

# Repealing the Factors Act 1889

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## 1. INTRODUCTION

It is important - especially in the commercial field - that English law is modern and up to date. One piece of legislation that is particularly obscure - not helped by the Victorian drafting - is the Factors Act 1889 ('**1889 Act**'). This piece of legislation can only be understood against the historical background of *who* factors were, and *why* they were accorded with legal privileges more extensive than other agents. The purpose of this article is to trace the history of factors. Also, to assert that the 1889 Act should be repealed. And, that factor's liens (particular and general) should be abolished.

- *Factors* - also, often, called commission merchants, commission agents or consignees for sale - were said to be a species of commercial (mercantile) agent. These descriptions do not give insight into their true role since *brokers*, also, acted as agents in commercial matters and they also received a commission;
- In Anglo-Saxon times, factors do not appear to have existed. There were just merchants (*mercatores*) and this category was wide. It included anyone who bought, or sold, goods on a professional basis;<sup>1</sup>
- However, by the 13<sup>th</sup> century, merchants were not only trading on their own account; they were acting as agents for others. More particularly, some of these persons were not just general '*brokers*'. That is, agents who acted as middlemen to sell the goods of others without possessing them or holding themselves out to be their owners. Rather, factors were involved in the English equivalent of an Italian form of partnership (*commenda*). As such, they possessed the goods (or money) of another to trade with, which they, usually, held themselves to be the owners of. Further, their commission was not a '*one off*' charge for acting as a middleman. It was more a form of partnership profit;
- Also - although factors could be appointed orally as well as by letters of commission - the authority given to them was usually wide - to '*dispose, do, and deal therein as if it were your own*'. As a result, those dealing with factors (as well as the courts) treated this as ostensible authority for the factor - without more - to sell, as well as to consign (that is to deliver, or entrust, for sale),<sup>2</sup> the goods of their principal.

Also, factors - probably the word derives from the Italian '*fattore*' - often pledged their principal's goods, to enable him to get his money '*up-front*'. Or, they lent money to their principal - taking a pledge over his goods they held, as security. Some factors also guaranteed payment of the purchase price of their principal's goods (*del credere*). In these roles the factor was the precursor to the banker.

- Given all this, it is (perhaps) unsurprising that the English courts - by way of exception to the principle of law of *nemo dat quod non habet*<sup>3</sup> - recognized, at common law, that a factor had a presumed (ostensible)

<sup>1</sup> See generally, GS McBain, *The Strange Death of the Law Merchant* (2016), International Law Research, vol 5, no 1, p 1 *et seq.*

<sup>2</sup> Oxford English Dictionary ('**OED**')(*consign*). '10. To deliver or transmit (goods) for sale or custody: usually implying their transit by ship, railway, or other public courier'. A synonym for consign was '*entrust*'. S Johnson, *A Dictionary of the English Language* (1<sup>st</sup> ed, 1755)(*consign*) '3. To commit; to entrust.'

<sup>3</sup> '*Nemo dat quod non habet*' (*no one can give what he does not have*). Thus, as HF Boyd & AB Pearson, *The Factors' Acts (1823 to 1877)*(1884) ('**Pearson**'), noted, p 1 'By the English common law one person can give to another no better title to goods than he has himself...A person, therefore, in possession of goods or of the *indicia* of property therein by a sale or pledge of the goods, could at common law only confer upon the purchaser or pledgee the same title which he himself possessed.' *Dyer v Pearson* (1824) 3 B & C 38 (107 ER 648) *per* Abbott CJ at p 42 'The general rule of the law of England is, that a man who has no authority to sell, cannot by making a sale transfer the property to another.'

authority to sell, or consign, goods *qua* owner although he was not the owner. Later, the Factor's Act 1842, recognised that a factor had a similar ostensible authority to pledge them;<sup>4</sup>

- Also, since a factor (often) lent money on another's goods or guaranteed their price, in 1755, the English courts upheld a general lien for all of a factor's charges - including for having goods insured, where required.

However, such amplified privileges imposed hardship, in many instances. For example, when a factor - without authority - sold (or pledged) goods to a third party who, later, discovered that the factor was not the owner. Or, when a third party discovered the goods he had bought (or lent money on) were subject to factors' liens (general or particular). The law on the factor, today, is contained in the 1889 Act - with the common law recognising the liens. It is asserted that neither the 1889 Act nor the liens are required, today, for the following reasons:

- **Categories Gone**. Factors belonged to the time when there were distinct legal concepts of: (a) merchant; (b) broker (a disclosed agent without possession of the goods); and (c) factor (usually, an undisclosed agent with possession of the goods). By 1835, trade restrictions with regard to merchants, brokers and factors had gone; so too, the law merchant.<sup>5</sup> Today, the law of agency refers to categories of '*principal*' and '*agent*'. The categories of '*merchant*', '*broker*' and '*factor*' no longer exist;
- **1889 Act**. The 1889 Act was not intended to deal with a factor who had *actual* or *implied* authority to sell (or consign or pledge) another's goods (or documents of title to the same):
  - Instead, it made it a presumption of law that a factor had *ostensible* (presumed) authority to sell, consignor pledge another's goods *even though* the owner had not expressly confirmed this. This reflected the older position of the factor being more a partner than a simple agent. It also reflected the reality that the factor, often, did not know who was the owner of the goods since - especially in the corn and textile trades - they were, usually, intermixed.<sup>6</sup> Further, it was (often) difficult - as a result of the geographical distance - for a factor to secure instructions from his principal;
  - Today, the law on partnership and agency is well developed, goods are clearly identified and it is easy to obtain instructions. Also, today, the vast majority of agency relationships are based on express or implied authority (which includes where a trade custom is implied into the agency) - as opposed to ostensible authority. This not only helps protect innocent third parties, it reflects modern commercial practice. Thus, *nemo dat* exceptions in the case of sales and pledges by factors pursuant to the 1889 Act should no longer be upheld. They are unnecessary;
- **No Factors Left ?** A factor was an agent (usually a rich, individual merchant): (a) in possession of another's goods (or documents of title to the same); (b) who held himself out as the owner; (c) acting in the ordinary course of his business in *certain* trades - such as domestic sales of corn and textiles as well as in the import and export of foreign goods, especially from the East and West Indies.
  - As a result, it was reasonable to assume that persons dealing with factors in these trades - as a matter of business custom - would know they were selling, consigning or pledging goods on behalf of an undisclosed owner. The pre-requisite of (c) was preserved in the Factors Act 1889, s 1 which refers to '*a mercantile agent having in the customary course of his business as such agent authority...to sell goods etc.*';<sup>7</sup> (*underlining supplied*)
  - Today, the East and West Indies trades, as such, do not exist. Further, corn, textile and import-export trades are very different, either not employing agents or, if so, entering into written agency agreements which specify the authority (or not) of an agent to sell or pledge;<sup>8</sup>

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There is one exception to that rule, *viz.* the case of sales in market overt.<sup>7</sup> For references to Roman and medieval law on *nemo dat*, see E McKendrick, *Goode on Commercial Law* (4<sup>th</sup> ed, 2010), p 450.

<sup>4</sup> The Factors' Acts 1823 and 1825 also recognised an ostensible authority to pledge. However, the Acts were more limited in scope in respect of this.

<sup>5</sup> See n 1 and the Municipal Corporations Act 1835, s 14. Long before 1835, factors also, often, acted as brokers and *vice versa*. For the argument that '*merchants*' and the '*law merchant*' finally expired in 1898, see McBain, n 1, s 24.

<sup>6</sup> The position of these trades, and the inter-mixing of goods in 1823, may be seen in the *Report from the Select Committee on the Law relating to Merchants, Agents, or Factors etc* (ordered by the House of Commons to be printed, 13 June 1823), pp 10-17.

<sup>7</sup> Factor's Act 1889, s 1(1).

<sup>8</sup> A factor lending money on the goods (and taking a pledge in return) or a general grant of authority to pledge the goods would be rare, not least, since banks now undertake export-import financing pursuant to (standardised) letters of credit (UCP 600).

- Thus, by 1889, the ‘old style’ factor - where it was reasonable to presume he had authority to sell (or consign or pledge) by reason of the long-standing customs of his trade - had gone, evidenced by no cases relating to them under the 1889 Act;
- **Cases under the 1889 Act.** There have been few successful cases under the 1889 Act (some 8-9 in more than 125 years).<sup>9</sup> Factors’ liens are also no longer availed of.<sup>10</sup> Further, such successful cases as there have been under the 1889 Act (all of which concern pledge or sale, and not consignment) could, much better, have been dealt with under the general law, to take account of the overall factual matrix, instead of being ‘squeezed’ into the context of the Act. These cases also related to trades - or comprise ‘one off’ (*ad hoc*) commissions - inappropriate to the 1889 Act since it could not be said the consent of the principal to the relevant sale (or pledge) by the agent could, reasonably, be presumed by virtue of it being a long-standing custom in the trade.

In conclusion, the 1889 Act should be repealed and the factors’ liens abolished.<sup>11</sup> Implied and ostensible authority under the general law has superseded the 1889 Act. Further, the Sale of Goods Act 1979 (‘SGA 1979’) provides adequate remedies for innocent third parties in cases where agents in possession of goods sell them without authority. The history, and analysis, of this area of law is now considered. It may be noted that:

- Historically, there have been few legal texts on the factor. Those which exist tend to deal with factors’ liens<sup>12</sup> or with legislation prior to the 1889 Act.<sup>13</sup> These are all now dated;
- After the 1889 Act, there have been no specialist texts on factors. The only modern material is contained in Halsbury, *Laws of England*<sup>14</sup> and Halsbury, *Statutes*.<sup>15</sup> Reference may also be made to Goode<sup>16</sup> as well as to other texts on commercial law,<sup>17</sup> contract<sup>18</sup> and agency.<sup>19</sup>

## 2. EARLY HISTORY UP TO 1290

### (a) Anglo-Saxon & Anglo-Norman Times

The nature of trading in England has changed over time. In Anglo-Saxon - and early medieval times - those who bought and sold goods as a profession were (likely) few. They were called ‘merchants’ from the French ‘marchand’ and the latin, ‘mercator’.<sup>20</sup> Why they were few in number is not hard to divine. England was very much a rural

<sup>9</sup> The last case of a person successfully claiming they were a factor under the 1889 Act, s 2 appears to have been in 1938, save in the case of car hire-purchase cases when it appears to have been in 1964. See *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147 (pledge) and *St Margaret’s Trust v Castle* [1964] CLY 1685 (h-p). This does not include cases under the 1889 Act, ss 8-10 which are replicated in the Sale of Goods Act 1979, ss 24-5 and 47(2).

<sup>10</sup> The last case appears to have been *Stevens v Buller* (1883) 25 Ch D 31 (general lien).

<sup>11</sup> This would not affect the right of the principal and agent to agree to a general (or a particular) lien as a matter of contract, for the agent’s charges. However, such a lien would not affect third parties.

<sup>12</sup> See: (a) R Whitaker, *Treatise of the Law relative to the Rights of Lien and Stoppage in Transitu* (1812); (b) B Montagu, *A Summary of the Law of Lien* (1821); (c) J Cross, *A Treatise on the Law of Lien and Stoppage in Transitu* (1840); (d) W Ashburner, *A Concise Treatise on Mortgages, Pledges and Liens* (1897, 1905 & 1911); (e) A Silvertown, *Law of Lien* (1988). See also GS McBain, *Codifying Common Law Liens* (2006), vol 20(4), CLQ, pp 3-47.

<sup>13</sup> See: (a) Pearson, n 3; (b) AB Pearson-Gee, *The New Factors Act Annotated* (1890); (c) FO Crump, *The English Law of Sale and Pledge by Factors and Agents* (1868); (d) PT Blackwell, *The Law relating to Factors* (1897); (e) W Paley, *A Treatise on the Law of Principal and Agent* (2<sup>nd</sup> American edition (1840), from the 3<sup>rd</sup> London ed); (f) JA Russell, *A Treatise on Mercantile Agency* (2<sup>nd</sup> ed, 1873); (g) D Keane & CT Smith (eds), *Selwyn, Abridgment of the Law of Nisi Prius* (last ed, 13<sup>th</sup> ed, 1869). See also RJC Munday, *A Legal History of the Factor* (1977) Anglo-American LR 221; AR Butterworth, *Bankers’ Advances on Mercantile Securities* (1902); ELG Tyler & NE Palmer, *Crossley Vaines on Personal Property* (5<sup>th</sup> ed, 1973) and AP Bell, *Modern Law of Personal Property* (1989).

<sup>14</sup> Halsbury, *Laws of England* (5<sup>th</sup> ed, with updates).

<sup>15</sup> *Ibid*, *Statutes of England* (5<sup>th</sup> ed, with updates).

<sup>16</sup> See n 3.

<sup>17</sup> See e.g. (a) P Dobson & R Stokes, *Commercial Law* (8<sup>th</sup> ed, 2012); (b) R Bradgate & F White, *Commercial Law* (2012); (c) LS Sealy & RJA Hooley, *Commercial Law, Text, Cases and Materials* (4<sup>th</sup> ed, 2009) (‘Sealey’); (d) I Brown, *Commercial Law* (3<sup>rd</sup> ed, 2001); (e) D Keenan, *Law for Business* (13<sup>th</sup> ed, 2006); (f) K Abbott *et al*, *Business Law* (9<sup>th</sup> ed, 2013); (g) M Furmston & J Chuah, *Commercial Law* (2<sup>nd</sup> ed, 2013); (h) E MacIntyre, *Business Law* (7<sup>th</sup> ed, 2014); (i) L Jones, *Introduction to Business Law* (3<sup>rd</sup> ed, 2013); (j) J Marson & K Ferris, *Business Law* (4<sup>th</sup> ed, 2013); (k) N Ryder, *Commercial Law* (2012); (l) E Baskind *et al*, *Commercial Law* (2013). The most helpful of these is Brown along with the last edition of R Sutton *et al*, *Chalmers’ Sale of Goods Act 1893* (12<sup>th</sup> ed, 1945), pp 182-98.

<sup>18</sup> HG Beale (ed), *Chitty on Contracts* (32<sup>nd</sup> ed, 2015); MP Furmston, *Law of Contract* (16<sup>th</sup> ed, 2012); J Beatson, *Anson’s Law of Contract* (29<sup>th</sup> ed, 2010).

<sup>19</sup> P Watts, *Bowstead & Reynolds on Agency* (20<sup>th</sup> ed, 2014). See also R Munday, *Agency Law and Principles* (2<sup>nd</sup> ed, 2013).

<sup>20</sup> OED, n 2, (merchant)(OF marchand). It noted that the term ‘merchant’ originally applied to ‘a person whose occupation was the purchase and sale of marketable commodities for profit’. Johnson, n 2 (merchant)[marchand, French]. ‘One who trafficks to remote countries.’ Also,

nation - with poor roads<sup>21</sup> and little personal security.<sup>22</sup> Thus, such merchants as there were, tended to be restricted to large towns. Indeed, in Anglo-Saxon and early Norman times, it seems clear that the buying, and selling, of goods in a market was restricted, by law, to certain fortified towns - and that this only changed with the franchising of the Crown prerogative to hold a market (or fair) from the 12<sup>th</sup> century onwards.<sup>23</sup> Further, the buyer and seller, invariably, sold in person without using a middleman. Suffice to say that there appear to be no references in the Anglo-Saxon period to agency or to factors.

### (b) Glanvill (c. 1189) - Britton (c. 1290)

The first legal text - Glanvill, *Treatise on the Laws and Customs of the Realm of England* (c. 1189)<sup>24</sup> - contained material on commercial matters.<sup>25</sup> However, it made no reference to agency nor to factors. Nor did Bracton in his *On the Laws and Customs of England* (c.1240).<sup>26</sup> Nor did the texts, *Fleta* (c.1290),<sup>27</sup> Britton (c. 1290)<sup>28</sup> or the *Mirror of Justices* (c.1290).<sup>29</sup>

### 3. EARLY HISTORY: MEANING OF THE WORD 'FACTOR'

In describing factors and their legal nature, there has been - until the 20<sup>th</sup> century - a large gap. This is due to the fact that there have been no legal treatises (and no general histories) that have discussed factors in any detail. Further, published common law cases concerning factors, pre-17<sup>th</sup> century, are few.<sup>30</sup> Also, until recently, economic historians had little knowledge of the influence that foreign merchants (especially Italian ones) had in English finance in medieval times.<sup>31</sup>

- Thus, how merchants, brokers and factors developed in the English medieval period was something of a 'black hole' leading many lawyers from Coke onwards or to pass over such matters in silence or to simply guess;<sup>32</sup>
- As it is, late 20<sup>th</sup> century historical and legal analysis on the law merchant, on markets and fairs and on bills of exchange (especially, their development in Italy and other countries)<sup>33</sup> has shone a new light on

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(merchandise) '1. Traffick; commerce; trade. 2 Wares; any thing to be bought or sold. Also, (to merchandise) 'To trade; to traffick; to exercise commerce.' Also, (merchantable) [*mercabilis*, Lat. from merchant]. 'Fit to be bought and sold.' A treatise, *Lex Mercatoria* (c. 1280) regarded a 'merchant' as someone who 'lives and ought to live off his movable goods and merchandise,' see ME Basile et al (ed), *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and its Afterlife* (Cambridge, Ames Foundation, 1998), ch 5, p 8. See generally, McBain, n 1.

<sup>21</sup> Indeed, it was not until 1353, that Edward III (1327-77) ordered London householders to start paving the roads (from Temple Bar to Westminster). It also likely that only the London-Dover road had a system of hackney stages by c.1390. See generally, GS McBain, *Time to Abolish the Common Carrier* [2005] JBL, Sept issue, pp 548-52. WJ Ashley, *An Introduction to English Economic History and Theory* (1923), p 97 'No general law for the repair of roads was passed until the Statute 2 & 3 Philip and Mary [c 8, 1555].' See also W Cunningham, *The Growth of English Industry and Commerce in Modern Times* (6<sup>th</sup> ed, 1925), pp 535-40.

<sup>22</sup> See generally, McBain, n 1.

<sup>23</sup> Ibid.

<sup>24</sup> R Glanvill, *The Treatise on the Laws and Customs of the Realm of England* (c.1189)(Nelson, 1965).

<sup>25</sup> See McBain, n 1.

<sup>26</sup> H Bracton (trans Thorne), *On the Law and Customs of England* c.1240 (Cambridge UP, 1968-76). Bracton is now online, see [bracton.law.harvard.edu](http://bracton.law.harvard.edu).

<sup>27</sup> *Fleta* (c. 1290), Selden Society ('SS'), vols 72, 89 & 99.

<sup>28</sup> FM Nichols (trans), *Britton* (John Byrne & Co, 1901).

<sup>29</sup> *The Mirror of Justices* (c. 1290), SS, vol 7.

<sup>30</sup> See the cases mentioned in *Southcote v Bennet* (1601) 4 Co Rep 83 (76 ER 1061). Also reported in Cro Eliz 815, pl 4 (78 ER 1041).

<sup>31</sup> MM Postan, *Medieval Trade and Finance* (1973), p 65 'Considering how important partnerships were in the organisation and finance of commerce, and how abundant is the historical literature dealing with them, it is surprising to find the subject almost wholly by-passed by English economic historians...the obscurities of English medieval law and terminology are largely to blame for the silence of modern historians. But...the silence does not mean that in this respect the practice of English merchants in the Middle Ages was fundamentally at variance with that of Italian or German or Flemish traders. For, looked at more closely, English records reveal the partnership and *societas*-like associations operating and covering a range of transactions as wide as that which the *societas* embraced abroad; fulfilling roughly the same functions and appearing in roughly the same forms.'

<sup>32</sup> Coke, a great master of land, criminal and constitutional law, wrote little on commercial matters. In particular, in E Coke, *Institutes of the Laws of England* (W Clarke & Sons, London, last ed, 1824, which is cited in this article). Nor did Blackstone. In particular, in W Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1<sup>st</sup> ed, 1765-9, Univ. of Chicago Press, rep 1979).

<sup>33</sup> See material cited in McBain, n 1.

matters, enabling more definitive statements on English economic history to be made and clearing up much confusion and inaccuracy.<sup>34</sup>

That said, the nature of factors - who they were and what they did in medieval times - has still not been explored, legally, in detail. Some remarks may, however, be made, to indicate that the 'factor' was much less an *employee* and much more a business *partner* than legal pleadings and cases might have otherwise supposed. Indeed, he was often a rich merchant who acted as the *active* partner for another (the 'sleeping partner') who gave him goods (or money to buy the same), to trade with and make profits. Further, his 'commission' was not just a charge for acting as an agent, but a share of the profits. Thus, from where did the term 'factor' derive? And, how was he different to a 'broker'?<sup>35</sup>

#### (a) Factor - Bailiff of the Manor

It is possible that the concept of a factor developed from the bailiff of a manor - he being charged with the buying, and selling, of manorial goods and produce. In the medieval manor, under the lord of the manor, there were three important offices: the steward, the bailiff and the reeve. The text, *Fleta* (c. 1290), described the *steward*. It recommended:

Let the lord [of the manor] then provide himself with a discreet and faithful steward, a man wise, prudent and well-mannered, humble and modest, peace-loving and temperate, who is versed in the laws and the customs of the county and the duties of his office *etc.*<sup>36</sup>

The steward tended to deal with administrative and legal matters in the manor. For example, he headed the manorial court.<sup>37</sup> Operational and administrative matters were left to the *bailiff*<sup>38</sup> and the *reeve* (or foreman).<sup>39</sup> These roles were, often, merged in smaller manors.<sup>40</sup> Ashley noted that:

the bailiff was the resident representative of the lord in the manor, and was especially charged with the cultivation of the demesne [estate].<sup>41</sup>

Thus, the bailiff was the estate manager. *Fleta* also stated:

The bailiff of every manor should be true in word, diligent and faithful in deed, and known, guaranteed and chosen as a careful improver... Nor let it be regarded as beneath a bailiff's dignity to get a profit for his lord out of the lord's own products, such as making malt from his barley, cloth from his wool, linen from his flax and so on, or to have a foal or palfrey reared and fed on bran and beans, or to do other things which bring an increase in the lord's profits.<sup>42</sup>

Likely, prior to the 13<sup>th</sup> century, the steward, bailiff and reeve were very much servants of the lord of the manor and under his personal direction. However, by the reign of Edward I (1272-1307), things had changed in a number of ways:

- There was more stability after the problematic reign of Henry III (1216-72), with the result that domestic trade increased. Edward I also encouraged foreigners to trade with - and reside in - England in

<sup>34</sup> Of particular merit on the presence of foreign merchants in England was A Beardwood, *Alien Merchants in England 1350-1377* (The Medieval Academy of America, 1931). Even more ground breaking was Postan, n 31, who discussed the Italian 'fattore' and the *commenda* (partnership) system. See also Munday, n13.

<sup>35</sup> OED, n 2, (*broker*) 'A retailer of commodities; a second hand dealer... 2 II 'One who acts as a middleman in bargains. 3. 'One employed as a middleman to transact business or negotiate bargains between different merchants or individuals' (McCulloch). Formerly used more widely, including the senses of jobber, agent, factor, commission agent.' Johnson, n 2, (*broker*) [from to *broke*] '1. A factor; one that does business for another; one that makes bargains for another.' The reference to McCulloch in the OED is to JR McCulloch, *A Dictionary of Commerce and Commercial Navigation* (3<sup>rd</sup> ed, 1859).

<sup>36</sup> *Fleta*, n 27, vol 72, p 241.

<sup>37</sup> Ashley, n 21, pp 10-1 'The steward, or seneschal, was not strictly a manorial officer, but the lord's representative over a number of manors; and his chief duty, besides a general control of the bailiffs, was to hold the manorial courts.'

<sup>38</sup> *Fleta*, n 27, pp 244-7.

<sup>39</sup> *Ibid*, pp 248-51.

<sup>40</sup> Ashley, n 21, pp 12-3, noted that - by the 14<sup>th</sup> century, if not before - the roles of bailiff and reeve tended to be merged and the terms 'reeve' and 'bailiff' tended to be used indifferently.

<sup>41</sup> *Ibid*, p 11.

<sup>42</sup> *Fleta*, n 27, pp 244, 227. TF Plucknett, *The Medieval Bailiff* (London, 1954), p 2 'he [the bailiff] must do a certain amount of trading on his lord's behalf and for his lord's profit, and let him beware the day of judgement when his account is rendered.' *Ibid*, p 23 'In its early history account is found only as between lord and bailiff, and so we have the interesting spectacle of an important remedy which later on was to concern agents, factors and partners evolving from the manorial economy, instead of being imported directly from the international fund of general commercial law.'

order to help finance the Crown<sup>43</sup> and there was a greater availability of coinage, which increased trade and mobility;<sup>44</sup>

- There were great trade fairs on the Continent and in England, bringing foreign merchants (and their business practices) here;<sup>45</sup>
- The Catholic church owned large estates and their abbots and monks were (often) assiduous in business, acting through agents.<sup>46</sup> This was especially so in the wool trade. Ecclesiastical law also developed the *use* (trust). That is, the holding of property for the benefit of another. This may have originated with the Franciscan order, enabling it to retain property and, yet, meet (in its view) its vow of poverty.<sup>47</sup>

Thus, Plucknett saw the bailiff as the precursor to the factor, noting that the factor's obligation to account in law (likely) derived from him. He stated:

In the course of his history the bailiff has...covered a great deal of ground. We first made his acquaintance as the key man in the country's greatest industry, agriculture, and we have seen him trading with his lord's goods and receiving his lord's moneys on so vast a scale that the common law was compelled to make room for him by giving the action of account, and by cautiously accepting the principles which lords, bailiffs and auditors were working out in the less formal atmosphere of rendering account out of court. Just as the action of account was to become the remedy for the professional merchant and his partners, so the principles which it embodied served the purposes of the trader and the factor.<sup>48</sup>

For his part, Lord Stowell, in *The Matchless* (1822), stated as to the origin of the term 'factor':

I believe it has a French origin in the word '*facteur*', and, in common parlance, it continues in a sense of great latitude to signify any agent whatever. In the northern district of this island, it is very generally applied to land stewards, bailiffs, and managers of estates.<sup>49</sup>

It is possible, therefore, that the concept of the 'factor' derived from the bailiff on a manorial estate. As a result, when *Fleta* (c. 1290) was writing about the bailiff and his selling of manorial produce (as well as his making a profit thereon),<sup>50</sup> his sentence indicates the beginnings of agency. Further, the medieval bailiff of a manor, in many cases, was closely connected to the wool and textile trades. In particular, up to the 13<sup>th</sup> century, manors and villages tended to be self-sufficient. Thus, housewives wove their own cloth. However, by the 13<sup>th</sup> century, weavers were establishing themselves in villages<sup>51</sup> and developing trade there, subject to the control of (or inter-acting with) the lord of the manor.

***In conclusion, the factor may have originated from the bailiff of the manor.***

<sup>43</sup> Beardwood, n 34. By the time of Edward III (1327-77) the involvement of foreigners in finance in London was extensive - especially in the wool trade which was so essential to the English economy. This is reflected in the staple system. See McBain, n 1, part 1, s 16 and G Unwin (ed), *Finance and Trade under Edward III* (1918) especially pp 93-135, *The Societies of the Bardi and the Peruzzi and their Dealings with Edward III, 1327-45*. Edward's grandfather, Edward I (1272-1307) had also extensive involvement with foreigners, being in financial thrall to Lombard merchants, who acted as his bankers although, in the *Calendar of Letter-Books preserved among the Archives of the Corporation of the City of London at the Guildhall* (printed by order of the Corporation under the Direction of the Library Committee), Letterbook C (1291-1309), n 79, intro, p ix, the editor (Sharpe), noted 'The favour shown by Edward [I] to foreign merchants, although springing out of necessity, rather than from any special liking he entertained for them, was, nevertheless, distasteful, to the London citizen.'

<sup>44</sup> Until the reign of Henry I (1100-35) there was little money. Thus, a large amount of trade would have been barter (exchange). Henry I commuted payments to the Crown into money, as opposed to supplying food and other provisions. Manorial services and rents also, gradually, began to be commuted as lords realised that money was easier to handle. Ashley, n 21, p 32 'It has not hitherto, I believe, been noticed that the appearance, about the middle of the thirteenth century, of bailiff's account-rolls, containing a list of all the receipts and expenses on the demesne, was the result of the changes which substituted money payments for labour.' See also *Ibid*, pp 46-7, 49.

<sup>45</sup> McBain, n 1, s 13.

<sup>46</sup> e.g. William of Cause - an official royal merchant who also served as Mayor Lincoln in 1298 - acted as the factor (or his son did) for Welbeck Abbey with regard to their purchases of wool at Boston fair in 1290. See EW Moore, *The Fairs of Medieval England* (Pontifical Institute of Medieval Studies, 1985), pp 66-7, 111.

<sup>47</sup> For the *use* see also HAL Fisher (ed), *The Collected Papers of Frederic William Maitland* (Cambridge UP, 1911), vol 2, p 408 'to all seeming the first persons who in England employed '*the use*' on a large scale were, not the clergy, nor the monks, but the friars of St Francis.' The *use*, after various transitions, became the concept of equitable ownership. *Ibid*, p 409. See also F Pollock & FW Maitland, *The History of English Law* (Cambridge UP, 1968) ('**P & M**'), vol 1, p 436 & vol 2, pp 228-32.

<sup>48</sup> Plucknett, n 42, p 32.

<sup>49</sup> *In re the Matchless* (1822) 1 Hagg 97 (166 ER 35), at p 100. See also Munday, n 13, p 225.

<sup>50</sup> See text to n 42.

<sup>51</sup> Ashley, n 21, p 27. Guilds of weavers were already in existence by 1130 in London, Lincoln and Oxford. *Ibid*, p 81.

### **(b) Factor – Active Business Partner**

However, while the concept of ‘*factor*’ may have derived from the bailiff, it may also have derived from the Italian term ‘*fattore*’ and that it referred to Italian, and other Continental, merchants (including the Flemish) who came to England - especially from the time of Henry III (1216-72) and, more so, in the reign of Edward I (1272-1307).<sup>52</sup>

- These merchants bought, and sold, goods for their own account. They also acted as agents for others, such as the sovereign and rich churchmen, monasteries, merchants and townsmen - buying and selling their goods;
- Further, in medieval times, Italians developed various forms of partnership.<sup>53</sup> This influenced the situation in England since Italian traders were so prevalent here.

As Postan noted, there were, roughly speaking, three types of Italian partnership.<sup>54</sup> One of these was the *commenda* of which he stated:

The *commenda* was a contract of ‘*sleeping*’ partnership, by which the *commendator*, or the sleeping partner, delivered goods or money to the *tractator*, or the active partner. The chief characteristics of the *commenda* were that the *commendator* contributed capital and no labour, while the *tractator* contributed labour and no capital; that the goods as a rule remained the property of the *commendator*; and that it was on his behalf and to his use that the *tractator* was supposed to be trading. The *commenda* was consequently employed most frequently as a labour partnership, and the ‘*labour*’ was frequently that of a ‘*factor*’ or ‘*commissioner*’. A merchant who had goods to sell at a distant place and could not go there himself, entrusted them to another person to do so on his behalf. Indeed sometimes the *commenda* was merely a *societas*-like form of ordinary hire of service. A merchant engaging a servant in a managerial capacity would very often conclude with him a contract of *commenda*, in which the goods or the funds of the business constituted the stock managed by the *tractator*.<sup>55</sup>

<sup>52</sup> See Beardwood, n 34. See also R De Roover, *Money, Banking and Credit, Money, Banking and Credit in Medieval Bruges: Italian Merchant Bankers, Lombards and Money-changers: A Study in the Origins of Banking* (Medieval Academy of America, 1948), p 11 ‘Professional money-lenders did not appear in Flanders until the end of the thirteenth century, when the Italian merchant and banking houses began to establish permanent branches in Bruges and to desert the fairs of Champagne. This migration of the Italian merchants to Flanders is an important development, because it meant the end of travelling or caravan trade, which centred around the fairs of Champagne, and its replacement by a more efficient form of organisation. Henceforth, merchants ceased to visit the fairs and began to conduct all their business from the counting-house, using partners, factors, or correspondents to represent them in foreign parts.’ Ibid, p 29 ‘In view of the slowness of medieval communications, to conduct foreign trade from behind a desk presented a stupendous problem of organisation, planning, supervision, and management. The old solution was for the merchant to secure permanent representation abroad either through partners, factors, agents, or correspondents. Goods were sent to them on consignment as much commodities were sold neither according to sample nor according to description, but after inspection by the prospective buyer.’

<sup>53</sup> FR Sanborn, *Origins of the Early English Maritime and Commercial Law* (1930), pp 202-3 ‘In a number of the Italian cities [in medieval times, factors] were liable for the principal’s debts, and they could also conclude contracts binding on him, so that in mercantile usage ‘*factor*’ and ‘*socius*’ had about the same significance. ... In Italy it was customary for the young merchant to go abroad for a time as a factor, in order to learn the principles of his business, returning home later when he had travelled and was experienced.’

<sup>54</sup> Postan, n 31, p 68 ‘The Italian sources distinguish, roughly speaking, three chief types of partnership: the *commenda*, the *collegantia* (*societas maris*) and the *compagna*.’ See also W Holdsworth, *A History of English Law* (Sweet & Maxwell, 2009 rep), vol 8, pp 195-7. W Mitchell, *An Essay on the Early History of the Law Merchant* (1904), pp 124-8 ‘During the Middle Ages contracts of partnership were common. ... In the early centuries the most common form of partnership was the ‘*commenda*’. This was a partnership in which one of the parties supplied the capital either in the shape of money or goods, without personally taking an active part in the operations of the society, while the other party supplied none or only a smaller fraction of the capital and conducted the actual trade of the association. ... Its popularity was due to the fact that it enabled the capitalist to turn his money to good account without violating the canonical laws against usury, and the small merchant or shipper to secure credit and to transfer the risk of ventures to the capitalist. ... The *commendator*. ... was a kind of sleeping partner, and it was left to the ‘*tractator*’ to carry out all the necessary operations. ... As a rule the *commendator* who supplied the capital took the risk of the transaction; if the goods were lost he could not recover the amount he had advanced, provided that the contract contained the usual clause ‘*ad risicum et fortunam dei, maris et gentium*’, or its equivalent. The usual share in the profits of a tractator who brought no capital into the partnership was a quarter, while in the case where he contributed to the general fund, his share of the profits amounted to a half. It is hard to tell whether the ‘*tractator*’ in early times always traded in his own name, though there is no doubt that in later times he did. Pertile [*Storia del Diritto Italiano 1896-1803*] holds the view that originally the tractator was regarded as a mere factor of the commendator who was responsible for the acts of the tractator, but that gradually in the course of time the principle was established that he was only responsible to the amount of the capital which he had advanced.’

<sup>55</sup> Ibid. Also, p 68 ‘It is possible that with the development of the law of agency, the *commenda* might have been used merely in order to relieve the principal from the full responsibility for his agent’s action on his behalf. The importance of this motive, however, ought not to be exaggerated, for the responsibility of the *commendator* for the actions of the *tractator* who was his factor, was not always and not everywhere different from the responsibility of a principal for the actions of his servant.’

Postan also pointed out that:

Common law, and to some extent even the customary law of English towns, did not recognise the sleeping partnership as such. Where and when the sleeping partnership was one of service, the remedy in common law lay in the various actions which applied to the relation of master and servant: mainly that of '*action of account*' by which the master could sue his servant or bailiff to render account for the goods or property entrusted to him. In this way the common law and most of the urban laws assimilated the legal position of the *commendator* to that of a master or a landlord and that of a *tractator* to that of a servant or bailiff. When the *societas* fulfilled the purposes of investment, the legal remedy lay in the action of '*debt*' as well as in that of '*account*', and thus the parties were disguised as ordinary debtors and creditors.<sup>56</sup>

Thus, what - to later legal eyes - was a master-servant relationship was, actually, more of a partnership, as a review by him of early Chancery records revealed.<sup>57</sup> Further, a formal contract of partnership was not required, since English law recognised the *use* (trust) which protected the ownership of the goods handed over to the factor.<sup>58</sup> A text Postan did not note, but which is also of interest, is a treatise on commercial matters by an unknown author, written c. 1280, called *Lex Mercatoria*.<sup>59</sup> It referred to the liability of apprentices and under-merchants. Thus, it stated that:

It often and commonly happens that apprentices and under-merchants [*submercatores*], [those] who publicly and openly trade under the control of their masters, cause money, goods, and merchandise to be lent for consumption, or sold on credit [*accomodari*], to them to the use of their masters. The lenders would deliver no goods at all to such apprentices and [under-] merchants if they were on their own and not with such masters...

In this case it is ordained that the masters of such apprentices and under-merchants should answer in the same way concerning goods and merchandise of this sort delivered to them in any way whatsoever by the hands of such apprentices and under-merchants, as if they themselves had received the same goods and merchandise by their own hands. But this applies on condition that these apprentices and under-merchants are known to serve and trade openly under the control of their masters and with the same masters' goods before and after such a loan or delivery or, at least, at the time of such a loan and delivery.<sup>60</sup>

It would seem likely that the reference to '*under merchants*' (which one takes to be a reference to persons operating pursuant to a contract of partnership or *commenda*),<sup>61</sup> refers to factors and not just to casual servants selling the goods of their master.<sup>62</sup> Further, the reference to '*control*' indicates that the goods were not

<sup>56</sup> Ibid, p 72. Postan also noted that, in the case of England, p 82 '*Commenda*-like arrangements, employed for the function of '*service*' were assimilated to ordinary relationships of master and servant; *commenda*-like arrangements for the power to loan were assimilated to ordinary loans or trusts, but *commenda* partnerships they nevertheless were.'

<sup>57</sup> Ibid, p 74 'the records...reveal numerous arrangements between parties which were much more regular and continuous. Inmost of these regular '*commitments*' of goods, the '*commissionaries*' were described as '*servants*' or '*factors*' but we must be very careful not to take the medieval appellation of '*servant*' at its face value. Sometimes the tractator was indeed an ordinary servant, but in the great majority of cases the words '*factor*' or '*servant*' were employed to describe the relation of agents and principals. The so-called '*servant*' or '*factor*' might be an independent merchant, sometimes of greater substance than the so-called master; very often, as we shall see further, he was his partner... We must, therefore, be very careful not to take the medieval appellation of servant in its modern sense. When a person in a managerial capacity was described as a '*servant*' he was often a merchant in the position of a *tractator* in a *commenda*. Postan also noted that 'junior partners commonly described themselves as the '*servants*' of their senior partners.'

<sup>58</sup> Ibid, p 82 'As Maitland rightly pointed out, the phrase '*to the use of*' was the untechnical designation of a trust: to possess goods '*to the use of*' somebody else meant to hold them on trust. And this probably explains why the *societas*-like nature of these arrangements was not insisted upon in England. The early development of the English '*trust*' made it possible to '*commit*' goods to other persons without the risk of losing the rights of ownership over them... Here goods could be safely given over in a *commenda*, without a formal contract of partnership.' For the use, see also Fisher, n 47, pp 403-16.

<sup>59</sup> Basile, n 20.

<sup>60</sup> Ibid, ch 16, p 15 ('*That merchants should answer concerning goods lent to their apprentices and under-merchants.*'). Ibid 'The merchants should also have the same action against any persons whatsoever in order to claim their goods and merchandise, if such goods and merchandise were sold on credit, delivered, or in any way released by their under-merchants or other men of theirs, as if they themselves had so sold on credit, released, or delivered the goods or the merchandise, even if the apprentices and under-merchants or other men are subsequently out of their master's service or have died.' See also commentary on pp 20, 72-3. See also LF Salzman, *English Trade in the Middle Ages* (1931), p 181.

<sup>61</sup> In the absence of banks, it was merchants that made the loans. As Unwin noted, n 43, p 28 'Most of the advances of capital on which London commerce and industry in the thirteenth and fourteenth century were dependent were made by merchants in the ordinary course of business...'

<sup>62</sup> See also Moore, n 46, p 111 'Sales of cloth, wool, and other commodities at the fairs were often conducted by factors, in the absence of the contracting merchants.' In a fn she noted 'Certainly the scope of activities of many of these business servants in England was analogous to that

necessarily in the hands of the owner<sup>63</sup> (if in the hands of the owner at all times, the middleman involved in their sale would have been designated a ‘broker’ (see **(d)**).

- Finally, the word ‘*factory*’ referred to trading stations (also called, commercial settlements) where factors (agents trading with the goods of others) were located.<sup>64</sup> For example, the Steelyard in London which was the exclusive trading stations for German (*hanse*) merchants for many centuries.<sup>65</sup> Or, the English settlement in Danzig where English agents traded with goods sent to them by English merchants from England.<sup>66</sup>

***In conclusion, the factor probably originated from the Italian fattore. That is, an agent entrusted with another’s goods (or money), pursuant to a partnership arrangement.***

### **(c) Conclusion – Derivation of Factor**

One would suggest that, in later medieval times - that is, from c 1290 onwards - the word ‘*factor*’ was less a reference to an (old style) land steward as such. Instead, it was much more to a person who acted as an agent for another (often, another merchant or a lord). Further, this relationship was akin to partnership. Thus, the commission of the factor was more in the nature of profits from his being the active partner in a business relationship than a fixed charge for acting as an agent. However, in legal terms, the role and responsibilities of the factor were treated as analogous to that of a servant (even though the factor might be much richer than his principal) since the courts had not yet developed legal principles of agency and partnership; this only occurred much later.<sup>67</sup> This role of the factor may be seen from the following instances:

- in 1291, the Barons of the Exchequer were ordered to hear an action between an Italian merchant (Gettus Honesti of Lucca) and Peregrin (son of Gerardin of Chartres) in which the latter pleaded that he was not a factor;<sup>68</sup>
- in 1323, Alice (widow of Robert Podifat) was summoned before the Mayor and Aldermen of the City of London to answer for wheat sold to her factor.<sup>69</sup>

In both these cases, the person was termed a factor, and it was likely the latter was more than a simple servant. Postan cites other cases where persons in the cloth and wine trades were using ‘*factors*’ who were more than servants.<sup>70</sup> Rather, they were business agents,<sup>71</sup> the master investing goods (or money) with them, for them to trade with.<sup>72</sup>

of the *fattore* in Italian companies...The distinction between servant and partner was sometimes only academic, though, especially in *commenda* arrangements.’ See also De Roover, n 52, p 32.

<sup>63</sup> See also Basile, n 20, ch 19, where under-merchants sell the goods of the master on credit to ‘*those far away*’, foreigners *etc*, such that the master (nor they) can recover the goods. They were liable if they did so contrary to the instructions of the master.

<sup>64</sup> OED, n 2 (*factory*) ‘1. An establishment for traders carrying on business in a foreign country; a merchant company’s trading station. 2. The body of factors in any one place. 3. The employment, office or position of a factor; factorship.’ Johnson, n 2, (*factory*) ‘[*from factor*] 1. A house or district inhabited by traders in a distant country. 2. The traders embodied in one place.’

<sup>65</sup> Hanseatic (German) merchants had a trading post at the Steelyard, on the banks of the Thames (now Thames Street), from AD 900-1597. In the time of Henry III (1216-72), he granted a charter to certain merchants of Flanders and of the Hanse towns (Lubeck, Hamburg, Bremen, Cologne) giving them possession of the Steelyard for services rendered. In 1597, Elizabeth I (1558-1603) ordered the closure of the Steelyard. See also G Cawston & AH Keane, *The Early Chartered Companies (AD 1296-1858)* (Arnold, 1896), pp 4-9.

<sup>66</sup> Postan, n 31, pp 297-8 & 316-7.

<sup>67</sup> The first legal text on agency was not until Paley in 1813, see n 13.

<sup>68</sup> H Hall, *Select Cases on the Law Merchant*, SS, vol 2, pp 53-4. See also McBain, n 12, p 29, fn 251. See also references to factors in 1323 and 1398, *Ibid*, fn 252.

<sup>69</sup> AH Thomas (ed), *Calendar of Plea and Memoranda Rolls preserved among the archives of the Corporation of the City of London at the Guildhall 1323-1364* (1926), p 95 ‘Alice, widow of Robert Podifat, was summoned to answer William le Coupere of Emlesworth for 32s, the price of 6 qrs of wheat sold to her factor, William de Crokeslee, at Queenhithe, payment for which should have been made on the spot...’. See also McBain, n 12, fn 253. Both Lady Isabella - mother of Edward III (1327-77) - and Edward IV (1461-83) employed factors. Lord Burleigh (William Cecil), was Elizabeth I’s factor, see Cunningham, n 21, p 53.

<sup>70</sup> Postan, n 31, pp 73 (agents taking the cloth of others, as well as their own, to sell), p 75 (agents selling wine for others).

<sup>71</sup> For the pitfalls of employing a factor see Salzman, n 60, p 181 which cites a case in 1318 when the king of France wrote to Edward II (1307-27) on behalf of two merchants of Montpellier who had sent over goods worth £10,000 (Paris money) to Jacques Boin, Guiraud de Rossignate and Guiraud de Byolkes living in London, to be sold by them as factors. However, they had appropriated the goods. Also, a case in 1432, where a merchant of Chesterfield discovered that his brother - pretending to be his factor and attorney [agent] - had executed various bonds and recognizances in their joint names, so that he dare not go abroad with his goods, for fear of arrest on them.

<sup>72</sup> Postan, n 31, p 77 ‘In 1365, William de Whetele cordwainer was summoned before London court to render an account to the executors of Henry Sket, another cordwainer, of certain skins entrusted to him ‘to trade withal.’

***In conclusion, by 1290, mention is made of the factor as one entrusted to trade with another's goods.***

**(d) Broker & Factor**

At some stage, a distinction was drawn between a 'broker' (also, called a sales broker or a middleman) and a 'factor'. Both were agents. However, the broker did not have possession of the goods of his principal. Nor did he present himself as their owner. Contrariwise, the factor did have possession of the goods and he, usually, did not disclose he was not the owner. This is explicable since the factor was much more of a partner than a simple agent and, also - in many cases - he would not know who was the owner of the individual goods. Further, while the broker received a fixed fee (commission) for each deal, the factor's commission was larger, reflecting his amplified function. Sanborn noted as to the broker:

During the Middle Ages the brokers attained to a very important position on the Continent. Usually limited in number, required to be of good character and repute, they were appointed and sworn in by the municipal magistrates or by the guilds. Their existence was often in the interests of the local monopoly, whenever it was required that strangers should arrange their sales through them. In some cities it was forbidden to everyone to contract directly and it was required to contract through the brokers, contracts otherwise made not being binding....Their fees were legally established by tariffs and they had their own guilds... In order to preserve impartiality neither the merchant nor a merchant's partner [factor] could be a broker, and a broker had to declare to the parties concerned any personal interest that he might have in a transaction.<sup>73</sup>

Brokers were prevalent at fairs, which became very popular in England in the 13<sup>th</sup> century. Moore states:

Another active figure at fairs was the sales broker....As they did in most major towns in England and the Continent, brokers at the great fairs effected sales, purchases, or exchanges for merchants, but the relationship of a broker with any given merchant was limited to the terms of the transaction, for which he was paid a fixed fee...In the records of fairs, brokers are associated especially with the trade in cloth and wool, although they were employed in sales of other commodities as well, as they were in London and elsewhere. It is not clear whether their services were mandatory in the cloth trade, but certainly their activities were heavily regulated by various authorities.<sup>74</sup>

***In conclusion, brokers were middlemen, paid to negotiate sales, without the possession of the goods or claiming to be their owner.***

**(e) Licensing of Brokers**

Unlike factors, brokers would have been closely regulated from an early time in England. This reflected the marked tendency of English medieval society (like the Romans) to be suspicious of 'foreigners' (that is, outsiders or *forenseci*).<sup>75</sup> Any man who was not a citizen of the town who paid scot and lot (local rates and charges) was taken to be a foreigner, even if he did not come from abroad. It also reflected the gild system which was one of monopoly (restrictive trade practices), seeking to concentrate all trade in local merchants and to charge extra for foreigners becoming involved in the sale of goods. Brokers were regulated in many cities and towns and London was one of the first. An Ordinance of Edward I (c. 1285) stated:

no person shall be a broker within the City, except such as shall be sworn and admitted by the mayor and aldermen. And if any broker shall be attainted of having gone out of the City and having made forestallment of any manner of merchandise coming towards town, he shall have forty days' imprisonment...

And no sworn broker shall be the host of merchants who import the merchandise of which he is such broker. And that no person shall be admitted as broker except upon the presentment of good folks of the same trade in which he is about to be such broker. And he shall be a broker in that trade only which he has so assigned unto him.<sup>76</sup>

<sup>73</sup> Sanborn, n 53, pp 203-4.

<sup>74</sup> Moore, n46, p 112.

<sup>75</sup> *Calendar of Letter-Books preserved among the Archives of the Corporation of the City of London at the Guildhall* (printed by order of the Corporation under the Direction of the Library Committee), Letterbook D (1309-14), introduction (by Sharpe) 'Another link with ancient Rome may, perhaps, be found in the antipathy which the freemen of the City of London entertained...to the foreigner and stranger...'

<sup>76</sup> HT Riley, *Liber Albus: The White Book of the City of London* (Griffin & Co, 1861), p 235 (*of brokers*). Ibid, p 273 (*oath of the brokers*). Ibid, p 345. Apprentices in London also had to be freemen of the City, Ibid, p 237 (Ordinance of c. 1285) 'no person shall from henceforth receive an

Such brokers were required to be involved in every sale of goods not made between citizens of the City of London and they took a commission for this. They were licensed both to ensure honesty and to ensure that any toll imposed on the sale was collected. Also, their experience was needed since being expert in, for example, the sale of wine or leather or cloth, they could ensure that local citizens were not cheated in respect of the quality or adequacy of the same.

- As to when licensed brokers (also called correctors) were first required in London, it is unclear through a lack of data on the original customs of London. However, it may be noted that London was granted the status of a ‘*commune*’ in 1191, with the result that the *indicia* of self-government would, likely, have arisen not long after;
- The customs of the City of London are contained in works such as: the *Liber Albus* (White Book) of the City of London (c. 1419),<sup>77</sup> the *Liber Custumarum* (Book of Customs) and *Liber Horn*.<sup>78</sup> There are also the Calendar of Letterbooks of the City of London,<sup>79</sup> the Calendar of Pleas and Memoranda Rolls of the City of London<sup>80</sup> and the Calendar of Early Mayor’s Court Rolls.<sup>81</sup>

The earliest Letterbook of the City of London - Letterbook A - refers to the swearing of correctors of wines and of leather in, what may have been, 1275.<sup>82</sup> Further, in 1285, in the context of an agreement with merchants on the brokerage on each cask of wine sold by them in the City, it refers to the merchants having paid brokerage from a time ‘*beyond memory*’.<sup>83</sup> Given this, likely, the inception of licensed brokers (i.e. appointing freemen of the City to act as brokers) was considerably earlier than 1275 - possibly, it arose by the beginning of the 13<sup>th</sup> century. It also seems clear that Regulations governing brokers - of which there were many<sup>84</sup> - were strictly enforced throughout the medieval period, with punishment (such as fines and the pillory) being imposed on unlicensed brokers.<sup>85</sup>

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apprentice, if he be not himself free of the City, and cause their covenant to be enrolled, of whatever condition such apprentice may be. And that no apprentice, after his term [of apprenticeship] fully served, shall follow his trade in the City, before he shall have been sworn of the freedom, and thereupon [en]rolled. And that no apprentice shall be received for a less term than seven years, according to the ancient and established usage.’

<sup>77</sup> In 1419, John Carpenter made a repertory (that is, a book of remembrances) of existing laws, observances, rights and franchises of the City which is generally referred to as the *Liber Albus*. This was translated by HT Riley in 1861, see n 76.

<sup>78</sup> The *Liber Custumarum* (compiled in the early part of the 14<sup>th</sup> century) and the *Liber Horn* (also called the *Liber Legum Regum Antiquorum*) belonged to Andrew Horn, lawyer and City Chamberlain who died in 1328. For these texts, see HT Riley, *Munimenta Gildhallae Londoniensis: Liber Albus, Liber Custumarum et Liber Horn* (Longmans, 1860), pts 1 & 2.

<sup>79</sup> The full title is: ‘*Calendar of Letter-Books preserved among the Archives of the Corporation of the City of London at the Guildhall*’ (printed by order of the Corporation under the Direction of the Library Committee). See Letterbooks **A** (1275-98), **B** (1275-1312), **C** (1291-1309), **D** (1309-14), **E** (1314-37), **F** (1337-52), **G** (1352-74), **H** (1375-99), **I** (1400-22), **K** (temp Henry VI (i.e. 1422-71)), **L** (Edward IV to Henry VII (i.e. 1461-1509)). See also British History online, www.british-history.ac.uk and GS McBain, *Liberties and Customs of the City of London – Are there any Left?* (2013) International Law Research, vol 2, no 1, pp 56-7. See also HT Riley, *Memorials of London and London Life...AD 1276-1419* (Longman, 1868). Riley, a Victorian researcher, extracted material from the Letterbooks for his book.

<sup>80</sup> *Calendar of Pleas and Memoranda Rolls preserved among the archives of the Corporation of the City of London at the Guildhall*, vol 1 (1323-64), vol 2 (1364-81), vol 3 (1381-1412), vol 4 (1413-37), vol 5 (1437-57), vol 6 (1458-82).

<sup>81</sup> AH Thomas, *Calendar of the Early Mayor’s Court Rolls preserved among the archives of the Corporation of the City of London at the Guildhall, AD 1298-1307* (1924). See also RR Sharpe (ed), *Calendar of Letters from the Mayor and Corporation of the City of London c. AD 1350-1370* enrolled and preserved among the archives of the Corporation at the Guildhall (1885).

<sup>82</sup> Letterbook A, n 79, p 1. ‘Correctors of Wines sworn. Nicholas de Suffok, William le Blond, Robert Heyrun, John de Watervile, Andrew de Pavely, Robert Corp, William de Denton etc.’ By 1293 record is made of brokers for: woolmen, drapers, corders, skinnners, apothecaries, vintners, those hiring of ships. See also Letterbook C, n 79, pp 17-8.

<sup>83</sup> *Ibid*, p 214 ‘all merchants whosoever coming to the said City with wine for sale have been accustomed *beyond memory* to pay for each cask of wine sold by the brokers of the City aforesaid the sum of 6d for brokerage...’ (*italics supplied*). See also *Ibid*, p 164.

<sup>84</sup> Letterbook D, n 79, pp 219-20 refers to regulations c. 1310. They include ‘no broker shall bring a stranger to another stranger for the purpose of buying or selling anything, under penalty of loss of office and forfeiture of the goods so bought and sold.’ Also, ‘every broker shall tender good advice, that honest men of the trade in which he is a broker may sell their wares to trustworthy and sufficient buyers who have the wherewithal to satisfy their creditors...’. See also Letterbook G, n 79, p 300, c. 1317, ‘That no broker intermeddle between vendor and purchaser in any bargain until he be sworn to the office and find sureties...’. Also, Letterbook H, n 79, pp 198-9, Proclamation of 1382 *re* brokers, including punishment of the pillory for a broker concluding a false bargain (*faux bargain de chevanche*). Also, no foreigner to be elected a broker ‘unless he be of good repute’. See also, Letterbook I, n 79, p 12, Ordinance of 1400 forbidding anyone to meddle with brokerage except English brokers chosen by misteries of the City and accepted and sworn by the mayor and aldermen under penalty off £100.’ *Ibid*, p 85 (in 1410, a proclamation), *Ibid*, p 264 (in 1421, Ordinance forbidding aliens to act as brokers). *Ibid*, pp 63-4. Also, Letterbook K, n 79, pp 342-3 (petition in 1451 to the mayor and aldermen against unlawful brokerage), *Ibid*, pp 350-2 (Ordinance of 1452 for the regulation of brokers). By the 15<sup>th</sup> century, the number of brokers in the City of London was fixed by Ordinance, see e.g. Letterbook, n 79, pp 350-2 (1452, restricted to 20 persons); Letterbook L, n 79, p 220 (1484-5, not to exceed 26 persons etc). For later legislation on brokers, see Paley, n 13, p 6.

<sup>85</sup> e.g. Thomas, n 81, pp 7-9, 32-3 etc (1298-1307); Memoranda, n 80, (1364-81), pp xxi, 151, 209; Memoranda, n 80, (1437-57), pp 131-2.

- As for foreign merchants, they had considerable restrictions imposed on them. They were allowed to warehouse their goods in the City, but they were not allowed to keep hostel (unless they were freeman and able to produce good credentials)<sup>86</sup> and they could only stay for 40 days.<sup>87</sup> Nor could they sell by way of retail - since this was only permitted to freemen - and they were fined if they did.<sup>88</sup> Indeed, Constitutions of 1319 - as well as a charter of 1376 of the City of London - expressly prohibited foreigners from selling by retail;<sup>89</sup>
- Because of such restrictions on foreign merchants and other strangers (i.e. non-citizens), there was often 'colouring of goods' by freemen. That is, his avowing their goods belonged to him.<sup>90</sup> This may have assisted in the rise of the factor as a means of getting round these restrictive trade practices against foreigners.

It is noteworthy that - in the Letterbooks and other *memorabilia* on the City of London - there is little reference to the 'factor'<sup>91</sup> and he does not seem to have been licensed, unlike the broker.

- This suggests that the broker came first, assisted by the lack of mention of the factor in texts such as Bracton (c.1240), Britton (c. 1290 and Fleta (c.1290);<sup>92</sup>
- It also suggests that the word 'factor' may have been the anglicisation of the Italian word 'fattore' (or the French equivalent 'facteur') and that it was used as a general expression to refer to those who possessed the goods of another and who sold (or consigned) them pursuant to a partnership type of arrangement.<sup>93</sup>

As foreign factors were displaced by English ones they, probably, adopted the same title and trading customs. Thus, a notarial document in 1447 witnessed that one Geoffrey Wolleman, a London merchant, held letters patent to ship 600 sacks of wool from London and Southampton through the straits of Morocco, and that Wolleman:

appointed John Maldon, grocer, his deputy, proctor, agent, *factor*, executant of his business and special messenger, to ship the said sacks and carry them beyond the straits of Morocco, to receive all goods and

<sup>86</sup> Letterbook C, n 79, introduction, p ix.

<sup>87</sup> Calendar of Letters, n 81, p ix 'The citizens of London...compelled the foreigner to sell by bulk or in gross, and then only to citizens and within forty days, and after exacting a tax for the liberty of trading at all, towards the support of the burdens of the town.' Foreign traders from certain nations, such as the Hanse of Almaine (also called the 'Emperor's men' or 'Easterlings'), see n 65, were granted greater trading privileges by the sovereign.

<sup>88</sup> Letterbook A, n 79, p 19 'Aubyn le Archier [in 1294] attached to answer the Commonality of the City of London for that he, not being free nor sworn of the said City, buys and sells by retail (*per particulas*) within the City as if he were a freeman, to the prejudice and loss of divers men in his business (*de officio suo*) and the other citizens of the same City...' He was fined. For the 40 day period, Ibid, p 80. See also Letterbook D, n 79, intro, p vii (in 1311, two alderman appointed to join the Chamberlain of London in imposing fines on foreigners who were found residing or trading in the City without having taken up the freedom). Also, Letterbook F, n 79, p 131 (complaint by wool and drapery brokers that non-freemen were intermeddling in their brokerage).

<sup>89</sup> GS McBain, *Liberties and Customs of the City of London – Are there any Left ?* (2013) International Law Research, vol 2, no 1, pp 40, 55-6 (Constitutions of 1319 and charter of 1376). In *Hutchins v Player* (1663) Bridg O 272 (124 ER 585), Bridgman CJ, p 307, noted that, in 1376, the City of London had a franchise (by charter) to restrain foreigners from buying and selling by retail or from being brokers (save for Aquitaine (High Almaine) merchants). E Lipson, *The Economic History of England* (1947), p 268 'The rule against retail trading was intended primarily to compel merchant strangers to sell their wares to native dealers and not to consumers.'

<sup>90</sup> Postan, n 31, p 67 'In places where strangers were not allowed to trade freely or were highly taxed, partnerships could be employed to 'colour' strangers' goods.' Letterbook D, n 79, intro, p iii. A freeman could lose his freedom of the City for colouring goods. The benefits of being a freeman were considerable. Ibid, pp ii-iii, he 'was free to trade by wholesale or retail with fellow-citizen or stranger, to carry his goods throughout the length and breadth of the land, and to enter any town without payment of murage or other toll.' Freedom could be obtained by birth, apprenticeship or redemption (the payment of a sum of money). Ibid, p 11.

<sup>91</sup> The OED references to the word 'factor' are very late, the earliest being from 1485. For earlier ones see ns 68-9, 92.

<sup>92</sup> Letterbook A, n 79, p 139 refers, in 1291-2, to one Walter le Mouner acknowledging the receipt of money from Geoffrey le Norton 'to put out to merchandise [ie. buy goods] to the use of the said Geoffrey'. This indicates a likely *commenda*. However, it is interesting, at this date, 1292, the word 'factor' was not employed, although it seems to have come into general usage, see n 68.

<sup>93</sup> For later references to factors, see Memoranda, n 80, (1437-57), p 8, 'Writ of corpus *cum causa* to bring Jerome Centorioun, merchant of Genoa, into Chancery with the cause of his taking and detaining. Dated 1439. Return that the said Jerome had been taken by virtue of an original bill of debt of 100 gold crowns at the suit of Baptista Spinula, merchant of Genoa, *factor* and attorney [agent] of Automotus Maruuf, merchant of Genoa, levied in the Chamber of Guildhall 28 May 1438; nevertheless he would be brought into Chancery as ordered.' (*italics supplied*). Ibid, p 70, Tilmannus Brewer *factor* and attorney [agent] for Gerard Bussshelman, merchant of Almaine. (*italics supplied*)

merchandise due to him and all debts owed to him, to sell, alienate, utter<sup>94</sup> and trade with his goods and chattels and to hear and receive accounts thereof and to sue either in person or by attorneys for moneys due to him.<sup>95</sup> (*italics supplied*)

This lends credence to the factor being an amplified agent; one who was not a middlemen - licenced to negotiate and effect sales in accordance with London and other regulations - but, rather, a person in a partnership, playing the role of the active partner, trading with another's wealth and goods.<sup>96</sup> Further, the express authority given to a factor 'to sell, alienate, utter and trade' with the principal's goods<sup>97</sup> evidences why the courts were, later, to presume (as a matter of law) that the factor, *per se*, had authority to sell and consign the goods of his principal in general, without securing express consent for each specific transaction.

***In conclusion, brokers were licensed from, at least, 1275 if not considerably before.***

#### **(f) Legal Position of Factors - Servants**

The Ordinance of Edward I of c. 1285 (see (e)) also stated:

if it so happen that any servant or apprentice of a man of the city [i.e. freeman of the City] shall buy goods of foreign merchants or others, and shall carry such goods unto his master's house where he is, his master shall be answerable unto the said merchant for the value of the goods aforesaid, if the merchant can prove that such apprentice or servant was [living] with the said master when he took the merchant's goods, and that the goods in his house, or elsewhere in his possession, have come into the hands of the master aforesaid.<sup>98</sup>

The fact that this did not specifically refer to a 'factor' suggests that, in 1285, the factor was not a term of art. However, a Yearbook case<sup>99</sup> indicates that a factor, by 1329, was liable to account - the same as a bailiff or other servant.<sup>100</sup>

***In conclusion, for legal purposes, factors - like bailiffs and apprentices - were treated as servants of the master.***

#### **4. SUMMARY – POSITION BY 1300-1320**

It is asserted that, by 1300-20, there were fairly clear categories of traders. There was the:

- *merchant*. He bought, and sold, goods as a profession, trading on his own account;
- *factor*. He was an amplified agent (more equivalent to our modern day partner) - being the active partner in a relationship, trading with the goods (or money) of others, to make a commission which comprised more than a fixed charge, being a share in the profits.
  - He was especially prevalent in trades - such as the wool, cloth and corn trades - where his skill was required in determining quality and in negotiating a fair price;

<sup>94</sup> OED, n 2 (*utter*) 'To put (goods, wares, etc) forth or upon the market, to issue, offer, or expose for sale or barter; to dispose of by way of trade; to vend, sell.' Also, 'Of goods. To find purchasers.' Likely, this was an archaic reference to the word 'sell'. See Johnson, n 2 (*utter*) '3. To sell; to vend.'

<sup>95</sup> Memoranda (1437-57), n 80, p 98. Wolleman gave all his goods and chattels to Maldon and others in 1447. Such gifts seem to have been common in business circles and they were also given by foreign merchants to London citizens. They comprised a form of charge without the need to part with possession. *Ibid*, pp xxii-viii. And, they, likely, comprised part of a trading partnership (*commenda*). See also Memoranda (1458-82), n 80, p 149 *et seq*.

<sup>96</sup> Postan, n 31, p 78 'They [the goods] were not delivered, as in the case of commissions, merely to be sold on behalf of their owner, but to be turned over, to be employed continuously over a certain period of time. When a merchant received a stock 'to traffick withal', he thereby assumed the right of full discretion over its employment, and was, therefore, either a 'servant' in a managerial capacity, or else an independent entrepreneur accepting an investment.'

<sup>97</sup> *Ibid*, p 75 cites a late 15th century Chancery petition which refers to 'sell and utter and yield [yield]'. See also *Ibid*, p 79 (entrusting of stock).

<sup>98</sup> p 249. It continues 'And this Ordinance is made, by reason that people of the City sometimes, after such manner of goods so taken by their servants, and by their apprentices, have been in the habit of discharging their apprentices and their servants and disavowing their acts, but of retaining the goods; whereby the merchants have lost their goods without recovery.' See also Basile, n 20, p 112.

<sup>99</sup> 3 Edw 3 pl 13 fo 5a-b, Seipp no 1329.013 (R brought a writ of account against J and counted that J had received 200 pounds from him, to profit to his use, and to account for this, and he showed a deed in counting that proved the receipt). Translations of many of the 22,000 cases in the Yearbooks have been published online by professor David Seipp in an Index, [www.bu.edu/law/faculty/scholarship/yearbooks](http://www.bu.edu/law/faculty/scholarship/yearbooks)).

<sup>100</sup> Postan, n 31, p 68, n 7 'the responsibility of the *commendator* for the actions of the *tractator* who was his factor, was not always and not everywhere different from the responsibility of a principal for the actions of his servant.' *Ibid*, p 72 'Common law, and to some extent even the customary law of English towns, did not recognise the sleeping partnership as such. Where and when the sleeping partnership was one of service, the remedy in common law lay in the various actions which applied to the relation of master and servant: mainly that of 'action of account' by which the master could sue his servant or bailiff to render account for the goods or property entrusted to him. In this way common law assimilated and most of the urban laws assimilated the legal position of the *commendator* to that of a master or a landlord and that of a *tractator* to that of a servant or bailiff.'

- He acted on a regular basis and, thus, maintained a running account with his principal(s) who were investors, being rich persons (such as nobility, ecclesiastics, townsmen, merchants);
- He was appointed orally or, more often, pursuant to a 'letter of commission.' The latter was, likely, a translation of the Italian the contract of '*commenda*' (investment), the factor also, often, being called a '*commissioner*.'<sup>101</sup>

His relationship with the principal can, perhaps, best be described as a financial partnership;<sup>102</sup>

- *broker*. He was a '*simple*' agent - a middleman paid a fixed fee for a specific transaction. He was employed due to his expertise in the sale of certain goods, such as wine, leather, textiles *etc.* He was licensed in the towns where he operated. In the case of London, licensing occurred, at least, by 1275 but, probably, from much earlier. Possibly from 1191 onwards;
- *servant*. He was a mere employee, on an annual salary, entrusted to buy, and sell, goods as instructed by his master.

One would suggest that the distinction between the terms '*factor*' and '*broker*' were not, legally, clear cut by 1290.

- If the origin of the word factor is '*fattore*' is correct,<sup>103</sup> then (likely) in 1290 and before, it was a term colloquially used - at first - to describe Italian and other foreign merchants who were selling goods in England as if they were their own, for foreign principals;
- It was only when local merchants became involved as agents acting for others on a partnership basis (similar to that of the Italian *commenda*) that they also became known as factors.

There was also, likely, a benefit in keeping things '*hazy*'. Since foreigners could not sell by retail, it enabled a local citizen - acting as a factor for the same (and taking a commission for his services) - to represent himself as the owner of the goods and to (effectively) '*colour them*' without risking the loss of his freedom of the City or town.

***In conclusion, from 1290 onwards, the term 'factor' (probably, from the Italian fattore) likely referred to persons who acted as amplified agents in a partnership arrangement in which they traded the goods of others, their commission being not a fixed fee (such as a broker had) but a share of the profits.***

## **5. HISTORY OF THE FACTOR: 1290 - 1622**

The idea that English foreign commerce was - almost completely - in the hands of foreigners until the 14<sup>th</sup> century was challenged by Lipson<sup>104</sup> who asserted that the English began to push foreigners out from many trades prior to then, including trade in the principal English commodity - wool. The result was that there were less foreign factors and more local ones. Given this, it might have been expected that local factors would resort to the English courts, in the case of disputes. And that, therefore, there would have been a considerable number of cases. However, as Holmes noted, there were few legal cases on the undisclosed principal in early times.<sup>105</sup> This, though, is not really

<sup>101</sup> Ibid. Also, p 69 '*the commenda...was essentially a contract of investment.*'

<sup>102</sup> Ibid, p 69.

<sup>103</sup> See **3(b)**.

<sup>104</sup> Lipson, n 89, p 567 'It is often assumed that English foreign commerce was almost completely, if not altogether, in the hands of aliens, at any rate until the fourteenth century was far advanced. But there are grounds for believing that the extent to which English merchants carried on oversea trade, and competed with aliens in earlier times, has been greatly under-estimated.' Ibid, p 569 'The relative positions of native and alien merchants in English trade at various periods are clearly shown in the statistics of the principal commodity - wool. Towards the end of the thirteenth century (1273) English merchants had no less than 35 per cent of the wool trade. Their share mounted to 75 per cent under Edward III (1333-36); it was nearly 80 per cent under Henry VI (1446-48); and it approached 88 per cent at the close of Edward IV's [1461-83] reign...English merchants also drew into their hands the greater portion of the export trade in cloth. Their share was 80 per cent under Edward III (1350-60); and even, when the volume of trade was greatly expanded, it still amounted to 55 per cent under Edward IV (1479-82).'

<sup>105</sup> W Holmes, *The History of Agency in Select Essays in Anglo-American Legal History* (1909) ('AALH'), vol 3, pp 391-2 'I have found no early cases turning upon the law of undisclosed principal. It will be remembered that the only action on simple contract before Henry VI [1422-71], and the chief one for a good while after, was debt, and that this was founded on a *quid pro quo* received by the debtor. Naturally, therefore, the chief question of which we hear in the earlier books is whether the goods came to the use of the alleged debtor.' Holmes, Ibid, p 390, cited YB 27 Edw 3 Lib Ass pl 5 fo 133b (1353), see Seipp Index no 1353.130 ass for the proposition that 'It always seems to have been recognised that an agent's ostensible powers were his real powers'. Seipp records the case as 'A poor man sued a bill of trespass against W. of W., serjeant of arms, of a horse and an ox wrongfully led away (*amene*). He pleaded not guilty. It was found that the bailiff of W. had sold the horse to the plaintiff for certain money (*den's*), and that W. when he came into the country re-took the horse. It was asked of the jurors if the bailiff was acknowledged as his bailiff, and they said yes, and he had sold other animals at the market. It was asked if he had special warrant to sell the horse, and they said no. In right of the oxen it was found that the bailiff had pledged the ox to the plaintiff for 12 bushels of wheat, price of 12 shillings, so that if he did not pay, the plaintiff would have the ox. It was found that the wheat came to the profit of his master, and his payment was made, and as to the one and to the other the plaintiff recovered his damages.' Holmes also cited 1 Show 95 (89 ER 473) (1689) '*Memorandum. In what cases the contract of the servant will bind the master.* Upon evidence in an *assumpsit* for wares sold it was held by Holt Chief Justice, that if a man send his servant with ready money to buy meat or other goods, and the servant buys upon credit, the

surprising:

- At fairs, especially cloth fairs where factors would be present, such matters would have been regulated at fair courts (piepowder courts), of which there are few records extant;<sup>106</sup>
- Further, going to court in any case would have been (likely) the last resort since this would have taken time and money. Rather, merchants (local and foreign) would have used peer, and gild, pressure to resolve disputes.<sup>107</sup>

**(a) Act of 1353**

An Act of 1353 provided that:

no merchant or other, of what condition that he be, shall lose or forfeit his goods nor merchandises for the trespass and forfeiture of his servant, unless he do it by the commandment or procurement of his master, or that he has offended in the office in which his master has set him, or in other manner, that the master be held to answer for the deed of his servant by the law-merchant, as elsewhere is used.<sup>108</sup>

As Holmes pointed out, in this period, the powers of the agent were his ostensible powers. He stated:

A man is not bound by his servant's contracts unless they are made on his behalf and by his authority, and that he should be bound then is plain common sense. It is true that in determining how far authority extends, the question is of ostensible authority and not of secret order. But this merely illustrates the general rule which governs a man's responsibility for his acts throughout the law. *If, under the circumstances known to him, the obvious consequence of the principal's own conduct in employing the agent is that the public understand him to have given the agent certain powers, he gives the agent those powers.* And he gives them just as truly when he forbids their exercise as when he commands it. It always seems to have been recognized that an agent's ostensible powers were his real powers; and on the other hand it always has been the law that an agent could not bind his principal beyond the powers actually given... There is, however, one anomaly introduced by agency even into the sphere of contract, - the rule that an undisclosed principal may sue or be sued on a contract made by an agent on his behalf...<sup>109</sup> (*italics supplied*)

This presumption in law that a factor had ostensible authority to sell, or consign, the goods of his principal was noted by Catesby JCP in *Wellys v Robynson* (1484):

if I deliver goods to one to trade (*pur merchandiser*) for me, by this authority he can well sell the goods, and distribute (them) at his pleasure (*pleasir*).<sup>110</sup>

Postan cited examples of expressions in contracts with factors that the factor use '*his best avail*' or '*do his best*' or '*sell as he would have sold his own goods*' and noted such formulas were similar to those employed by Hanseatic merchants in their instructions.<sup>111</sup> Since Hanseatic merchants had a long history in England - they received a charter to occupy a trading station in London (a factory, the Steelyard) as early as the time of Henry III (1216-72),

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master is not chargeable. But if a servant usually buy for the master upon tick [i.e. on credit], and the servant buy some things without the master's order, yet if the master were trusted by the trader, the master is chargeable.' Also, *Nickson v Brohan* (1711) 10 Mod 109 (88 ER 649) (if a master send a clerk, who has the general management of his cash concerns, with a note to the banker to receive the money, and the servant, instead of so doing, gets another person to give him a draft upon a banker for it, and the banker fails before the draft is presented, the master is liable for the loss).<sup>7</sup>

<sup>106</sup> See McBain, n 1.

<sup>107</sup> Ibid.

<sup>108</sup> 27 Edw III stat 2, c 19 (rep 1863).

<sup>109</sup> Holmes, n 105, p 390.

<sup>110</sup> YB 2 Ric 3 pl 39 fo 14a-15a, Seipp no 1484.039. The case concerned an asserted bailiff (factor) selling the goods (cloth) of his master and his duty to account. The fact his master was not a lord of the manor did not detract from his duty to account according to Catesby JCP 'I say that there is no distinction between one who is bailiff of a manor and of a house.' Thus, a factor was treated the same as a bailiff, *vis-à-vis* a liability to account for the principal's goods. For an earlier case of a factor, see *Tamworth's Case* (1367) 41 Edw 3 pl 8 fo 3a-4a (1367), Seipp no 1367.008 (Sir Nicholas Tamworth sought account against one to whom he had given money in London who went to Brittany and used it to buy cloth and jewels). Thorp CJCP noted that 'when the plaintiff had delivered the money to the defendant in London, it was the defendant's folly that he had traded outside of the realm.' See also J Baker (ed), *Reports of Cases from the time of King Henry VIII*, SS, vol 121, p 392.

<sup>111</sup> Postan, n31, p 82 'In all the examples quoted above the expressions 'to his best avail', 'to do his best', 'to sell as he would have sold his own goods' are invariably employed. The form of words is very similar to the *formulae* habitually employed by Hanseatic merchants in their instructions to persons entrusted with *sendeve*. Ibid, p 70 'The word *sendeve* apparently means 'goods sent out' ('*sende-vie*'), and the *sendeve* was in fact most frequently used in commission trade. A German merchant entering into his books that he had goods on *sendeve* with X, meant that he had sent goods to be sold on his behalf. But it is obvious that this type of entry, especially when the *sendeve* consisted of money, could also refer to *commenda*-like partnerships employed for the purposes of investment.'

and they had traded in England long prior that<sup>112</sup> - it seems possible that English factors adopted Germanic forms and this is the origin of the factor's ostensible authority to sell or consign the goods of the principal. In short, anyone in medieval times dealing with Hanseatic merchants - as well as with Lombards and other foreign merchants - knew, as a matter of course, that they were selling (or consigning) for undisclosed principals and this imputed knowledge was transplanted to English merchants who adopted similar roles when they were located in 'factories' abroad or when they were in possession of the goods of 'foreigners' in England, for the purposes of sale or consignment.

- As a result, it seems reasonable for the courts by 1484 (if not considerably before) to hold (in essence) that: 'If you deal with a factor, you may presume he has authority to sell his principal's goods or to deliver them for sale.'
- This also reflected the practical realities of the situation since the principal would not have been physically present or easily available to confirm the sale. Also, he may have given instructions orally or in a different language. Further, the principal was, often, an important man unfamiliar with business - the reason why he was 'entrusting' his goods to this factor, to deal with them as he saw fit. As such, he accepted the risk his factor might be dishonest or engage in sharp practice. Indeed, likely, this, sometimes, worked to the principal's advantage since business in those times was not known for moral scruples in practice.

### **(b) St German (1528) & Southcote v Bennet (1601)**

St German, *Doctor and Student* (1528),<sup>113</sup> made no reference to agency, save for noting that:

if a man send his servant to a fair or market to buy for him certain things though he command him not to buy them of no man in certain [i.e. from no specific individual]: and the servant does accordingly: the master shall be charged but if the servant in that case buy them in his own name not speaking of his master: the master shall not be charged unless the things bought come to his use [i.e. they are for the benefit of the master].<sup>114</sup>

It also seems clear that, in the 16<sup>th</sup> century, there was no change in treating the factor as a servant.<sup>115</sup> Similarly, in *Southcote v Bennet* (1601),<sup>116</sup> in the context of a factor being robbed of his master's goods, he was treated as a servant. The court stated:

if a factor (although he has wages and salary) does all that which he by his industry can do, he shall be discharged; and he takes nothing upon him [i.e. he is not personally liable], but his duty is as a servant to merchandise the best that he can, and a servant is bound to perform the command of his master.<sup>117</sup>

Willan provides examples of how factors were acting in Elizabethan times (1558-1603).<sup>118</sup> It may be noted that many of them were persons at the end of their apprenticeship.<sup>119</sup> And, there was a clear 'pecking order' in that - in

<sup>112</sup> See n 65.

<sup>113</sup> St German, *Doctor and Student* (1528), SS, vol 91.

<sup>114</sup> Ibid, p 269. The position was the same *re* a contract. If the servant made a contract in the name of the master it would not bind the latter unless authorised by him or 'it came to the master's use by his assent.' (i.e. was for the benefit of the master). It may be noted that reference to agents or factors is not made in J Fortescue, *On the Laws and Governance of England* (c. 1471, first published posthumously 1543, ed S Lockwood, Cambridge UP, 1997). Nor in T Smith, *De Republica Anglorum* (c. 1565, ed M Dewar, Cambridge UP, 1982).

<sup>115</sup> Holmes, n 105, vol 3, p 398, cites *Alford v Eglisfield* (1564) Dyer's Reports fo 230b, pl 56 'if a purveyor, factor, or servant make a contract for his sovereign or master.' See also JH Baker (ed), *Reports from the Lost Notebooks of Sir James Dyer*, SS, vol 109, p 141, n 2 (see the assumption by the master for the debt of the servant *etc*). Ibid, vol 110, p 444 'Note that the factor of a merchant shall not charge the merchant unless the thing for which he makes the contract comes to the use of the merchant, or the merchant agrees: by Dyer.' Ibid, Holmes, n 105, vol 3, ch 63. At p 369 'agency in its narrower sense presents only a special application of the law of master and servant.'

<sup>116</sup> 4 Co Rep 83 (76 ER 1061). Also reported in Cro Eliz 815, pl 4 (78 ER 1041). Cf. Coke, n 32, vol 1, 89a, s 123 'As if a bailife of a manor, or a receiver, or a factor of a merchant, or the like accountant, be robbed, he shall be discharged thereof upon his account.' See also Munday, n 13, p 226. Also, *Woodlife's Case* (1597) Moo 650 (72 ER 696) 'factor, servant & simul [and likewise].' and *Godfrey v Furzo* (1733) 3 P Wms 185, 186 (24 ER 1022) (factor as servant). See also YB 9 Edw 4 pl 22 fo 40b (1469), Seipp no 1469.111 (account, factor robbed of money).

<sup>117</sup> Followed by Holt CJ in *Coggs v Barnard* (1703) 2 Ld Raym 909 (92 ER 107) at p 918. See also JH Baker & SFC Milsom, *Sources of English Legal History* (1986), pp 275,375,539. Also, W West, *Symboleography* (last ed, 1641 ed), book 1, s 3 (*re* obligations) 'mediately, when if he which by nature differs from him, but not by law, whereby as by some bond he is fained [i.e. treated] to be all one person, does contract, of offend, of which sort in some cases be those which be in our power, as a wife, a bondman, servant, a factor, an attorney [agent], or procurator, exceeding their authority.' (*italics supplied*). Cited by Holmes, n 105, pp 375-6.

<sup>118</sup> TS Willan, *Studies in Elizabethan Foreign Trade* (1959). See also J Brown, *The Marchants Avizo* (1589, rep Harvard UP, 1957, ed P McGrath), an early English manual for factors.

<sup>119</sup> Ibid, p 12 'Th[e] use of apprentices as factors, during the closing years of their apprenticeship, seems to have been common.'

terms of status - the merchant had a higher status to a factor who had a higher status to an apprentice. The key determinant of whether a person was a factor was whether he had his principal's goods in his possession *with authority* to dispose of the same.<sup>120</sup> Simple possession would only have made him a bailee; an authority to dispose as if he were the owner made him a factor.

### (c) Position by the 17<sup>th</sup> Century

From late Elizabethan and Jacobean times there was a great increase in English trade and from an analysis of the early caselaw, it is possible to determine that factors principally acted for:

- Foreign merchants - selling their goods in England;<sup>121</sup>
- English merchants - exporting their goods abroad and selling them;<sup>122</sup>
- Farmers (especially those producing corn)<sup>123</sup> - who sent their goods from the countryside and needed a town agent to sell them on their behalf (or for the agent to consign them to others for sale);
- Those in the wool and textile trades<sup>124</sup> - who sent their goods from the countryside and needed a town agent to sell them on their behalf (or for the agent to consign them to others for sale).

In conclusion, by the 17<sup>th</sup> century, the common law upheld the *ostensible* authority of a factor to:

- sell his principal's goods - including selling in his own name;
- sell such goods on reasonable credit (at such time and price he thought best for his principal);
- receive payment from the sale.<sup>125</sup>

Such ostensible authority was subject to any *express* authority.

## **6. HISTORY OF THE FACTOR: 1775- 1823**

### **(a) Pledging of Goods**

By the end of the 17<sup>th</sup> century, the factor was not only, as a matter of course, selling the goods of his principal - he was acting as a banker to the same. This had also occurred in the case of the Italian *fattore* or local English merchants in medieval times, but, by the 17<sup>th</sup> century, the volume of foreign imports/exports was very much greater than in medieval times.<sup>126</sup> Further, such lending was concentrated, in particular, in the corn and textile trades. Thus, the factor was lending money to his principal on the security of the goods he received. This was to the benefit to both parties since the principal got his money '*up front*' and the factor earned a commission. The result was that it enabled the principal to survive, financially, prior to the sale of the goods. As to these trades:

<sup>120</sup> Ibid, p 20 'The real test was simply that if a merchant consigned [gave possession of] his goods to man and gave that man directions for disposing of them, then the man was accounted the merchant's factor.' Also, p 20-1 'It is clear that proof of factorship rested not on appointment in writing but on a factor's actions. If a man acted for and in the name of a merchant, he was accounted the merchant's factor.'

<sup>121</sup> For early cases see *Gonzales v Sladen* (1702) and *Garrat v Collum* [*Gurratt v Cullum*] (1710) cited in F Buller, *An Institute of the Law relative to trials at Nisi Prius* (1806), pp 42, 130. See also *Scott v Surman* (1742) Willes 400 (125 ER 1235) and *Kruger v Wilcox* (1755) Amb 252 (27 ER 168). See also Munday, n 13, p 223 and McBain, n 12, fn 244.

<sup>122</sup> For early cases see *Barton v Sadock* (*Saldock*) (1610) 1 Bul 103 (80 ER 800) per Fleming CJ at p 104 'Factors ought to render true, just, and perfect accompts in discharge of the trust in them reposed.' Also, *Southern v How* (1618) Cro Jac 468 (79 ER 400) and Pop 144 (79 ER 1243).

<sup>123</sup> *Estcott v Millard* (1783) Company Bankruptcy Reports 236 (corn factor); *Scrimshire v Alderton* (1742) 2 Str 1182 (93 ER 1114) (oats consigned to a factor); *Smart v Sandars* (1846) 3 CB 378 (136 ER 152) (corn factor). See also McBain, n 12, fn 246. Also, JH Baker, *An Introduction to English Legal History* (4<sup>th</sup> ed, 2002), p 366, referring to an Exchequer Chamber case, *Halliday v Higges* (1600) B & M 539, concerning a judgment against a factor who was alleged to have converted the proceeds of corn sold on behalf of the plaintiff. It may be noted that the corn trade was vital for many centuries to the English economy, especially for the poor. See also Baker & Milsom, n 117, pp 539-40. See generally, RB Westerfield, *Middlemen in English Business particularly between 1660 and 1760* (1915), ch 2.

<sup>124</sup> *Marsden v Panshall* (1686) 1 Vern 407 (23 ER 548); *Chapman v Derby* (1689) 2 Vern 117 (23 ER 684); *Downam v Matthews* (1721) Prec Ch 579 (24 ER 260); *Drinkwater v Goodwin* (1775) 1 Cowp 251 (98 ER 1070); *George v Clagett* (1797) 7 TR 359 (101 ER 1019). These were all clothiers. See also McBain, n 12, fn 247. For the rapid growth of the textile trade (helped with the introduction of the flying shuttle in 1733) see Cunningham, n 21, p 494 *et seq*. See generally, Westerfield, n 123, ch 5.

<sup>125</sup> McBain, n 12, p 11. Also, Pearson, n 3, p 7. Cf. Halsbury, n 14, vol 1, para 43 'The implied authority of a factor includes, subject to special instructions, authority: (1) to sell in his own name; (2) to sell on reasonable credit, and at such time and price as he may think beside for his principal; (3) to warrant; and (4) to receive payment when he has sold in his own name.' See also *Martini v Coles* (1813) 1 M & S 140 (105 ER 53) *per* Ellenborough CJ at p 147 'Where indeed a factor by the assent of his principal exhibits himself to the world as owner, and by that means obtains credit as owner, the principal will be liable who furnished the means; that was so decided before me at the Guildhall (*De Leira v Edwards*).' For caselaw on the factor by 1742, see C Viner, *General Abridgment of Law and Equity* (1<sup>st</sup> ed, 1741-53), vol 13 (*factor*).

<sup>126</sup> See Cunningham, n 21, pp 4-5 'The existence of taxation, as the chief means of defraying the expenses of the State, is pre-supposed in all the political economy of modern times. The requirements of the new system of finance forced statesmen to interest themselves in the development of national resources, the extension of commerce, and the prosperity of industry, far more seriously than was necessary in medieval times.'

- **Foreign Goods Imported**. In the case of goods imported into England, pledging by factors (likely) arose as a result of the considerable wealth amassed by London merchants. In the absence of banks, they could afford to lend to foreign merchants, to enable the latter to export their goods to England, for them to sell as factor and both parties to reap large profits;<sup>127</sup>
- **Corn & Textiles**. In the case of local trade, thanks to improvements in the roads from the 17<sup>th</sup> century<sup>128</sup> and the development of canals,<sup>129</sup> it was possible for local farmers to send their produce long distances, to London and other cities. This was especially so in areas such as the sale of corn. Also, in the textile industry or - rather - industries, since it comprised a number of trades which worked together to produce the finished cloth from the wool.<sup>130</sup> These industries were usually local cottage industries and very small, without access to credit in the absence of banks to lend. Thus, merchants, acting as factors, lent money on the security of the cloth. This enabled the textile industry to develop and expand greatly.

In the case of the textile industry, in *Drinkwater v Goodwin* (1775), Mansfield CJ noted that:

the principal and factor enter into a special agreement, by which the factor undertakes and actually pledges his credit to raise money, for the benefit of the principal; which money is to be worked up into cloths, and which cloths when so worked up, the principal agrees to send to the factor.<sup>131</sup>

Four other things the factor did:

- **Accepted Bills of Exchange ('BOE')**. Instead of advancing money on goods pledged to him, the factor sometimes accepted BOE drawn against the goods. He would then sell the goods and use this money to pay the BOE when presented to him;
- **Goods Pledged with 3<sup>rd</sup> Party**. Sometimes, the factor did not lend money, himself. Instead, he pledged the goods the principal had sent to him. Then, after taking a commission, he paid the loan sum to the principal (the loan being re-paid when the factor sold the goods);
- **Del Credere**. Sometimes, the factor acted as a guarantor (surety) for his principal, as to the payment of the price of the goods. He took a commission for this;<sup>132</sup>
- **Insuring the Goods**. Factors, often, undertook the responsibility of insuring the goods of their principals - charging a commission for the same.

Thus, in the 17<sup>th</sup> century, the factor moved from being a person who bought and sold goods on behalf of his principal, to also being a financier (banker) in respect of those goods. This was against the backdrop of the Bank of England only being established in 1694 and not being allowed to trade,<sup>133</sup> by an Act of 1708 providing that no

<sup>127</sup> After the time of Elizabeth [1558-1603], London's population, commerce and the wealth of its merchants expanded greatly.

<sup>128</sup> This was much assisted by the development of turnpike roads. See W Albert, *Turnpike Road System in England 1663-1840* (1972). Also, McBain, n 21, p 550. It may also be noted that the stage coach first appeared on the London streets in the 1620's. Ibid, p 551.

<sup>129</sup> See PS Bagwell, *The Transport Revolution 1770-1985* (1988). Also, McBain, n 21, p 550.

<sup>130</sup> Cunningham, n 21, p 499, n 2 'The complete independence of each link of the industry as it existed in Devonshire in 1630 is very remarkable. 'First the gentleman farmer, or husband-man, sends his wool to the market, which is bought either by the comber or the spinster, and they, the next week, bring it thither again in yarn, which the weaver buys; and the market following brings that thither again in cloth, where it is sold either to the clothier (who sends it to London), or to the merchant who (after it has passed the fuller's mill and sometimes the dyer's vat), transports it'. Cunningham quoted Westcote, *View of Devonshire* (1845), p 61, the latter's description being of the state of things c. 1630. See also LF Salzman, *English Industries of the Middle Ages* (1923), ch 9.

<sup>131</sup> 1 Cowp 251 (98 ER 1070) atp 256.

<sup>132</sup> See also McCulloch, n 35, p 587 'A factor is usually paid by a per-centage or commission on the goods he sells or buys. If he act under what is called a *del credere* commission, that is, if he guarantee the price of the goods sold on account of his principal, he receives an additional per-centage to indemnify him for this additional responsibility. In cases of this sort the factor stands in the vendee's place, and must answer to the principal for the value of the goods sold. But where the factor undertakes no responsibility, and intimates that he acts only on account of another, it is clearly established that he is not liable in the event of the vendee's failing.' The factor's general lien covered this commission. For an early case, see *Scrimshire v Alderton* (1742) 2 Str 1182 (93 ER 1114)(oats consigned to a factor) where a suit was brought by an undisclosed principal against a purchaser from a *del credere* factor Lee CJ opined that 'this new method [of the factor taking the risk of the debt for a larger commission] had not deprived the farmer [the principal] of his remedy against the buyer'. See also Selwyn, n 13, vol 1, p 731 'for an additional premium beyond the usual commission, [the factor] undertakes for the credit of the persons to whom he sells the goods consigned to him by his principal. *Del credere* is an Italian mercantile phrase, which has the same signification as the Scotch word *warrantice*, or the English word *guarantee*.' See also Blackwell, n 13, p 14 and Munday, n 13, pp 242-3. *Miller, Gibb v Smith Tyrer Ltd* [1917] 2 KB 141 per Bray J, p 162 'Anything in the shape of a *del credere* commission is rare.'

<sup>133</sup> Bank of England Act 1694, s 26 (still extant, present wording) 'to the intent that their majesties subjects may not be oppressed by the said corporation by their monopolizing or ingrossing any sort of goods wares or merchandizes the said corporation to be made and created by this Act shall not at any time during the continuance thereof deale or trade or permitt or suffer any person or persons whatsoever either in trust or for the benefit of the same to deale or trade with any of the stock-moneyes or effects of or any [wise] belonging to the said corporation in the buying or selling of any goods wares or merchandizes whatsoever and every person or persons who shall soe deale or trade or by whose order

bank with more than 6 partners was allowed,<sup>134</sup> and by the fact that, in 1750, there were, probably, no more than 12 banks in London, with the first country bank to be regularly established in the north of England being in Newcastle in 1755.<sup>135</sup>

**(b) Malynes – Lex Mercatoria (1622)**

Early legal dictionaries defined a ‘broker’ but not a ‘factor.’ Thus, the first edition of Cowell, *The Interpreter* (1607), did not define a factor. However, he defined a broker as deriving from the French ‘broieur’ being a grinder or breaker into small pieces:

because he that is of that trade, to deal in matters of money and merchandise, between English men and strangers, does draw the bargain to particulars, not forgetting to grind out something to his own profit.<sup>136</sup>

It also seems - at least in the cloth trade in the 17<sup>th</sup> century - ‘brokers’ began to call themselves ‘factors’, to dis-associate themselves from the former word which had become linked to the less reputable profession of pawnbroking.<sup>137</sup> There was an absence of any legal text, in the early 17<sup>th</sup> century, dealing with merchants, brokers or factors. However, Malynes, a merchant - in the first edition of his *Consuetudo vel Lex Mercatoria or the Ancient Law Merchant* (1622) - dealt with factors.<sup>138</sup> He stated:

The difference between a factor and a servant consists chiefly in this, that a factor is created by merchants letters, and takes salary or provision of factorage: but a servant or an apprentice is by his master entertained, some receiving wages yearly, and some others without wages. A factor is bound to answer the loss which happens by overpassing or exceeding his commission; whereas a servant is not, but may incur his master’s displeasure. For albeit that the Spanish proverb is, *quien passa comission, pierde provision*, that he that exceeds his commission shall lose his factorage. The case is altered long since by the custom of merchants, and now it is *su bolca lo paga*, his purse does pay for it. Factors therefore must be very careful to follow the commissions given them, very orderly and punctually: and because merchants are not able to prescribe everything so exactly unto their factors as is convenient, it behoves them to make good choice of the persons which they do employ, for their welfare depends on traffic...

This good factor therefore may be trusted, and all commissions given unto him may be ample, with addition of these words, *dispose, do, and deal therein as if it were your own; & this being so found; the factor is to be excused, although it should turn to loss, because it is intended he did it for the best, according to his discretion, which is and ought to be the truest director...*<sup>139</sup>

Malynes went on to make various observations in respect of factors and these were followed in subsequent legal dictionaries and trade directories as well as made their way into caselaw.<sup>140</sup> Blount, *Glossographia* (1674) defined a factor as:

or directions such dealings or trading shall be made prosecuted or managed shall forfeite for every such dealing or trading and every such order and directions treble the value of the goods and merchandise soe traded for to such person or persons who shall sue for the same by action in the High Court.’ See also Holdsworth, n 54, vol 8, p 188

<sup>134</sup> 7 Ann c 30, s 66 (rep 1867). See also McBain, n 12, p 28, fn 232.

<sup>135</sup> McBain, n 12, p 28, fn 232. A clearing house for banks was not established until 1795. Westerfield, n 123, p 382 ‘The following numbers of banks existed: in 1677, 44: 1738, 21; 1754, 18; 1763, 23; 1736:21; 1740, 28; 1759, 24; the fluctuations were caused by failures, amalgamations, and foundations. Country banks were very slow to rise. The first was founded at Gloucester in 1716. It was the only one of its kind as late as 1737. By 1750 there were twelve, and 1772 twenty-four country banks.’

<sup>136</sup> J Cowell, *The Interpreter* (1607). He also referred to 10 Ric 2 c 10 (1386, rep 1863) where such people were called ‘broggers’. (likely, from the latin *brocartii*, mediators). See also *Termes de la Ley* (last ed, 1721) (broker) ‘Broker seems to come of the french word *broieur*, *id est* [that is] *tritior*, he that grinds or breaks a thing into small pieces. And the true trade of a broker, as it appears in the statute made 1 Jac, c 21 [Act against Brokers, 1603, rep 1893] is to beat, contrive, make and conclude bargains between merchants and tradesmen. But the word is now also appropriated to those that buy and sell old and broken apparel and household stuff.’ See also Munday, n 13, pp 230-1.

<sup>137</sup> *Hutchins v Player* (1663) Bridg O 272 (124 ER 585), Bridgman CJ at p 306 noted ‘There are no brokers at Blackwell Hall for cloth than those now called factors. The name of broker, by reason of fripperers and those who buy old goods to sell again, being grown out of credit [it seems to have grown out of credit by 1607, see Cowell’s definition of broker, n 136 above], they nullified this by the name of factor; which, though it be an old word, yet in application to selling of cloths is new, and not to be found in our ancient statutes.’ See also Munday, n 13, p 231. OED, n 2 (*fripperer*) ‘A dealer in cast-off clothing.’ See generally, Westerfield, n 123, pp 296-304.

<sup>138</sup> G Malynes, *Consuetudo vel Lex Mercatoria or the Ancient Law Merchant* (1<sup>st</sup> ed, 1622; 3<sup>rd</sup> ed, 1686), p 82 (rep of 1<sup>st</sup> ed by Methglin Press). Malynes was also one of the first to discuss merchants and the law merchant, see McBain, n 1, s 19.

<sup>139</sup> *Ibid*, p 81.

<sup>140</sup> *Ibid*, ch 16.

a doer or maker. It is commonly used for him that buys and sells for a merchant, or that looks to his business, in his absence.<sup>141</sup>

Jacob, in the first edition of his *New Law Dictionary* (1729),<sup>142</sup> defined the factor as follows:

a merchant's agent residing beyond the seas, or in any remote parts, constituted by letter or power of attorney. And one factor may be concerned for several merchants, and they shall all run a joint risk of his actions. If the principal gave the factor a general commission to act for the best, he may do for him as he thinks fit, but otherwise he may not. Tho[ugh] in commissions at this time, it is common to give the factor power in express words to dispose of the merchandise, and deal therein as if it were his own, by which the factor's actions will be excused, tho[ugh] they occasion loss to his principal.<sup>143</sup>

What is noteworthy is the statement of Jacob that, 'at this time' (i.e. in 1729), the tendency was for the principal to enter into an express agency ('to give the factor power in express words'). This reduced considerably the need to assert any ostensible authority at common law to sell or consign; contract now governed the matter. Jacob also stated:

If a factor buys goods on account of his principal, where he is used so to do, the contract of the factor shall oblige the principal to a performance of that bargain, and he is the proper person to be prosecuted, on non-performance...if the factor has orders from his principal not to sell any goods but in such a manner, and he breaks those orders, he is liable to the loss or damage that shall be received thereby. And where any goods are bought or exchanged, without orders, it is at the merchant's courtesy whether he will accept of them, or turn them on his factor's hands.<sup>144</sup> When a factor has bought or sold goods pursuant to orders, he is immediately to give advice of it to his principal, lest the former orders should be contradicted before the time of his giving notice, whereby his reputation may possibly suffer...A factor shall suffer for not observing of orders, and no factor acting for another man's account in merchandise, can justify receding from the orders of his principal, tho[ugh] there may be a probability of advantage by it.<sup>145</sup>

Jacob's definition was followed in Postlethwayt, *Universal Dictionary of Trade and Commerce* (1<sup>st</sup> ed; 1751)<sup>146</sup> who also distinguished a factor from a servant.<sup>147</sup> Postlethwayt also expanded on the cases relating to factors as well as dealt, in detail, with factors residing abroad. Finally, Beawes, who was a merchant, in his *Lex Mercatoria* (1752)<sup>148</sup> stated:

*Of factors, supercargoes, and agents.* All these denomination import and signify the same thing, in regard of their function, though different in the method and place of discharging it, and is always understood to be one who acts for another, and who buys, sells, and negotiates, in conformity with the order of his

<sup>141</sup> T Blount, *Glossographia* (1<sup>st</sup> ed, 1656; 4<sup>th</sup> ed, 1674)(*factor*). Blount did not define a broker. Cf. T Blount, *A Law Dictionary and Glossary* (3<sup>rd</sup> ed, 1717) which defined a broker but not a factor. For some chancery cases on factors in the 17<sup>th</sup> century, see DEC Yale, *Lord Nottingham's Chancery Cases*, SS, vols 73 and 79.

<sup>142</sup> G Jacob, *A New Law Dictionary* (1<sup>st</sup> ed, 1729)(*factor*). Jacob also defined a 'broker' as 'broccatores, broccarii & auxionarii are those that contrive, make and conclude bargains and contracts between merchants and tradesmen, in matters of money and merchandise, for which they have a fee or reward...The original of the word is from a trader broken, and that from the Saxon *broc*, misfortune, which is often the true reason of a man's breaking; so that the broker came from one who was a broken trader [merchant] by misfortune, and none but such were formerly admitted to that employment; and they were to be freemen of the City of London, and allowed an approved by the lord mayor and aldermen, for their ability and honesty.'

<sup>143</sup> Jacob cited Malynes, *Lex Mercatoria*, see n 138.

<sup>144</sup> Ibid.

<sup>145</sup> See also J Montefiore, *A Commercial Dictionary* (1803) (*factor*) 'A factor is a merchant's agent or correspondent residing beyond the seas, or in any remote parts in this country, and, in some cases, constituted by a letter of attorney to sell goods and merchandise, and otherwise act for his principal, either with a stipulated salary or allowance for his care, or commission. He must pursue his orders strictly, and may be concerned for several merchants. In commissions given to factors, etc. it is customary to give them an authority in express words to dispose of the merchandise, and deal therein as if it were their own, by which the factor's actions will be excused, though they occasion loss to their principals.'

<sup>146</sup> M Postlethwayt, *Universal Dictionary of Trade and Commerce* (1<sup>st</sup> ed 1751) (*factors*) 'A factor is a merchant's agent, residing abroad, constituted by letter of attorney, to act for this principal.' See also R Rolt, *A New Dictionary of Trade and Commerce* (London, 1756) and T Mortimer, *Elements of Commerce, Politics and Finances* (London, 1772). See also Munday, n 13, pp 225-7.

<sup>147</sup> 'A factor and a servant differ in this, that the first is made by merchant's letters, and takes commission, but the servant is entertained with yearly wages, some without: a factor is answerable for loss sustained by misusing his commission, a servant only incurs displeasure; factors must therefore punctually observe their commissions. And factors deal most commonly for several, but a servant, dealing for others by his master's direction, can be no loser if they break [i.e. go bankrupt], for he has only his master's credit: wherefor intimations, citations, attachments, and other lawful courses are executed against servants, and not against factors.'

<sup>148</sup> Beawes, *Lex Mercatoria Rediviva or the Merchant's Directory* (1<sup>st</sup> ed, 1752), p 36.

principal, under the various circumstances of his principal's limitations and directions.<sup>149</sup>

**(c) Blackstone**

Blackstone, in his *Commentaries on the Laws of England* (1765-9),<sup>150</sup> generally, had little to say on commercial matters and very little to say on factors, besides categorising them as a form of servant. Thus, he stated:

There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as stewards, factors, and bailiffs: whom however, the law considers as servants *pro tempore*, with regard to such of their acts, as affect their master's or employer's property...<sup>151</sup>

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, expressly given, or implied; *nam qui facit per alium, facit per se* [he who acts through another does the act himself].<sup>152</sup>

***In conclusion, the lending of money by factors to their principals and the taking of a pledge in return, led to recognition by the courts of a factor's general lien in 1755 (see below).***

**7. HISTORY OF THE FACTOR: GENERAL LIEN - 1755**

**(a) Introduction**

Where the factor obtained (and retained) possession of specific goods of the principal on which he lent money he would take a pledge as security. However, the pledge only covered the loan in respect of those goods, whereas the factor wanted to secure all unpaid sums owed by the principal for all deals conducted with him. Thus, what was needed was a form of security that would cover a 'running account' of unpaid commission (factorage), *viz.* any:

- unpaid commission arising from the sale, consignment or pledge of all goods the principal had placed with the factor;
- unpaid commission arising from any loan the factor had given to the principal on all goods the principal had placed with him;
- unpaid *del credere* commission (for guaranteeing the payment of the price of all such goods);
- any commission for insurance placed by the factor.

The grant of such a security would enormously facilitate trade - especially, in industries such as the textile industry which comprised small tradesmen who were, otherwise, only paid when the cloth was finally sold.

- The maintenance of running accounts (fluctuating indebtedness) between a clothier and dyer was referred to in *Dowman v Matthews* (1721) and, doubtless, had long been practiced prior to that. However, it was the invention (in effect) of the general lien (the pre-cursor of a floating charge) in 1748 that got things going since it enabled a factor to retain one set of goods for other indebtedness owed to him by the principal in the same trade;
- Further, it is unsurprising that nearly all general liens recognized by the courts were connected with the textile trade. *viz.* general liens for:
  - packers (1748);
  - factors (1755);
  - calico printers (1764);
  - insurance brokers (1781);
  - bankers (1794);
  - fullers (1800, Exeter only);
  - dyers (1801, some districts);
  - bleachers (1866, Nottingham only).

While the courts also recognized general liens for solicitors (pre-1779) and stockbrokers (1858),<sup>153</sup> an explanation may be readily found in that solicitors were (often) involved in banks and banks were, later, involved in

<sup>149</sup> Ibid, p 36. See also the cases he cites.

<sup>150</sup> See n 32. C Molloy, *De Jure Maritimo et Navali or a Treatise of Affairs Maritime and of Commerce* (9<sup>th</sup> ed, 1769), writing at the same time as Blackstone, closely followed Malynes, see vol 2, pp 326-33.

<sup>151</sup> Blackstone, n 32, vol 1, p 415. See also Holmes, n 105, vol 3, p 398 who noted 'as late as Blackstone agents appear under the general head of servants.' Also, OW Holmes, *The Common Law* (Boston, 1945), p 228 (factors are always called servants in the old books).

<sup>152</sup> Ibid, p 417. Also formulated as '*qui facit per alium, est perinde ac si facit per se ipsum*' (he who acts through another, acts as if he were doing it himself). See also Coke, n 32, vol 4, p 109 ('*qui per alium facit, per ipsum facere videtur*').

<sup>153</sup> See McBain, n 12, p 12.

stockbroking.<sup>154</sup> Further, both solicitors and bankers were closely involved in the textile trade in the 18<sup>th</sup> century, helping to finance it. Finally, factors and merchants were involved not only in lending money but in establishing the first banks, as well as in insurance. In short, all these trades and professions were, or became, closely inter-related. As to the development of the factors' liens (particular and general) the following may be noted:

### **(b) Particular Lien**

Quite when a factor was accorded a *particular* lien, for payment of his commission, is unclear. Liens had been accepted in the case of common callings from early times. Thus:

- **Common Callings.** A *common (public) innkeeper* was obliged by law, to accept any traveller (wayfarer) who presented himself.<sup>155</sup> He also had strict liability imposed on him, by law, for loss or damage to the goods of that person when staying at his inn (which seems to have been first imposed c. 1368).<sup>156</sup> By way of compensation for these onerous responsibilities, the courts accorded the innkeeper a lien over the travellers' goods, if unpaid (this occurred by 1465 at the latest).<sup>157</sup> As for other common callings:
  - A *common farrier* was obliged to shoe the horse of any wayfarer who so demanded. He was also accorded a lien, if unpaid - though when this lien was first recognized is uncertain.<sup>158</sup>
  - A *common carrier* was accorded with strict liability by 1596 and a lien was recognized c. 1699.<sup>159</sup>
- **Improving Goods.** A person who worked on goods to improve them - such as tailor - was also accorded a lien. This may have been due to the fact that tailors, also, were '*common*' in early times. That is, they were obliged to make clothes for any member of the public, if so required.<sup>160</sup> Or, it may have been the result of a concession by the English courts due to the fact that - like common innkeepers, farriers and carriers - tailors were often bilked (the party making off without payment) and, to prevent this, they were accorded a lien over the cloth, to hold on to it until payment.<sup>161</sup> Which lien came first - that of the innkeeper or the tailor - is unlikely to be known through lack of records.

As for the factor, he did not exercise a common calling. That is, he was not obliged to act as an agent for anyone who asked. Further, he did not improve the goods of his principal; he simply sold them *etc.* However, one suspects that the factor's particular lien arose because the textile trade involved many persons carrying on distinct processes, such as weavers, bleachers, fullers, dyers, calico printers and packers - all of which could be said to improve goods - and many factors were also involved in these trades as well as being clothiers (the person who sold the end product, cloth).<sup>162</sup> Thus, it is likely that *qua* packer, bleacher, fuller, dyer *etc.*, factors were accorded with a particular lien. Whitaker, who wrote the first text on liens in 1816, stated:

Factors have always, it seems, been entitled to a particular lien upon the goods of their principal coming into their possession in the course of their trade, for the charges incident to those particular goods.<sup>163</sup>

### **(c) General Lien**

As previously noted, in the textile industry in particular, the participants maintained running accounts among each

<sup>154</sup> The only unconnected general lien to be recognised was the very last - that of a club trustee (in 1887) - and that lien is aberrant since it is a charge, rather than a lien. As to the involvement of merchants and factors in banks, Westerfield, n 123, p 384 'The prevalent custom of country merchants assuming the banking function was illustrated in divers businesses. Mansfield was a linen-draper, Cuming a cloth dealer, Alexander a tobacconist, Coutts a corn dealer, *etc.* The first country bank was the Old Gloucester bank founded by James Wood, a soap and tallow chandler. Another great London banking firm owes its origin to one Smith, a Nottingham draper, who develop a local banking business, extending to Preston, Hull, Lincoln, and finally London. The Liverpool bankers were originally general merchants, tea dealers, linen merchants, and one was a watch and clock manufacturer. The first country bank to be regularly established as such was at Newcastle in 1755. In light of their mercantile origin, it is apparent that the country banks performed an important service for country industry and trade. Their rise is one phase of the provincializing tendency of English commercial life after 1720.' See also G Davies, *A History of Money* (2002), pp 249-50, 286-92.

<sup>155</sup> GS McBain, *Abolishing the Strict Liability of Hotelkeepers* [2006] JBL, October issue, pp 705-55.

<sup>156</sup> *Ibid*, p 553. See *Navenby v Lassels* (1368), SS, vol 82, pl 52. See also Baker & Milsom, n 117, pp 552-4 and AKR Kiralfy, *A Source Book of English Law* (Sweet & Maxwell, 1957), p 202.

<sup>157</sup> McBain, n 155 and n 12, p 5.

<sup>158</sup> See McBain, n 12, p 5

<sup>159</sup> McBain, n 12, p 5.

<sup>160</sup> *Ibid*, pp 5-6. Both Hale and Blackstone referred to a '*common*' tailor.

<sup>161</sup> The cloth was supplied by the customer. See also Steffen & Danzigler, *The Rebirth of the Commercial Factor* (1965) 36 Col LR 745 (1965) at p 749, n 23 citing JB Ames, *History of Assumpsit*, AALH, n 105, vol 3, p 289 (tailor allowed a lien to prevent 'intolerable hardship.')

<sup>162</sup> McBain, n 12, pp 10-1.

<sup>163</sup> Whitaker, n 12, p 103. Whitaker did not cite authority for this proposition.

other, something unsurprising in the absence of banks.<sup>164</sup>

- In *Ex p Deeze* (1748)<sup>165</sup> Hardwicke LC upheld a general lien in favour of a packer who not only improved the goods (the cloth, by packing it) but who lent money on the same, with the goods being a pledge for re-payment;
- Mansfield CJ was to later claim (in 1768) the reason why a general lien in favour of a packer was upheld in *Ex p Deeze* (1748), was due to the fact that the packer in that case was ‘*in the nature of a factor*.’<sup>166</sup>

This is, probably, a case of *ex post facto* rationalization, since it seems that a factor’s general lien was upheld for the first time not in 1748 but in 1755, in *Kruger v Wilcox* (1755),<sup>167</sup> where Hardwicke LC stated:

All the four merchants, both in their examination in the cause, and now in court, agree, that if there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account, as well for the charges, customs *etc.* paid on account of the particular cargo.<sup>168</sup>

However, by 1805, the courts became more cautious on recognizing general liens at common law - mainly due to their unfairness *vis-à-vis* other creditors who had no means of ascertaining them and yet who took subject to them.<sup>169</sup> As it is, in 1812, Whitaker noted that:

wherever there is a course of dealings, and a general account between the principal and factor, and a balance is due to the factor, he has a lien upon all the goods of the principal in his hands, in the character of factor for such balance, without regard to the time when, or on account upon which he received them. He has his lien too, not only for money actually advanced to his principal, but also for the debt for which he is only a surety for him... The case, indeed, of a factor is that in which for the convenience of trade, from the nature of his employment, and with a view to encourage him to advance money upon goods in his possession, or which are to be consigned to him,<sup>170</sup> the right of lien appears to have been most favoured, and carried to the greatest extent. For it has been determined, that where a factor sells goods under a *del credere* commission, whereby he becomes responsible for the price, or where he is in advance for goods by actual payment, he has a lien on the price in the hands of the purchasers, though he has parted with possession of the goods; because though he has not the actual possession of the goods, yet as he has the power of giving a discharge or bringing an action, he has a right to retain the money in consequence of his lien, as much as a mortgagee has by the title deeds of an estate in his hands, though he is not in possession. Nor will this lien be defeated by proof that the factor knew at the time when he advanced the money to his principal, that the latter was in insolvent circumstances.<sup>171</sup>

Whitaker also noted 6 instances where a factor had no lien over goods, *viz*:

- (a) after the death of the principal;<sup>172</sup>
- (b) where there was a special agreement (e.g. express agreement otherwise);<sup>173</sup>

<sup>164</sup> See e.g. *Downam v Matthews* (1721) Prec Ch 579 (24 ER 260)(fluctuating indebtedness between a clothier and a dyer). See also McBain, n 12, p 12.

<sup>165</sup> 1 Atk 228(26 ER 146). The packer packedbaled goods, such as cloth, into proper parcels, so that that they could be exported. It also seems that early on packers were acting as factors. Westerfield, n 123, p 313 cites evidence of this in 1692.

<sup>166</sup> *Green v Farmer* (1768) 4 Burr 2214 (98 ER 154) at p 2218 per Mansfield CJ ‘It was certainly doubtful, before the case of *Krutzer and Wilcocks* [*sic*] ‘whether a factor had a lien, and could retain for the balance of his general account.’ Also, p 2222.

<sup>167</sup> Amb 253 (27 ER 168). See also McBain, n 12, p 10.

<sup>168</sup> At p 254.

<sup>169</sup> In *Rushforth v Hadfield* (1805) 6 East 519 (102 ER 1386) per Le Blanc J at p 528 ‘General liens are a great inconvenience to the generality of traders, because they give a particular advantage to certain individuals who claim to themselves a special privilege against the body at large of the creditors instead of coming in with them for an equal share of the insolvent’s estate. All these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor’s estate proportionally amongst all the creditors, and they ought not to be encouraged.’ See also McBain, n 12, p 14.

<sup>170</sup> See also *Houghton v Matthews* (1803) 3 Bos & Pul 485 (127 ER 263) at pp 488-9 per Chambre J ‘It seems to me that the liens of factors have been allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors...’. See also Steffen, n 161, p 749.

<sup>171</sup> Whitaker, n 12, pp 103-5. As to insurance, p 105 ‘if a factor effect an insurance for his principal, and the principal be indebted to the factor on the balance of account, he may retain the policy, and has a lien upon it while it remains in his possession, and the balance remains unpaid.’

<sup>172</sup> *Ibid*, pp 107-8 ‘where a factor advanced money to his principal, who was a clothier, relying on the credit of cloths remaining in his hands to reimburse himself, and the clothier died, and upon his administrator suing at law for the cloth, the factor came into equity, and prayed he might be allowed an account of the monies he had advanced, it was refused: because if there were debts of an higher nature, it would have been a *devastavit* in the administrator to pay the factor’s debt.’ Whitaker cited *Chapman v Derby* (1689), 2 Vern 117 (23 ER 684).

- (c) in respect of debts prior to becoming a factor;<sup>174</sup>
- (d) post-bankruptcy;<sup>175</sup>
- (e) where he had no possession;<sup>176</sup>
- (f) when possession had ended.<sup>177</sup>

## 8. HISTORY OF THE FACTOR: 1823-89

In *Baring v Corrie* (1818) a definition of lien was given, one which was much cited later on. Abbott CJ stated:

A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, [en]trusts him with the actual possession of the goods, and gives him authority to sell in his own name.

Abbott CJ also noted that:

the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name...In all the cases cited the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not. And at all events they knew that he had a right to sell the goods. But the case of a broker is quite distinguishable.<sup>178</sup>

Uncertainty, however, prevailed over whether a factor had a similar ostensible authority to *pledge*.

- ***Caselaw in 1742***. In *Paterson v Tash* (1742), it was reported that a factor had no such authority - although, in 1816, Gibbs CJ thought this case to be mis-reported.<sup>179</sup> In 1823, a Select Committee of the House of Commons, at the urging of factors,<sup>180</sup> advised Parliament that legislation was requisite.<sup>181</sup> In particular, it recommended that it would not be unwise to adopt the principle of certain foreign laws that '*possession constitutes title*' and that the law be altered to provide that:

a person possessing a bill of lading, or other apparent symbol of property, not importing that such property belongs to others, shall be considered as the true owner, so far as respects any person who may deal with him, in relation to such property, under an ignorance of his real character.<sup>182</sup>

<sup>173</sup> Ibid, pp 108-9. *Walker v Birch* (1795) 6 TR 258 ( 101 ER 541) held that - if goods were deposited with a factor pursuant to a special agreement that he pay to the principal the proceeds on sale - he had no general lien on the goods (if not sold), the agreement overriding the lien the common law otherwise provided for.

<sup>174</sup> Ibid, pp 109-10. *Houghton v Matthews* (1803) 3 Bos & Pul 485 (127 ER 263).

<sup>175</sup> Ibid, p 110 'A factor can acquire no lien on goods which have been consigned to him after the commission of an open act of bankruptcy by the consignor, though the factor have advanced money on the credit of the consignment, the legal effect of such act being to enable the consignees to rescind all contracts made by the bankrupt after the commission of it, except in particular cases provided for by statutes, within the provisions of which this case is not comprehended.' See also *Copland v Stein* (1799) 8 TR 199 (101 ER 1344).

<sup>176</sup> Ibid, p 111 According to the general rule of law with respect to liens where the goods of the principal do not come into the actual possession of the factor, he can acquire no lien upon them, even though he has accepted bills upon the faith of the consignment, and has paid part of the freight.' *Kinlock v Craig* (1789) 3 TR 119 (100 ER 487).

<sup>177</sup> Ibid, pp 111-2 'As by the general rule of law that liens cannot exist without possession, the lien of a factor cannot attach on goods which do not come into his possession: so in conformity to the same rule, his lien cannot continue on the goods, so as to enable him to maintain trover for them at law, after he has parted with possession of them to his principal.'

<sup>178</sup> 2 B & Ald (106 ER 317) 137 at p 143. It may be noted that, in this case, the factor was also acting, at times, as a merchant.

<sup>179</sup> 2 Stra 1176 (93 ER 1110). 'It was held by CJ Lee, that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt...And the jury found accordingly.' See also Pearson, n 3, p 7; Report, n 5, p 5 and Pearson-Gee, n 13, pp 3-4. Ibid, p 5 for subsequent decisions until 1822.

<sup>180</sup> There seems little doubt that the factors put great pressure on the Committee, to obtain the passing of the Factor's Act 1823. Crump, n 13, p 8 'By the exertions principally of the monied capitalists, Mr Paley tells us, whose interests were affected by the existing state of the law, in the year 1823 an Act of Parliament was obtained.' See also Paley, n 13, p 96.

<sup>181</sup> Report, n 6. See also Munday, n 13, pp 246-7.

<sup>182</sup> Ibid, p 21. It also noted 'This regulation, for the benefit of commerce, not to affect the right of the true owner to follow his goods while in the possession of his factor, or to recover the same from any persons having made advances thereon, upon payment of the amount of such advances; or, if previously sold by such person, to recover from him any balance in his hands beyond the amount of advances. Nor is any person taking a security for a prior debt due from a factor or agent, upon goods in the possession of such factor or agent, or of which he holds such symbol of property as is before mentioned, to acquire any greater interest therein than really belonged to, and might have been enforced by, such factor or agent.'

This course of action - the creation of a statutory exception to the rule of *nemo dat* in the case of pledge - was opposed, in particular, by the eminent lawyer, Sir James Scarlett (1769-1844, Baron Abinger).<sup>183</sup> Butterworth (in 1902) stated:

In 1823 an agitation was set on foot by London merchants, bankers, and brokers, with a view of obtaining an immediate alteration of the law, and petitions were presented to Parliament with that object. A Committee of the House of Commons was appointed to investigate into the law and practice of trade on the subject both at home and abroad; a great number of witnesses were examined, including many of the leading London merchants, and most of the British vice-consuls and commercial representatives on the continent; and the Committee issued a report strongly urging upon the house the necessity, in the protection of commerce, of an immediate change in the law.<sup>184</sup>

This course was strenuously opposed by the legal members of the House, but in the same year, 1823, the first Factors Act was passed, and as its provisions were found not to afford sufficient protection, a second Act was passed in 1825, a third in 1842, and a fourth in 1877. It has been said that these Acts are '*monumental examples of bewildering legislation*', and that the first three afford a model of the art of saying few things in many words; but as you are doubtless well acquainted with other excellent models of this art, and as all four Acts were repealed by the Factors Act 1889, you will be content, I trust, to forbear exploring those treasuries of perplexing verbosity.<sup>185</sup>

- **Factors Act 1823**.<sup>186</sup> As it was, the Factors Act 1823 was limited in scope. It only dealt with consignees at sea, according a consignee [factors were often termed consignees] a lien for sums advanced on the goods consigned to him.<sup>187</sup>
- **Factors Act 1825**.<sup>188</sup> This Act gave the factor a power to pledge.<sup>189</sup> However, it fettered the exercise of the same with the pledgee's notice of the agency.<sup>190</sup> This Act proved to be very unclear and necessitated

<sup>183</sup> Hansard Debates, vol ix, pp 211, 256. Scarlett [MP], p 211 'Nothing could be more just than that factors should be restricted from exceeding the authority of their principals, and nothing more likely to prevent frauds.' At p 256, 'Mr Marryat[MP] doubted the expediency of altering the law on this subject. A great deal had been said about the situation of merchants and factors, but the truth was, that neither merchants nor factors were materially interested in the question. Those who stirred in this matter were the brokers, who were in the habit of advancing large sums of money on goods, without inquiring of those from whom they obtained them, whether they were their own property or not. By such practices they sometimes made great gains, but being exposed to occasional losses, they came to parliament to ask that they might be screened from the effects of their own imprudence by an alteration of the law of the land. He contended, that the evils under the law might be easily obviated.' See also R Winter, *Objections to the proposed alteration of the law relating to Principal and Factor* (1823).

<sup>184</sup> He cited Pearson-Gee, n 13, pp 5-6. Ibid, Pearson-Gee, n 13, p 1 'The first Factors Act... was... the outcome of a prolonged struggle between the Parliamentary representatives of the commercial classes and the legal profession... as a consequence of which it was merely tentative in character, and had a very narrow scope.'

<sup>185</sup> Butterworth, n 13, p 42-3. Chalmers (in 1945), n 17, p 182 'The first Factors Act was passed in 1823, the second in 1825, and the third in 1842. These enactments were a model of the art of saying few things in many words.'

<sup>186</sup> 4 Geo 4, c 83, s 1 (persons in whose names goods shall be shipped, shall be deemed to be the true owners so as to entitle consignees to a lien thereon in respect of their advances, or of money or negotiable securities received by the shippers to the use of the consignees, provided the consignees have no notice that the consignors are not the actual proprietors of such property), s 2 (any person may take goods or a bill of lading in deposit from any consignee, but such person shall not acquire any further right than the consignee possessed), s 3 (the right of the true owner to follow his goods while in the hands of his agent, or of his assignees in the case of bankruptcy, or to recover them from assignees, etc, upon paying his advances secured upon them etc).

<sup>187</sup> Pearson-Gee, n 13, p 9 'The Act went a very little way. It altered the law as to pledging only in the particular case of consignments by sea. Under its provisions a consignee might acquire a lien upon the goods consigned to him for advances made, or securities given, to the consignor, and transfer the lien by a pledge of the goods, or of the bill of lading.' Crump, n 13, p 8 'That statute [of 1823], as Lord St Leonards remarks, in *Navulshaw v Brownrigg* [(1852) 2 De GM & G 441, 42 ER 943], 'merely gave to the person who took the pledge the right of the person who pledged, so that if the agent had a right as against his principal, that right was communicated to the pledgee and nothing further.' See also Pearson, n 3, pp 11, 13-4 & 21. Also, *Cole v North-Western Board* (1875) LR 10 CP at pp 364, 366-7 per Blackburn J and *Mildred v Maspons* (1883) 8 App Cas 874, 884 per Lord Blackburn. See also *Blandy v Allan* (1828) 3 C & P 447 (172 ER 495).

<sup>188</sup> 6 Geo 4, c 94.

<sup>189</sup> S 1 (factors or agents having goods or merchandise in their possession, shall be deemed to be the true owners, so as to give validity to contracts with persons dealing *bona fide* upon the faith of such property); s 2 (persons in possession of bills of lading etc to be the owner so far as to make valid contracts); s 3 (no person to acquire a security upon goods in the hands of an agent for an antecedent debt, beyond the amount of agent's interest in the goods), s 4 (persons may contract with known agents in the ordinary course of business or out of that course if within the agent's authority); s 5 (persons may accept and take goods etc in pledge from known agents, but in that case shall acquire no further interest than was possessed by such agent at the time of such pledge); s 6 (right of the true owner to follow his goods while in the hands of his agent or of his assignee, in the case of bankruptcy, or to recover them from a third person upon paying his advances accrued upon them and, in case of

further legislation.<sup>191</sup> Sir James Scarlett made a sustained criticism of the Bill that became the Factors Act 1825 in respect of the ostensible power to pledge, as he had in respect of the 1823 Bill. *Inter alia*, he stated:

- The main object [of the Bill] I take to be this; to enable agents and factors to raise money for their own use, or to pay their own debts, by making a binding and lawful pledge of the property of their principals, without their consent or authority;<sup>192</sup>
- The proposed alteration of the law is not confined to the case of a factor entrusted with goods for sale; but extends to give an express legislative sanction to the fraud of every species of agent or servant whom it may be necessary to trust with the receipts of goods for any purpose whatever, and who may chance to find, as doubtless he always may find, a money-lender discreet enough to accept his pledge of the warrant or order for the delivery of the goods without pressing for any inconvenient information.<sup>193</sup>

As it is - pledge cases under the 1889 Act (see **24(b)**) - evidence that the second point of Scarlett was prescient. It enabled an errant factor and a moneylender who failed to make inquiry (or who was deliberately dishonest) to enable the goods of a principal to be encumbered by act of law even though the principal might have expressly prohibited any pledge of his goods. Further, as Scarlett pointed out, the grant of such a statutory power was not necessary for an honest agent since he would not pledge without authority.<sup>194</sup> Also, a pledgee (moneylender) could otherwise easily protect himself by requiring evidence of title to the goods (either indicating that they belonged to the factor) or by requiring sight of the agency agreement (expressly stating the principal's authority to the pledge of his goods).<sup>195</sup> As it was, the 1825 Act did not give a '*carte blanche*' presumption of a factor's authority to pledge the goods of his principal - this did not result until the 1842 Act.

- ***Factors Act 1842***. This Act amended the Acts of 1823 and 1825. It also provided, in s 1 (*bona fide advances to persons intrusted with the possession of goods or documents of title, though known to be agents protected*).

from and after the passing of this act any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security bona fide made by any person with such agent so entrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.<sup>196</sup> (*underlining supplied*)

The words underlined connote the heart of the provision.

the bankruptcy of factor, the owner of goods so pledged and redeemed shall be held to have discharged *pro tanto* the debt due from him to bankrupt); s 7 (agents fraudulently pledging the goods of their principals deemed to be guilty of misdemeanour); s 8 (Act not extend to cases in which the agent has not made the goods in security for any sum beyond the extent of his own lien); s 9 (Act not lessen any remedy at law or equity which the party aggrieved may be entitled to adopt).

<sup>190</sup> See Pearson-Gee, n 13, pp 9-10; Pearson, n 3, pp 11-2, 14-6 & 27-64 and Crump, n 13, p 9 *et seq*. See also *Cole v North-Western Board* (1875) LR 10 CP at p 367 *per* Blackburn J.

<sup>191</sup> *Ibid*, p 12.

<sup>192</sup> Hansard Debates, vol xiii, p 1435 (June 25<sup>th</sup>, 1825).

<sup>193</sup> *Ibid*, p 1437. *Graham v Dyster* (1816) 2 Starkie 21 at p 27 *per* Abbott J 'It...is now the settled law, that a factor cannot pledge the goods of his principal; and it is for the benefit of commerce that this principle should be held sacred and inviolate. The person who entrusts another with the sale of his goods has no other security for the safety of his property except the incapacity of the agent to dispose of it otherwise than by sale.'

<sup>194</sup> *Ibid*, p 1448 'the interest of an honest factor cannot be concerned in this law.'

<sup>195</sup> *Ibid*, p 1449 'it is manifest, that a banker or merchant applied to by a factor to lend money upon the pledge of goods, must be aware, that if the borrower is honest, and means to pledge none but his own goods, he cannot possibly have the slightest objection to make his title to the goods known, by producing his invoice or letters of advice...The disclosure of his title, if it be a good one, can have no other effect than to strengthen his credit.'

<sup>196</sup> *Ibid*, pp 12-3 and Pearson, n 3, pp 12, 16-9 & 65-105. See also Hansard Debates, vol lxii, pp 996 (Lords) and lxiii, p 594 (Commons). Also, *Cole v North-Western Board* (1875) LR 10 CP at p 370 *per* Blackburn J 'The recital [to the 1842 Act] shows a plain intention to enact that what had, ever since the case of *Paterson v Tash*; been the law, should no longer be so; and that an agent having power to sell should be also enabled to pledge. But there is no indication of any intention to give a power to pledge where there is not a power to sell...'. See also Crump, n 13, pp 21 *et seq*.

- **Factors Act 1877**. This Act, s 2, clarified the position in respect of the revocation of an agency.<sup>197</sup> It also included new subject matter which did not relate to agents in particular but to buyers and sellers in general. Thus ss 3-5 dealt with sellers in possession, buyers in possession and stoppage in transit:
  - **Section 3 (vendors permitted to retain documents of title to goods)**. ‘Where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor or any person or agent entrusted by the vendor with the goods or documents within the meaning of the principal Acts as amended by this Act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person entrusted by the vendee with the goods or documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold.’
  - **Section 4 (vendees permitted to have possession of documents of title to goods)**. ‘Where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession or by any other person or agent entrusted by the vendee with the documents within the meaning of the principal Acts as amended by this Act shall be as valid and effectual as if such vendee or other person were an agent or person entrusted by the vendor with the documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods.’
  - **Section 5 (transfers of documents of title)**. ‘Where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bona fide* 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*.’
- **Factors Act 1889**. This repealed, and consolidated, the Factors’ Acts 1823-77.<sup>198</sup>

In, *Cole v North-Western Bank* (1875), Blackburn J, reviewing the Acts of 1823-42, stated:

At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud...[However] If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited.<sup>199</sup>

This is not wholly accurate since the common law did not hold that a *pledgor* had ostensible authority in *Paterson v Tash* (1742) and this issue remained uncertain<sup>200</sup> until legislation clarified the matter - which only effectively

<sup>197</sup> Ibid, pp 15-8 and Pearson, n 3, pp 12, 18-9 & 106-14. 1877 Act, s 2 ‘Where any agent or person has been intrusted with and continues in the possession of any goods, or documents of title to goods, within the meaning of the principal Acts [i.e. those of 1823-42] as amended by this Act, any revocation of his instrument or agency shall not prejudice or affect the title or rights of any other person who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents.’

<sup>198</sup> 40 & 41 Vict c 39. See also Pearson, n 3, pp 106-14. Munday, n 13, p 248 ‘It has been pointed out that the Factors Act 1889 affords neither a satisfactory nor a successful instance of codification in that it failed to take the opportunity to simplify and clarify the law, but preferred to reproduce and, to some extent, extend the previous provisions. This error was further compounded in 1893 when, in the Sale of Goods Act, the legislature proceeded to re-enact, virtually unaltered, certain provisions of the Factors Act.’ See also Gutteridge, *Contract and Commercial Law* (1935) 51 LQR at p 140.

<sup>199</sup> LR 10 CP at pp 362-3 *per* Blackburn J. Ibid, p 364 ‘The general principle of law, that, where the true owner has clothed anyone with apparent authority to act as his agent, he is bound to those who deal with the apparent agent on the assumption that he really is an agent with that authority, to the same extent as if the apparent authority was real...’. See also Pearson, n 3, p 2.

<sup>200</sup> See cases cited by Pearson, n 3, pp 4-6, 7-10. Also, Selwyn (1869), n 13, vol 1, p 733 ‘By the common law, a factor, as such, had not any authority to pledge, so as to transfer his lien to the pawnee, or to barter, but only to *sell* the goods of his principal.’

occurred with the Factors Act 1842. Blackburn J continued as to what he thought the effect of 1823-42 Acts were:

We do not think that the legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt... The legislature seems to us to have wished to make it the law that, where a third person has intrusted goods or the documents of title of goods to an agent who, in the case of such agency, *sells or pledges* the goods, he should be deemed by that act to have misled any one who *bona fide* deals with the agent, and makes a purchase from or advance to him without notice that he was not authorised to sell or to procure the advance.<sup>201</sup>

However, it should be noted that this statutory presumption of ostensible authority which Blackburn J divined in the 1823-42 Acts was wider than in the 1899 Act which required the sale, consignment or pledge having also to be in the '*customary course of his [the mercantile agent's] business.*' Thus, caselaw on the 1823-42 Acts should be treated with considerable circumspection.

## **9. WHO WERE FACTORS IN 1823?**

### **(a) Persons Claiming to be Factors**

It is also important to note who were the persons claiming to be factors in 1823. That is, persons who asserted that - by custom of trade - they might sell (or consign) the goods of others, without the need to obtain the express, or implied, authority of the owners of those goods. The Select Committee of the House of Commons report in 1823<sup>202</sup> provided useful information on this and their practices. It particular, it referred to submissions from the:

- (a) corn trade;
- (b) British manufacturers;
- (c) silk trade;
- (d) wool trade;
- (e) cotton trade;
- (f) East India trade;<sup>203</sup>
- (g) West India trade;<sup>204</sup>
- (h) Continental trade;
- (i) capitalists.<sup>205</sup>

In the case of the corn trade, for example, the following was stated:

The most eminent corn merchants and factors concurred in stating the vast amount of capital continually advanced on consignments from Ireland, as well as from various parts of Great Britain, large quantities of corn being always stored in the warehouses of London, Liverpool, Bristol and other ports, to wait for favourable markets; and although the sales, when made to dealers, are not at such long credits as on some other articles, the consignees [factors] are generally drawn upon at such short dates, before the corn arrives, that their accumulated advances are very heavy, and in general long continued before they can obtain a reimbursement from the sales. From Ireland, shipments appear to be continually made, at Waterford, Cork, Limerick, and other ports, on account of houses in Dublin or other places; the shippers draw on the consignees, when they transmit the bills of lading, for two-thirds or three-fourths of the value, and it is impossible for them to ascertain in most cases, who is the owner; frequently the same shipment belongs to two parties, residing in different parts, or the property changes hands after shipment, and disputes consequently arise, which involve the security on which the corn merchant or factor has advanced his money. In the evidence, and reported cases, given in the Minutes and Appendix, the Committee have recorded some remarkable cases, to show the manner in which corn-factors have had their securities on this description of property taken from them, in a way which no prudence or precaution

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<sup>201</sup> LR 10 CP at p 372 *per* Blackburn J

<sup>202</sup> See n 6.

<sup>203</sup> On the East Indies trade, see also Cunningham, n 21, pp 463-71.

<sup>204</sup> *Ibid*, pp 473-4.

<sup>205</sup> According to one estimate made in 1834, more than two thirds of the entire trade of Great Britain (both imports and exports) were handled by factors.

could have guarded against...<sup>206</sup>

Thus, in these cases, the factor was financing the shipment of the corn from Ireland, often, on extended credit (that is, not selling the goods until a considerable time after extending the loan). Today, things are wholly different.

- There is containerisation of goods so it is clear what shipment belongs to whom. Further, it is banks, under (wholly standardised) letters of credit, who finance shipments. Thus, the factor is not extending credit on the goods. Further, the bank will only release payment, enabling the import of the goods, if the relevant shipping documents (bills of lading *etc*) are in order;
- Also, the bank has a general lien (a banker's lien)<sup>207</sup> which it can exercise against its client (the importer) should the client not pay off the loan *via* the sale of the shipped goods or otherwise.

The evidence of the silk trade, was that:

the bulk of it is sent by merchants residing in the sea ports of Italy, and other countries where it is cultivated, to be sold by their correspondents in London, for the account of the shippers, who generally draw in anticipation for a large proportion of the value, long before the sales can be effected; and that when sales are made, they are made to the manufacturers and dealers on so long a credit, that the British merchants are frequently in cash advance for a space of six, nine or twelve months, to the extent of two-thirds or three-fourths of the whole value imported of this costly article. But it was proved by the witnesses, and corroborated by the testimony of an extensive shipper from Italy, that a large proportion of the whole belonged to a variety of persons residing in different towns and villages in the interior of Italy, to whom the shippers in the sea ports were in the habit of making advances, when they received the silk to forward to England. That these shippers had frequently five or ten properties included in the same bill of lading, and that it would be utterly impracticable to separate each property, and state the amount advanced by them on each, in such a way as to satisfy their correspondent in this country, who ought to be secured by the whole quantity of silk in hand, for the total amount of his advances thereupon.<sup>208</sup>

In the East India trade, the evidence was that goods (cottons, spices, indigo *etc*) from India often lay in English warehouses for months or years, awaiting a favourable sale.<sup>209</sup> Further, the importers often advanced money, which they borrowed from banks in England (so-called, capitalists) by giving the banks East India warrants as security (these warrants comprised transfers of property in the shippers' warehouses). These warrants were treated as negotiable (like BOE). However, by 1823 the evidence was that banks not were prepared to advance money on East India warrants '*in consequence of the insecurity supposed to attach to them.*'<sup>210</sup>

### **(b) Conclusion**

The proposal of factors (and the Committee) for legislation to be enacted to recognise that factors had - as a presumption of law - ostensible authority to *pledge* goods (and documents of title) *qua* owner, was useful to factors. However, it left principals at the mercy of unscrupulous factors. As it is, ostensible authority to pledge was only recognised, in full, in the Factors Act 1842 and, by then, things were changing anyway. The heart of the problem was that the factor had too many roles. He was acting, in many cases, as the person:

- (a) in possession of the goods of another as agent, for on-sale;<sup>211</sup>
- (b) lending on those goods (and taking a pledge as security);
- (c) guaranteeing the price of those goods (*del credere*);
- (d) insuring those goods;
- (e) sometimes, shipping those goods;
- (f) pledging those goods to banks and to brokers, to pay off his commission and the principal;

<sup>206</sup> Report, n 6, p 12. It also noted 'The seed, butter, and provision trades, which are carried on to so large an extent with Ireland, are conducted on the same principles, and appear to be liable to the same losses, arising from irregular dealings, or changes of ownership.

<sup>207</sup> See 7(a).

<sup>208</sup> Report, n 6, p 13. The wool trade (mainly imports from Spain and Germany) was conducted on the same basis. *Ibid*, p 14. In the case of the cotton trade (mainly cotton imported from America *via* Liverpool) the factor was, himself, borrowing from other brokers in England, in order to finance the shipment from America. *Ibid*.

<sup>209</sup> *Ibid*, p 15. The position in respect of West India and Continental trade was not materially different. *Ibid*, pp 16-7.

<sup>210</sup> *Ibid*, p16.

<sup>211</sup> It may be noted that there was much less need for factors within England by 1823 since banks were lending directly to sellers (local merchants) cutting out lending by the factor.

(g) consigning goods to others for sale.

Further, factors were often, also, acting as merchants and brokers. As it is, as history relates, banks took over (b) and (f), and (c) became obsolete. Insurance brokers took over (d) and shipping companies (e). Thus, despite the great *furor* in 1823 to obtain a change in the law *re* pledge, the reality was that, soon, factors were wholly eclipsed by banks in lending (the latter had more capital and could offer better rates). The *rationale* for the factor being accorded a general lien also decreased - since it was predicated on his acting *qua* banker to the principal. In any case, after 1805,<sup>212</sup> the English courts were much more reserved about permitting general liens at the common law, since they prejudiced third party creditors. Finally, the courts were not prepared to accept anybody as a factor (mercantile agent) for the purpose of the 1842 Act. Thus, in:

- ***Monk v Whittenbury (1831)***,<sup>213</sup> A wharfinger was not held to be a mercantile agent within the 1842 Act. It is clear Abbott CJ would also not have been prepared to hold that a carter (common carrier), warehouseman or packer was, either;<sup>214</sup>
- ***Heyman v Flewker (1863)***,<sup>215</sup> Willes J excluded as mercantile agents mere servants, caretakers or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent, like that class (factors) from which the Act has taken its name.<sup>216</sup>

In this case, pictures were deposited by the defendant (D) with one Inman (whose usual business was acting as an insurance agent) with instructions then (or subsequently given) for their sale on commission.<sup>217</sup> It was held that Inman came within the 1842 Act. That is, he was a factor (albeit, 'one-off'). Thus, D was bound by a pledge *bona fide* of the goods made by Inman, without authority, with the plaintiff - an innocent third party. Willes J accepted it might be that 'this is a hard case'.<sup>218</sup>

- It is asserted this case was wrongly decided, since there was no evidence the 'usual business' of the agent (Inman) was to sell pictures. Rather, it was sell insurance, as Willes J accepted.<sup>219</sup> The problem was that the 1842 Act, s 1 failed to refer to the agent having 'in the customary course of his business as such agent authority...to raise money on the security of goods',<sup>220</sup> an error which the 1889 Act, s 1 corrected, by adding such wording. Thus, the 1842 Act - because it was not well drafted - greatly extended who could be a factor. It could (if widely interpreted, as Willes J did) comprise any agent in commerce who had possession of another's goods *even though* possession in the instant case did not relate to his *customary course of business*.<sup>221</sup>
- Thus, it is asserted the correct decision should have been to hold that Inman was not a factor, merely a simple agent. Certainly, holding an *ad hoc* agent - not even acting in the customary course of his business - to be a factor, went against hundreds of years of precedent.

<sup>212</sup> For the only liens after 1805, see 7(a).

<sup>213</sup> 2 B & Ad 484 (109 ER 1222)(a wharfinger having received flour in that capacity and without authority to sell, sold it to a purchaser who had no knowledge of his lack of authority).

<sup>214</sup> *Ibid*, p 486 'If a wharfinger were so considered, it would be impossible to say that a carter, a warehouseman, or a packer was not...'

<sup>215</sup> 13 CBNS 519 (143 ER 205).

<sup>216</sup> At pp 527-8. In respect of the 1889 Act, see also Brown, n 17, p 386 'Carriers, warehousemen, forwarding agents, agents displaying goods in order to obtain offers for sale and other pure bailees, are not mercantile agents.' See also Bowstead, n 19, para 8-145. A person entrusted with keeping furniture in her own house and a wine merchant's clerk are not mercantile agents, see *Wood v Rowcliffe* (1846) 6 Hare 183 and *Lamb v Attenborough* (1862) 31 LJQB 41 at p 42 cited in Chalmers, n 17, p 184. Nor is a photographer, for the purpose of pledging goods without authority, see *Kendrick v Sotheby & Co* (1967) 111 Sol J 470. Pearson-Gee, n 13, p 31 put it thus 'The following kinds of agents who, owing to the effect of judicial decisions, were excluded from the operation of the previous Factors Acts, are, under the statutory definition now given of a mercantile agent, equally excluded from the operation of the present Act: (1) Agents who have the control or management of goods only, as e.g. clerks or servants, cashiers, caretakers and the like. (2) Agents with whom goods are deposited for safe custody, as e.g. bailees, wharfingers and warehousemen. (3) Agents who are employed in the carriage of goods, as e.g. carriers or forwarding agents.'

<sup>217</sup> Inman was not a *broker* since he was given possession of the goods and the general distinction between a broker and a factor, in those times, was that the latter had possession of the goods (or documents of title), but not the former.

<sup>218</sup> 13 CBNS 519 (143 ER 205) at p 527.

<sup>219</sup> *Ibid*, p 526 'it was no part of his ordinary business to sell goods on commission.'

<sup>220</sup> See text to n 196. Cf. the recital to the 1842 Act 'usual and ordinary course of business.'

<sup>221</sup> Thus, Willes J stated, at p 528 'The employment of Inman did strictly correspond, though in a small way, to that of a factor, because the defendant did not merely entrust him with the possession of the goods for safe custody, but employed him to sell the goods so entrusted to him upon commission.' The reference to commission is irrelevant in any case, since a broker also received a commission. Further, the flaw in the analysis was that possession was not given to Inman *qua* insurance agent.

Unfortunately, this decision was to be cited in 20<sup>th</sup> century cases without noting this; or that the wording in the 1842 and 1889 Acts was distinct;

- ***Fuentes v Montis (1868)***.<sup>222</sup> The plaintiffs (wine merchants) consigned to P (a factor) casks of sherry. He pledged them to the defendants after his authority was revoked. This time, Willes J held that P was not a factor, his authority having been revoked. Thus, there was no valid pledge.<sup>223</sup>
  - This case, effectively, contradicted Willes J's own decision in *Heyman v Flewker* (see above) which was not cited in it and where the factor also had no authority to pledge (it may be noted that his decision also produced uncertainty whether the 1842 Act only applied to a factor entrusted for the purpose of effecting a sale not yet made, see *Vickers v Hertz* (1871)<sup>224</sup> and *Cole v North-Western Bank* (1875)).<sup>225</sup>

***In conclusion, Heyman (1863) held, anomalously, that a person could be a factor even when: (a) acting on a 'one off' occasion; and (b) selling goods not part of his usual business (selling pictures, not insurance).***

## 10. LEGAL TEXTS IN THE PERIOD 1821-89

After the legal text of Whitaker (1812) there were other legal texts which dealt with factors and their lien:

- ***Montagu, Summary of the Law of Lien (1821)***.<sup>226</sup> This text only dealt with factors in an incidental fashion<sup>227</sup> (and much of it comprised, in any case, an Appendix, listing cases on the law of lien). This text was superseded by the Factors Acts 1823 and 1825;
- ***Cross, A Treatise on the Law of Lien and Stoppage in Transitu (1840)***.<sup>228</sup> This text considered the factors lien and relevant legislation.<sup>229</sup> Much of the material on the factor was superseded by the Factors Acts 1842 and 1877 and caselaw;
- ***Crump, The English Law of Sale and Pledge by Factors and Agents (1868)***.<sup>230</sup> This was a slim work which analysed, in particular, cases *post* 1842. It was superseded, in part, by the Factors' Act 1877;
- ***Selwyn, Abridgment of the Law of Nisi Prius (last ed, 1869)***.<sup>231</sup> This text defined the factor, as well as adverted to the distinctions between the same and a broker (see **App A**). It also noted that '*the character of factor and broker is, in practical business, frequently combined*'.<sup>232</sup> Such a statement was unsurprising, since the Municipal Corporations Act 1835 had removed any final restrictions on brokers. The text also referred to the Factors Act 1842 and cases thereunder.<sup>233</sup> Finally, it referred to the factor's lien and the (few) cases on the same, most of which were dated;<sup>234</sup>

<sup>222</sup> 3 CP 268 (Ex Ch) and LR 4 CP 93 (appeal affirmed by Cockburn CJ).

<sup>223</sup> In particular, Willes J considered the 1889 Act, s 4 'An agent in possession as aforesaid of such goods or documents shall be taken for the purposes of this Act to have been entrusted therewith by the owner thereof, unless the contrary can be shown in evidence.'

<sup>224</sup> Law Report 2 HL. Sc 113 referred to in LR 10 CP 351 at p 374, *per* Lord Blackburn.

<sup>225</sup> LR 10 CP 351 at p 374, *per* Lord Blackburn. See also Brown, n 17, p 385, fn 5.

<sup>226</sup> See n 12.

<sup>227</sup> Montagu, however, provide a useful list of general liens in his time, see Montagu, n 12, p 29.

<sup>228</sup> See n 12.

<sup>229</sup> Cross, n 12, ch 16. See also pp 29-30 'With respect to factors and brokers, whose authority is specifically defined by statutory provisions... Powers are now vested in these parties by enactment, which did not appertain to them at common law. Independently of these statutes, no right of lien attached upon the goods delivered by them beyond the interest, of right, claimable by themselves, unless for money advanced, or particular work done, for purposes connected with the sale. Factors had a right to sell, as incident to their character, and the terms of sale were binding upon the principal; but they had no right to pledge the goods entrusted to them, without the fullest and most explicit authority for that purpose. The [Factors Act 1823] amended and enlarged by [the Factors Act 1825], has since enabled all persons entrusted with goods, or documents of title relating to goods, to make valid contracts for the sale of them, or for the deposit or pledge thereof, as security for any money, or negotiable instrument advanced, or given, by any person; provided that the party purchasing, or advancing the loan, has no notice that the agent, with whom he deals, is not the true owner of the goods so sold or pledged.'

<sup>230</sup> See n 13. See also I Edwards, *An Essay on Brokers and Factors or Commission Merchants* (1870).

<sup>231</sup> See Selwyn, n 13.

<sup>232</sup> *Ibid*, p 732.

<sup>233</sup> *Ibid*, p 746-8.

<sup>234</sup> *Ibid*, pp 740-2.

- **Russell, Treatise on Mercantile Agency (1873)**.<sup>235</sup> A useful analysis, this text was superceded, in part, by the Factors' Act 1877;
- **Boyd & Pearson, The Factors' Acts (1823 to 1877)(1884)**.<sup>236</sup> This contained the texts of the Acts as well as some useful commentary on the history of pledging by factors prior to the 1823 Act.

*These works were superceded by the Factors Act 1889 which was a consolidation Act, repealing the Factors Acts 1823, 1825, 1842 and 1877.*

## **11. POSITION OF FACTORS BY 1889**

Factors were very much a creature of their time and, prior to analysing the present day provisions of the 1889 Act, the following general observations may be made:

- **Changing Role**. Factors had acted as proto-bankers. Rich merchants - especially in the 18<sup>th</sup> century, when there were few banks - were not only selling the goods of others, they were lending money on the security of such goods (or documents of title to the same). Also they were insuring them, guaranteeing the price of them (*del credere*) and procuring others to lend on the security of them, in many instances. Due to such lending, they were accorded a general lien;
  - However, by the 19<sup>th</sup> century, factors were supplanted by banks and had returned to their primary role of selling the goods of others. In this, they were no different to brokers, save they had possession of the goods (or documents of title) and they were, usually, undisclosed (though they did not have to be, to be a factor);
- **Textile Trade**. The factor had been particularly prevalent in the textile trade. By the 19<sup>th</sup> century, the separate trades of weaver, bleacher, fuller, calico printer, dyer, packer and clothier were dying out, as a result of machines and automation taking over this work (especially, the textile mill). In compacting the process, the distinct general liens for these trades became obsolete. Further, the factor no longer lent money and he needed (or permitted) no extensive '*running balance*', since cloth could be produced, sent out and sold much more quickly.
  - This explains *why* no cases (it seems) have arisen on the factor's general lien after 1889. Indeed, liens generally were rarely relied on by the 20<sup>th</sup> century (credit not being extended on the security of goods and there being developed floating charges *etc*), which help explain why there were no treatises on liens after Ashburner (in 1911);<sup>237</sup>
- **Categories**. After the Municipal Corporations Act 1835 opened up trade to everyone,<sup>238</sup> the term '*merchant*' faded away since there was no need to distinguish a '*merchant*' from a shopkeeper, market trader, wholesaler or retailer. Further, restrictions on *brokers* in cities and towns (which restrictions were generally obsolete in any event) also ended. As a result, reference to '*factors*' and '*brokers*' moved to become a general reference to an '*agent*'. Indeed, the only real distinction between the two was that a factor was a particular type of agent with additional privileges resulting from the 1889 Act, since a person calling himself a '*broker*' could also possess the goods of the principal.

The result of all this is that the '*factor*' became less and less relevant to distinguish one agent from another and

<sup>235</sup> Russell, n 13, p 1 'A factor, or commission merchant, is an agent to whom goods are consigned or delivered for sale, by or for a merchant or other person residing abroad or at a distance from the place of sale, and who, in return for his trouble, receives a compensation, commonly called factorage or commission. Factors, however, are sometimes the ostensible vendors of property belonging to merchants resident in the same place; and sometimes the same factor acts both for buyer and seller; the sale being perfected, and the property transferred, by the delivery of bills for the price, and by an entry being made in the factor's books to the debit of the one party, and the credit of the other. There are two kinds of factors, namely, *home* factors, and *foreign*. With us, a man is called a *home* factor, when both he and his principal reside in this country, whilst, on the other hand, a *foreign* factor is said to be one who, whether residing in England or abroad, is commissioned by a principal belonging to a different state or country from that in which the factor himself resides.'

<sup>236</sup> See n 3.

<sup>237</sup> After Ashburner, there were no more treatises on liens. This continues to this day, with the exception of two minor works, LE Hall, *Possessory Liens* (1917) and A Silvertown, *Law of Lien* (1988). Apart from Halsbury, the law on liens (and liens of factors in particular) has been given little attention in works of commercial law from 1911 until to date.

<sup>238</sup> The Municipal Corporations Act 1835, s 14, 'And whereas in divers cities, towns, and boroughs a certain custom hath prevailed, and certain byelaws have been made, that no person, not being free of a city, town, or borough, or of certain guilds, mysteries, or trading companies within the same, or some or one of them, shall keep any shop or place for putting to show or sale any or certain wares or merchandize by way of retail or otherwise, or use any or certain trades, occupations, mysteries, or handicrafts for hire, gain, or sale within the same' be it enacted, that notwithstanding any such custom or bye law, every person in any borough may keep any shop for the sale of all lawful wares and merchandizes by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft, for hire, gain, sale, or otherwise, within any borough'.

this is reflected in the fact that the 1889 Act was rarely availed of. As to legal texts, after the 1889 Act, there were:

- ***Blackwell, The Law relating to Factors (1897)***.<sup>239</sup> This work was more substantive than prior works. However, it has become dated;
- ***Ashburner, A Concise Treatise on Mortgages, Pledges and Liens (1897-1911)***.<sup>240</sup> Although it dealt with factors, it had very little to say besides noting that a factor had a general lien against his principal on goods or securities entrusted to him for sale.

Thus, the law on factors, from that time until today is scant. The best sources are Halsbury, *Statutes and Laws*,<sup>241</sup> Goode,<sup>242</sup> Chitty and Bowstead.<sup>243</sup> Against this background, the 1889 Act will now be considered, it being enacted much the same time as the category of ‘factor’ was in decline.<sup>244</sup> Gutteridge noted:

The Factors Act [1889] cannot be regarded as a satisfactory or successful instance of codification...An opportunity of simplifying and clarifying the law was thus thrown away and matters were not improved when a further opportunity of repealing part of the Act was not taken when the law of sale was codified in 1893 [the Sale of Goods Act 1893].<sup>245</sup>

Further, by 1889, ‘old style’ factors - such as corn, textile, East and West Indies factors - had died out. Thus, Brown (in 2001) noted:

The former factor constituted an established species of agent but this species is now extinct in commerce and the FA [Factors Act] has to be applied to situations of much more casual agency, such as that of a motor car dealer obtaining offers for a customer.<sup>246</sup>

Apart from these, other cases under the Act have been those of ‘small time’ commission salesmen - often, in ‘one off’ (*ad hoc*) situations of agency - contrary to the prior law on the factor. In all these cases, it would have been better if the 1889 Act had not existed, since the SGA 1893 and the common law on agency (express, implied, ostensible) would have dealt with the fact situations much flexibly instead of judges seeking to squeeze them within the narrow compass of the 1889 Act, s 2.

***In conclusion, the 1889 Act consolidated the law on factors. However, there have been few cases (and even fewer successful cases) under the Act in the last 125 years or so.***

## **12. FACTORS ACT 1889 & SGA 1979**

The 1889 Act contains three sections (sections 8-10) which deal with dispositions by sellers and buyers of goods, taking these from 1877 Act (see 8). In an example of statutory duplication - Gutteridge termed it a ‘rare example of double legislation’<sup>247</sup> - these sections were replicated in the Sale of Goods Act 1893 (‘SGA 1893’), s 25. They

<sup>239</sup> See n 13.

<sup>240</sup> Ashburner, n 12, p 76. It also noted ‘He does not cease to be a factor, and, as such, entitled to a general lien, because he is bound to sell in the principal’s name and at a price fixed by the principal.’ Ashburner cited *Stevens v Buller* (1883) 25 Ch Div 31. This is the last case also cited by Halsbury, n 14, vol 3(2), para 430.

<sup>241</sup> Halsbury, n 14, vol 1, para 12 ‘Amercantile agent is one 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.’

<sup>242</sup> At times, Goode is too summary, n 3, p 460 ‘The common law... developed the general principle that if the owner of goods entrusted them, or documents of title to them, to a professional dealer, a mercantile agent, he took his chance on the dealer’s integrity and could not complain if in selling the goods the dealer exceeded his authority.’ This fails to distinguish between the factor and the broker. And, that factors were not just professional dealers *per se*, but dealers whom, in the *customary course of their* business, would have possession of goods for undisclosed principals.

<sup>243</sup> See ns 18 & 19.

<sup>244</sup> Munday, n 13, p 250 ‘The passing of the Factors Act 1889 coincides approximately with the period which witnessed the decline of the factor. A number of considerations may account for his apparent demise from the commercial world. Improved means of communication and speedier methods of transport bringing buyer and seller closer together, along with the increased standardisation imposed upon manufactured goods have been suggested to have played a significant part in eroding away the importance of the factor. The advent of alternative forms of credit insurance and bankers’ confirmed credits has already been mentioned as contributing towards the reduced financial role played by the factor. But of comparable importance are the new forms of business organisation which industrialisation has brought in its train. The trend towards larger units has meant that, although much business is still conducted on commission, manufacturers have often tended to purchase raw materials in bulk from the original supplier rather than passing through the middleman.’

<sup>245</sup> Gutteridge, n 198, p 140.

<sup>246</sup> Brown, n 17, p 385 quoting Reynolds on *Agency* (16th ed, 1996), art 89, para 8-142. See also Bowstead, n 19, para 8-144.

<sup>247</sup> Gutteridge, n 198, p 140, fn 77 noted ‘The original Sale of Goods Bill proposed the repeal of this section.’ Gutteridge cited MD Chalmers, *Sale of Goods Act 1893* (1924, 10<sup>th</sup> ed), p 180. Ibid, n 17, p 192 ‘The Sale of Goods Bill originally proposed to repeal these two sections, but the repeal was afterwards omitted, as the provisions of the Sale of Goods Act [1893] are slightly narrower.’

were repeated in the successor to the same, the Sale of Goods Act 1979 ('SGA 1979'), ss 24 and 25.

#### **(a) Seller remaining in Possession**

The 1889 Act, s 8 states:

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.<sup>248</sup>

An identical provision is to be found in the SGA 1979, s 24, save for the exclusion of the words underlined. Ashburner (in 1897) said of the same section in the SGA 1893, s 25(1), that it was 'a repetition' of the Factors Act 1889, s 8.<sup>249</sup>

- As it is, the SGA 1893 and the SGA 1979 were passed subsequent to the 1889 Act. Thus, it is clear that Parliament prefers the wording in the 1979 Act to the wording in the 1889 Act, s 8. Further, it would seem there has never been a case on the additional (underlined) wording. Thus, if s 8 is repealed, this will be no loss;
- In any case, the wording in the SGA 1979, s 24 (which is intended to protect an innocent third party rather than abuyer who lets another (the seller) retain possession), could be improved, with the final words 'making the delivery or transfer were expressly authorised by the owner of the goods to make the same' being replaced by the words 'making the delivery or transfer were the owner' which is, actually, the purport. That is, a seller in possession is to be treated the same as the owner, in law, if he makes such a disposition to an innocent third party.

***In conclusion, the 1889 Act, s 8 is duplicated in the SGA 1979, s 24. It should be repealed since the latter is to be preferred. However, s 24 should simply refer, today, to an 'agent' and not to a 'mercantile agent' (factor) since, it is asserted the 1889 Act (and the factor) are no longer required, see 25. Further, the wording of s 24 can be simplified.***<sup>250</sup>

#### **(b) Buyer obtaining Possession**

The 1889 Act, s 9, states:

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.<sup>251</sup>

An identical provision is to be found in the SGA 1979, s 25(1) save for the exclusion of the words underlined. Ashburner (in 1897) said of the same section in the SGA 1893, s 25(2), that it was 'a repetition' of the Factors

<sup>248</sup> See also Factors Act 1877, s 3(8). This section 8 of the Factors Act 1899 is replicated in the Sale of Goods Act 1979, s 24 with the omission of the words 'or under any agreement for sale, pledge or other disposition thereof.' See also Halsbury, n 15, vol 9(1). For commentary on these sections of the Factors Act 1889 and the SGA 1979, see, *inter alia*, JN Adams *et al*, *Atiyah's Sale of Goods* (12<sup>th</sup> ed, 2010); MG Bridge, *The Sale of Goods* (3<sup>rd</sup> ed, 2014) and Benjamin's *Sale of Goods* (9<sup>th</sup> ed, 2014). See also Bell, n 13, p 507.

<sup>249</sup> Ashburner, n 12, p 146. Goode, n 3, p 458 notes that s 8 (and s 9) were re-enacted 'almost verbatim' in s 25 of the Sale of Goods Act 1893 (now ss 24 & 25 of the SGA 1979). See also Goode, n 3, pp 465-8 and Bell, n 13, p 504 'it is ignored, for the differences are only slight and are arguably only differences in form rather than in substance.'

<sup>250</sup> The adjective 'mercantile' was only added in the consolidating 1889 Act, as Munday, n 13, p 248, pointed out. Goode, n 3, p 458 'The Factors Act 1889 substituted the phrase 'mercantile agent' for 'agent entrusted', but the meaning would appear to be the same.'

<sup>251</sup> The section excludes conditional sale agreements, continuing, 'For the purposes of this section - (i) the buyer under a conditional sale agreement shall be deemed not to be a person who has bought or agreed to buy goods, and (ii) "conditional sale agreement" means an agreement for the sale of goods which is a consumer credit agreement within the meaning of the Consumer Credit Act 1974 under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled.' See also Goode, n 3, pp 468-72. See also *National Employer's Insurance v Jones* [1990] AC 24.

Act 1889, s 9.<sup>252</sup>

- As it is, the SGA 1893 and the SGA 1979 were passed subsequent to the 1889 Act. Thus, it is clear that Parliament prefers the latter in the 1979 Act wording to the wording in the 1889 Act, s 9. Further, it would seem there has never been a case on the additional (underlined) wording. Thus, if s 9 is repealed, this will be no loss;
- The words in s 9 '*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*' should (it is asserted) be amended to match better with s 8. Thus, it should state instead '*shall have the same effect as if the person making the delivery or transfer were the owner*.'<sup>253</sup>

In *Newtons of Wembly Ltd v Williams* (1964)<sup>254</sup> it was noted that the buyer of the goods did not have to be a factor (mercantile agent). However, the effect of the reference to a mercantile agent, the court considered, meant that such a transaction by the buyer would *only* be validated if the buyer was doing something that would constitute acting in the ordinary course of business *as if* he were a mercantile agent. However, this is unduly restrictive, today, and it is due to the section first having been in Victorian legislation relating to factors. The result is that an innocent third party could lose out in circumstances where this would not happen if it was a case of a seller in possession under s 8 - an anomalous situation which cannot have been intended. One would suggest that the real problem is the poor drafting of the Factors Act 1889 (*viz.* s 9 should have mirrored s 8 to a better extent).

***In conclusion, the 1889 Act, s 9 is duplicated in the SGA 1979, s 24. It should be repealed since the latter is to be preferred. Further, s 24 should be amended, in respect of its latter wording, to clarify matters.***

### **(c) Effect of transfer of documents on vendor's lien or right of stoppage in transitu**

The 1889 Act, s 10, states:

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*.<sup>255</sup>

A similar provision is to be found in the SGA 1979, s 47(2), which states:

Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith and for valuable consideration, then -

- (a) if the last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transit is defeated; and
- (b) if the last-mentioned transfer was made by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transit can only be exercised subject to the rights of the transferee.

It seems clear that s 47(2)(a) was not intended to make any substantive change to s 10. Thus, it simply repeats it, with minor grammatical changes. Section 47(2)(a) is also more clear.

***In conclusion, s 10 is duplicated in the SGA 1979, s 47(2). It should be repealed since the latter is to be preferred.***

### **13. 1889 ACT -DEFINITIONS**

This Act (which does not apply to Scotland)<sup>256</sup> contains various definitions, a number of which have been (effectively) superceded by more modern legislation. It may be noted that - while the Act is called the '*Factors Act 1889*' - there is no mention of the word '*factor*' in its content. This reflected a marked decline, by 1889, of the term

<sup>252</sup> Ashburner, n 12, p 146. See also *Martin v Whale* [1917] 2 KB 480, 486 *per* Scrutton LJ.

<sup>253</sup> For criticism of the wording of s 9, see L Rutherford & L Todd, *Section 25(1) of the Sale of Goods Act 1893: The Reluctance to create a Mercantile Agency* [1980] Cambridge LJ 346.

<sup>254</sup> [1964] 3 AE 532 (sale of a car).

<sup>255</sup> Halsbury, n 15, vol 9(1) notes that s 10 is '*substantially*' reproduced in the SGA 1979, s 47(2). See also Goode, n 3, p 468. Also, *Ant Jurgens v Louis Dreyfus* [1914] 3 KB 40 (delivery order a document of title).

<sup>256</sup> 1889 Act, s 16. However, Halsbury notes that this section was virtually repealed by the Factors (Scotland) Act 1890 which extended the Act, subject to certain provisions, to Scotland.

‘factor’ in ordinary usage and the use of the more generic term ‘broker’ instead.<sup>257</sup>

**(a) Definition of Mercantile Agent – Excludes Private Person or Employee**

Section 1 states that, for the purposes of the Act, the expression ‘mercantile agent’ means:

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.

This definition is tautologous,<sup>258</sup> in that a ‘mercantile agent’ is defined as the same, albeit one with authority to:

- sell goods;
- consign goods for the purpose of sale;
- buy goods;
- raise money on the security of goods (including by way of a pledge, mortgage or charge).

As to who is a factor (mercantile agent) under the 1889 Act, this excludes a private arrangement<sup>259</sup> and in *Hastings v Pearson* (1893)<sup>260</sup> it excluded a salaried employee selling goods on commission.<sup>261</sup> Although this decision was criticised in *Oppenheimer v Attenborough & Son* (1908)<sup>262</sup> and in *Weiner v Harris* (1910),<sup>263</sup> it is asserted that Mathew J (in *Hastings v Pearson*) was correct since the person was simply an employee (a servant) and not a factor and, thus, he was regulated by the terms of his employment.<sup>264</sup>

**(b) Mercantile Agent – Ad Hoc Agent**

Halsbury also notes that a ‘mercantile agent’ under the 1889 Act includes an agent even though he: (a) has only one customer; or (b) no general occupation as an agent; or (c) is acting as an independent dealer:<sup>265</sup> An example cited is:

- ***Lowther v Harris (1927)***.<sup>266</sup> The plaintiff (L) wanted to sell some household goods. L took a house some minutes distant from P’s two antique shops and stored the goods there. P was allowed to live in a flat on the top floor of the house and to use a room on the floor below as a sitting room. P used to bring customers from his shop to see the goods. P was given no authority to sell without L’s permission. When P brought customers to see the goods, they dealt with him and had no knowledge of L. P falsely represented to L that he was able to sell certain goods (a tapestry) to W for £525 and obtained L’s consent to the sale. However, P then sold it to H for £250, who was told by P that he was selling it on behalf of L. H acted in good faith and in the usual course of business, without notice of P’s absence of title. Wright J, while accepting that a

<sup>257</sup> Butterworth, n 13, p 44 ‘There are two extensive classes of mercantile agents known to lawyers, namely *factors*, who are entrusted with the possession as well as the disposal of property, and *brokers*, who are employed to contract about it, without being put in possession. In the mercantile world both of these classes are known as *brokers*, and the term *factor* is not commonly used except in a limited sense in particular trades - such as corn-factors, coal factors. In practice the business of broker and factor is often combined.’

<sup>258</sup> As noted by Munday, n 13, p 249.

<sup>259</sup> *Budberg v Jerwood & Ward* (1934) 51 TLR 99. See also *Wood v Radcliffe* (1846) 6 Hare 163 (67 ER 1132)(person entrusted to keep furniture in her own house). See also n 324.

<sup>260</sup> 1 QB 62.

<sup>261</sup> The plaintiffs (a firm of jewellers) employed B at a small salary to sell goods for them retail, on commission. Without authority, B pawned the goods with a pawnbroker (D) who accepted them in good faith and in the ordinary course of business. It was held the 1889 Act did not cover B, so D was accorded no protection under the Act in respect of the pledge. Judgment entered for the plaintiffs for a nominal sum, to be reduced to 1s if the D returned the goods. Mathew J stated at p 64: ‘the Act applies only to persons of the class ordinarily carrying on the business of mercantile agents, and that it has no reference to a man in such a position as [B] was. There is no such business as that of an agent to pledge with pawnbrokers small articles of jewelry for the purpose of raising money for the employer of the agent.’

<sup>262</sup> [1908] 1 KB 221 per Alverstone CJ at p 227.

<sup>263</sup> [1910] 1 KB 285 per Cozens-Hardy MR at p 292.

<sup>264</sup> See also Wright J on this, see n 267 (servant and shopman excluded) and Halsbury, n 265. The main thrust of the decision of Mathew J in *Hastings v Pearson* was that he thought there was no custom in the jewellery trade generally that an agent, *ipso facto*, had the right to pledge the goods of his principal, see n 261. See also **24(b)**.

<sup>265</sup> Halsbury, n 14, vol 1, para 12 ‘An agent may be a mercantile agent although he has no general occupation as an agent or he has only one customer, or though his general occupation is that of an independent dealer in the commodity to entrusted to him, provided that he acts in the transaction in question in his capacity as mercantile agent; but he must not be a mere servant or shopman.’

<sup>266</sup> 1 KB 393. Cf. CF Parker, *Mercantile Agents and the Single Transaction* (1952) 15 MLR 503-8. See also Bowstead, n 19, para 8-145.

mere servant or shopman was not a mercantile agent within the 1889 Act,<sup>267</sup> held P to be a mercantile agent. In particular, Wright J noted:

- *One Customer*. That P was acting as an agent for only one customer (L) and not as a general agent did not mean the 1889 Act did not apply;<sup>268</sup>
- *Pictures (Tapestries)*. These, as objects of purchase and sale, constituted those who dealt with them on commission, mercantile agents within the 1889 Act.<sup>269</sup> However, it is asserted that, simply selling a picture on commission did not make a person a factor (mercantile agent). A *broker* also sold on commission and a *shopman* was not a factor even if he sold on commission. Thus, it would have been better if Wright J had simply concluded that tapestries comprised ‘goods’ as defined in the Act;
- *Possession of Tapestry*. P had possession of it for the purpose of the 1889 Act, even if the same had been obtaining by fraud.<sup>270</sup>

The difficulty with *Lowther* is that - save for *Heyman v Flewker* in 1863, see 9(b) which is also an aberrant case - is that it is very different from the conception of the factor in prior caselaw where - by nature of the *trade* in which the agent was engaged - as a matter of course, a third party could be held to assume the agent had authority to sell, consign or pledge.

- That this should be presumed in the case of an antiques dealer selling outside his shop in an *ad hoc* agency - but not if within - created a supposed custom (as well as an anomaly) where none existed in 1927 and, almost certainly, none would be held to do so today;
- Further, in *Lowther*, there was express authority to sell the goods, albeit not at that price.<sup>271</sup> Therefore, the case was, really, one of sale by an agent at an undervalue. He had authority to sell but not at that price. Thus, the 1889 Act should not have applied and - although the sale would have been upheld in both cases - P should have been liable to L in damages, as an agent acting in breach of his authority.<sup>272</sup>

The opinion of Wright J in *Lowther*, excluding a mere shopman from the Act, effectively, overturned earlier cases where a shopman was held to be a mercantile agent within the 1889 Act:

- *Turner v Sampson (1911)*.<sup>273</sup> The sale of a picture from his shop by a picture dealer, acting as an agent, passed title to a buyer in good faith under the 1889 Act - although the principal had expressly specified no sale should be made without his being referred to or a particular price was obtained.<sup>274</sup>

<sup>267</sup> Ibid, p 398 per Wright J ‘It was contended that Prior [P] was a mere servant or shopman, and had no independent status such as is essential to constitute a mercantile agent. It was held under the earlier Acts that the agent must not be a mere servant or shopman...’. Wright J cited *Cole v North-Western Bank* (1875) (see n 199) at pp 372-3 per Blackburn J, *Heyman v Flewker* (1863) (see n 215) and *Lamb v Attenborough* (1862) 1 B & S 831 (121 ER 922) (where a servant, a clerk, obtained advances on dock warrants). See also Blackwell, n 13, pp 109-10.

<sup>268</sup> Wright J cited *Heyman v Flewker*, see n 215. He also cited *Hastings v Pearson* (see n 260) and *Weiner v Harris* [1910] 1 KB 285 (an agent entrusted with goods (jewels by a jewellery manufacturer) on sale or return on terms that they were not to become his property and that his remuneration should be a share of the profits on sale is a mercantile agent. The agent had pawned them with a pawnbroker, without authority), see also 24(b).

<sup>269</sup> Wright J cited *Heyman v Flewker*, see n 215. He also referred to *Turner v Sampson* (see text).

<sup>270</sup> In respect of another tapestry which P sold, it was held that no possession had been given.

<sup>271</sup> There is little evidence that L particularly wanted a sale to W. Rather, he wanted P to secure the sum of £525, regardless of the person sold to. Cf. Blackwell (writing in 1897), n 13, p 18 ‘If, for example, a principal directs the factor not to sell his goods below a certain price, but the factor does sell below the price fixed to a person who has no knowledge of the limitation placed upon the factor’s authority, as between the third person and the principal, the sale will be good. But the principal will be entitled to sue the factor for the difference between the price fixed and what the goods actually sold for.’

<sup>272</sup> Wright J, stated at p 397 ‘Unless the defendant has a defence under the [1889 Act] or on the ground of common law estoppel, it is clear that he is liable in damages for conversion [at commonlaw].’ However, it would not have been so if the sale had been categorised as one at an undervalue which - in essence - it seems to have really been, L wanting a sale (to whoever) but at his specified price.

<sup>273</sup> 27 TLR 200.

<sup>274</sup> Channell J stated that the 1889 Act had made a ‘substantial alteration in the law.’ Thus ‘under the previous Acts the test as to whether a particular transaction was validated by these Factors Acts depended entirely upon what was the actual relation between the person standing in the position of the factor and the true owner of the goods, and it depended on the *actual authority* (*italics supplied*) which the true owner of the goods had given to that person.’ [this statement seems incorrect. Under the Acts of 1823, 1825, 1842 and 1877 there was a presumption of authority in law if the entrusted agent was acting in the customary course of business. It did not depend on actual authority]. Channell J continued ‘the state of things was substantially altered by the Act of 1889...at the present time if a person carried on a business in which it was in the ordinary course for persons who carried on that business to have authority to sell, and if someone entrusted his goods to such a person, he was bound by his acts. It was necessary to read the words of section 2 as running: ‘Where a mercantile agent is, with the consent of the owner, in possession of goods as such agent.’ In such a case the agent had authority to sell.’

The problem with the cases of *Turner v Sampson* (1911) and *Lowther* (1927) were that they were creating new categories of factor (mercantile agent) although the 1889 Act was only a consolidation Act and such categories would not have been so incorporated in the past since there was no evidence of there being a custom of an agent having the right to sell or pledge within such a trade, without a need to resort to the principal. This stretching of the 1889 Act has been pointed out by Goode:

the courts have held (stretching the language of s 1 somewhat) that a person can be a mercantile agent even though his business is that of buying and selling on his own behalf, and not as agent at all, and even if he carries on an entirely different kind of business or no independent business, so long as in the particular case the owner entrusted the goods to him in a business capacity for the purpose of dealing with them in the way in which they would be dealt with by a mercantile agent.<sup>275</sup>

***In conclusion, it is asserted that Lowther was outside the tenor of the 1889 Act since it ignored the definition of a mercantile agent in that Act which refers to ‘a mercantile agent having in the customary course of his business as such agent’ authority. However, the sale by the agent, P, was not in the customary course of his business as an antiques shop dealer (shopman). It was a ‘one off’ transaction - part of a ‘special agreement’ which had long been recognised as excluding a person from being a factor.***<sup>276</sup>

### **(c) Deemed Possession**

The 1889 Act, s 1(2), states that 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.<sup>277</sup>

### **(d) Goods**

The 1889 Act, s 1(3), states that goods includes ‘*wares and merchandise*’.<sup>278</sup> However, a more modern definition is contained in the SGA 1979, s 61 which states:

“*goods*” includes all personal chattels other than things in action and money, and in Scotland all corporeal moveables except money; and in particular “*goods*” includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale; and includes an undivided share in goods.

### **(e) Documents of Title**

The 1889 Act, s 1(4) states that ‘*documents 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.<sup>279</sup>

### **(f) Pledge**

The 1889 Act, ss 1(5), states that 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.<sup>280</sup>

## **14. 1889 ACT, s 2 - POWERS OF MERCANTILE AGENT**

The 1889 Act, s 2 (1), states the powers of a mercantile agent with respect to the disposition of goods:

Where a mercantile agent is, with the consent of the *owner*,<sup>281</sup> *in possession of goods or of the documents*

<sup>275</sup> Goode, n 3, p 462.

<sup>276</sup> See n 173.

<sup>277</sup> See also Goode, n 3, p 461.

<sup>278</sup> This definition of goods derived from the Statute of Frauds 1677, ss 16 and 17 (rep).

<sup>279</sup> The SGA 1979, s 61, states that ‘*documents of title to goods*’ has the same meaning as it has in the *Factors Act*. See also Gutteridge, n 198, pp 140-1; Goode, n 3, p 461; Bowstead, n 19, para 8-149 and Butterworth, n 13, p 45.

<sup>280</sup> See also Halsbury, n 14, vol 1, para 148 citing *Waddington & Sons v Neale & Sons* (1907) 96 LT 786 (a piano was consigned to a piano dealer (H) for his sale. Without consent, H pledged them. It was held that handing goods for sale to an auctioneer who advanced money on them was not a ‘*sale, pledge, or other disposition*.’). For the history of s 1(5), see Pearson-Gee, n 13, p 35.

<sup>281</sup> *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 AE 63 (joint owners).

of title to goods,<sup>282</sup> any sale, pledge, or other disposition of the goods, made by him when *acting in the ordinary course of business*<sup>283</sup> 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<sup>284</sup> acts in good faith, and has not at the time of the disposition *notice*<sup>285</sup> that the person making the disposition has not authority to make the same.’;<sup>286</sup> (*italics supplied*)

Section 2 also states as to consent and possession:

- **Determination of Consent.** ‘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.’<sup>287</sup>
- **Possession of Documents of Title.** ‘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.’<sup>288</sup>
- **Consent Presumed.** ‘For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.’<sup>289</sup>

#### (a) Successful Cases under Section 2

Apart from *Lowther v Harris* (1927) and *Turner v Sampson* (1911), see **13(b)**, as to other successful cases under the 1889 Act, s 2, there have been a couple of car cases:

- ***Folkes v King (1923)*.**<sup>290</sup> The owner of a car (O) delivered it to a mercantile agent for sale, stipulating it not be sold for a specified price (£575) without permission. Sold for less than the specified price (£340) with D buying it, acting *bona fide*, it was held D had acquired good title by virtue of 1889 Act, s 2, including consent.<sup>291</sup> However, this case could as easily (if not better) been held to have not been governed by the 1889 Act. Thus, it would have been treated as a sale at an undervalue under the general law, title still passing to D;
- ***St Margaret's Trusts v Castle (1964)*.**<sup>292</sup> This was a hire-purchase agreement (a stocking transaction) with a prohibition on the mercantile agent (a car dealer) from selling the car until he had paid-off the hire-purchase sum. The Court of Appeal held that such wording was a cloak to hide the true nature of the transaction and it could be disregarded as being of no effect *vis-à-vis* a third party. Thus, a sale by a dishonest dealer to a *bona fide* third party of a car subject to such an agreement fell within the 1889 Act, s 2, it being treated (effectively) as a case where the dealer had an implied authority to sell it to customers. However, this case could have as easily (if not better) held that the 1889 Act did not apply. Thus, it would have been treated as a sale under the general law, pursuant to an implied authority, with title still passing to the *bona fide* third party.

Other car cases were held not to fall within section 2, due to there not being ‘*possession*’ or in the ‘*ordinary course*

<sup>282</sup> See Halsbury, n 15, vol 9(1) for cases re *possession*.

<sup>283</sup> This means acting within business hours, at a proper place of business, and in other respects in an ordinary way that a mercantile agent would act. *Oppenheimer v Attenborough & Son* [1908] 1 KB 221. See also Halsbury, n 15, vol 9(1) and Halsbury, n 14, vol 1, para 148.

<sup>284</sup> In *Beverley Acceptances Ltd v Oakley* [1982] RTR 417 ‘*possession*’ and the ‘*disposition*’ referred to in s 2(1) had to be contemporaneous. It was insufficient a person had possession as a mercantile agent but lost it prior to the purported disposition .

<sup>285</sup> See Halsbury, n 15, vol 9(1) for cases.

<sup>286</sup> 1889 Act, s 2 (1). See also Halsbury, n 15, vol 9(1) for cases.

<sup>287</sup> *Ibid* (2).

<sup>288</sup> *Ibid*, (3).

<sup>289</sup> *Ibid* (4).

<sup>290</sup> 1 KB 282.

<sup>291</sup> *Ibid*, per Scrutton LJ at p 305 ‘It appears to me to be enough to show that the true owner did intentionally deposit in the hands of a mercantile agent the goods in question.’ Cf. *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 KB 305 (in this case possession was *qua* bailee (a hirer under a h-p agreement) and not mercantile agent). See also Goode, n 3, pp 462-3.

<sup>292</sup> [1964] CLY 1685. See also *Davies, Registration Documents and Certification of Title to Motor Vehicles* [2001] JBL 489, 492.

of business'. Thus, in *Stadium Finance (Ltd) v Robbins* (1962),<sup>293</sup> the owner of a car (O) - wishing to sell it - left it with a car dealer (X) to put it in a showroom. Without authority, X sold the car on h-p. It was held (*per curiam*) that the 1889 Act, s 2, did not apply since either: (a) (Willmer J) without the ignition key or log book, there was no possession of the car with the consent of the owner;<sup>294</sup> or (b) (Willmer, Ormerod and Dankwerts LLJ) absence of a key and log book meant it was not in the *ordinary course of business* of the mercantile agent.<sup>295</sup> The decision in this case followed the earlier case of *Pearson v Rose* (1950).<sup>296</sup> Other cases involving cars were held not to fall within the Act.<sup>297</sup>

### **(b) Exclusions from the 1889 Act**

The Hire-Purchase Act 1964, part III, excluded from the 1889 Act private purchasers of vehicles on h-p or conditional sale, who have acted *bona fide*. Goode states:

Part III of the Hire-Purchase Act 1964, as amended by the Consumer Credit Act 1974, regulates the rights of third parties who purchase motor vehicles while these are still comprised in a hire-purchase or conditional sale agreement. The broad scheme of Part III is that a disposition of a motor vehicle made by a debtor under a hire-purchase or conditional sale agreement is to be effective to transfer to a 'private purchaser' taking in good faith and without notice of the agreement such title as was vested in the person who had supplied the goods under that agreement. This is so whether the private purchaser takes direct from the debtor or through the medium of a 'trade or finance purchaser.' If the private purchaser is not an outright buyer but himself takes the vehicle on hire-purchase or conditional sale his possession is protected and he will acquire the original owner's title on completing his payments and (in the case of a hire-purchase agreement) exercising his option to purchase.

The statutory provisions contribute a substantial inroad into the common law rule *nemo dat no quod non habet* which has hitherto been the cornerstone of English hire-purchase law. They override s 21 of the Sale of Goods Act [1979] but were without prejudice to the provisions of the Factors Act [1889] or of any other enactment enabling the apparent owner of goods to dispose of them as if he were a true owner. It should, however, be borne in mind that s 9 of the Factors Act and s 21(5) of the Sale of Goods Act do not in any event apply to dispositions by a debtor holding under a hire-purchase or conditional sale agreement which is within the Hire-Purchase Act 1965 or the Consumer Credit Act 1974.<sup>298</sup> (*wording divided*).

As to why professional car dealers were not included in part 3, in *Stevenson v Beverley Bentinck* (1976), Lord Denning stated:

It may be asked: why was no protection given to trade or finance purchasers? No doubt because Parliament thought they were well able to take care of themselves. There is available to them the Hire-Purchase Information Service. Whenever a car is offered to a trade purchaser or another dealer for sale, he at once wants to know whether it is on hire-purchase or not. If it is on hire-purchase, then he is not going to buy it until the title is clear. So it is a regular practice in the trade to telephone HPI and ask: 'Is this vehicle on hire-purchase or not? He then gets an answer on which he can safely act.'<sup>299</sup>

### **(c) Conclusion**

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<sup>293</sup> 2 AE 633.

<sup>294</sup> *Ibid*, per Willmer LJ at p 638 'Without either the key or the registrationbook, Palmer [the car dealer] was not... in possession of the car in his capacity of mercantile agent.'

<sup>295</sup> Cf. Ormerod accepted, p 635 'It was admitted that Palmer [the dealer] was a mercantile agent.' And, p 636 'It was unlikely that hire-purchase transactions were in the contemplation of the legislature in 1889, when the Factors Act [1889] was passed. The system of hire-purchase had certainly not become as frequent as it is today. It would be difficult, however, in these days to argue that a sale to a hire-purchase finance company by a motor car dealer was not a transaction in the ordinary course of business of a mercantile agent.' See also Halsbury, n 14, vol 1, para 12.

<sup>296</sup> [1950] 2 AE 1027 *per* Denning MR, p 1033 'So long as the owner retains the log book, the mercantile agent cannot dispose of the car in the ordinary course of his business, because it is not in the ordinary course of anyone's business to dispose of a second hand car without a log book.' See also Halsbury, n 14, vol 1, para 12. Also, *Ibid*, para 146, n 2. See also Goode, n 3, pp 463-4 and Brown, n 17, p 390. See generally, Davies, n 291.

<sup>297</sup> e.g. *Astley Industrial Trust Ltd v Miller* [1968] 2 AE 36 and *Belvoir Finance Co Ltd v Harold G Cole & Co Ltd* [1969] 2 AE 904. See also *Summers v Havard* [2011] EWCA Civ 764 (sales not in the ordinary course of business; also purchaser not acting in good faith). Also, *Fadallah v Pollak* [2013] EWHC 3159 (no evidence that mercantile agent, see para 35).

<sup>298</sup> Goode, n 3, p 473.

<sup>299</sup> [1976] 1 WLR 483 at p 486. See also *Moorgate Mercantile v Twitchings* [1976] 3 WLR 66 (*re* HPI).

As Dobson notes, it is possible - nowadays - for both private purchasers and car dealers to have checks carried out whether a car is subject to a finance agreement, has been a 'write off' or stolen.<sup>300</sup> Thus, the chances of car cases arising under the 1889 Act are much less likely. More particularly:

- The 1889 Act was not designed to cover car dealers since it could not (and cannot) be said that it was a usual custom (ordinary course of business) of that trade that its agents (car dealers), *per se*, had a right to sell, consignor pledge the goods of others of which they had possession as an agent simply by virtue of being a car dealer;
- Today, many car dealers are employees (shopmen) rather than agents;
- Unlike in olden times, where the principal was often difficult to contact or the agency depended on an oral agreement - or where it was difficult to identify the ownership of the goods a factor dealt with - today, a car dealer can easily contact the principal to secure his consent to a sale (or consignment or pledge) of his car. And, any agreement for a customer to sell his car is, invariably, in writing. Thus, the possibility of a car dealer mis-selling or mis-pledging a car, by accident, is much reduced.

In conclusion, the 1889 Act, s 2 is not required. Any sale (or consignment or pledge) by an agent is better governed by the general law (actual, implied or ostensible authority) - as well as the other exceptions to *nemo dat* contained in the SGA 1979, without the need to try and squeeze the fact situation into the confines of the 1889 Act. And, since the heart of 1889 Act is section 2 - along with definition of 'mercantile agent' in section 1 - and all the other sections are supplementary (and without direct caselaw), this means that the 1889 Act is no longer required. As to the other sections of the 1889 Act.

#### **15. 1889 ACT, s 3 - EFFECT OF PLEDGES OF DOCUMENTS OF TITLE**

The 1889 Act, s 3, states:

A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

This simply confirms that the documents are treated the same as the goods.<sup>301</sup> Halsbury notes that this section has no application where the pledge of the documents of title is by a person not a 'mercantile agent'.<sup>302</sup>

#### **16. 1889 ACT, s 4 - PLEDGE FOR ANTECEDENT DEBT**

The 1889 Act, s 4, states:

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. (*italics supplied*)

This considerably restricts the right of a factor to assert a pledge for an antecedent debt, something Whitaker noted in 1812.<sup>303</sup> Halsbury cites no caselaw.

#### **17. 1889 ACT, s 5 - RIGHTS ACQUIRED BY EXCHANGE**

The 1889 Act, s 5, states:

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.<sup>304</sup>

<sup>300</sup> Dobson, n 17, p 106 'it is now possible for a buyer (whether a trade purchaser or a private purchaser) to have a check carried out to discover whether a motor vehicle is subject to an existing finance arrangement, has ever been an insurance 'write off' or has been stolen.'

<sup>301</sup> Pearson-Gee, n 13, p 43.

<sup>302</sup> It cites *Inglis v Robertson and Baxter* [1898] AC 616 per Lord Herschell at 630. He stated 'the provisions of s 3 should not be treated as an enactment relating to all pledges of documents of title, but only to those effected by mercantile agents.' See also *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 at p 60 per Lord Wright.

<sup>303</sup> See n 173. Halsbury, n 15, vol 9(1) cites *Phillips v Huth* (1840) 6 M & W 572 (151 ER 540). Also, *Learoyd v Robinson* (1844) 12 M & W 745 (1844) 152 ER 1399. For the history to s 4, see Pearson-Gee, n 13, pp 43-9.

<sup>304</sup> See also Halsbury, n 14, vol 1, para 149 (*rights acquired by pledgee*) 'In the case of a pledge of goods by a mercantile agent, the pledgee acquires a right to hold the goods against the principal for the full value of the consideration if the advance has been made in cash. If the goods are pledge to secure a debt due from the agent to the pledgee before the time of the pledge, the pledgee acquires no right to the goods beyond

Halsbury notes that this section considerably extended the Factors Act 1842, s 2 by substituting ‘*valuable consideration*’ for ‘*advance*’ (which section was intended to protect exchanges of goods and securities made in good faith and to alter the law as declared, in particular, in *Taylor v Kymer* (1832)).<sup>305</sup>

#### **18. 1889 ACT, s 6 - AGREEMENTS THROUGH CLERKS**

The 1889 Act, s 6, states:

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.<sup>306</sup>

Halsbury cites no cases on this provision which is, really, administrative in nature.

#### **19. 1889 ACT, s 7 - CONSIGNORS & CONSIGNEES - LIEN**

The 1889 Act, s 7(1) states:

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 [factor] 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.<sup>307</sup> (*italics supplied*)

Ss (2) states that nothing in s 7 shall limit, or effect, the validity of any sale, pledge, or disposition, by a mercantile agent. Halsbury cites no cases on this section which only applies to goods (not to documents of title) and where the consignee has no notice that the consignor (the shipper) is not the owner.<sup>308</sup> This section is unlikely to be invoked in modern times since it envisages a consignee (the factor) lending money on the goods to the shipper.<sup>309</sup>

#### **20. 1889 ACT, s 11 - MODE OF TRANSFERRING DOCUMENTS**

The 1889 Act, s 11, states, that, for the purposes of the 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.

Halsbury cites no cases on this section.<sup>310</sup>

#### **21. 1889 ACT, s 12 - SAVINGS FOR RIGHTS OF TRUE OWNER**

The 1889 Act, s 12, states:

- **Criminal & Civil Liability.** ‘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’.<sup>311</sup>
- **Bankruptcy.** ‘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

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that which could have been enforced by the agent at the time of the pledge. Where, however, the goods are pledged in exchange for other goods, documents of title or negotiable securities, the pledgee acquires no right or interest in the goods so pledged in excess of the value of the goods, documents of title or negotiable securities at the time of the exchange.’

<sup>305</sup> 3 B & Ad 320 (110 ER 120). The case established that East India warrants were not to be treated as negotiable, see Abbott CJ at p 337. However, as can be seen in 1823 (see text to n 210), banks and merchants were already, in practice, not treating them as negotiable and, therefore, withdrawing from lending on them. See also Chalmers, n 17, p 191 and Pearson-Gee, n 13, pp 49-54.

<sup>306</sup> Pearson-Gee, n 13, p 54.

<sup>307</sup> See also Bowstead, n 19, para 8-156.

<sup>308</sup> Chalmers, n 17, p 191.

<sup>309</sup> Pearson-Gee, n 13, pp 55-6 (writing in 1890) mentioned no case and it seems there was no case under the 1823 and 1825 Acts *re* consignees generally. *Ibid*, p 9, n (p).

<sup>310</sup> Halsbury, n 15, vol 9(1). See also Pearson-Gee, n 13, p 69 (reproduces Factors Act 1877, s 5).

<sup>311</sup> 1889 Act, s 12 (1).

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.’<sup>312</sup>

- **Set Off** ‘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.’<sup>313</sup>

Halsbury notes that the terms of s 12 are negative and do not confer any positive right.<sup>314</sup>

## **22. 1889 ACT, s 13 - SAVINGS FOR COMMON LAW POWERS OF AGENT**

The 1889 Act, s 13, states:

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.

Halsbury cites no cases in respect of this section.

## **23. ROLLS ROYCE v COX (1967)**

The last successful case under the 1889 Act appears to have been *St Margaret's Trusts v Castle* (1964) (see **14(a)**). Subsequent to this case, the word ‘factor’ has been preserved in the concept of ‘factoring.’<sup>315</sup> However, this is a mis-nomer since there is an assignment of debts by one principal to another. Thus, there is no principal and agent relationship. Further, debts do not comprise ‘goods’ as defined in the 1889 Act. As for other subsequent cases relating to the factor<sup>316</sup> - in *Rolls Royce Ltd v Cox* (1967)<sup>317</sup> the court was not prepared to hold that salesmen, selling washing machines on commission, were factors. Denning MR stated:

I am quite clear that these salesmen were not factors. The usual character of a factor are these: He is an agent entrusted with the goods of several principals, or sometimes only one principal, for the purpose of sale in his own name without disclosing the name of the principal, and he is rewarded by a commission... These salesmen... did not sell in their own names but in the name and on behalf of their principals... They were agents pure and simple, and not factors. Even if they were factors, however, there is a written agreement which is inconsistent with any lien.<sup>318</sup>

Although it is not wholly correct that a factor sold in his own name (and he could still be a factor if he sold in the name of his principal in times past)<sup>319</sup> the *dictum* of Denning MR likely restricts the 1889 Act to agents acting for undisclosed principals. For his part Winn LJ stated:

Whether or not a trader or dealer is a mercantile agent, or being a mercantile agent also a factor, is in my opinion... to be determined by that part of the common law which is properly to be called the law merchant. It is by custom of the business or mercantile world established in any given case by evidence that a court has to be informed whether a particular class of trader or dealer is a factor: there was no such evidence given in this case and there is, therefore, no support for a proposition, which in any case I should have found most surprising, that travelling salesmen are by reason of their possession of goods belonging to their employers, factors, with all the special characteristics, derived from status, not from contract which appertain to a class of dealers to which it is relatively unlikely in modern times that there will be

<sup>312</sup> Ibid, (2). See also Halsbury, n 14, vol 3(2), para 430. Ibid, para 143.

<sup>313</sup> Ibid (3). Halsbury, n 15, vol9(1) notes the buyer has no such right if he knows the goods are sold by a person as an agent for an undisclosed principal or he knows the person sometimes acts as an agent and makes no inquiry into the capacity in which that person is acting in the particular transaction. It refers to *Kaltenbach v Lewis* (1885) 10 App Cas 617 and *Cooke (Isaac) & Sons v Eshelby* (1887) 12 App Cas 271.

<sup>314</sup> Halsbury, n 15, vol 9(1) cites *Triffit Nurseries v Salads Etcetera Ltd* [2000] 1 AE (Comm). See also Pearson-Gee, n 13, pp 69-71.

<sup>315</sup> See, for example, *Charge Card Services Ltd (No 2)* [1987] Ch 150; *Bibby Financing Services Ltd v Magson* [2011] EWHC 2495; *WH Smith Travel Holidays Ltd v Twentieth Century Fox Home Entertainment Ltd* [2015] EWCA 1188. Factoring usually involves the purchase of debts (such as from card holders) at a discount, with the same being assigned to the purchaser. See McBain, n 12, p 15. Also, Sealey, n 17, p 364 (the word factoring was used in a ‘wholly unrelated technical sense.’) For older commentary on factoring, see Munday, n 13.

<sup>316</sup> It may be noted that reference to the factor’s lien seems to have died out by 1914. Thus, *Jennings v Mather* [1901] 1 QB 108, at p 116 *per* Kennedy J ‘the trustee in bankruptcy of a factor has a right to maintain the factor’s lien in the interests of the creditor of the estate.’ *Hope v Glendinning* [1911] AC 419 at p 431 *per* Lord Kinnear ‘It is held both in Scotland and in England that for the balance which may arise on his general account the factor has a right of retention or lien over all goods and effects of the principal which, coming into his hands in his character of factor, may be in his actual or civil possession at the time when the demand against him is made.’ See also *The Marie Glaeser* [1914] P 218 *per* Sir Samuel Evans.

<sup>317</sup> 1 QB 552.

<sup>318</sup> At p 568. See also Dankwerts LJ at p 572 (whether or not they were factors, the terms of the agreement excluded the lien).

<sup>319</sup> For early cases, see Munday, n 13, pp 229-30.

any additions.<sup>320</sup>

While the ‘*law merchant*’ had, effectively, died out by 1898<sup>321</sup> and, thus, a reference to ‘*commercial law*’ might have been more apt, there is no doubt that factors derived from status, not contact. And, that their status was connected, in the past, with agents in very specific trades (i.e. the corn trade, textile trade, East and West Indies trade *etc*) where it was reasonable to hold that third parties buying goods from them (or lending to them on the security of goods) would know, as a matter of course, they were not the owners of those goods and that their principals could be presumed to have accorded them with authority to sell, consign or pledge. Thus, the statement of Winn LJ was apposite. So too, his belief that such a class of dealers was one ‘*to which it is relatively unlikely in modern times that there will be any additions.*’ His statement was made over 50 years ago and there would appear to be no subsequent cases on the 1889 Act or on factors.

***In conclusion, the statement of Winn LJ reflects the fact that factors - a class of agents accorded with amplified agency powers under the 1889 Act – had become redundant more than 50 years ago, if not considerably before.***

#### **24. ANALYSIS OF SUCCESSFUL CASES UNDER 1889 ACT**

Prior to discussing the repeal of the 1889 Act, it is important to note *few* how cases there have been under it in the last 125 years or so. Even more so how few *successful* cases. The latter fall into 2 categories: (a) sales; (b) pledges. As to these:

##### **(a) Sales by Mercantile Agents (Factors)**

The only cases where sales have been successfully upheld under the 1889 Act, s 2<sup>322</sup> appear to have been:

- (a) *Turner v Sampson* (1911)(picture dealer, selling the goods from his shop);
- (b) *Lowther v Harris* (1927)(antique dealer, selling the goods outside his shop).

However, besides being *ad hoc* agencies, these persons were shopman. Therefore, they should not have been within the 1889 Act. In any case, in light of *Rolls Royce Ltd v Cox* (1967) holding that commission salesmen were not covered by the Act - it is very dubious these cases would be upheld today. Also, if the 1889 Act had not applied in these cases, the *bona fide* third party buyer would, still, have been protected, since private limitations on the sale price would not have affected him. Other successful cases under the 1899 Act were:

- (c) *Folkes v King* (1923)(car dealer);
- (d) *St Margaret's Trust v Castle* (1964) (car dealer).

However, car dealers were never intended to be within the 1889 Act, which was a consolidation Act, and not intended to extend the categories within it. Further, it could not be said that car dealing had a trade custom that dealers, *ipso facto*, could be presumed to have authority to sell, consign or pledge goods without reference to their principal. Also, if the 1889 Act had not applied, the outcome would have been the same, *vis-à-vis* passing title to a *bona fide* third party - the first case being a sale at an undervalue and in the second, there being an implied authority to sell.

***In conclusion, it is dubious whether any of these agents would be treated as ‘mercantile agents’ today. Further, these cases could have been better dealt with outside the 1889 Act, when decided.***

##### **(b) Pledges by Mercantile Agents (Factors)**

As to cases of successful pledges under the 1889, s 2 (there have been no cases of charges or mortgages), these were, also, rather dubious, *viz.*

- (a) ***Oppenheimer v Attenborough (1908)***.<sup>323</sup> A pledge by a diamond broker, acting as a mercantile agent to a diamond merchant, was held valid, pursuant to the 1889 Act, s 2, although it was contrary to the custom of the diamond trade.<sup>324</sup> However, this decision is aberrant.<sup>325</sup> Today - absent the 1889 Act - it is

<sup>320</sup> At p 578. See also *Beverley Acceptances Ltd v Oakley* [1982] RTR 417 at p 424 per Denning MR ‘We have so few cases nowadays on the Factors Act [1889]...’.

<sup>321</sup> See McBain, n 1.

<sup>322</sup> The 1889 Act, ss 8 and 9 (sellers and buyers in possession) are not relevant since these sections are replicated in the SGA 1979 (as they were in the SGA 1893) and they can be treated as sales under that legislation.

<sup>323</sup> [1908] 1 KB 221.

<sup>324</sup> Where a diamond broker asked the friend to pledge a diamond, without authority of the principal, it was held not within the 1889 Act, s 2 since this was not in the ordinary course of business of the agent. *De Gorter v Attenborough & Son* (1905) 21 TLR 19 *per* Channell J ‘It was not in the ordinary course of business of a mercantile agent to go to some friend and ask him to pledge goods.’

likely the trade prohibition would be treated as an implied term;<sup>326</sup>

**(b) *Weiner v Harris (1910)*.**<sup>327</sup> An independent jewellery dealer, acting as an agent, pawned the jewels of his principal without authority.<sup>328</sup> Today - absent the 1889 Act - the issue would be one of interpretation of the relevant letter of instruction which only provided for 'sale or return' and, thus, seemed (clearly) to preclude *pledge*. Further, this case is one of a 'one customer' (*ad hoc*) agency and, thus, not really appropriate (in any case) for the 1889 Act. Also, in light of *Rolls Royce (1967)* it is likely that a jewellery salesman, today, would be treated the same as washing machine salesman and the 1889 Act held not to be applicable in any case;

**(c) *Jamesich v Attenborough & Son (1910)*.**<sup>329</sup> A mercantile agent in the jewellery trade pledged the goods without the authority of its principal. The decision followed *Weiner*. The agent was held to be within the 1889 Act, s 2 despite the high rate of interest, which suggest the pawnbroker may not have been unaware of the rather dubious circumstances of the pledge;

**(d) *Moody v Pall Mall Deposit & Forwarding Co (1917)*.** One O sent pictures to a gallery owner (a mercantile agent) some for sale, some for display. After revoking the agent's authority, a picture was pledged by the mercantile agent with a person acting *bona fide*. It was held the 1889 Act, s 2 applied to all goods in the custody of the mercantile agent, whether for sale or not. Bowstead described this as an inadequately reported case, and the precise facts are unclear.<sup>330</sup> Today (and even in 1917) it is dubious it can be said to be in the ordinary course of business of an art dealer to *pledge* pictures sent for *display* or *sale*.<sup>331</sup> Further O was a mere shopman and, thus, should not have been covered by the 1889 Act in any case;

**(e) *Lloyds Bank Ltd v Bank of America National Trust and Savings Association (1938)*.**<sup>332</sup> S, the client of the plaintiffs (P), pledged bills of lading with them as security for loans. Later, P released the bills back to S for sale and S replaced them with trust receipts in which S agreed to sell the goods (represented by the bills) as trustee for P. Instead, S pledged the bills with the defendants (D) as security for a loan, with D acting *bona fide*. Under the 1889 Act, s 2, it was held D took free of the first pledge.<sup>333</sup>

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<sup>325</sup> It is aberrant because - in earlier law - a factor was one whose trade was such (textiles, corn trade *etc*) that it was reasonable for the law to uphold a presumption that anyone dealing with it would know they were acting for undisclosed principals and, thus, that they had a power to sell or pledge. However, *Oppenheimer*, turns this on its head since the trade *prohibited* such pledges, it being the custom not to use agents in such circumstances, see Alverstone CJ at [1908] 1 KB 221, p 225. See also Bell, n 13, pp 502-3.

<sup>326</sup> Halsbury, n 14, vol 1, para 44 'An agent also has implied authority to act in accordance with the customs and usages of the place where, or the business in respect of which, his express authority permits him to act, subject to the conditions that such customs and usages must not be unreasonable, or change the essential nature of the contract of agency. Where the agent is a professional person, a contract made in the ordinary course of his profession and as agent is deemed to incorporate all reasonable usages, rules and regulations of that profession. Provided that the custom or usage is reasonable, the agent's implied authority to act in accordance with it is not affected by the fact that the principal may have been aware of its existence; and the agent is entitled to indemnity from his principal against losses caused by acting in accordance with it. Reliance will not, however, be permitted on a custom which is in direct conflict with the express terms of the contract of agency.'

<sup>327</sup> [1910] 1 KB 285. See also Tyler, n 13, p 191.

<sup>328</sup> This case overruled *Hastings v Pearson (1893)*, see n 260 which is, actually, the better case. See also Bowstead, n 19, para 8-158 and Bell, n 13, p 498. For an earlier case where *Hastings v Pearson (1893)* was also not upheld see *Tremole v Christie (1893)*, Solicitors Journal, 22nd July, p 650 (painting handed over to a dealer in prints and drawings for sale. He pledged it. Held 1889 Act, s 2 applied). Stirling J referred to *Heyman v Flewker (1863)*, see n 215. However, it seems clear he did not advert sufficiently to the difference in wording between the 1842 and the 1899 Acts as to the meaning of a mercantile agent. *Ibid*, ns 220-1.

<sup>329</sup> 102 LT 605.

<sup>330</sup> *Moody v Pall Mall Deposit Co (1917)* 33 TLR 306 and Bowstead, n 19, para 8-147. This case seems to be in direct contraction to *Fuentis v Montis (1868)*, see n 222 where it was held that a factor was not a factor once his authority was revoked.

<sup>331</sup> In the judgment the wording of Coleridge J is curious 'Under the old law clearly the Factors Acts did not apply. The *etats* prints were never sent for sale but for exhibition and under the old Acts Moody would have had no rights. But the words '*entrusted for sale*' were replaced by the words '*in the possession of the agent*' in the new Act. The object was to make the Act [1889 Act] apply to such goods - all goods which were in the custody of the agent, whether for sale or not.' However, this is to ignore the express words of the 1889 Act, s 2 that the mercantile agent must be acting in '*the ordinary course of business*.'

<sup>332</sup> [1938] 2 KB 147.

<sup>333</sup> See also Bowstead, n 19, para 8-158. This case was cited in *Fairfax Gerrard Holdings Ltd v Capital Bank plc [2007]* 1 LLR 171 which held that Dimond (D) a seller of goods (a machine) was not a mercantile agent within the 1889 Act, s 2, when selling to a finance company also involved (Capital), since D had no authority to sell the machine to it. However, it may be noted - in any case - if D had been held to be a mercantile agent, this would have been an '*ad hoc*' situation and, thus, not in its '*ordinary course of business*' (within s 2) without straining the meaning of these words. Indeed, this case is a classic instance of a legal situation being rendered more complex due the continued existence of the 1889 Act. If it had not existed, the matter would have been decided by referring solely to the SGA 1979, s 25(1) which, one would suggest, was the more appropriate piece of legislation anyway.

- However, the effect of so holding was to treat the plaintiffs (Lloyds Bank) - which was the lender - to be the 'owner' of the bills for the purpose of the 1889, s 2, distorting the meaning of 'owner'<sup>334</sup> as well as creating the curious situation of their client (which carried on the business of merchants, not factors)<sup>335</sup> being the bank's factor (mercantile agent);
- Today - absent the 1889 Act - the issue would be one of interpretation of the relevant release and whether it permitted a *pledge* of bills only released for *sale*.<sup>336</sup> Likely, it would be held not, with no valid pledge to D being created, on the basis of *nemo dat* and S being a mere trustee of the bills.

All of (a)-(e) are cases of a party pledging goods without authority. They reflect the mis-givings of Sir James Scarlett (Baron Abinger) in 1823 that giving statutory ostensible authority to factors to pledge was giving legislative sanction to fraud. This is, to factors (mercantile agents) who were fraudsters and who might find moneylenders discreet enough to accept their pledges, without pressing for any 'inconvenient information.' (see 8). Certainly, (a)-(c) may be said to come close to this, and the case of *Hastings v Pearson* (1893) which held the opposite<sup>337</sup> in, hindsight, is much to be preferred, even when the cases were decided. Today, following *Rolls Royce* (1967), none of (a)-(e) would be likely be held to be a mercantile agent. Absent the 1889 Act, the general law - including implied authority (including any trade custom) and the doctrine of estoppel - would, almost certainly provide a more just outcome with the context of the specific factual matrix of the case.

## 25. REPEALING FACTORS ACT 1889

It is asserted the 1889 Act is long past its 'sell by' date, for the reasons set out in the introduction. Thus:

- **Categorisation.** The 1889 Act - like prior Factors' Acts and the common law on factors - was predicated on certain distinct categories of persons, namely, 'merchants', 'brokers' and 'factors'. These categories no longer exist as identifiable (and distinct) groups of person, with their own specific legal privileges and restrictions. Instead, a more generic reference is made to 'principal' and 'agent' without the need to refer to the factor as an amplified agent. Also 'express', 'implied' and 'ostensible' authority at common law has superseded the 'actual' and 'ostensible' authority which the early law on factors developed;
- **No Factors Left.** The description of 'factor' was by reference to trade custom. They were persons in particular trades where the general public dealing with them could (reasonably) be presumed to know, as a matter of course, that they were selling (or consigning for sale or pledging) goods not as their owner. Not least, because the factor himself (usually) had no idea who the owner was - due to the inter-mixing of the goods in question (corn, grain, textiles) or the fact that the principal was located abroad and difficult to identify (often, due to on-sales in the exporting country). Today, there are no such trades where such a presumption can, reasonably, exist as a 'matter of course'. In conclusion, the 'factor' is defunct - like the merchant and the broker. The issue, now, at general law is (and should be) one of agency;
- **No Factors within 1889 Act.** Even if there are factors (mercantile agents) left, the number that might scrape within the confines of the 1889 Act, today, are minuscule. The 'old style' factors have gone (corn factors, textile factors, East and West Indies factors *etc*). And, caselaw had already excluded from the Factors Acts 1823-77 the following, agents:
  - controlling/managing goods - clerks, servants, cashiers, caretakers *etc*;
  - with safe custody of goods - bailees, wharfingers, warehousemen *etc*;
  - carrying goods - carriers, forwarding agents *etc*;
  - displaying goods - shopkeepers *etc*;
  - disposing of goods in a non- business capacity - acting in a private capacity *etc*.

Although a few cases under the 1889 Act covered salesmen on commission - as well as art and antique dealers acting on 'one off' commissions - *Rolls Royce* (1967) appears to have excluded them. Further, Denning MR treated a mercantile agent under the 1889 Act as such only when undisclosed. In the case of

<sup>334</sup> JM Holden, *Securities for Bankers' Advances* (5th ed, 1971), p 306 noted 'some may feel that this involved giving a very wide meaning to the word 'owner'...'

<sup>335</sup> [1938] 2 KB 147 *per* Greene MR at p 66 'The plaintiffs, Lloyds Bank Ltd, acted as bankers for a company which carried on the business of merchants both in India and England.'

<sup>336</sup> As Goode, n 3, p 461 points out, s 2 would also cover a mortgage or charge.

<sup>337</sup> See n 260.

cars sold on h-p to private purchasers, other legislation deals with the matter (Hire-Purchase Act 1964). Further, since, both private persons as well as professional car dealers now have access to HPI it is unlikely that any other 'car' cases (sales, pledge *etc*) will now come within the 1889 Act with any regularity. The effect of all these exclusions is an empty set - and deservedly so;

- **Nemo Dat.** The 1889 Act is an important, but unnecessary, exception to *nemo dat*. It is unnecessary since factors (even if they might still exist) no longer *pledge* goods, and it is inappropriate that they should be presumed to have authority to do so (it was contentious in 1823 and not permitted by the courts prior to that, especially in the period 1742-1823).<sup>338</sup> As to *sale*, today this should be left to the general law, regardless of whether the person has possession of the goods or discloses whether he is their owner or not. The issue should simply be - *Did the agent have the authority of his principal to sell or pledge - express, implied or ostensible* ? In the large majority of cases, today, the authority is express or implied (and, invariably, in writing) given the nature of modern commerce. In the case of ostensible authority, regard should not be had to the rigid terms of the 1889 Act. Rather, the factual matrix should be analysed in the context of the individual case. This will, invariably, produce a more just outcome.

As for the factor's *general lien* this, also, should be abolished.

- The general lien was accorded in 1775 since factors were extending loans to their principals and maintaining (long) running accounts. They no longer do so; banks do. Further, as long ago as 1805 (more than 215 years ago) the courts began to adopt a restrictive attitude towards general liens since they, manifestly, prejudiced third party creditors who have no easy means of detecting them;
- The factor's *particular* lien should also be abolished. It was anomalous, in any case, since a factor is not a 'common factor' - not being obliged to provide a service (unlike a common innkeeper or carrier). Nor does a factor work on the goods to improve them (unlike a workman's lien). Further, other agents do not have such a lien. Thus, the factor's particular lien arose, likely, due to its other textile roles (such as acting as a packer, weaver *etc*).

Abolition of the general and particular liens of a factor would not prevent their creation in *contract*. However, this would not affect third parties.

***In conclusion, the 1889 is, like market overt was - and the law merchant is - considerably past its 'sell-by' date.***

## **26. CONSEQUENCES OF REPEALING 1889 ACT**

As to the repeal of the 1889 Act, it should not affect any change in practice, for the following reasons:

- **ss 8-10.** These sections duplicate more modern sections in the SGA 1979, which should be preferred in any case. If the 1889 Act is repealed, the latter will still exist – albeit reference to '*mercantile agent*' should be replaced with one to an '*agent*'<sup>339</sup> Thus the SGA 1979 will govern sellers and buyers in possession whose agents make a '*sale, pledge, or other disposition*' to a person acting *bona fide*;
- **ss 1(5), 3 & 4.** These sections relate to pledge and factors (even if they still exist), no longer pledge goods. Nor should they be accorded (automatically) by presumption of law an authority to do so;
- **ss 1(1) & 2.** This is the heart of the 1889 Act. However, the '*factor*' no longer exists and, in any case, an agent should not be accorded (automatically), by presumption of law, with an authority to sell another's goods simply because he is in possession of them as an agent,<sup>340</sup>
- **Other Sections.** These are administrative only<sup>341</sup> or limit the power of the factor<sup>342</sup> or relate to historical matter.<sup>343</sup> The consignee's (factor's) lien against a shipper when not the owner (s 7) is not required.

More particularly, the essence of the 1889 Act was that, in s 2, of an agent being capable of passing good title to goods when:

- (a) with the consent of the owner;

<sup>338</sup> See 8.

<sup>339</sup> See 12.

<sup>340</sup> This issue of disclosing that he is an agent is not a hallmark of a factor since disclosure did not, in early law, prevent his, thereby, being a factor.

<sup>341</sup> See s 6 (agreements through clerks), s 11 (mode of transferring documents)

<sup>342</sup> See s 12 (savings for rights of true owner) and s 13 (savings for common law powers of agent).

<sup>343</sup> See s 5 (consideration, which dealt with East India warrants in particular).

- (b) in possession of them (or documents of title); it
- (c) makes a sale, pledge or other disposition<sup>344</sup> when
- (d) acting in the ordinary course of business.

If so, the agent is treated with having express authority ('*expressly authorised*'). If s 2 of the Act is repealed, the issue will be decided with regard to the general law (actual, implied and ostensible authority) and, in the case of sale, with regard to the other exceptions to *nemo dat* at common law and under the SGA 1979, *viz.*

- ***Estoppel*** SGA 1979, s 21(1);
- ***Power of Sale or Court Order***
- ***Sale - Voidable Title*** SGA 1979, s 23;
- ***Seller in Possession*** SGA 1979, s 24;
- ***Buyer in Possession*** SGA 1979, s 25;
- ***Unpaid Seller's Sale*** SGA 1979, s 48;
- ***Private Purchase of Vehicle*** Hire-Purchase Act 1964, pt 3.

As to these, with reference to the 1889 Act (if repealed), the position would be as follows:

#### **(a) Pledge or Other Disposition (Consignment) by Agent**

Repealing the 1889 Act would mean that the issue on any such loan would be no different for a factor as for any other agent. There would be a valid pledge if the agent had: (a) express; (b) implied; or (c) ostensible, authority in the instant case. And, '*implied*' authority would generally include any relevant trade custom by virtue of its being implied into the relevant contract.<sup>345</sup> Also,

- **Pledge by Agent of Seller or Buyer in Possession.** A seller (or buyer) in possession of goods who pledged them, *via* an agent, would be governed by the SGA 1979, ss 24 & 25. Thus, there would be no change if the 1889 Act, ss 8-9 were repealed;
- **Estoppel.** Assuming the SGA 1979, ss 24 and 25 or the Hire-Purchase Act 1964, pt 3 did not apply, an agent (including an erstwhile factor or mercantile agent) who pledged goods without authority (express, implied, ostensible) would not create a valid pledge - *unless* an estoppel could be sustained against the owner.

#### **(b) Sale by Agent**

Instead of asserting a presumption of law for a factor under the 1889 Act, the issue would be whether the agent had (a) express; (b) implied; or (c) ostensible authority to sell the goods. Also, whether any *nemo dat* exceptions (whether at common law or pursuant to the SGA 1979) applied or the Hire-Purchase Act 1964 applied. As it is, a person can have *ostensible* authority to sell at common law in much the same circumstances as under the 1889 Act, which Act need not be invoked.<sup>346</sup> Further, no private limitations affect such ostensible authority.<sup>347</sup>

### **27. CONCLUSION**

It is important that English commercial law be clear and intelligible to businessmen and ordinary people - as well as to lawyers. The 1889 Act satisfies none of this. It creates exceptions to the rule of *nemo dat* in respect of sale and pledge; exceptions which are no longer justifiable. Further, the 1889 Act has only produced a handful of successful cases in more than 125 years. Those relating to *sale* (4 or so cases, see **24(a)**) would have produced the same outcome even if the 1889 Act had not applied. Thus, a *bona fide* purchaser would not have lost out. And, those relating to pledge (5 or so cases, see **24(b)**) involved agents which, almost certainly, would not be treated as mercantile agents under the Act today. Also, they produced outcomes less just than they would have been if the

<sup>344</sup> All the successful cases under the 1889 Act concern sales and pledges - although s 2 would also cover consignments (deliveries), mortgages and charges.

<sup>345</sup> See n 326.

<sup>346</sup> *Lloyds v Scottish Finance Ltd v Williamson* [1965] 1 WLR 404.

<sup>347</sup> *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176 at p 209 *per* Lord Blackburn 'Where an agent is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal'. Furnston, n 18, p 622 'Limitation in fact imposed upon the powers of the agent and ignored by him will not exonerate the principal from liability, unless, of course, their existence is known to the third party to the transaction or the third party has not relied upon the ostensible authority of the agent.' He cited *National Building Society v Lewis* (1998) 3 AE 143.

1889 Act had not applied.<sup>348</sup> In conclusion, the 1889 Act should be repealed. Further, factors' liens (general and particular) are also no longer justifiable or necessary. They should be abolished.

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<sup>348</sup> Repealing the 1889 Act would also go a considerable way to achieving the proposed solution of Devlin J in *Ingram v Little* [1960] 3AE 332 'For the doing of justice the relevant question...is...which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part.' See also Bell, n 13, pp 514-5.

**APPENDIX A – DEFINITION OF A FACTOR**

Blount	1674	<i>Glossographia</i> (1674) defined a factor as ‘a doer or maker. It is commonly used for him that buys and sells for a merchant, or that looks to his business, in his absence.’ <sup>349</sup>
Jacob	1729	<i>New Law Dictionary</i> (1729) <sup>350</sup> ( <i>factor</i> ) ‘Is a merchant’s agent residing beyond the seas, or in any remote parts, constituted by letter or power of attorney. And one factor may be concerned for several merchants, and they shall all run a joint risk of his actions. If the principal gave the factor a general commission to act for the best, he may do for him as he thinks fit, but otherwise he may not. Tho[ugh] in commissions at this time, it is common to give the factor power in express words to dispose of the merchandise, and deal therein as if it were his own, by which the factor’s actions will be excused, tho[ugh] they occasion loss to his principal.’ <sup>351</sup>
Postlethwayt	1751	‘A factor is a merchant’s agent, residing abroad, constituted by letter of attorney, to act for this principal; and one may act for several merchants, who all run a joint risk of his actions: factorage is the allowance.’
Potts	1815	<i>A Compendious Law Dictionary</i> (1815)( <i>factor</i> ) ‘A factor is a merchant’s agent or correspondent residing beyond the seas, or in any remote parts of the country, and in somecases constituted by letter of attorney to sell goods and merchandise, and otherwise act for his principal, either with a stipulated salary or allowance for his care, or commission....In commissions granted to factors etc. it is customary to give them an authority in express words to dispose of the merchandise, and deal therein as if it were their own...’
Abbott CJ	1818	‘A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all cases cited the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not.’ <sup>352</sup>
Holroyd J	1818	‘A factor, who has the possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned; and he has not only the possession, but, in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority; and it may be right, therefore, that the principal should be bound by the consequences of such sale; amongst which, the right of setting-off a debt due from the factor is one. But the case of a broker is different: he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorise him to sell in his own name. If therefore he sells in his own name, he acts beyond the scope of his authority; and his principal is not bound.’ <sup>353</sup>
Story	1839	‘A factor is commonly said to be an agent employed to sell goods or merchandise, consigned or delivered to him by or for his principal, for a compensation, commonly called factorage or commission. Hence he is often called a commission merchant, or consignee, the goods received by him for sale are called a consignment; and when, for an additional compensation in case of sale, he undertakes to guaranty to his principal the payment of the debt due by the buyer, he is said to receive a <i>del credere</i> commission.’ <sup>354</sup>
Paley	1841	‘Of mercantile agents, some are entrusted with the possession, as well as the disposal and management of the property, these are usually denominated factors. Others are engaged merely in the negotiation of

<sup>349</sup> T Blount. *Glossographia* (1<sup>st</sup> ed, 1656, 4<sup>th</sup>ed 1674)(*factor*). He did not define a broker. Cf. T Blount, *A Law Dictionary and Glossary* (3<sup>rd</sup> ed, 1717) which defined a broker but not a factor.

<sup>350</sup> G Jacob, *A New Law Dictionary* (1<sup>st</sup> ed, 1729)(*factor*). He also defined a ‘broker’ as ‘broccatores, broccarii & auxionarii are those that contrive, make and conclude bargains and contracts between merchants and tradesmen, in matters of money and merchandise, for which they have a fee or reward...The original of the word is from a trader broken, and that from the Saxon *broc*, misfortune, which is often the true reason of a man’s breaking; so that the broker came from one who was a broken trader by misfortune, and none but such were formerly admitted to that employment; and they were to be freemen of the City of London, and allowed an approved by the lord mayor and aldermen, for their ability and honesty.’

<sup>351</sup> Jacob cited Malynes, *Lex Mercatoria*, see n 138.

<sup>352</sup> *Baring v Corrie* (1818) 2 B & Ald (106 ER 317) 137 at p 143.

<sup>353</sup> *Ibid*, p 148.

<sup>354</sup> J Story, *Commentaries on the Law of Agency* (1839), pp 32-3. The first edition was in 1839, with subsequent editions until 1882. Story also noted, pp 33-4 ‘Sometimes, in voyages abroad, an agent accompanies the cargo, to whom it is consigned for sale; and who is to purchase a return cargo out of the proceeds. In such cases the agent is properly a factor, and is usually called a supercargo.’ Also, p 34 ‘A factor differs from a broker in some important particulars. A factor may buy and sell in his own name, as well as in the name of his principal. A broker...is always bound to buy and sell in the name of his principal. A factor is entrusted with the possession, management, control, and disposal of the goods to be bought or sold, and has a special property in them and a lien on them. A broker, on the contrary, has usually no such possession, management, control, or disposal of the goods, and consequently has no such property or special lien.’

contracts relating to property, with the custody of which they have no concern. Brokers are principally of the latter description.<sup>355</sup>

McCulloch	1859	‘an agent employed by some one individual or individuals, to transact business on his or their account. He is not generally resident in the same place as his principal but, usually, in a foreign country. He is authorised, either by letter of attorney or otherwise, to receive, buy, and sell goods and merchandise; and, generally, to transact all sorts of business on account of his employers, under such limitations and conditions as the latter may choose to impose. A very large proportion of the foreign trade of this and most other countries is now carried on by means of factors or agents’ <sup>356</sup>
Selwyn	1869	‘A factor is an agent, who is commissioned by a merchant or other person to sell goods for him, and to receive the produce. ... A factor differs from a broker in some important particulars. A factor may buy and sell in his own name as well as in the name of his principal. A broker is always bound to buy and sell in the name of his principal. A factor is entrusted with the possession, management, control, and disposal of the goods to be bought or sold, and has a special property in them, and a lien on them. A broker, on the contrary, has usually no such possession, management, control, or disposal of the goods, and consequently has no special property or lien... But the character of factor and broker is, in practical business, frequently combined.’ <sup>357</sup> Also ‘A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the merchant, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation, he is not trusted with the possession of the goods, and he ought not to sell in his own name.’ <sup>358</sup>
Brett LJ	1876	‘The definition of a factor I thought always was that which is laid down in Smith’s <i>Mercantile Law</i> , where it is said: ‘There are two extensive classes of mercantile agents, namely, factors who are entrusted with the possession as well as the disposition of property, and brokers, who are employed without being put into possession of the goods.’ <sup>359</sup>
Cotton LJ	1883	A factor is an agent, but an agent of a particular kind. He is an agent entrusted with the possession of goods for the purpose of sale. This is the true definition of a factor.’ <sup>360</sup>
Factors Act	1889	S 1, for the purposes of the Act, this means: ‘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.
Walker	1980	‘A mercantile agent who in the ordinary course of business is entrusted with possession of goods or of the documents of title thereto with a view to their sale. By statute a factor may in certain cases pass to another a good title in property not his own but entrusted to him. A factor differs from a broker in that he may sell in his own name. The term factor is also used in Scotland for a property manager, who acts on behalf of the owner of the property, receiving rents and arranging for repairs. An estate factor is the general manager of an estate.’ <sup>361</sup>
Halsbury		‘a mercantile agent who in the ordinary course of business is entrusted with possession of goods or of documents of title thereto, and a ‘ <i>broker</i> ’; is a mercantile agent who in the ordinary course of business is employed to make contracts for the purchase or sale of property or goods of which he is not entrusted with the possession or documents of title.’ <sup>362</sup>

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<sup>355</sup> Paley, n 13.

<sup>356</sup> McCulloch, n 35, p 587.

<sup>357</sup> Selwyn, n 13. Selwyn also stated, vol 1, p 731 ‘Foreign factors are agents residing here, commissioned by merchants resident abroad, or the contrary. Home factors are agents resident in England, commissioned by merchants also resident in England.’

<sup>358</sup> *Ibid*, p 735.

<sup>359</sup> *Ex p Dixon* (1876) 4 Ch D at p 137. The reference is to Smith, *Compendium of Mercantile Law* (1<sup>st</sup> ed, 1834, 9<sup>th</sup> ed, 1877). The 9<sup>th</sup> ed, p 106 stated ‘There are two extensive classes of mercantile agents, namely, factors who are entrusted with the possession as well as the disposition of property, and brokers, who are employed to contract about it, without being put into possession of the goods.’

<sup>360</sup> *Stevens v Buller* (1883) 25 ChD 31, at p 37. This definition is not accurate since a factor was also entrusted to consign goods for sale (under the common law) and to pledge them (under the 1842 Act).

<sup>361</sup> The Scots term ‘*factor*’ is similar to the position in the time of Fleta (c.1290) in England, see 3(a).

<sup>362</sup> Halsbury, n 14, vol 1, para 12.