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NEW JERSEY LAW OF TRUST RECEIPTS*

A trust receipt in its simplest terms is merely a document reciting that the borrower holds certain goods, documents, or instruments for the account of a lender. The expression "trust receipt" is used in two main categories of situations in which, while the form of the trust receipt is the same, legal arguments in support of the transaction are considerably different. This should be carefully noted because the language of decisions defining trust receipts in one set of situations, if adopted as a formula, would make trust receipts in the other main category invalid.

A trust receipt is described as follows in the Uniform Trust Receipts Act as tentatively adopted at Chicago in 1930 by the National Conference of Commissioners on Uniform State Laws[1]:

> SECTION 2. [*What Constitutes Trust Receipt Transaction and Trust Receipt.*]
>
> 1. A trust receipt transaction within the meaning of this act is any transaction between a lender and a borrower for one of the purposes set forth in Subsection 3, whereby
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> (a) a lender holding a security interest in goods, documents or instruments delivers or causes to be

* The notes for this article have been arranged largely by C. Rudolf Peterson, Esq., A.B. Princeton 1928, LL.B. Columbia 1931, and member of the New York Bar. The longer notes are adapted for the most part from notes accompanying the trust receipt cases in Hanna's Cases and Materials on the Law of Creditors' Rights, and Cases and Other Materials on Security.

[1] Handbook of the National Conference of the Commissioners on Uniform State Laws (1931), 302 ff. The following quotations, however, are from a recent draft prepared but not yet published by Professor Karl N. Llewellyn, draftsman of the Uniform Act and one of the Commissioners from New York.

delivered such goods, documents or instruments to the borrower; or

(b) a lender gives new value in reliance upon the transfer by the borrower to such lender of a security interest in documents or instruments which are actually exhibited to the lender, or to his agent in that behalf, at the place of business of either lender or agent, but possession of which is retained by the borrower;

provided that the delivery under paragraph (a) or the giving of new value under paragraph (b) either

(i) be against the signing and delivery by the borrower of a writing designating the goods, documents or instruments concerned and acknowledging that a security interest therein remains in or has passed to the lender, or

(ii) be pursuant to a prior or concurrent agreement of the borrower to give such a writing. * * *

3. A transaction shall not be deemed a trust receipt transaction unless the possession of the borrower thereunder is for one of the following purposes:

(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; or

(c) in the case of instruments, for the purpose of delivering them to a principal for or under whom the borrower is holding them, or for consummation of some transaction involving delivery to a depositary or registrar, or for their presentation, collection, or renewal.

The Uniform Act in section 3[2] further provides that the

[2] "SECTION 3. [*Attempted Creation or Continuance of Pledge Without Deliv-*

agreement to pledge not accompanied by delivery of possession shall be valid to the extent of new value given by the lender, but as against lien creditors only for ten days, unless notice by filing or otherwise is given. Purchasers for value and without notice take free of any such agreement to pledge. Subsection 3 also contains a specific reference to the re-delivery by a pledgee for a temporary and limited purpose. The lender's interest in such a case persists for ten days without notice against lien creditors.

A contract, in due form, to give a trust receipt, if followed by delivery, is equivalent to a trust receipt.[8]

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ery or Retention of Possession.]

1. An attempted pledge or agreement to pledge not accompanied by delivery of possession, other than such as is described in Subsection 1 (b) of Section 2, shall be valid as against creditors of the borrower only as follows:

(a) to the extent that new value is given by the lender in reliance thereon, such pledge or agreement to pledge shall be valid as against all creditors with or without notice, for ten days from the time the new value is given, although the lender has not taken possession;

(b) after the lapse of the period provided in paragraph (a), and in any case not falling within paragraph (a), then the pledge shall have validity as against lien creditors becoming such without notice as described in Subsection 2 of Section 7, only being a new transaction begun at the time that the lender takes possession.

2. Purchasers for value and without notice of the lender's interest shall take free of any such pledge or agreement to pledge unless it has been perfected by possession taken.

3. (a) Where a lender, although for a temporary and limited purpose, delivers to a borrower goods, documents or instruments in which the lender holds a pledgee's or other security interest, but such delivery is not accompanied by the execution of a trust receipt or made pursuant to an agreement to execute a trust receipt, the lender's interest takes effect as in Subsection 1 (a) for ten days from the time of delivery; and after ten days takes effect as in Subsection 1 (b).

(b) If the transaction described in paragraph (a) of this Subsection except for the absence of the trust receipt or agreement to execute the same fulfills the requirements of a trust receipt transaction, then if the borrower later executes a trust receipt covering the goods, documents or instruments delivered, the provisions of this Act shall apply as if the transaction had been a trust receipt transaction from the beginning."

[8] "SECTION 4. [*Contract to Give Trust Receipt.*]

1. A contract to give a trust receipt, if in writing and signed by the borrower, shall, with reference to goods, documents or instruments thereafter delivered by the lender to the borrower in reliance on such contract, be equivalent to a trust receipt within the terms of Section 7 (1).

2. Such a contract shall as to such goods, documents or instruments be specifically enforceable against the borrower; but this Subsection shall not enlarge the scope of the lender's rights against creditors of the borrower as provided in and limited by Subsection 1."

Section 8[4] makes the lender's security interest in the trust receipt transactions valid against all creditors of the borrower for thirty days with or without notice. The documents or instruments must actually be shown to the lender and the thirty day period dates from that time.[5] The Act provides for filing with the Secretary of State of affidavits in regard to trust receipt transactions.[6] The Act states specifically that it

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[4] "SECTION 8. [*General Effect of Lender's Filing or Possession.*]
1. Proper filing under this Act shall be effective to preserve the lender's security interest in documents or goods as against all subsequent parties, save as otherwise provided by Sections 9, 10, 11, 14 or 15 of this Act.
2. The due taking or retaking of possession by the lender of goods, documents or instruments shall thereafter, so long as such possession is retained, have the effect of notice to all persons of the lender's interest.
3. Unless there is proper filing or the taking of possession within the period designated in Section 7 (1), the security interest of the lender shall, after the lapse of such period, be deemed, as against creditors, to accrue only from and as of the time of subsequent proper filing or of the lender's taking of possession, whichever is prior."

[5] "SECTION 7. [*Validity Against Creditors Apart from Filing.*]
1. The reservation by the lender of a security interest in goods, documents or instruments, or the transfer to the lender of such interest, under the terms of the trust receipt and of any written agreement covering the trust receipt transaction, shall without any filing be valid as against all creditors of the borrower, with or without notice, in the following cases: * * *
(b) But where the borrower at the time of the trust receipt transaction has and retains the documents or instruments, the period shall be reckoned from the time such documents or instruments are actually shown to the lender, or from the time that the lender gives new value under the transaction, whichever is prior."

[6] "SECTION 13. [*Filing and Refiling of Affidavit Concerning Trust Receipt Transactions Covering Documents or Goods.*]
1. Any lender undertaking or contemplating trust receipt transactions with reference to documents or goods is entitled to file with the Secretary of State his affidavit containing:
(a) a designation of the lender and the borrower, and of the chief place of business of each within this State, if any; and
(b) a statement that the lender is engaged, or expects to be engaged, in financing under trust receipt transactions the acquisition of goods by the borrower; and
(c) a description of the kind or kinds of goods covered or to be covered by such financing.
2. It shall be the duty of the filing officer to mark each affidavit filed with a consecutive file number, and with the date and hour of filing, and to keep such affidavit in a separate file; and to note and index the filing in a suitable index, indexed according to the name of the borrower and containing a statement of the borrower's chief place of business as given in the affidavit. The fee for such filing shall be one dollar.
3. Presentation for filing of the affidavit described in Subsection 1, and payment of the filing fee, shall constitute proper filing under this Act, in favor of the lender, as to any documents or goods falling within the description in the affidavit which are within one year from the date of such filing, or have been, within thirty days previous to filing, the subject-matter of a trust receipt transaction between the lender and the borrower.

does not apply to single transactions of legal or equitable pledge but only to transactions constituting a course of business.[7]

The degree to which merchandise and finance company creditors participate in trust receipt transactions, which involve businesses conducted on a national scale or at least in several states, is justification for the efforts of the National Conference of Commissioners on Uniform State Laws to eliminate some of the existing differences of conception of the nature of trust receipt transactions. The expression "trust receipt" is itself a misnomer. The person executing the receipt is not a trustee. It is an odd commentary on the use of language that a document, the whole purpose of which is to negative the idea that the signer is a trustee, should nevertheless use the word "trust" as a part of its title. What is intended is an emphasis upon the signer's fiduciary obligation. The document might more exactly be described as a bailee receipt, which is a term that some courts have attempted to specify. The expression "trust receipt", however, is now so well established that one may as well accept it in all legal discussion.[8]

The type of trust receipt which was likely first in point of use, although not first today in the matter of importance, is the trust receipt connected with the return of a pledge for a special

4. At any time before expiration of the validity of the filing a further affidavit conforming to the provisions of this section may be filed in like manner as the original filing. The proper filing of such further affidavit shall be valid in like manner as an original filing, and shall continue the prior rank of the lender's existing security interest as against all junior interests. It shall be the duty of the filing officer to mark, file and index the further affidavit in like manner as the original."

[7] "SECTION 15. [*Acts Not Applicable to Certain Transactions.*]

This act shall not apply to single transactions of legal or equitable pledge, not constituting a course of business, whether such transactions be unaccompanied by delivery, or involve constructive delivery, or delivery and redelivery, actual or constructive, so far as such transactions involve only a lender who is an individual natural person, and a borrower entrusted as a fiduciary with handling investments or finances of the lender."

[8] The discussion in the text assumes a unitary ownership. If one accepts the theory that the ownership is divided there is some basis for the notion that the signer of the trust receipt is a genuine trustee. The title is split into two or more parts, much as there may be different interests in real estate. On this analysis the ultimate buyer is the beneficial owner, while the financing agency, of course, has merely security title, as well as the right to possession. The signer of the trust receipt acknowledges an obligation not only to hold the possession at the direction of the financing agency, but also to hold his ultimate ownership subject to the same obligation. See Vold, *Trust Receipt Security in the Financing of Sales,* (1930) 15 CORN. L. Q. 543.

or temporary purpose.[9] This trust receipt is a common incident of collateral banking. Assume that the Reconstruction Finance Corporation makes a loan to a bank. The loan is secured by a pledge of customer's promissory notes. As these notes become due the Reconstruction Finance Corporation, through one of its fiscal agents, sends them to the local bank for collection, renewal, or substitution. The local bank, when it receives the notes, executes a trust receipt on which the notes are scheduled and which contains a statement of the interest of the corporation and a recital that the borrowing bank is holding the pledged paper for account of the lender with an obligation to return, within a certain period, and in any event on demand, and to forward all collections. In such a situation possession of the security in the first instance has been with the borrower. Possession has been transferred to the lender when the borrower's obligation was incurred and has now been returned to the borrower for a temporary and limited purpose. In other words the transaction is bi-partite.[10]

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[9] There are apparently no New Jersey cases. The pledgee's position, however, is so generally recognized that one may assume he would be protected in New Jersey. See particularly Reeves v. Capper and Another, 5 Bing. (N.C.) 136, 132 Eng. Rep. 1057 (1828); Rose v. Coble, 81 N.C. 517 (1868); Clark v. Corser, 154 Minn. 508, 191 N.W. 917 (1923). *Cf.* Hunter v. Payne, 113 Misc. 385, 184 N.Y.S. 433 (1920) [*aff'd* 197 App. Div. 919, 188 N.Y.S. 926 (4th Dept., 1921)]. Clark v. Iselin, 88 U.S. 360, 22 L. Ed. 568 (1875), stands out as a leading decision, as do White v. Platt, 5 Denio (N.Y.) 269 (1848); Leahy v. Simpson's Administrator, 60 Mo. App. 83 (1894); Radford Grocery Co. v. Powell, 228 Fed. 1 (C.C.A. 5th, 1915); Babbitt Brothers v. First National Bank (War Finance Corporation, Intervenor), 32 Ariz. 588, 261 P. 45 (1927); National Park Bank v. American Brewing Co., 79 Mont. 542, 257 P. 436, 1043 (1927). It has been held that the common law of England and the civil law of Scotland are identical on this point. Northwestern Bank, Limited, v. John Poynter, Son, & Macdonalds, [1895] A.C. 56. It is to be observed, however, that the validity of the pledge is maintained in the face of the pledgor, his trustee in bankruptcy, and his creditors. By redelivery of a pledged chose in action a creditor loses his hold on the property as against one who deals in good faith with the debtor in reliance upon his ostensible ownership. See JONES, A TREATISE ON THE LAW OF COLLATERAL SECURITIES AND PLEDGES (3d ed. 1912) §87; Canal-Commercial Trust & Savings Bank v. New Orleans, Texas & Mexico Railway Co., 161 La. 1051, 109 So. 834 (1926).

See generally *In re* Alday Motor Company, 50 F.(2d) 228 (D. Tenn. 1931); Hubbell, Slack & Co. v. Farmers' Union Cotton Co., 196 S.W. 681 (Tex. Civ. App., 1917); *In re* Reeve's Estate, 111 Iowa 260, 82 N.W. 912 (1900). *Cf.* City National Bank v. Lewis, 73 Okl. 329, 176 P. 237 (1918). The subject is discussed in Jones, *op. cit.*, §§40, 86, 87.

[10] It is arguable that a Uniform Trust Receipts Act should have nothing to do with the return of a pledge for a temporary and special purpose and that if it mentions such a transaction at all it should be only to eliminate it from the

The conventionalized trust receipt, in connection with importing transactions and the distribution of manufactured goods, is a document in a tri-partite arrangement.

An instance of the tri-partite set-up of an importing transaction would be found if a New Jersey importer wished to import silk from Japan. The usual method of arranging for the importation would be for the New Jersey company to obtain a letter of credit from a bank of international connections whereby the bank would agree to accept drafts up to a stated amount drawn on the bank by the sellers of the silk. The letter of credit would provide that each draft was to be accompanied by an ocean bill of lading, insurance certificate, and consular and other invoices. The bank would further stipulate that it be named as consignee of the shipment. In due course the bank would accept the draft and when the shipment arrived the bank would release the bills of lading to the importer upon the latter's signing a trust receipt reciting that the silk was the property of the bank, that the bank had the right to recall it at any time, but that the signer of the trust receipt had all the risks of loss to the property. There might or might not be a provision allowing the importer to sell the silk without the permission of the bank.

The most conspicuous use of the trust receipt in the distribution of manufactured goods has been in the financing of wholesale transactions of motor vehicles. The practice of motor car manufacturers is to do business on a cash basis. In a number of instances the motor car corporation has a finance company subsidiary whose function it is to assist dealers to obtain most of the money which they require in order to pay cash to the manufacturer. When a dealer wishes a shipment of cars he sends his order to the manufacturer and notifies the finance company. Cars are shipped by the manufacturer usually on negotiable bill of lading to the order of the consignor.

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trust receipts situation. The pledge is almost inevitably used in a loan transaction. The trust receipt is characteristically used in a purchase-money transaction. Taking the field as a whole there is little doubt that in these purchase-money situations there is less likelihood of deception of and injury to other creditors. It has been suggested that trust receipts be allowed as valid, without recording, only in purchase-money transactions. See Vold, *op. cit.* (1930) 15 CORN. L. Q. 543.

The manufacturer attaches to the bill of lading a sight draft for the full wholesale price of the car. The draft is drawn on the dealer and is payable to the manufacturer. The manufacturer endorses both the draft and the bill of lading in blank and sends them to some local representative. The finance company, in pursuance of previous arrangements with the dealer, having been notified of the shipment, draws a sight draft against the dealer for fifteen or twenty per cent of the manufacturer's draft. When the cars arrive the dealer pays the amount of the finance company's draft on him and thereupon the finance company pays the full amount of the manufacturer's draft. As soon as the manufacturer's draft is paid, the manufacturer's representative releases the bill of lading to the finance company which in turn delivers it to the dealer upon his signing a trust receipt. The trust receipt rarely covers more than four vehicles and frequently a separate trust receipt is signed for each vehicle. The trust receipt may or may not allow the dealer to sell the car without the permission of the finance company.[11]

The holder of an unrecorded trust receipt in New York has little to fear from adverse claimants unless they can protect themselves under the New York Factors Act or on the basis of

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[11] TRUST RECEIPT

Received of GENERAL MOTORS ACCEPTANCE CORPORATION the Motor Vehicles described above.

I (we) hereby acknowledge that said Motor Vehicles are the PROPERTY OF SAID GENERAL MOTORS ACCEPTANCE CORPORATION and agree to take and hold the same, at my (our) sole risk as to all loss or injury, for the purpose of storing said property; and I (we) hereby agree to keep said Motor Vehicles brand new and not to operate them for demonstrating or otherwise, except as may be necessary to drive said Motor Vehicles from freight depot or from above city to my (our) place of business with all due care at my (our) risk en route against all loss and damage to said Motor Vehicles, Persons or Property, and except as I (we) may be allowed by you in a special case to use the same for demonstrating upon or compliance with the conditions expressed in your instructions to us, and to return said Motor Vehicles to said General Motors Acceptance Corporation or its order upon demand; and pay and discharge all taxes, encumbrances and claims relative thereto. I (we) hereby agree not to sell, loan, deliver, pledge, mortgage, or otherwise dispose of said motor vehicles to any other person until after payment of amounts shown on Dealer's Record of Purchase and Release of like identification number herewith. I (we) further agree that the deposit made by me (us), in connection with this transaction, may be applied for reimbursement for any expense incurred by General Motors Acceptance Corporation, in the event of breach of this Trust or repos-

estoppel. The case of *Moors* v. *Kidder*[12] is a characteristic decision in which the holder of a trust receipt in an importing transaction was protected. There the defendant banker issued a letter of credit in ordinary form, the goods were shipped to the banker's order and when they arrived the importer was allowed to take the goods on trust receipt in order to enter them in a warehouse for the account of the banker. The importer wrongfully entered them in the name of his broker and pledged the warehouse receipts. The court held that the title of the banker, to whom the trust receipt had been delivered, was good against the pledgee. While the circumstances in the particular case might entitle the pledgee to protection under the New York Factors Act, the case is significant because of the categorical statement to the effect that the banker to whom the trust receipt had been issued had all the rights of an owner.[13]

The latest case of first importance involving New York law is *In re James, Inc.*[14] This case involved the business practices of the Commercial Investment Trust and the General Motors Acceptance Corporation in financing automobile distribution. The dealer, a bankrupt at the time of the decision of the case, was an automobile dealer in Watertown, New York. The arrangements for the shipment and financing of the transaction were the usual ones. The dealer became bankrupt after obtaining possession of several cars for which trust receipts had been issued. The dealer executed security documents, which were interpreted to be chattel mortgages, to other creditors. The court was faced with claims from the finance company,

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session of said Motor Vehicles.

It is further agreed that no one has authority to vary the terms of this Trust Receipt.

Executed this_____day of _____, 19____, at _____

Witness _____ _____
(Dealer)

By_____
Official Title if Company)

[12] 106 N.Y. 32, 12 N.E. 818 (1887).

[13] An earlier New York decision, though responsible for the doctrine, nowhere employs the term "trust receipt". Farmers' & Mechanics' National Bank v. Logan, 74 N.Y. 568 (1878). Charavay & Bodvin v. York Mfg. Co., 170 Fed. 819 (C.C.S.D. N.Y., 1909), examines the cases exhaustively. Among the more important New York decisions not already cited are First National Bank of Cincinnati v. Kelly, 57 N.Y. 34 (1874); Drexel v. Pease, 133 N.Y. 129, 30 N.E. 732 (1892); *In re* Cattus, 183 Fed. 733 (C.C.A. 2d, 1910).

[14] 30 F.(2d) 555 (C.C.A. 2d, 1929).

the chattel mortgagees, and the trustee in bankruptcy. The court found the chattel mortgages invalid for a reason which need not concern us in this discussion and then held in favor of the finance company as against the trustee in bankruptcy. The court stated that the trust receipt was not a pledge, a conditional sale, or a mortgage, that the ownership of the motor vehicle was in the finance company and that such ownership could not be defeated under the New York Factors' Act except by a bona fide purchaser, pledgee, or mortgagee.[15] Since the trustee in bankruptcy did not occupy any of these positions he could not acquire a right superior to that of the holder of the trust receipt.

The limitations of the trust receipt doctrine in New York are indicated clearly in the opinion of District Judge Augustus

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[15] Factors' or Traders' Acts exist in New York, Virginia, Massachusetts, Mississippi, and perhaps a few other states. Their provisions will generally result in the defeat of the holder of a trust receipt by *bona fide* purchasers and several different categories of creditors. The New York Factors' Act appears as §43 of the Personal Property Law and is phrased as follows: "Every factor or other agent, entrusted with the possession of any bill of lading, custom-house receipt, or warehouseman's receipt for the delivery of any merchandise, and every such factor or agent not having the documentary evidence of title, who shall be entrusted with the possession of any merchandise for the purpose of sale, or as security for any advance to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof." The section was derived from N. Y. Laws 1830, c. 179, §§3-6, and was amended by N. Y. Laws 1915, c. 273. The original act was doubtless influenced by the English Factors' Act (1923) IV Geo. c. 83, with which it has much in common.

Under the statute protection has been extended to the holder of a bill of sale as collateral security. Commercial Credit Corp. v. Northern Westchester Bank, 136 Misc. 325, 240 N.Y.S. 5 (1930). Clark v. Flynn, 120 Misc. 474, 199 N.Y.S. 583 (1923), however, turns as much upon principles of estoppel as upon the positive provisions of the Factors' Act.

Much has been written and decided around the Virginia Traders' Act, Va. Code Ann. (1930) §5224. See particularly Capital Motor Corp. v. Lasker, 138 Va. 630, 123 S.E. 376 (1924); Boice v. Finance and Guaranty Corp., 127 Va. 563, 102 S.E. 591 (1920); Hoge & Hutchinson v. Turner, 96 Va. 624, 631, 32 S.E. 291 (1899); Partlow v. Lickliter, 100 Va. 631, 42 S.E. 671 (1902); Waltham Piano Co. v. Smith, 37 F.(2d) 534 (C.C.A. 4th, 1930); Nusbaum v. The City Bank & Trust Co., 132 Va. 54, 110 S.E. 363 (1922). See also Wooding, *The Priority of General Judgment Creditors Over Other Liens on Chattel in Possession of Trader Under Traders' Act,* (1927) 13 VA. L. REG. (N.S.) 358; Tulley, *Conditional Sales and Consignments in Virginia,* (1926) 12 VA. L. REV. (N.S.) 166.

N. Hand, in the bankruptcy case of *In re Fountain.*[16] A doll manufacturer wished to borrow on the security of part of its stock. It executed a document in favor of the lender in which the manufacturer recited that he held certain described dolls as security for the loan. The document was called a trust receipt and was in the usual trust receipt form. The situation was bi-partite. On the actual facts the segregation of the security was so casual and the control by the lender so tenuous that the security would doubtless have failed in any event. The court, however, took occasion to state a distinction between the tri-partite and the bi-partite situation indicating its belief that the genuine trust receipt transaction was generically a chattel mortgage, but free from the chattel mortgage recording requirements, and refused to uphold the transaction in question against the trustee in bankruptcy.[17]

Pennsylvania, like New York, apparently upholds the tri-partite trust receipt transaction both in connection with importation and domestic distribution. The leading case is *Brown*

The position of a trust receipt holder in Massachusetts would apparently approximate that of one in New York so far as the Factors' Act is concerned. See International Trust Co. v. Webster National Bank, 258 Mass. 17, 154 N.E. 330 (1926), applying Mass. Gen. Laws (1921) c. 104. It should be noted that §5 specifically provides that a creditor who obtains security for an antecedent debt is not protected against those holding secret liens against goods in the factor's hands.

For the Mississippi Factors' Act see Miss. Code (1906) §4784. An application of it is Gillaspy v. International Harvester Co., 109 Miss. 136, 67 So. 904 (1915).

In the absence of Factors' Acts courts frequently rely on principles of estoppel to protect purchasers. The statement in Glass v. Continental Guaranty Corp., 81 Fla. 687, 88 So. 876 (1921), is typical: "An alleged owner of an automobile under a secret trust, who permits a dealer in automobiles to have the car at his sales place under circumstances that indicated authority to sell, is estopped to assert his title against a *bona fide* purchaser for value and without notice of the secret claim." In New Jersey the statement runs that an express or implied consent that the dealer should sell deprives the trust receipt holder of any rights against a purchaser. Finance Corp. of N. J. v. Jones, 98 N.J.L. 165, 119 A. 171 (1922). See also Brown Brothers v. The Wm. Clark Co., 22 R.I. 36, 46 A. 239 (1900); Jones v. Commercial Investment Trust, 64 Utah 151, 228 P. 896 (1924).

[16] *In re* A. E. Fountain, Inc., *In re* Carl Dernburg & Sons, Inc., 282 Fed. 816 (C.C.A. 2d, 1922).

[17] In the Dernburg bankruptcy certain furs for which a negotiable warehouse receipt indorsed in blank was held in pledge had been released to bankrupt on trust receipt, with the unlimited right of manufacture and substitution. The concluding paragraph of the court's opinion, which held against the trust receipt holder in both appeals, was as follows: "The result * * * is that the holder of a trust receipt has no better standing than the holder of an unfiled chattel mort-

Bros. v. *Billington.*[18] This was an importing transaction. Brown Bros. & Co. financed the importation of bicycles from England. The bills of lading ran to the order of Brown Bros. & Co. which delivered the bicycles to the importer on a trust receipt which gave the importer the authority to sell them for the banker's account. The importer agreed in case of sale to hand over the proceeds to the banker to apply on acceptances under the letter of credit. Brown Bros. could at any time cancel the trust receipt and take possession of the bicycles. A sheriff, at the instance of a judgment creditor, levied on the bicycles while they were in the possession of the importer. The court held that the goods belonged to Brown Bros. and that the sheriff could not make the levy. It was argued that the transaction amounted to a conditional sale which at that time was invalid in Pennsylvania against creditors of the vendee. The court said that the transaction did not amount to a conditional sale but was only a bailment.

That the doctrine of *Brown Bros. & Co.* v. *Billington* applies also to trust receipts issued in respect to the distribution of goods in domestic trade, is held by the recent case of *Houck* v. *General Motors Acceptance Corporation.*[19] This case involved the financing of automobiles for a local Pennsylvania dealer. The ordinary forms developed by the General Motors Acceptance Corporation were used. The dealer became bankrupt. The controversy was between the trustee in bankruptcy and the General Motors Acceptance Corporation as to automobiles in the possession of the bankrupt when the petition was filed. The court decided in favor of the finance company on the authority of *Brown Bros. & Co.* v. *Billington.*[20]

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gage, unless he derives his security title from a person other than the one responsible for the satisfaction of the obligation which the property secures. In such a case only can he deliver the property to the obligor to act as his fiduciary."

[18] 163 Pa. 76, 29 A. 904 (1894).

[19] 44 F.(2d) 410, 16 A.B.R. (N.S.) 468 (W.D. Pa. 1930).

[20] Other Pennsylvania cases sustaining this point of view are Monjo v. French, 163 Pa. 107, 29 A. 907 (1894); Canadian Bank of Commerce v. Baum, 187 Pa. 48, 40 A. 975 (1898); Perkins to use of Bank of Commerce v. Lippincott Co., 260 Pa. 473, 103 A. 877 (1918). The Federal cases generally refuse to name the transaction, relying upon the holding in Century Throwing Co. v. Muller, *infra* note 28. Assets Realization Co. v. Sovereign Bank of Canada *et al.*, 210 Fed. 156 (C.C.A. 3d, 1914); Roth v. Smith *et al., In re* Killian Mfg. Co., 215 Fed. 82 (C.C.A. 3d, 1914).

Prior to the period of large scale motor car production the trust receipt was used almost exclusively in importing transactions in which it seemed to have a peculiar utility. Some courts at least were impressed with the desirability of yielding to the demand of bankers engaged in financing foreign trade that the trust receipt device be recognized and protected because of its peculiar usefulness in foreign trade financing. There were even suggestions of special legislation taking the trust receipt in importing transactions alone out of the chattel mortgage or other security categories in which it might otherwise be placed. Massachusetts, by decision, has apparently made a distinction between the trust receipt in importing and in domestic transactions. The two reports of *Peoples National Bank* v. *Mulholland*[21] illustrate how important the source of title is considered by the courts. The case involved a bill in equity to enforce a trust. The plaintiff bank had previously paid a draft drawn by a German company covering a shipment of hides. The first report of the Master not only did not indicate the form of the bill of lading, but made it seem that the bill of lading had been sent by the seller to the importer and that thereby title had gone to the buyer before he executed the trust receipt to the bank. The Supreme Judicial Court in its first decision refused to uphold the bank, pointing out that there were no facts found by the Master to warrant an inference that the bank took title to itself as security for its advancement. When the case was returned to the Superior Court it was again referred to the Master. The Master's supplemental report showed that the plaintiff bank had received a bill of lading as agent for the German seller and upon accepting the draft to which it was attached took title to the hides as security to itself for payment of the amount it had obligated itself to pay to the seller by its acceptance. The case thereupon became one of a tri-partite trust receipt transaction. Since the bank was regarded as dealing with the hides not as mortgagee or pledgee but as owner it was entitled to a decree establishing the trust as asked for in its petition.

The decision in *Peoples National Bank* v. *Mulholland* and

[21] 224 Mass. 448, 113 N.E. 365 (1916); 228 Mass. 152, 117 N.E. 46 (1917).

the reasons given for it would seem to cover equally a trust receipt in a tri-partite automobile financing transaction. It should be observed, however, that the court in *Peoples National Bank* v. *Mulholland* is careful to refer to a "banker advancing the money on an importation."[22]

Subsequently in *Simons* v. *Northeastern Finance Corporation*,[23] the Supreme Judicial Court had an opportunity to consider the trust receipt in a domestic transaction. While the transaction seems to be a tri-partite one it is not certain that the Court so regarded it. Moreover it should be observed that the party against whom the finance company was claiming was a purchaser who would have been protected in any event. The Court, however, did say that the instrument called a trust receipt was not a trust receipt. For that reason the facts of the case should perhaps be examined. The subject matter of the transaction consisted of four used motor vehicles belonging to the New England Velie Company. A dealer named the Boulevard Motor Sales Company arranged to buy these motor cars for $1700. The Boulevard Company paid the Velie Company $700 and the Velie Company drew a time draft on the Boulevard Company for $1000. The connection of the defendant Finance Corporation with the transaction is somewhat obscure. The report states that the Velie Company sold the motor cars by bill of sale to the Finance Company for $1700 and the Finance Corporation took from the Boulevard Company a trust receipt in the usual form heretofore described as common in automobile transactions. This particular trust receipt did not give the Boulevard Company the power of sale. Apparently the Velie Company had the obligation of the Finance Corporation for $1700 less the amount paid. It was likely understood that if the draft on the Boulevard Company was not paid when due the Finance Corporation would be obliged to make up the amount unpaid to the Velie Company. When the paper settlement was complete the motor cars were actually taken by the Boulevard Company directly from the

[22] See also Moors v. Wyman, 146 Mass. 60, 15 N.E. 104 (1888); James Brown & Others v. Green and Hickey Leather Co. & Others, 244 Mass. 168, 138 N.E. 714 (1923); T. D. Downing Co. v. The Shawmut Corp. of Boston, 245 Mass. 106, 139 N.E. 525, 27 A.L.R. 1522 (1923).

[23] 271 Mass. 285, 171 N.E. 643 (1930).

Velie Company to the Boulevard Company's place of business. In due course the Boulevard Company defaulted and the Finance Corporation took possession of the vehicle in question which in the meantime had been sold to the plaintiff by the Boulevard Company, part of the purchase price being paid in cash and part by note under a conditional sales contract. The plaintiff sued the Finance Corporation in tort for conversion. The Supreme Judicial Court reversed the Municipal Court and the Appellate Division and held for the plaintiff. In the opinion of the Court the defendant was estopped to rely upon title against the plaintiff. Much of the discussion in the opinion is *dictum,* which, however, is interesting because of the following comment regarding the alleged trust receipt:

> "The instrument in writing between the Boulevard company and the defendant designated by the name 'trust receipt,' and so called in the record, was in no sense a 'trust receipt.' That term is applied to an instrument in writing whereby a banker, having advanced money for the purchase of imported merchandise and having taken title in his own name and retaining such title, delivers possession of the merchandise to the importer upon an agreement in writing to hold the merchandise in trust for the banker until he is paid. The only kind of instrument which we have recognized and called a trust receipt is one where the banker at the request of the importer buys goods directly from the foreign seller and takes title in his own name from the foreign seller and then turns the goods which he has thus bought directly in his own name over to the importer upon a trust receipt in order that the latter may carry on his own commercial adventure. * * * The essential elements of a trust receipt were lacking in the instrument executed between the defendant and the Boulevard company. The Boulevard company was not an importer and the transaction was one directly between the defendant and the Boulevard company. The written instrument was not a trust receipt."[24]

It is difficult to explain the foregoing paragraph except on the assumption that the court meant to restrict the trust

[24] 271 Mass. at 289, 171 N.E. at 644.

receipt doctrine in Massachusetts to importing transactions. While the actual situation in the case did not in all respects present the facts of a shipment of new motor cars from Detroit to Boston, the attorneys who had prepared the papers were evidently acquainted with the usual form of the trust receipt transaction in the automobile business and seemingly had done everything necessary to bring the case under the tri-partite doctrine. From the standpoint of the proponents of the trust receipt doctrine in automobile cases it is unfortunate that instances where the claimant is a purchaser are permitted to be litigated. In almost every such case the *bona fide* purchaser will be protected in any event. But a court in deciding for the purchaser may make irrelevant observations about trust receipts in general which will be cited later to the embarrassment of those endeavoring to uphold trust receipts.[25]

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[25] Some of the earlier cases interpreted trust receipts as conditional sales in an effort to sustain them. See the New Haven Wire Company Cases, 57 Conn. 352, 18 A. 266 (1899); Mershon v. Moors, 76 Wis. 502, 45 N.W. 95 (1890). The trust receipt is also viewed as a conditional sale in Iowa. Ohio Savings Bank & Trust Company v. Schneider, 202 Iowa 938, 211 N.W. 248 (1926), Recent Cases, (1928) 22 Ill. L. R. 563. See also Industrial Finance Corporation v. Cappleman, 284 Fed. 8 (C.C.A. 4th, 1922); General Motors Acceptance Corporation v. Mayberry, 195 N.C. 508, 142 S.E. 767 (1928).

As has been indicated, in New York the trust receipt is held to be *sui generis*. In the case of *In re* Cattus, 183 Fed. 733 (C.C.A. 2d, 1910), the statement runs: "The courts, without always defining exactly what the relation between the parties is or always defining it in the same way, still are astute to protect the rights of the banker in such case." Utah is likewise reluctant to call the transaction by any traditional name. Jones v. Commercial Investment Trust, 64 Utah 151, 228 P. 896 (1924).

In Kentucky, regardless of the category into which it falls, the trust receipt is finally resolved into a chattel mortgage for the purposes of the recording statutes. *In re* Draughn & Steele Motor Company, 49 F.(2d) 636 (E.D. Ky., 1931); General Motors Acceptance Corporation v. Sharp Motor Sales Company *et al.*, 233 Ky. 290, 25 S.W. (2d) 405 (1930). Texas holds to a similar view. See Commercial Credit Company v. Schlegel-Storseth Motor Company *et al.*, 23 S.W. (2d) 702 (Tex. Comm. of App. 1930); Carrollton Acceptance Company v. Wharton, 22 S.W. (2d) 985 (Tex. Civ. App. 1929); General Motors Acceptance Corporation v. Boddeker, 274 S.W. 1016 (Tex. Civ. App., 1925). The best exposition of trust receipt law is Karl T. Frederick, *The Trust Receipt as Security*, (1922) 22 COL. L. R. 395, 546. Mr. Frederick recognizes the similarity between the trust receipt and the chattel mortgage, but finds differences which entitle the former to special consideration. The chattel mortgage theory is likewise that adopted by the Commissioners on Uniform State Laws in their final draft of §16 of the Uniform Chattel Mortgage Act. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1926), 417; *Current Legislation*, (1927) 27 COL. L. R. 81. As an alternative, in view of the objections likely to arise, the Commissioners are preparing a Uniform Trust

Before taking up New Jersey cases involving trust receipts it may be worth while to say a word about New Jersey recording requirements for chattel mortgages and conditional sales.

Section 4 of the New Jersey Chattel Mortgage Act provides that a chattel mortgage shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith unless the mortgage shall be immediately recorded.[26] The statute originally required a

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Receipts Act. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1931), 302 ff.

Reference has already been made in the body of this article to the Pennsylvania rule which views the trust receipt transaction as a bailment. This theory does not lack the support of other jurisdictions. It is accepted in Nebraska. General Motors Acceptance Corporation v. Hupfer, 113 Neb. 228, 202 N.W. 627 (1925). It has likewise been held to be the law in New Mexico. *In re* Otto-Johnson Mercantile Company, 52 F.(2d) 678 (D. N.M., 1928). The language, though not necessarily the holdings, of two other Federal cases will justify the same conclusion. *In re* Bell Motor Company, Craig v. Industrial Acceptance Corporation, 45 F.(2d) 19 (C.C.A. 8th, 1930) [cert. denied, 283 U.S. 832, 51 Sup. Ct. 365, 75 L. ed. 1445 (1931), *sub nomine* Craig v. Industrial Finance Corporation]; Industrial Finance Corporation v. Cappleman, 284 Fed. 8 (C.C.A. 4th, 1922). See also Commercial Credit Company v. Peak, 195 Cal. 27, 231 P. 340 (1924).

In addition to the article by Frederick already cited the following examine the subject more or less exhaustively: Hanna, *Trust Receipts,* (1929) 29 COL. L. R. 545; Hanna, *Trust Receipts,* (1931) 19 CALIF. L. R. 257; Vold, *Trust Receipt Security in the Financing of Sales,* (1930) 15 CORN. L. Q. 543; 49 A.L.R. 282. See also Williston, *The Progress of the Law: Sales,* 1919-1920, (1921) 34 HARV. L. R. 741, 758-760; 1 WILLISTON ON SALES (2d ed. 1924) §§338 a and 338 b; Zane, *A Modern Instance of Zenothemis v. Demon,* (1925) 23 MICH. L. R. 339; Isaacs, *The Economic Advantages and Disadvantages of the Various Methods of Selling Goods on Credit,* (1923) 8 CORN. L. Q. 199; Magill, *The Legal Advantages and Disadvantages of the Various Methods of Selling Goods on Credit,* (1923) 8 CORN. L. Q. 210; Isaacs, *Business Security and Legal Security,* (1923) 37 HARV. L. R. 201; LLEWELLYN, CASES AND MATERIALS ON SALES (1930) pp. 758-766; HANNA, CASES AND OTHER MATERIALS ON SECURITY (1932), pp. 200 ff.; HANNA, CASES AND MATERIALS ON THE LAW OF CREDITORS' RIGHTS (1931), pp. 229 ff. See also the following notes: (1929) 14 CORN. L. Q. 388; (1929) 7 N. Y. U. L. Q R. 197; (1923) 32 YALE L. J. 602; (1924) 8 MINN. L. R. 144; (1927) 2 WASH. L. R. 125.

[26] Section 4 of the New Jersey Chattel Mortgage Act as amended by Laws 1928 c. 61, p. 131, appears in 1925-1930 Suppl. to Comp. Laws of N. J. c. 36 §4, and reads as follows:

"4. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder of said mortgage, his agent or attorney, stating the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon, be recorded as directed in the succeeding section of this act; * * *"

filing instead of recording. While a chattel mortgage is good against the parties in the absence of record, the statute has been interpreted with a good deal of strictness. The New Jersey courts are not inclined to protect a secured creditor whose security comes within the terms of the Chattel Mortgage Act unless he has complied strictly with this recording requirement. Prior to the adoption of the filing requirements for conditional sale,[27] New Jersey protected the conditional vendor against the creditors of the conditional vendee.[28] On the other hand since the establishment of filing requirements for conditional sales in New Jersey, the New Jersey Courts have taken the stricter view, which also represents minority opinion, as to the protection of conditional vendors in respect to property brought into New Jersey where the vendor has not complied with the New Jersey law although the vendors' interest would have been protected against the creditors in the state in which the conditional sale contract was made.[29] Taking these statutes

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A thorough historical statement regarding this section is contained in Roe *et al.* v. Meding, 53 N. J. Eq. 350, 354-355, 30 A. 587, 33 A. 394 (1895): "This section had its origin in the act of March 24th, 1864. P. L. of 1864 p. 493; Nix. Dig. of 1868 p. 613. That act provided for the filing of a mortgage, instead of its record, and did not require an affidavit. The words requiring an affidavit were inserted by the act of March 19th, 1878. P. L. of 1878 p. 139. The act of March 12th, 1880 (P. L. of 1880 p. 266), provided merely for the recording of chattel mortgages. It seems to have left it optional with the mortgagee whether he would record or file, making either sufficient. The act of March 25th, 1881 (P. L. of 1881 p. 226), was a revision of all legislation on that subject. So held by Vice-Chancellor Van Fleet in Bracher v. Smith, 8 N. J. L. J. 16. That act omitted the clause requiring an affidavit, but required the instrument to be recorded. That was followed by the act of 1885, in which the requisition of an affidavit was again inserted."

[27] The present section is the amendment of L. 1919, c. 210, p. 462, appearing in Cumulative Supplement to Comp. Stat. of N. J. 1911-1924 as c. 182 §91.

[28] The case of Cole v. Berry, 42 N. J. L. 308 (1880), is decisive on this point. After stating that there may be fraudulent acts which will bar the vendor, the court proceeds: "But where the case presents no other features than that the vendor has entered into a contract of sale on credit, and has delivered the goods to the vendee, upon an agreement that they shall remain the property of the vendor until payment of the purchase money, the property in the goods remains in the vendor until payment be made, without being subject to execution at the suit of the creditors of the vendee, and the title of the vendor is preferred to that of purchasers from the vendee." In support of the position that the New Jersey courts have held that a possession which is consistent with the agreement between the parties is not of itself actually or constructively fraudulent the opinion cites Runyon v. Groshon, 1 Beas. 86 (1858); Broadway Bank v. McElrath, 2 Id. 24 (1860); Miller ads. v. Pancoast, 5 Dutcher 250 (1861).

[29] In Thayer Mercantile Co. v. First National Bank, 98 N. J. L. 29, 119 A. 94 (1922), the action was one of replevin by the conditional vendor of an

as a whole it seems that in New Jersey judicial opinion has tended to resist anything which seemed like evasion of the recording requirements, although when the recording requirements are not involved the attitude in respect to the protection of security transactions has been rather favorable to the party having an undisclosed security title.[30]

The New Jersey decisions involving trust receipts in importing transactions are all in the Federal courts. So far as tri-partite arrangements are concerned the trust receipts have been upheld against creditors and the representatives of creditors. The Federal courts apparently make no distinction, moreover, between importing and domestic transactions.

Decisions in the State courts relating to trust receipts in

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automobile sold in New York and removed to New Jersey without the knowledge or consent of the plaintiff before payment of the full amount of the purchase price and in violation of the provisions of the contract. The defendant bank sued out a writ of attachment and the sheriff by virtue thereof attached the car. The paintiff failed to file its conditional sale agreement, or a copy thereof, in the office of the clerk of Middlesex County, New Jersey, within ten days after receiving notice of the removal of the car to that county, nor did he file on any subsequent date. *Held,* under Sections 5 and 14 of the Uniform Conditional Sales Act, in force in New Jersey, for the defendant.

Representative of the opposite point of view is Goetschius v. Brightman, 245 N.Y. 186, 156 N.E. 660 (1927). The general subject is discussed in Notes, Chattel Mortgage and Conditional Sale Recording Acts in the Conflict of Laws, (1928) 41 HARV. L. R. 779. The weight of authority is in accord with New York.

[30] In Thoss v. Olb, 98 N.J.L. 842, 121 A. 707 (1923), the holder of a bill of sale was given preference over a purchaser from the original owner on the theory that the first transaction was an absolute sale.

The requirement that a chattel mortgage must be recorded *immediately* is interpreted literally. Roe *et al.* v. Meding, 53 N.J. Eq. 350, 30 A. 587, 33 A. 394 (1895). A valid explanation of delay is of no consequence. Bollschweiler v. Packer House Hotel Co. *et al.,* 83 N.J. Eq. 459, 91 A. 1057 (1914) [*aff'd* 84 N.J. Eq. 502, 95 A. 459 (1915)]. Where there is no recordation, delivery must be immediate and followed by actual and continued change of possession. Evans v. Stanwood Rubber Co., 94 N.J. Eq. 630, 121 A. 2 (1923). Cases involving the sufficiency of the affidavit of consideration, etc., indicate that compliance is strictly required. See Fitzpatrick v. Barnard Phillips & Co., Inc., 95 N.J. Eq. 363, 123 A. 245 (1924); Unger v. Hochman, 4 N.J. Misc. 445, 133 A. 180 (1926). A chattel mortgage, though unrecorded, is still valid between the parties and their privies. W. D. Cashin & Co. v. Alamac Hotel Co., Inc., 98 N.J. Eq. 432, 131 A. 117 (1925). It is likewise good against a mortgagee for a past indebtedness. Milton v. Boyd, 49 N.J. Eq. 142, 22 A. 1078 (1891). Where a second mortgagee of chattels has recognized in his mortgage the existence of a previous mortgage upon the same chattels, he cannot attack the former mortgage on the ground that it was made in fraud of the mortgagor's creditors. Perrine v. First National Bank of Jamesburg, 55 N.J.L. 402, 27 A. 640 (1893). And a mortgagor's assignee for the benefit of creditors has no standing to attack an unrecorded chattel mortgage. Wimpfheimer *et al.* v. Perrine *et al.,* 61 N.J. Eq. 126, 47 A. 269 (1900).

domestic distribution have failed to protect the holder of a trust receipt except in one instance of an estoppel. In some of these domestic trust receipt transactions the holder of the trust receipt has been opposed by a purchaser, but the language of the decisions has indicated that the trust receipt would be held invalid in favor of creditors.

Century Throwing Co. v. *Muller*,[31] decided by the Circuit Court of Appeals in the Third Circuit in 1912 on a case arising from New York, is perhaps the leading case on New Jersey law and one of the more important cases on the law of trust receipts generally. This was an action at law by bankers for the recovery of damages for the detention of raw silk which the bankers claimed the defendant had converted. A New Jersey Silk Company had arranged for the purchase of silk in Yokohama. The bankers opened a letter of credit for the silk company and following the usual custom the silk was shipped from Japan with bill of lading to the order of the banker. When the goods arrived in New York the bankers endorsed the bill of lading to the Silk Company taking back a trust receipt.[32] The silk was removed to New Jersey and part of it delivered to the defendant throwsters to be thrown. After they had ren-

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[31] 197 Fed. 252 (C.C.A. 3d, 1912).

[32] "Received from Messrs. Muller, Schall & Co. the merchandise specified in the Bill of Lading per S. S. 'Inaba Maru' to N. Y. via Seattle.

F V
206/235 30 bales raw silk.

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

"New York, 3-11-10,

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

dered their services they were unwilling to deliver the thrown silk without payment of the claimed lien. The Silk Company thereupon agreed that if the throwsters would deliver the thrown silk, the Silk Company would turn over to the throwsters the quantity of raw silk which was in controversy in the case. The Silk Company shortly thereafter became bankrupt. The defendant claimed the right to retain the goods by virtue of a throwsters' lien created by New Jersey Statute.[33] The court upheld the position of the bankers, holding the bankers to be owners and the defendants bound by this ownership. In this connection the court said:

> "The exigencies of trade and commerce have caused many exceptions to be made to the rigid rule founded on the policy underlying the statute of frauds, by which the divorce of title from possession is declared either evidence of fraud or to be fraudulent *per se*. Accordingly, courts consistently recognize and protect the title of the real owner of goods placed by him in the hands of a bailee for a legitimate purpose, and will protect it, even where such bailee is clothed with all the indicia of ownership that physical possession can give, and undertakes, in violation of his contract, to dispose of the goods to an innocent purchaser. Cases of conditional sale and other bailments, where title has never passed from the real owner and where the possession of the bailee is not inconsistent with the real contract between the parties, are familiar illustrations of the law in this regard. In the present case, there can be no doubt that the title to the goods in question passed from the original vendors to the plaintiffs for a well recognized and lawful purpose, viz., to secure the plaintiffs by the acquirement and retention of said title against failure on the part of the Silk Company to make good the accept-

[33] 3 Comp. Stat. of N. J. p. 3140, §66. Section 1 is as follows:
"That all persons or corporations engaged in the business of manufacture, spinning or throwing cotton, wool or silk into yarn or other goods, shall be entitled to a lien upon the goods and property of others that may come into their possession for the purpose of being so manufactured, spun or thrown into yarn or other goods, for the amount of any account that may be due them from the owners of such cotton, wool or silk, by reason of any work and labor performed and materials furnished in or about the manufacturing, spinning or throwing of the same or other goods of such owner or owners."

ance by the plaintiffs of the purchase money draft at its maturity. Nor can it be seriously questioned that the plaintiffs could legally deliver possession of these goods to the manufacturer, for whose benefit the purchase had been made in Japan, without parting with the title to the same, and measurably retain the security intended to be given the plaintiffs by virtue of the original undertaking, provided always that the possession be consistent with the agreement between the parties for that purpose. The law has long been settled that such title and ownership will be recognized, so far as they are necessary to the security they were intended to give for the payment of the purchase money of the goods bailed, and this, although a dishonest bailee is thereby enabled, by violating his contract of bailment, to avail himself of such possession to represent the property as his own, and thus practice a fraud on third persons with whom he deals in respect thereto. But such cases are an exception to the ancient rule founded on the policy of the statute of frauds, touching the divorce of actual title and possession, the doctrine being, as held in New Jersey, that possession in one person, which is consistent with an agreement between the parties is not inconsistent with the actual title in another, which will be supported for the purposes stated in the contract. As said by the Supreme Court of New Jersey in Cole v. Berry, 42 N. J. Law, 308, 314 (36 Am. Rep. 511), in speaking of a conditional sale:

> " 'Where the vendee is in possession under a conditional contract of sale, he has no property to convey to a purchaser, and the vendor's title never having been divested, he may reclaim the property if the condition be not performed, even as against a purchaser for value in good faith.' "[34]

It is worth observing that in *Century Throwing Company* v. *Muller*[35] the court was applying New Jersey law although

[34] 197 Fed. 252, 258.

[35] *In re* Reboulin Fils & Company, Inc., 165 Fed. 245 (D. N.J., 1908), is another interesting case in point. Five hundred casks of cherries were imported by the bankrupt under a letter of credit arrangement with petitioner. The bills

the contract was apparently made in New York and the trust receipt valid under the New York decisions.[36]

The New Jersey District Court in *In re Schuttig*[37] was faced with the problem of a trust receipt in what it regarded as a bi-partite transaction. The bankrupt was a dealer in motor cars. Bills of lading covering a shipment drawn to the bankrupt's order and accompanied by sight drafts on the bankrupt, were sent by the manufacturer directly to a local bank. The dealer then applied to a finance company for a loan which was granted. The dealer paid the finance company twenty per cent of the purchase price and signed a trust receipt covering the entire shipment. The finance company then sent a check to the local bank for the full amount of the sight draft with instructions to release the bill of lading to the dealer. This was done. Subsequently, and with the cars still in his possession, the dealer become bankrupt. The court held the trustee in bankruptcy could hold the cars against the finance company for the reason that the finance company did not receive title directly from the manufacturer. The court said the transaction, as it stood, amounted to a chattel mortgage and being unrecorded failed to protect the finance company.

In *Keystone Finance Corporation* v. *Krueger,*[38] the Third Circuit Court of Appeals again had an opportunity to consider the New Jersey law of trust receipts. This was a motor car financing transaction in which what appears to have been a valid trust receipt in the view of the court had been issued in connection with the original shipment of the cars. The original financing agency had not been paid and new financing was arranged through the Keystone Finance Corporation. The dealer gave the Finance Corporation a bill of sale of the cars as security for a loan for the amount of debt to the first finance

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of lading were, however, many of them drawn to bankrupt's order, though they were invariably delivered in accordance with the agreement to extend credit and were surrendered only upon the execution of a trust receipt. Cross, D. J., held the petitioners were entitled to the cherries in the bankrupt's possession or their proceeds and specifically overruled the referee's conclusion that a chattel mortgage properly executed and recorded was necessary to preserve petitioner's interest.

[36] See *supra* note 13.

[37] 1 F.(2d) 443 (D. N.J., 1924).

[38] 17 F.(2d) 904 (C.C.A. 3d, 1927).

company. The money was then paid to the first company and the original trust receipt turned over to the Keystone Corporation. When the dealer became bankrupt the Keystone Corporation claimed the cars under the original trust receipt. The court held that since the Keystone Corporation had made a loan to the dealer and the dealer had paid off its obligation to the other finance company, the trust receipt was thereby extinguished. The court refused to consider that there was any question of parol assignment of the trust receipt involved and compelled the Keystone Corporation to rely on its bill of sale. Since the bill of sale was equivalent to a chattel mortgage and was unrecorded, the trustee in bankruptcy prevailed.

The Court of Errors and Appeals first expressed itself on the subject of trust receipts in *Commonwealth Finance Corporation* v. *Schutt*.[39] The case involved an ordinary instance of the financing of a dealer's purchase of motor vehicles. While the bill of lading was not made out to the order of the Finance Corporation, it does not seem to have been made out to the order of the dealer, and had not been delivered to the dealer at the time the trust receipts were executed. When the finance company received the trust receipt it gave the dealer a check which he used to pay the draft attached to the bill of lading and obtained the bill of lading, as agent for the finance corporation, if the papers are to be accepted at their face value. Thereupon the dealer sold the motor vehicles in the ordinary course of business to the defendant in the case. Since the court states that the dealer had the right to sell the motor cars provided it accounted to the finance company for the proceeds, it was unnecessary for the court to discuss whether the trust receipt was a chattel mortgage. As the court said, assuming the finance corporation was an owner, it was estopped to deny the validity of the sale merely because its agent had not paid over the proceeds to it. No principal can question the act of his agent in dealing with an ordinary purchaser in good faith, because the agent does not account to him. The court, however, went further and stated that the transaction was not as it appeared in the writing and that the evidence showed that the receipts which apparently

[39] 97 N.J.L. 225, 116 A. 722 (1922).

were not called trust receipts, although in the usual trust receipt form, were nothing more than a chattel mortgage. The court further stated that if the security device was not a chattel mortgage it was at least a conditional sale.

The latest statement by the Court of Errors and Appeals on a trust receipt situation is found in *Karkuff* v. *The Mutual Securities Co.*[40] This was an appeal from a decree of the Court of Chancery advised by Vice Chancellor Buchanan in an interpleader suit. The Mutual Securities Company had participated in an automobile trust receipt transaction for one Sharp, a dealer, doing business as the Plainfield Flint Company. The dealer executed a trust receipt in which he described himself as trustee-bailee acknowledging receipt of a car from the Securities Company as owner. The dealer agreed to return the car in good order and unused except that he might sell the car for the account of the Securities Company upon obtaining prior written consent. The dealer took the car to Plainfield, put it in a warehouse, and borrowed most of its value from one Brunson, giving the warehouse receipt as security. Subsequently the dealer sold the car to a purchaser on a conditional sale contract. The purchaser's note and conditional sales agreement were assigned to Brunson who surrendered the warehouse receipt. The car was delivered to the purchaser. Brunson, and the Securities Company knew nothing of their mutual claims for several months. The purchaser's note was payable to bearer. In the actual case Brunson sent the Securities Company the purchaser's promissory note under circumstances which entitled the Securities Company to believe that it was the dealer who sent it. The Securities Company discounted the note and credited the proceeds on a prior indebtedness due from the dealer to the Securities Company. Several weeks later Brunson asserted his ownership to the note. The Vice Chancellor held that Brunson was estopped because in reliance on Brunson's representation the Securities Company had changed its position by crediting the dealer with payment of about 75% of his debt instead of suing him or otherwise enforcing the collection. The Securities Company was held entitled to the fund in dispute. The Court of Errors and

[40] 108 N.J. Eq. 128, 148 A. 159 (1930).

Appeals affirmed the decree of the Vice Chancellor. Thus far it may seem that the decision has nothing to do with the law of trust receipts. This would be true were it not for what the Vice Chancellor says about the trust receipt:

> " 'The securities company had no prior claim over Brunson by reason of the so-called "trust receipt." It is contended on behalf of that company that it was the purchaser and owner of the car—not Sharp; but the proofs contradict this. It is true that the securities company gave its check to the Newark Flint Company for the full purchase price of the car, but Sharp contemporaneously gave the securities company his check for twenty per cent. of that amount (together with the time draft for the balance and the 'trust receipt'). Markey, the officer of the securities company who handled the transaction admitted, when questioned by the court, that the securities company advanced the money to Sharp so that he might purchase the car. The evidence also shows that Sharp, not the securities company, got the manufacturer's invoice for the car. The securities company was in the business of financing the purchase of cars for others, not buying cars for its own account.
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> " 'It is quite clear that Sharp bought the car and was the owner thereof, not the securities company. It follows that the so-called "trust agreement" was in fact and essence a chattel mortgage. Commonwealth Finance Corp. v. Schutt, 97 N. J. Law 225. It was not verified or recorded, and was invalid as against Brunson, who had no notice. Since Sharp was the owner of the car, he received the proceeds of his subsequent sale of the car not as bailee or trustee for the securities company, but for himself, as his own property.' "[41]

The Court of Errors and Appeals, Per Curiam, affirmed "for the reasons stated in the opinion filed in the Court below by Vice Chancellor Buchanan."

The inconsistencies and uncertainties in the foregoing cases illustrate something of the difficulty of predicting actual deci-

[41] 108 N.J. Eq. at 130, 148 A. at 159.

sions in trust receipt cases. It is arguable that the New Jersey law of trust receipts in the tri-partite transaction is represented by the Federal cases; that the actual set-up in the State cases did not show clearly that ownership had come to the finance companies from the seller and that insofar as the State cases are inconsistent with Federal holdings they may be distinguished. On the other hand it is possible that any trust receipt in New Jersey would be held by the State courts to be a chattel mortgage; and that once the highest court in the State had so determined the Federal court would follow that rule. A third possibility is that the New Jersey law is in accord with what seems to be the law in Massachusetts, namely, that the tri-partite trust receipt will be upheld against creditors in importing transactions and not in domestic business. My own conclusion, stated with some misgiving, is that the State courts in New Jersey are inclined to regard the trust receipt as a chattel mortgage and hence invalid under the same circumstances that would render a chattel mortgage unenforceable.[42]

The proposed Uniform Trust Receipts Act will be important in a state like New Jersey not only because of the certainty it will give to the law of trust receipts, but, assuming my conclusion as to the New Jersey law is correct, because of the validity the Uniform Act will give to trust receipts for limited periods without recording.

Whether any recording is needed for trust receipts is at best an open question. Much plausible argument can be made for the proposition that none of the chattel security recording laws is worth enough to make up for the trouble and expense it requires. Credit is no longer extended on the evidence of visible property, but on financial statements, and the debtor's

[42] One difficulty in the way of the recognition of trust receipts as valid without recording, is that with the broadening of the recording and filing requirements there has come to be a feeling that the law requires the recording of all security transactions. This of course is not the fact. Originally the law required no recording at all. Even today, in the leading European countries, there is much less reliance upon recording than in the United States. Leaving out of account the real estate recording laws, the practice in the United States for many years was to require only the recording of chattel mortgages, that is, only the recording (or filing) of the conveyance of ownership in a chattel or a lien on a chattel as security for a debt. The chattel mortgage was customarily an incident of a loan. The conditional sale recording requirements came much later.

business record and reputation. Persons who admit this still urge the utility of recording requirements for chattel mortgages and conditional sales on the ground that in the absence of such requirements fraudulent security papers, especially mortgages, will frequently appear in insolvency proceedings. No scientifically compiled data exist to substantiate this contention. Whatever policy is desirable in connection with chattel mortgages and conditional sales, few of the arguments for recording these security documents have any relevance in respect to trust receipts. Importers and dealers who are financed by trust receipts almost invariably have only a few large creditors. The interests of purchasers will generally be protected against the holder of a trust receipt irrespective of recording. The lending agencies who comprise the larger creditors in such transactions seem to be generally opposed to filing requirements. Such information as they desire they expect to get directly from their debtors. The small creditors of automobile dealers and importers, such as electric light and gas companies, trucking companies, and those who render various minor services, would be very unlikely to go to a record office before extending a small amount of credit to the debtor. A trust receipt, moreover, is used almost solely where the borrower receives new goods in his business. If there is little

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In most of the United States conditional sales were valid against creditors without recording. Not only were the chattel mortgage recording statutes too restricted to apply to conditional sales, but the security in a conditional sale transaction was an incident to a purchase and not an incident to a loan. When the recording requirements were adopted for conditional sales, the new statute did not purport to enact any general recording requirements for all security devices, but simply added the obligation of recording in a specific situation. Since the trust receipt is neither a conditional sale nor a chattel mortgage, and since there is no general requirement of recording of security transactions, it would seem that the trust receipt like the pledge and the assignment of book accounts, should be held to be outside the recording requirements. As a document the trust receipt is somewhat like a chattel mortgage although it is characteristically used in a purchase-money situation that comes closer to the usual form of conditional sale than it does to the loan transactions out of which most chattel mortgages arise. One reason for treating conditional sales and chattel mortgages today on the same basis is likely the fact that the chattel mortgage has come to be widely used in purchase-money transactions, notably in the installment furniture business. The causes of the use of chattel mortgage in connection with retail sales are various. Sometimes the seller wishes to take advantage of penal provisions against removing the security; at other times he wishes to avoid refiling provisions of the Conditional Sales Act and escape some of the difficulties of repossessing the property when a substantial amount has been paid.

active opposition to proposals for recording requirements in connection with trust receipts, there is even less evidence that business interests are in favor of this feature of the new legislation. There is no general feeling that serious credit problems demand solution through new recording statutes. In the circumstances it seems worth while to inquire whether the cost of business should be increased and the number of public office holders enlarged by making filing a condition of protecting holders of trust receipts against creditors.[43].

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[43] It is recognized that the latest draft of the Uniform Trust Receipts Act by permitting a trust receipt to be valid for a limited period without recording and by providing for the recording in a central office merely of the course of dealings rather than individual transactions, has obviated many of the objections to recording. The question remains whether in reducing the nuisance aspect of recording the Uniform Act has not also eliminated whatever value recording is supposed to have.