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Legislation

FACTOR'S LIEN ACT OF 1945 AND ACCOUNTS RECEIVABLE ACT OF 1943

Missouri in 1945 enacted a Factors' Lien Act. The scope of this act is very different from the type of act usually referred to as a "factors' act." In 1943 Missouri enacted an accounts receivable act which covers our type of commercial factoring. The scope of these various acts is indicated in the following paragraphs.

English and New York Factors' Acts

A factor is an agent or commission merchant with a power of sale. At common law, a factor could not pledge his principal's property to secure his own debt. The principal could recover the goods from the pledgee, and the pledgee's ignorance that the factor held the goods in the character of factor was no defense. Such a rule hampered trade and business. Accordingly, the common law was altered in England,¹ as well as in New York² and other American jurisdictions by factor's acts. The purpose of the statute was to protect innocent parties who advanced money to the factor upon the faith of the merchandise and his apparent ownership thereof, as evinced either by the factor's possession or by documentary evidence of title with which the factor had been entrusted by the principal. The statutes do not protect the pledgee when he knows the pledge is wrongful.³

Missouri does not have a factors act of the English or New York type.⁴

Missouri Accounts Receivable Act of 1943

Financing by the assignment of accounts receivable is often referred to as "factoring" or "commercial factoring." "Factoring" in this sense is to be distinguished from the term "factor" as an agent with power of sale.

Prior to the Missouri act there was little difficulty in assigning a particular account, provided the debtor was notified, but considerable difficulty was encountered in making a blanket assignment of accounts receivable, or in making assignments to secure future indebtedness. The statutory provisions on factoring are Sections 410.010-410.060, *Missouri Revised Statutes* (1949), enacted in 1943. The assignment may be perfected by the assignee by actual notice to the debtor, by filing proper notice with the secretary of state, or by the taking of an assignment within one year after the filing of such notice with the secretary of state.⁵ The

1. 4 GEO. IV. c. 83 (1823).

2. N. Y. PERS. PROP. LAWS § 43 (1951).

3. For a general treatment of the matter see 14 A.L.R. 423 (1921) and authorities therein cited.

4. MO. REV. STAT. § 561.630 (1949), seemingly permits the factor, if he is in lawful possession of bills of lading or of warehouse receipts, to pledge them, but this is permissible only to the extent of paying storage and freight charges on advances drawn by the principal. It should be noted that the statute is silent as to the pledging of the actual merchandise itself.

5. MO. REV. STAT. § 410.020 (1949).

statute further provides that upon such perfection, the assignment "shall be enforceable against and valid and binding upon all creditors of the assignor and all assignees and all purchasers who have not theretofore perfected their rights in one of said ways herein provided."⁶ The provisions are inapplicable if the assignee has actual notice of a prior assignment.⁷ If the debtor is unaware of the assignment, and pays any part or all of the debt to the assignor, his debt is thereby extinguished or reduced, but the assignor must thereafter pay over to the assigned.⁸ The return of merchandise to the assignor by the debtor, with credit therefore, does not prejudice the assignee's priority with respect to any balance owing.⁹ To date, there have been no reported cases construing this statute.

Missouri Factors' Lien Act of 1945

The Missouri Factor's Lien Act of 1945 is concerned basically with security in a shifting stock of goods. "Factor" is used in this act in an entirely different sense than in either of the above situations. Prior to the act, security in a shifting stock of goods had been obtained oftentimes by means of a chattel mortgage on the shifting stock, which was frequently an uncertain type of security in Missouri.¹⁰ A brief examination of the court decisions reveals the difficulty with the chattel mortgage as a means of financing. It is probably safe to say that, in general, the device is not favored. If the mortgage, expressly or by necessary implication, permits the merchant to remain in possession, sell the goods in the ordinary course of business, and retain the proceeds, then it is fraudulent and void, not only as to purchasers, but also as to existing and subsequent creditors.¹¹ As was pointed out in *Embree v. Rorry*,¹² the possession by the merchant does not constitute the fraud, but rather it is his power of sale and retention of the proceeds for his own use. However, if the merchant has a power of sale, but is required by the mortgage to apply the proceeds to a discharge of the mortgage debt, the mortgage is not void.¹³ And this is so if a sale of the entire property is permitted.¹⁴ Unless a power of sale and retention of the proceeds by the mortgagor appear upon the face of the mortgage, expressly or by implication, the courts will not pronounce the mortgage as such void. Questions of fraud arising from such mortgages are questions of fact for the jury.¹⁵ The mortgage, even though void as to part of the property covered, may

6. Mo. Rev. Stat. § 410.020 (1949).

7. Mo. Rev. Stat. § 410.020 (1949).

8. Mo. Rev. Stat. § 410.040 (1949).

9. Mo. Rev. Stat. § 410.050 (1949).

10. For a comparison to the law of other jurisdictions see 2 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES §§ 383-413 (6th ed. by Bowers 1933).

11. *White v. Groves*, 68 Mo. 218 (1878); *Bullene v. Barrett*, 87 Mo. 185 (1885).

12. 152 Mo. App. 257, 133 S.W. 83 (1910).

13. *Hubbell v. Allen*, 90 Mo. 574, 3 S.W. 22 (1886); *Manhattan Brass Co. v. Webster Glass Co.*, 37 Mo. App. 145 (1889); *Metyner v. Graham*, 57 Mo. 404 (1874); *Thompson v. Foerstal*, 10 Mo. App. 290. (1881).

14. *Pritchard v. Hooker*, 114 Mo. App. 605, 90 S.W. 415 (1905).

15. *Eby v. Watkins*, 39 Mo. App. 27 (1890); *Hewson v. Tootle*, 72 Mo. 632 (1880); *Johnson v. McAllister*, 30 Mo. 327 (1860); *Nicholson v. Golden*, 27 Mo. App. 132 (1887).

be valid as to other property covered.¹⁶ The mortgage is valid between the parties only, unless possession of the property is given to the mortgagee, or unless the mortgage is recorded (or filed).¹⁷ However, even if recorded, it may still be void for the above reasons.

No doubt it was the intention of the legislature in enacting the Factors' Lien Act, Sections 430.260-430.320, *Missouri Revised Statutes* (1949), to facilitate the acquisition of a security interest in a shifting stock of goods or in after-acquired property. The word "factor" is employed to describe anyone who "advances money on the security of merchandise."¹⁸ Then lien is a continuing general lien covering all loans and advances made by the factor, and if possession of the merchandise is in the factor, recordation and public notice is unnecessary.¹⁹ If the borrower retains possession, the lien is valid after recordation, provided the factor's name and designation as a factor is posted at the entrance to the borrower's place of business.²⁰ Such lien is effective against unsecured creditors of the borrower and against subsequent liens of creditors, except subsequent liens in favor of processors, dyers, mechanics and other artisans.²¹ When merchandise subject to this lien is sold by the borrower, in the ordinary course of business, the lien terminates, whether or not the purchaser knew of the lien, but it attaches to any obligation to pay for the merchandise, or to any other proceeds of the sale.²² When the indebtedness to the factor is satisfied, any interested person may cause the factor to execute a certificate acknowledging such satisfaction and to have the same recorded, and unless such satisfaction is recorded, the lien is deemed to remain in full force and effect.²³ The statute lastly provides that its stipulations shall not be construed as effecting any existing or future liens at common law, any rights at common law, or any rights given by other statutes.²⁴ To date there has been no reported case on this act.

As was pointed out above, if a merchant gives a mortgage on a shifting stock of goods, and if such mortgage permits the merchant to remain in possession, sell the goods in the ordinary course of business and retain the proceeds for his own use, it is void as to purchasers not in the ordinary course of business, and as to existing and subsequent creditors. Comparing this to the Factors' Lien Act of 1945, it is to be observed that protection is given to the creditor in whose favor the lien exists, in the case of a sale in the ordinary course of business, by the provision attaching the lien to any proceeds of the sale. Public recordation plus a conspicuous notice posted at the entrance to the borrower's place of business would seem to serve as adequate warning to creditors and purchasers not in the ordinary course of business. The

16. *Bullene v. Barrett*, 87 Mo. 185 (1885); *Citizens Trust Co. v. Elders*, 212 Mo. App. 589, 259 S.W. 136 (1923).

17. MO. REV. STAT. § 443.460 (1949).

18. *Id.* § 430.260.

19. *Id.* § 430.300.

20. *Id.* § 430.270.

21. *Id.* § 430.290.

22. *Id.* § 430.290.

23. *Id.* § 430.310.

24. *Id.* § 430.320.

1945 statute does not require a separate accounting of the proceeds of sales of the goods encumbered by the lien, although separate accounting is required in the case of a shifting stock which has been mortgaged. The 1945 act would seem to provide a much more effective security device than was possible prior to the act.

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