C O P Y

L-33

October 6, 1931

Gentlemen:

At the request of your Mr. I have re-examined and considered the question as to the validity of the lien acquired by a bank under a pledge to it of warehouse receipts issued by a warehouse company for goods warehoused under the so-called field storage plan.

In general there are two ways in which a valid lien upon chattel property may be effected. One is by chattel mortgage, in which case the possession of the mortgaged chattel ordinarily remains with the mortgagor. In order to make a chattel mortgage effectual against a subsequent bona fide purchaser from the mortgagor and against execution or attaching creditors, assignees, trustees in bankruptcy, etc. of the mortgagor, it is necessary in Ohio, and probably in all of the other states, that the chattel mortgage be properly filed of record unless the mortgagee takes and holds the open, notorious and exclusive possession and control of the property. The filing of the chattel mortgage is, of course, required in order to give notice of the existence of the lien to those dealing with the mortgagor.

In a pledge of chattel property, actual, open, exclusive and continuous possession of the pledged property by the pledgee is essential to make the pledge valid as against subsequent bona fide purchasers from the pledgor and execution and attaching creditors, assignees and trustees in bankruptcy, etc. of the pledgor. The possession of the pledgee in case of a pledge is to give notice of the lien to those dealing with the pledgor. Legally such possession has the same purpose and effect as the filing for public record of the chattel mortgage when possession is retained by the mortgagor.

In commerce and banking, one of the most important and common methods of obtaining credit is that of pledging bills of lading and warehouse receipts for commodities. Under the law merchant and the common law, bills of lading and warehouse receipts whereby

the carrier or the warehouseman undertook upon surrender of the receipt properly endorsed and payment of its charges, to deliver the goods to bearer or on the order of the person depositing the same, were regarded and treated as having many of the elements of negotiable paper, and the delivery of an order or bearer bill of lading or a warehouse receipt, properly endorsed, was held to be the equivalent of the actual delivery of the article described in the bill or receipt. However, the exact legal status of warehouse receipts was not the same in all jurisdictions, and in view of the enormous volume of business in which such receipts were used, and the consequent importance of having the legal attributes of such instruments as nearly uniform as possible throughout the states, some years ago a commission was appointed which drafted what is commonly known as the Uniform Warehouse Receipt Act, and secured the adoption of the Act by the legislators of a great many states. Ohio passed and adopted the Act in or about the year 1908, and it will be found in Sections 8457 to 8509 of our General Code.

The Act is largely a codification of what was considered the prevailing common law in respect of such instruments, and it has been held that in the states where adopted, this Act supersedes the common law on said subject.

The Act provides who may issue warehouse receipts, what terms the same must contain, distinguishes between negotiable receipts and non-negotiable receipts, defines the obligations and liabilities of the warehouseman and the effects of negotiation and transfer of the receipts and the rights of a transferee, etc. Without quoting the provisions of the Act in detail, it may be sufficient to say that by the negotiation of a negotiable warehouse receipt the transferee is vested with the same title to the goods as the depositor or person to whose order the warehouse receipt was issued had or had ability to convey to a purchaser in good faith for value, and he has the right upon presenting the warehouse receipt to the warehouseman and paying proper storage charges, to have the goods described in the receipt delivered to him, unless the warehouseman is able to show a valid excuse for failure to make such delivery. You of course understand that a warehouseman is in no sense an insurer nor does he guarantee title to the goods described in his receipt. He is liable only for ordinary care in storing the goods and will not be liable for damages to them unless the damage results from his lack of ordinary care.

If goods in the possession of the warehouseman are claimed by one other than the holder of his warehouse receipt, the warehouseman may protect himself by giving notice to the holder of its receipt or interpleading the parties. While the warehouseman is not, therefore, liable to the holder of the receipt if the goods are taken and claimed by some one having a better title than the depositor, the warehouseman would be responsible to the holder of its negotiable receipt for a voluntary delivery of the goods to any one else without requiring the production and surrender of the receipt.

The Uniform Warehouse Receipt Act contains no express reference to, or provisions in respect of, field storage, so-called, but the Act applies to all warehousing and all warehouse receipts, and in order to give to warehouse receipts the quasi-negotiable character that makes negotiation and delivery of the same legally equivalent to an actual delivery of the goods, it is necessary that the requirements of the Act, so far as applicable, be complied with.

The difference between ordinary warehousing and field storage is that in ordinary warehousing the goods are kept in the warehouseman's own warehouse premises. In field storage, the goods are ordinarily warehoused in premises that are leased to the warehouseman by the owner of the goods, and usually the warehouseman makes no use of the leased premises other than to warehouse the goods of his lessor. In most cases the building or land leased constitutes a part of the plant of the lessor and in some cases is so located with reference to the remainder of the plant that it is in practice difficult to exclude the lessor's employees therefrom. In some cases only a part of a building is leased, the remainder being used as a part of the lessor's plant.

In order to give notice that the warehouseman is in possession of the leased premises and has the possession, custody and control of the goods, the lease is usually recorded and signs are posted about and in the leased premises stating that the premises are leased to the warehouse company and that all of the merchandise therein is in its exclusive possession, custody and control. The warehouseman also usually has a representative to act as custodian of the leased premises and of the goods therein, and it is understood that no goods shall be stored in or removed from the warehouse premises except under the direction and control of the custodian.

It is well settled law that in order to give to a warehouse receipt a quasi-negotiable character so that a pledge of the receipt properly endorsed will amount to a symbolical delivery of the goods represented thereby, it is necessary that the warehouseman have the actual, complete, exclusive, open and notorious possession of the goods. There is, of course, no question as to such possession and control where the goods are stored in the general warehouse of the warehouseman, but where the goods are stored under the field storage method, the question as to the sufficiency of the warehouseman's possession and control has arisen quite frequently in attacks by creditors, assignees for creditors and trustees in bankruptcy of the pledgor. Many of the cases in which the validity of field storage warehouse receipts has been litigated are in the Federal Courts which have jurisdiction of bankruptcy proceedings, but there is a considerable number of such cases decided by state courts.

In most of the cases the attack is upon the validity of the receipts on the ground that there has been no actual warehousing,

that the alleged possession and control of the warehouseman is not actual and exclusive but merely a nominal or pretended possession, or at best a joint possession with the pledgor. In some of the cases attack has been made upon the form of the warehouse receipts on the ground that they do not accurately describe and identify the goods.

The question of possession is, of course, largely a question of fact depending upon the peculiar facts and circumstances developed in the case under consideration. Hardly two cases can be found in which the facts are exactly alike, and different courts sometimes come to opposite conclusions upon what appear to be substantially the same state of facts. In some cases the warehousing has been held good while in others which appear to be hardly distinguishable in the facts, the conclusion has been that the warehousing was invalid and the receipts ineffective. It is a fact that the more recent decisions, particularly in Federal Bankruptcy cases, have been less favorable to field storage and evince a growing disposition upon the part of the courts to scrutinize the conduct of the warehouseman very closely and to hold insufficient methods which formerly were considered valid. The courts all hold that there may be valid field storage but that in order to make such storage valid the warehoueman must have the actual, open, notorious and exclusive possession and control of the goods. The possession must be actual, open and exclusive. Merely nominal possession and control will not do nor can the possession be joint or in common with the pledgor. It is this requirement that the warehouseman have the actual, open and exclusive possession and control that makes proper storage warehousing difficult. Any method of such warehousing where the goods are in a building or on a yard which is being used by the pledgor's employes so that such employes have constant access to the warehoused goods is dangerous. The warehoused goods should be in a building or enclosure separated from the remainder of the pledgor's plant, so that the warehouseman can maintain an exclusive possession and control and so that the employes of the pledgor can have access to the pledged goods only in the presence of the warehouseman's representative, and when goods are being removed from or delivered into the warehouse, such representative should be present and in control. I think that it would be possible to devise a set of rules for storage which if strictly followed would make the warehousing safe as against attack, but conditions at different plants are hardly ever the same and in many cases strict compliance with such rules is in practice difficult, expensive and sometimes impossible. I will, however, endeavor to outline my opinion as to what the practice of the warehouseman should be, although you will understand that I do not mean to imply that a failure strictly to comply with some of the details would necessarily result in a decision that the warehousing was invalid.

WHO MAY RECEIPT

The Act provides that warehouse receipts may be issued by any warehouseman, and defines a warehouseman as a person (which of course includes a corporation) lawfully engaged in the business of storing goods for profit. To be of value as a pledge, a warehouse receipt must therefore be issued by a regular warehouseman who is engaged in the business of warehousing goods for profit.

THE WAREHOUSEMAN'S POSSESSION AND CONTROL

The warehouseman should have a lease of the premises that he is to occupy. In the lease the premises to be occupied should be accurately and definitely described.

The lease should give the warehouseman the right to use the leased premises for a general storage business, and where necessary should also grant him the right to pass over the other premises of the lessor for access to the leased premises and the right to use such loading equipment of the lessor as may be necessary to remove warehoused goods from the leased premises. It should also provide that the lessee may post and maintain in, upon and about the leased premises and the other premises of the lessor such signs and notices as the lessee may desire, to give notice of its occupancy and possession of the leased premises, and its exclusive possession and control of all goods in the leased premises. It should provide that the lessee's possession of the leased premises and its possession and control of the merchandise stored therein shall be exclusive.

In a number of the cases the fact that the lease reserved merely a nominal rent of $1.00 per year has been adversely commented upon, and it is therefore my opinion that it would be safer, although perhaps not absolutely essential, that the lease provide for the payment of a substantial rent at regular stated intervals.

Although in many of the cases it is said that the fact that the lease was recorded was in itself insufficient to give notice of the warehouseman's possession, I think that it is important that the lease be executed with all of the formalities required to entitle it to record, and that it be promptly recorded. When the lease is executed and delivered, if there be at the time any goods in the leased premises which are to be warehoused, I think that the owner and a representative of the warehouse company and the custodian who is to have charge of the warehouse, should go to the warehouse and the owner's representative should then state to the warehouseman that he delivers to him to be warehoused all of the said goods, and that the warehouseman should state that he accepts the possession of the goods in storage and that he then direct his custodian to take charge of the warehouse and of the goods and hold the goods in storage for the warehouse company and subject to its exclusive order and control.

It is in my opinion very desirable that the leased premises be entirely separated from the remainder of the premises occupied by the lessor. Wherever practicable an entire building or an entire storage yard should be leased and occupied exclusively by the warehouseman. I am aware that frequently such an arrangement is as a practical matter impossible. Frequently only a part of a building is used for storage and the remainder used for other purposes in the lessor's business. Such a situation presents an element of danger. If only part of a building or part of a storage yard is to be leased, the leased part of the building should be partitioned off so that it can be kept closed and locked, and the keys held by the warehouseman's custodian. In a storage yard a substantial fence with locked gate is desirable. Any arrangement whereby the premises occupied by the warehousemen are open and not separated from the portion of the plant used by the owner, so that the owner and his employes have

free access to the part of the premises where the goods are stored, and possibly use and occupy the premises in common with the warehouseman, is very dangerous and makes the warehouseman's alleged exclusive possession and control of the goods very questionable.

The warehouseman should post and at all times keep in place large and comspicuous signs printed in large letters so as to attract the attention of the passer-by and be easily read, stating that the premises are leased to and in the exclusive possession of the warehouseman, and that all of the goods and merchandise therein are in the warehouseman's exclusive possession and control. Such signs should be conspicuously posted at all entrances and all corners of the leased premises, and if the building or yard is large, they should also be placed at intervals along the sides and ends. Such signs should also be posted inside the leased premises at all prominent points so that the same would certainly be seen by any one visiting the premises. If the leased premises constitute a part only of a building, there should be a conspicuous sign outside the entrance to the building giving notice that a portion of the premises is so leased, etc., and another sign inside the entrance to the building, and of course, as previously stated, signs at all entrances of the portion of the building that are occupied by the warehouseman. The purpose of posting and maintaining signs is of course to give notice to the public of the warehouseman's possession. It is extremely important and there can hardly be too many or too prominent signs. The insufficiency of the signs has been a fatal defect in many of the decided cases and the importance of maintaining plenty of large and prominent signs cannot be over-emphasized.

For reasons hereinafter stated, I think inside the warehouse premises there should be posted in a prominent place on each pile or lot of goods a sign stating that all of said goods are in the exclusive possession and control of the warehouseman, and are represented by its outstanding negotiable warehouse receipt Number _____. It is also important to guard against the attaching to any of the warehoused goods of stock or other similar tags bearing the name of the pledgor. I have known of one case where such tags appeared and it was claimed by one visiting the warehouse that seeing the pledgor's name on these tags he supposed that said goods were not warehoused. If such tags are used, it would be better to have the warehouseman's name printed upon them, or if this is not done, that the tags bear no name.

The warehouseman should have a representative or custodian continuously on the premises during business hours. The custodian should have some sort of an office with the name of the warehouse company upon the door, and the custodian should keep posted in the office at all times a list showing the numbers of the warehouse receipts outstanding, and the respective quantities of goods represented thereby. This is a statutory requirement in some of the states. The custodian should at all times keep the keys to the warehouse premises in his possession. The owner

should not have such keys. No goods should be taken into the warehouse or removed therefrom except under the supervision of the custodian. The compensation of the custodian should of course be paid by the warehouseman. It is important that the custodian be intelligent and conscientious and that he thoroughly understand his duties, that he is the employee and representative of the warehouseman only, and that all of the goods in the warehouse are in his custody as representative of the warehouse company, and that in all matters relating to the placing of goods in the warehouse and the removal of them from the warehouse he is to act under the directions and orders of the warehouse company alone, and that the owner of the plant has no control over him in those matters.

As the officers of the warehouseman are not often at the plant, it is apparent that the maintenance of the exclusive possession and control of the warehoused goods necessary to make the warehousing effective is dependent almost exclusively upon the conduct of the custodian. The custodian should therefore be a man not only of absolute integrity, but should have sufficient strength of character to maintain his actual possession and control of the warehouse and its contents. In many cases it has been the practice to designate as custodian an employe of the plant, and while there are cases in which this practice was followed in which the warehousing was sustained, it has been severely criticized and was no doubt a highly contributing factor to a decision against the validity of the warehousing. In my opinion the employment of such a custodian is very dangerous. Theoretically it is difficult to maintain that a man employed by the pledgor can be holding the exclusive possession and control of the pledgor's goods for another, and as a practical matter it is hardly to be expected that such a man will resist his actual employer in matters relating to the warehouse premises. Where such a custodian is employed it is almost inevitable that a slackness in the management of the warehouse will develop. While no actual dishonesty may result, it will generally occur that the custodian will permit his employer or other employes to have the keys to the warehouse, to take in goods and remove goods in his absence, and thus gradually lose all actual control of the warehouse and its contents.

THE WAREHOUSE RECEIPT

The Uniform Warehouse Receipt Law provides that warehouse receipts need not be in a particular form, but that every such receipt must embody within its written or printed terms the following:

1. The location of the warehouse where the goods are stored.

2. The date of issue of the receipt.

3. The consecutive number of the receipt.

4. A statement whether the goods received will be delivered to the bearer, to a specified person or to a specified person or his order.

5. The rate of storage charges.

6. A description of the goods or of the packages containing them.

7. The signature of the warehouseman, which may be made by his authorized agent.

8. If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and

9. A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required."

The Act provides that the warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of said terms.

It also provides that the warehouseman may insert in the receipt any other terms and conditions, provided that such terms and conditions shall not be contrary to the provisions of the Act and shall not in any wise impair the warehouseman's obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

The Act does not in express words say that the omission of any of the prescribed information will invalidate the receipt or make it non-negotiable, and some courts have held that the omission of certain of the prescribed matters does not invalidate the receipt but merely makes the warehouseman liable to the holder for any damage caused by the omission. However, one of the above provisions does require especial attention.

Subdivision 6 requires the receipt to contain a description of the goods or of the packages containing them. On the other hand, another section of the Act provides that

> "If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole."

In the section of the Act containing various definitions, the term "fungible goods" is defined as:

> "Goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit."

In view of the above provisions, the question has arisen as to the validity of a warehouse receipt that calls merely for a stated number of packages or a stated quantity of goods without giving distinguishing marks or numbers by which the particular packages of goods can be identified especially in cases where the receipt covers only a part of a larger quantity of such goods in the warehouse. Probably where the goods are clearly fungible and one unit is of the same quality, grade and value as another unit and they are so treated in the trade, a warehouse receipt calling for a stated number or quantity out of a common mass would be valid.

But in the case where the goods are not of the same grade, quality or value, some of the more recent cases have decided that in order to make the warehouse receipt valid it must describe the particular goods covered thereby by distinguishing marks in such a way that the goods called for by the receipt can be readily identified in the warehouse, and the opinions in the cases referred to and the courts deciding them are such that I think it only safe to assume that the rule laid down in them may be followed in subsequent cases.

One of the cases above referred to was decided by the Circuit Court of Appeals of this Sixth Circuit. The case was not a field storage case. A firm of cotton factors had deposited a large number of bales of cotton in a warehouse and had obtained from the warehouseman negotiable warehouse receipts each calling for so many bales of cotton. It had pledged these receipts to various banks. It appeared that for many years it had been the custom at Memphis for banks to loan on such warehouse receipts at the rate of approximately $50.00 per bale. It further appeared that the bales were not all of the same weight nor was the cotton in the various bales of the same quality so that the bales were not of uniform value. Indeed, some bales were worth as much as $90.00, while others were not worth more than $20.00. Our Circuit Court of Appeals held that under these circumstances the bales of cotton could not be treated as fungible, and that the warehouse receipts were therefore invalid and that the pledgee banks had no lien upon any of the cotton.

In a somewhat similar case that arose in Georgia the Circuit Court of Appeals of that circuit also held that the warehouse receipts calling for a stated number of bales of cotton without further identification were invalid but decided that under the peculiar circumstances of that case the banks were entitled to something in the nature of an equitable lien.

It therefore becomes of great importance to determine whether goods are fungible so that they may be mingled, or are not fungible, so that the warehouse receipt must identify the particular article In the former of the two cases above referred to, Judge Denison who delivered the opinion, in discussing the claim there made that under the section of the Warehouse Receipt Act relating to fungible goods, the bales of cotton were fungible, used the following language:

> "We do not find that this section has been construed by other decisions in a way here helpful, and we must, without such aid, determine its force as applied to the present case. It seems a proper summary of text-book definitions, as modified by this section, to say that fungible goods are those of which each unit is fully equivalent to each other unit; that this equivalency may be inherent or may result from agreement; and that such agreement may be express or may be implied from custom. Further, it seems obvious that goods may be of one of three classes: Inherently fungible, or capable of acquiring that quality by agreement, or quite incapable thereof. Bushels of wheat of the same grade are necessarily the equivalent of each other; barrels of flour may or may not have that mutual relationship- presumptively, they do not (Jones on Collateral Securities, Sections 317, 318) - though the interested parties may intelligibly consent that flour shall be so considered; but that there should be any express agreement or any contract-raising custom whereby a bolt of cloth and a case of boots and shoes should be treated as equivalent to each other is beyond comprehension. We take it, the statute, section 23, must mean only that the right of the warehouseman to mix articles so as to lose their identity and his right to deliver on a receipt, not the thing which he received but other equivalents, are to be confined to the first two classes of articles above mentioned, viz., those inherently equivalent to each other, and those which may be so, and which, therefore, can rightfully be thought of as subject to an agreement or a custom to that effect, but that these rights do not extend to articles where mutual equivalency is inherently impossible. To use the foregoing illustration we cannot comprehend an agreement or custom which would authorize a warehouseman to deliver boots and shoes in satisfaction of his receipt for cloth.
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> "Bales of cotton certainly do not belong to the first group; their mutual equivalency is not clear and certain. A lot of bales coming from one source might belong to the second group; their

equivalency would be so possible, if not probable, that an agreement or custom therefor might well exist. The evidence, however, puts beyond controversy that cotton bales in a large mass, such as would accumulate in any general warehouse, and such as did accumulate in this warehouse, are as inherently incapable of acquiring this mutual equivalency as would be the cloth and the boots and shoes. The cotton in such bales is of all varieties, qualities, and grades, and the bales themselves are of various sizes. The actual selling value of the bales involved in this controversy varied from a minimum limit of about $20 to a maximum limit of about $90, and the variation was arbitrary by units, or by small lots. The figures brought here do not show results for each bale, but only as to the lot belonging to each consignor, by which can be stated the average price 2 bales or 5 bales or 10 bales. These figures cover about 1000 bales out of the 2000 involved. There is no reason to think that there was any more uniformity among the other thousand. It necessarily results that this section, 23, has no other bearing on the case. Even if it had, its only effect is to authorize an intermingling which never did in fact take place. No one claims that the identity of any single bale was ever lost, from the beginning to the end.

"It is only illustrative of the difficulty which the receipt holders here have, in standing upon section 23 and the supposed custom, to query what would happen if the holder came to the warehouse and demanded the bales of cotton called for by his receipt. Who could say what bales he should have? If he had loaned $50 per bale, must he take those bales that were worth $20 or could he take the $90 bales and leave the poorer ones for later comers? If the warehouseman were indifferent, an execution creditor or a consignor would not be. No theory of fungibility can answer these questions."

You will observe that Judge Denison said that there were certain classes of articles which are by their nature clearly fungible, and, on the other hand, that there are other classes of articles which are clearly not fungible, and could not be made so by any trade custom, and that there is a third class of articles which while not exactly alike and interchangeable unit for unit, sufficiently approximate that condition so that in the trade they are so regarded and treated, and that in such cases the articles may by custom be treated as fungible.

There are, of course, many articles which are by their nature and the usages of business fungible which fall into the first class described by Judge Denison. For instance, Number 2 wheat or similar grades of other grains are commonly mingled in grain elevators and one bushel is recognized and treated as being of exactly the same value as any other bushel, so that the owner of the grain delivering it to an elevator is not concerned whether he receives the identical bushel that he deposited,

or another bushel of grain of the same grade. No doubt the same is true of various grades of sand, stone, coal and a great many other articles. However, in order to be fungible, all of the units would have to be of the same grade, quality and value. For instance, it would be improper to consider lump coal, run-of-mine coal and slack coal as mutually fungible, but one ton of slack coal would no doubt be fungible as respecting any other ton of slack coal of the same grade and value, and would be so treated in the trade. Similarly, in the case of manufactured articles in cases or other containers, if all cases contain the same number of articles of the same grade and value so that in the trade one case is treated as the equivalent of any other case, such cases would be fungible, but if the cases or other containers contained unequal quantities or goods of different grades and values, such cases and containers could not properly be treated as fungible.

In determining whether any class of goods is fungible or non-fungible, I think a safe rule would be to say that goods in bulk which are of uniform grade, quality and value, so that in the particular trade one bushel, pound or other similar unit is treated as the equivalent of any other such unit, are fungible and may properly be mingled in the warehouse. Similarly, if the goods are packed in cases or other containers, if each case or container contains the same quantity and the goods in each such container are of the same grade, quality and value so that if a purchase were made of a given quantity, any of such containers would be deliverable under the usages of the trade, I think that such goods could be treated as fungible. All other goods in which the different units vary in grade, quality or value should not be treated as fungible. When I referred above to the usages of the trade, I of course referred to the trade engaged in buying, selling and using the articles. Goods not in themselves fungible could not be made fungible merely by a usage of bankers or lenders to treat the articles as interchangeable by establishing some sort of uniform storage loaning rate.

Where the goods are fungible there appears to be no objection to mingling them in the warehouse and in such cases I think that the warehouse receipt would be sufficient if it gave the proper number or quantity without attempting to identify the particular articles by distinguishing marks.

Where the goods are not fungible it is my opinion that the receipt should identify the particular goods covered by it by distinguishing marks, and that the goods themselves should bear such distinguishing marks so that one taking the receipt could go into the warehouse and definitely locate the particular goods covered by the receipt.

SUBSTITUTION OF GOODS

Closely related to the question next above discussed is that of permitting the substitution of goods in the warehouse. In many field storage cases the goods warehoused consist either of raw materials or of the manufactured product of the pledgor. In such cases the goods in the warehouse are necessarily changing from day to day. Goods are shipped or taken for use and new goods are manufactured or purchased and stored in the warehouse. In such cases it has frequently been the practice for the warehouseman to issue what may be called blanket warehouse receipts calling for certain specified quantities of goods without any identification of the particular goods covered, it being understood by the parties that the warehouseman should permit substitutions of goods from day to day as the pledgor's business might require, provided there were at all times in the warehouse a sufficient quantity of goods to satisfy the outstanding receipts, and that in case of demand for delivery by the holder of a warehouse receipt, the warehouseman should select and deliver to the claimant the required quantity of goods from the general mass of such goods in the warehouse at the time of demand. In other words, the warehouse receipt was not intended to cover any particular article, but in effect merely to require the warehouseman to see that he at all times had in his possession sufficient of such articles to satisfy all of his outstanding receipts. Sometimes provisions expressing this understanding have been incorporated in the warehouse receipts themselves.

The method just outlined for handling warehoused goods is unquestionably the most convenient and inexpensive method that could be devised. Indeed, in many cases the issuance of receipts definitely identifying the articles called for, will in practice involve much more trouble and some added expense, because in such cases it will be necessary that the receipt specifically calling for each article to be removed be presented to the warehouseman and either surrendered or the delivery of the article properly noted thereon. Similarly, as new articles come in, new warehouse receipts covering them will have to be issued, so that in an active business the details of handling the warehouse receipts may be troublesome and expensive. Such a method involves inconvenience not only to the pledgor and warehouseman but also to the pledgee bank because its warehouse receipts must be constantly changing, and some arrangement must be made so that the pledged receipts may be promptly presented to the warehouseman for cancellation or endorsement as deliveries of goods are required in the pledgor's business.

There is quite a number of field storage cases in which the use of blanket receipts and the substitution of goods were held not to affect the validity of the warehousing, although even before the adoption of the Uniform Warehouse Receipt Act, it had been held by some very high authorities, that under the common law the warehouse receipt must definitely describe the article. For instance, it was held that if the warehouseman had permitted the particular article called for by

his receipt to get out of his possession, he could not compel the holder of the receipt to accept another article although it were of precisely the same grade and value. However, this question had not apparently been very much litigated, and it was not until sometime after the adoption by most of the states of the Uniform Warehouse Receipt Act that the provision in the Act requiring the receipt to contain a description of the goods or of the packages containing them was raised in an attack upon warehouse receipts. In view of the authorities to which I have called your attention it is my opinion dangerous to use a blanket form of warehouse receipt and permit the substitution of goods in cases where the goods are not fungible. Probably there is no objection to a substitution of goods where they are clearly fungible. But in the case of non-fungibles, I think that the only safe course is to have the receipts definitely identify the particular goods covered. This would of course entirely preclude substitution.

THE WAREHOUSEMAN'S BOND

In some field storage transactions the pledgee bank has been furnished a surety bond guaranteeing to some extent due performance by the warehouseman. Your Mr. showed me one that you received in a field storage case, but as I now remember it, the bond was made to the bank and the storage company as obligees and merely guaranteed them against loss by reason of any misrepresentation by the pledgor as to the quantities of goods delivered by it to, and received by it from, the warehouseman; that is, in effect it was a guaranty that there would be no shortgage of the warehoused goods resulting from any misrepresentations or fraudulent conduct on the part of the pledgor. That bond could hardly afford protection as against a shortage resulting from misconduct of the warehouseman or its employees or as against claims that the warehouse receipts were invalid because the warehouseman had failed to do a valid job of warehousing. I would suggest that from the banker's standpoint it would be more desirable that the bond be made to the bank alone and indemnify the bank against loss by reason of shortage in goods resulting not only from the misconduct of the pledgor as stated in the bond, but also from acts of dishonesty on the part of the warehouseman, its officers, agents or employes. Of course even that coverage would not be by any means complete. Of course a much more valuable protection would be afforded you if the bond were in such form that it guaranteed the performance by the warehouseman of all the terms of its warehouse receipts and its prompt delivery to you upon demand of all articles called for by your receipts, and cast upon the surety the entire burden, expense and risk of any litigation involving the bank's rights and lien. Such a bond would in effect guarantee the legal sufficiency of the warehouseman's conduct of his warehouse business. I have never seen such a bond

and I doubt whether a surety company could be induced to assume such an obligation unless it were given substantial indemnity by the warehouseman.

I have endeavored to outline fully the opinion to which I have come from an examination of a large number of cases in which the validity of field warehousing has been involved. I think that I have covered practically all of the questions that have been raised in the cases that I have been able to find. If I have omitted anything or have not made entirely clear any of the points that I have endeavored to make, please let me know.

Yours very truly,

WCM-K