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Comments

Unrecorded Trust Receipts in Missouri

The recent decision of the Kansas City Court of Appeals in *Commercial Credit Co. v. Interstate Securities Co.*¹ sustaining the validity of a trust receipt without recordation as against a mortgagee provokes consideration as to whether the validity of the unrecorded trust receipt is finally and definitely settled in Missouri.

1. 197 S.W. (2d) 1000 (Mo. App. 1946).

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¹ The citation is not included in the original text.
Although the trust receipt is one of the most recent devices developed to offer purchase-money security, it is no longer a novelty to the attorney, the courts, or to a great many businessmen. The topic has been well-explored in law reviews and textbooks and has been the subject of frequent annotations to the extent that little original analysis or collation of cases is practical. However, a rational approach to the Missouri cases can hardly be made without some background as a basis.

**TRIPARTITE TRUST RECEIPTS**

The trust receipt first developed in the import field. It was utilized so that a bank could advance credit to an importer, permitting the importer to have a limited freedom with the imported merchandise and at the same time retain in the lending bank a security interest in the imported items themselves without the necessity for public record of that interest. The trust receipt is spawned from that need for credit on the one hand and the need for security other than the personal liability of the borrower on the other.

This import device was soon transplanted into the domestic financing of purchases of goods, but, as a glance at the digests will reveal, the trust receipt came into its own in domestic financing when automobile manufacturers adapted it to the financing of retail automobile agencies in the purchase of automobiles. The basic pattern is the same as that used in import financing. The conspicuous difference lies not in legal theory or practice, but in the fact that the position of the

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2. Barry v. Boninger, 46 Md. 59 (1876), is regarded as the first case to use the term "trust receipt," although earlier cases had dealt with transactions of the same nature. For a historical treatment of the early cases, as well as a good discussion of the trust receipt as a security device, see Frederick, *The Trust Receipt as Security* (1922) 22 Col. L. Rev. 546. For an interesting account of a Grecian commercial practice strikingly similar to the modern trust receipt transaction, see Zane, A *Modern Instance of Zenothenis v. Demon* (1925) 23 Mich. L. Rev. 339.


4. For an example of an import transaction with samples of the language employed in the instruments, see *In re Cattus*, 183 Fed. 733 (C.C.A. 2d, 1912); *In re Marks & Co.*, 222 Fed. 52 (C.C.A. 2d, 1915).

5. *Century Throwing Co. v. Muller*, 197 Fed. 252 (C.C.A. 3d, 1912). At page 258 the court says, "We can readily understand how the business of foreign importation by merchants, and especially by manufacturers, is facilitated and enlarged by making available to those of small means the credit of banking capital. The business of importation is thus extended, by not being confined to those concerns having large capital and established foreign credit." This statement is typical of many to be found in trust receipt cases.

6. Indeed, all the Missouri cases have involved the financing of purchases of automobiles.
lending bank, so important in the import field, has been assumed by large financing companies, financing on a nationwide basis the purchase of automobiles by retail agencies.

The business necessities which called the trust receipt into play in this aspect may be described thusly: A manufacturer has the automobiles that he wants to sell and desires to reach the widest market possible. The local retailer wants to buy, but too few can afford to pay for the automobiles displayed on the showroom floor. Without doubt the manufacturer in most instances has the financial resources to sell the cars to its dealers on credit, but its business is manufacturing cars, and it is not eager to enter the credit field, which has its own host of problems and techniques and requires a different type of organization. As a consequence large credit agencies entered the field to finance these local automobile dealers. A few of the larger companies are familiar to all—General Motors Acceptance Corporation, Commercial Credit Corporation, Universal Credit Corporation, and many others. These financing agencies, of course, have more than an accidental tie-up with particular automobile manufacturers.

The financing agency needs security for the money or credit advanced, yet at the same time the local dealer must be given at least a limited possession of the cars in order to make sales with which to repay the money so loaned. The pledge could not be utilized because, with minor exceptions, the pledgee's security is dependent upon continued possession by the pledgee.7 The chattel mortgage, the mortgagor retaining possession, was almost universally subject to recording requirements,8 and sometimes subject to restrictions on foreclosure. The conditional sale was little better in those jurisdictions requiring conditional sale contracts to be recorded,9 and especially where, as in Missouri, there exist further limitations on repossession by the conditional vendor.10 It was the failure of the older security devices to meet the needs of commercial credit that conceived and gave birth to the trust receipt in the import field and suggested its use, which has become so popular and so widespread, in the domestic field.

To take a concrete example of a trust receipt transaction for the purpose of this discussion, let us assume the case of a retailer (R) operating a retail automobile sales agency in Columbia, Missouri. R does the greater part of his business on a trust receipt basis, whereby a finance company (F) has contracted to furnish the capital. R orders five cars from the manufacturer (M) in Detroit. M ships the cars by carrier to Columbia, taking from the carrier an order bill of lading. M sends the bill of lading with sight draft attached (sometimes also a bill of sale) to F. F pays the draft.11 When the cars arrive in Columbia, R is notified and he goes to F

7. For a comment on the pledge analysis in trust receipt transactions, see Hanna, Trust Receipts, 29 Col. L. Rev. 545 (1929).
11. Inasmuch as these large financing companies cannot maintain a local office in each community, a local bank is customarily engaged as agent to pay the draft with money furnished by the financing agency, to take the dealer's trust
for the bill of lading, so that he may take possession of the cars from the carrier. The usual practice is for R to pay 15-20 per cent of the purchase price to F and to execute to F a note for the balance. F gives the bill of lading to R and simultaneously R executes a trust receipt to F. A number of variations of this arrangement are currently employed, but they have no effect on the ultimate validity of the transaction, so long as the source of F’s title is carefully observed, which cardinal fact will be more fully discussed below.

The terms of the trust receipt may vary, but the usual provisions are to the effect that R takes the bill of lading in trust for F to take possession of the cars, to take the cars from the freight depot and store them in R’s place of business, to keep the cars brand new, not to operate them for demonstration purposes, and to return them to the finance company upon demand for any reason. R further agrees that he assumes the risk of any loss or damage to the cars, stores them at his own expense, agrees to pay and discharge all taxes, etc., with respect to the cars. R further agrees that he will not sell, loan, deliver, pledge, mortgage, or otherwise dispose of the cars to any person until payment of the purchase price has been made to F. R may be authorized to sell the cars for not less than a stated amount or that due on the note, or he may be authorized to sell only after receiving formal permission from F. If authorized to sell, he is required to hold the proceeds in trust for F separate and apart from R’s other funds and to remit immediately or periodically to F.12

The above hypothetical case is descriptive of a tripartite or so-called “true” trust receipt transaction. It is to be noted that there are three parties involved: the initial owner (the manufacturer), the financing agency, and the local retail dealer, who is borrowing the money and who executes the trust receipt. Title moves from the initial owner to the financing agency by way of the bill of lading. Title was not in the retail dealer when he executed the trust receipt. Actually, of course, the bill of lading passes into the hands of the retail dealer in order for him to obtain possession of the cars from the carrier.13 And true it is that while the dealer has the bill of lading in his possession there is a logical inconsistency between the terms of the trust receipt which provide that the title “remains” or “continues” in the financing agency and the reality of the transaction in that the dealer does have the

receipt, to deliver the order bill to the dealer and to accept payment and effect release to the trust receipt when the cars have been sold. As to whether this modification of the arrangement will change the tripartite nature of the transaction, see In re Cullen, 282 Fed. 902 (D. Md. 1922); Matter of Lee, 6 Am. B.R. (n.s.) 437 (D.C. Wis. 1923). See also Vold, Trust Receipt Security in Financing of Sales, 15 CORN. L. Q. 543, 571 (1930); Vold, Sales, §§ 111, 112, p. 371 et seq.

12. Inasmuch as trust receipt cases turn on the particular facts before the court, nearly any cited case will furnish an example of the language of the trust receipts used in automobile financing.

13. And the dealer by negotiating the bill of lading to a holder in due course can cut off the security interest of the financing agency, even though in so doing he is acting wrongfully. Commercial Nat. Bank v. Canal-Louisiana Bank, 239 U.S. 520, 36 Sup. Ct. 194 (1916); In re Richeimer, 221 Fed. 16 (C.C.A. 7th, 1915); Roland M. Baker Co. v. Brown, 214 Mass. 196, 100 N.E. 1025 (1913).
bill of lading. But when the bill of lading is surrendered to the carrier, it is no longer operative and the dealer has the possession of the cars subject to the terms of the trust receipt, title has unaccountably remained in the financing agency or miraculously reversed to the financing agency. 14

But what is important from a legal standpoint is that title moved from the manufacturer to the financing agency without having passed into the hands of the retail dealer. Possession rests in the dealer, but title remains in the financing agency. The situation is just the opposite of that which prevails with respect to a pledge. Nor has the transaction been consummated in such a way that it could be said that the trust receipt was a conveyance of title by way of security as is the case with respect to a chattel mortgage or deed of trust. The arguments that it is not a conditional sale may be summarized roughly as follows: the relation is that of lender and borrower, not vendor-vendee; the holder of the trust receipt can repossess at any time, whereas the conditional seller can repossess only on default; the trust receipt does not purport to be a conditional sale.

But the recording acts represent an impinging doctrine on common law property rights and any separation of title and possession will very naturally be subject to close scrutiny to determine whether the particular separation of title and possession is governed by the existing recording requirements. When the full force of judicial scrutiny was leveled on trust receipt transactions, principally in the federal courts in bankruptcy proceedings, the courts, appreciative of the adaptability of the trust receipt to modern business needs, were astute in sustaining the validity of the trust receipt without recordation, 15 although they had some little difficulty describing in exact terms the legal relation and interests of the parties. 16

14. See Vold, Sales, §§ 111, 112, pp. 343-355, for a systematic development of the transaction with a discussion of the divided property interests of the parties at the various stages of the transaction.

15. Charavay and Bodvin v. York Silk Mfg. Co., 170 Fed. 819 (C.C.S.D.N.Y. 1909); In re Cattus, 183 Fed. 733 (C.C.A. 2d, 1910); Century Throwing Co. v. Muller, 197 Fed. 252 (C.C.A. 3d, 1912); In re Dunlap Carpet Co., 206 Fed. 726 (E.D. Pa. 1913), aff'd in Assets Realization Co. v. Sovereign Bank of Canada, 210 Fed. 252 (C.C.A. 3d, 1914); In re K. Marks & Co. 222 Fed. 52 (C.C.A. 2d, 1915); In re James, Inc. 30 F. (2d) 555 (C.C.A. 2d, 1929); Hamilton Nat. Bank v. McCallum, 58 F. (2d) 912 (C.C.A. 6th, 1932), cert. denied 53 Sup. Ct. 1919 (1932); In re Bell Motor Co., Craig v. Industrial Acceptance Corp.; 45 F. (2d) 19 (C.C.A. 8th, 1930), cert. denied 283 U.S. 32, 51 Sup. Ct. 365, (1931), sub nom, Craig v. Industrial Acceptance Corp.; In re Otto-Johnson Mercantile Co., 52 F.(2d) 678 (D.N. Mex. 1928); Moore v. Myman, 146 Mass. 60, 15 N.E. 104 (1888); People's Nat. Bank v. Muholland, 228 Mass. 152, 117 N.E. 46 (1917); In re Reboulin Fils & Co., 165 Fed. 243 (D. N.J. 1908); Commercial Credit Co. v. Peak, 195 Cal. 27, 231 Pac. 340 (1924); General Motors Acceptance Corp. v. Hupefer, 113 Neb. 228, 202 N.W. 627 (1925); Brown Brothers v. Billington, 163 Pa. 76, 29 Atl. 904 (1894). Professor Hanna in an article Extension of Public Recordation, 31 Col. L. Rev. 617, 630 (1931), says, "Over the country as a whole the majority of the decisions seem to hold that the trust receipt is not valid as a security without filing. If, however, one considers only the decisions in the large commercial states, it seems that the trend of authority is to support the device irrespective of public record."

16. See the following cases as to the difficulty of precise definition of the
Although the trust receipt did not purport to conform to any of the older security devices previously known to the law, it could be distinguished from the chattel mortgage only in the source of the finance company's title. Hence, one cardinal requirement was laid down by the courts: the title of the financing agency must be derived from someone other than the one executing the trust receipt and responsible for the satisfaction of the loan. Hence, it is that only the tripartite trust receipt transaction, an example of which has just been described, is accorded validity by the weight of authority, while the bipartite trust receipt transactions, to be discussed hereinafter, which have been ill-advised attempts to secure the same advantages accorded to the tripartite transaction, have resulted in no more security than is had from an unrecorded chattel mortgage or conditional sale.

Most of the cases sustaining the tripartite trust receipt without recording proceeded on the theory that the trust receipt did not conform, or purport to conform, to any of the traditional security devices, and hence, being separate and distinct, was not subject to recording statutes with respect to chattel mortgages or conditional sales. These courts in effect declared the trust receipt to be sui generis. Another line of decisions, also seeking to sustain them without recordation, viewed the relationship created by the trust receipt as being in the nature of a bailment.

A few earlier cases, in states where conditional sale contracts did not have to be recorded, construed them as conditional sales in order to sustain their validity without recordation.

Other courts, however, have taken the position that the recording laws of the state required them to be recorded to be valid. Some took the view that they were by their nature chattel mortgages. Most of these decisions, it is felt, result from


18. See cases cited in notes 31, 32, 33.
21. New Haven Wire Company cases, 57 Conn. 353, 18 Atl. 266 (1899). Mershon v. Moors, 76 Wis. 502, 45 N.W. 95 (1890). See a later case to the same effect, People's Loan & Inv. Co. v. Universal Credit Co., 75 F. (2d) 545 (C.C.A. 8th, 1935), where the court without discussion of the nature of the trust receipt held that the finance company had title in accord with the weight of authority, and that in Arkansas a conditional sale contract is not required to be recorded.
broad judicial interpretation of the recording statutes, as they do not seem anymore inclusive than elsewhere.23 Other courts just as positively took the position that they were conditional sale contracts and thus fell within the recording statute applicable to conditional sale contracts.24

In 1925, after a federal court decision declaring trust receipts to fall within the Ohio conditional sale statute, the legislature of Ohio specifically excepted certain uses of the trust receipt from the operation of the conditional sale statute. It was provided that the trust receipt should be valid and binding not only as between the parties thereto, but as against all creditors of the signer of the trust receipt and all persons claiming under the signer except purchasers and mortgagees in good faith and for value; but if the financing agency would preserve its rights under the trust receipt, it was required to file an affidavit in the county where the signer of the trust receipt was doing business stating that the business is being financed on a trust receipt basis with respect to a certain type of merchandise.25

The Ohio statute suggested a solution to the trust receipt problem. Uniformity in treatment was obviously desirable, especially since so much of the domestic trust receipt business was being done on a nationwide basis. But the time when it could be hoped that substantial uniformity could be secured through decision was long passed.26 With this and other considerations in mind the Commissioners on Uni-

Credit Corp., 113 N. J. Eq. 12, 165 Atl. 637 (Ch. 1933), aff'd on appeal, Morrow v. Smith, 115 N. J. Eq. 310, 170 Atl. 607 (1934); General Motors Acceptance Corp. v. Sharp Motor Sales Co., 233 Ky. 290, 25 S. W. (2d) 405 (1930); Universal Credit Co. v. Gasow-Howard Motor Co., 73 S. W. (2d) 909 (Tex. Civ. App. 1934); Universal Credit Co. v. Reiley, 171 Okla. 286, 42 P. (2d) 516 (1935); General Motors Acceptance Corp. v. Seattle Association of Credit Men, 67 P. (2d) 882 (1937), wherein the court said it was either a chattel mortgage or a conditional sale without deciding which; Matter of Lee, 6 Am. B. R. (n.s.) 437 (Dist. Ct. Wis. 1923).

23. The Texas statute is more broadly written than the usual statute. See 10 Texas L. Rev. 388 (1932). The Kentucky position may be explained by the following language of the court in General Motors Acceptance Corp. v. Sharp Motor Sales Co., supra note 22, at p. 293 of 233 Ky.: ". . . whatever may be the name or form of transaction, when it is designed to hold personal property as mere security for a debt, it is regarded as a chattel mortgage."

24. In re Bettman-Johnson Co., 250 Fed. 657 (C. C. A. 6th, 1918); General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928). General Motors Acceptance Corp. v. Whitely, 217 Iowa 998, 252 N. W. 779 (1934), while not giving sufficient facts to determine whether the transaction was tripartite or bipartite, the fact would make no difference as the court at page 780 of 252 N. W. says, "The most infallible test by which to determine under which class the contract falls is to ascertain whether there is a promise by the purchaser to pay for the goods delivered. If there is such a promise, then, no matter under what form the transaction is designated, it is held to be a conditional sale and not a bailment."


26. The Commissioners on Uniform Laws state in the Prefatory Note to their Uniform Trust Receipts Act that up to 1929 the weight of authority sustained the validity of the trust receipt, but beginning in 1930, there was a decided trend toward refusing validity unless recorded, the refusal stemming from a dislike of the financing agency's secret lien. While no attempt has been made to prove or disprove this observation by a collation of all the cases, a glance at the dates of the cases cited in note 22, supra would seem to bear this out.
form Laws, with the experience under the Ohio statute before them, promulgated in 1933, a Uniform Trust Receipts Act, which has been adopted in twenty-one states.\textsuperscript{27} The Uniform Act, naturally, covers only those transactions within its terms, but its terms embrace not only the tripartite transaction under discussion, but also include other bipartite transactions. The fundamental idea is that recordation of the individual trust receipt shall not be required, but a statement signed by the lender and borrower is to be filed with the Secretary of State, stating that they intend to do business on the trust receipt plan in respect to a particular type of goods. The statement so filed is effective for one year, and may be renewed.\textsuperscript{28}

One point of unanimity had, however, already been attained. Even in those majority jurisdictions sustaining the trust receipt without recordation, a bona fide purchaser for value without notice who had purchased in the regular course of business from the dealer the merchandise held under trust receipt was held not to take subject to the rights of the trust receipt holder, the decisions being based on the grounds of apparent authority\textsuperscript{29} in the dealer or estoppel.\textsuperscript{30}

**Bipartite Trust Receipts**

When the courts sustained the validity of the tripartite trust receipt, its use was attempted in many situations which did not fit the pattern of the tripartite transaction. When faced with these spurious uses of the trust receipt, the courts were keen to cut through the transaction and to lay bare the actual situation with the result that they found transactions undistinguishable from the older security devices. These questionable uses of the trust receipt, when disclosed, gave no greater security than would have been accorded to an unrecorded chattel mortgage or conditional sale. There was no magic in the term "trust receipt" alone.

One such use arises where the title passes from the manufacturer or seller to

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\textsuperscript{27} California, 1935; Connecticut, 1937; Idaho, 1945; Illinois, 1935; Indiana, 1935; Maryland, 1941; Massachusetts, 1936; Minnesota, 1943; Montana, 1945; Nevada, 1941; New Hampshire, 1939; New Jersey, 1938; New York, 1934; North Dakota, 1945; Oregon, 1935; Pennsylvania, 1941; South Dakota, 1945; Tennessee, 1937; Utah, 1945; Virginia, 1944; Washington, 1943.

\textsuperscript{28} The Uniform Act is an attempted reconciliation of the two competing interests involved. As the Prefactory Note to the Act points out either of the two previous base points is unfair to some interest. If the trust receipt is declared valid without recordation, the creditors and innocent mortgagees, pledgors, etc., of the dealer will suffer. On the other hand, if the trust receipt is declared to be a chattel mortgage or conditional sale and thus subject to recording acts, a very valuable credit device has been effectively hamstrung. Under the Uniform Act the filing of the notice that a certain business is operating on a trust receipt basis gives warning to all who might otherwise have relied on the possession of the dealer and at the same time imposes no cumbersome procedure of recordation and release as to each individual trust receipt.


the retailer instead of to the finance company, the technical requirement as to the 
source of the finance company’s title not being observed. Title being in the retailer, 
the execution of the trust receipt operates as a conveyance of the title to the finance 
company and hence the courts very rightly held that the trust receipt came within 
the chattel mortgage recording acts.81

A second questionable use arises where the seller ships goods to the dealer, 
taking a trust receipt as security for the purchase price. Here again the courts have 
looked beyond the terminology employed and recognized the transaction as one of 
conditional sale.82

Still another ill-advised use of the trust receipt arises where a bank or financing 
agency lends money to the dealer, who executes a trust receipt on part of his mer-
chandise as security for the loan. This use has also generally been condemned as 
nothing more than a chattel mortgage and hence not valid as against creditors or 
the bankrupt dealer’s trustee in bankruptcy.83

MISSOURI CASES84

In 1926 the first Missouri case involving the use of a trust receipt came to the 
Springfield Court of Appeals in Forgan v. Bridges.85 By this time many reported 
cases were in the books sustaining the validity of the financier’s title in the true 
tripartite trust receipt transaction and distinguishing clearly the bipartite trust 
receipt. Although the bulk of the reported cases involved import transactions, 
domestic use of the trust receipt in automotive financing was quite common. Al-
though it was the eastern commercial states that had predominated in the litiga-
tion, a good many of the middle western and other states had already taken a 
positive stand with regard to trust receipts. However, there were indeed many other 
jurisdictions which had not yet been called upon to consider them. This recapitu-
lation is made solely to point out that both counsel and the court had the benefit

31. In re Schuttig, 1 F. (2d) 443 (D. N. J. 1924); In re Alday Motor Co., 50 
F. (2d) 228 (D. Tenn. 1930); In re Draughn & Steele Motor Co., 49 F. (2d) 636 
(E. D. Ky. 1931); Hartford Accident and Indem. Co. v. Callahan, 271 Mass. 556, 
171 N. E. 820 (1930); McLeod Nash Motors v. Commercial Credit Trust, 246 
N. W. 17 (Minn. 1932); Commonwealth Finance Corp. v. Schutt, 97 N. J. L. 225, 
116 Atl. 722 (1922); New England Auto Investment Co. v. St. Germaine, 45 R. I. 
225, 121 Atl. 398 (1923).

32. In re Schiffert, 281 Fed. 284 (E. D. Pa. 1922); White v. General Motors 
Co. v. N. P. Dodge Co., 242 N. W. 367 (Neb. 1932), where such a transaction was 
considered a bailment. The court based its decision on General Motors Acceptance 
Corp. v. Hupfer, cited supra note 15, apparently without realizing that the Hupfer 
case involved a tripartite trust receipt.

(C. C. A. 2d, 1922) is representative of this type. The opinion by Judge Augustus 
Hand is valuable reading.

34. There being only four Missouri cases, they will be discussed chronologically 
by date of decision rather than by type.

35. 281 S. W. 134 (Mo. App. 1926).
of the pioneering of other courts and indeed the opinion of the court indicates that such was the case.

The facts before the court are not set out with sharp clarity, but it would seem that a tripartite transaction was attempted, but apparently through a misconception as to the proper use of trust receipts, the requisite technical nicety as to the source of the financier’s title was not observed with the result that, when the case came before the court, the court passed on a bipartite transaction. The facts were these. The Spalding Motor Co. delivered cars to the Dealer in Charleston, Mo., who paid 15 per cent of the purchase price and executed a trust receipt in the following language, “Received of Spalding Motor Co. . . . acting for Commercial Acceptance Trust . . . owner thereof . . . one new motor vehicle . . .” with the usual provisions as to the rights and privileges with respect to the cars. Further, the Dealer accepted a draft drawn by Spalding Motor to Commercial Acceptance Trust for the balance of the purchase price. Subsequently, the Dealer mortgaged the cars to the defendant. Commercial Acceptance Trust brought replevin against the defendant mortgagee, who had taken possession of the cars. The finance company cited and was relying on the earlier import cases sustaining the bank’s security title in the true tripartite transaction. The court rejected its claim and affirmed the lower court’s holding that the mortgagee should prevail. The court distinguished the cited tripartite cases by pointing out that in the tripartite transaction the possession and title to the goods was in the financing bank prior to the time the trust receipts were executed by the borrowing importer and that delivery of possession of the goods from the bank to the importer did not transfer title to the goods; whereas, in the case before the court, title had never been in Commercial Acceptance Trust, but was in the Spalding Motor Co., when the dealer was given possession pursuant to his trust receipt. No instrument was executed by Spalding Motor Co. to the Commercial Acceptance Trust whereby its title could be passed to the Acceptance Trust. Hence, the court held that when Spalding Motor Co. delivered the cars to the Dealer and received 15 per cent cash, title to the cars passed to the dealer.

Viewed from the standpoint of the standard tripartite trust receipt hereinbefore discussed, it is obvious that Commercial Acceptance Trust, in setting up the transaction so as to have a security title, failed to provide for an additional maneuver whereby it would derive its title from the seller, the Spalding Motor Co., by bill of sale or bill of lading. This essential element was attempted to be brought about by having the Spalding Co. deliver possession to the Dealer, and by a bald statement in the trust receipt transfer or put title in the Acceptance Trust. The court ruled that the parties failed because they had not observed the ritual of having title pass from the seller to the financing company. In the succeeding cases which have come before the Missouri courts, this case has never been mentioned or cited.36 The court could have decided that the trust receipt conveyed title to C.A.T. and

36. Cited in McLeod Nash Motors v. Commercial Credit Trust, 246 N. W. 17 (Minn. 1932).
since it was not recorded as a chattel mortgage was void as against subsequent mortgagees in good faith and without notice. However, the court rejects by necessary inference that possibility, which has been the position of several courts, and went along with the general holding in tripartite cases to the effect that the trust receipt does not convey and does not purport to convey title.

The second case involving the applicability of the Missouri recording statutes came to the Circuit Court of Appeals, Eight Circuit, from the District Court for the Western District of Missouri, in In re Bell Motor Company in 1930. There, the Studebaker Co. shipped cars under contract with the Bell Motor Co. to Joplin, Missouri, sending the bills of lading to a local bank. The bank, as agent for the Industrial Acceptance Corporation, gave Bell Motor the bills of lading upon the execution of a trust receipt. Bell Motor paid 20 per cent of the purchase price and executed a note to Industrial Acceptance Corporation for the balance, payable in 120 days. Bell Motor Co. fell into a precarious position financially, and the Acceptance Corp. recorded its trust receipts some five days before the petition was filed in involuntary bankruptcy. Industrial Acceptance Corp. filed its petition to reclaim the cars, then in the hands of the trustee in bankruptcy. The referee ruled that the transaction was essentially a conditional sale and void as against creditors because not filed as required by Missouri statute. The federal district court reversed the ruling of the referee and on appeal, the court of appeals affirmed, indicating that the trust receipt created a bailment or agency for sale. The court placed emphasis on the fact that the trust receipt provided that any sale authorized was “for the account of the Industrial Acceptance Corporation.” That is, as the court said, the money to be paid under the trust receipt was upon a sale of the goods by the dealer, not upon a sale of the goods to the dealer.

It is to be noted at the outset that this case represents the true or tripartite trust receipt transaction. Industrial Acceptance Corporation received its title to the cars from the Studebaker Company, not from the Bell Motor Co. The Bell Motor Co. received the bill of lading from the agent bank, only after executing the trust receipt.

The court considered an assertion that the transaction was a conditional sale. The court noted that were the transaction considered as being either a chattel mortgage or a conditional sale, it would be subject to the applicable Missouri recording statutes. The court does not say that the trust receipt is sui generis, but, influenced by an earlier Nebraska case, calls the transaction one of bailment. Two things weaken the case for future usefulness as sustaining the validity of tripartite trust receipts without recording: first, the court relies on the wording of the trust receipt as being that appropriate to bailment, and not on the dissimilarities between the transaction and that of a chattel mortgage and a conditional sale and, second, by additional remarks made by the court at page 24 of 45 F. (2d):

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"But there is another fatal weakness in appellant's contention. Even if these trust receipts should be construed to be in the nature of conditional sale contracts, and hence under the Missouri law, subject to the recording statute above quoted, still the instruments were valid as between the parties and as to all the world except creditors during the time they were withheld from record [citations omitted]. In the instant case there was no claim in the lower court that these instruments were void because credit had been extended to the bankrupt by others while they were withheld from record, nor was there any proof that there were any such subsequent creditors. The instruments were filed for record before the adjudication in bankruptcy, and the trustee took the property of the bankrupt subject to all liens or claims against it at the time of the filing of the petition. . . ."

In sustaining the tripartite trust receipt transaction without recordation the court was in line with the largest commercial states. While it seems that the commercial utility of the trust receipt justifies the decision, it should be pointed out that the position that the trust receipt creates a bailment is open to criticism. Professor Vold has, with copious citations of authority, forcibly demonstrated that the bailment analysis will not accord with the rights of the parties as set forth in the trust receipt and as enforced by the courts. He points out that the dealer is more than a bailee, because it is he who has the substantial beneficial ownership of the goods held under the trust receipt. The dealer has the power to extinguish the security interest of the financing house by tendering the amount advanced on the goods. Thus, if the goods increase in value it is he who reaps the profit. He can transfer his interest in the goods subject to the security interest of the financing agency. If the financing agency repossesses the goods and resells them, the dealer is entitled to any balance in excess of what was due the finance house. Likewise, it is the dealer who has the risk of the venture. If the goods are destroyed, depreciate in value, or are stolen or lost, it is he who suffers the loss. In any event the dealer must still pay the financing house irrespective of what happens to the goods. Upon retaking and resale the dealer is personally liable for any deficiency. Hence, it is obvious that the dealer is more than a bailee. He is the substantial owner. On the other hand the financing agency is not a true bailor for it has only a security interest or title in the goods.

The next case, Gardner Motor Co. v. Globe Securities Co., came to the Missouri Supreme Court in 1935. The Gardner Motor Co., a St. Louis manufacturer of automobiles had shipped five cars to its local dealer in Kansas City. It had consigned the cars to itself with instructions to notify its dealer. The bills of lading, invoices and trust receipts had been sent to a local bank which delivered the bill of lading to the dealer upon the execution of the trust receipt by the dealer. The dealer subsequently mortgaged the cars to Globe Securities Co. The mortgage, which had been duly recorded, provided that the mortgagee, upon default, could

41. 337 Mo. 177, 85 S. W. (2d) 651 (1935).
take possession of an sell the cars for the amount of the indebtedness. When the
dealer defaulted, Gardner Motor, learning for the first time of the mortgages,
asserted its right to absolute ownership and title by repossessing them. Globe
Securities Co. then brought an action of trover against Gardner Motors Co. Globe
Securities Co. argued that the trust receipts constituted either a chattel mortgage
or a conditional sale. Gardner Motors argued that the cars were only on con-
signment, title always remaining in it, that the relation was that of factor and
principal, and that the dealer-factor had no right to mortgage the cars. Held,
the transaction was a consignment for sale.

This was another bipartite transaction. And it is important to note that
in this case the dealer signed no note nor accepted a draft whereby it was under
any obligation to pay for the cars at any time. Judge Hays in his opinion pointed
out that a chattel mortgage can exist only where the mortgagor has title which
it can convey to the mortgagee as security. So here, where at no time had the
bill of lading gone into the hands of the dealer until the trust receipt had been
executed, the dealer had no title which could be conveyed by way of mortgage
or deed of trust. And he points out that in a contract for conditional sale beneficial
ownership is given, title to pass at a future time, the conditional vendee assuming
an absolute obligation to pay for the property. The trust receipt provided that
the dealer agreed “to store, warehouse and hold the automobiles in trust for the
said Gardner Motor Co., Inc., as its property, and to return same on demand . . .
but with liberty to exhibit and sell same for cash for “a specified sum” for the
account of said Gardner Motor Co., and in event of sale to pay over immediately
to Gardner Motor Co., the sum specified above . . .” From the terms of the trust
receipt the court concluded that the dealer was under no obligation either to pay
or to secure a purchase price, nor that any title had passed to the dealer to support
a chattel mortgage back. Nor did the trust receipts contemplate that title should
pass at a later time. Title was to pass only if and when a sale was made, and
then to pass directly from Gardner Motor to the customer. Since it was neither
a chattel mortgage nor a conditional sale, the court concluded that it created an
agency or bailment for sale and no recordation was necessary. And further, that
since Missouri follows the common law rule that a factor authorized to sell can
not mortgage or pledge, the dealer had no authority to mortgage the cars to Globe
Securities Co.

Although this was a bipartite transaction and the court construed the trust
receipts as creating a bailment for sale, it should not be concluded as a general
proposition that the bipartite trust receipt does not have to be recorded to be
valid in Missouri. The weight of authority is that the bipartite transaction creates either a chattel mortgage or a conditional sale. The special circumstance in the Gardner Motor Case—the fact that the dealer was under no obligation to pay—makes it a special case. An attorney presented with a bipartite trust receipt case should feel justified and confident in bringing to the court’s attention the necessity for recordation under our statutes any transaction which falls into the security pattern of the chattel mortgage or conditional sale.
Commercial Credit Co. v. Interstate Securities Co. is the most recent pronouncement of a Missouri court on the subject. The Dealer had an arrangement with Commercial Credit whereby Commercial Credit agreed to finance the purchase of cars from Chrysler on the “wholesale floor plan.” When the Dealer desired to purchase automobiles, it would order them from Chrysler. Commercial Credit maintained an agent at the Chrysler plant, who would pay for the cars, so ordered and would take a bill of sale from Chrysler. That agent would forward the bill of sale to Commercial Credit’s local office in Kansas City. Chrysler, upon Commercial Credit’s direction, shipped the cars directly to the Dealer and mailed to it the invoices. The Dealer could either pay cash for the cars or execute a trust receipt for them to the local office of Commercial Credit. Apparently the Dealer at no time executed a note obligating him to pay for the cars. In 1935, at the outset of its financing of the Dealer’s purchases of automobiles, Commercial Credit had obtained from the Dealer a trust receipt executed in blank. The Dealer had also entered into a floor plan arrangement with Interstate Securities Co., which financed some of the Dealer’s wholesale purchases and also financed some of the Dealer’s retail sales. It seems that the Dealer upon the receipt of the invoices would exhibit them to Interstate who would lend money on the cars, taking a chattel mortgage. Twelve cars were involved in the controversy. Apparently the Dealer upon the receipt of the cars had mortgaged them to Interstate and as to five of them had not executed a trust receipt to Commercial Credit’s local agent. Thereupon Commercial Credit filled out the blank trust receipt executed by the Dealer some two years before, covering the five cars. The Dealer defaulted, Interstate took the cars under the mortgage and sold them. Commercial Credit claimed that it had retained title to the cars in question at all times, that the trust receipt did not constitute a chattel mortgage and was not required to be recorded. Interstate Securities contended that the trust receipt constituted a secret lien and that the trust receipt was not valid because not filled out in accordance with the intentions of the parties.

The court held that the Dealer had never gotten title to the cars for which it had not paid cash. The invoice was the only paper passing into the hands of the dealer. Commercial Credit had title by bill of sale from Chrysler. The court very properly remarked that “standing alone, an invoice is not regarded as evidence of title; it is as appropriate to a bailment as to a sale.” Therefore; the court held that the relationship was that of bailment for sale and that Commercial Credit should prevail in its replevin action against the mortgagee. The decision gives little helpful discussion of the trust receipt in Missouri, citing without discussion the Gardner Motor Co. case and In re Bell Motor Co. The court does not indicate that it perceives any difference in the factual pattern presented in those two Missouri cases. In the instant case there is a peculiar admixture of facts. The transaction is essentially tripartite in character. However, the dealer executed no note to Commercial Credit as is customary in the usual financing transaction.

42. 197 S. W. (2d) 1000 (Mo. App. 1946).
utilizing trust receipts. Deciding as it does that a bailment was created by the trust receipt this case is a springboard for a future decision that a bailment is created in the tripartite transaction where the dealer executes a note and obligates himself to pay a definite sum.

What, if any, conclusions may be drawn from the Missouri cases?

**Tripartite:** The twig has been bent toward sustaining their validity without recording. The basis seems to be on a theory of bailment, which is hard to sustain and is certainly an inadequate statement of the relationship created by the trust receipt.

**Bipartite:** While Missouri has not been confronted with bipartite transactions of the nature set out above under “bipartite trust receipts,” the case of Forgan v. Bridges and the Gardner Motor Co. case indicate that the Missouri courts are prepared to distinguish bipartite and tripartite transactions and in a proper case will construe the bipartite transaction as either a bailment, a chattel mortgage or conditional sale, depending upon the facts.

(3) If our economy is beset by a severe depression, it is safe to predict that the trust receipt will come under fire. It is to be hoped, however, that the legislature will adopt a middle ground, such as the Uniform Trust Receipts Act, to save the usefulness of the trust receipt as a credit carrier.

**James P. Brown**

**Distinction between Employee and Independent Contractor in Application of Social Security Act to Orchestras**

The term “employee” is not defined in the federal Social Security Act.¹ The applicable treasury regulation provides that one is an employee if there exists between him and the person for whom he performs services the legal relationship of employer and employee².

Divergent opinions have been expressed as to what factors are largely determinative of whether one is an employee or independent contractor. Many courts have announced right of control as the chief determinant. Other courts

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². Treasury Regulations 106, § 402.204; 107 id. § 403.204. The term “employee” is synonymous with the term “servant.” The words “employer” and “employee” are now commonly used instead of the older terms “master” and “servant.” 35 Am. Jur. 445.

The courts have differed as to whether the common law concept of the distinction between an employee and independent contractor applies in cases arising under the Social Security Act, or whether a broadened concept applies in cases arising under the Social Security Act. The courts have disagreed on this point. Jones v. Goodson, 121 F. (2d) 176 (C. C. A. 10th, 1941), American Oil Co. v. Fly, 135 F. (2d) 491 (C. C. A. 5th, 1943), Texas Co. v. Higgins, 118 F. (2d) 636 (C. C. A. 2d, 1941), Anglim v. Empire Star Mines Co., 129 F. (2d) 914 (C. C. A. 9th, 1942), and Indian Refining Co. v. Dallman, 31 F. Supp. 455 (S. D. Ill., 1940) apply the common law concept. United States v. Vogue 145 F. (2d) 609 (C. C. A. 4th, 1944), and Grace v. Magruder, 148 F. (2d) 679 (App. D. C., 1945) apply the broadened concept. For a discussion of this development, see (1945) 14 Fordham L. Rev. 252.
consider right of control as being only one of several elements that are relevant to this inquiry.\(^3\) The *Restatement of Agency* lists control over the manner of doing the work as only one of nine factors to be considered in determining whether one is a servant or independent contractor.\(^4\)

In a number of early cases concerning application to band leaders of provisions of state unemployment compensation statutes, state courts held leaders of name bands to be independent contractors and leaders of non-name bands to be employees.\(^5\)

The first case relating to liability of a band leader for federal social security taxes on members of the band is that of *Williams v. United States.*\(^6\) The contract of employment incorporated by reference the by-laws and regulations of the American Federation of Musicians, which prohibited sidemen from accepting engagements with establishments. The court stated that in the absence of a right to employ and discharge members there could be no effective control. Since the contract gave no right of control to the establishment, the leader was held to be an independent contractor.

The position of the court is somewhat confused by its reference to the significance of the leader's being engaged in an independent business for profit. Although the court did not clearly indicate the extent to which it was influenced by this latter factor, it is evident that it placed chief emphasis on right of control.

The same court later in *Spillson v. Smith*\(^7\) said of the *Williams* case that the controlling factor in that case was the absence of right of control.

After the *Williams* decision the American Federation of Musicians required

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3. *Tiffany, Principal and Agent* (2d ed. 1924) 101-4. Courts which hold that right of control is the main determinant of the existence of an employer-employee relationship have on occasion interpreted facts as placing control in one who in no real sense had control in order to attain a just result, indicating that they have been influenced by the presence of other elements. For a discussion of this practice of the courts see (1920) 20 Col. L. Rev. 335, where reference is made to the case of McNamara v. Leipzig, 227 N. Y. 291, 125 N. E. 244 (1919). It has been held that the relationship of principal and agent may exist between a licensed pilot and an unlicensed person for whom he operates an airplane, although the latter is prohibited by statute from exercising any control over the manner of operation. *United Air Lines Services, Ltd.*, v. Sampson, 30 C. A. (2d) 135, 86 P. (2d) 366 (1938).


6. 126 F. (2d) 129 (C. C. A. 7th, 1942).

7. 147 F. (2d) 727 (C. C. A. 7th, 1945).
all orchestras to use what was known as the "Form B" contract. This form provided that the establishment should have complete control of services of orchestra members, and that the proprietor of the establishment authorized the leader on his behalf to replace employees who failed to perform services provided for under the contract.

In *Birmingham v. Bartels* it was held that the provision in "Form B" relative to control was conclusive of the existence of an employer-employee relationship between the establishment and the leader. Previous decisions had been to the effect that an express provision that the relationship of employer and employee shall or shall not exist is not conclusive. However, there would appear to be some justification for distinguishing between the effect of the two provisions. Specific provisions relative to factors characteristic of the employer-employee relationship would be more clearly indicative of the intent of the parties than a more general designation as to the relationship.

Although decisions of state courts are referred to, no specific mention is made in the *Williams, Spillson* or *Bartels* case of the distinction made by state courts between name and non-name bands. It would appear on the basis of the cases in point that the federal courts do not recognize the validity of this distinction. Indeed, there would seem to be no necessity for such a classification if a contractual provision as to right of control is determinative of the employer-employee relationship.

However, the propriety of applying the concept of the conclusiveness of right of control, which developed in cases concerned with imposition of tort liability, to the determination of liability under the Social Security Act may be seriously questioned. It is conceivable that there may be some justification for the proposition that the one possessing a right of control over a servant should exercise that control in such a manner as to prevent the servant from committing torts against third persons when acting within the scope of his employment. However, an excise tax on employment is normally paid out of the profits of the business in connection with which the employment occurs. The question is whose business is it? In determining the answer to that question it would seem appropriate to take into consideration all of the factors characteristic of a business enterprise, rather than to limit the inquiry to the ascertainment of the existence or non-existence of a right of control.

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