Under this section, it is not every individual trust receipt transaction, which need be filed to insure the entruster of the privileges resulting from filing. The entruster need only file a statement containing:

1. A designation of the entruster and trustee and their respective places of business within the state;
2. A statement that the entruster is engaged in financing the trustee's acquisition of goods under trust receipts;
3. A description of the kind of goods to be covered by such financing.

It therefore seems that the entruster need file only one such statement, which will be sufficient to cover a series of transactions. Provision is also made for refiling of statements at any time before the expiration of the validity of the first filing.[80] One of the chief business complaints assigned against the filing requirement was that to require filing would place an intolerable burden and expense upon any entruster doing a voluminous amount of financing business under trust receipts, and might discourage the use of this device. Perhaps this is why we do not require the filing of each individual trust receipt. To say the least, the burden thrust upon the entruster is under our statute manifold less than the amount of work and money involved in filing each individual receipt. For example, one statement filed by the entruster will be sufficient to cover numerous trust receipts in which the same trustee is involved. Where a transaction falls within the provisions of this Act and any other law requiring filing, the entruster has the right to elect under which law he will file and his filing under this right of election shall be sufficient to continue his protection under this Act.[81]

How well the Act will solve the glaring defects of the common law idea of trust receipts is too uncertain to allow for accurate prophecy. Suffice to say, in conclusion, that the Act is the culmination of instructive research and study of the many perplexing problems involved in the subject matter at hand with a view of producing a logical, fair, comprehensible and *practical* trust receipt doctrine.

MOSES J. KATZ.

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[80] *Id.* §58-e, subd. 5.

[81] *Id.* §58-h.