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## TRUST RECEIPTS — A LEGISLATIVE PROBLEM

Trusts receipts have in recent years become a new device in domestic trade, already vitally essential to the wholesaling of valuable articles for quick retail turn-over.<sup>1</sup> In West Virginia, as in other jurisdictions, motor-cars and radios have compelled their use.<sup>2</sup> The normal form of trust receipt<sup>3</sup> contemplates an agreement by the dealer to hold these individualized chattels "in trust" for the manufacturer or his assignee, there being a right of sale in the dealer once proper release of the particular chattel has been secured. Obviously it must be binding as between the immediate parties,<sup>4</sup> and it is also effective as against those who act with knowledge of the trust arrangement.<sup>5</sup> There is considerable doubt, however, as to its validity against creditors and *bona fide* purchasers without notice.<sup>6</sup> Confusion is increased by a failure to place trust receipts clearly in any recognized security group,

<sup>1</sup> Bogert, *The Effect of the Trust Receipts Act* (1935) 3 UNIV. CHI. L. REV. 26. The following articles are helpful sources of additional information: Taylor, *Trust Receipts* (1921) 6 CORN. L. Q. 168; Frederick, *The Trust Receipt as Security* (1922) 22 COL. L. REV. 395 and 546; Vold, *Trust Receipt Security in Financing of Sales* (1930) 25 CORN. L. Q. 521; Hanna, *Trust Receipts* (1929) 29 COL. L. REV. 545, *Trust Receipts* (1931) 19 CALIF. L. REV. 257; Notes (1927) 49 A. L. R. 282, (1933) 87 A. L. R. 302.

<sup>2</sup> See also Note (1931) 37 W. VA. L. Q. 269; Preston, *Trust Receipt Doctrine with Special Reference to the Decisions and Statutes of Virginia* (1926) 12 VA. L. REV. 393.

<sup>3</sup> This device is very modern, probably first being used in the case of Barry and Hoogewerff v. Boninger and Lehr, 46 Md. 59 (1876). It originated in the importing business but is equally applicable to domestic transactions. *In re James*, 30 F. (2d) 555 (1929). But see *Simons v. Northeastern Finance Corp.*, 271 Mass. 285, 171 N. E. 643 (1930).

<sup>4</sup> *Brown v. Green and Hickey Leather Co.*, 244 Mass. 168, 138 N. E. 714 (1923); *General Motors Acceptance Corp. v. Kline*, 78 F. (2d) 618 (1935).

<sup>5</sup> *Commercial Credit Co. v. Schlegel-Storseth Motor Co.*, 23 S. W. (2d) 702 (1930).

<sup>6</sup> Representative cases upholding validity against creditors on bankruptcy include: *Canal Commercial Trust & Savings Bank v. New Orleans T. & M. Ry.*, 161 La. 1051, 109 So. 834 (1926); *In re Otto-Johnson Mercantile Co.*, 52 F. (2d) 678 (1928); *In re James*, *supra* n. 3; *Hamilton National Bank v. McCallum*, 58 F. (2d) 912 (1932). *Contra: In re Fountain*, 282 Fed. 816 (1922); *G. M. A. C. v. Mayberry*, 195 N. C. 508, 142 S. E. 767 (1928); *In re Draughn v. Steele Motor Co.*, 49 F. (2d) 636 (1931); *Commercial Investment Trust Corp. v. Wilson*, 58 F. (2d) 910 (1932). Validity against purchasers and others dealing *bona fide* with dealer: *In re Dunlay Carpet Co.*, 206 Fed. 726 (1913); *Century Throwing Co. v. Muller*, 197 Fed. 252 (1912); *Downing Co. v. Shawmut Corp.*, 245 Mass. 106, 139 N. E. 525 (1923). *Contra: Glass v. Continental Guaranty Corp.*, 81 Fla. 687, 88 So. 876 (1921); *Foreign Trade Banking Corp. v. Gerseta Corp.*, 237 N. Y. 265, 142 N. E. 607 (1923); *Jones v. Commercial Investment Trust*, 64 Utah 151, 228 Pac. 896 (1924); *Motor Bankers Corp. v. Commercial Investment Trust*, 258 Mich. 301, 241 N. W. 911 (1932).

courts disagreeing as to whether the transaction is a pledge,<sup>7</sup> agency,<sup>8</sup> bailment,<sup>9</sup> conditional sale,<sup>10</sup> chattel mortgage,<sup>11</sup> or an entirely different and unique device.<sup>12</sup> Accordingly, there is similar disagreement about the necessity of recordation.<sup>13</sup> As the owner of the chattel has clothed the dealer with the *indicia* of ownership, the former may be precluded by the doctrines of estoppel or apparent authority as against some innocent third party, who has purchased the chattel in good faith.<sup>14</sup>

Other cases uphold these agreements in the absence of recordation, where the holder of the trust receipt secured title from some third party,<sup>15</sup> but refuse to extend them to the case where title comes direct from the debtor since the latter is in effect only a chattel mortgage. Such a distinction between the bi-partite transaction and the tri-partite transaction has been approved by several writers, among them Vold,<sup>16</sup> yet, as Williston has pointed out,<sup>17</sup> it is merely a distinction without a difference

<sup>7</sup> Canal Commercial Trust & Savings Bank v. New Orleans T. & M. Ry., *supra* n. 6. Hanna supports this theory in (1929) 29 COL. L. REV. 545 at 550.

<sup>8</sup> Barry and Hoogewerff v. Boninger and Lehr, *supra* n. 3; Foreign Trade Banking Corp. v. Gerseta Corp., *supra* n. 6.

<sup>9</sup> G. M. A. C. v. Hupfer, 113 Neb. 228, 202 N. W. 627 (1925); *In re Otto Johnson Mercantile Co.*, *supra* n. 6; Hamilton Nat. Bank v. McCallum, *supra* n. 6.

<sup>10</sup> G. M. A. C. v. Mayberry, *supra* n. 6; White v. G. M. A. C., 2 F. Supp. 406 (1932).

<sup>11</sup> McLeod Nash Motors v. Commercial Credit Trust, 187 Minn. 452, 246 N. W. 17 (1932); Commercial Investment Trust Corp. v. Wilson, *supra* n. 6; Smith v. Commercial Credit Corp., 113 N. J. Eq. 12, 165 Atl. 637 (1933).

<sup>12</sup> *In re Cattus*, 183 Fed. 733 (1910); *In re James*, *supra* n. 3.

<sup>13</sup> Hanna, *Extension of Public Recordation* (1931) 31 COL. L. REV. 617. If law does not require recordation, an unauthorized recordation would have no effect. G. M. A. C. v. Kline, 78 F. (2d) 618 (1935).

<sup>14</sup> Glass v. Continental Guaranty Corp., *supra* n. 6; Jones v. Commercial Investment Trust, *supra* n. 6.

<sup>15</sup> *In re Fountain*, *supra* n. 6; *In re James*, *supra* n. 3. "The question in this case is how far a serviceable nag may be ridden, or, less metaphorically, may the so-called 'trust receipt' highly useful in certain kinds of commercial transactions, and which the courts have in consequence struggled to sustain, in spite of its apparent conflict with recording laws, be upheld when the principal, if not the sole, reason for resorting to it is to escape from those very statutes." *In re Cullen*, 282 Fed. 902 (1922).

"Trust receipts have generally been held not subject to recording or filing acts, probably because such statutes are to prevent secret liens upon property of persons who have had prior possession and ownership of the property. And it is undoubtedly for this very reason that holders of trust receipts have been allowed to prevail against the ultimate purchaser or his trustee in bankruptcy only where the title of the holder was derived from some one other than the debtor." Hamilton Nat. Bank v. McCallum, *supra* n. 6.

<sup>16</sup> Vold, *loc. cit.* *supra* n. 1.

<sup>17</sup> WILLISTON, SALES (2d ed. 1924) § 338b. Some cases like Smith v. Commercial Credit Corp., *supra* n. 11, expressly reject the rule while many others disregard it.

so far as the third party is concerned. The outward appearance and the reliance thereupon are more or less the same in each instance. At best, it is an arbitrary rule governing recovery solely according to a secret juggling of title and, even if admitted, can hardly be a final solution of the problem.<sup>18</sup>

In West Virginia, the law, once apparently settled, now appears just as uncertain as it is elsewhere. The legislature had amended the conditional sales act to provide that if goods were sold under either conditional sale or trust receipt with a power to resell, the reservation of title was void against *bona fide* purchasers, even despite recordation. In preparation of the 1931 code, the code revisers struck out this provision as not properly included in the uniform act, and restored the original section.<sup>19</sup>

However, creditors in West Virginia are protected in some degree by the so-called trader's act. This provides that if anyone transacts business as a trader and sells for another without disclosing the name of his principal by a conspicuous sign at the place of business, and without due published notice, then all the property used in the business shall be liable to the trader's creditors for all his debts.<sup>20</sup> This statute has been held in Virginia to cover the trust receipt case,<sup>21</sup> but it is expressly limited to creditors and can not be construed to include purchasers.<sup>22</sup>

Their position must depend on an interpretation of confusing case law, yet surely they are as clearly entitled to absolute protection as a creditor. Both have relied upon apparent ownership by the dealer: both have been equally deceived by the secret trust receipt. Yet in the very same transaction a creditor is protected, while a purchaser may possibly be defrauded. His rights are too

<sup>18</sup> The Uniform Trust Receipts Act has recently been adopted by New York as a solution. This is of particular importance because of the great commercial activity in that state.

<sup>19</sup> W. VA. REV. CODE (1931) c. 40, art. 3, § 9, and revisers' note.

<sup>20</sup> W. VA. REV. CODE (1931) c. 47, art. 8, § 1, as amended by Acts of 1933.

<sup>21</sup> Capitol Motor Corp. v. Harry M. Lasker, Inc., 138 Va. 630, 123 S. E. 376 (1924). See also Seaboard Citizens' National Bank v. Spandorfer, 160 Va. 826, 170 S. E. 12 (1933).

<sup>22</sup> Boice v. Finance & Guaranty Corp., 127 Va. 563, 102 S. E. 591 (1920). Unfortunately, "creditors" has been construed to mean "lien creditors". Capitol Motor Corp. v. Lasker, *supra* n. 21; Finance & Guaranty Co. v. Oppenhimer, 276 U. S. 10, 48 S. Ct. 209 (1928). It is submitted that this is an unnecessarily narrow construction in view of the express language of the statute. Cf. International Trust Co. v. Webster National Bank, 258 Mass. 17, 154 N. E. 330 (1926), and Osgood Bradley Co. v. Standard Co., 259 Mass. 302, 156 N. E. 440 (1927), where *bona fide* pledges from the borrower in possession were protected against the trust receipt on the ground that the borrower was a "factor" under the Massachusetts Factor's Act.

important to be left in doubt, especially in view of the extensive use of trust receipts in modern financing. There is as much reason to prohibit secret liens here as in the case of a mortgage or conditional sale. Thus, in view of the danger involved and the previously expressed legislative intent to invalidate such secret trusts toward *bona fide* purchasers, it would seem advisable to amend the trader's act to include expressly these latter. The present act has had an honorable existence for almost a century without hampering legitimate business: it is believed an amendment to protect purchasers might have an equally beneficial effect.

In other words, the trust receipt transaction has now attained an importance which requires not only legal recognition, but legislative regulation. Granted the existence of a strong policy of the law against secret liens, effort should be made to protect by proper statute innocent parties whose rights might otherwise be jeopardized. Admittedly, such an act will somewhat burden the use of the trust receipt, yet as against such a consideration there must be offset the business security of *bona fide* purchasers. Apart from this legislation, the common law can satisfactorily accommodate itself to the modern financing method of trust receipts.