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Property Security - A New Security Device - The Wisconsin Factor's Lien Law

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PROPERTY SECURITY — A NEW SECURITY DEVICE — THE WISCONSIN FACTOR'S LIEN LAW

With the enactment of the Factor's Lien Law in 1951,[1] Wisconsin became the twenty-second state to pass such legislation, the sixteenth since the close of World War II.[2] The purpose of this article is to examine the problem causing this rush to legislate together with an analysis of the supposed answer to the problem.

I. The Problem Involved

According to a survey made by the United States Department of Commerce for the first quarter of 1946, 98.2 per cent of the business in the United States employed less than 500 people, and could be classified as small business.[3] Because small businesses are usually undercapitalized, they must borrow, if at all, on a secured basis. In addition, the 300,000 to 500,000 new businesses started each year are usually pioneered by men with little or no business experience and also are usually undercapitalized. Their credit problem too is based on a forced secured borrowing with little or no security to offer. As these businesses grow, they find themselves in continuously over-extended positions, their fixed assets encumbered, their financial statements not providing an adequate basis for the extension of credit, and their inventory so small that it must be available for further processing or display on their shelves for sale. However, the only security most of them have to offer is this same inventory.

To extend credit on the basis of this security under the security devices available in Wisconsin prior to the Factor's Lien Law was risky if not impossible. The common law pledge with its requirement of possession in the pledgee[4] was of no utility in this situation. The use of a chattel mortgage was also valueless unless it provided for including additions to or replenishments of the stock. Such a mortgage, however, has after acquired property features and Wisconsin early went on record holding a mortgage on after acquired property a mere revocable license in the mortgagee to take possession of the mortgaged property when acquired by the mortgagor, provided the mortgage gave such rights of entry and possession.[5] A second difficulty with this type of mortgage is that if any of the proceeds arising from the sale of the

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[1] Wis. Laws (1951), ch. 486.
[2] H.R. Silverman, *Factoring; Its Legal Aspects and Economic Justification*, 13 L. & Contemp. Prob. 593, 602 (1948).
[3] *Ibid.*, at p. 595.
[4] Seymor v. Coburn, 43 Wis. 67 (1877); Beilfuss v. Corrigan, 95 Wis. 651 (1897). Field warehousing suffers similar disadvantages, see note, 37 Va. L. Rev. 1023 (1951).
[5] See Mietus, *Chattel Mortgages on After Acquired Property*, 23 Marq. L. Rev. 80 (1939).

mortgaged property are used for the mortgagor's benefit, the court will hold it is fraudulent as to creditors as a matter of law.[6]

As early as 1887 the legislature recognized the stringency of the above holdings on a mortgage on stock in trade, and created what is today section 241.14 of the Wisconsin Statutes, allowing to a limited extent such mortgages. While the decisions negativing clauses including after acquired property provisions were thus attempted to be remedied by legislation, no attempt was made to relieve the mortgagor from the rule requiring him to account strictly for all the proceeds from the sale of the mortgaged property, and to use none for his own purposes. In addition to this defect, the legislative approval provided for the after acquired property clauses was relatively ineffective due to the frequent reports necessary to be filed (every four monhts)[7] and the lack of control by the creditor over the filing of these reports but the requirement that he foreclose immediately should the debtor fail to file.[8]

The remaining chattel security device available in these situations in Wisconsin is the conditional sale. While it does not suffer from such a lack of judicial approval[9] as the chattel mortgage on after acquired property, its use provides little answer to the basic problem herein considered, i.e., where the borrower has an existing inventory. Its utility is restricted to a simple purchase money device, and does not approach the idea of a floating charge like the Factor's Lien.

In other jurisdictions a further security device is available, the use of the trust receipt. However, Wisconsin does not have the Uniform Trust Receipts Act, an act which is most nearly analogous to the Factor's Lien Law in its recording requirements—the lender being protected simply by the filing of a general statement of intent to enter trust receipt transactions instead of more cumbersome and inconvenient separate recordation of each separate transaction as in the case of a chattel mortgage.[10] A general description of the kind of goods to be covered is all that is required.[11] Once such a statement is filed, the borrower and lender have only to enter agreements covering the specific goods as the money is advanced to be protected under the act. Such latter agreement need not be recorded. However, even under this act, most courts have restricted its application to those situations where the underlying transaction was the acquisition of new goods by the borrower,[12] and thus it would not aid a borrower who already has an

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[6] See comment, 1947 WIS. L. REV. 453.
[7] WIS. STATS. (1951), sec. 241.14 (1).
[8] *Ibid.*, 241.14 (2).
[9] Wisconsin is one of the twelve states to enact the UNIFORM CONDITIONAL SALES ACT, WIS. STATS. (1951), ch. 122.
[10] UNIFORM TRUST RECEIPTS ACT, sec. 13, 9 U.L.A. 372.
[11] *Ibid.*
[12] In re Chappel, 77 F.Supp. 573 (D.C. Ore., 1948).

inventory on hand and desires to finance his operations rather than the purchase price of his inventory.

These older security devices all show certain deficiencies rendering their use difficult where the manufacturer has an inventory on hand and wants to retain possession, process it, and sell it in the normal course of business using the proceeds to repay loans and to buy new raw materials so that processing may continue.

II. History of Factoring

It is beyond both the purpose and scope of this article to engage in a detailed history of the commercial factor. Excellent discussions may be found elsewhere.[13] Enough will be said, however, to give the Wisconsin Factor's Lien Law its proper historical setting.

Factoring originally arose when the buyer and the seller were far apart and the seller needed someone in this far off port to whom he could consign his goods.[14] The factor thus became the middleman agent of the seller.[15] Often he advanced money to his principal[16] or incurred expenses in handling the goods before he sold them; where the account between the factor and the principal indicated a balance due the factor, he was given as security a general lien on the goods in his possession.[17] Usually the lien depended upon physical possession of the goods by the factor,[18] but in some cases the court sustained a lien based on constructive possession.[19]

As business conditions changed, factoring as a marketing device diminished, but factoring as a financing device became more prominent.[20] However, since the factor could no longer rely on a possessory lien, the factor had no adequate protection for his loan.[21] Since most factoring was done in the great ocean ports, the pressure for legislation favorable to factors was felt there first. It was in this situation that the New York act was passed in 1911,[22] the purpose of which was to give the agent-factor out of possession the same lien as if he were in possession.

The lien created under the Wisconsin act is much broader than the lien created by this first legislation, for the factor no longer is an agent; he may be "any person, firm, bank or corporation engaged in whole or

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[13] See Steffan and Danziger, *The Rebirth of the Commercial Factor,* 36 Col. L. Rev. 745 (1936).
[14] 2 Meechem, Agency, sec. 2496-97 (2nd ed. 1914); Restatement, Security, sec. 62, comment (d) (1941).
[15] *Supra,* note 2.
[16] Gilmore, *Chattel Security; II,* 57 Yale L. J., 761 (1948).
[17] Restatement, Security, sec. 62 (a); 2 Meechem, *supra,* note 14, sec. 2563.
[18] 2 Glenn, Fraudulent Conveyances and Preferences 935 (rev. ed. 1940).
[19] 2 Meechem, *supra,* note 14, sec. 2563 n. 59.
[20] *Supra,* note 13, at 761.
[21] Johnson, *The New York Factor and the Chandler Acts A study in Competing Equities,* 10 Brook L. Rev. 323, 350 (1941).
[22] New York Personal Property Law (McKinney, Supp. 1947) sec. 45.

in part, in the business of lending or advancing money on the security of merchandise whether or not they are employed to sell such merchandise."[23] This lien is totally different from the possessory agent's lien of the common law factor.

III. Analysis of the Wisconsin Act and Comparison[24] With Other States

While almost half the states now have legislation on their books covering financing by factors, the legislation is nowhere near being a uniform act, and the individual state acts have been characterized as being "models of bad drafting."[25] However, a majority of the various acts do show a similarity in their basic provisions to which the Wisconsin Law can be compared.

In most states, including Wisconsin, a factor no longer is the agent of the borrower, nor need he have authority to sell the merchandise.[26] The continuing lien[27] given the factor by the act is restricted in Wisconsin, as in nine other states, to all merchandise other than trade fixtures, machinery, and equipment (Wisconsin along with two other states in addition excludes motor vehicles) generally described in the written agreement entered into between the factor and the borrower; twelve states have no merchandise restrictions whatsoever.

The lien provided for in the Wisconsin Act terminates on the sale of the goods,[28] nineteen states providing similarly; the lien, however, in Wisconsin follows the proceeds of the sale unless provided otherwise in the written agreement entered into between the factor and the borrower.[29] Twelve states make provision for automatic transfer of the lien to the proceeds of the sale, only Maryland and Delaware make the transfer of the lien contingent upon the written agreement. Five states have no provision at all covering the situation.

Wisconsin does not require a sign to be posted on the borrower's premises giving notice of the existence of the lien. The states are evenly split on this proposition. The effective period of the lien in Wisconsin is limited to three years with a possibility of renewal for an additional year.[30] Five states in substance make similar provision, while fifteen states have no time limitation whatsoever.

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[23] Wis. Stats. (1951), sec. 241.145 (1). Inasmuch as repeated reference will be made to the Wisconsin Act, further citation will be made to the section number only.

[24] The comparison made is based on the excellent work of H.R. Silverman, *supra* note 2. At page 602 appears a graphical collection of all the factor's acts passed prior to the Wisconsin Act.

[25] *Supra*, note 16, at 771.

[26] Sec. 241.145 (1)

[27] Sec. 241.145 (2).

[28] Sec. 241.145 (5).

[29] Sec. 241.145 (1)

[30] Sec. 241.145 (8)

In Wisconsin the notice of the lien must be filed with the register of deeds in the county where the merchandise is to be located,[31] a provision found in twenty other states. Wisconsin, however, requires no additional filing, while most other states require, in addition, notice filed either at the borrower's location, or the factor's location, or botn. The notice, to be valid in Wisconsin must be filed within fifteen days of the agreement;[32] only five states have similar provisions, sixteen states have no time limitation on the filing of the notice at all. The requirements concerning the contents of the notice and its formalization seem to be in substance uniform in all the states, Wisconsin requiring the notice to be signed by the factor and borrower[33] and contain a general description of the merchandise to be covered by the agreement.[34] The effectiveness of the lien as against unsecured creditors,[35] the provision for non-invalidation by certain acts,[36] and the separate treatment of the problem of possession of the merchandise by the factor without filing the notice[37] also seem to be quite uniform.

The above analysis and comparison of the Wisconsin Act with those of the other states illustrates the fact that most of these acts, while not uniform, are similar in their basic provisions. The Wisconsin Act is most similar to the Minnesota Act,[38] Minnesota being the twenty-first state to enact such legislation.[39] The Wisconsin Act, however, differs in at least two respects from all other acts. Not only does a purchaser for value in the ordinary course of the business take free of the factor's lien, but the borrower is given the power to execute chattel mortgages and conditional sales to purchasers in the usual course of business and can sell or assign the agreements free of the factor's lien.[40] The second difference is that purchase money chattel mortgages executed by the borrower are given priority over the factor's lien if recorded within twenty days after receipt of the merchandise by the borrower.[41] The significance of these differences together with other problems raised by the Wisconsin Act will be treated in the ensuing section.

IV. Problems Raised by the Wisconsin Factor's Lien Law

As has been indicated, supra,[42] the enactment of the Wisconsin Factor's Lien Law came on the fiftieth anniversary of the enactment of the original New York act. In a normal situation, fifty years experience

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[31] Sec. 241.145 (4).
[32] Sec. 241.145 (4).
[33] Sec. 241.145 (3).
[34] Sec. 241.145 (2)
[35] Sec. 241.145 (6)
[36] Sec. 241.145 (10).
[37] Sec. 241.145 (11).
[38] Comment, 34 Minn. L. Rev. 119 (1950).
[39] *Supra*, note 2.
[40] Sec. 241.145 (5)
[41] *Ibid.*
[42] See section II.

with a particular piece of legislation, including legislative refinement and judicial construction, usually results in a quite workable act, one whose ambiguities and weaknesses have been thoroughly pointed out for the wary to avoid and the bold to exploit.

The growth of factoring under the New York act, however, was not a normal situation due to the fact that factoring in its early years in New York was carried on by a relatively restricted group of specialists whose aim it was to remain out of courts and thus keep the weak act of 1911 from being further weakened by a court whose members may not be conversant with commercial practice and who might take a dim view of factoring.[43] Thus the first construction of the New York act did not come until 1927,[44] sixteen years after its original enactment. It is for this reason that, while the act has existed in New York for fifty years, its judicial construction has been very limited.

An additional reason explaining the lack of authority on this subject lies in the anomalous history of enactment given to the act by the various states; for, while the act is a relatively old one as far as New York goes, it is new as far as the rest of the states are concerned, the second state to create such legislation being Rhode Island in 1938.[45] Prior to 1945 only five states had such legislation, but in the next six years, seventeen states enacted it.[46] Thus, while we are not aided by New York construction due to the policy of the commercial factors there, we can not be aided by the construction of other states either due to the comparative newness of the legislation. It is with this background that the following discussion proceeds.

1. The first general problem posed by the Wisconsin Factor's Lien Law is: Is this lien a new type of security device or is it merely a refinement of a chattel mortgage to which we can look for aid in construing the new law? It has been generally held that this is an entirely new type of security device,[47] but one court has described it as an "alternative to a chattel mortgage or a common law pledge,"[48] and some writers have likened it to a field storage warehouse without segregation and possession,[49] and as coextensive with the conditional sale or chattel mortgage.[50] The act itself is not much aid in its construction. Provision

[43] *Supra,* note 21, at p. 346.
[44] *Supra,* note 21.
[45] Chap. 447, GENERAL LAWS OF RHODE ISLAND (1948).
[46] *Supra,* note 2.
[47] In re H. M. Kouri Corp., 66 F.2d 241, 243 (2d Cir., 1933); In re Merz, 37 F.2d 1, 4 (2d Cir., 1930); Colbath v. Mechanics' National Bank, 96 N.H. 112, 70 A.2d 608, 610 (1950); Utica Trust Co. v. Decker, 244 N.Y. 340, 346, 155 N.E. 665, 667 (1927).
[48] In re Comet Textile Co. 15 F.Supp. 963, 964 (D.C. N.Y., 1936).
[49] *Supra,* note 16.
[50] J. Francis Ireton, *The Proposed Commercial Codes: new Deal in Chattel Security,* 43 ILL. L. REV. 794, 808 (1949).

is made for liberal construction,[51] but it is not indicated in whose favor it is to be liberally construed.

2. Another problem raised by the law is as to the type of lien created. The writers are in disagreement as to whether the lien created is a floating credit charge.[52] At least one court favors this idea.[53]

3. A third problem posed by the law is: What is the effect of the Wisconsin Bulk Sales Act[54] on the factoring agreement? The Bulk Sales Law provides for a conclusive presumption of fraud in "the sale, transfer, or assignment in bulk, otherwise than in the ordinary course of trade . . . of any part, or the whole, of any stock of goods, wares, and merchandise . . ." without the compliance with certain conditions, the most important of which is notice by the purchaser to the existing creditors of the vendor, transferor, or assignor, of the proposed sale. Certain transactions are exempted from the operation of the statute, (generally sales made pursuant to court order) but a factoring agreement is not so legislatively exempted. However, while there is a legislative mandate to liberally construe the Factor's Lien Law,[55] the Wisconsin court has held that the Bulk Sales Act is "penal in its character, in derogation of the common law, and should be strictly construed."[56]

The answer to the problem of whether a factoring agreement would come under the operation of the Bulk Sales Act lies in the answer to another problem, more specifically, what is a "sale, transfer, or assignment" in bulk under the Wisconsin statutes? The fact that the factoring agreement covered only a small part of the borrower's merchandise would have no effect on the operation of the law, since the Wisconsin act includes sales, transfers, or assignments "of any part" of the merchandise of the seller.

The Wisconsin court has consistently adhered to its announced rule of strict construction of the statute;[57] illustratively, the court held[58] that the statute was aimed at the "merchant" as ordinarily defined, and not at the wide field of people who might deal with property generally considered merchandise. From this and analogous decisions, it can be concluded that a factoring agreement entered into with a borrower not a merchant, as the term is ordinarily defined, would not come within the

[51] Sec. 241.145 (12).
[52] Stone, *The "Equitable Mortgage" in New York,* 20 COL. L. REV. 519, 532 (1920), says that a floating credit charge may be created; Dunham, *Inventory and Accounts Receivable Financing,* 62 HARV. L. REV. 588, 595 (1949) says that it may not.
[53] Manchester National Bank v. Roche, 186 F.2d 827 (1st Cir., 1951).
[54] WIS. STATS. (1951), sec. 241.18.
[55] Sec. 241.145 (12).
[56] Missos v. Spyros, 182 Wis. 631, 197 N.W. 196 (1924).
[57] *Ibid.*
[58] Nichols, North, Buse Co. v. Belgium Cannery, 188 Wis. 115, 205 N.W. 804 (1925).

purview of the Bulk Sales Act. Thus, it is only in those limited situations where a merchant desires to finance his operations by entering into a factoring agreement, that the problem of the Bulk Sales Act would arise.

In continuing this analysis, it must be borne in mind that, while some disagreement as to what type of a lien the factor receives and whether it is analogous to any existing security devices has arisen, it is well settled that the factor does not receive title to the goods and the agreement is not a sale. Thus, those decisions that include a chattel mortgage as within the operation of the Bulk Sales Act would be the most analogous authority for a similar inclusion of a factoring agreement. Unfortunately, the Wisconsin court has never been faced with the question of whether a chattel mortgage is within the purview of the act. However, the Court of Appeals for the Seventh Circuit in *Goetz v. Michael Tauber and Co.*,[59] in considering the Wisconsin Bulk Sales Act held that a consignment of goods in bulk by a merchant to a broker to sell at an auction was not a conveyance within the meaning of the Bulk Sales Act, stressing the fact that legal title never passed from the merchant.

The decided weight of authority is to the effect that the giving of a chattel mortgage on a stock of goods for a bona fide debt or new consideration does not constitute a sale, transfer, or assignment in bulk, in violation of statutes forbidding such a sale or transfer in bulk of a stock in trade, otherwise than in the ordinary course of business, without certain preliminary proceedings.[60] The reasoning seems to be that before the statute becomes applicable, the mortgagor has to divest himself completely of all his interest in the property. There is a respectable minority,[61] however, who follow the seemingly more logical reasoning that if the Bulk Sales Act was intended to prevent a merchant from disposing of his merchandise in bulk and then absconding with the proceeds, the evil to be remedied lies both in sales and mortgages and the law should be applicable to both.

As indicated, the Wisconsin court has not as yet taken its position on this problem. The one decision considering an analogous problem, while indicating a reasoning in line with the majority, is of dubious value. At best, it can be said that the validity of a factor's lien on goods in the hands of a merchant is questionable unless the Bulk Sales Act is complied with.

4. Another problem, perhaps of greater magnitude than that arising by virtue of the operation of the Bulk Sales Act on the factoring agreement, is that arising by virtue of the operation of the federal bankruptcy

[59] 282 Fed. 869 (7th Cir., 1922).
[60] Annotations, 9 A.L.R. 473, continued, 14 A.L.R. 753, continued 57 A.L.R. 1049.
[61] *Ibid.*

laws on the factoring agreement. Under the bankruptcy laws as they existed from 1938 until 1950, the factor had little protection, for the factor's lien under the state law terminated on the sale of the merchandise by the borrower in the ordinary course of business. Yet, unless the factor had a right superior to a purchaser in the ordinary course of business, if the borrower went bankrupt, the trustee in bankruptcy could set aside the lien of the factor as a voidable preference if certain other elements were present. Under the law as it existed, legitimate security transactions were beclouded by an aura of uncertainty.[62] Agitation soon arose to amend the offending section of the law in favor of lenders who did non-notification accounts receivable financing and others.[63] The present bankruptcy statute, sec. 60 (a), is the product of that movement.[64]

Today, a transfer of property other than real property is perfected within the meaning of the Bankruptcy Act at the time when no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. Thus, the problem presented is, under the Wisconsin Factor's Lien Law is the lien of the factor superior to that of a lien obtained by a creditor of the borrower in an action upon a simple contract?[65] An affirmative answer is indicated under the Wisconsin law, inasmuch as the lender is protected as against all unsecured creditors and as against subsequent secured creditors. Due to this express provision of the act, the bankruptcy laws should have little effect on the validity of the factor's lien.

5. An interesting problem is that raised by the treatment of accounts receivable in the Wisconsin Act. The law by definition is restricted to securing the factor by means of a lien on personal property, and, unless stipulated by the parties to the contrary, also on the proceeds and accounts receivable arising from the sale or other disposition of such merchandise. There is no general lien on all accounts receivable. To include accounts existing at the date of the agreement, or thereafter arising other than through the sale of merchandise included in the agreement, the borrower and the factor must follow the provisions of sec. 241.28 of the Wisconsin Statutes relating to assignment of accounts receivable. This is not required of accounts arising from the sale of

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[62] Corn Exchange National Bank and Trust Co. v. Klauder, 318 U.S. 434, 63 S.Ct. 678, 87 L.Ed. 884 (1943); In re Vardaman Shoe Co., 52 F.Supp. 562 (D.C. Mo., 1943); In re Rosen, 157 F.2d 997 (3rd Cir., 1946).

[63] Kupfer, *Progress in the Amendment of 60 (a)* . . ,13 L. & CONTEMP. PROB. 624 (1948).

[64] 11 U.S.C. sec. 96.

[65] McKenzie v. Irving Trust Company, 323 U.S. 365, 369, 69 S.Ct. 405, 89 L.Ed. 305 (1945). "Sec. 60 (a) adopts the state law as the rule of decision in determining the effectiveness of a transfer as against the trustee."

merchandise included in the agreement. These accounts are automatically assigned by operation of law.

It is with respect to this latter group of accounts that some doubt has arisen as to the validity of the factor's lien under the present sec. 60 (a) of the bankruptcy laws. The argument has been advanced that if the borrower should sell merchandise included in the factoring agreement on credit within four months of his bankruptcy, the lien the factor would receive on the new account receivable arising from the sale would be a voidable preference, being a transfer of security made within four months of bankruptcy in consideration of an antecedent debt.[66] This position hardly seems tenable, for the transaction more properly should be regarded as a "value exchange," the factor releasing his lien on the merchandise sold in consideration of receiving a lien on the new account given birth to by the sale.

6. The Wisconsin Factor's Lien Law gives the factor a continuing lien upon all merchandise "generally described" in the written agreement entered into by the factor and the borrower regardless of whether or not the merchandise is in possession of the borrower at the time of the making of the agreement, or even whether it is in existence. It is thus apparent that any attempt to create a lien by oral agreement would be void.[67] A more difficult problem is that raised by the requirement that the merchandise be generally described in the written agreement. The exact particularity of description thus demanded does not seem to be settled, but a description including the "entire assets of the corporation" has been held to be too broad.[68] In mortgages a description of property now owned or hereafter acquired by the mortgagor is usually sufficient.[69] Demand for too detailed a description would tend to defeat the purpose of the act,[70] and a suggested correction of this type of act has been to substitute a description of the location of the articles rather than a description of the character of articles which are not capable of description.[71]

If the goods are adequately described in the record notice, the courts have held that the lien attaches as soon as the goods are acquired,[72] but there is some feeling that something should be done to subject a particular lot of goods, merchandise or raw materials to the lien as they become a part of the buyer's inventory.[73] The problem of the effect of the bankruptcy laws on the imposition of such a lien is present here as it

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[66] *Supra*, note 53.
[67] Lichtenberg v. Harvey, 57 F.2d 82 (2d Cir., 1932).
[68] Heyman v. Kevorkian, 193 App. Div. 859, 184 N.Y. Supp. 783 (1920).
[69] Cohen and Gerber, *Mortgages of Merchandise*, 39 COL. L. REV. 1338, at 1350 (1939).
[70] *Supra*, note 16 at 771.
[71] *Supra*, note 50 at 812.
[72] *Supra*, note 48.
[73] *Supra*, note 2 at 604.

was, supra, in the imposition of the lien on new accounts receivable arising within four months of bankruptcy of the borrower. It is readily apparent that, assuming no new consideration is given, if the borrower acquires merchandise within four months of bankruptcy, the imposition of a lien on such goods in favor of the factor could be attacked as a voidable preference under sec. 60 (a). The theory of a "value exchange" could not be employed in these transactions as it could in the accounts receivable problem. However, even if it is set aside as a voidable preference, the position of the factor is not worsened for it is only in those situations where the imposition of the new lien could not be substantiated as a "value exchange," that is, something given in consideration of receiving the lien, that it could be attacked as a preference; but having parted with nothing to secure the new lien, the factor is not hurt if he loses it.

7. Another problem arising under the Wisconsin Act, one which has its origin, as does the problem of the particularity of the description of the merchandise required in the record notice, in a lack of legislative clarity, is the problem as to who is a "purchaser for value in the ordinary course of business" within the meaning of the act? Nowhere are the terms included in the phrase defined, yet all three terms, purchaser, value, and ordinary course of business, present problems which strike at the very heart of the act.

Who is a purchaser under the act? One taking merchandise as security? The Uniform Trust Receipts Act and the Uniform Chattel Mortgage Act both provide such a person is a purchaser though not in the ordinary course of business. While it does not seem that the power of sale given the borrower in the act includes the power to borrow generally on the merchandise or pledge it for his own benefit, the borrower in Wisconsin is given the power to execute chattel mortgages which have priority over the factor's lien if filed within twenty days of the receipt of the merchandise by the borrower.[74] The consideration for such a mortgage can be money or credit extended in the usual course of business on the strength of a mortgage which is given in payment in whole or in part of the purchase price of the merchandise. If this is construed as allowing mere purchase money mortgages, this provision should be no more objectionable than that which gives dyers and finishers priority over the factor's lien.[75] It is subject to the criticism, however, that the factor never knows the status of the inventory, there being a twenty day gap between the date of the acquisition of the new merchandise by the borrower and the time when the factor can be sure his lien is secure. Also, the provision lends itself to the criticism that it can become a vehicle whereby the factor can lose out altogether; for

[74] Sec. 241.145 (5).
[75] Sec. 241. 145 (6).

example, F makes the initial loan and becomes secured by a lien on all of B's merchandise by virtue of a factoring agreement. Then X makes a loan to B which B uses to purchase new merchandise to replace merchandise being sold. X's lien, if filed in time, is superior to that of F and F may end up with no security at all.

The Wisconsin Act also makes provision whereby the borrower can sell merchandise in the ordinary course of business and accept conditional sales and chattel mortgages from the purchasers.[76] In addition, the borrower can sell or assign the contracts for value in the ordinary course of business free of the factor's lien. Thus a borrower financing through factor F can sell merchandise on credit taking back a conditional sales contract which he can then assign to bank B, the assignment being free of the factor's lien if made for value. The problems arising under such an arrangement are as follows: 1) If value means anything other than cash, it is obvious that factor F may find its collateral dissapated by the borrower in a perfectly legitimate manner. Net effect of such a transaction is to leave no security for the factor. 2) If bank B pays cash, is such cash "proceeds" within the meaning of subsection two of the act whereby the factor is given a lien on the proceeds of the sale of merchandise covered by the factoring agreement? If the borrower sells the merchandise and takes a chattel mortgage, that is proceeds of the sale. When he sells the chattel mortgage for cash, there are proceeds of proceeds. The court may hold the lien doesn't extend to these indirect proceeds.

It is apparent that the question of what is value takes on great importance in view of the above provisions. Value in some statutes is "any consideration sufficient to support a simple contract," including antecedent indebtedness. This definition is generally accepted commercially.[77] However, if the value is not commensurate with the actual worth of merchandise, it may not be in the usual course of business.[78]

The Uniform Trust Receipts Act solves a similar problem by providing that the buyer in the ordinary course of business must give new value which does not include "extensions or renewals or existing obligations of the trustee, nor obligations substituted for such existing obligations,"[79] before he can cut off the entrustor's lien. The Uniform Chattel Mortgage Act excludes purchasers who rely on antecedent debts from protection given purchasers in the ordinary course.[80]

The problem of what "ordinary course of business" comprehends is not well settled. The same phraseology is used in the Bulk Sales Act, but unfortunately it has received no judicial construction. However, the

[76] Sec. 241.145 (5).
[77] *Supra*, note 38.
[78] UNIFORM REVISED SALES ACT, Proposed Final Draft No. 1, 195 (1944).
[79] UNIFORM TRUST RECEIPTS ACT, sec. 1, 9 U.L.A. p 6.
[80] UNIFORM CHATTEL MORTGAGE ACT, sec. 18(2) (a).

rule seems to be that where it is questioned whether a disputed sale was one to which such statutes apply, the issue is to be determined in accordance with the showing as to whether the sale was made in the way in which a merchant owing debts usually conducts his business or whether the seller took an unusual method of disposing of his property in order to secure the consideration for his own benefit thereby leaving his creditors unpaid.[81] The same test could be applied to the present statute.

V. Conclusion

The Wisconsin Act is not to be overly criticized for its poor drafting features. Provision is made for foreclosure of the factor's lien, a feature notably lacking in all other acts.[82] In addition, the lead given by the Supreme Court in *Benedict v. Ratner*[83] has been followed, and provision has been made whereby the exercise of control by the borrower over returned merchandise or the failure of the factor to require the borrower to account for merchandise sold shall not invalidate the factor's lien, thus abrogating a bankruptcy problem.

The Act in another respect shows the benefit of early New York experience for provision is made that when the factor or any third party on account of the factor shall have possession of goods or merchandise such factor shall have the benefit of the lien provided by the act without the required filing.[84] In New York it had been held[85] that under the act as written, if the lendor, who was not a seller, attempted to enforce a factor's lien based on possession of the liened goods, since he was not a factor by the common law definition, he could not have a lien without complying with the notice provisions of the statute.

The above discussion is not intended as a comprehensive review of all the possible problems that exist or can arise by virtue of this new legislation. Undoubtedly many of the above suggested problems may never arise, whereas some not discussed may arise to plague the users of the Act.[86] Only through continued use of the Act will many of the difficulties herein suggested be resolved.

The use of the factor's lien will not supplant the use of existing security devices in those situations where they can be safely used. Its widest use may be expected in financing undercapitalized small businessmen. Due to the relatively poor credit risks the factor will be dealing with, and the apparent weaknesses in the law as far as the factor is

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[81] Annotation, 2 L.R.A. (N.S.) 337 et seq.
[82] *Supra*, note 16 at p. 770 n. 39.
[83] 268 U.S. 353, 361 n. 11, 45 S.Ct. 566, 69 L.Ed. 991 (1925).
[84] Sec. 241.145 (11).
[85] Irving Trust Co. v. B. Linder and Bros., 264 N.Y. 165, 190 N.E. 332 (1934).
[86] Steffen and Danziger, *supra*, note 13, question whether more than one factor may finance a borrower under this type of act but conclude that this is possible; Gilmore, *supra*, note 16, raises the problem of whether or not agricultural crops may be suitable subjects for factor's loans.

concerned, it will be incumbent upon him to adequately provide for his own security in the agreement with the borrower. Assuming this is done in a workmanlike manner, there seems to be no reason why the factor's lien should not take its place as a legitimate security device alongside the conditional sale, the chattel mortgage, and the assignment of accounts receivable.

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