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FOR GENERATIONS businessmen in the United States and other commercial countries have been searching for a feasible method of obtaining loans on the security of raw material, goods in process and finished product. The need for such financing arises generally in the case of a small manufacturer or processor of goods who has already encumbered his real estate and fixtures in order to purchase raw material and requires additional financing with which to meet salaries, utility costs or other operating expenses. His inventory is his only remaining asset of immediate security value.

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The problem is obvious. Our borrower must find some way to utilize his inventory (raw material) as security so as to obtain the desired operating capital; however, the pledging of his inventory would have the effect of terminating his enterprise because the efficacy of the common law pledge as a security device depends upon possession by the lender of the object pledged.[1] If the lender fails, in the first instance, to obtain possession or if he later suffers the loss of possession, he loses the security for his loan.

At an early date the borrower and his banker attempted to solve the problem by the execution of a chattel mortgage containing an after-acquired property clause to compensate for the shifting of merchandise. The attempt failed, however, because of judicial invalidation of the after-acquired property clause.[2]

[1] Thorne v. First National Bank, 37 Ohio St. 254 (1881); Deardorff v. Fullington, *Dayton* 96 (Montgomery Super. Ct. 1868).

[2] In Ohio a chattel mortgage containing an after-acquired property clause gives the mortgagee no right in property acquired by the mortgagor after the execution of the mortgage. Chapman v. Weimer, 4 Ohio St. 481 (1855). The ineffectiveness of the after-acquired property clause persists even though a liberal rule of description of mortgaged chattels prevails in Ohio. The reason for the failure of the after-

The possibility that trust receipt financing might provide the needed capital for the manufacturer and, at the same time, afford adequate protection to the lender could not be realized because the trust receipt was designed to furnish inventory to the borrower[3] and, therefore, is utterly useless to a manufacturer who has already acquired an inventory, but who desperately needs operating capital.

From a cursory examination a field warehousing plan would appear to meet the needs of the parties. Field warehousing has proved successful in the case of grocers and other dealers in staple commodities which are handled in their original form, but it entails too many restrictions on the borrower's freedom of control of inventory to be of value to a manufacturer.[4]

Thus there was needed a hybrid form of security device which eliminated the shortcomings, but retained the beneficial aspects, of the above types of financing. It is not unusual that such a hybrid plan should be provided by legislation. It is somewhat surprising, however, that the ultimate solution to the problem of the manufacturer and his financial agent should be discovered in a specie of commercial financing which antedates the problem itself.

HISTORICAL DEVELOPMENT OF FACTORING

There is evidence that the commercial factor was known to the ancient Romans, at least to a limited extent. He attained his maturity, however, during the early colonial period of the British Empire. British merchants, desirous of taking advantage of the growing markets in the Americas, found it unsatisfactory, and sometimes impossible, to make direct contact with customers in the colonies; and, as a result, factoring came into prominence.

The normal procedure called for the British businessman to select a dependable agent in the colonies or send one of his own choosing to take up residence there. The British merchant would then entrust his goods to the

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acquired property clause in the situation under consideration is the continuous change in the character of the chattels as well as the fact that entirely new chattels are subsequently acquired. 7 OHIO JUR. 296.

[3] *In re* Chappel, 77 F. Supp. 573 (D. Ore 1948); Hanna, *Trust Receipts*, 19 CALIF. L. REV. 257 (1931). In a trust receipts operation, the lender takes title to the merchandise and entrusts it to the borrower who uses it in his business, the lender being required under the Uniform Trust Receipts Act only to file a certificate of intention to enter into such financing. UNIFORM TRUST RECEIPTS ACT § 13, 9 UNIFORM LAWS ANN. 372.

[4] In a field warehousing arrangement the borrower is required to segregate the goods which are subject to the lien, to post a sign indicating the lien at the location of the goods and to employ a warehouseman to supervise the passage of inventory in and out of the warehouse. The borrower is required further to obtain a release of some nature, depending upon the type of plan used, from the lender for inventory removed and sold in the regular course of the business. He is also required periodically to furnish the lender with warehouse receipts covering new inventory received. See Note, 37 VA. L. REV. 1023 (1951).

factor in the colonies; the factor would proceed to select his own customers, make the sales, retain an agreed commission and forward the balance to his principal in the mother country. The legal effect of the transaction was similar to a pledge. Title remained in the principal until the goods were sold, but the factor acquired possession and a lien on the goods to assure the payment of his commission.

In time the factor began to find it to his advantage to sell the goods on credit. Consequently the structure of his arrangement with his principal underwent some revision.[5] In some instances he would purchase the goods himself and sell them on his own account and on his own terms. More commonly, however, either he would advance funds to his principal on the basis of the goods received or he would guarantee the credit of his customers. In the latter two instances, of course, the factor retained his lien for commissions.

It might, from a mere perusal of historical development, be difficult to perceive just how the early merchant-factoring arrangement could furnish the solution to the present day problem of inventory financing for manufacturers. Actually, however, an analysis of the factoring concept reveals that only the requirement of possession of the entrusted goods by the factor would render it unworkable as a method of inventory financing.

The first step toward removal of the requirement of possession by the lender came with the 1911 amendment to Section 45 of the New York Personal Property Law. Prior to the amendment that section was little more than a legislative expression of the common law rules of factoring, in that it provided for a pledge of goods by the principal to the factor and for a lien in favor of the factor, but founded upon his possession of the pledged goods. However, after the amendment of 1911 and the subsequent, though less revolutionary, amendments of 1931, 1935 and 1943, Section 45 read, in part, as follows:

> If so provided by any written agreement with their principals, consigners or employers (hereinafter called the person creating the lien), all factors, consignees and commission merchants shall have 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 occupancy or possession or not for all their loans and advances to or for the account of the person creating the lien and such lien shall be valid from the time of the agreement creating the lien or at the time of filing such notice or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the person creating the lien.

Thus the first time there came into existence a workable plan whereby a

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[5] For a more detailed analysis of historical development of the factor see Cameron, *Factors' Liens in Ohio*, 23 Ohio Bar 361 (1950); 2 MECHAM, AGENCY §§ 2496-97 (2d ed. 1914).

manufacturer or processor of goods could pledge his stock-in-trade as security for a loan and, at the same time, retain possession of the pledged materials for use in his business.[6]

Unfortunately, the very persons whom the new law was calculated to benefit were slow to recognize its potential. Nor did the new enactment find ready approval in the other states. From 1911 until 1938, when similar statutory provisions were enacted in Rhode Island and South Carolina, Section 45 of the New York Personal Property Law remained the only legislative enactment of its type in the country. Nevertheless, despite criticism ranging from mild skepticism to condemnation,[7] in recent years, the legislatures of the more commercially minded states began to pass similar legislation, and at the present time twenty-two state have enacted what has come to be called a Factors' Lien Act.[8]

These acts have created a new type of factor who differs from the ancestor, whose name he bears, in that his primary function is the lending of money on the security of inventory, as opposed to the selling of entrusted goods for a commission. This new factor was created by the simple expedient of eliminating as a prerequisite for the pledge and resultant lien of the factor the necessity of his taking and maintaining possession of the pledged property.

FACTORS' LIEN ACTS TODAY

The Factors' Lien Acts in all states follow the general pattern of the original New York amendment of 1917, although they differ to a considerable degree in their specific provisions. Each act, with the exception of that of Connecticut, provides for a master-factoring agreement owned or

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[6] It is recognized that the New York Act, as it is now constituted, also governs the original form of factoring whereby the factor takes possession of the goods as a selling agent, but that form of transaction is beyond the scope of this article.

[7] The acts have been challenged for poor draftsmanship. Gilmore, *Chattel Security: II*, 57 YALE L.J. 761, 768 (1948). They have been further criticized as requiring too much supervision on the part of the lender. Steffan and Danziger, *The Rebirth of the Commercial Factor*, 36 COL. L. REV. 745 (1936).

[8] ALA. CODE ANN. tit. 47, §§ 132 (1), *et. seq.* (1947); CONN. REV. GEN. STAT. §§ 7256 *et seq.* (1949); DEL. REV. CODE c. 79, §§ 3340A *et seq.* (1935); ME. REV. STAT. c. 167, §§ 3-A *et seq.* (1944); MD. ANN. CODE GEN LAWS art. 2, §§ 21, *et seq.* (Cum. Supp. 1947); MASS. ANN. LAWS c. 255, §§ 40 *et seq.* (1945); MICH. STAT. ANN., §§ 26.415(1) *et seq.* (Cum. Supp. 1951); MINN. STAT. c .514, § 514.80 (Henderson 1949); MO. REV. STAT. ANN. §§ 430.260 *et seq.* (1949); N.H. REV. LAWS c. 262-A, §§ 1 *et. seq.* (1943); N.J. STAT. ANN. § 2:60-252 *et seq.* (Cum. Supp. 1951); N. Y. PERS. PROP. LAW § 45; N.C. GEN. STAT. ANN. §§ 44-70 *et seq.* (1950); PA. STAT. ANN. tit. 6, §§ 221 *et seq.* (Cum. Supp. 1952); OHIO GEN. CODE §§ 8364-1 *et seq.*, R.I. GEN. LAWS c. 447, § 1 *et seq.* (1938); S.C. CODE ANN. §§ 8785-1 *et seq.* (Supp. 1946); TEX. STAT., REV. CIV. art. 5506c, §§ 1 *et seq.* (1948); VT. CODE c. 129, §§ 2738 *et seq.* (1947); VA. CODE ANN. § 55-144 (1950); W Va. CODE ANN. §§ 3946 (17) *et seq.* (1949); WIS. STAT. §§ 241.145 *et seq.* (1951).

in the possession of the borrower.[9] In all of the acts there is a requirement that inventory received by the borrower subsequent to the execution of the master agreement shall be designated in separate written statements delivered to the factor.[10] Each state requires that a written notice of the factor's lien be recorded; however, provisions of the various statutes differ greatly as to the information to be included in the notice and the place in which it shall be recorded.[11]

All of the acts stipulate that the factor's lien shall be valid from the time of the recording of notice thereof as against the claims of unsecured creditors of the borrower and against other liens subsequently perfected,[12] except that liens acquired by third persons as a result of "processing, warehousing, shipping or otherwise dealing with the merchandise"[13] shall be superior liens. It is also contemplated under all of the statutes that the borrower, so long as he abides by the provisions of the act and the terms of his master-agreement, shall have the right to deal with the pledged merchandise as though the same were free from the lien and to sell the finished product in the regular course of his business to purchasers who take free of the lien.[14]

Despite the similarity in structure of the Factors' Lien Acts there are numerous variations as to specific details.

In two states[15] the act is limited in its application to a manufacturer or processor of merchandise, in another,[16] to wholesalers, as opposed to borrowers who display their products for sale on the retail market. Less than one-half of the acts expressly exclude from the operation of the lien trade fixtures, which of course, were never intended to come within the acts' coverage.[17]

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[9] Section 8364-2 of the Ohio General Code begins: "If so provided by any written agreement with the borrower, a factor shall have a lien upon such merchandise owned by and in the custody or possession of the borrower, including such merchandise as is temporarily out of the borrower's custody or possession. "

[10] *E.g.*, OHIO GEN. CODE § 8364-2 (Cum. Supp. 1952)

[11] The Ohio Act requires that notice of lien be filed in the office of the county recorder of the county wherein the borrower does business or has its principal place of business or principal office (corporation) or, if the borrower does no business in Ohio or has no principal place of business or office in Ohio (corporation), in the county where the merchandise is located. OHIO GEN. CODE §§ 8364-2, 8364-3.

[12] *E.g.*, OHIO GEN. CODE § 8364-4.

[13] *Ibid.*

[14] *Ibid.*

[15] *E.g.*, MICH. STAT. ANN. § 26.415(1) (Cum. Supp. 1951). Vermont has a similar provision.

[16] TEX. STAT., REV. CIV. art. 5506c, § 1 (1948)

[17] Ohio excludes from the act's coverage not only trade fixtures but also "machinery," "equipment" and "motor vehicle, whether or not intended for sale." OHIO GEN. CODE § 8364-1. *In re* Wyse Laboratories, Inc., 55 Ohio L. Abs. 321 (S.D. Ohio 1949). There seems no sound reason why the benefits of this method of financing

In most of the states which have enacted this legislation a sign must be posted wherever goods subject to a factor's lien are stored in order to notify those who deal with the borrower that his stock-in-trade is covered by the lien.[18] It is submitted that the requirement of the posting of a sign diminishes the attractiveness of factors' lien financing from the standpoint of both the borrower and his banker. In the first place, it is quite possible the sign will create the effect of a psychological sales detriment to the borrower for a new, and perhaps somewhat timid, customer may have some misgivings over dealing with a firm that finances its operations by a pledge of its merchandise. Secondly, to require the lender to ascertain that a sign remains posted during the existence of the lien merely imposes upon the lender one more obligation in an arrangement which has already been criticized for the amount of policing which it entails. Admittedly, the presence of a sign furnishes an immediate and concrete warning to all those who deal with the borrower, but there is nothing unreasonably burdensome in requiring third persons to rely on the record notice, as has been done in the case of deeds, leases and mortgages.

The place of recording the lien differs greatly under the various acts. The recording points commonly stipulated are governed by (1) the location of the goods, (2) the location of the borrower's place of business and (3) the location of the factor's place of business. In some states notice of lien need be recorded only in the county or municipality (depending upon the recording system of the particular state) where the merchandise is situated;[19] in others, however, it is required to be filed in various combinations of two of the above locations.[20]

In only six states[21] is there to be found any limitation of time within which a notice of lien must be filed. In those states it is stipulated that

should be foreclosed from manufacturers of motor vehicles, but as the Act now reads such is the result.

[18] For example, in New York it is provided: " there shall be placed and maintained in a conspicuous place at the main entrance of the store, loft or other premises in or at which such merchandise, or any part thereof, shall be located, kept, or stored, a sign on which is printed in legible English, the name of the lienor and a designation of said lienor as lienor, factor or consignee. " N. Y. PERS. PROP. LAW § 45. Ohio has no such requirement.

[19] *E.g.*, DEL. REV. CODE c. 79, § 3340-A (1945).

[20] In Maine the notice is required to be filed at both the borrower's and lender's location. ME. REV. STAT. c. 167, § 3-A (1944). In South Carolina it must be filed at the location of the borrower and the location of the merchandise. S.C. CODE ANN. § 8785-3 (Supp. 1946). New Jersey requires the notice to be filed at the location of the factor and the location of the merchandise. N.J. STAT. ANN. § 2:60-254 (Cum. Supp. 1951).

[21] Delaware, Maryland, Massachusetts, Minnesota, Ohio and West Virginia. Ohio requires the notice to be filed within 15 days after the execution of the factoring agreement. OHIO GEN. CODE § 8364-3.

such notice must be filed within a period, ranging from ten[22] to thirty days,[23] after the execution of the factoring agreement. However, the statutes fail to make clear the effect of a failure to file within the specified period, nor have there been any judicial expressions on that subject. In *Irving Trust Co. v. Lindner & Brothers, Inc.*[24] the highest court of New York held that the complete failure of a lender to file notice of lien had the effect of nullifying the lien when the factor attempted to take actual possession of his security within four months of the bankruptcy of the borrower. Although the New York act contains no time limitation, within which notice of the lien must be filed, it is suggested that the courts are likely to deal quite severely with factors who fail to record notice of their liens within the required period of time.

These time period provisions for filing notice are susceptible of a number of different interpretations. It is possible that the courts may regard them as mere grace periods for the benefit of the lender, in which case, if the lender records on the last day of the period, he would obtain a lien prior to the rights of any creditor who received his security during the time period. In conjunction with such an interpretation, it is likely that a factor might be permitted to record his notice of lien anytime after the running of the period, with the sole qualification that he lose his priority of lien over creditors who obtain their security before recording by the factor. Those seem the more logical rules of construction to apply to the time statutes; nevertheless, it is not improbable that the time requirements may be regarded as imposing an absolute obligation on the factor, and his non-compliance will result in the loss of the lien.

In a great majority of the states which have enacted Factors' Lien Acts, the lien remains valid for an indefinite period after the recording of notice. In a few states, however, statutes have been passed limiting the life of a factor's lien.[25]

Another question over which the acts are at considerable variance is the fate of the factor's lien on specified merchandise after that merchandise has been sold in the regular course of the business of the borrower. In most states the act expressly provides that the lien on the merchandise shall cease at the time of the sale.[26] A majority of the acts provide further that the lien shall attach to the proceeds of the sale;[27] and along this same

[22] MASS. ANN. LAWS c. 255, § 42 (1945).

[23] W VA. CODE ANN. § 3946 (20) (1949)

[24] 264 N.Y. 165, 190 N.E. 332 (1934).

[25] In Ohio the notice of lien remains valid for 3 years after filing, but may be refiled for an additional 3 year period upon the termination of the first 3 years. *Query:* May the notice be refiled more than once? OHIO GEN. CODE § 8364-5.

[26] *E.g.* OHIO GEN. CODE § 8364-4.

line, a few acts have provided for an automatic transfer of the lien to the resultant account receivable where the sale has been made on a credit basis.[28] In a number of states the legislators, fearful either that the attachment of the lien to the proceeds of a sale might infringe upon the normal right of the borrower to accept the return of merchandise and make other adjustments with his customers or that such adjustments or returns might subject the factor to the loss of his lien, have enacted statutes providing for the maintenance of the lien intact as to the balance of the purchase price or account receivable after adjustment between the borrower and his customer.[29]

To the banker-factor, who wishes to insure the retention of his security, the importance of strict compliance with the terms of the act can scarcely be overemphasized. There are numerous decisions in cases involving bankrupt debtors which stand as mute testimony of the courts' dislike for liens which do not afford third persons the highest degree of opportunity to obtain notice thereof or with respect to which the lienors have been somewhat less than diligent in securing their rights.[30]

Every banker who contemplates factors' lien financing must, of course, give serious consideration to the possibility of the bankruptcy of his borrower. Under Section 60a of the Bankruptcy Act[31] any preferential transfer made by a bankrupt within four months prior to the filing of a petition in bankruptcy may be set aside by the trustee in bankruptcy. Under the 1938 amendment to that section a transfer was deemed to have been made "when it became so far perfected that no bona fide purchaser from the debtor and no creditor could have acquired any rights in the property

[27] *E.g.*, N.Y. PERS. PROP. LAW § 45. The Ohio Act contains no reference to the subject.

[28] *E.g.*, N.Y. PERS. PROP. LAW § 45.

[29] Section 2:60:257 of the New Jersey Act reads: "If merchandise sold, or any part thereof, is returned to or recovered by the assignor from the person owing the account receivable and is thereafter dealt with by him as his own property, or if the assignor grants credits, allowances or adjustments to a person owing an account receivable, the right to or lien of the lienor or assignee upon any balance remaining owing on such account receivable and his right to or lien on any other account receivable assigned to him by the assignor shall not be invalidated, irrespective of whether the assignee shall have consented to or acquiesced in, such acts of the assignor."

[30] Corn Exchange Bank v. Klauder, 318 U.S. 434, 63 Sup. Ct. 679 (1942) (failure to file notice of assignment of accounts receivable resulted in loss of lien when borrower became bankrupt within four months); Benedict v. Ratner, 268 U.S. 353, 45 Sup. Ct. 566 (1925) (assignment of accounts receivable held fraudulent where assignor not required to account to borrower for proceeds of collected accounts); Twyne's Case, 3 Co. Rep. 80b, 76 Eng. Rep. 809 (K.B. 1601) (secret assignment of goods by debtor held fraudulent where debtor retained possession of and freedom of disposal over goods); *cf.* Irving Trust Co. v. Lindner & Bros., Inc., 264 N.Y. 165, 190 N.E. 332 (1934).

[31] 64 STAT. 25, 11 U.S.C. § 96(a)(1) (1950).

thereafter superior to the rights of the transferee." This so-called "bona fide purchaser test" aroused the fears of the conscientious banker-factor. Under the Factors' Lien Act certain persons were granted rights superior to his lien, even though their rights may have come into existence after the creation of the lien.[32] The mere fact that these classes of persons had the power under given circumstances to defeat the factor's lien by acquiring rights in the property "superior to the rights of the transferee" rendered it impossible for the factor ever to perfect his lien insofar as the Bankruptcy Act was concerned.[33] The factor would, therefore, constantly run the risk of losing his lien in the event of the bankruptcy of the borrower.

After twelve years, however, Congress came to his aid by amending Section 60a so as to supply what has been called the "subsequent lien test." Under this amendment in 1950 a transfer is deemed to have been made at the time "when it became so far perfected that 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."[34] Thus, the fact that a bona fide purchaser in the course of business could defeat the factor's lien no longer prevented its perfection. Congress further allayed the fears of the factor by excluding from the definition of the word "lien", as used in the amendment, all "liens which under applicable law are given a special priority over other liens which are prior in time."[35] This brings the specific lienors covered in Ohio General Code Section 8364-4 squarely within the exclusionary provision of the definition. Today, therefore, although one who engages in the "processing" or "warehousing" of the merchandise covered by the factor's lien has the power to obtain a lien superior to that of the factor, this fact does not result in the destruction of the factor's lien in the case of the bankruptcy of the borrower.

SUGGESTED AMENDMENTS TO THE OHIO ACT

The factors' lien acts in all states have been subjected to a great deal of criticism, which was to some extent justifiable, for the low calibre of draftsmanship which went into their preparation.[36] In that respect, the

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[32] " specific liens arising out of contractual acts of the borrower with reference to the processing, warehousing, shipping, or otherwise dealing with the merchandise in the usual course of the borrower's business, preparatory to their sale, shall be superior to the lien of the factor on such merchandise. " OHIO GEN. CODE § 8364-4. In addition, under the same section purchasers in the "course of business" took the property free from the lien of the factor.

[33] See 3 COLLIER, ON BANKRUPTCY § 60.38 (14th ed. 1941)

[34] 64 STAT. 25, 11 U.S.C. § 96(a)(1) (1950)

[35] *Ibid.*

[36] See note 7 *supra.*

Ohio enactment is even less artistic than the average. Nevertheless, a few, relatively simple changes would eradicate most of its existing deficiencies.

1. The term "borrower," as used in the Act, is not defined. It is suggested that "borrower" be limited to the class of persons or corporations qualifying as "manufacturers" or "processors" of goods or materials who do not display their goods for retail sale to the general public. Such a change would alleviate, to a certain extent, the dangers inherent in the muliplicity of security devices which are available in types of business enterprises other than manufacturing, and also would serve to eliminate some of the necessity of policing on the part of the factor.

2. It is obvious to one who is familiar with the Factors' Lien Act of another state that paragraphs (a), (b) and (c) of Ohio General Code Section 8364-2 are intended to set forth the requirements of the notice of lien in Ohio. Yet, to a person whose first contact with factors' liens comes with a reading of the Ohio Act, the purpose of those paragraphs is not so readily apparent. Standing as they do, without a verb and completely divorced by lack of reference from the remainder of the Section, they serve only to confuse the reader who is earnestly attempting to discover what he must do to comply with the Act. The purpose of subparagraphs (a), (b) and (c) can be clarified merely by prefacing them with an introductory sentence.[37]

3. As has been previously discussed, a great deal of the misgiving which is aroused by any type of inventory or receivable financing stems directly from the fear that third parties will not be furnished adequate notice of the extent of the lender's lien. With that fact in mind, it would seem advisable to amend Section 8364-2 so as to require the notice of lien to include a description of the merchandise subject to the lien in its various stages of production[38] and the maximum amount of advances to be made under the master agreement.[39]

4. Perhaps the most glaring weakness in the Ohio Act is its failure to stipulate what happens to the lien upon the sale of the merchandise within its coverage. The lien becomes detached from the goods; however, it is not clear as to whether it follows the proceeds of the sale. The protection of the lender absolutely demands that a provision transferring the

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[37] This has been done by the Bureau of Code Revision for the new Ohio Revised Code. See OHIO REV. CODE § 1311.61.

[38] Michigan has so required. MICH. STAT. ANN. § 26.415(4) (Cum. Supp. 1951) Bankers making loans under the Act probably will find it helpful, in administering their loans, to incorporate by a column arrangement in their master agreement, a general description of the security as it passes through the various stages of production, from acquisition to sale.

[39] Missouri and West Virginia so require. MO. REV. STAT. ANN. § 430.260 (1949); W VA. CODE ANN. § 3946(18) (1949).

lien to the proceeds of a cash sale be inserted in the Act. But what of the case where the borrower sells on credit terms? Is the lender to suffer the loss of his lien in that situation? As the act now stands,[40] the answer is probably "yes." There is nothing to restrain the borrower from assigning his accounts receivable to a third party. The obvious remedy for that problem is the addition of a phrase providing for an automatic transfer of the factor's lien to the account receivable resulting from the sale of specific merchandise. But that raises another question. Are the parties, then, required to comply with the Ohio statutes relating to the recording of assignments of accounts receivable?[41] The answer again must be in the affirmative, for third parties, negotiating for the assignment of the accounts, should not be required to search the record in a more extensive manner than would permit discovery of assignments taken and recorded in the usual manner.

5. For reasons previously stated, it would seem advisable to amend the Ohio Act so as to provide for the perpetuation of the factor's lien in the case of a return of merchandise or other adjustment between the borrower and his customers. The adjustment provision of the New Jersey Act is suggested as a pattern.[42]

6. Under Section 8364-4 of the Ohio General Code a purchaser "in the ordinary course of the business of the borrower" takes free and clear of the factor's lien. But who is a purchaser in the ordinary course of the business? Does a creditor of the borrower who accepts merchandise in satisfaction of a pre-existing debt meet the qualifications? Probably not. Nevertheless, the question should not be left open to conjecture. Minnesota and Wisconsin have attempted to provide the solution by requiring that the purchaser give "value."[43] Still there remains the question of whether or not the cancellation of a pre-existing debt is to be considered value.[44] The problem is best solved by requiring the purchaser to give "new value," as under the Uniform Trust Receipts Act.[45]

CONCLUSION

Despite the skepticism of many bankers, it may still be said, with complete conviction, that the Factors' Lien Act satisfies a vital need in our

[40] OHIO GEN. CODE §§ 8509-3 *et seq.*

[41] OHIO GEN. CODE §§ 8509-3 *et seq.*

[42] See note 29 *supra.*

[43] MINN. STAT. c. 514, § 514.83 (Henderson 1949); WIS. STAT. § 241.145 (1951).

[44] There is some indication in Ohio law that cancellation of a so-called antecedent debt constitutes consideration sufficient to support a simple contract. Fowler v. Smith, 24 Ohio App. 324, 156 N.E. 913 (1926)

[45] UNIFORM TRUST RECEIPTS ACT § 1; 9 UNIFORM LAWS ANN. 372.

private financial system. Admittedly, it has its faults, the greatest of which is its complicated procedure, but the benefits to the borrower, and to small-scale enterprises generally, far outweigh its limitations. It is a matter of near certainty that an increasing number of bankers and manufacturers alike will begin to show an interest in factoring as time proves its worth.

Undoubtedly, the previously suggested amendments of the Ohio Act would serve to eliminate a great many of the technical problems of compliance with the terms of the Act. Nevertheless, it would be sheer folly to state that the mere incorporation of those amendments would relieve the banker-factor of all risks attendant upon the making of loans on the security of goods in process. There is a certain element of chance which the banker must accept in making any type of loan, and in many instances, he must also accept the accompanying possibility of the loss of his security, whether or not he has taken possession thereof. The risks which remain are properly to be considered the responsibility of the banker. As in any other type of loan, the banker-factor may minimize those risks by conscientious analysis of the borrower's market, financial standing and business practices, and by alert supervision of his loan.