

LAWS OF THE UNITED KINGDOM

THE FACTORS ACT, 1889

(52 & 53 Vict. c. 45.)

An Act to amend and consolidate the Factors Acts.

[26th August, 1889]

Preliminary

1. Definitions.-For the purposes of this Act-

(1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

The definition of mercantile agent applies to those who "buy" goods and those who "consign" goods for sale.

The common classes of mercantile agents are auctioneers, brokers, factors, consignees, supercargoes, ships-husbands, masters of ships, partners, etc. (Story on Sale, § 78).

A person entrusted with furniture to keep in her own house was held not to be an agent within the meaning of the Acts (*Wood v. Rowcliffe* (1846), 6 Hare 183).

A wine merchant's clerk authorised to sign delivery orders, who by doing so obtained possession of dock warrants relating to goods belonging to his master, was held not to be an agent within the Acts (*Lamb v. Attenborough* (1862), 31 L. J. Q. B. 41).

The Act applies to goods sent to a retailer on "sale or return" (*Weiner v. Harris*, [1910] 1 K.B. 285, C. A.).

A warehouseman who is also a broker cannot in his capacity of broker pledge goods warehoused with him (*Cole v. N.W. Bank* (1875), L.R. 10 C. P. 354).

For criminal frauds by agents and factors, see Larceny Act, 1.916 (c. 50), s. 22, Vol. 4, title CRIMINAL LAW.

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf:

It is to be noted that the word "person" has been used in this definition. Thus it covers "Dispositions by Mercantile Agents," the subject-matter of ss. 2-7, pp. 38-40, *post.* and also "Dispositions by Sellers and Buyers of Goods," ss. 8-10, pp. 40-41, *post.*

(3) The expression "goods" shall include wares and merchandise:

As the expression " goods " includes wares and merchandise all decisions on the meaning of these words in s. 16 of the Statute of Frauds (commonly known as s. 17, now s. 4 of Sale of Goods Act, 1893 (c. 71) Vol. 17, title SALE OF GOODS, *post*), would appear to be incorporated.

(4) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

The definition includes a warehouse-keeper's certificate, which though included in the Act of 1825 had been omitted in the Act of 1842, and had been held not to be a document of title (*Gunn v Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491).

Cash receipts given in place of delivery orders are not documents of title (*Kemp v. Palk* (1882), 7 App. Cas. 573).

"Documents of title" used in the ordinary course of business as proof of the possession. or control of goods or authorising the possessor of such document to transfer or receive goods, do not require registration as bills of sale (Bills of Sale Act, 1878 (c. 31), s. d, Vol. 2, title BILLS of SALE).

(5) The expression " pledge " shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:

The language of this definition is very wide and is probably intended to include a mortgage as well as cases such as the granting of a letter of credit to be operated on by bills of exchange in consideration of the pledge of goods or documents (Chalmers' Sale of Goods, 10th Edn., p. 164); and see English and Empire Digest, Vol. 1, p. 435, Nos. 493-494.

(6) The expression " person " shall include any body of persons corporate or unincorporated.

Dispositions by Mercantile Agents.

2. Powers of mercantile agent with respect to disposition of goods.-

(1) Where a mercantile agent is, with the consent of the owner, in possession of goods" or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the person taking under the disposition acts in good faith, and has not at the time a the disposition notice that the person making the disposition has not authority to make the same.

An agent is not in possession by "consent" of the owner if he has obtained possession in circumstances which render him guilty of larceny by a trick (*Oppenheimer v. Frazer & W Wyatt*, [1907] 2 K.B. 50, C.A.; see also *Heap v. Motorists' Advisory Agency, Ltd.*, [1923] 1 K.B. 577; *Folkes v. King*, [1923] 1 K.B. 282; and *Lowther v. Harris*, [1927] 1 K.B. 393, and English and Empire Digest, Vol. 1, pp. 333-336). Cf. *Cahn v. Pockett's Bristol Channel, etc., Co.*, [1899] 1 Q.B. 643, C.A.. (fraud not amounting to larceny); *Lake v. Simmons*, [1927] A. C. 487 (absence of owner's consent to possession).

An agent employed to obtain orders but not to sell is not within the Act (*Brown & Co. v. Bedford Pantechnicon Co., Ltd.* (1889), 5 T. L. R. 449, C.A.).

A pledge by a mercantile agent must be in the *ordinary course of his business* as an agent, *i.e.* "as if he were carrying out a transaction which he was authorised by his master to carry out" (LORD ALVERSTONE, C.J., in *Oppenheimer v. Attenborough & Son*, [1908] 1 K.B. 221, at p. 227)), and see English and Empire Digest, Vol. 1, pp. 336-337, Nos. 501-505.

A. delivery to an auctioneer for sale by auction is not a disposition contemplated by the Act (*Waddington & Sons v. Neale & Sons* (1907), 96 L.T. 786).

Formal notice is not required, but suspicion alone is not enough (*Navulshaw v. Brownrigg* (1852), 21 L. J. Ch. 908).

Notice to one joint buyer is notice to all (*Oppenheimer v. Frazer & Wyatt*, [1907] 2 K.B. 50, C.A.).

Onus to prove good faith and absence of notice is on the person taking under the disposition (*Heap v. Motorists' Advisory Agency, Ltd.*, *supra*), and see English and Empire Digest, Vol. 1, p. 337, Nos. 506-509.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent : provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

For validity of sale after determination of consent, see *Moody v. Pall Mall Deposit Co.* (1917), 33 T.L.R. 306. For authority to pledge see English and Empire Digest, Vol. 1, pp. 330-340.

This sub-section was first introduced into the Act of 1877 to override the decision in *Fuentes v. Montis* (1868), L.R. 4 C. P. 93, Ex.Ch., where it was held that the agent was not entrusted. with goods within the meaning of the Acts if his authority had been revoked.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner:

This sub-section was first introduced in the Act of 1842 to alter the law laid down in *Hatfield v. Phillips* (1845), 12 Cl. & Fin. 343, where it was held that a person entrusted with a bill of lading for the purpose of selling the goods mentioned in it, was not to be considered as entrusted with the dock warrant notwithstanding that his possession of the bill of lading enabled him to obtain the dock warrant.

(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3. Effect of pledges of documents of title.-A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

This section is controlled by the heading "Dispositions by Mercantile Agents," which covers ss. 2-7 inclusive (*Inglis v. Robertson & Baxter*, [1898] A.C. 616) (pledge of documents of title by person other than mercantile agent). See Preliminary Note, p. 36, *ante*.

4. Pledge for antecedent debt.-Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

This section draws a marked distinction between past consideration and present or future consideration.

A pledge in exchange for other goods previously pledged and for an additional advance is protected by the Act (*Sheppard v. Union Bank of London* (1862), 7 H. & N. 661). Where goods are pledged to obtain a new loan the proceeds of which are to be applied merely to repay an old loan, the Act will not protect (*Learoyd v. Robinson* (1844), 12 M. & W. 745; *Phillips v. Huth* (1840), 10 L.J. Ex. 65).

5. Rights acquired by exchange of goods or documents.-The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

This section considerably extends the scope of the Act of 1842 by substituting for "advance" "valuable consideration." It protects exchanges of goods and securities made in good faith. The Act of 1842 altered the law as declared in *Taylor v. Kymer* (1832), 3 B. & Ad. 320, and in *Phillips v. Huth* (1840), 6 M. & W. 572.

6. Agreements through clerks, etc.-For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

7. Provisions as to consignors and consignees.-(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person:

(2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

This section applies only to goods and not to documents of title, and to cases where the consignee has not had notice that the consignor is not the owner.

The second sub-section shows that the section is to be construed as amplifying the powers of mercantile agents under s. 2, p. 38, *ante*.

Dispositions by Sellers and Buyers of Goods.

8. Disposition by seller remaining in possession.-Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

This section is reproduced in s. 25(1) of the Sale of Goods Act, 1893 (c. 71), Vol. 17, title SALE OF GOODS, *post*, with the omission of the words "or under any agreement for sale, pledge, or other disposition thereof."

The case of a seller remaining in possession of goods and afterwards dealing with them in fraud of the original buyer was first dealt with in the Act of 1877 and altered the law as declared in *Johnson v. Credit Lyonnais Co.* (1877), 3 C. P. D. 32. The present Act extends the principle of the former Act to goods as well as documents of title.

As to resale by an "unpaid seller," see Sale of Goods Act, 1893 (c. 71), s. 48, Vol. 17, title SALE OF GOODS.

There is no "delivery or transfer" where goods are pledged to the warehouseman who stores them (*Nicholson v. Harper*, [1895] 2 Ch. 415).

9. Disposition by buyer obtaining possession.-Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

This section is reproduced in s. 25 (2) of the Sale of Goods Act, 1893 (c. 71), Vol. 17, title SALE OF GOODS, *post*, with the omission of the words "or under any agreement for sale, pledge, or other disposition thereof."

The hirer in a hire-purchase agreement where there is an "option to buy" but no binding agreement to buy is not a person who has "agreed to buy goods" within the meaning of this section. Contrast *Lee v. Butler*, [1893] 2 Q.B. 318 (agreement to buy), with *Helby v. Matthews*, [1895] A.C. 471 (option to buy or return goods). For repairer's lien, see *Green v. All Motors, Ltd.*, [1917] 1 K.B. 625, C.A.; *Albemarle Supply Co., Ltd. v. Hind & Co.*, [1928] 1 K.B. 307.

10. Effect of transfer of documents on vendor's lien or right of stoppage in transitu.-Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

This section is substantially reproduced in the proviso to s. 47 of the Sale of Goods Act, 1893 (c. 71), Vol. 17, title SALE OF GOODS, *Post*. It applies to all documents of title mentioned in s. 1(4), p. 37, *ante*. There is

no requirement as to absence of notice, as the mere fact that the price is unpaid does not make it a fraud to transfer the goods or documents so as to defeat the seller's lien or right of stoppage in transitu (*Cahn v. Pockett's Bristol Channel, etc., Co.*, [1899] 1 Q.B. 643, C.A.) (stoppage in transitu).

As to the transfer of a delivery order not relating to specific goods see *Ant. Jurgens Margarinefabrieken v. Drefus (Louis) & Co.*, [1914] 3 K.B. 40.

Supplemental.

11. Mode of transferring documents.-For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

12. Saving for rights of true owner.-(1) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

As to criminal liability of factors or agents misappropriating documents of title, see the Larceny Act, 1916 (c. 50), s. 22, Vol. 4, title CRIMINAL LAW.

(2) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

Documents of title or goods held by an agent for his principal are as a general rule considered as trust property and do not pass to the agent's trustee in bankruptcy unless the provisions as to reputed ownership apply. See Bankruptcy Act, 1914 (c. 59), s. 38 (1) and (2) (c), title BANKRUPTCY and INSOLVENCY, pp. 643, 644, *post*.

(3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

For buyer's right of set-off against agent whom he believed to be a principal, see *Kaltenbach v. Lewis* (1885), 10 App. Cas. 617; *Cooke & Sons v. Eshelby* (1887), 12 App. Cas. 271.

13. Saving for common law powers of agent.-The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

This section recognises that the Factors Acts are partly declaratory and partly enacting.

[Ss. 14, 15 *rep.* 8 *Edw.* 7, c. 49.(S.L.R.)]

16. Extent of Act.-This Act shall not extend to Scotland.

The Factors (Scotland) Act, 1890, extended the Act subject to certain provisions to Scotland. The provisions of the Acts are more nearly declaratory of Scotch common law than of English common law.

17. Short Title.-This Act may be cited as the Factors Act, 1889.

[Schedule of repealed enactments spent.]

AGREEMENTS.

See the various titles in connection with which they occur.
