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TRUST RECEIPT SECURITY IN FINANCING OF SALES

L. Vold*

The trust receipt device for financing import and wholesale trade, and manufacturing connected therewith, has to a considerable extent displaced the more familiar devices for purchase money security upon the goods that are dealt with. The law applicable to trust receipt financing appears at first contact both complex and obscure. Careful analysis of the business facts greatly simplifies the problem, however, and systematic analysis of the divided property interests involved at successive stages in the transaction brings comparative order out of the apparent complexity. The subject of trust receipt financing of sales may therefore profitably be set forth from the point of view of an analysis of the business facts and an ascertainment of the divided property interests at successive stages in that business transaction.

I. THE BUSINESS BACKGROUND—NEED FOR SECURED PRODUCTIVE CREDIT

The immensity of present-day marketing operations in the process of distribution of goods from original producer to ultimate consumer for the satisfaction of human wants requires large use of credit. Ordinary consumers have neither the means nor the inclination to pay so largely in advance as to finance them. Individual producers usually are equally unable to do so. The marketing process requires to greater or less extent the service of certain intermediate agencies and a more or less extensive system of financial backing for their operations. The credit that carries the business is therefore, as it were, the goose that lays the golden eggs.

Credit advances for business operations require the giving of effective security. The more effective it is the larger proportionally may be the amount of the advance. The goods to be handled in sales transactions may themselves conveniently be used as the security. Frequently, as a practical matter, they constitute the principal if not the only security available to the seller. How to arrange the transaction so as most effectively to utilize the very goods sold has therefore become a very immediate problem. The familiar types of security, such as liens, pledges, chattel mortgages, and conditional sales, have all been contrived with reference to certain recognized business needs, and their various particulars

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and restrictions are often but poorly adapted to getting practical
business done on a purchase money security basis.

Manifestly the unpaid seller's lien and his legal power to stop the
goods in transit in the event of the buyer's insolvency, while con-
venient and useful to the seller in collecting the price where the
buyer is not yet in possession, are not adapted to serve as security
devices in credit transactions where delivery to the buyer is made.
The same may be said of the seller's power of disposal of goods
shipped pursuant to a contract with the buyer under a bill of lading to
the seller's order, reserving title in him as security. Where the
buyer, as a practical business matter, must be entrusted with pos-
session under a sale on credit, any security for the price which is
dependent on the seller's power to control possession is manifestly
not well adapted. Were the law of liens and pledges developed so
broadly that despite a redelivery to the pledgor the pledge could
still remain operative with respect to third parties dealing with the
pledgor, that form of security could with but slight adaptation be
made practically available for cases of purchase money security in
goods purchased. Yet, since any such development of the law of
pledge would seriously impair the protection against secret liens
afforded as a matter of policy to third parties dealing with pledgors,
so broad a development is hardly to be expected.

Parties have often resorted to the familiar chattel mortgage
device for providing purchase money security in the goods dealt
with. However, restrictions on foreclosure and recording require-
ments severely limit the security holder's powers under the chattel
mortgage and hence greatly impair its usefulness as a credit carrier.
These restrictions historically were imposed to prevent oppression
of the borrower by the lender and to prevent deception of third
parties dealing with the mortgagor in possession through the asser-
tion of superior secret liens. These reasons do not apply with the
same force where the mortgage is given, not to secure a loan, but
to secure the purchase price of the goods dealt with in current com-
cmercial transactions. Ordinary chattel mortgage statutes never-
theless make no distinction based on such considerations. When,
in order to avoid the restrictions on the effectiveness of the chattel
mortgage security in commercial cases, the conditional sale device
was developed, legislation in many places imposed restrictions of
analogous character upon the conditional sale, notably in recording
requirements. These have cut down the effectiveness of the con-
ditional sales security and so far impaired its range of usefulness
as a credit carrier based on purchase money security in the goods
The trust receipt device aims to give the banking house such adequate security in the goods as to make available the necessary credit for carrying on productive marketing under such conditions.

III. The Successive Business Stages in the Standard Tripartite Trust Receipt Transaction

a. The Undifferentiated Preliminary Stages

The standard trust receipt transaction familiar in modern importing and wholesale business is with respect to the property incidents involved in its earlier stages in no essential different from other transactions differently financed. It begins, like other transactions, with a preliminary negotiation in which a business dealer or manufacturer ascertains on what terms desired goods can be purchased from a distant seller and what financial backing can
be obtained from a banking house on the security of the goods to be bought.

In the next stage which may be called that of procuring credit, the prospective buyer contracts with the banking house for the opening of credit in his favor. In the import trade this is often supplied in the form of a letter of credit from the banking house to the distant seller or his banking correspondents promising to pay drafts for the price of goods purchased by the business dealer or manufacturer in accordance with specified terms, the drafts to be accompanied by bills of lading for the goods, made out either to the order of the banking house or to the order of the shipper and properly indorsed by him to the banking house. In the domestic wholesale trade the arrangements may often be more informal, but in any event the understanding is that the banking house will pay the distant seller's drafts for the price when accompanied by order bills of lading giving it control over the goods.

The next stage may be called the stage of shipment under contract. The buyer places his order with the distant seller who ships in accordance with the terms of the credit arranged for, taking from the carrier an order bill of lading in the form indicated. Contemporaneously the seller draws his draft for the price on the banking house, or on the buyer, as the case may be, and procures it, accompanied by the order bill of lading as collateral security, to be forwarded through banking channels for presentment for payment. The next stage may be called the stage of banker's advances on the security of the order bill of lading, which is reached when the banking house pays the draft, taking as security the order bill of lading and thereby acquiring the power of disposal of the goods. The particular steps may vary somewhat in detail, depending on what facilities for making the exchange of money for documents have in the instance been made available. Thus in the import trade it is common for the seller to draw on the foreign correspondent of the banking house under the terms by the letter of credit, the details of surrender of the documents in exchange for payment being there carried out and the correspondent forwarding the documents to its principal. In the domestic wholesale trade, where the arrangements often are more informal, the distant seller may send the draft for the price, with the order bill of lading attached, through independent banking channels for presentment. The banking house financing the deal then pays the independent banking correspondent which acts for the seller, taking the order bill of lading as security. In many instances, doubtless, these details are handled at the same
time with the giving of the trust receipt by the business dealer or manufacturer, the next step in the business process. The important element, however, is that the banking house advancing the price maintains control of the order bill of lading until it gets the trust receipt. In many instances the arrangements are such that the distant seller draws, not a sight draft, but a time draft for the price, which the financing bank accepts on presentment instead of paying it, the seller then realizing his payment through immediate discount of the accepted draft.

b. The Stage of the Technical Trust

The first stage in which the trust receipt transaction assumes characteristics distinguishing it from transactions otherwise financed may be called the stage of the technical trust. The essence of the transaction is that it is expected that the goods will be turned over to the buyer before repayment, for limited use in his business. When they arrive at their destination, therefore, it is common for the banking house to surrender to the buyer the order bill of lading to enable him to get the goods from the carrier and use them in the limited ways agreed upon. At the time of surrendering the order bill, the banking house requires the buyer to sign and deliver to it the so-called “trust receipt”. The trust receipt recites in substance that the bill of lading and the goods held thereunder are and continue to be the property of the banking house as security for its advances, that they are merely turned over to the business dealer or manufacturer to be held in trust for the banking house and used only for certain purposes which are set out, until the advancements have been repaid, and that the banking house may at any time cancel the trust and resume possession. This short interval, during which the buyer holds the order bill of lading under the terms specified in the trust receipt, may be called the stage of the technical trust.

c. The Stage of Limited Agency

When the business dealer or manufacturer surrenders the order bill of lading to the carrier, he receives the goods into his own possession with authority from the banking house to deal with them in such limited manner as is indicated by the terms of the trust receipt. This stage may for convenience be called the stage of limited agency.
IV. THE DIVIDED PROPERTY INTERESTS UNDER THE STANDARD TRIPARTITE TRUST RECEIPT ARRANGEMENT

a. The Divided Property Interests During the Undifferentiated Preliminary Stages

In the earlier undifferentiated stages of the standard tripartite trust receipt transaction, the property interests involved are no different from those encountered in other sales transactions going through similar stages and otherwise financed. Thus at the stage of preliminary negotiation neither personal obligations nor property interests in any specific goods are as yet involved. In the stage of procuring credit, contractual obligations may be assumed as between the business dealer or manufacturer and the banking house, but no property interests in specific goods are as yet involved. In the stage of shipment under contract by the distant seller, property interests in the specific goods are for the first time encountered; but as yet nothing arises which is peculiar to trust receipt transactions. At this stage the beneficial interest in the goods passes to the buyer by appropriation when the goods are shipped, the seller reserving, however, the power of disposal of the goods as security for the purchase price by making the shipment under order bills of lading. It is common legal speech to describe this arrangement by saying that the distant seller who takes the bill of lading to the order of the banking house or to his own order has reserved the legal title to the goods as security.

At this early stage in the transaction are encountered the divided property interests familiar in connection with shipment of goods under contract under order bills of lading. Possession is in the carrier. The beneficial interest is in the party who ordered the goods. If the distant seller shipped to his own order, the legal title giving him the power of disposal is reserved in him as security. If he procured the bill of lading to the order of the banking house but the banking house has as yet advanced nothing, the final practical effect is the same, though its description in legal terms is a little more complicated. In such case it would ordinarily be recognized that the banking house has the legal title, but holds it on behalf of

1See Uniform Sales Act, § 19, rule 4 (2), §§ 20 (2), 22 (a).
2Williston, Sales (2d ed. 1924) § 284, with cases cited. Convenient illustrations of the same position where goods are shipped under contract with a purchaser, but shipped under straight bills of lading naming the shipper as consignee are the following cases: Rudin v. King-Richardson Co., 311 Ill. 513, 143 N. E. 198 (1924) (books); Banik v. Chicago M. & St. P. Ry., 147 Minn. 175, 179 N. W. 899 (1920) (hoops).
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the shipper, the distant seller, for his security for the purchase price. Meantime, as the seller is himself in possession of the bill of lading, he effectually prevents any dealing with the document by the banking house until it advances the purchase price to him and receives the order bill of lading in exchange.3

When the banker makes advances on the security of the order bill of lading, the seller is out of the picture so far as property in the goods is concerned. The banking house has succeeded to his security interest.4 At this point, therefore, possession of the goods is in the carrier, the beneficial interest in the goods is in the business dealer or manufacturer, while the banking house holds the legal title as security for its advances, with a power to dispose of the goods if the beneficial owner defaults in repaying its advances. The banking house, moreover, has the legal power to cut off the beneficial interest of the business dealer or manufacturer by wrongfully negotiating the order bill of lading to an innocent purchaser for value without notice.5

The standard of commercial honesty of reputable banking houses is so high, however, that direct and intentional abuse of this power is seldom observed in the reported cases.6 So far, therefore, the transaction presents divided property interests of no special peculiarities attributable to trust receipts. The new phases are those which follow.

b. The Divided Property Interests During the Stage of Technical Trust

During the stage of the technical trust the business dealer or manufacturer becomes the holder of the order bill of lading for the goods, but subject to the terms set out in the trust receipt designed to preserve the security interest of the banking house. The parties at this stage of the transaction have created a superficially anomalous situation. By the indorsement and delivery to him of the order bill of lading, the indicia of title and the accompanying complete power of control and disposal of the goods are transferred to the dealer or manufacturer who is already the beneficial owner. At the same time the private agreement of the parties, as shown by the express recital in the trust receipt, is that the property in the goods is to continue in the banking house for its security.

The apparent contradiction between what the parties have done and what they have said is readily dealt with, however, if regard is

3Williston, Sales § 286, and cases in notes 49, 50 thereto.
4Williston, loc. cit. supra note 2, and authorities cited in its accompanying notes 26, 27. See also Williston, Sales §§ 286a, 286b, 286c.
5Uniform Sales Act, § 33.
had to the practical business aspects of what they seek to accomplish thereby. The form of the bill of lading, being to order, has permitted its effective use as a security device for the financing involved in the earlier stages while the goods were in transit. Now that the transit is ended and the goods are to go into the possession of the one who is to use them, business convenience requires that the banking house turn over the order bill of lading to the beneficial owner in order that he may attend to the practical details of getting the goods from the carrier and turning them into money. The banking house must for the moment trust to the honesty of the business dealer or manufacturer. It puts special reliance upon him at this point, for as holder for the moment of the order bill of lading, he has the legal power to cut off the security interest of the banking house by negotiating it, though wrongfully, to an innocent purchaser for value without notice, although the private agreement that the property continue in the banking house for its security is enforceable between the parties. At this stage, therefore, the security interest of the banking house is continued in existence but is for the time being not in the form of legal title but rather is much like, if not identical with, an equitable lien, or the equitable interest of the beneficiary of a trust. The business dealer or manufacturer, already the beneficial owner, may now as indorsee of the order bill of lading be described in familiar stereotyped terms as holder of the legal title to the goods, being, however, trustee for the security of the banking house to the extent of its advances.

If the more precise terminology of powers be preferred in describing the resulting situation, it is even easier to see that the property interests here are divided. Possession is in the carrier, who has a lien for freight, which gives the carrier certain limited powers with respect to the goods. The business dealer or manufacturer, who bears the

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7For supporting dicta, see In re Reboulin Fils & Co., infra note 10 (cherries); In re Cattus, infra note 10; Century Throwing Co. v. Muller, infra note 10 (silk); In re K. Marks & Co., infra note 37; In re James, infra note 10 (automobiles); Baring v. Galpin, infra note 10 (iron rods); Moors v. Wyman, infra note 35 (hides); Peoples Nat. Bank v. Mulholland, infra note 28 (hides); Moors v. Kidder, infra note 33 (shellac); Drexel v. Pease, infra note 10 (sardines); Scott v. Industrial Finance Corp., 265 S. W. 181 (Tex. Civ. App. 1924) (automobiles).

8Mention need only be made of the well settled rule that specific performance may be had of an agreement for security.
risk of loss and is entitled to the business profits, who has the liabilities of ownership and the powers giving him the advantages of ownership, is the beneficial owner. As holder of the order bill of lading he also has the power wrongfully to negotiate the bill of lading to an innocent purchaser for value without notice and thereby to cut off the security interest of the banking house, but the latter has the power to retake the goods while the beneficial owner still has them under his control, and to apply them through sale or otherwise to the satisfaction of its claim for advances. To protect itself against dishonest negotiation of the order bill of lading where the dealer or manufacturer is hard pressed for cash a well-advised banking house might well put subsequent takers on notice of the trust by making appropriate recitals in its indorsement on the order bill of lading.\footnote{Such, in substance was the form of the indorsement in Farmers & Mechanics Nat. Bank v. Logan, 74 N. Y. 568 (1878) (wheat).}

c. The Divided Property Interests During the Stage of Limited Agency

When the carrying out of the trust receipt transaction reaches the stage which in this paper is called the stage of limited agency, the bill of lading has become spent, the business dealer or manufacturer having surrendered it to the carrier and received possession of the goods. There is now no longer the apparent inconsistency between what the parties have recited in the trust receipt and what they have done in dealing with the order bill of lading. Their agreement recites in terms that the banking house throughout has the property in the goods as security for its advances and that the business dealer or manufacturer is to hold possession for the banking house, making only certain specified limited use of the goods until the advances thereon have been repaid. Nothing in what the parties have done materially qualifies at this stage the effect of these terms. There is therefore at this stage no legal obstacle to giving effect to the recitals in the trust receipt. While courts and writers have at times been greatly puzzled to find appropriate names in which to express the results,\footnote{The clearest recent judicial utterance defining the tripartite trust receipt relationship is found in the case of In re James, 30 F. (2d) 555 (C. C. A. 2d, 1929) (automobiles). For other cases of expressions devoted to the difficulty of precise definition of the relationship see: In re Reboulin Fils & Co., 165 Fed. 245 (D. N. J. 1908) (cherries); Charavay & Bodvin v. York Silk Mfg. Co., 170 Fed. 819 (C. C. S. D. N. Y. 1909) (silk); In re Cattus, 183 Fed. 733 (C. C. A. 2d, 1910); Century Throwing Co. v. Muller,} it is abundantly clear that the business dealer...
or manufacturer, beside the beneficial interest in the goods, now also has possession. The banking house has a property interest in them which the parties have described in terms appropriate to its holding the title as security. Although the possessor has authority to use the goods in his business, he now has no power to cut off the security interest by making a transfer to a purchaser. Expressed in terms of powers in each party with respect to the goods, some of the applications of which are set out below, the fundamental fact of divided property interests in the goods at this stage in the transaction is easily recognized.

Before taking up in detail the practical applications of this analysis a little explanation may fittingly be devoted to the merely verbal difficulty encountered if the stereotyped language of legal title is used in describing the property interests at this stage. How, it may be asked, is the legal title now in the banking house, when in the stage of technical trust immediately preceding it was in the business dealer or manufacturer, considering that all that has happened since is that the person who all along was beneficial owner has now also secured possession? The realities of ideas and of business facts are not, however, slaves to mere words. If it is insisted that legal title was in the business dealer or manufacturer in the stage of the technical trust, and no regard is had to analysis of what powers


Recent writers commenting on this newly developing branch of the law have put somewhat divergent interpretation on the legal materials available. See Taylor, Trust Receipts (1921) 6 CORNELL LAW QUARTERLY 168; Frederick, The Trust Receipt as Security (1922) 22 Col. L. Rev. 395 and 546; Hanna, Trust Receipts (1929) 29 Col. L. Rev. 545.

For a comprehensive annotation of trust receipt cases: Note (1927) 49 A. L. R. 282.

11The cases, supra note 10, clearly recognize this feature, though often expressing it in different ways. Further authorities may be found in connection with the detailed analysis, infra notes 22-31.

In Brown v. Mass. Hide Corp., 218 Fed. 769 (C. C. A. 5th, 1915), leather to which the banking house held title under an importer's trust receipt was sold by the importer, together with other leather not subject to receipt, and it was impossible to identify the proceeds of each. The bankers, under the doctrine of subrogation, were held entitled to enforce their claim against the entire fund.
were involved therein, it may still be answered in as dogmatic and
verbal a manner that the title may pass by appropriation in accord-
ance with a prior agreement. The agreement of the parties, as liter-
ally expressed in the trust receipt, usually is that the title is to con-
tinue in the banking house. Giving their agreement the only inter-
pertation consistent with their acts in indorsing the order bill of
lading to the buyer, this must mean that the title was intended to re-
vert to the banking house as soon as the business dealer or manufac-
turer ceased to be holder of the order bill of lading. Accordingly, the
carrier's delivery of the goods to the business dealer or manufacturer
constitutes the act by which, according to the agreement of the
parties, the title is reappropriated to the banking house for its secur-
ity. In connection with this verbal objection and its corresponding
verbal answer, moreover, and for its possible bearing in discussing
the application of chattel mortgage recording acts to trust receipt
transactions, it is to be noted that though the banking house has
thus reacquired the technical legal title, yet the banking house has
had throughout a security interest in the goods which was acquired
in the first instance from the distant seller. In consequence there is
no occasion from the form of the transaction for construing the stand-
ard tripartite trust receipt transaction as a chattel mortgage, its sub-
stance never at any time having been a conveyance of the property
interest from the borrower to the lender as security for a loan.

The fact of divided property interests in the goods during the
stage of limited agency is conspicuously apparent when the respective
powers and liabilities of the business dealer or manufacturer and of
the banking house, as shown in the current court decisions, are
examined in detail. It is therefore very inadequate, and may at
times prove misleading, to describe the relations of the parties as a
mere bailment in which the banking house is the owner and the
business dealer or manufacturer is a mere bailee. The latter enjoys

2Instances of such inadequate expressions in the opinions of courts are not
hard to find. Thus, in Brown Bros. & Co. v. Billington, 163 Pa. 76, 29 Atl. 904
(1894), the court says the contract was but a bailment for sale, without any
title or ownership of any kind in the bailee in any event. The point actually
decided, however, is not open to criticism, that execution creditors of the ben-
eficial owner take subject to the security holder's priority. So in General Motors
Acceptance Corp. v. Hupfer, 113 Neb. 228, 202 N. W. 627 (1925), the court said
that until compliance with the terms of the trust receipt the dealer was a bailee
and no more. The point decided in the case, that the trust receipt arrangement
was not a conditional sale or chattel mortgage and therefore did not fall within
the local recording acts, seems correct, as will be shown later in this discussion,
intra note 37 and accompanying text. It seems very unfortunate to rest that
correct result on the indefensible ground that the trust receipt arrangement is a
mere bailment and nothing more.
most of the substantial benefits of ownership, limited by the bank's security interest. He has possession. He may use the goods so far as he does not violate the terms of the trust receipt. He has the power to extinguish the security interest of the banking house by tendering the amount advanced on the goods, thereby becoming owner free and clear. In consequence he enjoys the chance of gain incident to ownership of the goods. Enhancements in their market value accrue to him on his tendering merely what is due the banking house. The same remark manifestly applies to accessions to the goods in cases of further manufacture, and to their increase, if any, in case of live animals. He may also transfer his interest in the goods, subject, of course, to the security interest of the banking house, his transferee succeeding to his position with respect to the goods and enjoying the same powers to realize on them for himself by tendering the outstanding advances. In case of repossession and resale by the banking house he is entitled to any balance remaining after its reimbursement. It seems accurate to say that he has the ordinary beneficial incidents of ownership, except as qualified by the security interest.

The business dealer or manufacturer also carries the substantial burdens of ownership in the goods. He bears the risks. If the goods are accidentally destroyed, or deteriorate in quality or value, or are stolen or lost, it is his loss. He remains personally liable for the amount advanced thereon by the banking house irrespective of what later happens to the goods themselves. Even in case of retaking by the banking house and resale in the attempt to realize on its security he remains personally liable for any deficiency.

The expenses in dealing with the goods, such as storage, freight, customs dues, and costs of manufacture are his, not chargeable to

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13 See for instance Drexel v. Pease, supra note 10. The point seems never to have been directly questioned in the reported cases. The point is expressly covered by the language used in many current trust receipts, in providing that the restrictions imposed thereby shall be operative until the necessary payments have been made to discharge the advances of the banking house.


15 In re Dunlap Carpet Co., supra note 10 (wool); Roth v. Smith, supra note 10 (silk—security holder under trust receipt prevails against trustee in bankruptcy of the beneficial owner's transferee on consignment); Commercial Credit Co. v. Peak, 195 Cal. 27, 231 Pac. 340 (1924) (automobiles); Perkins v. W. A. Lippincott Co., 260 Pa. 473, 103 Atl. 877 (1918) (dry goods).


17 Charavay & Bodvin v. York Silk Mfg. Co., supra note 10 (silk). The same position, though not often directly discussed, is also implicit in the point decided in most trust receipt cases.

18 Ibid.
the banking house. His interest in the goods or their proceeds is open to execution or attachment by his creditors, subject, of course, to the prior security interest of the banking house. On the sale of the goods, the incidental warranties are his obligations, not those of the banking house. Looking at the substantial property incidents that the parties have arranged for, therefore, rather than merely at the wording "title to the goods" which the parties have used in the trust receipt, it is very clear that the business dealer or manufacturer is much more than a mere bailee. He is, rather, the beneficial owner of the goods during this stage of limited agency in the carrying out of the trust receipt transaction.

Similar examination of the interest held by the banking house during this stage is equally convincing that it holds its legal title merely as security. It may assign its claim for advances with its security interest therefor. It may repossess the goods and apply them on its claim. If there is a deficiency it can hold the beneficial owner, its debtor, for that amount. If there is any balance over, it must account to the business dealer or manufacturer for the excess. Its interest in the goods is extinguished by his tender of the amount due. While the forms of speech used to describe the interest of the banking house at this stage have widely differed, there is substantial unanimity in the result that it holds the title to the goods merely as security for its advances. The sweeping

19 Downing Co. v. Shawmut Corp., supra note 10 (advances for customs dues on importation of nuts). The point is frequently expressly covered in well drawn contracts, especially in cases where further manufacture is contemplated.

20 The present writer has noticed no cases in which this position has ever been questioned. The cases assume the point in discussing the question of priority between such lienors and the banking house. See for instances, cases, infra notes 34, 35.

21 The point must follow inevitably from the oft repeated position that the banking house is not a seller but a mere encumbrancer. For discussion of the point in an analogous case, see Tolerton & Stetson Co. v. Anglo-California Bank, 112 la. 706, 84 N. W. 930 (1901).

22 Commercial Credit Co. v. Peak, supra note 15 (1924) (automobiles).


24 In Gerseta Corp. v. Equitable Trust Co. of N. Y., supra note 16 (silk), this principle was applied in favor of the beneficial owner's creditor, invoking the doctrine of subrogation to the additional collateral security which had been required by the banking house. Drexel v. Pease, supra note 10.

25 See the cases, supra note 10.

In Moors v. Bird, 190 Mass. 400, 77 N. E. 643 (1906) (paper) while the banking house was referred to as having title to the goods, it was required to refund mistaken excess payments made to it by the purchaser for credit on account of the beneficial owner's claim for purchase money.
language of the trust receipt purporting to vest or retain in the banking house the entire title and absolute property interest is limited to the purpose of safeguarding this interest.\(^8\) It is not intended to throw to the banking house either the business risks or the business profits of the trust receipt transaction.\(^9\) Having by the original agreement a claim to the proceeds in the event of sale as security for its advances, enforceable between the original parties, its collection of the proceeds is not a preference voidable in later bankruptcy proceedings.\(^10\) Between the original parties it is of course entitled to the proceeds so far as necessary to repay its advances.\(^11\)

V. APPLICATION OF RECORDING ACTS TO TRIPARTITE TRUST RECEIPT TRANSACTIONS

In the absence of applicable recording acts the ascertainment of what property interests in the goods are held respectively by the business dealer or manufacturer and by the banking house ordinarily answers the question of what each can successfully claim against transferees or creditors of the other. Each can transfer only what he has, and the creditors of each can take only what he has. *Caveat emptor.* *Caveat creditor.* That is the general rule of property. Consequently, if no recording acts are applicable, the banking house may ordinarily retake goods sold by the business dealer or manufacturer in violation of the terms of the trust receipt, even though

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\(^8\) In People’s Nat. Bank of Boston v. Mulholland, 228 Mass. 152, 117 N. E. 46 (1917), the banking house permitted the business dealer to take possession on giving the customary trust receipts. The dealer permitted the goods covered by the trust receipt to get mixed with other goods of the same type. It was held the banking house was entitled to assert its claim against the entire commingled mass so far as necessary to discharge its advances thus applying for its protection to that extent the doctrine of tortious confusion of an owner’s goods.

\(^9\) As early as in the case of Drexel v. Pease, supra note 10, at 136, 30 N. E. at 734, this position was carefully formulated in the following language, “The correspondent’s position is one of ownership so far only as is necessary to secure him for the advances he made upon the merchandise described in the bill of lading, and in such a case as this he is bound to sell upon receipt of the purchase price from the principal, or in other words, upon receipt of the amount he advanced upon its credit. In no other sense is the correspondent the owner of the property.”

That similarly the banking house is not chargeable with expenses of carrying on the business operations, see Downing Co. v. Shawmut Corporation, *supra* note 10 (nuts).

\(^10\) In re Perlhefter, 177 Fed. 299 (S. D. N. Y. 1910) (shoes).

they were sold to an innocent purchaser for value without notice. Such purchaser, on the ordinary application of the rules of property law, cannot acquire a larger property interest than his seller had. The same rule manifestly prevents pledgees, mortgagees, or other encumbrancers in good faith for value from acquiring any interest not subordinate to the already vested security interest of the banking house. Attaching or execution creditors of the business dealer or manufacturer can only take subject to the security interest of the banking house. The same rule applies as obviously to an assignee for the benefit of creditors, receiver in insolvency or trustee in bankruptcy of the business dealer or manufacturer, who can take and apply for the creditors only the assets to which the business dealer or manufacturer was beneficially entitled. Caveat emptor. Caveat creditor.

Ordinary chattel mortgage recording acts do not apply to the standard tripartite trust receipt transaction. Those acts of the ordinary type apply to that form of security transaction which has traditionally been familiar under the name of chattel mortgage, which consists of a conveyance by the borrower, the mortgagor, of a property interest in his goods to the lender, the mortgagee, as security for a loan. The tripartite trust receipt transaction is entirely different. It is not a conveyance from the borrower to the lender at all, but is a conveyance from a third party, the distant seller, carrying the beneficial ownership to the borrowing business dealer or manufacturer and, in consummation of the same transaction, putting the security interest in the banking house. Recording acts, drawn to apply to the chattel mortgage transaction familiar to the lawmaker when the

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In 1875, even before the name “trust receipt” had become familiar in business practice this result was reached in Dows v. Nat. Exchange Bank, 91 U. S. 618, (1875).

Cases where the sale can be upheld on the score of apparent authority are of course distinguishable. See cases infra note 43.

32 Century Throwing Co. v. Muller, supra note 10 (silk); In re James, supra note 10 (automobiles); Commercial Credit Co. v. Peak, supra note 15 (automobiles); General Motors Acceptance Corp. v. Hupfer, supra note 12 (automobiles); Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818 (1887) (shellac).

34 Brown v. Billington, supra note 12 (bicycles); Mershon v. Wheeler, 76 Wis. 502, 45 N. W. 95 (1890) (tin plates).

35 In re Cattus, supra note 10; In re James, supra note 10 (automobiles); Baring v. Galphin, supra note 10 (iron rods); Moors v. Wyman, 146 Mass. 60, 15 N. E. 104 (1888) (hides).
enactment was made, cannot be held to cover the newer and different form of security presented by the trust receipt transaction without judicial construction very greatly enlarging their scope. Such judicial enlargement cannot be justified on the score of legislative intent. Such acts do not purport to cover security transactions of all kinds but only apply to the designated mortgage form of security. Moreover, the subsequent enactment of recording acts to apply to the novel form of security presented by conditional sales is a legislative interpretation that chattel mortgage recording acts do not apply to security transactions generally, but are limited to their specified mortgage form of security. Accordingly it is generally held that the ordinary type of chattel mortgage recording act does not apply to the tripartite trust receipt form of security. The security interest of the banking house may therefore be successfully asserted against purchasers, encumbrancers, or other successors of the business dealer or manufacturer, even though they were without notice thereof and even though the trust receipt was not recorded as a chattel mortgage.

Ordinary conditional sale recording acts similarly do not apply to the tripartite trust receipt transaction. The familiar situation to which such acts apply is a conveyance from the conditional seller to the conditional buyer of the beneficial interest in the goods, coupled with delivery of possession to the conditional buyer, the conditional seller retaining the legal title as security for the pur-

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36 General Motors Acceptance Corp. v. Hupfer, supra note 12 (automobiles).
In Moors v. Drury, 186 Mass. 424, 71 N.E. 810 (1904), it was held that the trust receipt transaction was not a mortgage within the meaning of a statute which required a mortgagee to surrender his security to the assignee in insolvency in order to be permitted to prove his claim in the insolvency proceedings.

See also cases supra note 33.

Contra to the statement in the text is the case of In re Richheimer, supra note 6 (coffee) in which it is asserted that the trust receipt arrangement, with security title in the lender and possession in the borrowing importer, is against the public policy of Illinois as declared by statute requiring either change of possession or record for all mortgages, trust deeds, or liens. This case is greatly weakened, however, because the point was probably not necessary for the decision, the case being one of transfer of negotiable documents of title procured, it would seem, with the security holder's authority. The later case of Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N.E. 225 (1925) substantially repudiated the public policy announced.
chase price. This form of security therefore is a reservation by the seller of a security interest in himself on his conveyance to the buyer of the beneficial interest and the possession of goods. Again it is apparent that the form of the tripartite trust receipt transaction is quite distinct. That transaction is not a reservation of a security interest by the lender on a transfer by him of the beneficial ownership and delivery of possession to the borrower. Its form is a conveyance from a third party, the distant seller, who conveys the beneficial interest to the business dealer or manufacturer and, as a part of the same transaction, before possession has been delivered to the beneficial owner, conveys the security interest to the banking house which advances the purchase price. The same reasons against enlarging the scope of conditional sale recording acts by mere judicial construction are applicable as in the case of chattel mortgage recording acts. Accordingly, it is usually held that the security interest of the banking house can be successfully asserted against parties claiming through the business dealer or manufacturer, even though there was no notice and even though it was not recorded as a conditional sale. Legislation going beyond the ordinary chattel mortgage or conditional sale recording acts is necessary if trust receipt transactions are to be subjected to recordation.

VI. POLICY OF EXTENDING RECORDING ACTS TO TRIPARTITE TRUST RECEIPT SECURITY

Whether tripartite trust receipt transactions as such should be recorded in order to be enforceable by the security holder against purchasers or creditors claiming through the beneficial owner is a question of policy involving legislative judgment of the relative importance of certain conflicting interests. The need for such legislation seems much less, while the objections to it seem much stronger, than in the ordinary cases of either chattel mortgages or conditional sales. In the case of chattel mortgages, two general purposes are served by the legislation. In the first place, subsequent parties, purchasing from the mortgagor for value without notice or extending him credit on the strength of his continued ownership of property which admittedly was formerly his own and still is in his possession without visible change in his relations to it, are protected against the assertion of secret liens on the property. In the second place, the mortgagor himself, in the statutory formalities for foreclosure, is protected against undue sacrifice of his interest in the property by summary informal foreclosure by the security holder. The appearance

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38See cases, supra notes 33, 37.
of continued unencumbered ownership of property formerly held free and clear and still in his possession tends to give a false basis for dealings and for credit if secret liens can be asserted against it. The mortgagor, as the historic borrower at the mercy of the lender, needs the protection against sacrifice of his interest in summary foreclosure. Reasons in favor of chattel mortgage recording acts as applied to the ordinary loan transaction are therefore strong reasons. Nor is it apparent that the recording requirement seriously impairs the obtaining of legitimate loans by the mortgagor. Legislative judgment that chattel mortgage recording acts serve useful social ends in connection with ordinary loan transactions can therefore be readily accepted.

In the case of conditional sales analogous considerations do not seem so strong. The conditional buyer was not formerly the owner, as in the case of the chattel mortgagor, but is in possession and rightfully uses the goods freely as his own. The problem of secret liens prejudicing those who deal with him as owner is therefore present in a milder form than in the case of the mortgage loan. The conditional buyer, moreover, is under no compulsion in making the purchase, while the chattel mortgagor, by the stress of his necessities, is often at the mercy of the mortgagee lender in borrowing. Accordingly it is not strange that conditional sale recording acts are not so universally adopted in the various states as are chattel mortgage acts, nor that the foreclosure permitted under conditional sales is usually more summary than it is under chattel mortgage acts.

In the tripartite trust receipt transactions the need for recording for the protection of other interests is relatively slight. The problem of secret liens prejudicing those who deal with the business dealer or manufacturer in possession for the time being of the goods is reduced to comparatively small proportions, if not to the vanishing point. The business dealer or manufacturer was not owner at all before the transaction and was not in possession. He does not long remain in possession, the goods passing in trade in the ordinary course of business. He does not while he has them deal with the goods except in very limited ways. There is no more basis from appearances for relying on him as owner than there is in the ordinary case of a factor in possession or in the case of a lessee, cases where the ordinary rules of property are given unrestricted application in transactions with purchasers and creditors. Nor can it persuasively be contended that the business dealer or manufacturer, as a borrower from the banking house, is so forced into the deal by the stress of his necessities and at its mercy as lender that in that aspect he much
TRUST RECEIPT SECURITY

resembles the traditional mortgagor in a loan transaction, whom historic equity law protects from oppression by the mortgagee.

The need for recording acts in the tripartite trust receipt transaction is thus comparatively slight. On the other hand, compliance with recording acts in such transactions would burden the ordinary business to be done, relatively much more than in the cases where the traditional chattel mortgage or conditional sale are ordinarily used. For goods passing onward in course of trade, as do the goods ordinarily financed through trust receipt transactions, the burden of delay and expense of recording and, in turn, discharging from record for every successive transaction would very seriously impair the dispatch of business by sellers. Neither bank nor merchant can as a practical matter search the records in handling individual items in the business of the day. Similarly, buyers of goods in ordinary course of commercial trade would be equally unable, as a practical matter, to search the records for the history of every commercial purchase. Furthermore, in such cases, purchasers in the ordinary course of business are now protected without recording just as they are in the case of consignments, by the application of the doctrine of apparent authority. Those who do not deal with the business dealer or manufacturer in the ordinary course of business would seem to have here no greater need for protection against secret liens than they have in dealing with factors or lessees in cases of consignments or leases.

It is true that the scope of chattel mortgage or conditional sale recording acts has in a few states been so enlarged by recent legislative amendments or by judicial interpretation as to include tripartite trust receipt transactions, but under present conditions

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39 See discussion, infra note 43.

In In re Bettman-Johnson Co., 250 Fed. 657 (C. C. A. 6th, 1918) (cherries) the business dealer's trustee in bankruptcy as receiver for creditors was held to prevail over the banking house claiming under an unrecorded trust receipt, under the very broad terms of the Ohio conditional sale statute, Ohio Gen. Code (Page, 1926) § 8570.

The case of In re Richheimer, supra note 6 (coffee) reached this result by judicial interpretation, in the light of what was said to be the local public policy of Illinois against secret liens. See however Sherer-Gillett Co. v. Long, supra note 37, a conditional sale case.

In Industrial Finance Corp. v. Cappleman, 284 Fed. 8 (C. C. A. 4th, 1922), it was held under the South Carolina statute, S. C. Code of Laws (1912) §§ 3542, 3740 [now to be found in S. C. Code of Laws (1922) §§ 5312, 5519], that the security holder under an unrecorded trust receipt could not prevail against the
it seems unlikely that this broad extension of the recording principle to the individual tripartite trust receipt transactions will be rapidly or widely copied. Should it make much headway, it would seem inevitable that similar extensions, resting for their merits upon substantially identical grounds, will be demanded for ordinary wholesale consignment or leasing transactions. It seems more likely either that trust receipt transactions will be left, as is common now, to be governed merely by the ordinary rules of property law, or that some legislation specially adapted for them will provide for the filing once for all of a general statement showing the existence of the financing arrangement but not requiring interference with the routine business of the commercial day by requiring the filing of the individual transactions.41

VII. APPARENT AUTHORITY—FACTORS ACTS

Two situations may be identified in which the security interest held by the banking house under its trust receipts during the stage of limited agency can be lost through dealings between the business dealer or manufacturer and other parties. One is the type of situation where the legal rule of apparent authority applies. The other is the type of situation covered by certain factors acts, enacted in a few states only.

It is well established law that if a principal actually authorizes his agent to sell goods a sale in accordance with the authority passes the principal's property in the goods. The authority may be shown by express terms or may be inferred from the circumstances surrounding the transaction. Thus if the possessor under the trust receipt resells to others with the consent of the banking house,
thereby to secure the cash with which to repay advances, the purchaser acquires the property in the goods free and clear. Where the business dealer or manufacturer habitually resells without carefully observing the terms specified in the trust receipt, and the facts are known to the banking house, its manifested acquiescence suffices to prove the necessary authority.42 Where the resales are made in the usual way in the ordinary course of business, moreover, the interest of the banking house is cut off, even though made in violation of the terms of the trust receipt, if the facts are such that the legal rule of apparent authority is applicable. In the domestic trade in automobiles, the banking house often permits the retail dealer to display in his showroom the cars covered by the trust receipt, where they appear to be a part of his sale stock, thus assisting in creating the appearance that the dealer had a right to sell. His sale in the ordinary course of business is in such cases regarded as within the rule of apparent authority. This situation some writers refer to in terms of estoppel. The purchaser in such cases takes clear of the security interest of the banking house even though the sale was made without observing the terms and conditions specified in the trust receipt.43 Where, however, the resale is not made in the ordinary course of business, the security interest remains unaffected and can be enforced against the purchaser even though he had no notice, the appearance of authority to sell in the ordinary course of business not justifying reliance thereon where sales are made out of the usual course.44

Factors acts, in force, may also enlarge the power of the business dealer or manufacturer to cut off the security interest of the banking house. At common law a factor given authority to sell on behalf


See also Commercial Acceptance Trust v. Bailey, 87 Cal. App. 117, 261 Pac. 743 (1927) (automobile). In this case the court says the fact that the sale was for an antecedent debt does not prevent its being in the ordinary course of business—a very questionable generalization.

of his principal does not without more thereby have the legal power to make a valid pledge of his principal’s goods. Factors acts in England changed the rule and, for the protection of security holders, put the burden on principals where their factors prove unfaithful. In New York and Massachusetts, and perhaps in a few other states, factors acts of this type are in effect. Accordingly, in those states, if in a trust receipt case the goods are entrusted to the business dealer or manufacturer on such terms, expressed or inferred from the surrounding circumstances, that the latter has from the banking house the broad general authority of a factor to make resales, generally the factors act applies. In such cases, therefore, should the business dealer or manufacturer pledge the goods to another, the new security holder would take priority over the banking house holding the trust receipt.

VIII. Variant Type—Tripartite Bailment Receipt Security

Careful analysis of what are ordinarily described as trust receipt transactions reveals that, while the term describes with reasonable accuracy the standard type dealt with in the foregoing pages, there is also a variant type which might with greater accuracy be described as a bailment receipt transaction. For describing this the term "bailment receipt" is occasionally used in the reports; but no established usage carefully distinguishes the two terms, and "trust receipt" is by usage extended to cover both varieties of transaction. The fact difference between the standard and the variant type is found neither in the language actually employed in the trust receipt, nor in the name by which it is usually called, but in the fact in the variant type that the bill of lading under which the distant seller made shipment was taken in the form of a straight bill making the goods deliverable to the banking house as the named consignee.

47The leading case is Paterson v. Tash, 2 Strange 1178 (1743). The cases are very numerous.

48A good discussion of the policy of the Factors Act, N. Y. Cons. Laws, c. 45 (PERSONAL PROPERTY LAW) § 43, may be found in Freudenheim v. Selig Gutter, 201 N. Y. 94, 94 N. E. 640 (1911).


Under the Virginia Traders Act, VA. CODE ANN. (1924) § 5224, a somewhat similar result is reached with respect to lien creditors. See Capital Motor Corp. v. Lasker, 138 Va. 630, 123 S. E. 376 (1924).

The property interests during the preliminary undifferentiated stages are substantially identical with those found under the standard type. The difference in legal effect between the two appears in the next stage. The standard type goes through a stage above described as the stage of the technical trust. The variant type has no technical trust, inasmuch as no title is ever vested by the banking house in the business dealer or manufacturer through making him holder of an order bill of lading. The banking house merely authorizes him to take possession of the goods from the carrier. Therefore, in this type the stage of limited agency succeeds directly to the undifferentiated earlier stages. The trust receipt, however, is apt to be couched in the usual terms, reserving title in the bank as security for its advances, the legal effect of which is nowhere contradicted by conduct to the contrary in indorsing to the business dealer or manufacturer an order bill of lading. In this type, therefore, since the banking house retains title as security throughout, and merely authorizes the business dealer or manufacturer to take possession from the carrier, the term "bailment receipt" seems more appropriate to the actual transaction than does the term "trust receipt." The banking house is not here subjected to the risk of having its security interest cut off by a wrongful transfer of the bill of lading in the stage of technical trust. Its perils as security holder are merely such perils as are encountered in the stage of limited agency. From the standpoint of the effectiveness of the security of the banking house, therefore, this variant type affords better protection than does the standard type of tripartite trust receipt transaction. On the other hand, the business convenience of making the shipment under order bills of lading is in other respects very great, especially in permitting the making of financing arrangements to suit as the individual shipment is nearing destination. Hence the tripartite trust receipt transaction is much more frequently found in what is here described as its standard type, dealing with shipments under order bills of lading, than in the described variant type where shipments have been made under straight bills of lading naming the banking house as consignee.49


See also the general discussion in WILLISTON, loc. cit. supra note 3, much of which is applicable also to this situation.

49The cases, supra note 48 may serve for illustration. Most of the reported cases where trust receipts for goods have played a conspicuous part in the litigation seem to have been cases where the shipments were made under order bills of lading.
The effectiveness of the tripartite trust receipt arrangement in providing security to the banking house valid against third parties dealing with the business dealer or manufacturer without the necessity of recording, not unnaturally has led to attempts to secure similar advantage for the security holder in other relations by insertion of the magic terms "in trust", or "trust receipt". Doubtless, too, parties have at times used in other situations the forms adapted to tripartite security transactions without any very clear perception of the legal differences. In the case of pledges it is often convenient that the pledged goods or securities should be redelivered to the pledgor for temporary or special purposes. Under the law of pledge ordinarily applicable, the effectiveness of the security as against third parties who have dealings with the pledgor is defeated by redelivery to the pledgor. If on the redelivery a trust receipt could change this result by the recital that the goods were to be held by the pledgor in trust for the pledgee whose interest was to remain unaffected, the device obviously would offer a wide range of unaccustomed advantage for pledgees. As obviously, however, the recital is only a slightly varied form of expressing what has long since become familiar as the bargain between pledgor and pledgee that the security should continue in spite of the redelivery of possession. That familiar bargain, being one for security, is specifically enforceable between the parties, giving rise to what is ordinarily called an equitable lien. It may sometimes be held good against general creditors of the pledgor. It is not effective, however, in ordinary cases to safeguard the security interest against dealings by the pledgor with third parties, the equitable lien being cut off on a transfer of the goods by the pledgor to a purchaser or encumbrancer in good faith.


It was held, however, in In re Shulman, 206 Fed. 129 (E. D. Pa. 1913), that a promise by the owner of goods to hold them as security for a banker's loan to him without being accompanied by delivery in pledge did not enable the bank to prevail over the borrowing owner's trustee in bankruptcy.

To the same effect is Bank of North America v. Penn Motor Car Co., 235 Pa. 194, 83 Atl. 622 (1912) (automobiles) resting on the local rule in Pennsylvania that as against creditors a conveyance or encumbrance without change of possession is conclusively deemed to be fraudulent.
for value without notice. The mere use of the terms "in trust" or "trust receipt" therefore does not serve to change the ordinary legal incidents of redelivery to the pledgor in an ordinary bipartite pledge transaction.

Substantially similar reasoning disposes of the bipartite trust receipt transaction as a substitute for a chattel mortgage. As indicated above, this form of security transaction is a conveyance of the security interest in the mortgaged chattels from the borrowing mortgagor to the lending mortgagee. Such a conveyance of security interest in goods from the borrower to the lender falls within the chattel mortgage recording requirements, whether it has been called by the name of mortgage or not. Thus a conveyance by the borrower to the lender, in form absolute and by the parties called a sale outright but intended as security, is held to be a chattel mortgage and is dealt with accordingly. The same is true though the parties give such a conveyance the name of a conveyance "in trust" or

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There is some contrary authority. See Clare v. Agerter, 47 Kan. 604, 28 Pac. 694 (1892) (horses).

In Thacher v. Moors, 134 Mass. 156 (1883), a pledgee delivered to a warehouseman to hold on his behalf, the warehouseman not being known to be a partner with pledgor. The warehouseman procured a loan on the goods as owner. It was held on these special facts that the original pledgee's interest could be asserted against the encumbrancer.

See Hanna, op. cit. supra note 10, at 551–554 for discussion of authorities favoring an extension of pledge security in such cases.

53 "When a pledgee of negotiable securities, holding them as collateral security for the pledgor's debt, returns them to the pledgor temporarily, on a trust receipt, he takes the risk only that third persons may, in good faith, and to his prejudice, deal with the holder as the apparent owner of the securities, but he does not thereby forfeit the pledge to other creditors of the pledgor." O'Niell, C. J., in Canal-Commercial Trust & Sav. Bank v. New Orleans etc. Ry., supra note 52, at 1066, 109 So. at 839, 49 A. L. R. at 282.

See also Fletcher Am. Nat. Bank v. McDermid, supra note 50 (agreement by pledgor to hold automobile in trust for pledgee, without delivery of possession, not operative to protect security interest of pledgee against dealings by pledgor with third persons); Arena v. Bank of Italy, 194 Cal. 195, 228 Pac. 441 (1924) (bipartite trust receipt taken on redelivery of pledged goods to pledgor held not enforceable against attaching creditor of pledgor).

54 Illustrative of the point are Root v. Republic Acceptance Corp., 279 Pa. St. 55, 123 Atl. 650 (1924), and Barker Piano Co. v. Commercial Security Co., 93 Conn. 129, 105 Atl. 328 (1918). The cases are very numerous.
require the borrower to sign a "trust receipt" instead of a chattel mortgage. Like other chattel mortgages, these are enforceable between parties, but for enforcement against certain classes of third parties must be recorded as required by the chattel mortgage recording act.

If a seller in the first instance delivers goods to a buyer, taking his note for the price and a paper signed by the buyer called a trust receipt reciting that the property belongs to the seller but is delivered to the buyer in trust for storage only until the note is paid, this transaction, being in fact a conveyance by one to the other of the beneficial interest and possession of the goods, reserving the legal title as security until payment, is of course a conditional sale. The fact that the parties have called it by another name while carefully preserving all its attributes does not prevent the courts from giving effect to the realities. Accordingly, such transactions are subject to conditional sale recording acts despite the "trust receipts" terminology used by the parties.

In the case of Scott v. Industrial Finance Corp., 265 S. W. 181 (Tex. Civ. App. 1924), this accounts for the result between the parties even on the possible interpretation of the facts that the transaction was a bipartite trust receipt arrangement.


A legitimate argument to be addressed to the legislature is that not all chattel mortgage situations are necessarily alike in their business aspects. It may well be urged that legislatures should make a distinction in legal requirements respecting a chattel mortgage on goods already owned given by the mortgagor as security for a loan—the traditional type for which the familiar mortgage law was developed—and the chattel mortgage for part of the purchase price on new goods given to the seller by the buyer as security at the time of the purchase. In the first there is much more danger of oppression than there is in the second. There is also greater danger of misleading third parties dealing with the mortgagor without knowledge of secret liens. It may be urged, therefore, that ordinary recording requirements should not apply to the purchase money mortgage type. No such distinction has been taken, however, in the legislative drafting of the ordinary chattel mortgage recording acts. Courts have accordingly held the chattel mortgage recording acts applicable to all transactions which are shown to be chattel mortgages in fact irrespective of the business purposes they were projected in the instance to serve.

X. THE FACT BORDERLINE BETWEEN TRIPARTITE AND BIPARTITE TRUST RECEIPTS

The conspicuous differences, with regard to the application of recording acts, between tripartite trust receipt transactions proper and bipartite chattel mortgages or conditional sales cloaked in the words of trust receipts, naturally lead to close inquiry as to whether the particular transaction is in reality tripartite or bipartite. It may be granted without discussion that the standard tripartite trust receipt transaction is found if the distant seller ships the goods under contract with the business dealer or manufacturer, taking the bill of lading to the order of the banking house, and delivers the bill of lading to the banking house on getting payment of his purchase price before the bill of lading is turned over to the business dealer or manufacturer in exchange for his trust receipt. On such facts it is clear that the security interest in the goods held by the banking house for its advances came to it not by a conveyance

*The proposed draft Uniform Trust Receipts Act would bear out this suggestion, in extending its range to cover certain bipartite as well as tripartite transactions. See Hanna, *op. cit. supra* note 10, at 556, 557.*
from the borrower but by a conveyance from the distant seller. The transaction, therefore, is not an ordinary chattel mortgage. It is equally clear that this transaction is not an ordinary conditional sale with the banking house as assignee of the conditional seller, since the distant seller, while reserving the title as security, has not given control over possession to the business dealer or manufacturer. On the other hand the distant seller may reserve title as security by shipping under a bill of lading to his own order, and send the bill of lading, indorsed, with a draft on the purchaser for the price, for collection through ordinary banking channels. If the purchaser pays the draft with his own funds and therefore secures the bill of lading for the goods, and thereferer arranges to convey the goods to the banking house as security for advances, the security transaction is bipartite, and will be at once recognized as in fact a chattel mortgage. The security interest in the goods in such a case came to the lending banking house by a conveyance from the borrower, not from an outside third party such as the distant seller.

An intermediate situation may be encountered, however, in which the fact distinction between a tripartite and a bipartite transaction is not so clear. It seems to be common now in the financing of automobile retailers for the distant seller who has made a shipment of cars to forward all the papers by arrangement to an intermediary bank in the retailer's town. That bank, having no interest of any sort in the deal, then acts in accordance with its instructions both for the distant seller and for the distant banking house or financing company which is to finance the deal, neither of whom can maintain local offices in every town where goods are to be distributed and their undertakings carried out. The intermediary bank thus acts for the distant seller in collecting the draft for the price and turning over the bill of lading to the financing banking house which provided

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60See for illustrations cases, supra notes 33, 37.
61See supra note 38.
62In Keystone Finance Corp. v. Krueger, supra note 56, the same result was reached where the financing company furnished money directly to the retail dealer in cars with which to take up the bill of lading, the retailer using the money for that purpose and giving the financing company a bill of sale of the cars as security.

To the same effect on substantially similar facts is New England Auto Investment Co. v. St. Germaine, supra note 43 (automobiles).

In Finance & Guarantee Co. v. Stitt, 21 F. (2d) 718 (C. C. A. 3d, 1927), the financing company similarly furnished the check directly to the retail dealer with which to take up the bill of lading for the cars shipped, the parties going through the form of giving a lease of the cars from the financing company to the dealer. It was held not valid against the retailer's trustee in bankruptcy.
the funds for its payment. At the same time it acts for the financing house in paying the draft with funds provided for the purpose and in receiving the bill of lading as security for the advance. At the same moment it also acts for the financing banking house both in getting from the automobile retail dealer his note and his signed trust receipts covering the cars in question, and in delivering to the automobile retail dealer the order bills of lading giving him control over the goods. Since these details are all carried out simultaneously when the automobile retail dealer calls at the intermediary bank, it has been plausibly argued that the bill of lading was delivered directly to the retail dealer and that hence the security interest in the goods held by the financing banking house under the trust receipt must be a chattel mortgage, as it came to the banking house, not from the distant seller, but from the borrowing retail dealer. In answer to this contention it may be suggested that there is nothing in the simultaneousness of the several operations which prevents the transaction from being given effect, as the parties evidently intended, as a transfer of the bill of lading from the distant seller through the financing banking house to the retail dealer. Accordingly it seems proper to hold, carrying out the evident intention of the parties and permitting thereby the productive functioning here of a very convenient security device, that the case just described is still a tripartite trust receipt transaction.

In the absence of legislative changes in the scope of the recording acts, therefore, a conveyance by a debtor to his creditor of a security interest in goods, being in fact a chattel mortgage, is subject

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63 *In re Cullen,* supra note 10 (automobiles); *In re Schuttig,* 1 F. (2d) 443 (D. N. J. 1924) (automobiles).

This position is also hinted at in the lower court, *In re James,* 30 F. (2d) 551 (N. D. N. Y. 1927) which was later reversed on appeal, 30 F. (2d) 555 (C. C. A. 2d, 1929).

Such is the position deliberately adopted in the upper court, *In re James,* 30 F. (2d) 555 (C. C. A. 2d, 1929) (automobiles). In the lower court, too, this position, though questioned, was accepted by the court 30 F. (2d) 551 (N. D. N. Y. 1929).

This practice is also tacitly upheld, though without direct reference to the matter in many instances where the cases have been argued and determined on other grounds, and no question raised as to this point. See for instance Commercial Credit Co. v. Peak, supra note 15 (automobiles); Commercial Acceptance Trust v. Bailey, supra note 43 (automobiles); Glass v. Continental Guaranty Corp., 81 Fla. 687, 88 So. 876 (1921), 25 A. L. R. 312 (1923) (automobiles); General Motors Acceptance Corp. v. Hupfer, supra note 12 (automobiles); Scott v. Industrial Finance Corp. supra note 23 (automobiles); Jones v. Commercial Investment Trust, supra note 10 (automobiles); Industrial Finance Corp. v. Cappleman, supra note 40 (automobiles—holding, however, that recording act of South Carolina, supra note 40, was broad enough to cover all securities).
to the chattel mortgage recording act even though phrased in the language of trust, borrowed from tripartite trust receipt transactions. That a bipartite purchase price security arrangement cannot be upheld on the same basis as the tripartite trust receipt device is due to the circumstance that the bipartite arrangement falls within the range of the already established rules of law of pledge, mortgage, or conditional sale, rules whose application has in earlier times been worked out with reference to other and varying interests, and whose limits have now become largely crystalized either through stare decisis or through legislation. The law of trust receipts, as currently applied, upholds the tripartite trust receipt as security for the purchase price of goods without subjecting it to the narrowing restrictions applicable to the older, more familiar bipartite security devices developed primarily to serve other ends and whose limits were fixed primarily with reference to other interests. The effectiveness of the tripartite trust receipt device as a credit carrier for the purchase price of goods where the older forms of security are ill adapted thus makes available a large range of productive business operations for the more complete satisfaction of human wants.

65See authorities supra notes 56–58.