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BILLS OF LADING AS COLLATERAL SECURITY.

The use of credit has increased with the growth in population and the development of business. It has been estimated that about eighty-five per cent of the business transacted in the United States is effected by means of credit instruments.¹ It has been stated that the use of credit "furnishes a more perfect and convenient means of payment in large sums and between distant places than the precious metals, saving time and labor. Credit takes the place of corresponding amounts of gold and silver. This is a saving, as it enables us to employ these precious metals for other useful purposes. Capital is employed," as a result of the use of credit, "more productively. He who possesses capital but for any reason is unable to make use of it, transfers it to another for a compensation to the benefit of both as well as that of the public economy."² As the use of credit is based essentially upon the confidence of the creditor in the debtor, of the creditor's faith in the debtor's ability to pay an obligation when it matures, the absence of credit knowledge seriously impairs the extension of credit in both domestic and foreign trade. This restraint upon business has been met by the use of some form of collateral to secure the payment of the specific debt when it is due. In the movement of goods, the shipping documents are the most commonly used as collateral when attached to a draft drawn by the seller of the goods upon the buyer. They consist of the bills of lading, issued by the carrier of the goods, the insurance policies, commercial or consular invoices, and other miscellaneous certificates. Of these the bill of lading is of prime importance because it is a token of title to the goods, and a receipt showing that the goods have been actually received by the carrier for transportation.³ The interest which

¹ Findings of Dr. David Kinley, as a result of an investigation conducted for the National Monetary Commission in 1910. Phillip's Readings in Banking, pg. 150; Credits and Collections, Ettinger and Golieb, pg. 6.

² Findings of Professor Conrad, quoted by Professor Ely, "German Co-operative Credit Unions."

³ Banking and Business, Willis and Edwards, p. 268. Bills of Lading may be taken in the name of the consignee; to the order of the consignee; or to the order of the consignor. When taken "straight" in the name of the consignee it is practically worthless as collateral security; to the order of the consignee it is valuable as security if offered by the

must determine the banker's rights, remedies, and liabilities upon discounting a draft with a bill of lading attached has given rise to much confusion and conflict of opinion among the courts throughout the many jurisdictions.

It seems that much of the conflict of opinion and diversity of the holdings of the many courts upon practically the same facts exist as a direct consequence of the many interpretations that have been given to general broad statements as to the legal character of bills of lading, and their significance as documents of title. The interpretation of the words *title* and *property* is open to so many different results that this alone is sufficient to cause such confusion. To some the word *title* is a mere relative term, expressing relative rights that may exist in several persons at the same time to the same goods; while to others the term is absolute in its nature, incapable of division and can only exist in the general owner, the trustee or the mortgagee of the property.⁴

The Kentucky Court of Appeals has been inclined to say that the interest which a bank receives upon discounting a draft with a bill of lading attached is that of a pledgee. Its holding is based upon the theory that the transfer of the bill of lading is equivalent to the transfer of the possession of the goods, and

consignee. The bill of lading taken to the order of the consignor is the correct form and the most valuable as collateral. *Bills of Lading as Collateral Security under the Federal Law*. 16 *Michigan Law Review*, 402, 409. When the bill of lading is taken "straight" in the name of the consignee the carrier does not have to demand the bill of lading before delivering the goods. *Wigton v. Bowley*, 130 Mass. 252. The pledgee of a bill of lading made to the order of the consignor can recover against the carrier who forwards goods upon the order of the pledgor without receiving the bill of lading; the pledgee cannot recover against the carrier if the goods were shipped under a bill of lading in the name of the consignee. *Forbes v. Boston & Lowell Railway Co.*, 133 Mass. 154.

⁴One writer very aptly stated the difficulty when he observed that "the use of the artificial concept 'property' in the law of sales of goods, has inevitably produced some difficulties. Whether the policy of one-worded brevity in describing complex and varying groups of phenomena should prevail despite the resulting vagueness, is as a practical matter no longer arguable, for the Sales Act adopts the term and requires one categorically to decide who has the 'property' as a basis of determining certain legal consequences." The same writer defines "property" as a "description of the conclusion drawn from the presence of certain attributes," and enumerates those attributes as "the risk of loss," the "right to specific goods," "the right to possession until some act, e. g. payment is performed," and "the power of disposal." *The Passing of Property as Affected by a Bill of Lading to the Seller's Order*. 22 *Columbia Law Review*, 462.

for that reason the transaction more nearly resembles the creation of a pledge than the execution of a mortgage. In the case of *Douglas, Receiver, etc. v. People's Bank of Kentucky*,⁵ the court said: "It is also well settled that the owner of a bill of lading may pledge the same as collateral security for a debt; and as it is indispensable to the validity of a pledge that the actual possession of the property pledged should pass to the pledgee, so the possession of the property which is sought to be pledged while it is in transit may be effected by transferring the bill of lading. Such transfer of the bill is regarded as the equivalent to investing the pledgee with actual possession of the property. Such pledge does not invest the pledgee with title to the property. The title remains in the pledgor; but the pledgee acquires a lien upon the property for the security of his debt, and this lien as long as he retains the possession of the property, either actual or symbolical, is a legal lien which is paramount to, and will therefore prevail against any prior equities existing on behalf of third parties of which the pledgee had no notice or of which he was not required by law to take notice."⁶ The facts of the case are very unsatisfactory, however, to sustain such a sweeping statement. It was an action brought by a bank to recover from a railroad company for the wrongful delivery of goods which were subject to a bill of lading pledged to the bank. The evidence as to whether the bank had surrendered the bill of lading to the consignee was contradictory and conflicting in its nature, and the court seemed to have finally rested its decision upon the basis that the bank was estopped by its past conduct in permitting the consignee to secure the possession of the property by a surrender of the bill of lading, to assert that title was in the bank and that the delivery by the carrier was wrongful. The case cannot be cited, therefore, as conclusive authority for the proposition that the negotiation of the draft with the bill of lading created a pledge which became ineffectual upon

⁵ 86 Ky. 176, 5 S. W. 420, 10 Ky. Law Rep. 243, 9 Am. St. Rep. 276, cited with approval by *Scottsville Oil Co. et al v. Dye Bros. et al.* 203 Ky. 496, 262 S. W. 615.

⁶ The court there cited *Petit v. First National Bank of Memphis*, 4 Bush (Ky.) 334, which holds that a bank discounting a draft drawn on the vendee of cotton with a bill of lading taken in the name of the vendee has a superior lien to attaching creditors of the shipper. *Kentucky Refining Co. v. Bank of Morriston*, 89 S. W. (Ky.) 492, which was cited with approval by *Grooms v. National Bank of Kentucky et al.*, 218 Ky. 346, 292 S. W. 512 accord.

the surrender of the constructive possession. Indeed there is authority which states that the interest of the bank is that of a mortgagee. *In re Non-Magnetic Watch Co.*⁷ decided that where a seller ships goods under a contract of sale, by the terms of which title does not vest in the buyer until accepted by him, and takes a bill of lading for the goods so shipped, which he transfers to a bank to secure payment of a draft for the price of the goods drawn on the consignee by the seller, and discounted for him by the bank, "the bank acquires *legal title* to the goods which it is entitled to hold until payment of its claim." It is thus seen that the definitions propounded by the courts shed very little light upon the rights and liabilities of the bank arising from its negotiation of a draft with a bill of lading attached.

Upon examining some of the legal consequences of taking the bill of lading in the name of the shipper we find that it reserves the "property" in the goods to the shipper, which is subject to a levy under an execution by a judgment creditor. In *Kentucky Refining Co. v. Globe Refining Co.*⁸ the appellant bought oil from a vendor in Texas. By the terms of the sale the quantity and the quality were guaranteed and the vendor failed to perform according to the terms of the guaranty. The appellant brought an action for the breach of the contract and recovered. Upon obtaining judgment an attachment issued and the oil, which had been shipped in the appellant's cars, was levied upon by the sheriff. The appellee intervened and made claim to the same oil. Its claim was based upon a second contract of sale by the vendor after the appellant had refused to accept a draft for the purchase price. The subsequent contract with the

⁷ N. Y. St. Rep. 98, 34 N. Y. S. 1017, Banks and Banking, 2 Michie, Section 179, p. 1550.

⁸ 104 Ky. 559, 47 S. W. 602, 84 Am. St. Rep. 468, 20 Ky. L. Rep. 779, 42 L. R. A. 353, 22 Columbia Law Review, 462, at p. 465 cited with approval by *Frick & Lindsey Co. v. Holbrook et al.*, 202 Ky. 416, 259 S. W. 1033, which held, that when goods are shipped under a bill of lading taken in the name of the shipper and forwarded with draft attached under a contract of sale, the contract is finally executed upon the passage of title at the place of delivery to the buyer, and therefore the latter county had jurisdiction of the case rather than the county where the goods were delivered to the carrier; and by *Bruno, et al v. Phillips & Co.*, 80 Ind. Ap. 658, 142 N. E. 21, which stated that the legal effect of taking the bill of lading in the name of the seller and indorsing it to a bank with draft attached was to reserve title in the bank and that "where there was no evidence to rebut the effect and the presumption arising from the bill there is no question to submit to a jury. The legal presumption must and does control."

appellee was completed and it accepted a sight draft by telephone the same day as the levy of the attachment by the sheriff. Attached to the draft, accepted by the appellee, was a bill of lading taken in the name of the seller. It was indorsed as follows, "On *payment* of attached draft, deliver to the Globe Refining Co.—" The court held that the property was subject to the attachment of the appellant. By taking the bill of lading to the order of the shipper the title, the *jus disponendi* of the goods was reserved to the consignor and the appellant could attach the same. The mere acceptance of the sight draft was not sufficient to pass title to the appellee for by the very terms of the indorsement of the bill of lading it was not to be delivered until payment of the draft.

Another consequence of that "property" reserved in the vendor by taking the bill of lading to his order is the "right of disposal." In the case of *Proctor & Gamble Co. v. Peters, White & Co.*,⁹ the vendor delivered oil to the vendee's cars, and took the bill of lading to his own order, and to the notice of the vendee. The vendee's name was stricken therefrom and that of another party inserted. The first buyer brought an action for conversion. The court held that he could not recover. A seller who takes a bill of lading in his own name not only retains the right to the possession, but also the property in the goods and has complete control over them, and the second buyer acquires an indefeasible right under a subsequent contract of sale. Though the goods here were delivered to the buyer's receptacles, the fact that the seller took the bill of lading to his own order overcame the presumption of an intention to appropriate the goods to the contract.

The property thus reserved seems to be distinctly a security title, and like that of a conditional sale¹⁰ if the goods are destroyed or deteriorate in value the loss must fall upon the buyer. This was the rule in New York even before the adoption of the Uniform Sales Act. The rule there seems to have arisen from a dictum in *Farmer's etc. Bank v. Logan*¹¹ which did not even involve the loss of goods. The question there presented was whether the bank could maintain its rights to the goods against

⁹ 233 N. Y. 77, 7 Cornell Law Quarterly 399.

¹⁰ *Prather v. Norfelt*, 1 A. K. Marsh. (Ky.) 178, XV Kentucky Law Journal, 155.

¹¹ 74 N. Y. 568.

a bona fide purchaser who bought the same without notice of the bank's title. The dictum, however, recited: "Had it lessened in value, or been burned up, he," the buyer, "would have been liable to the plaintiff," the bank, "first, on his promises to accept the draft, and after acceptance, on that obligation to pay it." The New York court affirmed this as the common law rule in the case of *Standard Casing Co. v. California Casing Co. Inc.*¹² Here the vendor in California failed to perform his contract by the terms of which the shipment was to be made under a bill of lading to the shipper's order. The question involved was as to the measure of damages, whether the contract was to be considered as having been breached in California or New York. The court held that the breach should be considered as having occurred at the place where the property passed. This they said was California, and this was true even though that state had not adopted the Uniform Sales Law. Cardoza J. said, "We are not advised that the Uniform Sales Law has been adopted in that state. We think, however, that the statute in the provisions above quoted is declaratory of the rule at the common law." He there cited Professor Williston.¹³ From what has been stated above it might be readily seen that the Uniform Sales Law prevailing in many jurisdictions, has provided that the buyer is to bear the risk of loss when goods are shipped under a bill of lading to the shipper's order.¹⁴ The dictum announced in *Farmer's etc. Bank v. Logan, Supra*, had been previously stated as the law in England. In the case of *Brown v. Hare*¹⁵ rape oil was shipped under a bill of lading to the shipper's order, and under a contract which provided that it should be shipped "free on board, point of delivery." The ship was lost at sea. The brokers of the vendor presented a draft with documents for acceptance after they had received information that the goods had been destroyed. When the vendees learned of the loss they returned the documents and insisted that they should not bear the loss of the goods. In an action for failure to accept the bill of exchange, and for goods sold and de-

¹² 233 N. Y. 413, 135 N. E. 334.

¹³ 1 Williston on Sales, Section 284, 34 Harvard Law Review, 751.

¹⁴ Uniform Sales Act, Section 22 (a), has not been adopted by Kentucky. The Federal Uniform Bill of Lading Act applies to all of the states in interstate commerce. 1 Minnesota Law Review, 493.

¹⁵ 3 H. & N. 484, affirmed 4 H. & N. 822.

livered, the court held that they were liable, that the loss should fall upon the vendee.

There have been cases, however, which failed to distinguish the true nature of the title reserved by the vendor and upon finding that the bill of lading was taken in the name of the shipper, declared that it was the purpose of the vendor to reserve the title to the goods until payment. They imposed as an incident of this title the risk of loss or deterioration of the goods while in transit. In *Cragun Bros. v. Todd & Kraft*¹⁶ a buyer of peaches in Des Moines, Iowa, refused to accept the same upon their arrival. The contract of sale provided that they should be delivered "free on board at Hot Springs, Utah." The car was delayed and the shipment was in a damaged condition upon its arrival. In an action for the contract price the court held that the vendor could not recover. Some have been of the opinion that this was the rule of the common law and that the liability of the vendor was changed by the Uniform Sales Act.¹⁷

Notwithstanding the rule that the bank acquires¹⁸ "the right of disposal" reserved by the vendor by taking the bill of lading to his own order, and is relieved from the burden of the "risk of loss," which passes to the purchaser, it does not assume the liabilities of the transferor under the contract of sale for the performance or fulfillment of its warranties of quality. Although this question was early passed upon, it was only recently presented to the Kentucky Court in the case of *Hawkins v. Alfalfa Products Co.*¹⁹ The vendee of a carload of meal purchased the same from a Nebraska Corporation, and accepted and paid a draft drawn by the vendor to which was attached an order bill of lading in the name of the vendor and to the notice of the vendee. The draft had been discounted by the defendant bank. The meal proved of inferior quality and of little value. The vendee attempted to attach the money paid by him to the bank in satisfaction of his damages for the breach of contract of sale. The court held that the bank had the superior

¹⁶ 131 Iowa 250, 108 N. W. 450.

¹⁷ Comment on Recent Cases, 16 Illinois Law Review, 545.

¹⁸ The transfer of a bill of lading by indorsement and delivery for value, passes to the transferee whatever title the transferor had at the time. *Dickson v. Merchant's Elevator Co.*, 44 Mo. App. 498.

¹⁹ 152 Ky. 152, 153 S. W. 201, 44 L. R. A. (N. S.) 600, quoted with approval in *Munson v. De Tamble Motors Co.*, 83 Conn. 415, 91 Atl. 531, L. R. A., 1915A, 881.

right to the money thus paid and the vendee could not recover. It said: "To impose upon the transferee of a bill of lading who takes it in good faith for a valuable consideration, the duty of fulfilling the contract between the seller and the buyer would impair if not destroy the value of bills of lading as instruments of trade and commerce, in the transaction of which they play so useful a part. No bank would feel safe in advancing or lending money on a bill of lading if the law burdened it with the performance of the contract between the seller and the buyer." The New York court was likewise very late in passing upon the liability of a bank upon discounting a draft with a bill of lading attached for a breach of the contract of sale. It did so in the case of *Springs et al v. Hanover National Bank*.²⁰ In that action the bills of lading were forged and the vendee did not discover the forgery until the draft had been paid. Like the Kentucky Court of Appeals, the New York court held that the vendee could not recover back money paid to the bank in satisfaction of the draft, and established its rule in accord with that of the majority of the courts.

North Carolina, Texas and Alabama at first followed a rule to the contrary, which permitted the vendee to recover for the breach of contract of warranties, both in an action upon the acceptance of the draft and in an action by the drawee to recover back money paid thereon. In *Finch v. Gregg et al*.²¹ the drawee bought "good corn" and had accepted and paid a draft presented by the bank with bill of lading attached. A second shipment was made under a similar arrangement and the buyer began attachment proceedings to recover for the loss which he had sustained by reason of the first shipment which proved of inferior quality. The court held that the bank as assignee of the bill of lading, taken in the name of the shipper, became the owner of the property and succeeded to the rights and liabilities of the vendor. They were therefore liable upon the warranty of quality contained in the contract of sale. It followed *Landa v. Lattin Bros*.²² which held the bank liable in an action by the vendee for a breach of warranty of quality of wheat.

²⁰ 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. (N. S.) 241.

²¹ 126 N. C. 176, 49 L. R. A. 679.

²² 19 Tex. Civ. App. 246, 46 S. W. 48, overruled by the Texas Supreme Court when the question was certified by the court of Civil Appeals in *Blaidsell Jr. Co. v. Citizen National Bank*, 96 Tex. 626, 75 S. W. 292. On motion for rehearing the Court of Civil Appeals adopted the answer

*Mason et al v. Nelson et al.*²³ overruled *Finch v. Gregg*, supra, the majority opinion being written by the judge who presided in the Superior Court upon the trial of that case. The plaintiff in this action bought cotton by sample, accepted and paid a draft which had been discounted by a bank in Texas. The cotton proved of inferior quality and the buyer brought his action to recover back money paid to the bank under a mistake of fact. The court held that a demurrer to the petition should be sustained. The court adopted the criticisms²⁴ of *Finch v. Gregg*, made at the time that opinion was written. The dissenting opinion stressed the hardship that was worked upon the vendee who had no opportunity to inspect the goods before payment of the draft²⁵ and who was denied, by this rule, the right to recover back money paid to the bank. It also objected that the manufacturing interests of North Carolina were fast growing, and that local consignees were obtaining goods from all sections of the country and that this rule would seriously impair the security of trade and the development of commerce.

The Alabama Court in *J. C. Hass, et al. v. Citizens' Bank of*

of the Supreme Court and sustained a demurrer to the petition in an action to recover back money paid to the bank. 76 S. W. 70.

²³ 148 N. C. 492, 62 S. E. 625.

²⁴ The Annotator in 49 L. R. A. 679 at p. 683 considers that *Finch v. Gregg*, and *Landa v. Lattin Bros.* were decided upon wrong principles and if the right principles had been considered a different result would have been reached. The view was criticized, first: Because of the measure of damages that could be received against the vendor for breach of warranty of quality would ordinarily be the difference between the value of the goods if they had been as warranted, and their actual value in their defective condition. Under special circumstances, such as sharp fluctuations in the market price, the buyer might thus recover from the seller almost double the price of the goods as determined by the original contract. It would be manifestly unjust to hold the bank, who was not a party to the original warranty, in excess of the amount actually received by it. A second criticism was founded upon the idea of the negotiability of the draft attached to the bill of lading. If the bills of exchange are negotiable in form, and the bank is an innocent holder for value, the drawee cannot set up the defective quality of the goods as a failure of consideration, nor that the bill of lading was fictitious. The leading case of the ample authority cited was *Robinson v. Reynolds*, 2 Q. B. 196.

²⁵ A dictum in *Old National Bank of Waupaca v. People's Bank of Harrisville*, 89 W. Va. 132, 108 S. E. 716, 18 A. L. R. 728, stated that the consignee might inspect the goods under an order from the bank and the carrier could not demand the bill of lading. But see *Ten Broeck Tyre Co. v. Rubber Trading Co.*, 136 Ky. 526, 217 S. W. 345.

*Dyersburg*²⁶ was the third jurisdiction to adopt what seems to have been the minority view as to the bank's liability upon the contract of the vendor upon discounting his draft with a bill of lading attached. The plaintiff in this action purchased bran and meal and accepted and paid a draft presented by the defendant bank without an opportunity to inspect the cars. Upon an inspection there appeared to be a shortage. They brought their action against the bank and the court held that the demurrer to the petition should be overruled. It treated the transaction as an assignment of the contract of sale, between the original parties, to the bank. The court stated that the title remained in the vendor by terms of the bill of lading, and upon the negotiation of the draft the bank became the purchaser of the goods. They refused to accept the doctrine that the bill of lading was taken for security only, that the real transaction was in the nature of a loan to the vendor by the bank, or that the bank was the vendor's agent for collection. The court refused to apply the rule in the case of *Bank of Gunter'sville v. Jones Cotton Co.*²⁷ The vendor of cotton in that action, pursuant to the instructions of the purchasers, consigned the same to a Cotton Company, and attached to the bill of lading a draft drawn upon the Cotton Company to the order of the vendor. The bank cashed the draft and the Cotton Company having accepted the same could not defend an action thereon because of the failure of title in the vendor. The case is distinguished on the ground that there was no retention of title in the vendor.

One of the strongest arguments for supporting the view of the Kentucky court in saying that the interest received by the bank is that of a pledgee rather than that of a mortgagee and a reason that has undoubtedly influenced the courts in avoiding any definite description of that interest is that most jurisdictions do not require the documents to be registered under the

²⁶ 144 Ala. 562, 39 So. 129, 1 L. R. A. (N. S.) 242, was practically overruled by *Cosmos Cotton Co. v. First National Bank of Birmingham*, 171 Ala. 392, 54 So. 621, 32 L. R. A. (N. S.) 1173, though the opinion attempted to distinguish the Hass Case. It held that a bank discounting a draft with bill of lading attached was not liable in an action brought by the consignee for shortage or inferiority of quality in the shipment. Three of the Justices concurred in the opinion; two in the conclusion, but thought the Hass Case contra and should be overruled; and one thought the Hass Case unsound but properly differentiated and it was unnecessary to overrule it.

²⁷ 156 Ala. 525, 46 So. 971.

fling statutes.²⁸ The holding that it is a mortgage however, is not open to criticism provided the transferee retains the documents of title. In fact this objection has been met by the statement that the interest of the bank is that of a mortgagee in possession. In *Seward v. Miller & Higdon*,²⁹ the consignee of fruit was the shipper's agent. He sold the fruit while it was in transit and drew a draft upon the vendee for the price. This he discounted at the bank. The vendee refused payment and the consignee resold the fruit. Before it was paid for by the second purchaser, the fruit was attached as the property of the consignee. The court held that the bank might prevail. The opinion stated that, "The indorsement and delivery of a bill of lading to a bank as collateral security for paper discounted, not only invests the bank with title to the goods, but operates as a delivery of the goods, and the bank in such case, if not the absolute owner, stands in the position of a mortgagee in possession, and is not required, in order to protect its lien to have its papers recorded." It cited *First National Bank v. Kelley*.³⁰

This result seems both logical and desirable but it is not a complete solution of the problems since in importing goods and raw materials upon credit, it is often necessary for the bank to surrender the documents of title to the buyer for the purpose of resale or processing the same. This is necessary for in many instances it is out of the profits of the specific transaction that the buyer expects to meet his acceptance due at the bank. The bank in this situation usually attempts to protect its interest by a trust receipt. In the proper situation the trust receipt has been sustained. One of the earliest cases and the one most frequently cited as authority for this proposition is *Farmers & Mechanic Bank v. Logan*, supra. The court there permitted the bank to prevail over a purchaser from the principal. The documents of title had been surrendered to the principal for a specific purpose and notice of authority thus given was stamped upon the bill of lading. The court denied that the bank was the mere pledgor and that it lost its special property upon surrender of the goods. It said the bank was the general owner and that the purchaser from the principal could not rely upon the possession alone but was required to inquire into his title and

²⁸ Kentucky Statutes, Section 496.

²⁹ 106 Va. 309, 55 S. E. 631.

³⁰ 57 N. Y. 34.

right to dispose of the goods. There are other transactions where the attempt to use the trust receipt has proved unsuccessful. The newly developed method of financing the distribution in the automobile industry by separate Finance Corporations is an example.³¹ The attempt of the Finance Corporations to reserve the title and at the same time surrender the possession to the Sales Agencies has been treated by the courts as the usual chattel mortgage. The reason for this holding is that by the transaction the titles to the automobiles pass directly to the distributors and their subsequent recital that it is vested in the Finance Corporation is ineffectual against the creditors of the distributors.

It seems that the better description of the trust receipt transaction, the one that is sustained by the courts, is that it is in the nature of a chattel mortgage. And this is true even though the courts have not required that the trust receipt should be recorded. The principal reasons that the courts have exempted the recording of trust receipts are the utter impracticability of making the banks conform to this practice; and also, the ever present tendency to encourage any legitimate means of increasing the business activity in the community. A most learned analysis and discussion of the problem³² has distinguished the trust receipt from the usual chattel mortgage in that prior to the time of the arrangement, the obligor has had neither the possession nor the title to the goods. For this reason it has not fallen within the evils sought to be eliminated by the recording acts. Here the seller of the goods has formerly had both the possession and the title to the goods. By the sale and discounting the draft with the bill of lading attached he passes a security title to the bank which is equivalent to that of the ordinary mortgagee; and also passes to the buyer the equity of redemption. New difficulties have been raised by the Uniform Sales Act since it seems certain that an innocent holder for value would prevail over the holder of the trust receipt. It has been suggested, however, that the banker might protect his interest by stamping or writing on the documents the purpose for which they were surrendered.³³

³¹ Annotation 49 A. L. R. 232, at p. 309.

³² The Trust Receipt as Security. 22 Columbia Law Review 395 and 546.

³³ 2 Williston on Sales, Section 437, citing *Dows v. National Exchange Bank*, 91 U. S. 618.

Since taking the bill of lading to the order of the shipper reserves the "property" in the goods which is subject to a levy under an execution; and since it reserves to the shipper the power of disposal, it is evident that two important elements, two important incidents of the ownership of goods are thus reserved to the shipper and transferred to the bank. The idea that that ownership is absolute, however, is refuted by the rule that the risk of loss and deterioration pass to the buyer. It is further refuted by the rule that a transferee of the bill of lading does not warrant the quality nor the quantity of the goods under the original contract between the buyer and the seller. It thus appears that the bank receives title to the goods upon negotiation of a draft with a bill of lading attached, but that title is only for security. It is that of a mortgagee. This description is objectionable in that the bank is not required to record its papers under the filing statutes. This has been answered by the rather artificial explanation that the bank stands in the position of a mortgagee in possession. Others frankly explain it upon, the practical necessities of trade, and stress the impracticability of requiring the banks to record their paper, and the benefits received by the community as a result of the stimulus afforded to business. Under the trust receipt relation it seems that one is forced to abandon the analogy of a mortgagee in possession, for in that situation the bank has surrendered the possession to the buyer. This situation also proves to be an acid test for the description of the bank's property as that of a pledgee. Here, clearly, the rights of the bank would be lost if the interest received by it were of no greater value than the mere right to the possession of the goods until payment. It is therefore submitted that it is more accurate to describe the property of the bank as that of a mortgagee, whose title is not subject to the filing statutes, since in this situation the evil of misleading creditors by the separation of the ownership and possession of the goods does not exist.

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