

Title: The banker's security under a Letter of Credit Transaction

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Introduction

In modern banking practice, the banker's security against a loan or a credit includes a wide spectrum of different kinds of security such as shares, stocks, bonds, life policies, promissory notes, bills of exchange, a guarantee, a debenture, pledge or mortgage and documents of title to the goods. The main object of a security is to safeguard the banker against the debtor's bankruptcy or where the debtor is a body corporate against the contingency of its liquidation. (1)

The most available security for a banker engaged in an export-trade transaction is the goods. Against opening a letter of credit, the banker acquires a documentary pledge over the documents of title to the goods. Thus the banker's primary remedy where the account party defaults in reimbursing him is to dispose of the goods and apply the proceeds in satisfaction of the advances made to the account party. The practical method utilized by bankers to protect advances made to finance a credit is by acquiring title to the goods subject of the underlying transaction. The significance of title for the banker rests in the right which it confers on him against rival creditors rather than against the account party.

A secured banker is entitled to dispose of the goods and recompense himself out of the proceeds without the need of a lawsuit. Where the account party wrongfully disposes of the goods, the banker is entitled to trace the property or the proceeds into the hands of a third party. Again, if the account party has gone into bankruptcy, the banker as a secured creditor is entitled to claim their release, or alternatively a first claim on the proceeds of the property subject of his security. As to any unpaid balance, he shares pro rata with unsecured creditors in the balance of the bankrupt account party's assets. Still the main risk is that a banker who undertakes to finance a documentary credit may find that the value of the goods out of the proceeds of which he can satisfy his claim is substantially less than the advance made to the account party. The account party depends upon disposal of the goods to provide him with a sum sufficient to reimburse the issuing banker. To enable the account party to resell the goods, bankers utilize the trust receipt device with a view to allowing the account party to have temporary possession of the documents of title to the goods.

The main task of this article is to discuss the security devices which have been innovated in the course of commercial banking usage to serve the needs of business convenience. In carrying out that task, I have discerned that the English case law is much more helpful in tracing the development of the security devices presently utilized by bankers in connection with documentary credits. In the U.S.A., article 9 has abolished separate devices such as the trust receipt, and the letter of hypothecation. Article 9 of the U.C.C stands for the entire corpus of personal property security law. In the Sudan and Kingdom

of Saudi Arabia the basic concepts of such devices are not indigenous though the difference lies in the nomenclature given to these legal concepts.

However, in order to understand and evaluate the law relating to the banker's security against the goods, one must unravel an intricate tangle of cases. Considerable support can be mustered for the view that the law is something less than uniform in this area of the law. On the cases alone, it would require more than eagle-eyed observer to indicate a uniform trend. As accurately noted in Paget's Law of Banking "The authorities are confusing: it is difficult to draw out of them any principles of general application and dangerous to rely upon them as support for the effectiveness of any document not strictly on all fours with that considered in the particular case".(2) In banker's security, complex priority problems not amenable to happy solution may arise, when third parties are involved such as creditors of the account party, bona fide purchasers and the bankrupt account party trustee in bankruptcy. This article will consider the topics involved under the following headings:

I. Forms of documents of title

II. The security devices utilized by bankers

(a) The pledge

(i) The position under Islamic law

(ii) The position in the U.S.A.

(b) The letter of hypothecation

(c) The trust receipt

III. The position of the banker vis-à-vis third parties.

I. Forms of documents of title

Documents of title utilized in international sale transactions are of two kinds. One type of document gives title to the goods indicated in them. The other type of document serves as a receipt showing that particular goods have been placed in a warehouse. The bill of lading whether it bears the title of a marine bill of lading or a combined transport bill of lading, is an internationally recognized document of title to the goods. However, warehouse receipts issued by certain bodies are conferred a similar status of documents of title. (3) A dock warrant or a warehouse keeper's warrant is a document issued by an authorized warehouse keeper. It serves two functions; it is a contract of storage; and a document of title. Endorsement and delivery of the document is sufficient to pass title to the goods. On the other hand, non-transferable warehouse keepers' receipts or certificates are documents which merely show the location where the goods have been lodged. The word non-negotiable or not-transferable appears on the face of a warehouse keeper's

certificate. Likewise, delivery orders are not deemed documents of title to the goods. Accordingly, if the banker releases a bill of lading to the order of the account party for the purpose of warehousing the goods, he should ask the latter to furnish him in lieu of the bill of lading a warehouse keeper's warrant indicating that the goods are deliverable either to the banker or to his assigns by endorsement.(4)

The distinction between a document of title to the goods and other documents not representing title to the goods is of crucial importance to the banker's security against the account party's insolvency. Possession of a delivery order or a non-transferable warehouse keeper's certificate is of no avail to the banker against the claim of the trustee in bankruptcy. On the other hand, the banker's security interest is perfected by his possession of the documents of title to the goods. In *Charles Barber and others v. William Meyerstein*, (5) Lord Hatherley was reported to have said, "Now if anything could be supposed to be settled in Mercantile Law, I apprehend it would be this, that when goods are at sea, the parting with the bill of lading, be it one bill out of a set of three, or be it one bill alone, is parting with ownership of the goods". (6)

Again in *Official Assignee of Madras v. Mercantile Bank of India Ltd.*, (7) Lord Wright said "But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading."(8) Similarly, in *William McEwan and Sons v. James Archibald Smith*, (9) Lord Campbell said "If a bill of lading is given, and that is indorsed for valuable consideration, that would take away the right of the vendor to prevent the delivery of the goods, but that is not so with a delivery order. It would be a gratuitous dictum to say that, according to the usage of trade or the law of the land, such could be the effect of a delivery order". (10)

In summary, then, the kind of document a banker is interested to obtain as security against advances, is the type of document utilized in the ordinary course of business as evidencing possession or control of the goods, or authorizing that possession of the goods shall be effected by endorsement or by delivery of such document.

II. Security devices utilized by bankers

On principle, a banker who has made advances to a customer has a general lien by operation of law over all securities furnished by that customer to him. (11) In the case of documentary credit transactions, the banker's lien on the document is a condition of payment under the credit. It bestows on him not only the right to hold the documents till being reimbursed by the applicant for the credit, but also a right to dispose of the goods if the documents of title to the goods were forwarded to the order of the banker as consignee, or have been endorsed in blank by the applicant for the credit as consignee. (12). However, bankers with a view to maintaining their charge over the goods utilize three security devices vis., the pledge, the letter of hypothecation and the trust receipt.

(a) **The Pledge**

One of the devices by means of which the banker protects himself against the risk incurred is the pledge which is the oldest chattel security device. Pledge arises when the goods or documents of title to the goods or bearer securities are delivered by the debtor pledgor to the creditor pledgee to be held as security for satisfying a debt or for the discharge of any other obligation, on the understanding that the property shall be restored to the pledgor the moment the debt or other obligation has been discharged. If a definite time of payment has been determined, the pledgee has an implied power to enforce his right by sale upon default; however, if there is no determined time for payment, the pledgee may demand satisfaction of the debt, and in default thereof, may enforce the pledge by sale, after notifying the pledgor of his intention to sell.

It is submitted that pledge is a form of bailment which can not be created unless possession of the subject matter of the pledge, either actual or constructive has been delivered to the pledgee. It gives a special property in the goods though the general property in the good remains in the pledgor. However, it provides the pledgee with a lien on the property for payment of the debt.(13). Constructive possession could be effected by delivery of an indorsed bill of lading or handing over the key to the store. However, pledge of documents which are not considered as documents of title such as a delivery order or a non-transferable warehouse keeper's certificate does not give the pledgee a special property in the goods. It is merely considered as pledge of the ipsa corpus of the documents which must be perfected by a delivery warrant operating as an attornment to the pledgee.(14) Similarly, handing over the key to the store operates as an acknowledgement to the effect that the nature of the pledgor's possession as owner is changed from possession as owner to possession as bailee for the pledgee. (15)

The same position appears to hold in Scotland. In *West Lothian Oil Company v Mair*,(15a) at the date of winding up of the company, empty oil barrels were lying at the company's works enclosed separately from other barrels by a fence, the key of which was held by Mair who claimed them as his property by virtue of certain alleged sales by the company to him. It was held that there had been delivery and the security was completed. Lord Young said "Now, I am of opinion, upon the evidence, that the setting of the goods apart in the yard by themselves, which was locked up, and the key delivered to the purchaser upon payment of the price, amounted to delivery at the Common Law."(15b)

In *Official Assignee of Madras v. Mercantile Bank of India Ltd*,(16) Lord Wright was reported to have said "if however, the goods were in the custody of a third person who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him, there was thus a change of possession and a constructive delivery".(17) Again in *City Distillery v. Doherty*,(18) Lord Parker said "Where a warehouse keeper issues his warrant for goods, he has already been constituted a bailee of them by deposit and receipt of the goods

themselves. The warrant does not make him bailee, it enables the bailor to make other parties bailors".(19) In Scotland, mere transfer of the bill of lading carries the real right in the goods as distinguished from a mere personal right (jus ad rem) which occurs in the event a delivery order or a warrant is issued or transferred without intimation to the custodian of the goods.(20) The custodian must be an independent warehouseman not the servant of the owner of the goods.(21) Again, the goods must be specifically ascertained at the time the delivery order is made. In *Hayman v McLintock*, (22) a flour merchant sold to a purchaser a particular number of sacks of flour. In implement of the sale he gave to the purchaser delivery orders addressed to the storekeeper which orders were intimated to the storekeeper who gave the purchaser transfer notes acknowledging that he had effected transfer of the particular number of sacks of flour to their account and subject to their instructions. However, the individual sacks of flour were not specifically ascertained. Upon sequestration of the flour merchant's estate, his trustee claimed the whole flour in the store. It was held that as the goods were not separately marked or identified, no property in them had passed to the purchaser. Lord McLaren said "As the sacks of flour were neither numbered, or marked, nor put into receptacles, nor ascertained in such way as to distinguish them from other flour in the warehouse, no effectual right in security was constituted by the delivery order."(23)

The question naturally arises as to whether redelivery of the goods by a banker pledgee to a debtor pledgor invalidates the pledge. The Scottish Court of Session in *William Todd & Son v. Merchant Banking Company*, (24) had the issue placed squarely before it. In that case a Newcastle merchant working under the style of Messrs. Bryant, Ridley & Company, purchased from a Spanish merchant a consignment of esparto grass. They arranged with the Merchant Banking Company of London to accept the Spanish merchant's drafts for the cost against the bill of lading. The bill of lading which bore the goods was forwarded to the M.B.C., blank indorsed along with drafts for the amount of the cargo, which were accepted by the bank. B.R. & Co., sold portion of the cargo of which the M.B.C. agreed to give a delivery order on receipt of an undertaking from B.R. & Co. that they would pay the price to the bank, to which arrangement B.R. & Co. agreed. Afterwards, M.B.C. duly notified the ship-brokers in charge of the goods to hold the goods subject to their order. They handed over the bill of lading to the ship-brokers who acknowledged receipt of the bill of lading and agreed to hold the cargo subject to the order of M.B.C.

B.R. & Co., then proceeded to dispose of the cargo to their customers in Scotland against a written undertaking by each purchaser to remit the contract price direct to M.B.C., on receipt of which undertaking the bank authorized the ship-brokers to deliver the necessary quantity of esparto. One of the first sales was made to William Todd & Sons without mention of the M.B.C. except a Notandum to the effect that "draft to be remitted to M.B.C., London". However B.R. & Co.'s clerk arranged that Messrs. Todd & Son should remit the amount to M.B.C. and should provide the bank with an undertaking to that effect, which they did. On receipt of the undertaking the bank authorized the ship-brokers to give delivery which they did. A second sale was made between the parties, but the condition as to payment was not made a special term of the bargain. The bankers allowed delivery on the undertaking of B.R. & Co. that they would obtain from William Todd & Sons an obligation to pay to them which B.R. & Co. failed to do prior to

arrestment of the second lot. It was held that the arresting creditor must be preferred to the bankers as the goods were the property of the debtor. The bankers being merely security holders which security they had lost by allowing delivery to take place.

The Court speaking through Lord President John Inglis said, "They were selling on their own account and for their behoof, although no doubt, perhaps, they were selling for behoof of the creditors, the bank who had advanced money on the cargo. That was the case when sales were made to Mr. Todd, and the others, and the bank granted delivery orders, and in doing so they have just parted with so much of the security".(25) In this case, Lord Shand was reported to have said "There was a letter accompanying the contract note, in which Messrs. Bryant, Ridley & Company no doubt said 'you will send a letter of obligation to Merchant Banking Company, just as you did before' and if Todd & Son had complied with that request the arrestment would have been futile."(26) The Court has carefully articulated the scope of its burden of inquiry. It has well-taken into account the legitimate concerns of the bankers as creditors and that B.R. & Co. were selling for their behalf, however the Court was caught by the deeply entrenched principle in the law of Scotland that without possession or delivery neither contract or implication of law can create effectual rights in security. In *Clark & S.V. West Calder Oil Co. Ltd.*,(27) Lord Shand said "There is no principle more deeply rooted in the law than this, that in order to create a good security over subjects delivery must be given. If possession is retained no effectual security can be granted."(28)

In this case several considerations argue in favour of the bankers though the court seized on the argument which hinged on the bankers parting with their security without obtaining in lieu thereof any security over the price. It may be argued that the bankers earned the right to reimbursement when they had honoured the Spanish seller's draft. The banker's security interest was attached by actually taking possession of the bill of lading which they forwarded to the ship-brokers asking them to hold the goods to their order. The ship-brokers attorned to the bankers request and on the same day informed B.R. & Co. that "the B/L came to hand from the Merchant Bank with instructions to hold the grass to their order". (29) The discussion thus far suggests that by delivery of the bill of lading to the bankers and the arrangement afterwards made with the ship-brokers the goods never ceased to be the property of the bankers. Again, B.R. & Co. had incurred a secured obligation vis a vis the bankers before arrestment being made against them.

Another compelling point in favour of the bank was that the main purpose of allowing delivery was to enable B.R. & Co. to liquidate the loan out of the proceeds of the sale of the goods. B.R. & Co. could not reimburse the bank without resale of the goods. As a matter of fact, the bankers allowed delivery to the purchaser Todd and not the debtor B.R. & Co. On the other hand, the bankers were not commodity traders involved in selling and buying goods. Perhaps, another major contention in favour of the bankers could be that as the bankers had given value against the goods, they were entitled to a security interest not only in the goods and the documents, but also in any contract right emanating from the transaction.

Finally and perhaps most significantly, the contract note was accompanied by a

letter in which B.R. & Co. requested Messrs. Todd & Son to remit the proceeds to the bankers. Throughout the transaction Todd knew that payment was to be made to the bankers. These facts could support the argument that such arrangement amounted to an assignment in favour of the bankers, on the ground that consent of the debtor Todd could not be taken as a condition for a valid assignment. On the other hand it was unfair to penalize the bankers for failure of Todd to inform them.

Similar facts arose in *North Western Bank v. Poynter*(30) which was a Scottish Appeal, where the facts are as follows: Merchants under the style Messrs. Page & Co. contracted to sell to Messrs. Cross & Co. several hundred tons of phosphate which were to be shipped between certain dates. Before arrival of the goods Page & Co. desired upon the bill of lading to obtain an advance. The bankers agreed to make an advance on the security of the merchandise which Page & Co. agreed to pledge to the bankers and warehouse it in their name. On arrival of the goods the bankers handed the bill of lading to Messrs. Page & Co. on terms of an undertaking by which the merchants were constituted as agents for the bank. The cargo was sold and Page & Co. received the proceeds, but before payment to the bank, they became insolvent. In the Court of Session, it was ruled that delivery of the goods by a pledgee to a pledgor as his agent puts an end to the pledge though delivery may be parted with to a stranger. The House of Lords reversed the court's ruling.

Lord Herschell was reported to have said "I confess that, with all respect, as a matter of principle I am unable to see why such rule should exist. It does not seem to me to be a reasonable rule. If the rule exists, it is one which runs counter to every-day commercial practice and, I am satisfied, in every day commercial understanding of business transactions. Nevertheless, it may be that it is an established rule".(31) The decision of the Court of Session might have been different if Messrs. Page & Co. became insolvent while the goods were in the warehouse on the ground that constructive delivery has already been made to the banker. Under Scots Law, constructive delivery arises when goods assigned in security are in a store and delivery of them is attempted by a delivery order addressed by the pledgor/owner of the goods, to an independent storekeeper or by endorsement to the pledge of the storekeeper's warrant, such constructive delivery is effectual to transfer a real right in the goods, provided that intimation of the assignation is made to the warehouseman. (32)

It may be argued that upon constructive delivery being made by passing over the bill of lading to the bankers as security, the prior owner-pledgor, has ceased to be the owner of the goods. In considering whether the banker as pledgee has parted with his pledge, the issue on this point should be whether the constructive delivery made has conferred on the banker a real right or a mere personal right in the goods? Under Scots Law, it is submitted that constructive delivery confers on the pledgee a real right as distinguished from a mere personal right in the goods.(33) As the goods were specifically ascertained and identified when constructive delivery took place,(34) then, the prior pledgor has ceased to be the legal owner of the goods. From this perspective, it seems to me that, on principle, the soundness of the Court of Session's argument was found doubtful by the House of Lords.

Again much more persuasive points can be discerned in favour of the banker. The banker redelivered the goods to the pledgor, Page & Co. on terms of an express written undertaking to the effect that Page & Co. were constituted as agents for the bank. In contrast, in Todd's case the goods were delivered on terms, which might give rise to an implied agency. Again, at the time of delivery to Messrs. Cross & Co., the right of the banker in the security was already perfected. As the banker's security interest in the proceeds was antecedent to the creditor of Page, the latter should not be entitled to arrest the proceeds.

In the Page's case, it was argued at the Bar that the sale could not be a sale of the banker's goods to Cross & Co. as the contract with Cross & Co. was made prior to the date the security interest attached in favour of the banker. However, Lord Herschell responded to this argument by saying "But, my Lords, I apprehend that if an owner of goods (for this purpose the case is precisely the same as if the bank had been absolute owners) places his goods for sale in the hands of an agent, and if that agent, for the purpose of implementing an open contract which he has, delivers those goods to the person who has made the contract with him in such a way that upon delivery the sale becomes complete and the obligation to pay the price arises, that is just as much as a sale of his principal's goods to that person, and just as much makes the purchaser liable to his principal and liable to be sued by his principal, as if the agent had not contracted before the goods were delivered, and has afterwards made the only contract that was ever made".(35)

In summary, the banker as pledgee of the documents of title to the goods may redeliver them to the debtor-pledgor for a temporary particular purpose without losing his security over the goods. However, in view of the present different approach of Scots Law to rights in security over moveable property, the rule is of doubtful application in Scotland, unless the banker effects some overt act which makes other parties such as rival potential claimants aware of a preference being conferred on the banker as a secured creditor. Due to the unsatisfactory position under Scots Law as to security over moveable property against loans and credit transactions, the Scottish Law Commission has been asked to examine the present position of the law. In light of article 9 of the Uniform Commercial Code of the U.S.A., and the recommendations of the Crowther Committee,(36) the said Commission has recommended a new system of security over moveables based upon establishment of filing system for the recording of security interests.(37) In effect, delivery of the security subjects to the creditor would not be required.

(i) The position under the Islamic Law

The idea of pledge according to the predominant view under Islamic Law is almost similar to the position in modern laws. The three elements of pledge are recognized viz., delivery of possession of the pledged property to the pledgee; retention of title in the pledgor; and lien on the property by the pledgee for payment of the debt. However, Hanfis and Shafis have taken the view that delivery of possession is not a condition for a valid

pledge, yet in the absence of possession the pledge shall neither bind the pledgor nor impair the right of third party claimants. (38) On the other hand Malikis have expressed the view that delivery of possession is neither a condition of validity nor a requisite to bind the pledgor. They have contended that pledge binds the pledgor at the moment he agrees with the pledgee to effect a pledge. Delivery of possession is a condition for completion of the contract of pledge. Yet, a pledgee without possession is not in a position to safeguard his security against third party rival claimants. (39) A similar view has been expressed by Shi'ite Immate Jurisprudence. They have contended that delivery of possession is not a condition for validity of a pledge. The contract of pledge is deemed to be concluded when the two parties agree to create a pledge. Once the contract of pledge is concluded, the pledgee is entitled to claim delivery of possession from the pledgor who is not entitled to retrocession. (40)

Article 767(3) of the Sudanese Civil Transaction Act adopts the view that delivery of possession to the pledge is a condition for a completed binding contract. Again, the predominant view under Islamic law is that the pledgor and the pledgee may agree to lodge the security with a trustworthy third party. (41) In modern terms such a third party may be a warehouse keeper. This view is adopted by article 768(1) of the Sudanese Civil Transaction Act, 1984.

The question now is, can the pledgee redeliver the security to the pledgor as his agent without losing his security or impairing validity of the pledge? Hanfis and Shafis have taken the view that the pledgee after perfection of the pledge may release the security to the pledgor as his agent without losing his security over the pledged property. (42) Article 779(2) of Sudanese Civil Transaction Act 1984 adopts this view. It provides that the pledgee may release the pledged property to the pledgor to sell on terms that the pledgor is constituted as agent for the pledgee. In practice, bankers in both the Sudan and Kingdom of Saudi Arabia are in the habit of releasing documents of title to their customers to enable them to liquidate advances out of the proceeds of sale. It appears then, that this practice does not contravene the concept of pledge under Islamic Law.

(ii) The position in the U.S.A.

In the U.S.A. the different types of secured transactions are governed by Article 9 of the Uniform Commercial Code. In the words of one commentator, Article 9 has "abolished separate devices such as the trust receipt and the chattel mortgage, and merged the very different rules found in such divergent sources as the Common Law pledge and the incomprehensible factor's lien acts". (43) Again, Professor Grant Gilmore said "The article applies to (any transaction regardless of its form) intended to create a security interest in personal property. The term security interest is defined in (Section 1-201 (37) to mean 'an interest in personal property which secures payment on performance of an obligation. The essential purpose of Article 9 was to bring an end to the long period of fragmentation of personal property security law". (44)

This signifies that pledge or any other security device utilized by bankers comes under the umbrella of a security interest, insofar as a stated factual arrangement

constitutes an interest in property. Section 9-120(5) affords protection to a banker having a security interest in a document of title such as a bill of lading or a transferable warehouse keeper's certificate. A security interest of this kind is deemed to be perfected without filing for a period of 21 days from the time it attaches. (45) Accordingly, the banker is entitled without prejudice to his security right in the goods or the documents of title representing the goods to release them to the account party-debtor for the same period of 21 days in order to dispose of the goods. The banker can continue its perfected security interest to the documents by effecting a filing during the 21 days period. Filing perfects the security interest for five years from the filing date (46) which period is subject to renewal. (47)

However, if the account party upon release of the documents sells the goods to a purchaser in the ordinary course of business, the purchaser acquires the goods free from the banker's security in the documents.(48) The banker's security then turns to be a security interest in the proceeds of the sale to the bona fide purchaser.(49) Such a security interest prevails for ten days, unless the banker perfects a security interest as to the proceeds of the sale of the goods to the bona fide purchaser.(50) As a practical matter, however, the same result could be obtained under the U.C.C. viz., the banker may temporarily release the documents without impairing his security interest in the goods.

(b) **The letter of hypothecation**

In essence hypothecation is a legal arrangement whereby merchandise may be made available as security for a loan without transferring property in the goods or possession to the financier. The original notion of the hypothec form was the security of a lien on a res to cover a contingent liability. It was used whenever the existence of the claim is not certain such as liability of a debtor to a surety for a possible default. As default is uncertain, in such instances, it was thought enough assurance for the creditor to have the res legally identified in advance to cover default while remaining in the obligor's hands. (51) It is defined in the Encyclopedic Dictionary of Roman Law as "a form of real security. The thing pledged as a hypotheca was not handed over to the creditor, but remained with the debtor who might use it but could not alienate it."(52) It was described by Holland as a mode of creating security "by which not merely the ownership of the thing, but its possession also remains with the debtor. This is called by the Roman lawyers and their modern followers hypotheca". (53) It is defined by Gloag & Irvine as "a real right in security in favour of a creditor over subjects which are allowed to remain in the possession of the debtor". (54)

Professor J.M. Holden accurately observed that the letter of hypothecation as used by modern bankers is not hypothecation in the strict sense of the word. (55) Again P.J.M. Fidler states that "hypothecation is in fact a misnomer, since strictly speaking a hypothecation is a transaction whereby goods may be made available as security for a debt without transfer of either property or the possession to the lender. What is usually known as letter of hypothecation is in fact a pledge".(56) Likewise, Gutteridge and Megrah have noted that "the use of the term 'hypothecation' is somewhat of an anomaly, as the Law of England does not admit, as a general rule, of anything corresponding to the

hypothec of Roman Law".(57)

While the letter of hypothecation is conceptually different from a letter of trust, nonetheless they are sometimes used interchangeably by bankers. The seminal case which shows this type of usage is *Reg v. Townshend*, (58) where a fruit broker applied to his banker for an advance as against certain goods consigned to him which were then at sea. He deposited with the banker the bill of lading and signed a document named as a letter of hypothecation by which he undertook to hold the goods in trust for the bankers and to hand over to them the proceeds of sale of the goods. The form of the hypothecation note was in the following tenor: "In consideration of your advancing the sum of fifteen hundred pounds we hereby undertake to hold in trust for you the underspecified produce (now warehoused at foot in our name and to our sole order, and subject to no charge except warehouse rent thereon - and to hand to you the proceeds as and when received, to the amount of the advance, holding ourselves responsible for any deficiency. We further undertake, on request, to transfer the produce to you or as you shall direct, in which event it is agreed that you shall have absolute power of sale. The property is insured against all fire risks in the Manchester Fire Insurance Company, and we undertake to keep it fully covered, to hold the policy on your account, and, in the event of loss, to collect the Insurance money, and to pay the same to you as and when received. The produce is not sold, and we expect to receive the proceeds within about from this date". (59)

On arrival of the goods the bankers redelivered to the fruit broker the documents including the bill of lading in order to obtain delivery of the goods; however the fruit broker dealt with the goods and did not hand over the proceeds to the bank. It was held by Day J., that the hypothecation note contained a declaration of an express trust in favour of the bankers as to the proceeds of sale of the goods. It was also held that such a hypothecation note was a bill of sale within the definition in the Acts of 1878, and 1882 as being a declaration of trust without transfer, and was required to comply with provisions of those Acts as to form and registration. However, the hypothecation was deemed to come within the exceptions as the goods were at sea at the time of its execution.

However, in *Re Slee; Ex parte North Western Bank* (60) where a wool broker gave a similar hypothecation note against advances on wool, Sir J. Bacon, C.J. said "the Bills of Sales Act relates to totally different transactions, makes different rights, imposes different duties, and it would be a perversion of the words, as it would be a total departure from the meaning, to say that such a transaction of advances and hypothecation amounted to a bill of sale". (61)

On principle, however, a letter of hypothecation or a letter of lien executed by a banker's customer confers on the banker a contractual right in the nature of a charge on the goods, insofar, as the banker has no actual or constructive possession of the goods. In contrast a letter of trust or a trust receipt, as will be examined in part (c) is a memorandum executed by the creditor-banker attached to the documents of title when returned to the customer to enable him to deal with the goods. It confers on the banker a

proprietary interest in the goods, insofar, as the Memorandum constitutes the customer as the banker's agent for the purpose of realizing the banker's security. It appears then, that the hypothecation note utilized in the above discussed cases was not a hypothecation in the strict sense of the word.

In *Re Hamilton Young & Co.; Ex P. Carter*,⁽⁶²⁾ the National Bank of India used to make periodical advances to a Mercantile firm in Manchester against a letter of lien. The tenor of the letter of lien was as follows: "We beg to advise having drawn a cheque on you for -, which amount please place in the debit of our loan account No. 2, as a loan on the security of goods in the course of preparation for shipment to the East. As security for this advance we hold on your account and under lien to you the undermentioned goods in the hands of as per their receipt enclosed. These goods when ready will be shipped to Calcutta and the bills of lading duly endorsed will be handed to you, and we then undertake to repay the above advance either in cash or from the proceeds of our drafts ... to be negotiated by you and secured by the shipping documents representing the above-mentioned goods".

Upon bankruptcy of the firm, the trustee in bankruptcy claimed the goods on the ground that the letters of lien were bills of sale and that they were void for lack of registration. In the Court of first instance Bigham J., held that "the goods were no doubt the goods of the bank in the sense that they held a charge on them".⁽⁶³⁾ The Court of Appeal dismissed the Appeal. Cozen-Hardy, L.J., writing for the Court said "The general policy of the Bills of Sale Act 1878 was not to interfere with ordinary business transaction. Insofar as they might be hit by the general words in the definition of "bill of sale" they are taken out by the express exception. I think the letter of lien, coupled with the deposit of the bleacher's receipt was a "document used in the ordinary course of business as proof of the control of the goods" within the meaning of S.4 of the Act of 1878. It enabled the bank to prevent the bankrupts by injunction from dealing with goods in any manner inconsistent with the arrangement contemplated by the parties - an arrangement which would result in the handing over of bills of lading when the goods were ready for shipment to Calcutta. It thus gave the bank a "control" of the goods".⁽⁶⁴⁾

It seems to me that the *Re Hamilton* was a classic example for showing the situation in which a proper letter of hypothecation note may be executed by a banker's customer. In that case the bank had only advanced money without actually or constructively taking possession of the bill of lading at any moment of the transaction. The firm only undertook to repay the advance either in cash or from the proceeds of their drafts. In such a case the letter of hypothecation confers on the banker a charge on the goods. In contrast, when the banker holds the document of title to the goods and then returns them to the customer for the purpose of liquidating the loan out of the proceeds, the object of the security document whether called a letter of hypothecation or a letter of trust is to maintain the original charge of the bank. Thus, if the customer becomes bankrupt the trustee in bankruptcy or a liquidator is not entitled to claim the goods as they are already impressed with a trust in favour of the banker.

However, in *Landenburge & Co. v. Goodwin Ferreira & Co. Ltd.*,⁽⁶⁵⁾ a different

result was reached. In that case, the defendant company carrying on business as merchants in Manchester consigned goods to customers in South America. In order to obtain advances from the plaintiffs who were bankers in London, wrote to them enclosing for their acceptance the company's drafts in connection with a particular shipment then being made. They also attached copies of the bills of lading and of the invoices relating thereto. Their letter expressly stated that they hypothecated the goods or the proceeds thereof in favour of the plaintiffs.

The plaintiffs having accepted the drafts, in pursuance of the above arrangement, and the defendant company having gone into liquidation, the plaintiffs claimed to be entitled to the proceeds of the goods as against the liquidator. The Court entered judgment in favour of the defendant company. Pickford J. was reported to have said "In the circumstances of this case it is difficult to see how any valid charge or mortgage on the goods could have been given to the plaintiffs, for there was no interest in the goods remaining in the defendant company (except the possible case of stoppage in transit). Therefore, the only thing remaining which could be the subject of the hypothecation was the proceeds of the goods. The proceeds of the goods are the invoice values which have to be paid by the customers. That constitutes a book debt owing by the customer to the defendant company". (66) He then proceeded "I therefore come to the conclusion that there were in this case charges on book debts of the defendant company, and as they were not registered they are void against the liquidator, and there must be judgment for the defendant company". (67)

This case shows the uncertainty surrounding the meaning of the letter of hypothecation or a letter of lien. In *Nippon Yusen Kaisha and Banjiban Serowgee*, (68) Lord Wright equated hypothecation with equitable lien in situations where the owner of a proprietary right in goods parts with both property and possession. (69)

It is respectfully submitted that there is no reason why the banker must lose his security interest in such a situation where he has given value against the proceeds of the goods. In the circumstance of the *Landenbuge* case (70) the banker should be accorded a security interest in the proceeds of the goods upon which he had relied and against which he has actually made an advance. Whether such security interest is termed an equitable lien or an equitable assignment the result should be reimbursement of the bank. Again it is difficult to distinguish the *Landenbuge* case from the *Re Hamilton* case (71) where the banker's security interest prevailed by virtue of a letter of lien over the interest of unsecured creditors.

It seems to me that it is much more in accord with the needs of international commerce to consider a letter of hypothecation as a *sui generis* device or a mercantile specialty which bestows on the banker a secured right against the proceeds of the goods subject to hypothecation. While the letter of hypothecation does not evince actual possession of the goods, nonetheless, possession or control over the goods may be deemed a constructive one in view of the hypothecation note.

From the preceding discussion it may seem that the letter of hypothecation has

one major risk to the banker. The account party debtor may unlawfully dispose of the goods to the detriment of the security interest of the banker, as the latter has neither possession nor title to the goods. Thus, a bona fide purchaser and a subsequent pledgee who obtains possession of the goods may take them free from any equity. It appears, then, that due to this basic disadvantage, bankers have developed the security of the trust receipt as will be examined in a moment.

(c) The letter of trust or trust receipt

The trust receipt arrangement arises in the situation where a banker who has already perfected an interest in the goods by having a bill of lading drawn to his order and a draft drawn upon the bank, agrees to hand over the shipping documents to his customer to enable him to liquidate the loan out of the proceeds of sale. It is in the form of a memorandum whereby the customer acknowledges that the banker shall remain the owner of the goods and the documents of title thereto till he pays the amount due to the bank.

One of the basic utilities of the trust receipt as accurately put by one commentator is "to provide lenders of certain types of short-term credit with a predominant security interest that will afford protection against most other types of creditors in cases of the debtors insolvency".(72) In the words of another commentator "the trust receipt arrangement permits the buyer to sell the goods in the ordinary course of business free from the banker's security interest, but requires the account party to repay the proceeds to the banker upon effecting sale".(73)

This arrangement is deemed to create a fiduciary relationship between the parties to the effect that the customer holds the goods in trust for the banker. Unlike the letter of hypothecation, the trust receipt maintains the banker's original charge or proprietary interest in the goods as title to the goods is not with the consignee.

The legal nature of the transaction has spawned much controversy. On the one hand, Henry Harfield expresses the opinion that "a trust receipt is structured on common law principles. A bank which had advanced money to finance a shipment of goods acquired proprietary interest in the goods, delivery of the property for a specific purpose created a fiduciary relationship for breach of which the court would normally impress the goods with trust".(74) Professor Davis suggests that "the relationship appears to be partly bailment, partly agency and partly trust. It is a bailment in the sense that the documents are actually placed in the hands of the customer. It constitutes an agency in the sense that the customer is authorized to realize the goods and receive the purchase price for them". (75)

On the other hand, Professor Williston espouses the view that "In substance the transaction is a mortgage and the only excuse for not requiring record can be that, on a balance of conveniences, it is more important to have a form of business necessary for commerce proceed unhampered than it is to protect such persons as may be deceived by the apparent ownership of those to whom bankers have entrusted the goods upon which

they hold security. This excuse is no better and no worse when the bill of lading runs directly to the banker's order than when it is merely endorsed to him".(76)

Gutteridge & Megrah express the view that the transaction is a pledge as "a letter of trust arises where a bank-pledgee having possession of documents of title or actual or constructive possession of the goods, received from or on behalf of the owner, delivers them to the owner or to a third party, who undertakes to hold them and, if sold, the proceeds, in trust for the bank. The object of the letter of trust is to enable the bank as pledgee to redeliver to the buyer, without forfeiting its rights as pledgee by parting with possession". (77)

This article contends that the better view is to regard the trust receipt as a mercantile specialty coined to meet particular commercial needs. It appears that in its inception, the trust receipt was first conceived from a banker's practical perspective. In support of this view one might argue that it is not a pledge as the banker in a trust receipt transaction acquires a proprietary title to the goods. However, in a proper pledge, the pledgee acquires only a special property in the goods leaving the general property in the pledgor. In contrast, in a proper trust receipt transaction, the banker is deemed to be the owner of the goods. Likewise, it is not a mortgage as mortgage is a conveyance of an interest in property subject to the mortgagor's right of redemption; it does not involve delivery of the chattel to the mortgagee. If we say that the banker has a lien similar to the lien theory of mortgage, then it is difficult to articulate an adequate rationale sufficient to fit the analysis with the actual facts of a trust receipt. In a trust receipt transaction, the banker acquires title to the goods by virtue of possession of the bill of lading indorsed to his order. Moreover, the banker pays or accepts the drafts drawn upon him by the consignor.

The trust receipt is not an equitable trust, in the strict sense of the word at the common law, as the banker "does not divest himself thereby of the property which he has in the goods".(78) The banker by virtue of the trust receipt memorandum remains the owner of the goods till reimbursement being made by the account party. The critical issue lies in the difficulty of legally categorizing the residue ownership which the account party retains. The banker's title derives from the documents of title to the goods and as such it prevails over the title derived from the goods. In *Mechanics & Traders BK v. Farmers & Mechanics Nat. BK.*, (79) an American case, the Court of Appeal said "The judge ruled at the trial that the plaintiff (the lending bank) was a mortgagee of the grain, but whether the plaintiff held it as a mortgagee, pledgee, or by any other title is not material, so long as the title or the right to the possession was vested in the plaintiff's. To all intents and purposes the plaintiff's property in the wheat was clearly established and beyond any question". (80)

Bankers sometimes arrange a letter of trust without taking possession of the goods or the documents of title thereto. Such an arrangement is in fact in the nature of a hypothecation note. A proper letter of trust arises where the banker takes actual or constructive possession of the documents of title to the goods. In *Mercantile Bank of India v. Chartered Bank of India, Australia & China* and others (81) the defendant bank

made advances to Messrs. Straus, merchants in India on the security of a document described as a trust receipt. The merchants, by virtue of the security document, undertook that the goods purchased with the money advanced shall be kept apart from their other goods and shall be held by them as agents and trustees for the bankers. They further undertook to deliver the goods to the banker if the advances were not repaid. The documents were not registered in accordance with the Indian Trust Act, 1882, which provides that trusts were not valid unless declared by a written and registered document. It was held in this case that the trust receipt document did not create a trust in favour of the bankers, but were equitable charges to secure repayment of the loan, and were therefore valid although unregistered.

In that case, Porter J., was reported to have said "Had the property been physically transferred to the defendant bank, either by storage in their godowns or by storage in a portion of Messrs. Straus's godowns, and the key handed over, there would in my view, have been created a legal charge which would have remained nonetheless legal though the property had later been transferred to Messrs. Straus for realization on the defendant's bank behalf". (82)

In *Re Davis Allester Ltd.*, (83) the court was asked to consider whether the bank as holder of a trust receipt was entitled to priority upon liquidation of the debtor-company for full amount of the proceeds of sale? In that case the above mentioned company borrowed money from Barclays Bank by way of overdrafts, and in consideration for the overdrafts deposited with the bank as security the bill of lading and other documents of title to the goods. When the time came to sell the goods, the bank released the bill of lading and the other documents for realization of the goods on terms stated in a letter of trust given by the company to the bank to the effect that the company undertook to hold the goods when received, and the proceeds when sold as the bank's trustee, and to remit to the bank the entire proceeds as realized. Upon the company's liquidation, the bank as against other creditors claimed priority on the proceeds of the goods.

Astbury J. said "In my judgment these letters of trust do not fall within the bills of sale definition at all. The pledge rights of the bank were complete on the deposit of the bills of lading and other documents of title. These letters of trust are mere records of trust transactions given by the bank and accepted by the company stating the terms on which the pledgors were authorized to realize the goods on the pledgee's behalf. The bank's pledge and its rights as pledgee do not arise under these documents at all, but under the original pledge. The bank as pledgee has a right to realize the goods in question from time to time, and it was more convenient to them, as is common practice through the country to allow realization to be made by experts, in this case by the pledgors. They were clearly entitled to do this by handing over the bills of lading and other documents of title for realization on their behalf without in any way affecting the pledge rights". (84)

In this case the court has carefully articulated the scope of the circumstances in which a proper trust receipt may be executed. The banker's security interest in the goods was supported by the fact that the bankers had already perfected a legal charge before execution of the letter of trust. In contrast, in *The Mercantile Bank of India v. Chartered*

Bank of India (85) where the banker has not perfected a previous pledge before the trust receipt arrangement, the court declined to accept the banker's contention to a legal charge over the goods or the proceeds of sale.

In the American case *Irby v. Cage Drew & Co.* (86) goods which had been released by bankers under a trust receipt arrangement were retaken from the receiver and sold by the bank for an amount less than the loan. The receiver contended that such retaking extinguished the obligation to pay the balance due on the ground that the trust receipt arrangement constituted a conditional sale. The court declined to accept the receiver's argument and ruled that the banker was entitled to claim the balance. Again, in the American case *Barret v. Bank of Manhattan Company* (87) the defendant bankers issued upon request of a New York Corporation a letter of credit in favour of an Indian trader of jute bags. The Corporation was in the habit of conducting business in New York and in the Philippines Islands. The letter of credit terms prescribed that shipment shall be made direct to the Philippines. On presentation of the beneficiary drafts along with the requisite shipping documents, the bank honoured the beneficiary's drafts. Afterwards, the bank released the shipping documents including the bill of lading to the Corporation against a trust receipt. The Corporation after taking delivery of the goods placed them in a warehouse, but failed to reimburse the bank after being notified thereof. The bank then obtained redelivery of the warehouse receipts for the goods in the Philippines, sold the goods and reimbursed itself. Thereafter, the Corporation went into bankruptcy. The trustee in bankruptcy contended that the bank was not entitled to receive the proceeds of the sale of the goods on the ground that selling of the goods by the bank, under the circumstances, constituted an unlawful preference. He also contended that the trust receipt transaction was invalid as the destination of the goods was the Philippine and not New York where the trust receipt transaction was executed.

The Court declined to accept any of the trustees in bankruptcy's contentions and ruled that the trust receipt transaction was valid irrespective of the physical situs of the goods. This case shows that a trust receipt vests the banker with a proprietary interest in the goods and imposes a personal obligation on the account party to remit the proceeds of sale to the bank. In *Midlands Bank Ltd. v. Eastcheap Dried Fruit Co. Ltd.*, (88) the court decided that in the event the account party defaults in remitting the proceeds, the banker may sue him for detention or conversion. However, there is one instance in which the banker proprietary interest in the goods ceases to exist. It occurs when the banker fails to honour his obligation as prescribed in the credit. It is accordingly submitted that the account party is entitled to dispose of the goods and apply the proceeds to honour the underlying sale transaction.

In *Sale Continuation Ltd. v. Austin Taylor and Co. Ltd.*, (89) the court was asked to consider whether, in pursuance of a trust receipt transaction, the account party is bound to remit the proceeds of sale to the banker irrespective of the latter failure to honour the draft drawn under the credit? In that case the defendants as agents for a company of timber exporters of Kuala Lumpur, Malaysia sold to a Belgian firm of timber importers certain hardwood to be shipped to Antwerp, Belgium. The contract having been entered into, the defendants approached the plaintiffs requesting them to open an irrevocable

credit in favour of the Malaysian Company. The plaintiff bank opened the credit accepted a draft drawn by the Malaysian Company and passed over the documents of title to the defendant in order to collect the purchase price from the buyers against a trust receipt in the following terms:- We hereby acknowledge the receipt of the documents of title in the goods (now in pledge to you as security for advances) to be held by us on the following terms and conditions. We undertake to hold the documents of title and the goods when received (and the proceeds thereof when sold) as trustees for you further to pay to you the proceeds of sale without deduction of any expenses immediately on receipt thereof."

The defendants forwarded the required documents to the buyers. However, before receiving payment creditors of the bank appointed a receiver who notified the defendant of his appointment. The plaintiff bank ceased to honour acceptances falling due and went into liquidation with assets insufficient to meet liabilities. Accordingly, the drafts were returned dishonoured to the Malaysian Company. The defendant remitted to the Malaysian Company the proceeds he received from the purchaser of the timber and sent to the bank's liquidator the dishonoured draft.

The liquidator raised a suit against the defendants claiming charges, commission, interest and damages for breach of the trust receipt transaction on the ground that these claims represented the consideration for opening the credit, and the bank had not evinced an intention not to honour drafts because payment was to be made by way of proof in the winding-up proceedings. The court rejected the liquidator's contentions. In an opinion written by Paul J., the court said "to honour means to pay in full, not merely to give the drawer a right to a claim for the payment of money or part of the money in a future date. The appointment of the receiver and manager and the commencement of the winding-up seems to me clearly to have given notice to the defendants and the holders of the draft that the plaintiffs would not be able to honour the drafts on the due date. These are mutual obligations under the contract and no obligation to provide funds to meet the drafts can arise if it is known in advance that the drafts are not going to be met".(90)

A literal interpretation of the trust receipt document shows that the defendants were bound to remit the proceeds of sale to the plaintiffs, irrespective of the fate of the drafts drawn under the credit. However, the court with a view to achieving equity as between the account party and the bank went behind the face of the document. Under this view, therefore, the banker's security interest in the goods is deemed to be perfected when he pays the drafts drawn under the credit.

As already noted the present Scottish Law approach to securities over movables is different from the English. The general rule in Scottish Law is that there can be no security over moveables without possession; redelivery by the pledgee to the pledgor invalidates the pledge insofar as the pledgor has regained possession of the goods which he had pledged.(91) The rule was used by the Scottish Courts to defeat some Romalpa clauses. In *Emerald Stainless Steel Ltd. v. South Side Distribution Ltd.*(92) goods were supplied by the sellers to purchasers under a condition of sale to the effect that title to the goods to be held by buyers as trustees for the sellers pending payment of all money owed.

The Court was asked to consider whether the condition is enforceable? Lord Ross said "I am of the opinion that it can not be construed merely as a clause of retention of title but that it is truly an attempt to create a security without possession in which the machinery of a trust under Scots Law is thought to be employed. So far as the reference is concerned I am quite satisfied that no valid trust under the Law of Scotland could be created by the language used in this condition."(93)

Again in *Clark Taylor & Co. Ltd. v. Quality Site Development (Edinburgh)*, (94) bricks were sold and delivered to the buyer. The sale contract contained a proviso by virtue of which the buyers agreed to hold the proceeds when sold as trustees for the sellers. The buyers went into receivership while the goods were in their possession. The question raised before the court was: whether an irrevocable trust thereby created? The court ruled that such an arrangement does not constitute a proper trust as the essential ingredients of trust were lacking; it denies the objectives of the law of bankruptcy and liquidation, and subjects a person creating more than one trust to criminal law. Similarly, in *Deutz Engines Ltd. v. Terex Ltd.*,(95) the same issue was placed squarely before the court where Lord Ross said "This provision appears to me to be seeking security without transfer of possession by the debtor which in certain special circumstances is not permitted by the Law of Scotland".(96)

It is submitted that the main purpose of a security is to protect the creditor against the debtor when the latter goes into receivership. However, the object of the Romalpa clause is to safeguard the unpaid seller of goods; insofar as the seller retains title to the goods he can reclaim the goods from the buyer's liquidator. The relevant and crucial questions are: whether a Romalpa clause i.e. retention of title clause, can be considered a security interest? Whether a Romalpa clause can be deemed a hypothec?

It appears that the Scottish courts incline to treat a Romalpa clause as a form of hypothec, namely a security without possession. In the *Emerald* case, Lord Ross said "I accept that the only recognized forms of legal hypothec, that is, where a person has security without possession, are those of a landlord, a superior, a solicitor and certain maritime hypothec. It is contrary to principle that a seller in Scotland should be able to obtain security in this way."(97) In support of the court's view one commentator argues that reservation of title should be treated "functionally as part of the overall problem of creditor competition and security devices."(98) On the other hand one commentator contends that "if this argument is good law, it leads to the startling result that the short life of Romalpa in Scotland is at an end". (99)

However, in a recent case *Armour and another (Respondents) v. Thyssen Edelstahlwerke A.S. (Appellants)*, (100) the House of Lords ruled that a Romalpa clause is neither a security interest nor a hypothec. In that case the appellant a German company sold and delivered on credit a particular quantity of steel strip to Carron Co. Ltd., a Scottish Company. The contract of sale contained a Romalpa clause. At the time the respondents were appointed as receivers the goods were lying in Carron's works. The House of Lords was asked to consider whether the steel strip remained the property of the appellants? The House of Lords ruled that there was no question of security in the

case as the appellants were not in a position of debtors because the essence of a right in security entails that the debtor retains the ultimate right to the goods, and there is no ground to deny the express intention of the parties that the property in the steel strip should not pass to Carron until the debt due by it had been satisfied. Lord Keith of Kinkel said "I am, however, unable to regard a provision reserving title to the seller until payment of all debts due to him by the buyer as amounting to the creation by the buyer of a right of security in favour of the seller. Such a provision does in a sense give the seller security for the unpaid debts of the buyer. But it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the buyer."(101)

It is interesting to note that in *Associated Alloys Pty Ltd V CAN 001452 106(in liq)* (101a) an Australian case the sale contract includes a Romalpa clause and a sub clause which provides that the seller is entitled to all the proceeds whether tangible and intangible. However, the High Court in construing the phrase "the proceeds" raised the question "whether the phrase the proceeds is limited merely to the funds comprised in the payments made by the third party to the buyer or whether it also includes the obligations in debt owed to the buyer by the third party, that is, the chose in action, or book debts of the buyer."(101b) The court decided that the phrase "the proceeds" relates only to the money received in the discharge of the debt and that it did not include the right to sue for payment of that debt. The High Court held that such a right falls within the ambit of a chose in action. It may be argued that insofar as the chosen in action is a traceable asset, then it seems appropriate to fall within the ambit of the definition assigned to the phrase "the proceeds". However, it appears to me that the Australian High Court adopted the conceptual approach of Lord Keith of Kinkel which does not regard the use of reservation of title clauses as amounting to creation by the buyer of a right of security in favour of the seller.

From the preceding discussion it may be seen that the hypothec and the trust receipt may not work in Scotland. At present the two devices are of doubtful application in view of the different Scottish approach to securities over movables. In the *Clark Taylor* case, the court said "In order to bring about the successful constitution of a trust recognized as such by our law, where the truster and the trustee are the same persons, there must be in existence an asset, be it corporeal or incorporeal or even a right relating to future acquirenda, there must be a dedication of the asset or right to defined trust purposes, there must be a beneficiary or beneficiaries with defined rights in the trust estate, and there must also be delivery of the trust deed or subject of the trust or a sufficient and satisfactory equivalent to delivery, so as to achieve irrevocable divestiture of the truster and investiture of the trustee in the trust estate."(102)

But the trust receipt device as utilized by bankers is not a trust in the strict sense of the word. No doubt it does not divest the banker from the property which he has in the goods. It is a device innovated by bankers to answer the needs of the business community. As the legal nature of the transaction created much controversy, this article suggests that it could be regarded as a mercantile specialty adapted to the needs of the banking and business community.

In practice validity of the trust receipt transaction is recognized in the Sudan and Saudi Arabia. However its validity may be derived from the general Islamic Law

principles. In Article II, the Cow, God ordains "if you be on a journey and can not find a scribe, then a pledge in hand (shall suffice). And if one of you entrusteth to another let him who is trusted deliver up that which is entrusted to him (according to the pact between them) and let him observe his duty to Allah his Lord". (103) Also the prophetic tradition says "He who has amana i.e. trusteeship) let him return it to the person who has entrusted him with it". (104)

The trust receipt transaction is in the nature of bailment under Islamic Law. Delivery in a bailment contract may be actual or constructive such as handing over of the documents of title to the goods. The object of bailment is a trust in the hands of the bailee. Accordingly, if the banker actually paid the beneficiary's drafts against the security of the documents of title to the goods, the account party is deemed to hold the goods on trust for the banker.

III. The position of the banker vis a vis third parties

The threshold question to be dealt with is this: can a customer-pledgor who deals dishonestly with the goods after having the documents of title released to him by the banker-pledgee against a trust receipt transfer title to a bona fide purchaser for value without notice? The court had this question before it for consideration in *Lloyd's Bank Ltd. v. Bank of America National Trust and Saving Association*. (105) In that case the plaintiffs advanced money or gave banking accommodation to S & Co. which carried on business in London and Bombay and received by way of security bills of lading and invoices relating to certain merchandise on terms set out in a letter of hypothecation and two agreements which conferred on the plaintiffs an immediate right of sale.

The plaintiffs handed to S & Co. in London the documents of title to the goods against signing trust receipts to enable them to dispose of the merchandise as trustees for the plaintiffs. S & Co. who encountered financial straits pledged with the defendants the documents of title to the goods released to them by the plaintiffs against the trust receipt. The defendants neither knew nor had any reasonable ground to suspect that the transactions were not regular in every respect. S & Co. having gone into liquidation, the plaintiffs instituted a suit against the defendants claiming value of the merchandise or return of the documents. The plaintiffs claim failed on the ground that they were owners of the goods represented by the documents of title within S.2 sub-s 1 of the Factor's Act, 1889 and as such were in a position to give instructions for, and assent to, a sale of the goods and that S & Co were mercantile agents within the sub-section in possession of the documents of title with the plaintiff's consent. On appeal (106) the decision of the court of first instance was affirmed.

However, on almost similar facts a different result was reached in *Mercantile Bank of India Ltd. and Central Bank of India*, (107) where both the appellants and the respondents were in the habit of advancing loans to merchants on the security of goods represented by railway receipts. The bankers used to take possession of the railway receipts by way of pledge in addition to promissory notes for the loan advanced and a letter of lien. The banker would then hand over the railway receipts to their own godown

keeper in order to obtain possession of the goods, and he in pursuance of the usual practice followed by the banker and in order to make use of the merchant's services, delivered the railway receipt back to them for the particular purpose of clearing the goods and storing them in the banker's godown.

The merchants, however, then fraudulently pledged the goods with the appellants, by depositing the same receipts with them to obtain a second loan. The appellants neither knew nor had any ground for suspecting any fraud from the part of the merchants as they had been in the habit of advancing loans to the merchants under arrangements similar to those made with the respondents. On a claim by the respondents against the appellants for damages for conversion, the Privy Council speaking through Lord Wright said "All that the respondents did was, it would seem, to deal with their own property, as pledgees, in the usual course of business which was well known to and had been followed both by the appellants and the respondents. It would seem, accordingly, that they were entitled to rely on the rule of law that no one could transfer a better title than he has possessed, save in the exceptional cases not here mentioned, such as sales in market overt or where there has been a transfer of property available on the ground of fraud but not yet avoided, or where the special provisions of the Factors Acts apply". (108)

The ruling of the court seems consistent with *Johnson v. Credit Lyonnais*(109) where a tobacco merchant sold a quantity of tobacco to the plaintiff who left the dock warrant with the merchant without taking any steps to enter a change in the books of the dock company. The merchant fraudulently pledged the same documents with the defendant bankers against an advance. The defendant obtained new warrants from the dock company. The Court of Appeal decided that the plaintiff was entitled to recover the proceeds of the sale of the tobacco from the defendant bankers. However, this case was decided in 1873. It is obvious that the argument of the court in *Mercantile Bank of India and Central Bank of India* (110) hinged upon non-application of the special provisions of the Factors Act of 1889 in India. The case also shows that once a banker acquires legal title to the goods or the documents of title to the goods, a third person who obtains the goods or title to the goods, take them subject to the bankers right even if he is a bona fide purchaser for value without notice, unless the person who disposed the goods is deemed to be a mercantile agent.

In addressing this issue under the Islamic Law I should note first that one of the fundamental Shari'a precepts is that "people have dominion over their properties". (111) This signifies that an owner is entitled without the need to a law suit to retake possession of his property or misappropriated proceeds as long as he can trace them into the hands of a fraudster or any other person. However, this article contents that a bona fide purchaser for value without notice is protected on the ground of the Shari'a maxim "damage can not be removed by a similar damage". (112) In support of this position, a rule or a custom which adapts to the needs of the commercial practice is endorsed by the Shari'a insofar as it does not contravene an enshrined Shari'a precept. Again commercial needs prevail over juridical niceties whenever the ultimate goal is the general good.

In the U.S.A., despite filing, a bona fide purchaser for value takes free of the

entruster's interest. (113) In *Blydenstein v. New York Sec. & Tr. Co.*, (114) a Scottish firm under the style of *Lipman & Co.*, having a branch house in New York delivered bills of lading relating to goods shipped to themselves in New York to the plaintiffs, London bankers, as a security against advances made to them. The bills of lading were redelivered to the firm in New York against a trust receipt on terms that the firm was obliged to account for the proceeds. The goods were warehoused in the name of the firm and a negotiable warehouse receipt was passed over to the defendants as a security for a loan. The firm then failed. The plaintiffs claimed from the defendants the proceeds of the goods delivered to the firm against the trust receipt transaction. The plaintiffs lost the claim on the ground that the defendants were in the position of bona fide purchasers for value without notice. The court also said "Assuming that the ownership of the goods passed from *Lipman & Co.* to the plaintiffs in London and did not pass back by the subsequent transaction, *Lipman & Co.* were indisputably factors instructed with the possession both of the documentary evidence of title and the goods".(115)

From the preceding discussion I may recapitulate my major findings as follows: Despite the fact that the banker has by operation of the law a general lien upon deposited securities by his customer, nonetheless the trust receipt does not afford the banker sufficient protection against dishonest dealings by his customer. The decisions of the cases already discussed are a stern warning to bankers in this regard. Again, in a situation where the seller negotiates in the underlying sale transaction a *Romalpa* clause to the effect that title to the goods shall not pass to the buyer till full payment of the purchase price is made, the banker who actually paid value against the goods may realize that his security over the documents of title to the goods is of no avail to him. (116)

The other practical and fundamental question is this: Does the purchaser of a bill of exchange drawn under a letter of credit acquire any specific charge upon the goods? The issue arose in *Brown Shipley & Co. v. Kough*(117) where a provision merchant in New York under the firm of *Archibald Baxter & Co.* consigned to the defendant *Kough*, a commission merchant, in London under the firm *Jones Brothers*, cargoes of lard and cheese by the ships *Greece* and *Britannic*, and on the same day drew a bill of exchange upon his firm in the following form:- sixty days after sight of this first of exchange (second and third unpaid) pay to the order of Messrs. *Brown Shipley & Co.*, two thousand five hundred pounds sterling, value received, and charge the same to account of cheese per *Britannic* and lard per *Greece*, as advised.

Messrs *Jones Brothers* (signed) *Archibald Baxter & Co.*
London.

On the same day, the said firm wrote to the defendant *Kough* a letter including bills of lading of lard and cheese. A day after *Baxter & Co.* drew another bill of exchange in the same tenor payable to the order of the plaintiffs including another bill of lading covering another consignment per *Britannic*. The plaintiffs purchased the two bills of exchange in New York and later presented them to the defendants for acceptance, but having heard in the meantime that the drawers had suspended payment they refused to accept them. Thereafter, *Baxter & Co.* were adjudicated bankrupt.

The goods on arrival in England were taken possession of and disposed of by the defendant Kough, who received the proceeds of sale and claimed to retain out of the net proceeds the balance due to him on his general account with Baxter & Co. The plaintiffs raised an action against the defendant claiming to be entitled to a charge on the proceeds of the cheese and lard in priority to all other persons. The Court speaking through Chitty J. said "I take it now to be settled law that a mere reference on the face of the bill to a cargo, showing that the bill is drawn (to use a term in mercantile language) as against the cargo, does not create any charge in favour of the bill holder as against the cargo or the proceeds of the cargo". (118)

The case shows that the direction on the face of the bill of exchange signifies a direction as to the account against which the bill is contemplated to be applied. Such a direction does not mean an assignment or a transfer of the specific appropriation from the drawer of the bill to the payee. In explaining this position of the law Fry, L.J. said "A bill of exchange is a negotiable instrument taken in the ordinary course of business free from the equities between the original parties to the transaction. An equitable assignment is not a negotiable instrument, and need not at all be free from the equities between the parties. If the same instrument creates the one and the other, does the equitable assignment travel to the hand of every holder of the bill of exchange? or if not, where does it stop?"(119)

Again in *Roby & Co. Perseverance Ironworks v. Ollier*(120) James L.J., was reported to have said "I am not prepared to say that merely because a bill of exchange purports to be drawn against a particular cargo, it carries a lien on that cargo into the hands of every holder of the bill".(121) Similarly, in *Phelps, Stokes & Co. v. Comber*(122) Mr. Justice Cotton said "I am by no means satisfied that merely saying that the bill is drawn against a certain cargo, even when that notice is sent to the person to whom the cargo is consigned will give a lien or a charge on the cargo".(123)

In *Ex Parte Dever in re Suse*(124) where merchants and bankers, carrying on business in London under the firm Suse & Sibeth, at the request of M, a merchant carrying on business in London and who was acting as an agent for a merchant carrying on business at Shanghai, China, granted to the latter a letter of credit. The letter of credit authorized the Shanghai merchant to draw on the bankers drafts to be accompanied by bills of lading and invoices of tea, purchased according to order of M. The letter of credit stipulated that these documents to be surrendered to them against their acceptances. The credit also prescribed that the documents shall be accepted on presentation by bona fide holders, at maturity. Bills were drawn by the Shanghai merchant under the credit against various parcels of tea consigned by him to M. for sale. In each instance, the bill indicated the parcel of tea against which it was drawn, and in each instance the bill of lading and other shipping documents were attached to the bill. The Shanghai merchant discounted the bills with a Chinese bank, and their agent in London in exchange for the acceptance delivered the bill of lading and other shipping documents to the bankers in London, in whose name the tea was then warehoused with a dock company. The bankers, whenever M. effected a sale of a portion of the tea, passed over to him warrants or delivery orders. The bankers used to debit M with the amount of the acceptances and

credit him the amount of proceeds of sale. The London bankers suspended payment and filed a liquidation petition before their acceptances matured.

It was held in this case that the bill-holders, under the letter of credit could not claim any specified appropriation of the teas to meet the acceptances. It was contended in this case that the teas were appropriated under the arrangement between the parties to meet the acceptances, and the proceeds of sale were subject to a trust in favour of the bill-holders. Baggallay L.J. was reported to have said "The bills of exchange were drawn expressly with reference to the letter of credit, and that letter contains a distinct statement that the bills of lading were to be surrendered to the acceptors on their accepting the bills of exchange. The acceptors acquired, under the letter of credit, a right to the bills of lading, and the holders of the bill of exchange can not be heard to assert any right to them as against the acceptors".(125)

It was also contended that insofar as the bill of lading was attached to the bill of exchange, the bill-holder has a lien on the goods. Cotton L.J. responded to this argument by saying "But the bill of lading is to be surrendered to the acceptor on his acceptance of the bill of exchange. That must mean that it is to be delivered up free from the lien of the bill-holder". (126) However, it was held that as the Shanghai merchant is the drawer of the bill and the remitter of the goods, he was entitled to have the proceeds of the teas in specie at the date of suspension applied in payment of the acceptances, but not the proceeds of the sale of the teas which were sold before the suspension.

On principle, in a letter of credit transaction no party other than the issuing or the confirming bank can acquire a lien or charge over the goods or the proceeds. However, there is one exception to this rule which arises when both the drawer of a bill of exchange and the acceptor become insolvent. In a double insolvency situation, the bill-holder is entitled to claim the security applied to meet the acceptances, though he is neither party nor privy to the letter of credit transaction. The rule was laid in the *Ex parte Waring*. (127) A clear enunciation of the rule was stated in *Ex parte Dever in Re Suse (2)* (128) where Cotton L.J. said "as I understand the principle of the rule is that the court finds in the hands of a bankrupt certain property, which has been remitted to him by another also became bankrupt to secure him against a liability which he has undertaken upon bills drawn on him by that person. The property can not be applied in paying the general creditors of the acceptor, because it was in his hands impressed with a trust, nor can it go to pay the general creditors of the drawer, because he was not entitled to have it back without meeting the acceptances. The court thereupon applies the property in such a way as will carry out as far as possible the equities between the two estates". (129)

The rationale behind the rule was also explained in *Banner v. Johnston*(130) where Lord Hatherley said "The one firm whose estate is being administered in bankruptcy may not be injured by another bankrupt firm getting the benefit of the securities, whilst at the same time it can not discharge the obligation it has incurred to pay the bills. But it is only in that case that the holders of bills or securities of this description have ever been held entitled to such an equity".(131) Again, in *Vaughan v. Halliday*,(132) Sir W.M. James L.J., said "The principle of the *ex parte Waring* applies

where there are equities to adjust between two parties who become insolvent, and the adjustment of which equities, by a piece of good luck, so far as third party is concerned, operates for the benefit of such third party".(133)

R.R. Pennington and A.H. Hudson suggest that in a situation of a double insolvency, the solution is to treat the security as terminated. They criticized the rule by saying "It is to say the least an oddity that the beneficiary should be given the benefit of a security agreed upon by the bank and the debtor which he has not stipulated for himself, over which scope he has no control, and in which he has no proprietary interest outside the bankruptcy of the parties".(134) These are weighty arguments, given the fact that as a result of the rule some of the holders of the acceptances will be paid in full, however, they are much less weighty in the context of its application where there are equities to settle between two insolvent estates. A compelling point in favour of the rule is that the rule is envisaged to apply when the remittances to cover the acceptances were already earmarked to meet particular acceptances, whilst the remittances in connection with other acceptances are not yet made.

Conclusion

The most immediate security for a banker engaged in an international sale transaction is the goods. By acquiring title to the goods against advances the banker is entitled to dispose of the goods and reimburse himself out of the proceeds without the need of a lawsuit. The banker as a secured creditor is entitled to a first claim against the goods if the debtor went into bankruptcy or where the debtor is a company, in the event of its liquidation.

The banker as pledgee of the document of title to the goods may redeliver them to the debtor pledgor for a temporary particular purpose without impairing his security interest in the goods. While this reflects the position of the law in the other jurisdictions discussed in this thesis, however, it is of doubtful application presently in Scotland, in view of the different approach of Scots Law to rights in security over moveable property. The general rule, under the said law, is that without possession no security can be perfected. The rule was applied by Scottish Courts to defeat some Romalpa clauses; however, this approach was recently overturned by the House of Lords. This article argues that the security devices utilized by bankers such as the letter of hypothecation and the trust receipt could and should be regarded as mercantile specialties coined to meet particular commercial needs. This article maintains that a banker earns a right to reimbursement when he honours drafts drawn under the credit. His security should be deemed attached when he takes possession of the documents of title to the goods. Whenever he gives value against the goods, he is entitled to a security not only in the goods and the documents, but also in any contract right emanating from the original transaction between him and the debtor.

The letter of hypothecation has one major risk to the banker namely, the debtor may unlawfully dispose of the goods to the detriment of the security interest of the banker as the banker has neither possession nor title to the goods. A bona fide purchaser

for value or a subsequent pledgee who obtains possession of the goods may take them free from any equities. On the other hand, the trust receipt transaction does not afford the banker sufficient protection against dishonest dealings by his debtor. In a situation where a seller negotiates a Romalpa clause stipulating that title to the goods shall not pass to the buyer till full payment of the purchase price, the banker who actually gave value against the security of the goods may realize that his security over the goods is of no aid to him. Similarly, if the debtor upon release of the documents of title to him against a trust receipt sells them to a bona fide purchaser for value without notice in the ordinary course of business, the purchaser acquires the goods free from the banker's security in the documents of title to the goods.

This article contends that a banker as holder of a trust receipt is entitled to priority against rival creditors for the full amount of the proceeds unless the banker fails to honour the drafts drawn under the credit. Again the purchaser of a bill of exchange drawn under the credit is not entitled against the banker to acquire any specific charge upon the goods. However, in a double insolvency situation where the drawer of the bill of exchange and the acceptor become insolvent it seems fair to consider that the bill holder is entitled to claim the security applied to meet the acceptance on the ground of adjusting equities between the two insolvent estates.

Footnotes.

1. See *E.P. Ellinger "Modern Banking Law" [Clarendon Press, Oxford, 1989 ed.] at p.529, see generally Steven Wechsler "Rights and remedies of the secured party after an unauthorized transfer of collateral" Vol. 32 Buffalo, L.Rev. 373 (1983), see also Jackson & Kronman "Secured financing and priority among creditors" 88 Yale L.J 1143 (1979), see also B.Y. Smith "Secured transactions" Vol. 39 Bus. Lawyer, 1395 (1984), see also B.S. Wheble "The finance of international trade" Journal of the Institute of Bankers 92 (1965) see also Lingard "Bank Security Documents" [Butterworth, London, 1985] at p.212.*

2. *cf. Paget's "Law of Banking" 10th ed. 1989 [Butterworths] at p.535.*

3. *cf. P.J.M. Fidler "Sheldon and Fidler, Practice and Law of Banking" 11th ed., 1982 at p.477, see also Paget's op cit. at p.535*

4. *cf. Fidler op cit. at p.478 and after.*

5. *[1970] Vol. IV L.R., at p.317.*

6. *ibid. at p.325.*

7. *[1935] A.C. at p.53.*

8. *ibid. at p.59.*

9. *(1849) 11 H.L.C., at p.308.*

10. *ibid. at p.329.*

11. *cf. Branda v. Barnett (1846) 12 CL & F 787, see also Halesowen Presswork & Assemblies Ltd. v. Westminster Bank Ltd. [1971] 1 Q.B. 25, see also Benjamin's Sale Goods (1981 ed. Sweet & Maxwell) at 2111.*

12. *cf. Ellinger op cit. supra note 1 at p.571.*

13. *cf. J. Milnes Holden "Securities for bankers [Isaac Pitman & Sons Ltd., London,*

1953], 225.

14. See *Official Assignee of Madras v. Mercantile Bank of India* [1935] A.C. at pp.58, 59.

15. cf. *Mercantile Bank of India Ltd. v. Chartered Bank of India, Australia & China & others* [1938] K.B.D. at p. 414.

15a. (1892) 20 R, 64.

15b. *ibid.* at p.69.

16. [1935] A.C., 53.

17. *ibid.* at p.59.

18. [1914] A.C. p.850.

19. *ibid.* at p.864.

20. cf. *Widenmeyer v Burn Stewart & Co.*, (1967) S.C 85; see also *Gloag and Henderson "Introduction to the Law of Scotland"* [W. Green & Son, Ltd., Edinburgh, 9th ed. 1987] at p.262.

21. See *Anderson v McCall* (1866) 4 M. 765, see also *Gloag & Henderson, op cit.* at p.263.

22. 1907 S.C, 936.

23. *ibid.* at pp.952-953.

24. (1883) 10 R. 1009.

25. *ibid.* at p.1018.

26. *ibid.* at p.1019.

27. (1882) 9 R 1017.

28. *ibid.* at 1033.

29. *Supra* Note 24 at p.1019.

30. [1894] A.C. 56.

31. *ibid.* at p.69.

32. cf. *Gloag and Henderson "Introduction to the Law of Scotland"* [Edinburgh, W. Green & Son Ltd., 9th ed., 1987] at p.262, see also *Gloag & Irvine "Law of right in security"* [William Green & Son, Edinburgh, 1897] at p.256.

33. cf. *Allan McNeil, J.A. Lillie "The Mercantile Law of Scotland"* [W. Green & Son Ltd., 1949] at p.254, see also *Widenmeyer & Burn Stewart & Co.*, 1967 S.C. 85, see also *Gloag and Henderson op cit.* at p.262.

34. cf. *West Lothian Oil Co. v Mair* (1892) 20 R, 64.

35. *ibid.* at p.72.

36. A Working Party Report [CMND. 4596, published in March 1971] by a Committee assigned the task to examine the law relating to consumer credit.

37. cf. Report by the Working Party on security over moveable property, March 1986 [Scottish Law Commission].

38. cf. *Kassani, Badi'ah* [Cairo-Gamaliah Publications - 1327H-28] Vol. 6 at p.127, see also *Shirbini, Mughni at Muhtag* (Cairo-Mustaffa al-Babi Publications, 1958) vol. 2 at p.133, and see also *Ramli, Niah'iat al-Muhtag* [al-Babi Publications, 1940] Vol. 3 at p.280.

39. cf. *Al-Dousagi-Hashi'at* [Beirt-Dar Ihia al-Kutub al-Arabiah] Vol. 3 at p.231, see also *Shrah al-Kharshi ala Mukhtasr Khalil* [Cairo-Bulag Publishers - 1317H] vol. 5 at

- p.245, and see also *Bulgat al-Salik Liagrab al-Masalik* [Mustaffa Babli Publications - Cairo, 1952] Vol. 2 at p.112.
40. cf. Al. Aqli, *Muftah al-Karama* [Cairo, Radwiah Publications, 1323H] Vol. 5 at p.138.
41. cf. Badi'ah, *op cit. supra note 38*, vol. 6 at p.137, see also Shirbini, *op cit.* Vol. 4 at p.265.
42. cf. Ibn Qudama, *Mughni* [Beirt. Dar-al-Kitab al-Arabi-1972] Vol. 2 at p.133.
43. cf. Peter F. Coogan "Intangibles as Collateral under the UNCC" Vol. 77 *Harv. L.Rev.* 997 (1964).
44. cf. Grant Gilmore, "The assignee of contract rights and his precarious security" Vol. 74 *Yale L.J.* 217 (1964) at pp.226-27.
45. See S.9-304 (4) of UCC.
46. cf. S.9-403 (2) of UCC.
47. cf. S.9-403 (3) of UCC.
48. cf. S.9-307 of UCC.
49. cf. S.9-306 (2) of UCC.
50. cf. S.9-306 (3) of UCC.
51. cf. John H. Wigmore "The pledge idea: A study in comparative legal ideas" *Harv. L.Rev.* Vol. X343 (1897) at 346.
52. cf. *Encyclopedic Dictionary of Roman Law*, Vol. 43, Part 2 (1953), published by the American Philosophical Society, at p.490.
53. Holland "On Jurisprudence" quoted by E.N. Durfee "the lien or equitable theory of the mortgage - some generalizations" Vol. X, *Mich. L.Rev.* 587 (1912).
54. Gloag & Irvine "On the law of rights in security" at p.406.
55. cf. J.M. Holden, *op cit. supra note 13*, at p.227.
56. cf. Fidler *op cit. supra note 3* at 479.
57. cf. Gutteridge & Megrah "The law of Bankers Commercial Credits" [London, Europa Publication Ltd., 1984 ed.] at p.214.
58. (1884) 15 *Cox C. C* Vol. XV.
59. *ibid.* at p.469.
60. (1872) *L.R. 15 Eq.* 69.
61. *ibid.*
62. [1905] 2 *K.B.* 381.
63. *ibid.*
64. [1905] 2 *K.B.* 772.
65. [1912] 3 *K.B.* 275.
66. *ibid.* at p.280.
67. *ibid.* at p.281.
68. [1938] *A.C.* at p.429.
69. *ibid.* at p.444.
70. [1912] 3 *K.* 13 275.
71. [1905] 2 *K.B.* 381.
72. cf. Note, *Mich. L.Rev.* Vol. 58 (1960) at p.783.
73. cf. Grant Gilmore and Allan Axelrod "Chattel security" *Yale L. J* Vol. 57 (1957) at p.517.

74. cf. Henry Harfield "Bank Credits and Acceptances" [The Ronald Press Company, New York, 5th ed., 1974] at p.89.
75. A.G. Davis "The law relating to commercial letters of credit" [Pitman & Sons Ltd. 2nd ed., 1955] at pp.170-171.
76. cf. Williston, "The process of the law" Harv. L.Rev. (1919-20) at p.759.
77. Gutteridge & Megrah *supra* note 57 at p.215.
78. cf. Davis *op cit.* at p.170.
79. (1875) 60 N.Y. 40 discussed by Karl T. Frederick "The trust receipt as security" Columbia. L.Rev. 395 (1922) at p.410.
80. *ibid.* at p.47.
81. [1938] L.T.R. at p.412.
82. *ibid.* at p. 414.
83. [1922] 2 Ch. D, p.211.
84. *ibid.* p.216.
85. [1938] L.T.R., 412 [1938] A.C. 287.
86. (1908) 121 La. 615, 46, 50, 670, discussed by Frederick, *supra* note 79 at p.415.
87. (1954) 218 F. 2 d 763 - 2nd cir.
88. [1962] Lloyd's L. Rep, 359.
89. [1968] 2 Q.B. at p.849.
90. *ibid.* at p.860.
91. cf. Gloag & Irvine "On the law of rights in security" at p.188.
92. 1981 S.L.T. 162.
93. *ibid.* at 163.
94. 1981 S.L.T, 308.
95. 1983 S.L.T. 273.
96. *ibid.* at 274.
97. 1981 S.L.T. at 163.
98. cf. 1983 S.L.T (News), at p.105.
99. *ibid.* at p.77.
100. 1990 S.L.T 891.
101. *ibid.* at 894.
- 101a (2000) 171ALR 568
- 101b *ibid* at 573
102. 1981 S.L.T. 308 at p.312.
103. Verse 383 of Article II.
104. cf. Ibn Hanbal, Ahamed "Musnad" 6 vols. Cairo, 1313H.
105. [1937] 2 K.B. 631.
106. [1938] 2 K.B. 147.
107. [1938] A.C. 287.
108. *ibid.* at p.297.
109. (1877) 3 C.P.D.
110. [1938] A.C 287.
111. It is a text of a prophetic tradition related by Ahamed in his Musnad.
112. cf. Ibn Nageem "al-Ashabah Wa-al Nathaier" [Dar-al-Tibaha - Cairo, 1290H] at p.34.
113. cf. Grant Gilmore "The Commercial doctrine of good faith purchaser" Vol. 63,

- Yale L.J.* 1057 (1954) 1103, see also comment "selected priority problems in secured financing under the Uniform Commercial Code" Vol. 68 *Yale L.J.* (1959) at p.751.
114. 1895 C.C.A., 67 *Fed.* 469, discussed by Frederick, *supra* note 79, at 417.
 115. *ibid.* at p.
 116. cf. *Benjamin's sale of goods*, 1981 ed, at 1524.
 117. (1855) 29 *Ch. D.* 848.
 118. *ibid.* at p.856.
 119. *ibid.* 875.
 120. (1872) *L.R.* 7 *Ch.* 695.
 121. *ibid.* 698.
 122. (1885) Vol. XXIX *Ch. D.*, at p.813.
 123. *ibid.* at p.818.
 124. (1884) Vol. XIII *Q.B.D.*, 766.
 125. *ibid.* at p.775.
 126. *ibid.* at p.776.
 127. 19 *Ves.* 345.
 128. (1885) Vol. XIX *Q.B.D.*, 627.
 129. *ibid.* at p.623.
 130. (1871) *L.R.*, 5*H.L.*, 157.
 131. *ibid.*
 132. (1874) *Ch. App.* Vol. IX, 561.
 133. *ibid.* at p.567.
 134. cf. R.R. Pennington, A.H. Hudson "Commercial Banking Law" [Macdonald & Ellans, 1st ed., 1979] at p.377.