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Factors Liens--Recent Amendments to New York Statute

C. Joseph Danahy

same liabilities and has the same rights, and is entitled to the same remedies, to compel a distribution or partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed." (Italics new.)

These new amendments are not retroactive but apply only to wills of decedents dying subsequent to their taking effect.[25]

Students and practitioners alike, it is anticipated, will agree that these new amendments are steps forward in the logical and just development of a statute founded on the equitable theory that those bound by ties of blood to the testator are the natural objects of his bounty.

WILLIAM J. CAHILL.

FACTORS LIENS — RECENT AMENDMENTS TO NEW YORK STATUTE.—As it is customary to read in textbooks that by the common law a factor has a general lien upon all the goods of his principal in his possession and upon the price of such that are lawfully sold by him, one might suppose that this is a right of great antiquity whereof the memory of man runneth not to the contrary.[1] Yet a search of the Year Books, the early statutes, Glanville's Tractatus de Legibus Angliæ, Bracton's de Legibus et Consuetudinibus Angliæ, Coke's Institutes, and even Blackstone's Commentaries, will reveal no trace or inkling that such a lien was recognized or enforced at the common law. In fact it is not until the middle of the eighteenth century that we find this right enforced in England, where the case of *Kruger* v. *Wilcox*[2] decided by Lord Hardwicke during that period so characteristic for the growth of the common law, is strikingly illustrated the ease with which the great Chancellors and Judges of that time incorporated the principles of the law merchant into the common law. When this case was brought before Lord Hardwicke he called before him four merchants and examined them upon the usage and customs of merchants in regard to such a lien. The four merchants all agreed that if there is a course of dealings and general account between the merchant and factor he may retain the ship and goods or produce for such balance of his account as well as for his charges. Lord Hardwicke then gave his opinion that a factor has a lien. Although this view was later confirmed by Lord Mansfield[3] and Lord Kenyon[4] we learn from a

[25] *Ibid.* §10.

[1] 2 MECHEM, LAW OF AGENCY (2d ed. 1914) §2559.
[2] Kruger v. Wilcox, 1 Ambler 252 (1755).
[3] Godin v. London Assurance Co., 1 Burr. 489 (1758).
[4] Walker v. Birch, 6 T. R. 258 (1795).

later commentator [5] that this right is regarded as an encroachment upon the common law and is not to be favored. However, this right gradually became recognized in practically all common law jurisdictions.[6] In New York Section 182 of the Lien Law is declaratory of this common law lien.[7]

This common law lien like other common law liens is dependent on possession.[8] The State of New York has by statute created or permits to be created a new type of factor lien without in any way impairing or altering the common law lien. This statute is Section 45 of the Personal Property Law,[9] and was originally passed in the year nineteen hundred and eleven. However, due to the general language used therein and the vagueness of some of its provisions, it was deemed advisable to reenact the entire section. This was done by the Legislature of 1931 and became effective on April 25, 1931.

The lien permitted by this section must be the result of an express agreement.[10] It may include after-acquired property or property having no existence at the time of the creation of the lien.[11] It may attach to the proceeds of the sale of merchandise or to accounts receivable.[12] It is not dependent on possession.[13] If the terms of the statute are complied with in respect to posting of notice and filing it will prevail as against the rights of creditors.[14]

From its very nature, and because of the failure of the Legislature to clearly express its will in the original statute, this lien has been confused with chattel mortgages and the Courts have been called upon to clearly define the intention of the Legislature. In *Heyman* v. *Kevorkian* [15] the Court pointed out that this section was merely an extension of the lien in favor of factors and could not be invoked by a manager of a corporation who loans money to it evidenced by a promissory note which was agreed to be a first lien upon the entire assets of the corporation. In *Benedict* v. *Ratner* [16] Mr. Justice Brandeis in discussing the rule that retention of dominion

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[5] Kent Commentaries, p. 678: "A general lien for a balance of account is founded on custom and is not favored; and it requires strong evidence of a settled and uniform usage, or a particular mode of dealing between the parties to establish it. General liens are looked upon with jealousy because they encroach upon the common law and destroy the equal distribution of the debtor's estate among his creditors."

[6] 1 JONES, LIENS (3d ed. 1914) §418 *et seq.*

[7] Laws of 1897, c. 418, §72.

[8] *Supra* note 6, §20.

[9] Laws of 1911, c. 326, §1 as amended by c. 766 of the Laws of 1931, §45, PERSONAL PROPERTY LAW.

[10] *Ibid.*

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

[15] 193 App. Div. 859, 184 N. Y. Supp. 783 (1st Dept. 1920).

[16] 268 U. S. 353, 45 Sup. Ct. 566 (1925).

by the mortgagor of accounts receivable is fraudulent as to creditors, cites this section and says:

> "It is possible that if its conditions are performed the section does away with the rule that the retention of possession by the mortgagor with power of sale for his own benefit is fraudulent as to creditors."

The New York Court of Appeals has had occasion to differentiate between this lien and a chattel mortgage.[17] The Court said:

> "This section 230 of the Lien Law applies to every mortgage of goods and chattels whereas section 45 of the Personal Property Law relates to liens upon merchandise or the proceeds thereof created by agreement. In the case of the former the mortgage or a true copy thereof must be filed in the town or city where the mortgagor resides. In the case of the latter in addition to posting a sign at the entrance of the building where the chattels are situated, a notice naming the lienor and the creator of the lien describing the general nature of the merchandise subject to the lien and the period of time during which advances may be made thereon and various other facts, must be filed in the town or city where the lienor has his place of business. In order, therefore, that each section should be given full effect, it would seem necessary to draw a distinction between liens of Section 45 of the Personal Property Law and the chattel mortgages of Section 230 of the Lien Law. If we apply the common law concept of a chattel mortgage we will have no difficulty in making this distinction. Thus in *Parshall* v. *Eggert* (54 N. Y. 18, 23) the following definition is given: 'A chattel mortgage is a present transfer of the title to the property mortgaged subject to be defeated on payment of the sum it is given to secure.' Chattel mortgages are in no sense liens upon merchandise or the proceeds thereof for they are not liens at all. They are not created by agreement. They are not given to secure the payment of commission or other charges. A mortgagee named therein could in no true sense be designated as lienor factor or consignee." [18]

Thus the old section by its silence as to who could create or benefit by this lien caused considerable confusion and left much to judicial construction. The new section cures this defect by specifically providing that this lien may be created by principals, consignors or employers for the benefit of factors, consignees, and commission merchants or their successors in interest.[19]

[17] Utica Trust Co. v. Decker, 244 N. Y. 340, 155 N. E. 665 (1926).
[18] *Ibid.* at p. 346, N. E. at 667.
[19] *Supra* note 9.

The new section also clarifies the law as to the nature of services or advances which might be the subject of the lien.[20]

The new section also removes any doubt as to the extent of the merchandise or the proceeds thereof to which this lien might attach by providing in sweeping language that "A continuing general lien upon all goods and merchandise from time to time consigned to or pledged with them whether in their constructive, actual or exclusive possession or not and upon any account receivable or other proceeds resulting from the sale or disposition of such goods and merchandise." [21]

The new section provides that the notice required to be posted on the entrance of the place where the merchandise is stored must be on the *main* entrance,[22] also that a formal assignment of accounts receivable is in and of itself of the same force and effect as the statutory notice to the person owing the account.[23]

The Legislature also included in the new section a paragraph to the effect that this statute is to be liberally construed to secure the beneficial interests and purposes thereof.[24]

The new section while by no means a model for the further codification of the law is unquestionably an improvement over the old section. It at least reveals what the Legislature had in mind and makes for a degree of definiteness in this phase of the law. It needs no argument to demonstrate that if Section 45 of the Personal Property Law is to be an aid rather than a hindrance to the commercial and economic forces of the community that the rights attempted to be created thereby should be clear, definite and certain. One cannot study the history of this section of the law without being forcibly impressed with the value and need of a ministry of justice [25] as suggested by the present Chief Judge of the New York Court of Appeals. The Legislatures seem ready and willing to enact any remedial legislation that is necessary as is witnessed by the large number of changes in our statutory law annually. If the judiciary were in a position to co-operate intelligently with the Legislature considerable effort would be saved by both to the benefit of the entire community.

C. JOSEPH DANAHY.

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[20] *Ibid.* For all their loans and advances to or for the account of the person creating the lien together with interest thereon, also for the commission, charges and expenses properly chargeable against or due from said person creating the lien and for the amount due upon any notes or other obligations given to or received by them for or upon account of any such loans or advances, interest, commissions or expenses.

[21] *Supra* note 9.

[22] *Supra* note 9.

[23] *Supra* note 9.

[24] *Supra* note 9.

[25] CARDOZO, LAW AND LITERATURE (1931) p. 41.