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Secured Transactions History: the Northern Struggle to Defeat the Judgment Lien in the Pre-chattel Mortgage Act Era

GEORGE LEE FLINT, JR.*

INTRODUCTION

Reformers recently have attacked the priority accorded the Anglo-American nonpossessory secured transaction both under bankruptcy¹ and nonbankruptcy law.² These reformers believe that the law should reserve some of the debtors assets for general creditors,³ most notably tort claimants with judgment liens won by highly-paid plaintiff's attorneys.

In an earlier era, an eminent jurist noted that lawmakers adopt legal rules, such as the priority rule, to solve some problem.⁴ After centuries pass, the original problem has vanished, yet the rule remains. So a new generation of lawmakers first determines if some new rationale justifies the rule. If so, the rule takes on a new life. The implication is that only when this effort fails should lawmakers change rules to accommodate the new conditions. Current economic justifications for the nonpossessory secured transaction have so far proven unhelpful.⁵

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1. See Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 909 (1996) (a 25% carve out). A secured transaction insures that a lender gets repaid. In return for the loan, the lender gets an interest in the borrower's personalty. See U.C.C. § 1-201(37) (1997). Secured transactions do not include security interests in realty, the subject of mortgages. See U.C.C. § 9-104(j) (1997). Secured transactions differ depending on whether the creditor takes possession of the collateral, a pledge, or the debtor retains possession of the collateral, a nonpossessory secured transaction. See U.C.C. § 9-102(2) (1997).

2. See Elizabeth Warren, *An Article 9 Set-Aside for Unsecured Creditors*, 51 CONSUMER FIN. L.Q. 323 (1997) (a 20% set aside in U.C.C. § 9-301); see also Lynn M. LoPucki, *Should the Secured Credit Carve Out Apply Only in Bankruptcy? A Systems/Strategic Analysis*, 82 CORNELL L. REV. 1483 (1997).

3. See, e.g., *Benedict v. Ratner*, 268 U.S. 353, 364-65 (1925) (rejecting chattel mortgage of accounts even though transaction has no ostensible ownership problem, effectively reserving accounts for general creditors).

4. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (1881).

5. See, e.g., Lois R. Lupica, *Asset Securitization: The Unsecured Creditor's Perspective*, 76 TEX. L. REV. 595, 620 (1998); Bebchuk & Fried, *supra* note 1, at 862-63 n.23 (providing numerous citations).

So before engaging in search of a replacement justification and before succumbing to the reformers' siren song to emasculate the nonpossessory secured transaction, an understanding of the original reason for the rule granting the nonpossessory secured transaction priority would prove helpful. This article aims to provide that understanding.

Prior legal historians failed to investigate the reasons for the development of the nonpossessory secured transaction in Anglo-American jurisdictions. Instead, they assumed that pre-chattel mortgage act law banned the nonpossessory secured transaction as fraudulent.⁶ As a result these historians found certain situations inexplicable. For example, their most prominent spokesman, Grant Gilmore,⁷ noticed his fraudulent myth could not explain the use of different security devices in England and the United States during the nineteenth century:

The hypothesis which has just been outlined does not account for the curious fact that the nineteenth century development of personal property security was one thing in the United States and a quite different thing in England.... For an explanation of this divergent development, we must await the patient labors of the historians.⁸

The author has recently shown that this fraudulent scenario has no basis in the historical record.⁹ So the current investigation breaks new ground. This article endeavors to examine that historical record to determine in what situations the parties used the early nonpossessory secured transaction, what rules the courts developed to handle the transaction, and which parties benefitted from the old rules, which parties desired to ban the transaction, and

6. See 1 GRANT GILMORE, *SECURITY INTEREST IN PERSONAL PROPERTY* 24 (1965); Thomas D. Morris, 'Society is not Marked by Punctuality in the Payment of Debts': *The Chattel Mortgages of Slaves*, in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* 147, 150 (University Press of Mississippi, 1984).

7. Grant Gilmore was a law professor at Yale University, respected legal historian, and a draftsman of the article of the Uniform Commercial Code dealing with secured transactions. For Gilmore's expertise in secured transactions, see DOUGLAS G. BAIRD & THOMAS H. JACKSON, *CASES, PROBLEMS, AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY* XXV (1987) (calling Gilmore the chief architect of Article 9). Gilmore wrote two books on legal history. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977); see also MARQUIS WHO'S WHO, INC., *WHO'S WHO IN AMERICA* 154 (40th ed. 1978).

8. Gilmore, *supra* note 6, at 26.

9. See George Lee Flint, Jr., *Secured Transactions History: The Fraudulent Myth*, (draft of article, on file with author and the *Northern Illinois University Law Review*) (forthcoming in 29 *UNIV. N. MEX. L. REV.* (1999)) [hereinafter Flint, *Fraudulent Myth*].

which parties sought the reform of recording through the chattel mortgage acts.

The Anglo-American nonpossessory secured transaction first appeared in the late seventeenth century.¹⁰ The 1677 Statute of Frauds destroyed the priority previously accorded the collusive judgment.¹¹ For a collusive judgment, a security device involving a recognizance, statute merchant, or statute staple, the secured party obtained the judgment and execution writ prior to the lending with the cooperation of the debtor.¹² Collusive judgments, covered all the debtor's personalty as well as some realty as of the date of the judgment, permitted debtor possession of the collateral, and had enjoyed priority as of the date of the execution writ. Many classes of society used collusive judgments extensively for a variety of different transactions, both commercial and non-commercial. But the 1677 Statute of Frauds, designed by landed aristocrats to facilitate the one-time sale of family land and treasures to satisfy debts from luxuriant living, provided judgment liens, including collusive judgments, with priority against personalty from the time the judgment creditor delivered the writ of execution to the sheriff. The destruction of the priority previously accorded this competing security interest made the nonpossessory secured transaction viable.

In the eighteenth century the nonpossessory secured transaction generally took the form of a sale subject to defeasance or reconveyance conditions regarding payment of the debt: the chattel mortgage, the conditional bill of sale, or the deed of trust.¹³ The difference between a chattel mortgage and a conditional bill of sale involved redemption and the risk of loss for the collateral. Under the chattel mortgage the debtor retained equitable title for purposes of reacquiring the collateral in equity court, a redemption, for a reasonable period after default. A conditional bill of sale eliminated this right of redemption; instead, the debtor had a right to repurchase, the conditions of which the debtor had to satisfy or lose the right to repurchase. For a chattel mortgage the risk of loss lay on the debtor, while for a conditional bill of sale, on the secured party. The deed of trust resembled the chattel mortgage except instead of the secured party obtaining title to the collateral a third party, the trustee, received title. Under all three

10. *See id.* at 22-24 nn.89-95.

11. 29 Car. II, c. 3, § 16 (1677) (Eng.), reprinted in 5 STATUTES OF THE REALM 839, 841 (London, Dawson's of Pall Mall, 1810-28) [hereinafter STAT. OF REALM]; *see also* Flint, *Fraudulent Myth*, *supra* note 9, at 22-24 nn.89-95.

12. *See id.* at 17-21 nn.76-87.

13. *See id.* at 8-9 nn.33-37.

forms the pre-chattel mortgage act nonpossessory secured transaction constituted a sale.

But use of the nonpossessory secured transaction did not come without problems. The form of the transaction, devised in the fifteenth century for landed aristocrats, had significant ramifications for buyers and sellers of trade goods. He who had title to the collateral, had priority in the collateral. The priority for a nonpossessory secured transaction dated from the date of the sale, when title passed. So a seller on credit created a nonpossessory secured transaction by retaining title, the conditional bill of sale, or taking back title, the chattel mortgage. But his buyer, whether a wholesaler or retailer, had no title, or at best conditional title, to transfer in a resale. This tension between the desires of the first seller for security and of the ultimate buyer not to pay twice for the collateral¹⁴ would lead to legal conflict during the pre-chattel mortgage act era and afterwards.

Moreover, although nonpossessory secured transactions enlarge the available collateral to offer in return for credit, they create a potential for debtor fraud not available with the collusive judgment. The nonpossessory secured transaction separates the ownership of the collateral, the interest held by the creditor, from its possession, held by the debtor. This separation allows the debtor to create such successive security interests in the collateral by keeping secret the earlier interests. The potential for secret security interests led third parties injured by that secrecy to attack the nonpossessory secured transaction as fraudulent under the 1571 Fraudulent Conveyance Statute.¹⁵

Under this statute the English courts developed the rebuttable rule, designed to benefit the emerging merchant aristocracy, to determine whether debtor possession constituted fraud.¹⁶ The rebuttable rule presumed debtor possession as fraudulent. The secured party could rebut the presumption by showing evidence of a nonpossessory secured transaction and allow the jury to determine its validity. Merchants in the eighteenth century generally

14. The purchases were once to the now insolvent debtor on the collateral's purchase and again later to the secured party as owner of the collateral.

15. Fraudulent Conveyance Act of 1571, 13 Eliz. I, c. 5, § 1 (Eng.) [hereinafter Fraudulent Conveyance Act], *reprinted in* 4 STAT. OF REALM, *supra* note 11, at 537; 14 Eliz. I, c. 11, § 1 (1572) (Eng.) (reenacting the Fraudulent Conveyance Act of 1571), *reprinted in* 4 STAT. OF REALM, *supra*, at 602; 29 Eliz. I, c. 5, § 1 (1587) (Eng.) (perpetualizing the Act), *reprinted in* 4 STAT. OF REALM, *supra*, at 769; *see also* Fraudulent Conveyance Act of 1585, 27 Eliz. I, c. 4 (Eng.), *reprinted in* 4 STAT. OF REALM, *supra*, at 709 (extending the Fraudulent Conveyance Act of 1571 to purchasers); 39 Eliz. I, c. 18, § 3 (1588) (Eng.), *reprinted in* 4 STAT. OF REALM, *supra*, at 916 (perpetualizing the extension). *See generally* A.K.R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 550 (Sweet & Maxwell, Ltd., 4th ed. 1958).

16. *See* Flint, Fraudulent Myth, *supra* note 9, at 33-38 nn.140-162.

extended credit with informal documentation.¹⁷ Consequently, they might have provided their debtor-buyer a title document in absolute form (without the defeasance or reconveyance condition) and require supplementation to demonstrate the defeasance or reconveyance condition in light of debtor possession. The rebuttable rule allowed this additional evidence to affect favorably the outcome. Never-the-less, the rebuttable rule, applied by a jury, provided a chance of defeating the nonpossessory secured transaction by those opposed to it.

The chattel mortgage acts obviated only the secrecy problem. The chattel mortgage acts required a public filing for the priority of the nonpossessory secured transaction. The southern American colonies adopted them in the eighteenth century, the northern United States adopted them in the 1830's, and Great Britain adopted one in 1854.¹⁸

This article examines the readily findable pre-chattel mortgage act appellate opinions for factual data bearing on the early use of the nonpossessory secured transaction. These decisions range from inception of the nonpossessory secured transaction fostered by the 1677 Statute of Frauds to the alteration of the priority rule by the chattel mortgage acts. Since southern states did not begin their opinions until after the adoption of their respective chattel mortgage acts, this article does not include the southern opinions. Similarly, the article only briefly describes the opinions of England as numbering too few and spread over too large a time period to provide accurate indications of use. So the majority of opinions examined come from the northern United States. The first three sections treat the northern United States. The first section explores the parties involved in the early transactions and examines the structure of the early nonpossessory secured transaction. Endorsers dominated the secured group. Parties entered nonpossessory secured transactions after lending and required supplemental documentation to evidence the transaction. The second section plumbs the litigation to enforce the early nonpossessory secured transaction and investigates the four rules the American courts used when third parties challenged the nonpossessory secured transaction. Most actions sought remedies for interference by judgment liens. The court's rule fostered this litigation. The third section determines the social groups behind a particular rule. Equipment manufacturers and institutional lenders, accurate draftsmen, risked loss under the rebuttable rule's jury determination. Retailers and buyers opposed the nonpossessory secured transaction since it interfered with selling from

17. 6 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 393 (Methuen & Co., Ltd., 5th ed. 1942, reprinted Methuen & Co., Ltd., 1966).

18. See Flint, *Fraudulent Myth*, *supra* note 9, at 3-4 nn.10-12.

inventory. Wholesalers and jobbers, sloppy draftsmen, favored the status quo. The fourth section deals with the English opinions for confirmation of the American trends. The English situation differed in that the English bankruptcy laws, which did use a fraudulent rule, reduced the problems experienced by equipment manufacturers and retailers. As merchants they would be subject to the fraudulent rule. English equipment manufacturers also had far less political power in England than did their counterparts in America.

I. THE AMERICAN DECISIONS

The American opinion evidence contained three drawbacks. First, the facts behind appellate opinions in the Anglo-American system are bizarre, pathological, and atypical.¹⁹ Parties do not litigate over well settled situations described in the legal rules. Typical fact patterns result in settlement before reaching the appellate court. Parties only fight over questionable cases that do not fit the accepted legal rule. So the facts underlying the found opinions might not provide a good indication of the era's accepted business practices. But the rule in general use did appear from the opinions. The party favored by that rule would advocate its application. The other party would advocate an exception. The court's rule generally would modify that generally accepted rule to fit the bizarre situation. Historians can make inferences as to the era's accepted business practices from the rule in general use.

Second, the facts behind the appellate opinion in the Anglo-American system are not readily available, but are severely attenuated.²⁰ The American legal systems use an adversary system. Parties only present those facts favorable to their position to the trial court. Appellate lawyers further reduce these facts by disclosing to the appellate court only those facts important to the particular point of the appeal. The appellate judges further sift these facts to present only those necessary to support their opinion. Early opinions suffered two additional winnowings.²¹ Trial judges in early American courts used procedures designed to strictly narrow the issues involved, to one if possible. Also since appellate judges omitted the facts from their reported opinions, the early reporters selected from the other appellate court documents

19. KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 62 (1930).

20. *Id.* at 35.

21. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY 1760-1830*, at 21-22 (1975) (colonial pleadings designed to present jury with one issue); *id.* at 86-87 (colonial pleading not replaced with notice pleading until 1830's).

the facts they thought relevant to the opinion.²² So the facts available from the reported appellate opinions only dimly mirrored the conditions in the historical era. But the large number of cases established some factual trends.

Third, many states did not commence reporting appellate opinions until shortly before the passage of the chattel mortgage acts, and some even later. Lawyers did not report colonial opinions. Historians cite as causes the availability of printed English opinions, regarded as the ultimate authority in the colonies, and the absence of a large market to justify the printing cost.²³ Reports of American opinions began at the turn of the nineteenth century because of statutes requiring appellate judges to write reasons for their opinions or authorizing the appointment of court reporters.²⁴ By then American courts needed reports to avoid the confusion caused by forgetting,

22. ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 37 (1990).

23. *E.g., id.* at 24-26. Some colonial lawyers kept notebooks of opinions they deemed significant, some of which Alexander Dallas published for Pennsylvania in 1790 covering cases from 1754 to 1776 and Josiah Quincy, for Massachusetts in 1865 covering cases from 1761 to 1772. CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 328 n.1 (1911). The practice continued after the American Revolution. Dudley Atkins Tyng reported some for Massachusetts in 1808, covering 1786 to 1805, 2 Mass. 497; Richard Smith Coxe, for New Jersey in 1816 covering 1790 to 1793, 1 N.J. Law 1; and Joseph Angell, for Rhode Island in 1847 covering 1828 to 1841, 1 R.I. xviii, 1. Similarly, twentieth century historians have published some New York colonial trial reports. These opinions predominantly use the form pleading then common, making it difficult to discern the true facts. *See* RICHARD B. MORRIS, ED., *SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784* (1935).

24. For written opinion statutes, *see* 1784 Conn. Laws, p. 268 (May Sess.: Act Establishing the Wages of the Superior Court); 1819 Ill. Laws, p. 373, 374-75, §§ 7 & 8 (written and published); 1816 Ind. Laws, c. 1, § 26, p. 21; 1840 Iowa Terr. Laws, res. 4, p. 54-55 (extra session); 1849 Minn. Laws, c. 20, § 8, p. 56 (written and a reporter selected); 1806 Pa. Laws, c. 122, § 25, p. 345; 1836 Wis. Terr. Laws, c. 9, § 6, p. 37. Some states reported opinions by judicial order, *see* CHARLES HAMMOND, *CASES DECIDED IN THE SUPREME COURT OF OHIO* 1 (Geo. D. Emerson, 1850) (August 1821). Pennsylvania, however, only had unofficial reports before 1845. EDWIN C. SURRENCY, *RESEARCH IN PENNSYLVANIA LAW* 20 (1965) (expressing doubt about the completeness of the earliest reported period 1754 to 1806). For reporter statutes, *see* 1820 Me. Laws, c. 17, § 9, p. 18; 1804 Mass. Laws, c. 133, p. 449-50; 1844 Mich. Laws, c. 21, § 2, p. 19; 1806 N.J. Laws, c. 115, p. 688-89; 1815 N.H. Laws, c. 46, p. 16 (repealed Dec. 18, 1816); 1804 N.Y. Laws, c. 68, p. 468; 1845 R.I. Laws, p. 62 (Jan. Sess.); 1823 Vt. Laws, c. 12, p. 9. Vermont had several private printings prior to 1823 covering narrow eras. DANIEL CHIPMAN, *REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF VERMONT* xiii-xiv (1824); *see also* WILLIAM BRAYTON, *REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF THE STATE OF VERMONT* (1821) (for cases 1815 to 1819); NATHANIEL CHIPMAN, *REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF VERMONT IN THE YEARS 1789, 1790, AND 1791* (1793) (for cases 1789 to 1791); ROYALL TYLER, *REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF JUDICATURE OF THE STATE OF VERMONT* (1809) (for cases 1800 to 1803). For the need for reports, *see* EPHRAIM KIRBY, *REPORT OF THE CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT* iii (1789); CHIPMAN, *supra*, at 4 (English common law does not apply in all cases, so America needs its own common law).

misunderstanding, or erroneously remembering their prior decisions. So reported opinions in the northern states started in 1778 for Pennsylvania (published in 1790), 1786 for Connecticut (published 1789), 1794 for New York (published 1801), 1804 for Massachusetts (published 1805), 1804 for New Jersey (published 1808), 1816 for New Hampshire (published 1819), 1817 for Indiana (published 1830), 1820 for Maine (published 1822), 1820 for Illinois (published 1831), 1821 for Ohio (published 1833), 1824 for Vermont (published 1824), 1839 for Wisconsin (published 1840), 1839 for Iowa (published 1849), 1843 for Michigan (published 1846), 1847 for Rhode Island (published 1847), and 1851 for Minnesota (published 1853).²⁵ Minnesota's and Rhode Island's reports began after the passage of their respective chattel mortgage act.

These reports contained one hundred forty-seven appellate opinions in the northern states dealing with the nonpossessory secured transactions prior to the passage of the respective chattel mortgage act.²⁶ To understand why the

25. For dates of the first reports, see WARREN, *supra* note 23, at 328-331. For the first reports, see NATHANIEL ADAMS, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPERIOR COURT OF JUDICATURE FOR THE STATE OF NEW HAMPSHIRE (1819); JOSEPH ANGELL, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF RHODE ISLAND xviii (J.H. Bongartz, 1909-10) (first printed in 1847 in pamphlet form); ISAAC NEWTON BLACKFORD, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF JUDICATURE OF THE STATE OF INDIANA (Bowen-Merrill Co., 3d ed. 1891) (1830); SIDNEY BREESE, REPORTS OF CASES AT COMMON LAW AND IN CHANCERY ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF ILLINOIS (Callaghan & Co., 2d ed. 1877) (1831); CHIPMAN, *supra* note 24 (including a few cases from 1814 to 1823); WILLIAM COLEMAN, CASES OF PRACTICE ADJUDGED IN THE SUPREME COURT OF THE STATE OF NEW YORK (Lawyer's Co-operative Publishing Co., 1883) (1801); ALEXANDER JAMES DALLAS, REPORTS OF CASES RULED AND ADJUDGED IN THE COURTS OF PENNSYLVANIA BEFORE AND SINCE THE REVOLUTION (Nicklin & Johnson, 3d ed. 1830) (1790); SAMUEL DOUGLAS, REPORTS OF CASES ARGUED AND DELIVERED IN THE SUPREME COURT OF THE STATE OF MICHIGAN (1846); JAMES GILFILLAN, CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF MINNESOTA (1877) (including revised opinions reported with statutory recompilations as early as 1853); ARLETTE M. SODERBERG & BARBARA L. GOLDEN, MINNESOTA LEGAL RESEARCH GUIDE 99, 199 (1985); SIMON GREENLEAF, REPORTS OF CASES ARGUED AND DECIDED IN THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE (Dresser, McCallan & Co., 1876) (1822); HAMMOND, *supra* note 24 (1833); KIRBY, *supra* note 23; EASTIN MORRIS, REPORTS OF CASES IN LAW AND EQUITY DETERMINED IN THE SUPREME COURT OF IOWA (T.H. Flood & Co., 1892) (1847); WILLIAM SANDFORD PENNINGTON, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW JERSEY (Frederick D. Linn & Co., 1881) (1808); SILAS URIAH PINNEY, REPORTS OF CASES ARGUED AND DECIDED IN THE SUPREME COURT OF THE TERRITORY OF WISCONSIN (1872) (including opinions reported as early as 1840 as an appendix to the session laws); RICHARD A. DANNER, LEGAL RESEARCH IN WISCONSIN 50 (1980); EPHRAIM WILLIAMS, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS (Little, Brown & Co., 1866) (1806).

26. The one hundred forty-seven opinions are distributed amongst the northeastern states as follows: Maine, 24; New Hampshire, 2; Vermont, 9; Massachusetts, 35; Rhode Island,

nonpossessory secured transaction arose in the eighteenth century required an identification of those taking advantage of the priority rule for the nonpossessory secured transaction and their business practices with the nonpossessory secured transaction. This information came from identifying the parties involved in the opinions and the situation surrounding their use of the nonpossessory secured transaction. This situation involved identification of the borrowers, their courthouse opponents, the timing of the nonpossessory secured transaction with respect to the loan, and the documentation for the transaction.

A. THE PARTIES

The debtors in the early nineteenth century belonged primarily to those businesses spurring economic growth in the era. One hundred twelve of the one hundred forty-seven opinions (76%) specify the debtor type. Before 1815 commercial merchants in the international trade dominated the northern economy due to the absence of European competition, occupied by the Napoleonic Wars. Many commercial merchants owned the ships transferring their goods and so spawned the subsidiary shipbuilding industry. Some merely transferred their goods on the ships of others. Others formed the financial service institutions for their burgeoning trade, the banks and insurance companies. After 1818 with the return of European competition, the American international trade declined as a percentage of the American economy.²⁷

The opinions reflected the commercial merchants' dominance of the pre-chattel mortgage act economy. Fifty-two opinions (46%), the largest single

0; Connecticut, 7; New York, 34; New Jersey to 1840, 2; Pennsylvania to 1840, 18; Ohio, 6; Michigan, 1; Indiana, 4; Illinois, 5; Wisconsin, 0; Iowa, 0; and Minnesota, 0. This numbering does not include assignments for the benefit of creditors, genuine bottomry or respondentia bonds, or pledge opinions. It also excludes opinions dealing with attempted bottomry and respondentia bonds that failed the necessity requirements and hence do not constitute an authorized ship mortgage. But the numbers do include security given by the ship owner in the form of a bottomry or respondentia bond enforceable under the common law, rather than the admiralty, and bailment lease opinions. The bailment lease consisted of two agreements: a lease for a term with rental payments approximating the purchase price and a future sale or option to purchase for a nominal additional payment. Pennsylvanians used it to sell an object on credit. See James A. Montgomery, *The Pennsylvania Bailment Lease*, 79 U. PA. L. REV. 920, 921 (1931); 1 Grant Gilmore, *supra* note 6, at 77-78 (developed in 1831 after the conditional bill of sale failed as a security device for Pennsylvania in 1825); see also *Myers v. Harvey*, 39 Pa. (2 Pen. & W.) 478 (1831) (recognizing the bailment lease); *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826) (rejecting the conditional bill of sale as security).

27. DOUGLAS NORTH, *THE ECONOMIC GROWTH OF THE UNITED STATES 1790-1860*, at 36-42, 47 (W.W. Norton & Co., 1966); GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION 1815-1860*, at 10-11 (Harper & Row, Pub., 1951).

grouping, dealt with loans to them as shipowners and traders. Most of the twenty-three opinions before 1820, sixteen, involved shipowners while one involved a trader.²⁸ After 1820, shipowners continued to borrow, appearing in fifteen additional opinions.²⁹ Twenty more opinions concerned traders and their firms.³⁰

28. For early shipowners, *see* *Philips v. Ledley*, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096) (sloop operator); *Hurry v. The John and Alice*, 12 F. Cas. 1017 (C.C.D. Pa. 1805) (No. 6,923), *on retrial*, *Hurry v. Hurry's Assignees*, 12 F. Cas. 1015 (C.C.D. Pa. 1808) (No. 6,922) (brig owner); *Forbes v. The Hannah*, 9 F. Cas. 406 (Adm. Ct. Pa. 1786) (No. 4,925) (brig owner); *Starr v. Knox*, 2 Conn. 215 (1817) (shipowner); *Clark v. Richards*, 1 Conn. 53 (1814) (owner of sloop); *Tucker v. Buffington*, 15 Mass. (14 Tyng) 477 (1819) (two failed shipowners); *Putnam v. Dutch*, 8 Mass. (7 Tyng) 286 (1811) (insolvent co-shipowner); *Portland Bank v. Stubbs*, 6 Mass. (5 Tyng) 423 (1810) (ship owning firm); *Portland Bank v. Stacey*, 4 Mass. (3 Tyng) 661 (1808) (two shipowners); *Hussey v. Thornton*, 4 Mass. (3 Tyng) 405 (1808) (two shipowners); *Haven v. Low*, 2 N.H. 13 (1819) (shipowner); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1816) (co-shipowner and merchant firm); *M'Intyre v. Scott*, 8 Johns. 159 (N.Y. Sup. Ct. 1811) (shipowner); *Wendover v. Hogeboom*, 7 Johns. 308 (N.Y. Sup. Ct. 1810) (vessel buyer); *Jennings v. Insurance Co. of Pa.*, 13 Pa. (4 Binn.) 244 (1811) (schooner owner); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791) (ship operator and owner). Shipowners used sloops for the coastal trade, two-masted brigs in the Latin American trade, and three-masted ships in the Atlantic trade. *See* George Rogers Taylor, *supra* note 27, at 107. For the trader, *see* *Dawes v. Cope*, 13 Pa. (4 Binn.) 258 (1811) (Philadelphia merchant).

29. *See* *The Mary*, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187) (owner of sloop); *Winslow v. Tarbox*, 18 Me. 132 (1841) (brig owner); *Gleason v. Drew*, 9 Me. 79 (1832) (boat buyer); *Colson v. Bonzey*, 6 Me. 474 (1830) (master and vessel owner); *Thorndike v. Stone*, 28 Mass. (11 Pick.) 183 (1831) (freight operator); *Peters v. Ballister*, 20 Mass. (3 Pick.) 495 (1826) (insolvent Portland shipowner); *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 19 Mass. (2 Pick.) 249 (1824) (shipowner); *Badlam v. Tucker*, 18 Mass. (1 Pick.) 388 (1823) (North Carolina ship owning firm); *Bartlett v. Williams*, 18 Mass. (1 Pick.) 288 (1823) (shipowner); *Marston v. Baldwin*, 17 Mass. (16 Tyng) 606 (1822) (shipowner); *Murray v. Burtis*, 15 Wend. 212 (N.Y. Sup. Ct. 1836) (sloop seller); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1832) (sloop operator); *Birkbeck v. Tucker*, 2 Hall 121 (N.Y. Super. Ct. 1829) (ship owner); *Ring v. Franklin*, 2 Hall 1 (N.Y. Super. Ct. 1829) (ship owner); *Thorn v. Hicks*, 7 Cow. 696 (N.Y. Sup. Ct. 1826) (sloop buyer).

30. *See* *D'Wolf v. Harris*, 29 U.S. (4 Pet.) 147 (1830) (Rhode Island merchant); *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (Philadelphia merchant); *Franklin Ins. Co. v. Lord*, 9 F. Cas. 712 (C.C.D. Mass. 1826) (No. 5,057) (Boston merchant); *United States v. Delaware Ins. Co.*, 25 F. Cas. 811 (C.C.D. Pa. 1823) (No. 14,942) (Philadelphia merchant); *Lane v. Borland*, 14 Me. 77 (1836) (firm); *Ward v. Sumner*, 22 Mass. 59 (1827) (merchant in mercantile firm); *Witwell v. Vincent*, 21 Mass. 452 (1825) (gin jobber); *Parks v. Hall*, 19 Mass. 206 (1824) (wine jobber); *Rice v. Austin*, 17 Mass. (16 Tyng) 197 (1821) (navy contractor for lumber); *Lanfeer v. Sumner*, 17 Mass. (16 Tyng) 110 (1821) (Boston consignee); *New England Marine Ins. Co. v. Chandler*, 16 Mass. (16 Tyng) 275 (1820) (shareholder of bank and insurance companies); *Rogers v. Traders Ins. Co.*, 6 Paige Ch. 581 (N.Y. Ch. 1837) (Mobile traders); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. Ch. 1835) (New Orleans trading partnership); *Lewis v. Stevenson*, 2 Hall 63 (N.Y. Super. Ct. 1829) (New York City merchant); *Stutson v. Brown*, 7 Cow. 732 (N.Y. Sup. Ct. 1827) (member of firm); *Ludlow v. Hurd*, 19 Johns. 218 (N.Y. Sup. Ct. 1821) (member of insolvent trading firm); *Collins v. Meyer*, 16 Ohio 547 (1847) (merchant partner); *Delaware Ins. Co. v. Archer*, 35 Pa. (3 Rawle) 216 (1832) (Philadelphia merchant);

The manufacturing industries began on a large scale when Jefferson's 1807 embargo forced some commercial merchants in the international trade to shift their moneys to manufacturing embargoed goods in order to reduce risks.³¹ After 1815, these businesses and their competitors, especially the textile industries, began to require funds. Since commercial merchants, the one group at the time with investable money,³² funded these emergent manufactures, as well as established manufacturers, they would use the same lending practices employed in their shipping business. Again, the opinions mirrored this need and practice. Twenty-nine opinions (26%), the second largest grouping, dealt with manufacturing businesses. Most of these opinions, sixteen, treated emergent manufacturing businesses, prominent only after 1807 and requiring mechanical power, fourteen dealt with textiles both cotton and woolen and two unspecified, but requiring steam engines.³³ Thirteen opinions involved established manufacturing, prominent in the colonial era but only on a small scale, three dealt with bricks, three with leather, two with spirits, two with printing, one with shipbuilding, one with lumber, and one

Insurance Co. of Pa. v. Duval, 23 Pa. (8 Serg. & Rawle) 138 (1822) (Philadelphia merchant); Fisher v. Willing, 23 Pa. (8 Serg. & Rawle) 118 (1822) (Philadelphia merchant).

31. For commercial merchant funding of manufacturing, *see* NORTH, *supra* note 27, at 56, 159; PETER J. COLEMAN, THE TRANSFORMATION OF RHODE ISLAND 1790-1860 71-77 (1963); ROBERT DALZELL, ENTERPRISING ELITE: THE BOSTON ASSOCIATES AND THE WORLD THEY MADE 4 (1987); BARBARA M. TUCKER, SAMUEL SLATER AND THE ORIGINS OF THE AMERICAN TEXTILE INDUSTRY: 1790-1860 34 (1984) (in England); *id.* at 47-63 (tracing the origin of factory culture to Rhode Island merchant practices). *But see* PHILIP SCRANTON, PROPRIETARY CAPITALISM: THE TEXTILE MANUFACTURERS AT PHILADELPHIA, 1800-1885 36-41 (1984) (describing the alternative of alien skilled workers as sole proprietorships eventually owning mills).

32. *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 56 (1957) (noting that Pennsylvania bank merchants lent only to themselves); *id.* at 66 (Massachusetts merchants incorporated Massachusetts banks); *id.* at 72 (banks set up for merchants only).

33. For the textiles, *see* Wilbur v. Almy, 53 U.S. (12 How.) 180 (1850) (cotton textile factory operator); Swift v. Thompson, 9 Conn. 63 (1831) (cotton textile factory owner); Brinley v. Spring, 7 Me. 241 (1831) (cotton and iron manufacturing company); Reed v. Jewett, 5 Me. 96 (1827) (carding machine operator); Haskell v. Greely, 3 Me. 425 (1825) (partner in lease of carding machine); Sumner v. Hamlet, 29 Mass. (12 Pick.) 76 (1831) (woolen textile factory owning partnership); Carrington v. Smith, 25 Mass. (9 Pick.) 419 (1829) (textile factory operator); Flagg v. Dryden, 24 Mass. (8 Pick.) 52 (1828) (textile factory operator); Ayer v. Bartlett, 23 Mass. (7 Pick.) 71 (1827) (cotton textile factory buyer); Homes v. Crane, 19 Mass. (2 Pick.) 607 (1824) (textile factory owner); Barrett v. Pritchard, 19 Mass. (2 Pick.) 512 (1824) (woolen manufactory operator); Gale v. Ward, 14 Mass. (13 Tyng) 352 (1817) (wool carding factory buyer); Sturgis v. Warren, 11 Vt. 433 (1839) (woolen manufacturing company); Tobias v. Francis, 3 Vt. 425 (1830) (woolen textile factory operator). For steam engines, *see* Langdon v. Buel, 9 Wend. 80 (N.Y. Sup. Ct. 1832) (buyer of steam engine); Rogers v. Dare, Wright 136 (Guernsey County Ct. 1832) (steam engine operator).

addressed construction.³⁴ Moreover, the bulk of the manufacturing cases occurred after 1823, except one each in 1815, 1817, and 1819.

The northern economy included two other groups of less substantial means; the farmers and townspeople.³⁵ The smaller borrowing needs of these less substantial groups did not involve nonpossessory secured transactions until late in the pre-chattel mortgage act era. Commercial merchants did not lend to the common man until the political strength of the less wealthy forced the formation of banks to fund their activities.³⁶ Sixteen opinions (14%) dealt with farmers, none before 1826.³⁷ Twelve opinions (11%) concerned the townspeople, namely, seven retailers, three transporters, and two professionals, none before 1819.³⁸

34. See *Patten v. Smith*, 5 Conn. 196 (1824) (Hartford printer and bookbinder); *Goodenow v. Dunn*, 21 Me. 86 (1842) (ship builder); *Smith v. Putney*, 18 Me. 87 (1841) (newspaper publisher); *Macomber v. Parker*, 31 Mass. (13 Pick.) 497 (1833) (brick maker); *Merrill v. Hunnewell*, 30 Mass. (13 Pick.) 213 (1832) (brick factory owner); *Reed v. Upton*, 27 Mass. (10 Pick.) 522 (1830) (brick maker); *Jewett v. Warren*, 12 Mass. (11 Tyng) 300 (1815) (deceased insolvent saw mill operator); *Elder v. Rouse*, 15 Wend. 218 (N.Y. Sup. Ct. 1836) (church builder); *McLachlan v. Wright*, 3 Wend. 348 (N.Y. Sup. Ct. 1829) (brewer); *Reynolds v. Shuler*, 5 Cow. 323 (N.Y. Sup. Ct. 1826) (distillery operator); *Jenkins v. Eichelberger*, 44 Pa. (4 Watts) 121 (1838) (tanner); *Passmore v. Eldridge*, 27 Pa. (5 Serg. & Rawle) 198 (1826) (tannery operator); *Clow v. Woods*, 20 Pa. (5 Serg. & Rawle) 275 (1819) (tannery operator).

35. See JONATHAN HUGHES, *AMERICAN ECONOMIC HISTORY* 30, 32-34 (3d ed. 1990); TUCKER, *supra* note 31, at 24-26 (merchants, artisans, and unskilled farm workers).

36. See HAMMOND, *supra* note 32, at 116 (Hamilton's banks served only merchants, not farmers); *id.* at 119 (agrarians oppose U.S. bank); *id.* at 145-47 (Republicans came to power to break Federalist commercial bank monopoly, made banks ancillary to agriculture and industry by lending to farmers and mechanics).

37. See *Toby v. Reed*, 9 Conn. 216 (1832) (farm owner); *Pickard v. Low*, 15 Me. 48 (1838) (buyer of oxen); *Tibbetts v. Towle*, 12 Me. 341 (1835) (buyer of oxen); *Smith v. Tilton*, 10 Me. 350 (1833) (buyer of oxen); *Lunt v. Whitaker*, 10 Me. 310 (1833) (farmer); *Fletcher v. Willard*, 31 Mass. (14 Pick.) 464 (1833) (farmer); *Adams v. Wheeler*, 27 Mass. (10 Pick.) 199 (1830) (farmer); *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522 (1827) (tenant farmer); *Ash v. Savage*, 5 N.H. 545 (1831) (buyer of oxen); *Hooben v. Bidwell*, 16 Ohio 509 (1847) (buyer of wagon and oxen); *Middlesworth v. Robinson*, *Wright* 552 (Ohio 1834) (farmer); *Myers v. Harvey*, 39 Pa. (2 Pen. & W.) 478 (1831) (farmer); *Welsh v. Bekey*, 38 Pa. (1 Pen. & W.) 57 (1829) (farmer); *Durkee v. Leland*, 4 Vt. 612 (1832) (maple sugar farmer); *Spaulding v. Austin*, 2 Vt. 555 (1830) (sheep herder); *Fletcher v. Howard*, 2 Aik. 115 (Vt. 1826) (farmer).

38. For retailers, see *Bartels v. Harris*, 4 Me. 146 (1826) (store operator); *Shumway v. Rutter*, 24 Mass. (7 Pick.) 56 (1828) (tavern operator); *Jackson v. Dean*, 1 Doug. 519 (Mich. 1845) (tavern operator); *Hendricks v. Mount*, 5 N.J.L. 738 (1820) (insolvent store operator); *Divver v. McLaughlin*, 2 Wend. 597 (N.Y. Sup. Ct. 1829) (grocery operator); *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (tavern operator); *Weller v. Wayland*, 17 Johns. 102 (N.Y. Sup. Ct. 1819) (tobacconist). For transporters, see *Hunt v. Holton*, 30 Mass. (13 Pick.) 216 (1832) (stable operator); *Kellogg v. Brennan*, 14 Ohio 72 (1846) (steamboat operator); *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826) (wagoner). For professionals, see *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837) (traveling preacher); *Clark v. Jack*, 47 Pa. (7 Watts) 375 (1838) (law partnership).

These two groups also appeared later since some states provided exemptions from levy for livelihood necessities.³⁹ Lenders would not lend to nonsubstantial individuals on the basis of unleviable assets. And these two groups had few other assets until late in the pre-chattel mortgage act era. Lenders of the era insured repayment by lending on reputation or leviable collateral, a lesson carried over from the collusive judgment.⁴⁰

Three homeowners, one in 1810, could belong to any group.⁴¹

Examination of the collateral, described in one hundred and thirty-nine opinions (95%), revealed the same. Forty-eight opinions (35%), the largest grouping, involved the commercial merchant trade.⁴² Forty dealt with ships

39. See, e.g., Conn. Rev. Stat., tit. 2, § 74 (1821) (necessary apparel, bedding, household furniture, arms, implements of trade, one cow, ten sheep, two swine, two cords of wood, limited meat, potatoes, and wool, and one stove); 1821 Me. Laws 95 (wearing apparel, beds and bedding, household utensils, tools of trade, school books, one cow, one swine, and ten sheep); 1805 Mass. Acts 100 (wearing apparel, beds, bedsteads, bedding, and necessary household utensils, necessary tools of trade, Bibles, school books in use, one cow and one swine); 1807 N.H. Laws, p. 19 (wearing apparel, one bed, bedstead and bedding, Bible and school books in use, one cow, and one swine, and tools of trade up to \$20); 1851 N.J. Laws, p. 278 (household goods and tradesmen's tools up to \$200); 1815 N.Y. Laws 227 (sheep, one cow, two swine, wearing apparel, bedding, cooking utensils, one table, six chairs, and eating utensils); 1828 Pa. Laws, No. 128 (limited household utensils and implements of trade, wearing apparel, two beds and bedding, one cow, two hogs, six sheep, one stove, limited meat, potatoes, grain, and flax); 1820 R.I. Laws, p. 18, 22 (June Insolvency Act: furniture, bedding, implements of trade and husbandry, not exceeding \$150); 1797 Verm. Laws, p. 19, 29 (section 12: necessary apparel and bedding).

40. For collateral lending, compare JAMES GRANT, MONEY OF THE MIND: BORROWING AND LENDING IN AMERICA FROM THE CIVIL WAR TO MICHAEL MILKEN 77-79 (1992) (lending on the basis of collateral values in 1870s), with *id.* at 14-15, 384 (lending on basis of cash flows even with negative equity in the 1980s).

41. See *Ripley v. Dolbie*, 18 Me. 382 (1841) (buyer of horse); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810) (town tenant); *Woodward v. Gates*, 9 Vt. 358 (1837) (buyer of horse).

42. For ships and cargos, see *Harris v. D'Wolf*, 29 U.S. (4 Pet.) 147 (1830) (ship, brigs with furniture and cargo); *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1826) (Canton tea on ship); *Franklin Ins. Co. v. Lord*, 9 F. Cas. 712 (C.C.D. Mass. 1826) (No. 5,057) (specie); *United States v. Delaware Ins. Co.*, 25 F. Cas. 811 (C.C.D. Pa. 1823) (No. 14,942) (specie); *Hurry v. The John and Alice*, 12 F. Cas. 1017 (C.C.D. Pa. 1805) (No. 6,923), *on retrial*, *Hurry v. Hurry's Assignees*, 12 F. Cas. 1015 (C.C.D. Pa. 1808) (No. 6,922) (ship); *Philips v. Ledley*, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096) (sloop); *Forbes v. The Hannah*, 9 F. Cas. 406 (Adm. Ct. D. Pa. 1786) (No. 4,925) (brig); *The Mary*, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187) (sloop with tackle, apparel and furniture); *Starr v. Knox*, 2 Conn. 215 (1817) (brig); *Clark v. Richards*, 1 Conn. 53 (1814) (sloop); *Goodenow v. Dunn*, 21 Me. 86 (1842) (vessel); *Winslow v. Tarbox*, 18 Me. 132 (1841) (brig); *Gleason v. Drew*, 9 Me. 79 (1832) (boat); *Colson v. Bonzey*, 6 Me. 474 (1830) (vessel); *Brinley v. Spring*, 7 Me. 241 (1831) (schooner); *Thorndike v. Stone*, 28 Mass. (11 Pick.) 183 (1831) (ship); *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 19 Mass. (2 Pick.) 249 (1824) (brig); *Badlam v. Tucker*, 18 Mass. (1 Pick.) 389 (1823) (brig); *Bartlett v. Williams*, 18 Mass. (1 Pick.) 288 (1823) (vessel); *Tucker v. Buffington*, 15 Mass. (14 Tyng) 477 (1819) (ship, sloop); *Putnam v. Dutch*, 8 Mass. (7 Tyng)

and their cargos, such as Canton tea, South Carolina cotton and rice, and Liverpool salt. Eight concerned traders, their shares of stock, and their goods, including candles, Canton tea, Florida live oak, rum, and gin. Thirty opinions (22%), the second largest grouping, related to manufacturing collateral.⁴³

286 (1811) (sloop); *Portland Bank v. Stubbs*, 6 Mass. (5 Tyng) 422 (1810) (ship and profits of Liverpool salt); *Portland Bank v. Stacey*, 4 Mass. (3 Tyng) 661 (1808) (schooner and cargo of South Carolina cotton and rice); *Haven v. Low*, 2 N.H. 13 (1819) (sloop); *Murray v. Burtis*, 15 Wend. 212 (N.Y. Sup. Ct. 1836) (sloop); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1832) (sloop); *Birkbeck v. Tucker*, 2 Hall 121 (N.Y. Super. Ct. 1829) (ship); *Ring v. Franklin*, 2 Hall 1 (N.Y. Super. Ct. 1829) (ship); *Stutson v. Brown*, 7 Cow. 732 (N.Y. Sup. Ct. 1827) (sloop); *Thorn v. Hicks*, 7 Cow. 696 (N.Y. Sup. Ct. 1827) (sloop); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1816) (ships and cargos from Batavia); *M'Intyre v. Scott*, 8 Johns. 159 (N.Y. Sup. Ct. 1811) (brig); *Wendover v. Hogeboom*, 7 Johns. 308 (N.Y. Sup. Ct. 1810) (vessel); *Delaware Ins. Co. v. Archer*, 35 Pa. (3 Rawle) 216 (1832) (dry goods); *Insurance Co. of Pa. v. Duval*, 23 Pa. (8 Serg. & Rawle) 138 (1822) (merchandise); *Fisher v. Willing*, 23 Pa. (8 Serg. & Rawle) 118 (1822) (ship); *Dawes v. Cope*, 13 Pa. (4 Binn.) 258 (1811) (tobacco and sugar); *Jennings v. Insurance Co. of Pa.*, 13 Pa. (4 Binn.) 244 (1811) (schooner); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791) (ship and brig). For merchant goods, *see Whitwell v. Vincent*, 21 Mass. (4 Pick.) 449 (1827) (hogshead of gin); *Marston v. Baldwin*, 17 Mass. (16 Tyng) 606 (1822) (rum); *Rice v. Austin*, 17 Mass. (16 Tyng) 197 (1821) (Florida live oak); *Lanfeer v. Sumner*, 17 Mass. (16 Tyng) 110 (1821) (Canton tea); *New England Marine Co. v. Chandler*, 16 Mass. (16 Tyng) 275 (1820) (shares of insurance company and bank); *Hussey v. Thornton*, 4 Mass. (3 Tyng) 405 (1808) (boxes of candles); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. Ch. 1835) (trading goods); *Lewis v. Stevenson*, 2 Hall 63 (N.Y. Super. Ct. 1829) (counting-house and household furniture).

43. For the factory of the emergent manufacturer, *see Swift v. Thompson*, 9 Conn. 63 (1831) (land, factory, and cotton textile machinery); *Carrington v. Smith*, 25 Mass. (9 Pick.) 419 (1829) (factory and spinning mule); *Ayer v. Bartlett*, 23 Mass. (7 Pick.) 71 (1827) (factory and cotton textile machinery); *Gale v. Ward*, 14 Mass. (13 Tyng) 352 (1817) (land, factory, and carding machines); *Sturgis v. Warren*, 11 Vt. 433 (1839) (factory and woolen textile machinery). For the equipment of the emergent manufacturer, *see Wilbur v. Almy*, 53 U.S. (12 How.) 180 (1851) (spindle machinery); *Hankins v. Ingols*, 4 Blackf. 35 (Ind. 1835) (carding machine); *Reed v. Jewett*, 5 Me. 96 (1827) (carding machine); *Haskell v. Greely*, 3 Me. 425 (1825) (carding machine); *Flagg v. Dryden*, 24 Mass. (7 Pick.) 52 (1828) (looms); *Homes v. Crane*, 19 Mass. (2 Pick.) 607 (1824) (carding machines); *Langdon v. Buel*, 9 Wend. 80 (N.Y. Sup. Ct. 1832) (steam engine); *Rogers v. Dare*, *Wright* 136 (Guernsey County Ct. 1832) (steam engine); *Tobias v. Francis*, 3 Vt. 425 (1830) (carding machine). For inventory of the emergent manufacturer, *see Sumner v. Hamlet*, 29 Mass. (12 Pick.) 76 (1831) (flannel in factory); *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512 (1824) (woolen goods in factory). For the factory of the established manufacturer, *see Macomber v. Parker*, 31 Mass. (14 Pick.) 497 (1833) (kilns of brick); *Merrill v. Hunnewell*, 30 Mass. (13 Pick.) 213 (1832) (arches of brick). For equipment of the established manufacturer, *see Patten v. Smith*, 5 Conn. 196 (1824) (printing apparatus); *Watson v. Williams*, 4 Blackf. 26 (Ind. 1835) (blacksmith bellows and tools); *Smith v. Putney*, 18 Me. 87 (1841) (printing press); *Reed v. Upton*, 27 Mass. (10 Pick.) 522 (1830) (brick pressing machine); *McLachlan v. Wright*, 3 Wend. 348 (N.Y. Sup. Ct. 1829) (brewery utensils and beer, malt, hops, barrels, and furniture); *Reynolds v. Shuler*, 5 Cow. 323 (N.Y. Sup. Ct. 1826) (copper still, steam tubs, and coolers); *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (blacksmith tools, livestock, crops, and furniture). For inventory of the established manufacturer, *see Jewett v. Warren*, 12 Mass. (11 Tyng) 300 (1815) (logs in river); *Elder v. Rouse*, 15 Wend. 218 (N.Y. Sup. Ct. 1836) (builder's rights in church pews); *Jenkins v.*

Sixteen of these opinions treated collateral of the emergent manufacturers, namely their factory buildings, equipment (such as textile machinery) and inventory (such as wool and flannel). Fourteen referred to the collateral of the established manufacturers, namely their buildings, equipment (such as brick machinery) printing presses and blacksmith's tools, and inventory such as logs, bricks, and pews.

The third largest grouping for the collateral, thirty opinions (22%), pertained to farming collateral, such as hay, corn, wheat, rye, horses, cattle, sheep, hogs, maple sugar equipment, ploughs and wagons.⁴⁴ The fourth largest grouping, sixteen opinions (11%), treated collateral of townspeople.⁴⁵ Nine opinions tied-in with retail merchants, such as general stores, a dry goods

Eichelberger, 44 Pa. (4 Watts) 121 (1835) (hides); Passmore v. Eldridge, 27 Pa. (12 Serg. & Rawle) 198 (1824) (hides and household furniture); Clow v. Woods, 20 Pa. (5 Serg. & Rawle) 275 (1819) (hides and tools).

44. For farm produce, *see* Toby v. Reed, 9 Conn. 216 (1832) (produce and farm); Adams v. Wheeler, 27 Mass. (10 Pick.) 199 (1830) (hay, horse, and cart); Butterfield v. Baker, 22 Mass. (5 Pick.) 522 (1827) (produce, corn); Myers v. Harvey, 39 Pa. (2 Pen. & W.) 478 (1831) (grain in ground, plough, wagon, and horse); Welsh v. Bekey, 38 Pa. (1 Pen. & W.) 57 (1829) (wheat and rye in ground). For livestock, *see* Thornton v. Davenport, 2 Ill. 296 (1836) (livestock); Jordan v. Turner, 3 Blackf. 309 (Ind. 1833) (colt, steer, cow, mare); Ripley v. Dolbier, 18 Me. 382 (1841) (stud horse); Pickard v. Low, 15 Me. 48 (1838) (oxen); Tibbetts v. Towle, 12 Me. 341 (1835) (oxen); Smith v. Tilton, 10 Me. 350 (1833) (oxen); Lunt v. Whitaker, 10 Me. 310 (1833) (livestock); Johns v. Church, 29 Mass. (12 Pick.) 557 (1832) (mare and cow); Ash v. Savage, 5 N.H. 545 (1831) (oxen); Randal v. Cook, 17 Wend. 53 (N.Y. Sup. Ct. 1837) (horses); Patchin v. Pierce, 12 Wend. 61 (N.Y. Sup. Ct. 1834) (mares and cattle); Ferguson v. Union Furnace Co., 9 Wend. 345 (N.Y. Sup. Ct. 1832) (oxen); Ferguson v. Lee, 9 Wend. 258 (N.Y. Sup. Ct. 1832) (cow, hogs, and household furniture); Middlesworth v. Robinson, Wright 552 (Ohio 1834) (hog); Atwater v. Mower, 10 Vt. 75 (1838) (cow); Spaulding v. Austin, 2 Vt. 555 (1830) (sheep, cows, and chaise and harness); Fletcher v. Howard, 2 Aik. 115 (Vt. 1826) (hog). For farm equipment, *see* Rhines v. Phelps, 8 Ill. (3 Gilm.) 455 (1846) (wagon and horses); Morris v. Grover, 2 Ill. (1 Scam.) 528 (1840) (wagon, harness, and horse); Sawyer v. Shaw, 9 Me. 47 (1832) (chaise); Fletcher v. Willard, 31 Mass. (14 Pick.) 464 (1833) (farming utensils and cattle); Ackley v. Finch, 7 Cow. 290 (N.Y. Sup. Ct. 1827) (chaise and harness); Hooben v. Bidwell, 16 Ohio 509 (1847) (wagon, yoke, and oxen); Woodward v. Gates, 9 Vt. 358 (1837) (wagon, sled, harnesses, and horses); Durkee v. Leland, 4 Vt. 612 (1832) (sap buckets, cauldron kettle, and sap holder).

45. For retail merchants, *see* Abbott v. Goodwin, 20 Me. 408 (1841) (stock of store, now lime); Cutter v. Copeland, 18 Me. 127 (1841) (board logs); Bartels v. Harris, 4 Me. 146 (1826) (stock in trade); Parks v. Hall, 19 Mass. (2 Pick.) 206 (1824) (wine and vinegar); Jackson v. Dean, 1 Doug. 519 (Mich. 1845) (tavern furniture, carriage, wagon, harness, and horse); Collins v. Myers, 16 Ohio 547 (1847) (stock of dry goods); Hall v. Snowhill, 14 N.J.L. 8 (1833) (calico); Divver v. McLaughlin, 2 Wend. 596 (N.Y. Sup. Ct. 1829) (contents of retail grocery); Weller v. Wayland, 17 Johns. 102 (N.Y. Sup. Ct. 1819) (merchandise and household furniture). For transporters, *see* Hunt v. Holton, 30 Mass. (13 Pick.) 216 (1832) (stable horse); Rogers v. Traders Ins. Co., 6 Paige Ch. 583 (N.Y. Ch. 1837) (steamboat); Bailey v. Burton, 8 Wend. 339 (N.Y. 1831) (coaches, harness, and horses); Kellogg v. Brennan, 14 Ohio 72 (1846) (steamboat); Martin v. Mathiot, 29 Pa. (14 Serg. & Rawle) 214 (1826) (wagoner's horse and wagon).

store and a grocery store. Five had to do with transportation, three livery operators and two steam boaters. Two dealt with professionals, a minister and a lawyer.⁴⁶ Those fifteen opinions (10%) dealing with a single horse and household furniture could belong to any group.⁴⁷

These debtors reflected the groups in society needing to borrow money. These businesses, predominantly the commercial merchants followed by the manufacturers, would grant whatever rights reasonably needed to foster the borrowing, including nonpossessory secured transactions.

Opinions identifying those demanding security numbered less, eighty-nine opinions (61%). Those groups, allied with the commercial merchants, dominated. In the early nineteenth century American banks, composed of commercial merchants for the purpose of lending to other commercial merchants, generally lent, not on the basis of collateral, but on the basis of guarantees, usually from commercial merchant members or their substantial friends.⁴⁸ Similarly, inventory sellers extended credit through accepting bills of exchange, sometimes guaranteed by substantial merchants known to the seller.⁴⁹ Guarantors previously had not used collusive judgments for these guarantee transactions but instead had become co-debtors.⁵⁰ Thus,

46. See *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837) (traveling preacher's mare and goods); *Clark v. Jack*, 47 Pa. (7 Watts) 375 (1838) (law library).

47. For single horses, see *Ulmer v. Hills*, 8 Me. 326 (1832) (horse); *Lane v. Borland*, 14 Me. 77 (1836) (horse); *Look v. Comstock*, 15 Wend. 244 (N.Y. Sup. Ct. 1836) (horse); *Case v. Boughton*, 11 Wend. 106 (N.Y. Sup. Ct. 1833) (horse); *Brown v. Bement*, 8 Johns. 96 (N.Y. Sup. Ct. 1811) (horse and chair); *Wood v. Dudley*, 8 Vt. 430 (1836) (mare). For household furniture, see *Ingraham v. Martin*, 15 Me. 48 (1838) (household furniture); *Holbrook v. Baker*, 5 Me. 309 (1828) (clock); *Shumway v. Rutter*, 24 Mass. (7 Pick.) 56 (1828) (household furniture); *Ward v. Sumner*, 22 Mass. (5 Pick.) 59 (1827) (household furniture); *Hendricks v. Mount*, 5 N.J.L. 738 (1820) (household furniture); *Gardner v. Adams*, 12 Wend. 297 (N.Y. Sup. Ct. 1834) (bureau); *Ludlow v. Hurd*, 19 Johns. 218 (N.Y. Sup. Ct. 1821) (plate and furniture); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1811) (household furniture); *Gifford v. Ford*, 5 Vt. 532 (1833) (household goods).

48. See HAMMOND, *supra* note 32, at 56 (bank merchants of first banks lent to selves); see also Harold Livesay & Glenn Porter, *The Financial Role of Merchants in the Development of U.S. Manufacturing 1815-1860*, 9 EXPLORATIONS IN ECON. HIST. 63, 65-67 (1971) (banks lent only on strong collateral, usually government bonds or real estate mortgages; whereas banks would lend to wealthy merchants on their signatures).

49. For seventeenth century England, see ROBERT ASHTON, *THE CROWN AND MONEY MARKET 1603-1640* 6-7 (1960) (sureties as guarantors on bonds and bills obligatory). For eighteenth and early nineteenth century, see FRITZ REDLICH, *THE MOLDING OF AMERICAN BANKING: MEN AND IDEAS--PART I 1781-1840* 10-12 (1951) (in 1790s lent only on double-name paper, a practice that led to accommodation paper in the country banks).

50. See ANGELA CONYERS, *WILTSHIRE EXTENTS FOR DEBTS: EDWARD I--ELIZABETH I* 10 (1973) (holders of collusive judgments proceeded against sureties as debtors; many collusive judgments had three or four co-debtors, often family members). Guarantors became liable only when the debtor had insufficient assets, in which event a subsequent claim on the collateral behind the collusive judgment would do the guarantor little good. See *id.*

guaranteeing after the collusive judgment era acquired a new aspect, namely an attempt to recoup on some of the collateral before total collapse by the debtor by the time of execution. Commercial merchants also comprised some of the first manufacturers in Eastern New England.⁵¹ Consequently, the vast majority of secured parties constituted the note endorsers, ultimately for bank and supplier loans, and the commercial merchants, their partners and manufacturers for direct loans, as well as an occasional bank or insurance company, totaling fifty-three opinions (60%).⁵²

51. *See id.* at 69 (as controlling shareholders or partners); COLEMAN, *supra* note 31, at 77-83 (the merchant families of Brown in Providence, D'Wolf in Bristol, and Hazard in Newport as partners); DALZELL, *supra* note 31, at vii, 7 (the merchant families of Lowell in Newburyport and the Lawrences, Cabots, and others in Boston as shareholders).

52. For the twenty-one note endorsers, *see* Swift v. Thompson, 9 Conn. 63 (1831) (endorser for New London Bank); Bartels v. Harris, 4 Me. 146 (1826) (endorser); Haskell v. Greely, 3 Me. 425 (1825) (endorser for Bangor Bank); Johns v. Church, 29 Mass. (12 Pick.) 557 (1832) (surety); Ward v. Sumner, 22 Mass. (5 Pick.) 59 (1827) (endorser); Gordon v. Massachusetts Fire & Marine Ins. Co., 19 Mass. (2 Pick.) 249 (1824) (endorser); Badlam v. Tucker, 18 Mass. (1 Pick.) 389 (1823) (Wilmington partnership endorser); Jewett v. Warren, 12 Mass. (11 Tyng) 300 (1815) (endorser for Kennebec Bank); Putnam v. Dutch, 8 Mass. (7 Tyng) 286 (1811) (co-shipowner endorser); Doane v. Eddy, 16 Wend. 523 (N.Y. Sup. Ct. 1837) (surety); Patchin v. Pierce, 12 Wend. 61 (N.Y. Sup. Ct. 1864) (surety); Ferguson v. Union Furnace Co., 9 Wend. 345 (N.Y. Sup. Ct. 1832) (purchase money endorser); Bailey v. Burton, 8 Wend. 339 (N.Y. 1831) (surety); Divver v. McLaughlin, 2 Wend. 596 (N.Y. Sup. Ct. 1829) (surety for rent); Weller v. Wayland, 17 Johns. 102 (N.Y. Sup. Ct. 1819) (endorser for Middle District Branch Bank); M'Intyre v. Scott, 8 Johns. 159 (N.Y. Sup. Ct. 1811) (accommodation party); Hooben v. Bidwell, 16 Ohio 509 (1847) (surety); Passmore v. Eldridge, 27 Pa. (12 Serg. & Rawle) 198 (1824) (endorser); Clow v. Woods, 20 Pa. (5 Serg. & Rawle) 275 (1819) (accommodation party for Bank of Pittsburgh); Dawes v. Cope, 13 Pa. (4 Binn.) 258 (1811) (endorser friend); Spaulding v. Austin, 2 Vt. 555 (1830) (surety). For the fifteen merchants, five partners, and three manufacturers, *see* D'Wolf v. Harris, 29 U.S. (4 Pet.) 147 (1830) (New York City merchant); Hurry v. The John and Alice, 12 F. Cas. 1017 (C.C.D. Pa. 1805) (No. 6,923), *on retrial*, Hurry v. Hurry's Assignees, 12 F. Cas. 1015 (C.C.D. Pa. 1808) (No. 6,922) (Liverpool merchant); Forbes v. The Hannah, 9 F. Cas. 406 (Adm. Ct. Pa. 1786) (No. 4,925) (Dublin merchant); Smith v. Putney, 18 Me. 87 (1841) (printing partner); Macomber v. Parker, 31 Mass. (14 Pick.) 497 (1833) (lessee of debtor's brickyard); Hunt v. Holton, 30 Mass. (13 Pick.) 216 (1832) (assignees of debtor's former partner); Merrill v. Hunnewell, 30 Mass. (13 Pick.) 213 (1832) (owner of debtor's brickyard); Whitwell v. Vincent, 21 Mass. (4 Pick.) 449 (1827) (auctioneers); Peters v. Ballistier, 20 Mass. (3 Pick.) 495 (1826) (Boston merchant co.); Marston v. Baldwin, 17 Mass. (16 Tyng) 606 (1822) (store-owner seller of rum); Rice v. Austin, 17 Mass. (16 Tyng) 197 (1821) (merchant); Lanfear v. Sumner, 17 Mass. (16 Tyng) 110 (1821) (English merchant house); Hussey v. Thornton, 4 Mass. (3 Tyng) 405 (1808) (mercantile partnership); Levy v. Welsh, 2 Edw. Ch. 438 (N.Y. Ch. 1835) (debtor's factory); Look v. Comstock, 15 Wend. 244 (N.Y. Sup. Ct. 1836) (ex-partner); Ring v. Franklin, 2 Hall 1 (N.Y. Super. Ct. 1829) (merchant firm); Hendricks v. Robinson, 2 Johns. Ch. 283 (N.Y. Ch. 1816) (two co-shipowners); Collins v. Myers, 16 Ohio 547 (1847) (merchant partner); Rogers v. Dare, Wright 136 (Guernsey County Ct. 1832) (manufacturer of steam engine); Jenkins v. Eichelberger, 44 Pa. (4 Watts) 121 (1835) (Baltimore merchant); Fisher v. Willing, 23 Pa. (8 Serg. & Rawle) 118 (1822) (Philadelphia merchant); Jennings v. Insurance Co. of Pa., 13 Pa.

The next largest group embodied the sellers and their lenders with twenty-six opinions (29%).⁵³ Of these, twelve sellers, all but one an equipment seller, and all four financiers possessed substantial means as commercial merchants or as manufacturers and their lenders. The remaining secured parties consisted of the less substantial (11% of the opinions), four landlords, four relatives, and two sheriffs.⁵⁴

(4 Binn.) 244 (1811) (St. Thomas merchant); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791) (co-shipowner). For the four banks and five insurance companies, see *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (insurance company); *Franklin Ins. Co. v. Lord*, 9 F. Cas. 712 (C.C.D. Mass. 1826) (No. 5,057) (insurance company); *United States v. Delaware Ins. Co.*, 25 F. Cas. 811, (C.C.D. Pa. 1823) (No. 14,942) (insurance company); *Brinley v. Spring*, 7 Me. 241 (1831) (trustee for banks); *New England Marine Ins. Co. v. Chandler*, 16 Mass. (16 Tyng) 275 (1820) (bank); *Portland Bank v. Stubbs*, 6 Mass. (5 Tyng) 422 (1810) (bank); *Portland Bank v. Stacey*, 4 Mass. (3 Tyng) 661 (1808) (bank); *Delaware Ins. Co. v. Archer*, 35 Pa. (3 Rawle) 216 (1832) (insurance company); *Insurance Co. of Pa. v. Duval*, 23 Pa. (8 Serg. & Rawle) 138 (1822) (insurance company). Banks did not appear in many cases since the standard method of transferring security interests to banks involved a trustee, usually a bank officer, who took in trust for the bank corporation. See *New England Marine*, 16 Mass. at 277.

53. For the fourteen merchant and manufacturer sellers, see *Philips v. Ledley*, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096) (sloop seller); *Patten v. Smith*, 5 Conn. 196 (1824) (printing apparatus seller); *Gleason v. Drew*, 9 Me. 79 (1832) (boat seller); *Thorndike v. Stone*, 28 Mass. (11 Pick.) 183 (1831) (ship seller); *Reed v. Upton*, 27 Mass. (10 Pick.) 522 (1830) (seller of brick machinery); *Flagg v. Dryden*, 24 Mass. (7 Pick.) 52 (1828) (broker-seller of loom); *Ayer v. Bartlett*, 23 Mass. (7 Pick.) 71 (1827) (seller of Andover textile factory); *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512 (1824) (wool seller); *Gale v. Ward*, 14 Mass. (13 Tyng) 352 (1817) (woolen factory seller); *Langdon v. Buel*, 9 Wend. 80 (N.Y. Sup. Ct. 1832) (steam engine seller); *Thorn v. Hicks*, 7 Cow. 696 (N.Y. Sup. Ct. 1827) (firm ship seller); *Wendover v. Hogeboom*, 8 Johns. 308 (N.Y. Sup. Ct. 1811) (vessel seller); *Kellogg v. Brennan*, 14 Ohio 72 (1846) (seller of steamboat); *Tobias v. Francis*, 3 Vt. 425 (1830) (woolen factory seller). For the eight less substantial sellers, see *Ripley v. Dolbier*, 18 Me. 382 (1841) (horse seller); *Pickard v. Low*, 15 Me. 48 (1838) (oxen seller); *Lane v. Borland*, 14 Me. 77 (1836) (horse seller); *Tibbetts v. Towle*, 12 Me. 341 (1835) (oxen seller); *Myers v. Harvey*, 39 Pa. (2 Pen. & W.) 478 (1831) (horse and wagon seller); *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826) (horse seller); *Woodward v. Gates*, 9 Vt. 358 (1837) (horse seller); *Fletcher v. Howard*, 2 Aik. 115 (Vt. 1826) (seller of farm tools). For the four purchase money lenders, see *Wilbur v. Almy*, 53 U.S. (12 How.) 180 (1851) (textile machinery purchase financier); *The Mary*, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187) (sloop purchase financier); *Reed v. Jewett*, 5 Me. 96 (1827) (refinancier of textile machinery purchase); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1832) (financier of sloop purchase).

54. For the landlords taking security interests for rents, see *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522 (1827); *Jackson v. Dean*, 1 Doug. 519 (Mich. 1845); *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810). For the relatives, see *Toby v. Reed*, 9 Conn. 216 (1832) (debtor's father); *Fletcher v. Willard*, 31 Mass. (14 Pick.) 464 (1833) (debtor's brother); *Shumway v. Rutter*, 24 Mass. (7 Pick.) 56 (1828) (debtor's brother); *Ludlow v. Hurd*, 19 Johns. 218 (N.Y. Sup. Ct. 1821) (debtor's father-in-law). For the sheriffs, see *Ulmer v. Hills*, 8 Me. 326 (1832) (deputy sheriff); *Atwater v. Mower*, 10 Vt. 75 (1838) (constable).

These secured parties mirrored the groups in society with sufficient wealth to serve as guarantors, namely the merchants, and those selling on credit, predominantly merchants and manufacturers. They carefully sought some protection in extending credit. The appearance of relatives suggests that parties used the nonpossessory secured transaction to grant a preference.⁵⁵

Identification of those willing to remain general creditors involved difficulty. To obtain rights to the collateral, general creditors generally had to obtain a judgment and a court order commanding the sheriff to levy against the collateral. The 1677 Statute of Frauds provided the priority date for the judgment as the date of delivery of the writ of execution to the sheriff for execution.⁵⁶ Consequently, since the sheriff or his representative held the collateral, he appeared as the defendant in most cases. But forty-eight opinions (33%) did reveal the identity of the general creditor. Those groups remaining general creditors resembled the groups demanding secured credit. The commercial merchants again dominated with seventeen opinions (35%).⁵⁷ These commercial merchants did not relate on a friendly basis with the debtor as did the secured parties. So they had to use the courthouse to obtain an interest in the collateral.

The main difference between this group and the corresponding secured party group lay with the very few endorsers, only two opinions. Those guaranteeing the debtor's debt had befriended him enough to also obtain security when needed.

55. Courts honored preferences outside of bankruptcy, even if insolvent. *See, e.g.,* Cook v. Swan, 5 Conn. 140 (1823) (mortgage); Bartels v. Harris, 4 Me. 146 (1826) (bill of sale for trade stock); Widgey v. Haskell, 5 Mass. (4 Tyng) 144 (1809) (rule does not apply to an assignment for the benefit of creditors: bill of sale of ship to secure); Hendricks v. Robinson, 2 Johns. Ch. 283 (N.Y. Ch. 1816) (assignment of ships to secure); Lindle v. Neville, 28 Pa. (13 Serg. & Rawle) 227 (1825) (mortgage).

56. *See supra* notes 11-12 and accompanying text.

57. *See* The Mary, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187) (supplier of cargo in Nassau, New Providence); Starr v. Knox, 2 Conn. 215 (1817) (New York City trading partnership); Clark v. Richards, 1 Conn. 53 (1814) (Philadelphia shipper); Sumner v. Hamlet, 29 Mass. (12 Pick.) 76 (1831) (mercantile partnership); Badlam v. Tucker, 18 Mass. (1 Pick.) 389 (1823) (Boston mercantile firm); Lanfear v. Sumner, 17 Mass. (16 Tyng) 110 (1821) (Boston merchant co.); Portland Bank v. Stubbs, 6 Mass. (5 Tyng) 422 (1810) (English partnership of shippers); Rogers v. Traders Ins. Co., 6 Paige Ch. 583 (N.Y. Ch. 1837) (New York City merchants); Stutson v. Brown, 7 Cow. 732 (N.Y. Sup. Ct. 1827) (firm); Thorn v. Hicks, 7 Cow. 696 (N.Y. Sup. Ct. 1827) (shipper); Collins v. Myers, 16 Ohio 547 (1847) (merchant firm); Clow v. Woods, 20 Pa. (5 Serg. & Rawle) 275 (1819) (former partner, exporter). For commercial merchants as insurance companies and endorsers, *see* Whitwell v. Vincent, 21 Mass. (4 Pick.) 449 (1827) (endorser); Gordon v. Massachusetts Fire & Marine Ins. Co., 19 Mass. (2 Pick.) 249 (1824); New England Marine Ins. Co. v. Chandler, 16 Mass. (16 Tyng) 275 (1820); Jennings v. Insurance Co. of Pa., 13 Pa. (4 Binn.) 244 (1811); Fletcher v. Howard, 2 Aik. 115 (Vt. 1826) (surety).

The other groups of general creditors, also represented among the secured group, consisted of relatives, landlords, and sheriffs, four opinions (9%).⁵⁸

The other main difference involved the significant presence of townspeople, twelve opinions (25%), all dealing with service providers to the shipping industry.⁵⁹ The remaining opinions (31%) dealt with eight buyers, four stand-ins for several general creditors, and the federal government for custom duties three times.⁶⁰

So predominantly the guarantors, substantial commercial merchants for banks and inventory suppliers, and the sellers, equipment manufacturers, took security interests. They would become the proponents of the nonpossessory secured transaction. In contrast other commercial merchants, the buyers, the service providers, and the government did not take security interests. The latter two groups had or eventually obtained statutory liens for their

58. For the relatives, landlord, and sheriff, *see* *Reed v. Jewett*, 5 Me. 96 (1827) (brother); *Randall v. Cook*, 17 Wend. 53 (N.Y. Sup. Ct. 1837) (sheriff); *Reynolds v. Shuler*, 5 Cow. 323 (N.Y. Sup. Ct. 1826) (landlord); *Haven v. Low*, 2 N.H. 13 (1819) (has debtor's surname).

59. For artisans, *see* *Philips v. Ledley*, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096) (ship carpenter with judgment lien); *Winslow v. Tarbox*, 18 Me. 132 (1841) (Charlestown ship repairer); *Tucker v. Buffington*, 15 Mass. (14 Tyng) 477 (1819) (sail repairer); *Ring v. Franklin*, 2 Hall 1 (N.Y. Super. Ct. 1829) (ship repairer); *Wendover v. Hogeboom*, 7 Johns. 308 (N.Y. Sup. Ct. 1810) (sail makers); *Kellogg v. Brennan*, 14 Ohio 72 (1846) (workers servicing boat); *Fisher v. Willing*, 23 Pa. (8 Serg. & Rawle) 118 (1822) (ship master); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791) (seamen). For retailers, *see* *Colson v. Bonzey*, 6 Me. 474 (1830) (ship supplier); *Bartlett v. Williams*, 18 Mass. (1 Pick.) 288 (1823) (ship supplier); *Birkbeck v. Tucker*, 2 Hall. 121 (N.Y. Super. Ct. 1829) (ship chain seller); *M'Intyre v. Scott*, 8 Johns. 159 (N.Y. Sup. Ct. 1811) (ship chandler).

60. For the buyers, *see* *Forbes v. The Hannah*, 9 F. Cas. 406 (Adm. Ct. D. Pa. 1786) (No. 4,925) (ship buyer); *Lane v. Borland*, 14 Me. 77 (1836); *Gleason v. Drew*, 9 Me. 79 (1832); *Murray v. Burtis*, 15 Wend. 212 (N.Y. Sup. Ct. 1836); *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. Sup. Ct. 1832) (company); *Lewis v. Stevenson*, 2 Hall 63 (N.Y. Super. Ct. 1829) (as pledge); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810); *Hooben v. Bidwell*, 16 Ohio 509 (1847). For the others, *see* *Harris v. D'Wolf*, 29 U.S. (4 Pet.) 147 (1830) (U.S. for duties); *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (U.S. for duties); *United States v. Delaware Ins. Co.*, 25 F. Cas. 811 (C.C.D. Pa. 1823) (No. 14,942) (U.S. for duties); *Swift v. Thompson*, 9 Conn. 63 (1831) (trustee for creditors); *Jewett v. Warren*, 12 Mass. (11 Tyng) 300 (1815) (executor); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. Ch. 1835) (trustee for creditors); *Dawes v. Cope*, 13 Pa. (4 Binn.) 258 (1811) (assignee for benefit of creditors).

protection.⁶¹ The two former groups would become the advocates to ban the nonpossessory secured transaction.

B. THE STRUCTURE

Examination of the timing of taking the security interest, delineated in ninety-seven opinions (66%), revealed two major uses of the litigated nonpossessory secured transaction. First, secured creditors desired a preference over other creditors when they felt insecure for some reason. Thirty-eight of the opinions (39%) involved prior lendings.⁶² Only twenty-three opinions (25%) concerned current lendings, excluding the purchase

61. See 1 U.S. Stat. 627, 676 (1799) (government has priority for customs, but only in insolvency); 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 171-72 (13th ed. 1884) (New York in its Revised Code of 1829 provided shipwrights, material men, and suppliers of ships with a lien that ceased when the ship left the state). For ship supplier lien laws, see, e.g., Ind. Rev. Laws, c. 14, p. 120 (1838); 1838 Io. Terr. Laws, p. 67; 1834 Me. Laws, c. 104, p. 109; 1848 Mass. Laws, c. 290, p. 770; 1839 Mich. Laws, No. 43, p. 70; 1857 N.J. Laws, c. 138, p. 382; 2 N.Y. Rev. St., pt. 3, c. 8, tit. 8, § 1, p. 493 (1829); 1840 Ohio Laws, p. 115; 1835 Pa. Laws, No. 173, p. 616.

62. See *Harris v. D'Wolf*, 29 U.S. (4 Pet.) 147 (1830) (\$300,000 prior advances); *Toby v. Reed*, 9 Conn. 216 (1832) (\$1700 prior debt); *Swift v. Thompson*, 9 Conn. 63 (1831) (\$9700 prior endorsements); *Starr v. Knox*, 2 Conn. 215 (1817) (prior debt); *Rhines v. Phelps*, 8 Ill. (3 Gilm.) 455 (1846) (prior debt); *Kitchell v. Bratton*, 2 Ill. (1 Scam.) 300 (1836) (prior debt); *Thornton v. Davenport*, 2 Ill. (1 Scam.) 296 (1836) (\$200 prior debt); *Case v. Winship*, 4 Blackf. 425 (Ind. 1837) (\$150 prior notes); *Watson v. Williams*, 4 Blackf. 26 (Ind. 1835) (\$48 prior judgment); *Jordan v. Turner*, 3 Blackf. 309 (Ind. 1833) (\$18 prior judgment); *Lunt v. Whitaker*, 10 Me. 310 (1833) (prior debt); *Macomber v. Parker*, 31 Mass. (14 Pick.) 497 (1833) (advances made); *Merrill v. Hunnewell*, 30 Mass. (13 Pick.) 213 (1832) (prior debts); *Sumner v. Hamlet*, 29 Mass. (12 Pick.) 76 (1831) (\$500 prior debt); *Shumway v. Rutter*, 24 Mass. (7 Pick.) 56 (1828) (payment of prior judgment lien); *Peters v. Ballistier*, 20 Mass. (3 Pick.) 495 (1826) (\$7400 prior advance); *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512 (1824) (second secured prior debts); *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 19 Mass. (2 Pick.) 249 (1824) (prior endorsements); *Parks v. Hall*, 19 Mass. (2 Pick.) 206 (1824) (\$10,000 prior advance); *Bartlett v. Williams*, 18 Mass. (1 Pick.) 288 (1823) (\$2700 prior note); *Lanfear v. Sumner*, 17 Mass. (16 Tyng) 110 (1821) (prior debt); *Putnam v. Dutch*, 8 Mass. (7 Tyng) 286 (1811) (prior endorsements); *Portland Bank v. Stacey*, 4 Mass. (3 Tyng) 661 (1808) (\$80,000 prior debt); *Jackson v. Dean*, 1 Doug. 519 (Mich. 1845) (\$200 past due rent); *Haven v. Low*, 2 N.H. 13 (1819) (\$400 prior advances); *Hall v. Snowhill*, 14 N.J.L. 551 (1835) (\$900 prior debt); *Elder v. Rouse*, 15 Wend. 218 (N.Y. Sup. Ct. 1836) (\$100 prior debt); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. Ch. 1835) (first secured for \$5200 prior advances); *Gardner v. Adams*, 12 Wend. 297 (N.Y. Sup. Ct. 1834) (prior \$17 note paid); *Langdon v. Buel*, 9 Wend. 80 (N.Y. Sup. Ct. 1832) (prior \$500 purchase price); *McLachlan v. Wright*, 3 Wend. 348 (N.Y. Sup. Ct. 1829) (prior \$1500 debt); *Stutson v. Brown*, 7 Cow. 732 (N.Y. Sup. Ct. 1827) (prior \$1100 notes); *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (\$120 past due rent); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1816) (prior \$80,000 advances); *Myers v. Harvey*, 39 Pa. (2 Pen. & W.) 478 (1831) (prior judgment paid); *Wood v. Dudley*, 8 Vt. 430 (1836) (prior \$11 debt); *Gifford v. Ford*, 5 Vt. 532 (1833) (prior \$23 debt); *Fletcher v. Howard*, 2 Aik. 115 (Vt. 1826) (prior \$14 sale).

money loans, and eleven opinions (11%) future lendings.⁶³ The second major use related to purchase money lendings, with twenty-five opinions (26%).⁶⁴

Since the largest group of litigating secured parties used the nonpossessory secured transaction primarily to gain a preference when feeling

63. For the current lendings, *see* *Franklin Ins. Co. v. Lord*, 9 F. Cas. 712 (C.C.D. Mass. 1826) (No. 5,057) (current \$10,000); *United States v. Delaware Ins. Co.*, 25 F. Cas. 811 (C.C.D. Pa. 1823) (No. 14,941) (current \$10,000); *Hurry v. The John and Alice*, 12 F. Cas. 1017 (C.C.D. Pa. 1805) (No. 6,923), *on retrial*, *Hurry v. Hurry's Assignees*, 12 F. Cas. 1015 (C.C.D. Pa. 1808) (No. 6,922) (current 1500 pounds sterling); *Forbes v. The Hannah*, 9 F. Cas. 406 (Adm. Ct. D. Pa. 1786) (No. 4,925) (current 214 pounds sterling); *Letcher v. Norton*, 5 Ill. (4 Scam.) 575 (1843) (current note); *Reed v. Jewett*, 5 Me. 96 (1827) (\$80 advanced on date of security); *Fletcher v. Willard*, 31 Mass. (14 Pick.) 464 (1833) (simultaneous debt of \$200); *Thorndike v. Stone*, 28 Mass. (11 Pick.) 183 (1831) (current \$18,000); *Reed v. Upton*, 27 Mass. (10 Pick.) 522 (1830) (\$200 current note); *Homes v. Crane*, 19 Mass. (2 Pick.) 607 (1824) (\$2000 current loan); *Tucker v. Buffington*, 15 Mass. (14 Tyng) 477 (1819) (\$10,000 current advance); *Birkbeck v. Tucker*, 2 Hall. 121 (N.Y. Super. Ct. 1829) (\$8000 current advance); *Ring v. Franklin*, 2 Hall 1 (N.Y. Super. Ct. 1829) (\$6000 current advance); *Ackley v. Finch*, 7 Cow. 290 (N.Y. Sup. Ct. 1827) (\$120 current advance); *Collins v. Myers*, 16 Ohio 547 (1847) (current \$34,500); *Hombeck v. Vanmetre*, 9 Ohio 153 (1839) (current note); *Rogers v. Dare*, *Wright* 136 (Guernsey County Ct. 1832) (\$600 current repairs); *Delaware Ins. Co. v. Archer*, 35 Pa. (3 Rawle) 216 (1832) (current \$17,000); *Insurance Co. of Pa. v. Duval*, 23 Pa. (8 Serg. & Rawle) 138 (1822) (current \$12,000); *Fisher v. Willing*, 23 Pa. (8 Serg. & Rawle) 118 (1822) (current 5000 pounds sterling); *Dawes v. Cope*, 13 Pa. (4 Binn.) 258 (1811) (current \$5500 endorsement); *Jennings v. Insurance Co. of Pa.*, 13 Pa. (4 Binn.) 244 (1811) (current \$2500 advance); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791) (1800 pounds current operating capital). For the future lendings, *see* *Johns v. Church*, 29 Mass. (12 Pick.) 557 (1823) (\$240 note suretied); *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522 (1827) (future unpaid rent); *Ward v. Sumner*, 22 Mass. (5 Pick.) 59 (1827) (\$3500 future advance); *Badlam v. Tucker*, 18 Mass. (1 Pick.) 389 (1823) (unmatured endorsed \$2400 notes); *Rice v. Austin*, 17 Mass. (16 Tyng) 197 (1821) (future advances up to \$5000); *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837) (\$175 note suretied); *Patchin v. Pierce*, 12 Wend. 61 (N.Y. Sup. Ct. 1834) (\$100 note suretied); *Bailey v. Burton*, 8 Wend. 339 (N.Y. 1831) (\$100 note suretied); *Look v. Comstock*, 15 Wend. 244 (N.Y. Sup. Ct. 1836) (if pay \$60 note); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829) (future rent up to \$800); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810) (future \$400 annual rent).

64. *See* *Philips v. Ledley*, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096) (\$380); *Patten v. Smith*, 5 Conn. 196 (1824) (\$900); *Morris v. Grover*, 2 Ill. (1 Scam.) 528 (1840) (\$160); *Ripley v. Dolbier*, 18 Me. 382 (1841) (remaining); *Smith v. Putney*, 18 Me. 87 (1841) (\$800); *Pickard v. Low*, 15 Me. 48 (1838) (\$30 of \$60); *Lane v. Borland*, 14 Me. 77 (1836) (\$80); *Tibbetts v. Towle*, 12 Me. 341 (1835) (\$172); *Gleason v. Drew*, 9 Me. 79 (1832) (\$50); *Sawyer v. Shaw*, 9 Me. 47 (1832) (\$170); *Whitwell v. Vincent*, 21 Mass. (4 Pick.) 449 (1827); *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512 (1824) (first secured \$400); *Marston v. Baldwin*, 17 Mass. (16 Tyng) 606 (1822) (\$600); *Gale v. Ward*, 14 Mass. (13 Tyng) 352 (1817); *Hussey v. Thornton*, 4 Mass. (3 Tyng) 405 (1808); *Murray v. Burtis*, 15 Wend. 212 (N.Y. Sup. Ct. 1836) (\$500); *Case v. Boughton*, 11 Wend. 106 (N.Y. Sup. Ct. 1833) (\$140); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1832) (\$2000); *Thorn v. Hicks*, 7 Cow. 696 (N.Y. Sup. Ct. 1827) (price of paid judgment); *Wendover v. Hogeboom*, 7 Johns. 308 (N.Y. Sup. Ct. 1810); *Hooben v. Bidwell*, 16 Ohio 509 (1847); *Kellogg v. Brennan*, 14 Ohio 72 (1846) (\$12,500); *Jenkins v. Eichelberger*, 44 Pa. (4 Watts) 121 (1835); *Woodward v. Gates*, 9 Vt. 358 (1837); *Tobias v. Francis*, 3 Vt. 425 (1830).

insecure, they frequently failed to document their nonpossessory secured transaction in a fashion designed to delineate clearly the security interest. Some purchase money lenders operated similarly. The opinions, some with more than one nonpossessory secured transaction, provided a description of the documents creating the nonpossessory secured transaction in one hundred forty-eight situations. Most either took the form of a chattel mortgage, fifty-six opinions (38%),⁶⁵ or of a bill of sale, forty-three opinions (29%).⁶⁶ Both

65. For mortgages on chattels, *see* *The Mary*, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187); *Patten v. Smith*, 5 Conn. 196 (1824); *Rhines v. Phelps*, 8 Ill. (3 Gilm.) 455 (1846); *Letcher v. Norton*, 5 Ill. (4 Scam.) 575 (1843); *Kitchell v. Bratton*, 2 Ill. (1 Scam.) 300 (1836); *Thornton v. Davenport*, 2 Ill. (1 Scam.) 296 (1836); *Case v. Winship*, 4 Blackf. 425 (Ind. 1837); *Hankins v. Ingols*, 4 Blackf. 35 (Ind. 1835); *Watson v. Williams*, 4 Blackf. 26 (Ind. 1835); *Cutter v. Copeland*, 18 Me. 127 (1841); *Melody v. Chandler*, 12 Me. 282 (1835); *Lunt v. Whitaker*, 10 Me. 310 (1833); *Colson v. Bonzey*, 6 Me. 474 (1830); *Johns v. Church*, 29 Mass. (12 Pick.) 557 (1832); *Flagg v. Dryden*, 24 Mass. (7 Pick.) 52 (1828); *Carrington v. Smith*, 25 Mass. (9 Pick.) 419 (1829); *Badlam v. Tucker*, 18 Mass. (1 Pick.) 389 (1823); *Portland Bank v. Stubbs*, 6 Mass. (5 Tyng) 422 (1810); *Hall v. Snowhill*, 14 N.J.L. 551 (1835); *Randall v. Cook*, 17 Wend. 53 (N.Y. Sup. Ct. 1837); *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837); *Murray v. Burtis*, 15 Wend. 212 (N.Y. Sup. Ct. 1836); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. Ch. 1835); *Gardner v. Adams*, 12 Wend. 297 (N.Y. Sup. Ct. 1834); *Patchin v. Pierce*, 12 Wend. 61 (N.Y. Sup. Ct. 1834); *Case v. Boughton*, 11 Wend. 106 (N.Y. Sup. Ct. 1833); *Ferguson v. Lee*, 9 Wend. 258 (N.Y. Sup. Ct. 1832); *Langdon v. Buel*, 9 Wend. 80 (N.Y. Sup. Ct. 1832); *McLachlan v. Wright*, 3 Wend. 348 (N.Y. Sup. Ct. 1829); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829); *Reynolds v. Shuler*, 5 Cow. 323 (N.Y. Sup. Ct. 1826); *Collins v. Myers*, 16 Ohio 547 (1847); *Hooben v. Bidwell*, 16 Ohio 509 (1847); *Kellogg v. Brennan*, 14 Ohio 72 (1846); *Hombeck v. Vanmetre*, 9 Ohio 153 (1839); *Clow v. Woods*, 20 Pa. (5 Serg. & Rawle) 275 (1819); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791); *Woodward v. Gates*, 9 Vt. 358 (1837). For bottomry and respondentia bonds (ship and cargo mortgages made overseas under distress conditions), *see* *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (respondentia); *Franklin Ins. Co. v. Lord*, 9 F. Cas. 712 (C.C.D. Mass. 1826) (No. 5,057) (respondentia); *The Mary*, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187) (bottomry); *United States v. Delaware Ins. Co.*, 25 F. Cas. 811 (C.C.D. Pa. 1823) (No. 14,942) (respondentia); *Hurry v. The John and Alice*, 12 F. Cas. 1017 (C.C.D. Pa. 1805) (No. 6,923), *on retrial*, *Hurry v. Hurry's Assignees*, 12 F. Cas. 1015 (C.C.D. Pa. 1808) (No. 6,922) (bottomry); *Forbes v. The Hannah*, 9 F. Cas. 406 (Adm. Ct. D. Pa. 1786) (No. 4,925) (bottomry); *Thorndike v. Stone*, 28 Mass. (11 Pick.) 183 (1831) (bottomry); *Delaware Co. v. Archer*, 35 Pa. (3 Rawle) 216 (1832) (respondentia); *Insurance Co. of Pa. v. Duval*, 23 Pa. (8 Serg. & Rawle) 138 (1822) (respondentia); *Jennings v. Insurance Co. of Pa.*, 13 Pa. (4 Binn.) 244 (1811) (bottomry). For indentures, deeds of assignment, and deeds, *see* *Harris v. D'Wolf*, 29 U.S. (4 Pet.) 147 (1830) (New York law) (deed of assignment); *Brinley v. Spring*, 7 Me. 241 (1831) (indenture); *Reed v. Upton*, 27 Mass. (10 Pick.) 522 (1830) (indenture); *Hunt v. Holton*, 30 Mass. (13 Pick.) 216 (1832) (deed); *Ward v. Sumner*, 22 Mass. (5 Pick.) 59 (1827) (deed); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1816) (deed of assignment); *Passmore v. Eldridge*, 27 Pa. (12 Serg. & Rawle) 198 (1824) (deed); *Fisher v. Willing*, 23 Pa. (8 Serg. & Rawle) 118 (1822) (indenture).

66. *See* *Wilbur v. Almy*, 53 U.S. (12 How.) 180 (1851) (Connecticut law); *Starr v. Knox*, 2 Conn. 215 (1817); *Morris v. Grover*, 2 Ill. (1 Scam.) 528 (1840); *Jordan v. Turner*, 3 Blackf. 309 (Ind. 1833); *Goodenow v. Dunn*, 21 Me. 86 (1842); *Abbott v. Goodwin*, 20 Me. 408 (1841); *Flanders v. Barstow*, 18 Me. 357 (1841); *Winslow v. Tarbox*, 18 Me. 132 (1841);

of these documents transferred ownership of the collateral to the secured party.⁶⁷ But a significant number involved other forms, such as contracts, twenty-six (18%) opinions, receipts, ten opinions (7%), real estate deeds, six opinions (4%), oral agreements, five opinions (3%), or, in Pennsylvania, bailment leases, two opinions (1%).⁶⁸

Smith v. Putney, 18 Me. 87 (1841); Ingraham v. Martin, 15 Me. 373 (1839); Smith v. Tilton, 10 Me. 350 (1833); Gleason v. Drew, 9 Me. 79 (1832); Ulmer v. Hills, 8 Me. 326 (1832); Holbrook v. Baker, 5 Me. 309 (1828); Fletcher v. Willard, 31 Mass. (14 Pick.) 464 (1833); Adams v. Wheeler, 27 Mass. (10 Pick.) 199 (1830); Homes v. Crane, 19 Mass. (2 Pick.) 607 (1824); Gordon v. Massachusetts Fire & Marine Ins. Co., 19 Mass. (2 Pick.) 249 (1824); Parks v. Hall, 19 Mass. (2 Pick.) 206 (1824); Bartlett v. Williams, 18 Mass. (1 Pick.) 288 (1823); Tucker v. Buffington, 15 Mass. (14 Tyng) 477 (1819); Jewett v. Warren, 12 Mass. (11 Tyng) 300 (1815); Putnam v. Dutch, 8 Mass. (7 Tyng) 286 (1811); Portland Bank v. Stacey, 4 Mass. (3 Tyng) 661 (1808); Hendricks v. Mount, 5 N.J.L. 738 (1820); Look v. Comstock, 15 Wend. 244 (N.Y. Sup. Ct. 1836); Hall v. Tuttle, 8 Wend. 375 (N.Y. Sup. Ct. 1832); Bailey v. Burton, 8 Wend. 339 (N.Y. 1831); Birkbeck v. Tucker, 2 Hall 121 (N.Y. Super. Ct. 1829); Ring v. Franklin, 2 Hall 1 (N.Y. Super. Ct. 1829); Lewis v. Stevenson, 2 Hall 63 (N.Y. Super. Ct. 1829); Ludlow v. Hurd, 19 Johns. 218 (N.Y. Sup. Ct. 1821); Weller v. Wayland, 17 Johns. 102 (N.Y. Sup. Ct. 1819); Hendricks v. Robinson, 2 Johns. Ch. 283 (N.Y. Ch. 1816); M'Intyre v. Scott, 8 Johns. 159 (N.Y. Sup. Ct. 1811); Brown v. Bement, 8 Johns. 96 (N.Y. Sup. Ct. 1811); Barrow v. Paxton, 5 Johns. 258 (N.Y. Sup. Ct. 1810); Middlesworth v. Robinson, Wright 552 (Ohio 1834); Rogers v. Dare, Wright 136 (Guernsey County Ct. 1832); Wood v. Dudley, 8 Vt. 430 (1836); Gifford v. Ford, 5 Vt. 532 (1833); Durkee v. Leland, 4 Vt. 612 (1832); Spaulding v. Austin, 2 Vt. 555 (1830). Of these bills of sale, only *Gleason* involved a purchase money security interest.

67. See *supra* note 13 and accompanying text.

68. For contracts, see Philips v. Ledley, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096) (contract of sale); Ripley v. Dolbier, 18 Me. 382 (1841) (written instrument); Prichard v. Low, 15 Me. 48 (1838) (sealed instrument); Soule v. White, 14 Me. 436 (1837) (instrument in writing); Lane v. Borland, 14 Me. 77 (1836) (contract); Tibbetts v. Towle, 12 Me. 341 (1835) (contract); Sawyer v. Shaw, 9 Me. 47 (1832) (contract); Macomber v. Parker, 31 Mass. (14 Pick.) 497 (1833) (contract); Merrill v. Hunnewell, 30 Mass. (13 Pick.) 213 (1832) (assignment); Barrett v. Pritchard, 19 Mass. (2 Pick.) 512 (1824) (assignment); Lanfear v. Sumner, 17 Mass. (16 Tyng) 110 (1821) (assignment); New England Marine Ins. Co. v. Chandler, 16 Mass. (16 Tyng) 275 (1820) (assignment); Ayer v. Bartlett, 23 Mass. (7 Pick.) 71 (1827) (contract of sale); Whitwell v. Vincent, 21 Mass. (4 Pick.) 449 (1827) (contract of sale); Rice v. Austin, 17 Mass. (16 Tyng) 197 (1821) (consignment); Hussey v. Thornton, 4 Mass. (3 Tyng) 405 (1808) (contract of sale); Ash v. Savage, 5 N.H. 545 (1831) (contract of sale); Rogers v. Traders Ins. Co., 6 Paige Ch. 583 (N.Y. Ch. 1837) (assignment); Elder v. Rouse, 15 Wend. 218 (N.Y. Sup. Ct. 1836) (sealed instrument); Ackley v. Finch, 7 Cow. 290 (N.Y. Sup. Ct. 1827) (agreement); Bissel v. Hopkins, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (written instrument); Wendover v. Hogeboom, 7 Johns. 308 (N.Y. Sup. Ct. 1810) (agreement); Jenkins v. Eichelberger, 44 Pa. (4 Watts) 121 (1835) (sale and resale); Welsh v. Bekey, 38 Pa. (1 Pen. & W.) 57 (1829) (agreement); Dawes v. Cope, 13 Pa. (4 Binn.) 258 (1811) (assignment); Atwater v. Mower, 10 Vt. 75 (1838) (written instrument). For receipts, see Clark v. Richards, 1 Conn. 53 (1814) (custom house enrollment); Reed v. Jewett, 5 Me. 96 (1827) (bill of parcels); Bartels v. Harris, 4 Me. 146 (1826) (bill of parcels); Haskell v. Greely, 3 Me. 425 (1825) (bill of parcels); Shumway v. Rutter, 24 Mass. (7 Pick.) 56 (1828) (bill of parcels); Peters v. Ballistier, 20 Mass. (3 Pick.) 495 (1826) (bill of lading); Barrett v. Pritchard, 19 Mass. (2 Pick.) 512

Other than the oral agreements, these forms should not provide a problem, provided the documentation established the nonpossessory secured transaction. Unfortunately for the secured party, frequently, the documentation did not establish the nonpossessory secured transaction. Often, in sixty-seven opinions (46%), the secured party required additional evidence to establish or confirm the nonpossessory secured transaction. The title document typically established only an absolute sale. But under the rebuttable rule, the courts allowed consideration of this additional evidence.⁶⁹

The most prevalent evidence (48% of the opinions) involved supplementary documents of the same type as the primary documents.⁷⁰ The

(1824) (receipt); *Marston v. Baldwin*, 17 Mass. (16 Tyng) 606 (1822) (memorandum); *Haven v. Low*, 2 N.H. 13 (1819) (custom house enrollment); *Fletcher v. Howard*, 2 Aik. 115 (Vt. 1826) (memorandum). For real estate documents, *see Toby v. Reed*, 9 Conn. 216 (1832) (mortgage); *Swift v. Thompson*, 9 Conn. 63 (1831) (deed); *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522 (1827) (lease); *Gale v. Ward*, 14 Mass. (13 Tyng) 352 (1817) (mortgage); *Sturgis v. Warren*, 11 Vt. 433 (1839) (mortgage); *Tobias v. Francis*, 3 Vt. 425 (1830) (mortgage). For oral agreements, *see Sumner v. Hamlet*, 29 Mass. (12 Pick.) 76 (1831) (agreement); *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. Sup. Ct. 1832) (declaration); *Thorn v. Hicks*, 7 Cow. 696 (N.Y. Sup. Ct. 1827) (sale); *Jackson v. Dean*, 1 Doug. 519 (Mich. 1845) (agreement); *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826) (agreement). For bailment leases, *see Clark v. Jack*, 47 Pa. (7 Watts) 375 (1838); *Myers v. Harvey*, 39 Pa. (2 Pen. & W.) 478 (1831). *See also supra* note 26 for an explanation of bailment leases.

69. Early Connecticut cases, using the absolute-conditional rule, refused to admit supplemental defeasance contracts to contradict title documents, namely ship enrollments, in absolute form. *See Starr v. Knox*, 2 Conn. 215 (1817) (defeasance contract); *Clark v. Richards*, 1 Conn. 53 (1814) (conditional bill of sale). *See infra* note 97 and accompanying text for the absolute-conditional rule.

70. For defeasance contracts (chattel mortgages), *see Starr v. Knox*, 2 Conn. 215 (1817); *Smith v. Putney*, 18 Me. 87 (1841) (mortgage); *Colson v. Bonzey*, 6 Me. 474 (1830); *Bartels v. Harris*, 4 Me. 146 (1826) (deed); *Lewis v. Stevenson*, 2 Hall 63 (N.Y. Super. Ct. 1829) (deed of trust); *Ring v. Franklin*, 2 Hall 1 (N.Y. Super. Ct. 1829); *Stutson v. Brown*, 7 Cow. 732 (N.Y. Sup. Ct. 1827); *Brown v. Bement*, 8 Johns. 96 (N.Y. Sup. Ct. 1811); *Insurance Co. of Pa. v. Duval*, 23 Pa. (8 Serg. & Rawle) 138 (1822) (foreclosure agreement); *Jennings v. Insurance Co. of Pa.*, 13 Pa. (4 Binn.) 244 (1811); *Gifford v. Ford*, 5 Vt. 532 (1833). For bills of sale, *see Toby v. Reed*, 9 Conn. 216 (1832); *Clark v. Richards*, 1 Conn. 53 (1814); *Lane v. Borland*, 14 Me. 77 (1836); *Thorndike v. Stone*, 28 Mass. (11 Pick.) 183 (1831); *Haven v. Low*, 2 N.H. 13 (1819); *Fisher v. Willing*, 23 Pa. (8 Serg. & Rawle) 118 (1822). For receipts, *see Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (bill of lading); *Franklin Ins. Co. v. Lord*, 9 F. Cas. 712 (C.C.D. Mass. 1822) (No. 5,057) (memorandum); *United States v. Delaware Ins. Co.*, 25 F. Cas. 811 (C.C.D. Pa. 1823) (No. 14,492) (bill of lading); *Sumner v. Hamlet*, 29 Mass. (12 Pick.) 76 (1831) (bill of parcels); *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 19 Mass. (2 Pick.) 249 (1824) (memorandum); *Bartlett v. Williams*, 18 Mass. (1 Pick.) 288 (1823) (memorandum); *Delaware Co. v. Archer*, 35 Pa. (3 Rawle) 216 (1832) (memorandum); *Dawes v. Cope*, 13 Pa. (4 Binn.) 258 (1811) (bill of lading); *Passmore v. Eldridge*, 27 Pa. (12 Serg. & Rawle) 198 (1824) (confirmation). For contracts, *see Winslow v. Tarbox*, 18 Me. 132 (1841) (bond); *Rice v. Austin*, 17 Mass. (16 Tyng) 197 (1821) (contract); *Tucker v. Buffington*, 15 Mass. (14 Tyng) 477 (1819) (unsealed writing); *Gardner v. Adams*, 12 Wend. 297 (N.Y.

next most prevalent evidence consisted of oral security agreements, twenty-seven opinions (40%).⁷¹ The different type of supplemental instrument involved lease backs and recordations, eight opinions (12%).⁷²

In the pre-chattel mortgage act era, the commercial merchant class demanded the nonpossessory secured transaction when they became insecure. They had previously guaranteed the loan or made the loan as a purchase money lender and later obtained the security interest for protection against an impending judgment lien. As a result, their documentation for the transaction frequently appeared in several documents and often in oral agreements.

II. AMERICAN LITIGATION TO ENFORCE THE NONPOSSESSORY SECURED TRANSACTION

But secured parties experienced difficulty in enforcing these poorly drafted, hastily taken nonpossessory secured transactions against the parties that mattered, the judgment lienholders. Judgment lienholders continued their practices from the collusive judgment era by obtaining the sheriff's levy on the collateral. Sheriffs levied because the applicable court rule permitted jury determination of the validity of the nonpossessory secured transaction. Thus, the newly emergent secured parties had to sue to recover the collateral as its owner and stood a chance of losing it, depending on the impressions of a jury.

Sup. Ct. 1834) (assignment); *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (instrument); *Durkee v. Leland*, 4 Vt. 612 (1832) (unsealed writing).

71. See *Patten v. Smith*, 5 Conn. 196 (1824); *Rhines v. Phelps*, 8 Ill. (3 Gilm.) 455 (1846); *Case v. Winship*, 4 Blackf. 425 (Ind. 1837); *Ripley v. Dolbier*, 18 Me. 382 (1841); *Flanders v. Barstow*, 18 Me. 357 (1841); *Smith v. Tilton*, 10 Me. 350 (1833); *Gleason v. Drew*, 9 Me. 79 (1832); *Ulmer v. Hills*, 8 Me. 326 (1832); *Holbrook v. Baker*, 5 Me. 309 (1828); *Reed v. Jewett*, 5 Me. 96 (1827); *Fletcher v. Willard*, 31 Mass. (14 Pick.) 464 (1833); *Shumway v. Rutter*, 24 Mass. (7 Pick.) 56 (1828); *Whitwell v. Vincent*, 21 Mass. (4 Pick.) 449 (1827); *Peters v. Ballistier*, 20 Mass. (3 Pick.) 495 (1826); *Lanfear v. Sumner*, 17 Mass. (16 Tyng) 110 (1821); *New England Marine Ins. Co. v. Chandler*, 16 Mass. (16 Tyng) 275 (1820); *Jewett v. Warren*, 12 Mass. (11 Tyng) 300 (1815); *Hussey v. Thornton*, 4 Mass. (3 Tyng) 405 (1808); *Ash v. Savage*, 5 N.H. 545 (1831); *Hendricks v. Mount*, 5 N.J.L. 738 (1820); *Randall v. Cook*, 17 Wend. 53 (N.Y. Sup. Ct. 1837); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1832); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829); *Birkbeck v. Tucker*, 2 Hall 121 (N.Y. Super. Ct. 1829); *Ackley v. Finch*, 7 Cow. 290 (N.Y. Sup. Ct. 1827); *M'Intyre v. Scott*, 8 Johns. 159 (N.Y. Sup. Ct. 1811); *Spaulding v. Austin*, 2 Vt. 555 (1830).

72. See *Toby v. Reed*, 9 Conn. 216 (1832) (realty recordation); *Hankins v. Ingols*, 4 Blackf. 35 (Ind. 1835) (realty recordation); *Ward v. Sumner*, 22 Mass. (5 Pick.) 59 (1827) (leaseback); *Homes v. Crane*, 19 Mass. (2 Pick.) 607 (1824) (leaseback); *Parks v. Hall*, 19 Mass. (2 Pick.) 206 (1824) (leaseback); *Gale v. Ward*, 14 Mass. (13 Tyng) 352 (1817) (realty leaseback); *Rogers v. Dare*, *Wright* 136 (Guernsey County Ct. 1832) (leaseback); *Woodward v. Gates*, 9 Vt. 358 (1837) (recorded under N.H. chattel mortgage act).

A. THE TYPE OF ACTION

One hundred thirty-five opinions (92%) described the type of litigation. The vast majority of opinions, one hundred seven (79%), involved the secured party suing, or being sued by, a third party. These opinions involved the priority rule.

The remaining opinions did not pertain to third parties contesting the efficacy of the nonpossessory secured transaction. These remaining opinions did not involve the priority rule.⁷³ The second largest grouping, fourteen opinions (10%), had to do with secured parties contending with the debtor.⁷⁴ Most, eight opinions, dealt with wrongful retention of the property, almost all concerned the trover action.⁷⁵ The remaining six dealt with contractual matters.⁷⁶ The third largest grouping, thirteen opinions (10%), referred to various contractual matters with third parties. Most, nine opinions, involved the secured party's liability to those providing service to the collateral.⁷⁷ All

73. Courts enforced fraudulent conveyances between the parties. Fraudulent Conveyance Act of 1571, *supra* note 15, at § 1, *reprinted in* 4 Stat. of Realm, *supra* note 11, at 537.

74. For secured parties as plaintiff, *see* *Wilbur v. Almy*, 53 U.S. (12 How.) 180 (1851); *Case v. Winship*, 4 Blackf. 425 (Ind. 1837); *Ripley v. Dolbier*, 18 Me. 382 (1841); *Rogers v. Traders Ins. Co.*, 6 Paige Ch. 583 (N.Y. Ch. 1837); *Elder v. Rouse*, 15 Wend. 218 (N.Y. Sup. Ct. 1836); *Atwater v. Mower*, 10 Vt. 75 (1838); *Gifford v. Ford*, 5 Vt. 532 (1833); *Durkee v. Leland*, 4 Vt. 612 (1832). For debtors as plaintiff, *see* *Flanders v. Barstow*, 18 Me. 357 (1841); *Smith v. Tilton*, 10 Me. 350 (1833); *Case v. Boughton*, 11 Wend. 106 (N.Y. Sup. Ct. 1833); *Ackley v. Finch*, 7 Cow. 290 (N.Y. Sup. Ct. 1827); *Brown v. Bement*, 8 Johns. 96 (N.Y. Sup. Ct. 1811); *Wood v. Dudley*, 8 Vt. 430 (1836). The Fraudulent Conveyance Act provided for enforcement between the parties. *See* Fraudulent Conveyance Act, *supra* note 15, at § 1, *reprinted in* 4 Stat. of Realm, *supra* note 11, at 538.

75. *See* *Ripley v. Dolbier*, 18 Me. 382 (1841); *Smith v. Tilton*, 10 Me. 350 (1833); *Ackley v. Finch*, 7 Cow. 290 (N.Y. Sup. Ct. 1827); *Brown v. Bement*, 8 Johns. 96 (N.Y. Sup. Ct. 1811); *Atwater v. Mower*, 10 Vt. 75 (1838); *Wood v. Dudley*, 8 Vt. 430 (1836); *Gifford v. Ford*, 5 Vt. 532 (1833). For replevin, *see* *Case v. Winship*, 4 Blackf. 425 (Ind. 1837). For trover and replevin actions, *see infra*, note 87 and accompanying text.

76. *See* *Wilbur v. Almy*, 53 U.S. (12 How.) 180 (1851) (accounting); *Flanders v. Barstow*, 18 Me. 357 (1841) (assumpsit); *Rogers v. Traders Ins. Co.*, 6 Paige Ch. 583 (N.Y. Ch. 1837) (bill to recover insurance proceeds); *Elder v. Rouse*, 15 Wend. 218 (N.Y. Sup. Ct. 1836) (debt); *Case v. Boughton*, 11 Wend. 106 (N.Y. Sup. Ct. 1833) (covenant); *Durkee v. Leland*, 4 Vt. 612 (1832) (assumpsit).

77. *See* *Philips v. Ledley*, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096) (ship carpenter); *Winslow v. Tarbox*, 18 Me. 132 (1841) (ship repairer); *Colson v. Bonzey*, 6 Me. 474 (1830) (ship supplier); *Tucker v. Buffington*, 15 Mass. (14 Tyng) 477 (1819) (sail makers); *Birkbeck v. Tucker*, 2 Hall 121 (N.Y. Super. Ct. 1829) (ship chain supplier); *Ring v. Franklin*, 2 Hall 1 (N.Y. Super. Ct. 1829) (ship repairer); *Thorn v. Hicks*, 7 Cow. 696 (N.Y. Sup. Ct. 1827) (shipper); *M'Intyre v. Scott*, 8 Johns. 159 (N.Y. Sup. Ct. 1811) (ship chandler); *Wendover v. Hogeboom*, 7 Johns. 808 (N.Y. Sup. Ct. 1810) (sail makers).

treated contractual and quasi-contractual actions.⁷⁸ Two dealt with judgment lien creditors suing sheriffs for wrongful levy, a tort action.⁷⁹ Two opinions concerned the debtor or secured party suing on an insurance policy, a contractual matter.⁸⁰ The remaining opinion (1%) dealt with the debtor as a tort victim.⁸¹

Of the one hundred seven opinions treating the priority rule, the largest single subset, eighty opinions (75%), involved the secured party contending with a judgment lien creditor, or his stand-in the sheriff, who had wrongfully taken the collateral, owned by the secured party, by levying against the property of the debtor. In most of these opinions, seventy-four, the secured party brought the lawsuit.⁸² Occasionally, six times, the judgment lienholder

78. See *Philips v. Ledley*, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096) (indebitatus assumpsit); *Winslow v. Tarbox*, 18 Me. 132 (1841) (suit for repairs); *Colson v. Bonzey*, 6 Me. 474 (1830) (action for supplies); *Tucker v. Buffington*, 15 Mass. (14 Tyng) 477 (1819) (assumpsit); *Thorn v. Hicks*, 7 Cow. 696 (N.Y. Sup. Ct. 1827) (case); *M'Intyre v. Scott*, 8 Johns. 159 (N.Y. Sup. Ct. 1811) (action for value); *Wendover v. Hogeboom*, 7 Johns. 808 (N.Y. Sup. Ct. 1810) (assumpsit).

79. See *Goodenow v. Dunn*, 21 Me. 86 (1842) (general's administrator v. sheriff's administrator); *Gale v. Ward*, 14 Mass. (13 Tyng) 352 (1817) (judgment lien v. sheriff).

80. See *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 19 Mass. (2 Pick.) 249 (1824) (debtor v. insurer); *Jennings v. Insurance Co. of Pa.*, 13 Pa. (4 Binn.) 244 (1811) (secured party v. insurer).

81. See *Middlesworth v. Robinson*, Wright 552 (Ohio 1834).

82. See *Harris v. D'Wolf*, 29 U.S. (4 Pet.) 147 (1830) (federal marshal); *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (federal marshal); *Toby v. Reed*, 9 Conn. 216 (1832) (execution officer); *Patten v. Smith*, 5 Conn. 196 (1824) (constable); *Rhines v. Phelps*, 8 Ill. (3 Gilm.) 455 (1846) (sheriff); *Letcher v. Norton*, 5 Ill. (4 Scam.) 575 (1843); *Kitchell v. Bratton*, 2 Ill. (1 Scam.) 300 (1836); *Thornton v. Davenport*, 2 Ill. (1 Scam.) 296 (1836); *Hankins v. Ingols*, 4 Blackf. 35 (Ind. 1835); *Watson v. Williams*, 4 Blackf. 26 (Ind. 1835); *Jordan v. Turner*, 3 Blackf. 309 (Ind. 1833); *Abbott v. Goodwin*, 20 Me. 408 (1841) (deputy sheriff); *Cutter v. Copeland*, 18 Me. 127 (1841) (sheriff); *Smith v. Putney*, 18 Me. 87 (1841) (deputy sheriff); *Ingraham v. Martin*, 15 Me. 373 (1839) (sheriff); *Melody v. Chandler*, 12 Me. 282 (1835) (officer); *Gleason v. Drew*, 9 Me. 79 (1832) (officer); *Ulmer v. Hills*, 8 Me. 326 (1832) (officer); *Brinley v. Spring*, 7 Me. 241 (1831) (sheriff); *Holbrook v. Baker*, 5 Me. 309 (1828) (constable); *Reed v. Jewett*, 5 Me. 96 (1827) (deputy sheriff); *Bartels v. Harris*, 4 Me. 146 (1826) (deputy sheriff); *Haskell v. Greely*, 3 Me. 425 (1825) (deputy sheriff); *Macomber v. Parker*, 31 Mass. (14 Pick.) 497 (1833) (sheriff); *Fletcher v. Willard*, 31 Mass. (14 Pick.) 464 (1833) (sheriff); *Hunt v. Holton*, 30 Mass. (13 Pick.) 216 (1832) (judgment lien); *Merrill v. Hunnewell*, 30 Mass. (13 Pick.) 213 (1832) (sheriff); *Johns v. Church*, 29 Mass. (12 Pick.) 557 (1832) (deputy sheriff); *Reed v. Upton*, 27 Mass. (10 Pick.) 522 (1830) (deputy sheriff); *Adams v. Wheeler*, 27 Mass. (10 Pick.) 199 (1830) (deputy sheriff); *Carrington v. Smith*, 25 Mass. (9 Pick.) 419 (1829) (deputy sheriff); *Shumway v. Rutter*, 24 Mass. (7 Pick.) 56 (1828) (sheriff); *Ayer v. Bartlett*, 23 Mass. (7 Pick.) 71 (1827) (sheriff); *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522 (1827) (sheriff); *Ward v. Sumner*, 22 Mass. (5 Pick.) 59 (1827) (sheriff); *Homes v. Crane*, 19 Mass. (2 Pick.) 607 (1824) (sheriff); *Parks v. Hall*, 19 Mass. (2 Pick.) 206 (1824) (sheriff); *Bartlett v. Williams*, 18 Mass. (1 Pick.) 288 (1823) (deputy sheriff); *Marston v. Baldwin*, 17 Mass. (16 Tyng) 606 (1822) (deputy sheriff); *Rice v. Austin*, 17 Mass. (16 Tyng) 197 (1821) (sheriff); *Lanfeer v. Sumner*, 17 Mass. (16 Tyng) 110 (1821) (deputy sheriff); *Putnam v. Dutch*,

sued the secured party.⁸³ The second largest subset, twelve opinions (11%), treated the secured party battling a purchaser of the collateral who bought from the debtor.⁸⁴ The third largest subset, eleven opinions (11%), related to secured parties fighting general creditors.⁸⁵ Seldom did a secured party

8 Mass. (7 Tyng) 286 (1811) (deputy sheriff); *Portland Bank v. Stubbs*, 6 Mass. (5 Tyng) 422 (1810) (deputy sheriff); *Portland Bank v. Stacey*, 4 Mass. (3 Tyng) 661 (1808) (deputy sheriff); *Hussey v. Thornton*, 4 Mass. (3 Tyng) 405 (1808) (attaching officers); *Jackson v. Dean*, 1 Doug. 519 (Mich. 1845) (sheriff); *Ash v. Savage*, 5 N.H. 545 (1831) (deputy sheriff); *Haven v. Low*, 2 N.H. 13 (1819) (deputy sheriff); *Hall v. Snowhill*, 14 N.J.L. 551 (1835) (sheriff); *Randall v. Cook*, 17 Wend. 53 (N.Y. Sup. Ct. 1837) (sheriff); *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837) (judgment lien); *Look v. Comstock*, 15 Wend. 244 (N.Y. Sup. Ct. 1836) (judgment lien); *Gardner v. Adams*, 12 Wend. 297 (N.Y. Sup. Ct. 1834) (secured's assignee); *Ferguson v. Lee*, 9 Wend. 258 (N.Y. Sup. Ct. 1832) (secured's assignee); *Langdon v. Buel*, 9 Wend. 80 (N.Y. Sup. Ct. 1832) (sheriff); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1832) (sheriff); *McLachlan v. Wright*, 3 Wend. 348 (N.Y. Sup. Ct. 1829) (judgment lien); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829) (deputy sheriff); *Stutson v. Brown*, 7 Cow. 732 (N.Y. Sup. Ct. 1827) (judgment lien); *Reynolds v. Shuler*, 5 Cow. 323 (N.Y. Sup. Ct. 1826) (bailiff); *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (judgment lien); *Ludlow v. Hurd*, 19 Johns. 218 (N.Y. Sup. Ct. 1821) (judgment lien); *Weller v. Wayland*, 17 Johns. 102 (N.Y. Sup. Ct. 1819) (deputy sheriff); *Collins v. Meyer*, 16 Ohio 547 (1847); *Kellogg v. Brennan*, 14 Ohio 72 (1846); *Clark v. Jack*, 47 Pa. (7 Watts) 375 (1838) (sheriff); *Jenkins v. Eichelberger*, 44 Pa. (4 Watts) 121 (1835) (sheriff); *Myers v. Harvey*, 39 Pa. (2 Pen. & W.) 478 (1831) (judgment lien); *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826) (sheriff); *Clow v. Woods*, 20 Pa. (5 Serg. & Rawle) 275 (1819) (sheriff); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791) (admiralty marshal); *Sturgis v. Warren*, 11 Vt. 433 (1839) (deputy sheriff); *Woodward v. Gates*, 9 Vt. 358 (1837) (constable); *Tobias v. Francis*, 3 Vt. 425 (1830) (execution official).

83. See *Sumner v. Hamlet*, 29 Mass. (12 Pick.) 76 (1831) (deputy sheriff); *Badlam v. Tucker*, 18 Mass. (1 Pick.) 389 (1823) (sheriff); *Patchin v. Pierce*, 12 Wend. 61 (N.Y. Sup. Ct. 1834) (judgment lien); *Bailey v. Burton*, 8 Wend. 339 (N.Y. 1831) (judgment lien); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1816) (judgment lien); *Spaulding v. Austin*, 2 Vt. 555 (1830) (constable).

84. For secured parties as plaintiff, see *Morris v. Grover*, 2 Ill. (1 Scam.) 528 (1840); *Pickard v. Low*, 15 Me. 48 (1838); *Lane v. Borland*, 14 Me. 77 (1836); *Tibbetts v. Towle*, 12 Me. 341 (1835); *Lunt v. Whitaker*, 10 Me. 310 (1833); *Sawyer v. Shaw*, 9 Me. 47 (1832); *Lewis v. Stevenson*, 2 Hall 63 (N.Y. Super. Ct. 1829); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810); *Hooben v. Bidwell*, 16 Ohio 509 (1847); *Hombeck v. Vanmetre*, 9 Ohio 153 (1839). For purchasers as plaintiff, see *Murray v. Burtis*, 15 Wend. 212 (N.Y. Sup. Ct. 1836); *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. Sup. Ct. 1832).

85. For secured parties as plaintiff, see *Whitwell v. Vincent*, 21 Mass. (4 Pick.) 449 (1827); *Peters v. Ballistier*, 20 Mass. (3 Pick.) 495 (1826); *Jewett v. Warren*, 12 Mass. (11 Tyng) 300 (1815) (debtor's administrator); *Hendricks v. Mount*, 5 N.J.L. 738 (1820) (bailee with notice); *Welsh v. Bekey*, 38 Pa. (1 Pen. & W.) 57 (1829) (debtor's executor). Statutes provided that executors and administrators pay debts of creditors before legacies. See, e.g., *Royce v. Burrell*, 12 Mass. (11 Tyng) 395 (1815) (citing Stat. 1783, c. 36, § 3); *Lee v. Wright*, 33 Pa. (1 Rawle) 149 (1829). For general creditors as plaintiff, see *Swift v. Thompson*, 9 Conn. 63 (1831); *Starr v. Knox*, 2 Conn. 215 (1817); *Clark v. Richards*, 1 Conn. 53 (1814); *New England Marine Ins. Co. v. Chandler*, 16 Mass. (16 Tyng) 275 (1820); *Passmore v. Eldridge*, 27 Pa. (12 Serg. & Rawle) 198 (1824) (insolvency trustee); *Fletcher v. Howard*, 2 Aik. 115 (Vt. 1826) (pledgee not in possession).

confront another secured party, never-the-less, they contested in four opinions (4%).⁸⁶ These opinions all dealt with the fraudulent conveyance challenge to the nonpossessory secured transaction.

The reason for so few battles between secured parties lay with legal theory. The debtor had transferred ownership of the collateral to the first secured party and had nothing left to transfer to the second secured party except the right of redemption under a chattel mortgage or the right to repurchase under a conditional bill of sale, provided the debtor had not created secret mortgages. Parties did not develop the nonpossessory secured transaction to defeat fellow secured parties.

Most of the actions brought by the parties in the litigation related to trespass, replevin, and trover. Property owners used trespass to recover damages for injury to their property. The English writ system used by the northern states designed two actions, replevin and trover, for personal property owners to retrieve or obtain compensation for property wrongfully taken. Parties used replevin to stop a levying sheriff, or another, by claiming ownership of the chattels. They brought trover, the damage action for conversion, when the defendant no longer held the personalty.⁸⁷

Of those one hundred seven actions between the secured party and a third party, ninety-three opinions (87%) sought these three remedies. The secured party clearly required litigation to enforce his ownership rights. Thirty opinions treated trespass actions.⁸⁸ Twenty-nine pertained to replevin

86. See *The Mary*, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187) (second v. first); *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512 (1824) (first v. second); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. Ch. 1835) (first v. second); *Rogers v. Dare*, Wright 136 (Guernsey County Ct. 1832) (first v. second).

87. HOLDSWORTH, *supra* note 17, at 285 (trespass); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 333 (1979) (replevin).

88. For trespass actions involving judgment lien creditors, see *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (won, after); *Toby v. Reed*, 9 Conn. 216 (1832) (lost, unspecified); *Patten v. Smith*, 5 Conn. 196 (1824) (lost, unspecified); *Abbott v. Goodwin*, 20 Me. 409 (1841) (won, unspecified); *Cutter v. Copeland*, 18 Me. 127 (1841) (won, unspecified); *Smith v. Putney*, 18 Me. 87 (1841) (won, before); *Ulmer v. Hills*, 8 Me. 326 (1832) (won, unspecified); *Brinley v. Spring*, 7 Me. 241 (1831) (won, before); *Haskell v. Greely*, 3 Me. 425 (1825) (won, after); *Fletcher v. Willard*, 31 Mass. (14 Pick.) 464 (1833) (won, unspecified); *Merrill v. Hunnewell*, 30 Mass. (13 Pick.) 213 (1832) (lost, unspecified); *Sumner v. Hamlet*, 29 Mass. (12 Pick.) 76 (1831) (won, unspecified); *Adams v. Wheeler*, 27 Mass. (10 Pick.) 199 (1830) (won, unspecified); *Carrington v. Smith*, 25 Mass. (9 Pick.) 419 (1829) (won, before); *Parks v. Hall*, 19 Mass. (2 Pick.) 206 (1824) (won, before); *Rice v. Austin*, 17 Mass. (16 Tyng) 197 (1821) (won, unspecified); *Hall v. Snowhill*, 14 N.J.L. 551 (1835) (won, unspecified); *Patchin v. Pierce*, 12 Wend. 61 (N.Y. Sup. Ct. 1834) (won, unspecified); *Ferguson v. Lee*, 9 Wend. 258 (N.Y. Sup. Ct. 1832) (lost, unspecified); *Langdon v. Buel*, 9 Wend. 80 (N.Y. Sup. Ct. 1832) (lost, unspecified); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829) (lost, unspecified); *Ludlow v. Hurd*, 19 Johns. 218 (N.Y. Sup. Ct. 1821) (won, before); *Weller v.*

actions.⁸⁹ Twenty-eight referred to trover actions.⁹⁰ Six opinions had to do

Wayland, 17 Johns. 102 (N.Y. Sup. Ct. 1819) (won, before); Clark v. Jack, 47 Pa. (7 Watts) 375 (1838) (won, unspecified); Martin v. Mathiot, 29 Pa. (14 Serg. & Rawle) 214 (1826) (lost, unspecified); Clow v. Woods, 20 Pa. (5 Serg. & Rawle) 275 (1819) (lost, before); Sturgis v. Warren, 11 Vt. 433 (1839) (lost, unspecified); Spaulding v. Austin, 2 Vt. 555 (1830) (won, unspecified). The parentheticals show whether the secured won or lost and whether the third party's debt came before or after the secured parties' debt. See *infra* notes 94-95 and accompanying text for the analysis of these matters. For trespass actions dealing with general creditors, see Fletcher v. Howard, 2 Aik. 115 (Vt. 1826) (won, before). For trespass actions concerning another secured party, see Rogers v. Dare, Wright 136 (Guernsey County Ct. 1832) (won, after).

89. For replevin actions involving judgment lien creditors, see Harris v. D'Wolf, 29 U.S. (4 Pet.) 147 (1830) (won, after); Rhines v. Phelps, 8 Ill. (3 Gilm.) 455 (1846) (lost, unspecified); Ingraham v. Martin, 15 Me. 373 (1839) (won, unspecified); Gleason v. Drew, 9 Me. 79 (1832) (won, unspecified); Holbrook v. Baker, 5 Me. 309 (1828) (won, unspecified); Reed v. Jewett, 5 Me. 96 (1827) (won, unspecified); Bartels v. Harris, 4 Me. 146 (1826) (won, before); Macomber v. Parker, 31 Mass. (14 Pick.) 497 (1833) (won, unspecified); Johns v. Church, 29 Mass. (12 Pick.) 557 (1832) (won, unspecified); Reed v. Upton, 27 Mass. (10 Pick.) 522 (1830) (won, unspecified); Butterfield v. Baker, 22 Mass. (5 Pick.) 522 (1827) (lost, unspecified); Ward v. Sumner, 22 Mass. (5 Pick.) 59 (1827) (won, unspecified); Homes v. Crane, 19 Mass. (2 Pick.) 607 (1824) (won, after); Bartlett v. Williams, 18 Mass. (1 Pick.) 288 (1823) (won, after); Marston v. Baldwin, 17 Mass. (16 Tyng) 606 (1822) (won, before); Putnam v. Dutch, 8 Mass. (7 Tyng) 286 (1811) (won, before); Portland Bank v. Stubbs, 6 Mass. (5 Tyng) 422 (1810) (won, after); Portland Bank v. Stacey, 4 Mass. (3 Tyng) 661 (1808) (won, before); Hussey v. Thornton, 4 Mass. (3 Tyng) 405 (1808) (won, before); Jackson v. Dean, 1 Doug. 519 (Mich. 1845) (won, before); Haven v. Low, 2 N.H. 13 (1819) (won, unspecified); Randall v. Cook, 17 Wend. 53 (N.Y. Sup. Ct. 1837) (lost, unspecified); Hall v. Tuttle, 8 Wend. 375 (N.Y. Sup. Ct. 1832) (won, before); Myers v. Harvey, 39 Pa. (2 Pen. & W.) 478 (1831) (won, before). For replevin actions dealing with purchasers, see Morris v. Grover, 2 Ill. (1 Scam.) 528 (1840) (lost, after); Pickard v. Low, 15 Me. 48 (1838) (won, after); Murray v. Burtis, 15 Wend. 212 (N.Y. Sup. Ct. 1836) (won, after); Hooben v. Bidwell, 16 Ohio 509 (1847) (won, after); Hombeck v. Vanmetre, 9 Ohio 153 (1839) (won, after).

90. For trover actions involving judgment lien creditors, see Melody v. Chandler, 12 Me. 282 (1835) (won, unspecified); Hunt v. Holton, 30 Mass. (13 Pick.) 216 (1832) (won, after); Shumway v. Rutter, 24 Mass. (7 Pick.) 56 (1828) (lost, unspecified); Ayer v. Bartlett, 23 Mass. (7 Pick.) 71 (1827) (won, after); Badlam v. Tucker, 18 Mass. (1 Pick.) 389 (1823) (won, unspecified); Lanfear v. Sumner, 17 Mass. (16 Tyng) 110 (1821) (lost, before); Ash v. Savage, 5 N.H. 545 (1831) (won, unspecified); Doane v. Eddy, 16 Wend. 523 (N.Y. Sup. Ct. 1837) (lost, unspecified); Look v. Comstock, 15 Wend. 244 (N.Y. Sup. Ct. 1836) (lost, before); Gardner v. Adams, 12 Wend. 297 (N.Y. Sup. Ct. 1834) (lost, after); McLachlan v. Wright, 3 Wend. 348 (N.Y. Sup. Ct. 1829) (lost, before); Stutson v. Brown, 7 Cow. 732 (N.Y. Sup. Ct. 1827) (lost, before); Reynolds v. Shuler, 5 Cow. 323 (N.Y. Sup. Ct. 1826) (won, before); Bissel v. Hopkins, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (won, unspecified); Jenkins v. Eichelberger, 44 Pa. (4 Watts) 121 (1835) (won, unspecified); Morgan's Executors v. Biddle, 6 Pa. (1 Yeates) 3 (1791) (won, unspecified); Woodward v. Gates, 9 Vt. 358 (1837) (lost, unspecified); Tobias v. Francis, 3 Vt. 425 (1830) (lost, unspecified). For trover actions dealing with purchasers, see Lane v. Borland, 14 Me. 77 (1836) (won, after); Tibbetts v. Towle, 12 Me. 341 (1835) (won, after); Lunt v. Whitaker, 10 Me. 310 (1833) (won, after); Sawyer v. Shaw, 9 Me. 47 (1832) (won, after); Ferguson v. Union Furnace Co., 9 Wend. 345 (N.Y. Sup. Ct. 1832) (won, after); Barrow v. Paxton, 5 Johns. 258 (N.Y. Sup. Ct. 1810) (won, after). For trover actions concerning general creditors, see Swift v. Thompson, 9 Conn. 63 (1831) (lost, unspecified);

with an admiralty version of the same actions, a libel, or a western version of the same actions, a statutory action for right of property.⁹¹ Nine actions (8%) involved equity actions, such as bills to foreclose, for an accounting, or for discovery, and other damage actions.⁹² The remaining five opinions (5%) did not identify the action.⁹³

Under these actions, the secured party won most of the time, seventy-six times out of the one hundred seven.⁹⁴ Obviously, the fraudulent conveyance argument against the nonpossessory secured transaction did not carry the day under the eighteenth century priority rule. But on a state by state basis, the fraudulent conveyance argument did matter.

Five states, three Eastern New England states and New Jersey and Michigan, generally upheld the nonpossessory secured transaction. Four of these five states upheld the nonpossessory secured transaction every time a party raised the fraudulent conveyance objection: Maine seventeen times, New Hampshire twice, New Jersey twice, and Michigan once. Massachusetts upheld it over eighty percent of the time with twenty-four of twenty-nine opinions.

Jewett v. Warren, 12 Mass. (11 Tyng) 300 (1815) (won, before); Peters v. Ballistier, 20 Mass. (3 Pick.) 495 (1826) (won, before). For trover actions treating another secured party, *see* Barrett v. Pritchard, 19 Mass. (2 Pick.) 512 (1824) (won, after).

91. For the libel action dealing with another secured party, *see* The Mary, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187) (admiralty case: lost, after). The court handled the nonpossessory secured transaction under the common law since the transaction did not satisfy admiralty requirements for a bottomry bond. Admiralty law required that the loan secured by the bottomry bond be for a necessity to continue the voyage. For right to payment actions involving judgment lien creditors, *see* Letcher v. Norton, 5 Ill. (4 Scam.) 575 (1843) (won, unspecified); Kitchell v. Bratton, 2 Ill. (1 Scam.) 300 (1836) (won, unspecified); Hankins v. Ingols, 4 Blackf. 35 (Ind. 1835) (won, unspecified); Watson v. Williams, 4 Blackf. 26 (Ind. 1835) (won, unspecified); Jordan v. Turner, 3 Blackf. 309 (Ind. 1833) (lost, unspecified).

92. For equity actions involving judgment lien creditors, *see* Bailey v. Burton, 8 Wend. 339 (N.Y. 1831) (discovery: lost, unspecified); Hendricks v. Robinson, 2 Johns. Ch. 283 (N.Y. Ch. 1816) (accounting: won, unspecified); Kellogg v. Brennan, 14 Ohio 72 (1846) (foreclosure: lost, before). For damage actions dealing with purchasers, *see* Lewis v. Stevenson, 2 Hall 63 (N.Y. Super. Ct. 1829) (indebitatus assumpsit: won, after). For damage actions concerning general creditors, *see* Starr v. Knox, 2 Conn. 215 (1817) (book debt: lost, after); Clark v. Richards, 1 Conn. 53 (1814) (case: lost, after); Whitwell v. Vincent, 21 Mass. (4 Pick.) 449 (1827) (assumpsit: won, after); Hendricks v. Mount, 5 N.J.L. 738 (1820) (case: won, after). For equity actions treating another secured party, *see* Levy v. Welsh, 2 Edw. Ch. 438 (N.Y. Ch. 1835) (foreclosure: won, unspecified).

93. For unidentified actions involving judgment lien creditors, *see* Thornton v. Davenport, 2 Ill. (1 Scam.) 296 (1836) (won, unspecified); Collins v. Myers, 16 Ohio 547 (1847) (lost, unspecified). For unidentified actions dealing with general creditors, *see* New England Marine Ins. Co. v. Chandler, 16 Mass. (16 Tyng) 275 (1820) (won, after); Welsh v. Bekey, 38 Pa. (1 Pen. & W.) 57 (1829) (lost, before and after); Passmore v. Eldridge, 27 Pa. (12 Serg. & Rawle) 198 (1824) (won, unspecified).

94. *See supra* notes 88-93 for cases won or lost.

Five additional states, the two major mid-Atlantic states, New York and Pennsylvania, and three western states had difficulty upholding the transaction, yet enforced it more than fifty-five percent of the time: New York with fourteen of twenty-four opinions, Pennsylvania with five of eight opinions, Ohio with three of five opinions, Indiana with two of three opinions, and Illinois with three of five opinions. But New York's difficulty did not arise until after 1828. Through 1828 New York courts upheld the nonpossessory secured transaction eighty-eight percent of the time, but only forty percent of the time after 1828. Pennsylvania also observed a discontinuity. Before the development of the bailment lease in 1831, Pennsylvania courts upheld the nonpossessory secured transaction only thirty-three percent of the time. After 1830 Pennsylvania courts upheld the bailment lease in each of two opinions before 1840.

Two states had extreme difficulty upholding the transaction. The states of Western New England, Connecticut and Vermont, found the transaction fraudulent most of the time: Connecticut with six of six opinions and Vermont with three of five opinions.

The other northern states, Rhode Island, Iowa, Wisconsin, and Minnesota, had no opinions.

Moreover, the secret nonpossessory secured transaction, unknown to a subsequent creditor, had no significant correlation to the results. Only fifty-four opinions identified whether the other creditor incurred his debt before the secured party obtained his security interest, a preference, or came after the secured party, a secret lien.⁹⁵ Twenty-four involved preferences, thirty dealt with secret liens. On a state-by-state basis the secret liens appeared as follows: Maine, six of nine; Vermont, none of one; Massachusetts, eight of seventeen; Connecticut, three of three; New Jersey, one of one; New York, seven of fifteen; Pennsylvania, one of two; Ohio, three of four; Illinois, one of one; and Michigan, none of one. So courts enforced secret liens in large numbers.

Third parties objected to enforcement of the nonpossessory secured transaction, not because the debtor had kept it secret, but because the title documentation indicated an absolute sale. Only because of supplemental documentation did the secured party win. Judgment lienholders did not think about challenging the secrecy aspect since they had enjoyed the benefit of secrecy during the collusive judgment era. All they thought to challenge was the honesty of the competing nonpossessory secured transaction.

95. See *supra* notes 62-63 for cases involving preferences or secret liens.

B. THE AMERICAN COURTS' RULES

Although the early American courts enforced the nonpossessory secured transaction frequently, the large number of trespass, replevin, and trover actions indicated that the rules the courts used did not work well. The courts' rules resulted in interference with the nonpossessory secured transaction by third parties. The secured party most often prevailed at the courthouse after litigation, but stood a chance of losing, depending on the state.

The rule American courts used to handle these hasty, poorly documented nonpossessory secured transactions, in the one hundred seven opinions challenging the validity of the transaction, numbered four. Two of the rules, the absolute-conditional rule and the *per se* fraud rule determined the effectiveness of the nonpossessory secured transaction under a black and white rule applied by the judges.⁹⁶ These two rules should preclude much litigation. Under a black and white rule, sheriffs could determine without litigation the transaction's validity when the secured party first challenged levy. The third, the heightened rebuttable rule, allowed the judges to set the standard. So in these jurisdictions the rule would generate litigation until the respective court established the standards. The fourth, the rebuttable rule, however, left the matter for the jury. In these jurisdictions, hopes for a favorable jury pronouncement would lead those with shaky positions to pursue litigation. And the hope of changing the rule to the rebuttable rule fostered litigation in the other jurisdictions.

English Courts had used the absolute-conditional rule, devised for the benefit of the landed aristocrats, before the 1677 Statute of Frauds to determine whether settlor, seller, or debtor possession constituted fraud.⁹⁷ Under this rule, if the transaction documents indicated an absolute sale, one without any conditions, but the parties permitted debtor retention of possession, the court would find the transaction a fraudulent conveyance and would not enforce it against adversely affected third parties. But if the transaction documents indicated a conditional sale, one contingent upon some event, and if the debtor retention of possession was consistent with the conditions, then the court would enforce it against adversely affected third parties. This rule allowed the judge to determine absoluteness or conditions from the document as a question of law. A jury only need determine compliance with the conditions.

96. See *Butler v. Van Wyck*, 1 Hill 438 (N.Y. Sup. Ct. 1841) (explaining the impact of the New York rebuttable rule statute).

97. See Flint, *Fraudulent Myth*, *supra* note 9, at 29-33 nn.123-39 (absolute-conditional rule enunciated in 1615 and obsolete by sale of goods provision of the 1677 Statute of Frauds).

The *per se* fraud rule deemed void with respect to third parties any transaction that exhibited debtor possession of the collateral, namely all nonpossessory secured transactions. English courts used the *per se* fraud rule only under bankruptcy law.⁹⁸ The heightened rebuttable rule, an American invention,⁹⁹ resembled the rebuttable rule but required more than just the nonpossessory secured transaction to rebut the presumption of fraud from the debtor's possession of the collateral.

Five states opted for determination by the judge. Three northeastern states, Pennsylvania before 1820 (in 1791), Connecticut before 1824 (in 1814, 1817, and 1823), and Vermont before 1830 (in 1826), adhered to the absolute-conditional rule before abandoning it for either the *per se* fraud rule or the heightened rebuttable rule.¹⁰⁰ These states found the absolute-conditional rule unacceptable. Pennsylvania in 1819 adopted the *per se* fraud rule.¹⁰¹ Justices in Connecticut in 1823 and in Vermont in 1829, after their state legislatures passed the sale of goods provision of the 1677 Statute of Frauds in 1821 and 1823,¹⁰² respectively, adopted the heightened rebuttable rule. But these jurisdictions merely traded one question of law for another, avoiding the lottery with the jury under the rebuttable rule. And two western states, Indiana in 1833 and Illinois in 1836, aware of the rebuttable rule and to avoid its lottery effect, opted for the absolute-conditional rule.¹⁰³

Those states applying the rebuttable rule and the heightened rebuttable rule suffered the most litigation by far, ninety-one opinions. Since this group included only two of the three main commercial states, this imbalance did not

98. See Flint, *Fraudulent Myth*, *supra* note 9, at 40-45 nn.172-86.

99. See *Sturtevant v. Ballard*, 9 Johns. 337 (N.Y. 1812).

100. For secured party victory with debtor's possession condition absent, see *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791) (at sea exception to rule, secured party's possession impossible until arrival, so deemed consistent with mortgage); *Fletcher v. Howard*, 2 Aik. 115 (Vt. 1826) (applying absolute portion of rule to void prior competing absolute sale, secured party in possession wins). For secured party defeat with debtor's possession condition absent in the primary document, but possibly present in supplemental documentation, see *Starr v. Knox*, 2 Conn. 215 (1817) (bill of sale and defeasance contract inadmissible to contradict custom house enrollment showing absolute ownership); *Clark v. Richards*, 1 Conn. 53 (1814) (bill of sale with mortgage provisions inadmissible, due to privity requirement, to contradict custom house enrollment showing absolute ownership).

101. *Clow v. Woods*, 20 Pa. (5 Serg. & Rawle) 275 (1819).

102. 29 Car. II, c. 3, § 17, *reprinted in* 5 Stat. of Realm, *supra* note 11, at 839, 841; see also Flint, *Fraudulent Myth*, *supra* note 9, for the rise of the rebuttable rule caused by the sale of goods provision. In England the rebuttable rule, which leaves the matter to the jury, may have operated well for the class in power, since courts selected jurors from that class, the aristocracy. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 233 (1945). However, in the United States courts selected jurors from the masses. *Id.*

103. *Jordan v. Turner*, 3 Blackf. 309 (Ind. 1833) (rejecting the rebuttable rule); *Thornton v. Davenport*, 2 Ill. (1 Scam.) 296 (1836) (rejecting the *per se* fraud rule).

arise solely due to commercial activity. The rebuttable rule fostered litigation. The large number of opinions dealing with the debtor's possession condition in the primary documentation, thirty-eight opinions, confirmed the fostering effect.¹⁰⁴ The parties could have easily resolved these matters under the prior absolute-conditional rule without litigation. The large number of opinions in this category lost by the secured party, fourteen, suggests the reason for the litigation. Under the rebuttable rule as well as the heightened rebuttable rule, a general creditor could possibly destroy the nonpossessory secured transaction through a favorable jury or judicial panel. This became a real threat in Connecticut after 1824, New York after 1826, Vermont after 1830, and in Massachusetts after 1832. In those years a secured party in this category actually lost.

The debate in those states following the rebuttable rule and the heightened rebuttable rule dealt with what circumstances would rebut the presumption. For one set of states, Massachusetts, Maine, Michigan, New Hampshire, New Jersey, New York before 1829, and Ohio, the rebuttable rule meant that the secured party need only present evidence of the security arrangement to rebut the fraud presumption caused by debtor possession,

104. For secured party victories with debtor's possession condition in the primary document, *see* *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (New York law); *Abbott v. Goodwin*, 20 Me. 408 (1841); *Ingraham v. Martin*, 15 Me. 373 (1839); *Lane v. Borland*, 14 Me. 77 (1836); *Melody v. Chandler*, 12 Me. 282 (1835); *Sawyer v. Shaw*, 9 Me. 47 (1832); *Brinley v. Spring*, 7 Me. 241 (1831); *Macomber v. Parker*, 31 Mass. (14 Pick.) 497 (1833); *Sumner v. Hamlet*, 29 Mass. (12 Pick.) 76 (1831); *Reed v. Upton*, 27 Mass. (10 Pick.) 522 (1830); *Adams v. Wheeler*, 27 Mass. (10 Pick.) 199 (1830); *Carrington v. Smith*, 25 Mass. (9 Pick.) 419 (1829); *Ayer v. Bartlett*, 23 Mass. (7 Pick.) 71 (1827); *Peters v. Ballistier*, 20 Mass. (3 Pick.) 495 (1826); *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512 (1824); *Badlam v. Tucker*, 18 Mass. (1 Pick.) 389 (1823); *Jackson v. Dean*, 1 Doug. 519 (Mich. 1845); *Hall v. Snowhill*, 14 N.J.L. 551 (1835); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. Ch. 1835); *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. Sup. Ct. 1832); *McLachlan v. Wright*, 3 Wend. 348 (N.Y. Sup. Ct. 1829); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810); *Hooben v. Bidwell*, 16 Ohio 509 (1847). For secured party defeats with debtor's possession condition in the primary document, *see* *The Mary*, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187) (voiding prior mortgage against bottomry bond); *Merrill v. Hunnewell*, 30 Mass. (13 Pick.) 213 (1832) (secured party could not identify bricks subject to security interest); *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837) (possession given as accommodation to debtor); *Gardner v. Adams*, 12 Wend. 297 (N.Y. Sup. Ct. 1834) (possession given as accommodation to debtor); *Ferguson v. Lee*, 9 Wend. 258 (N.Y. Sup. Ct. 1832) (mortgage in default, so presently in absolute form); *Langdon v. Buel*, 9 Wend. 80 (N.Y. Sup. Ct. 1832) (fraud not challenged as secured party had assigned notes but not mortgage); *Bailey v. Burton*, 8 Wend. 339 (N.Y. 1831) (fraud as payoff three times value of debt); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829) (mortgage does not reflect true deal); *Reynolds v. Shuler*, 5 Cow. 323 (N.Y. Sup. Ct. 1826) (priority of landlord's lien); *Collins v. Myers*, 16 Ohio 547 (1847) (due to debtor power of disposition); *Kellogg v. Brennan*, 14 Ohio 72 (1846) (priority of service person's liens); *Sturgis v. Warren*, 11 Vt. 433 (1839); *Woodward v. Gates*, 9 Vt. 358 (1837); *Tobias v. Francis*, 3 Vt. 425 (1830).

either through documentation or witness accounts of the parties' intentions. But a second set of states, New York after 1828, Connecticut after 1823, and Vermont after 1829, required additional evidence under the heightened rebuttable rule. Unfortunately, under either the rebuttable rule or the heightened rebuttable rule, leaving the debtor in possession of the collateral insured that the rebuttal could occur in the courthouse.¹⁰⁵

The large number of opinions treating the debtor's possession condition in the secondary documentation or its absence, fifty-two, suggests the use of the rebuttable rule.¹⁰⁶ Of these opinions, the secured party won thirty-nine.

105. See, e.g., *Lewis v. Stevenson*, 2 Hall 63 (N.Y. Super. Ct. 1829) (debtor possession requires the secured party "to show why the possession was so left").

106. For secured party victories with debtor's possession condition in the supplemental document, see *Patton v. Smith*, 4 Conn. 450 (1823) (rebuttable rule demands retrial, *after retrial*, 5 Conn. 196 (1824) (adopting heightened rebuttable rule); *Holbrook v. Baker*, 5 Me. 309 (1828); *Homes v. Crane*, 19 Mass. (2 Pick.) 607 (1824); *New England Marine Ins. Co. v. Chandler*, 16 Mass. (16 Tyng) 275 (1820); *Ash v. Savage*, 5 N.H. 545 (1831); *Hendricks v. Mount*, 5 N.J.L. 738 (1820); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1832); *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824); *Rogers v. Dare*, *Wright* 136 (Guernsey County Ct. 1832); *Spaulding v. Austin*, 2 Vt. 555 (1829). For secured party defeats with debtor's possession condition in the supplemental document, see *Patten v. Smith*, 5 Conn. 196 (1824); *Parks v. Hall*, 19 Mass. (2 Pick.) 206 (1824) (rare Massachusetts case using absolute-conditional rule); *Randall v. Cook*, 17 Wend. 53 (N.Y. Sup. Ct. 1837) (possession given as accommodation to debtor). For secured party victories with debtor's possession condition possibly in supplemental document, see *Smith v. Putney*, 18 Me. 87 (1841); *Gleason v. Drew*, 9 Me. 79 (1832); *Ulmer v. Hills*, 8 Me. 326 (1832); *Reed v. Jewett*, 5 Me. 96 (1827); *Bartels v. Harris*, 4 Me. 146 (1826); *Fletcher v. Willard*, 31 Mass. (14 Pick.) 464 (1833); *Whitwell v. Vincent*, 21 Mass. (4 Pick.) 449 (1827); *Bartlett v. Williams*, 18 Mass. (1 Pick.) 288 (1823); *Rice v. Austin*, 17 Mass. (16 Tyng) 197 (1821); *Jewett v. Warren*, 12 Mass. (11 Tyng) 300 (1815); *Hussey v. Thornton*, 4 Mass. (3 Tyng) 405 (1808); *Haven v. Low*, 2 N.H. 13 (1819); *Lewis v. Stevenson*, 2 Hall 63 (N.Y. Super. Ct. 1829). For secured party defeats with debtor's possession condition possibly in supplemental document, see *Shumway v. Rutter*, 24 Mass. (7 Pick.) 56 (1828) (follows *Lanfear*); *Lanfear v. Sumner*, 17 Mass. (16 Tyng) 110 (1821) (rare Massachusetts case applying absolute-conditional rule noted by the reporter as in error, but dealing with Pennsylvania security interest void under *per se* rule in Pennsylvania); *Stutson v. Brown*, 7 Cow. 732 (N.Y. Sup. Ct. 1827) (fraud when made pending judgment). For secured party victories with debtor's possession condition absent, see *Harris v. D'Wolf*, 29 U.S. (4 Pet.) 147 (1830) (New York law); *Cutter v. Copeland*, 18 Me. 127 (1841); *Pickard v. Low*, 15 Me. 48 (1838); *Tibbetts v. Towle*, 12 Me. 341 (1835); *Lunt v. Whitaker*, 10 Me. 310 (1833); *Haskell v. Greely*, 3 Me. 425 (1825); *Hunt v. Holton*, 30 Mass. (13 Pick.) 216 (1832); *Johns v. Church*, 29 Mass. (12 Pick.) 557 (1832); *Ward v. Sumner*, 22 Mass. (5 Pick.) 59 (1827); *Marston v. Baldwin*, 17 Mass. (16 Tyng) 606 (1822); *Putnam v. Dutch*, 8 Mass. (7 Tyng) 286 (1811); *Portland Bank v. Stubbs*, 6 Mass. (5 Tyng) 422 (1810); *Portland Bank v. Stacey*, 4 Mass. (3 Tyng) 661 (1808); *Murray v. Burtis*, 15 Wend. 212 (N.Y. Sup. Ct. 1836); *Patchin v. Pierce*, 12 Wend. 61 (N.Y. Sup. Ct. 1834); *Ludlow v. Hurd*, 19 Johns. 218 (N.Y. Sup. Ct. 1821); *Weller v. Wayland*, 17 Johns. 102 (N.Y. Sup. Ct. 1819); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1816); *Hombeck v. Vanmetre*, 9 Ohio 153 (1839) (provision had expired). For secured party defeats with debtor's possession condition absent, see *Toby v. Reed*, 9 Conn. 216 (1832); *Swift v. Thompson*, 9 Conn. 63 (1831) (nonpossessory secured transaction alone not

Under the absolute-conditional rule, the secured party would have lost them all. So the rebuttable rule permitted the implication of a nonpossessory condition for the security interest when the documentation failed to do so. This rule aided the secured party who only hastily took a security interest when the debtor began to become insolvent. Yet opinions adopting a successor rule to the absolute-conditional rule reflected no rational derivation from English common law,¹⁰⁷ nor any connection to party affiliation, much less any connection to, or revulsion from, aiding the last minute secured party.

The early Massachusetts opinions lack citations to the source of, or policy behind, the rebuttable rule until 1823.¹⁰⁸ Three old-school Massachusetts Federalists, Theophilus Parsons, Samuel Sewall, and George Thatcher, delivered *Hussey v. Thornton*,¹⁰⁹ the first opinion in Massachusetts to treat the nonpossessory secured transaction, written by Parsons in 1808.¹¹⁰ Parsons merely rejected defendant's argument to use the absolute-conditional rule and affirmed a jury instruction to accept the secured party's excuse for debtor possession, if factually correct. Thereafter, Massachusetts followed the rebuttable rule, with only three relapses reverting to the absolute-conditional rule, resulting in secured party loses.¹¹¹ Other than these relapses, the secured

sufficient to rebut presumption); *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522 (1827) (instrument did not create a security interest); *Look v. Comstock*, 15 Wend. 244 (N.Y. Sup. Ct. 1836) (secured party took possession, then returned collateral).

107. See Flint, *Fraudulent Myth*, *supra* note 9, at 33-35 nn.141-48 for the derivation from the sale of goods provision of the 1677 Statute of Frauds. All seaboard states properly followed this derivation as did Michigan and Illinois. *Id.* at 59 nn.240-41. Only Ohio and Indiana did not follow it. *Id.* at 59 nn.238, 240.

108. For the earliest citations, see *Badlam v. Tucker*, 18 Mass. (1 Pick.) 389 (1823) (citing *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (K.B. 1800)); *Bartlett v. Williams*, 18 Mass. (1 Pick.) 288 (1823) (citing *Kidd*); *New England Marine Ins. Co. v. Chandler*, 16 Mass. (16 Tyng) 275 (1820) (citing *Twyne's Case*, 76 Eng. Rep. 809, *sub. nom.* *Chamberlain v. Twyne*, 72 Eng. Rep. 809 (Star Chamber 1601)).

109. 4 Mass. (3 Tyng) 405 (1808), see also *Portland Bank v. Stacey*, 4 Mass. (3 Tyng) 661 (1808) (law of this state).

110. Theophilus Parsons (1750-1813) of Newburyport, Essex County, served as Chief Justice (1806-1813). A.N. MARQUIS CO., WHO WAS WHO IN AMERICA, HISTORICAL VOLUME 1607-1896 397 (1963). Samuel Sewall (1757-1814) of Marblehead, Essex County, served as U.S. Representative (1796-1800), Justice (1800-1813), and Chief Justice (1814). A.N. MARQUIS CO., *supra*, at 476. George Thatcher (1754-1824) of Biddeford, York County, (now Maine) served as U.S. Representative (1789-1801) and as Justice (1801-1824). 18 DUMAS MALONE, DICTIONARY OF AMERICAN BIOGRAPHY 386 (1936). See WILLIAM T. DAVIS, HISTORY OF THE JUDICIARY OF MASSACHUSETTS 178-79 (1971) (holders of office); DAVID HACKETT FISCHER, THE REVOLUTION OF AMERICAN CONSERVATISM: THE FEDERALIST PARTY IN THE ERA OF JEFFERSONIAN DEMOCRACY 254-58 (1965) (Federalist party affiliation).

111. For the relapses, see *Shumway v. Rutter*, 24 Mass. (7 Pick.) 56 (1828) (follows *Lanfear*); *Parks v. Hall*, 19 Mass. (2 Pick.) 206 (1824) (jury instructed on absolute-conditional rule, appellate court avoids rule by treating transaction as a sale and resale); *Lanfear v. Sumner*,

party won twenty-four opinions and lost two under the rebuttable rule in Massachusetts. The losses involved documentation that failed to create the security interest or to uniquely identify the collateral.

New York also obscured the source of, and policy behind, the rebuttable rule. Three New York Republicans, Smith Thompson of the Livingston faction, Ambrose Spencer of the Clinton faction and later an Antimason and a Whig, and Joseph Christopher Yates, and two Federalists, James Kent of the old-school, later a Whig, and William W. Van Ness of the new school, decided the 1810 *per curiam* *Barrow v. Paxton*¹¹² opinion, New York's first nonpossessory secured transaction opinion.¹¹³ The court rejected the argument to use the absolute-conditional rule to reverse an application of the rebuttable rule. The court cited an English marriage settlement opinion for the proposition, overlooking the secured party's argument formulated from Buller's treatise and an English nonpossessory secured transaction opinion.¹¹⁴ In the second case to provide a source for the rule, the chancery merely cited the general proposition that debtors have a right to prefer one creditor over another outside of bankruptcy.¹¹⁵ Until 1829, New York followed the rebuttable rule, with only one foreshadowing of the heightened rebuttable

17 Mass. (16 Tyng) 110 (1821) (dealing with a Pennsylvania security interest void under *per se* rule in Pennsylvania).

112. 5 Johns. 258 (N.Y. Sup. Ct. 1810) (citing *Cadogan v. Kennet*, 98 Eng. Rep. 1171 (K.B. 1776), a marriage settlement opinion).

113. Smith Thompson (1768-1843) of Amenia, Dutchess County, served as Justice (1802-1814), Chief Justice (1814-1818), Secretary of the Navy (1819-1823), and Justice of the U.S. Supreme Court (1824-1843). A.N. MARQUIS CO., *supra* note 110, at 528. Ambrose Spencer (1765-1848) of Hudson, Columbia County, served as Justice (1804-1819), Chief Justice (1819-1823), and U.S. Representative (1829-1831). *Id.* at 498. Joseph Christopher Yates (1768-1837) of Schnectady, Schnectady County, served as Justice (1808-1822) and Governor (1823-1825). JAMES GRANT WILSON, 6 APPLETON'S CYCLOPAEDIA OF AMERICAN BIOGRAPHY 638 (6th ed. 1887). James Kent (1763-1847) of New York City served as Justice (1798-1804), Chief Justice (1804-1814), and Chancellor (1814-1823). A.N. MARQUIS CO., *supra* note 110, at 292. William W. Van Ness (1776-1823) of New York City served as Justice (1807-1822) and had banking connections. The legislature acquitted him in 1820 of using his office to obtain a bank charter. WILSON, *supra*, at 248. See FISCHER, *supra* note 110, at 302 (Kent's party); *id.* at 318 (Van Ness's party); ALEXANDER FLICK, 6 HISTORY OF THE STATE OF NEW YORK 57-58 (1934) (Yates's party); MALONE, *supra* note 110, at 444 (Spencer's party, switched from Jacobin Federalists in 1798); *id.* at 471 (Thompson's party); HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATION OF THOMAS JEFFERSON 76 (1986) (Spencer's faction); WILLIAM PRESTON VAUGHN, THE ANTIMASONIC PARTY IN THE UNITED STATES, 1826-1842 at 43 (1982) (Kent, a Whig).

114. For the formulation from Buller and *Kidd*, see Flint, *Fraudulent Myth*, *supra* note 9, at 49-50 nn.194-96.

115. See *Hendricks v. Robinson*, 2 Johns. Ch. 283, 306 (N.Y. Ch. 1816) (citing *Hopkins v. Grey*, 87 Eng. Rep. 1149 (K.B. 1704), a preference opinion).

rule.¹¹⁶ Even with this foreshadowing, the secured party won eight opinions and lost one under the rebuttable rule in New York. The loss involved fraud pending a known judgment.

In the other three seaboard states using the rebuttable rule, the secured party consistently won, winning twenty-one opinions and losing none. Republicans dominated the later seaboard state courts espousing the rebuttable rule for the first time.

In New Hampshire, Republicans William Merchant Richardson, Samuel Bell, later a Whig, and Levi Woodbury, later a Democrat, rendered *Haven v. Low*,¹¹⁷ written by Woodbury in 1819.¹¹⁸ Woodbury drew New Hampshire's rule from the modern English rule.

In New Jersey, moderate Federalist Andrew Kirkpatrick and Republicans, Samuel Lewis Southard, later a Whig, and William Rossell, later a National Republican, delivered *Hendricks v. Mount*,¹¹⁹ written by Southard in 1820.¹²⁰ Southard merely claimed it as undoubtedly correct.

116. See *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (secured party victory).

117. 2 N.H. 13, 17 (1819) (citing *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (K.B. 1800)).

118. William Merchant Richardson (1774-1838) of Chester, Rockingham County, served as Republican U.S. Representative (1811-1814) for Massachusetts and Chief Justice (1816-1838). A.N. MARQUIS CO., *supra* note 110, at 442. Samuel Bell (1770-1850) of Frankestown, Hillsborough County, served as Justice (1816-1819), Governor (1819-1823), and U.S. Senator (1823-1835). *Id.* at 51. Levi Woodbury (1789-1851) of Portsmouth, Rockingham County, served as Justice (1817-1823), Governor (1823-1824), U.S. Senator (1825-1831 & 1841-1845), Secretary of the Navy (1831-1834), Secretary of the Treasury (1834-1841), and Justice of the U.S. Supreme Court (1845-1851). *Id.* at 595. See Sen. Doc. No. 100-34, 100th Cong., 2d Sess., BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-1989 (1989) (Richardson, Republican party, Bell eventually a Whig); DONALD B. COLE, JACKSONIAN DEMOCRACY IN NEW HAMPSHIRE, 1800-1851 36 (1970) (all three appointed by Isaac Hill).

119. 5 N.J.L. 738 (1820).

120. Andrew Kirkpatrick (1756-1831) of New Brunswick, Middlesex County, served as Justice (1798-1804) and Chief Justice (1804-1824). A.N. MARQUIS CO., *supra* note 110, at 296. Samuel Lewis Southard (1787-1842) of Hunterdon County served as Justice (1815-1820), U.S. Senator (1821-1823 & 1833-1842), Secretary of the Navy (1823-1829), Secretary of the Treasury (1825), Secretary of War (1828), and Governor (1832-1833). *Id.* at 496. William Rossell (1760-1840) of Monmouth County served as Justice (1804-1826) and Federal District Judge (1826-1840). BICENTENNIAL COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 428 (2d ed. 1983). See MALONE, *supra* note 110, at 412 (Southard party eventually a Whig); CARL E. PRINCE, NEW JERSEY JEFFERSONIAN REPUBLICANS: THE GENESIS OF AN EARLY PARTY MACHINE 1789-1817 36 (1964) (Kirkpatrick's party); *id.* at 92 (Rossell's party).

In Maine, Republicans William Pitt Preble, and Nathan Weston, Jr., later a Democrat, and Federalist Prentiss Mellen, decided *Haskell v. Greely*,¹²¹ written by Mellen in 1825 from Massachusetts opinions.¹²²

Democrats dominated the courts adopting the rebuttable rule after 1832. In Ohio, an evenly balanced court under Whig Peter Hitchcock and Democrat John Crafts Wright rendered the *Rogers v. Dare*¹²³ opinion in 1832 without support.¹²⁴

Democrats Epaphroditus Ransom, Charles Wiley Whipple, Alpheus Felch, and Daniel Goodwin rendered the *Jackson v. Dean*¹²⁵ opinion written by Ransom in 1845 from New York opinions.¹²⁶

But, Republican dominated courts also rendered the opinions espousing the heightened rebuttable rule, a rule that in practice destroyed the nonpossessory secured transaction. In Connecticut, Republicans Stephen Titus Hosmer, John Thompson Peters, Jeremiah Gates Brainerd, and William

121. 3 Me. 425, 427 (1825) (citing *Badlam v. Tucker*, 18 Mass. (1 Pick.) 389 (1823) and *Jewett v. Warren*, 12 Mass. (11 Tyng) 300 (1815)).

122. William Pitt Preble (1785-1857) of York, York County, served as Justice (1820-1828) and as a president of a railroad company (1845-1848). A.N. MARQUIS CO., *supra* note 110, at 423. Nathan Weston, Jr., (1782-1859) of Augusta, Kennebec County, served as Justice (1820-1834) and Chief Justice (1834-1841). 7 JAMES T. WHITE & CO., THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 503 (1897). Prentiss Mellen (1764-1840) of Portland, Cumberland County, served as U.S. Senator (1818-1820) for Massachusetts and Chief Justice (1820-1834). A.N. MARQUIS CO., *supra* note 110, at 423. Mellen also incorporated Maine's first savings bank in 1819 with no restrictions on investments and served as its president. WILLIAM CHADBOURNE, A HISTORY OF BANKING IN MAINE 1799-1930 118-119 (1936). See MALONE, *supra* note 110, at 184 (Preble switched to Republican in 1814); RONALD F. BANKS, MAINE BECOMES A STATE: THE MOVEMENT TO SEPARATE MAINE FROM MASSACHUSETTS 1785-1820 185 (1970) (Mellen, a Federalist in 1819).

123. Wright 136 (Guernsey County Ct. 1832).

124. John Crafts Wright (1783-1861) of Steubenville, Jefferson County, served as Republican, later Democrat, U.S. Congressman (1823-1829) and as Justice (1831-1835). See A.N. MARQUIS CO., *supra* note 110, at 598. Peter Hitchcock (1781-1854) of Burton, Geauga County, served as Republican U.S. Congressman (1817-1819) and as Justice (1819-1832 & 1845-1852). *Id.* at 253; MALONE, *supra* note 110, at 77 (Hitchcock, a Republican eventually a Whig).

125. 1 Doug. 519, 524 (Mich. 1845) (citing two post-chattel mortgage acts cases from N.Y.).

126. Epaphroditus Ransom (1797-1859) of Kalamazoo, Kalamazoo County, served as Justice (1836-1843), as Chief Justice (1843-1847), and as Governor (1847-1849). See CHARLES LANMAN, BIOGRAPHICAL ANNALS OF THE CIVIL GOVERNMENT OF THE UNITED STATES DURING ITS FIRST CENTURY 350 (1876); F. CLEVER BALD, MICHIGAN IN FOUR CENTURIES 253 (1961). Charles Wiley Whipple (1805-1856) served as Justice to 1856. 4 Mich. iii (1857) (death of Whipple). Alpheus Felch (1804-1896) of Monroe, Monroe County, served as Justice (1843-1845), Governor (1846-1847), and Democrat Senator (1846-1852). See A.N. MARQUIS CO., *supra* note 110, at 177. Daniel Goodwin (1799-1887) served as Justice (1843-1850). See WILSON, *supra* note 113, at 682.

Bristol delivered *Patten v. Smith*,¹²⁷ written by Hosmer in 1824 and adopting the heightened rebuttable rule.¹²⁸ But a nonpossessory secured transaction alone did not satisfy the special reason exception. Hosmer found support for the new rule in an English bankruptcy opinion, cited as if it were a decision under the 1571 Fraudulent Conveyance Statute. So the secured parties suffered three defeats.¹²⁹

Like Massachusetts, New York did not always follow the rebuttable rule, but unlike Massachusetts, New York's uneasiness did not entail a desire to return to the absolute-conditional rule, a rule that allowed the nonpossessory secured transaction under certain formalities. Republicans John Savage, later a Democrat, Jacob Sutherland, and William Learned Marcy, later a Democrat, rendered *Divver v. McLaughlin*,¹³⁰ written by Savage in 1829 and adopting the heightened rebuttable rule, allowing for the possibility of an appellate court to find fraud without a jury.¹³¹ The legislature had earlier enshrined the

127. 5 Conn. 196 (1824) (citing *Ryall v. Rolle*, 26 Eng. Rep. 107, *sub. nom.* *Ryall v. Rowles*, 27 Eng. Rep. 1074 (Ch. 1749)).

128. Stephen Titus Hosmer (1763-1834) of Middletown, Middlesex County, served as Justice (1815-1819) and Chief Justice (1819-1833). WILSON, *supra* note 113, at 269. John Thompson Peters (1765-1834) of Hebron, Tolland County, served as Justice (1818-1834). *Id.* at 743; LANMAN, *supra* note 126, at 331. Jeremiah Gates Brainerd served as Justice from (1818-1824). William Bristol (1779-1836) of New Haven, New Haven County, served as Justice (1819-1826) and Federal District Judge (1826-1836). BICENTENNIAL COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 120, at 56 (Bristol later a Whig). Federalist Asa Chapman, Justice (1818-1825), did not participate in the opinion. *Patten v. Smith*, 5 Conn. 196, 202. *See* 2 Conn. vii (1820) (Chapman); 6 Conn. iii (1829) (Chapman); 7 Conn. iii (1831) (Brainerd); RICHARD J. PURCELL, *CONNECTICUT IN TRANSITION, 1775-1818* 239 (1963) (Bristol republican party); *id.* at 251 (Hosmer and Brainerd only ones of a two-thirds Federalist dominated court to avoid Republican purge of four Federalists in 1818).

129. For secured party defeats with debtor's possession condition in the supplemental document, see *Patten v. Smith*, 5 Conn. 196 (1824). For secured party defeats with debtor's possession condition absent, see *Toby v. Reed*, 9 Conn. 216 (1832); *Swift v. Thompson*, 9 Conn. 63 (1831) (establishing that a nonpossessory secured transaction without more fails to satisfy the heightened rebuttable rule).

130. 2 Wend. 596 (N.Y. Sup. Ct. 1829) (citing Savage's earlier opinion *Bissel*; secured party defeat); *accord* *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. Sup. Ct. 1832) (pre-statutory secured party victory since no fraud in law); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1832) (pre-statutory secured party victory); *McLachlan v. Wright*, 3 Wend. 348 (N.Y. Sup. Ct. 1829) (secured party defeat); see also *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (secured party victory). The same justices decided *Bissel* as *Divver*, except John Woodworth, a Clintonian, preceded Marcy. John Woodworth (1768-1858) of Albany, Albany County, served as Justice (1819-1828). WILSON, *supra* note 113, at 608; 2 J. HAMPDEN DOUGHERTY, *LEGAL AND JUDICIAL HISTORY OF NEW YORK* 73 (1983) (Woodworth, a Clintonian).

131. John Savage (1779-1863) of Salem, Washington County, served as U.S. Representative (1815-1819) and Chief Justice (1823-1836). A.N. MARQUIS CO., *supra* note 110, at 456. Jacob Sutherland served as Justice (1823-1836). William Learned Marcy (1786-1857) of Troy, Rensselaer County, served as Justice (1829-1831), U.S. Senator (1831-1833), Governor of New York (1833-1839), Secretary of War (1845-1849), and Secretary of State

rebuttable rule in statute, requiring a jury to consider the matter of fraud.¹³² The New York courts, however, remained hostile. They interpreted the statute to require the secured party to negative fraud.¹³³ Under the tougher New York rebuttable rule, the secured party won six opinions and lost nine. The losses involved documentation that failed to create the security interest or various allegedly fraudulent practices such as keeping the security interest secret, transferring collateral worth several times the debt, slow delivery, enforcement after the debt's payoff, and fraud pending judgment. But the losses also included three opinions involving debtor possession solely to work off the loan.¹³⁴

In Vermont Republicans, Samuel Prentiss, later a Whig, Titus Hutchinson, Charles Kilbourne Williams, later Whig, and Stephen Royce, Jr., later a Whig and Republican, and National Republican Ephraim Paddock,

(1853-1857). A.N. MARQUIS CO., *supra* note 110, at 332. Marcy's father-in-law, Benjamin Knowler, co-founded the Albany Regency and served as president of the Albany Regency's bank in Albany, the Manufacturer's and Farmer's Bank of Albany. LEE BENSON, *THE CONCEPT OF JACKSONIAN DEMOCRACY: NEW YORK AS A TEST CASE* 66-67 (1961). *See* Sen. Doc. No. 100-34, *supra* note 118 (Savage, later a Democrat); 7 N.Y.R. 414 (1884) (Sutherland appointed 1823); 12 N.Y.R. ii (1884) (Sutherland resigned 1835).

132. For the statute, *see* 2 N.Y. Rev. Stat., c. 7, tit. 2 § 5 (1829). The statute reads:

Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by a immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.

The legislature first passed this statute as part of the revised statutes of 1830. *See* 2 SAMUEL WILLISTON, *LAW GOVERNING SALES OF GOODS* 451-52 (1948). The revisers desired a return to the old fraudulent conveyance statute they claimed required delivery for a mortgage challenged by a creditor; however, the legislature changed the language to provide the good faith exception. *See* *Smith v. Acker* 23 Wend. 653, 673-74 (N.Y. 1840) (Sen. Verplanck).

This statute meant that the secured party must negative the fraudulent presumption by more than just the documentation creating the security interest, with fraud determined by a jury. *Gardner v. Adams*, 12 Wend. 297 (N.Y. Sup. Ct. 1834), *Look v. Comstock*, 15 Wend. 244 (N.Y. Sup. Ct. 1836); *Murray v. Buttis*, 15 Wend. 212 (N.Y. Sup. Ct. 1836).

133. *See* *Gardner v. Adams*, 12 Wend. 297 (N.Y. Sup. Ct. 1834) (secured party loss); *accord* *Randall v. Cook*, 17 Wend. 53 (N.Y. Sup. Ct. 1837) (secured party loss); *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837) (secured party loss); *Murray v. Burtis*, 15 Wend. 212 (N.Y. Sup. Ct. 1836) (secured party loss); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. Ch. 1835) (secured party victory).

134. *See, e.g.,* *Randall v. Cook*, 17 Wend. 53 (N.Y. Sup. Ct. 1837); *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837); *Gardner v. Adams*, 12 Wend. 297 (N.Y. Sup. Ct. 1834).

decided the 1830 *per curiam Tobias v. Francis*¹³⁵ opinion, adopting the heightened rebuttable rule.¹³⁶ Three secured party losses followed.¹³⁷

A Republican court rendered the one *per se* fraud opinion. Pennsylvania differed from the other northern states in that it had adopted a bankruptcy law in 1785 for seven years similar to the English bankruptcy law, including the reputed ownership clause.¹³⁸ So when confronted with a nonpossessory secured transaction in the form of a chattel mortgage, Republicans John Bannister Gibson, later a Jacksonian Democrat, and Thomas Duncan (concurring opinion) preferred the *per se* fraud rule applicable to the reputed ownership clause, rejecting both the absolute-conditional rule and the rebuttable rule, in *Clow v. Woods*,¹³⁹ written by Gibson in 1819.¹⁴⁰ Gibson found support in an English bankruptcy opinion cited as if it were a decision under the 1571 Fraudulent Conveyance Statute rather than the reputed ownership clause of the English Bankruptcy Act of 1624. Gibson rejected the English view of incorporating merchant customs as the common law since he

135. 3 Vt. 425 (1830).

136. Samuel Prentiss (1782-1857) of Montpelier, Washington County, served as Chief Justice (1825-1829) and U.S. Senator (1831-1842). A.N. MARQUIS CO., *supra* note 110, at 423 (Prentiss later a Whig). Titus Hutchinson (1771-1857) of Woodstock, Windsor County, served as Justice (1826-1830) and Chief Justice (1830-1833). 4 JAMES T. WHITE & CO., THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 442 (1924). Charles Kilbourne Williams (1782-1853) of Rutland, Rutland County, served as Justice (1822-1824 & 1829-1842), Chief Justice (1842-1846), and Governor (1850-1852). WILSON, *supra* note 113, at 525. Stephen Royce, Jr. (1789-1868) of St. Albans, Franklin County, served as Justice (1825-1827 & 1829-1846), Chief Justice (1846-1852), and Governor (1854-1856). WILSON, *supra* note 113, at 340. Ephraim Paddock served as Justice (1828-1831). See ROSSITER JOHNSON, TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS (1904) (Hutchinson and Royce); FISCHER, *supra* note 110, at 245 (Prentiss, a Federalist); 2 Vt. iii (1830) (Paddock); 4 Vt. iii (1833) (Paddock); RANDOLPH A. ROTH, THE DEMOCRATIC DILEMMA: RELIGION, REFORM, AND THE SOCIAL ORDER IN THE CONNECTICUT RIVER VALLEY OF VERMONT 1791-1850 103 (1987) (Hutchinson, a Republican in 1818); ROBERT VEXLER, CHRONOLOGY AND DOCUMENTARY HANDBOOK OF THE STATE OF VERMONT 8 (1979) (Williams and Royce, Whig governors; Royce later a Republican).

137. For secured party defeats with debtor's possession condition in the primary document, *see Sturgis v. Warren*, 11 Vt. 433 (1839); *Woodward v. Gates*, 9 Vt. 358 (1837); *Tobias v. Francis*, 3 Vt. 425 (1830).

138. For a discussion of the reputed ownership clause, *see Flint, Fraudulent Myth*, *supra* note 9, at 40-41 n.172.

139. 20 Pa. (5 Serg. & Rawle) 275 (1819) (citing *Ryall v. Rolle*, 26 Eng. Rep. 107, *sub. nom.* *Ryall v. Rowles*, 27 Eng. Rep. 1074 (Ch. 1749)).

140. John Bannister Gibson (1780-1853) of Carlisle, Cumberland County, served as Justice (1816-1827 & 1851-1853) and Chief Justice (1827-1851). A.N. MARQUIS CO., *supra* note 110, at 203. Thomas Duncan (1760-1827) of Carlisle, Cumberland County, served as Justice (1817-1827). WHITE, *supra* note 122, at 298 (Duncan appointed by Governor Snyder). Federalist William Tilghman (1756-1827) of Philadelphia, Philadelphia County, Chief Justice (1806-1827), did not participate in the opinion. A.N. MARQUIS CO., *supra* note 110, at 203.

saw widely diverse commercial practices and instead adopted principles to reduce litigation.¹⁴¹ The *per se* fraud rule did just that. However, some Pennsylvanian parties found the *per se* fraud rule undesirable as denying security and experimented after 1819 with various other security devices, such as the conditional bill of sale and the sale and resale to create the nonpossessory secured transaction in Pennsylvania before hitting upon the bailment lease.¹⁴² The Pennsylvania courts enforced bailment leases.

Whigs and Democrats each dominated one of the courts adopting the absolute-conditional rule. In Indiana, Democrats Isaac Newton Blackford, Stephen C. Stevens, and John T. M'Kinney delivered the *Jordan v. Turner*¹⁴³ opinion written by Stevens in 1833.¹⁴⁴ Adhering to the early common law, they couched their opinion in language more appropriate for the rebuttable rule but admitted only explanatory evidence consistent with the terms of the primary written documentation for the nonpossessory secured transaction. The results complied with those obtainable under the absolute-conditional rule.¹⁴⁵

In Illinois, Whigs William Wilson, Samuel Drake Lockwood (dissenting), and Thomas C. Browne and Democrat Theophilus Washington Smith rendered the *Thornton v. Davenport*¹⁴⁶ opinion written by Wilson in

141. BERNARD SWARTZ, MAIN CURRENT IN AMERICAN LEGAL THOUGHT 211 (1993).

142. For secured party defeats with debtor's possession condition in the primary document, see *Jenkins v. Eichelberger*, 44 Pa. (4 Watts) 121 (1835) (sale and resale); *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826) (conditional sale); *Clow v. Woods*, 20 Pa. (5 Serg. & Rawle) 275 (1819) (chattel mortgage). For secured party defeat with debtor's possession condition possibly in the supplemental document, see *Passmore v. Eldridge*, 27 Pa. (12 Serg. & Rawle) 198 (1824) (deed). For secured party defeat with debtor's possession condition absent, see *Welsh v. Bekey*, 38 Pa. (1 Pen. & W.) 57 (1829) (articles of agreement). For secured party victories with debtor's possession condition in the primary document of a bailment lease, see *Clark v. Jack*, 47 Pa. (7 Watts) 375 (1838); *Myers v. Harvey*, 39 Pa. (2 Pen. & W.) 478 (1831).

143. 3 Blackf. 309 (Ind. 1833).

144. Isaac Newton Blackford (1786-1859) of Vincennes, Knox County, served as Justice (1819-1835). See WILSON, *supra* note 113, at 273; BICENTENNIAL COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 120, at 39. Stephen C. Stevens served as Justice (1831-1836). See 2 Blackf. v. (Ind.); 4 Blackf. v. (Ind.) (same). John T. M'Kinney served as Justice (1831-1837). See 2 Blackf. v. (Ind.); 4 Blackf. v. (Ind.) (same).

145. For secured party victory with debtor's possession condition in the primary document, see *Hankins v. Ingols*, 4 Blackf. 35 (Ind. 1835) (upholding trial court's rebuttable rule in jury instructions). For secured party victory with debtor's possession condition absent, see *Watson v. Williams*, 4 Blackf. 26 (Ind. 1835) (mortgage lacks possession condition, so explanatory evidence wrongly excluded since it can not be inconsistent). For secured party defeat with debtor's possession condition absent, see *Jordan v. Turner*, 3 Blackf. 309 (Ind. 1833) (debtor possession inconsistent with mortgage, unexplained, is fraud; but evidence not consistent with mortgage excluded).

146. 2 Ill. (1 Scam.) 296 (1836).

1836.¹⁴⁷ These judges rejected the *per se* fraud rule and emphatically adhered to the absolute-conditional rule, citing two irrelevant cases, an English marriage settlement case and a Virginia recorded mortgage case. Mixed decisions resulted as some attorneys tried to advance a contrary rule on behalf of their client to replace the absolute-conditional rule.¹⁴⁸

So the courts adopting the various rules did not reveal the policy considerations behind them, nor indicate which groups favored which rule. Party affiliation also did not separate the courts adopting a particular rule.

III. PROPONENTS BEHIND THE RULES

To determine the groups favoring the status quo, those favoring the validity of the nonpossessory secured transaction, and those opposing it required determining the lending practices of the various groups of creditors and matching that with the various legal rules. To determine the lending practices of the major pre-chattel mortgage act lenders involved examination of the secured party groups and the corresponding debtor groups for whether the parties used primary documentation in absolute or conditional form and whether they created security interests orally.

Only three categories of lenders required consideration. The rebuttable rule favored those secured parties that both lacked adequate title documentation of the security interest, either with an absolute form or oral creation, and only occasionally entered into a nonpossessory secured transaction thereby avoiding much litigation under the rebuttable rule to

147. William Wilson (1794-1857) of White County served as Justice (1818-1824) and as Chief Justice (1824-1848). See MALONE, *supra* note 110, at 347 (Wilson became a Democrat upon the demise of the Whigs). Samuel Drake Lockwood (1789-1874) of Batavia, Kane County, served as Justice (1825-1848). See A.N. MARQUIS CO., *supra* note 110, at 319 (Lockwood later a Republican). Theophilus Washington Smith (1784-1846) of Chicago, Cook County, served as Justice (1825-1842). See WILSON, *supra* note 113, at 590. Thomas C. Browne served as Justice (1818-1847). See also THOMAS FORD, A HISTORY OF ILLINOIS FROM IT COMMENCEMENT AS A STATE IN 1818 TO 1847 328 (1945) (in 1840 all were Whigs except Smith).

148. For secured party victory with debtor's possession condition in the primary document, see *Letcher v. Norton*, 5 Ill. (4 Scam) 575 (1843); *Thornton v. Davenport*, 2 Ill. (1 Scam.) 296 (1836) (citing *Cadogan v. Kennet*, 98 Eng. Rep. 1171 (K.B. 1776), and *Clayborn's Executor v. Hill*, 1 Va. (1 Wash.) 177 (1793)). For secured party defeat with debtor's possession condition in primary document, see *Rhines v. Phelps*, 8 Ill. (3 Gilm.) 455 (1846) (becomes absolute after expiration of security interest); *Morris v. Grover*, 2 Ill. (1 Scam.) 528 (1840) (decided on procedural grounds so never confronted the proper rule; appears to use rule: first of two creditors to gain possession has priority). For secured party victory with debtor's possession condition absent, see *Kitchell v. Bratton*, 2 Ill. (1 Scam.) 300 (1836) (retrial granted to determine who had possession of the collateral). For the advocacy of the *per se* fraud rule, see *Thornton v. Davenport*, 2 Ill. (1 Scam.) 296 (1836) (Lockwood, J., dissenting).

enforce their rights. This group would prefer the status quo. The other two groups of lenders encountered difficulty under the rebuttable rule due to its determination by litigation. Those lending groups that ordinarily used proper documentation would desire a black and white rule, such as the absolute-conditional rule, to end litigation under the rebuttable rule to enforce their interests. In contrast, those groups that failed to take a nonpossessory secured transaction and lost under the rebuttable rule to a secured party would prefer an insolvency, pro rata distribution rule and an elimination of litigation by voiding all nonpossessory security interests. This group would desire the *per se* fraud rule or the heightened rebuttable rule.

Of the eighty-nine opinions identifying the secured party, only seven did not also identify the debtor. But identification of the collateral provided an inference as to the debtor's identification. Each of these unidentified cases involved livestock indicating the debtor as a farmer.

These eighty-nine opinions dealt with five debtor groups: thirty-one shippers, namely twenty-nine shipowners and two cargo owners, nineteen farmers, nineteen manufacturers, eleven retailers (including the five publishers and transporters), and nine traders, namely seven wholesalers and two jobbers. These same opinions involved seven secured party groups: twenty-one endorsers, twenty traders, thirteen farmers, thirteen manufacturers, nine financial institutions, namely four banks and five insurers, eight shippers (all shipowners), and five retailers.

A. TRADERS REQUIRED THE REBUTTABLE RULE

Examination of the loans to the five debtor groups revealed that loan documentation for loans to traders and retailers involved by far the least care. These two groups risked losing their credit without the rebuttable rule.

For loans to traders secured parties drafted fifty-five percent of the security interests in absolute form and thirty-three percent involved a security interest created orally.¹⁴⁹ For loans to retailers, secured parties composed

149. From the endorser, *see* *Ward v. Summer*, 22 Mass. (5 Pick.) 59 (1827) (trading firm). From traders, *see* *Whitwell v. Vincent*, 21 Mass. (4 Pick.) 449 (1827) (absolute, oral; gin jobber); *Rice v. Austin*, 17 Mass. (16 Tyng) 197 (1821) (absolute; navy contractor-jobber); *Lanfear v. Sumner*, 17 Mass. (16 Tyng) 110 (1821) (absolute, oral; consignee); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. Ch. 1835) (trading firm); *Collins v. Myers*, 16 Ohio 547 (1847) (merchant partner). From the farmer, *see* *Lane v. Borland*, 14 Me. 77 (1836) (trading firm). From the bank, *see* *New England Marine Ins. Co. v. Chandler*, 16 Mass. (16 Tyng) 275 (1820) (absolute, oral; shareholder). From the retailer, *see* *Ludlow v. Hurd*, 19 Johns. 218 (N.Y. Sup. Ct. 1821) (absolute; trading firm).

thirty-six percent of the security interests in absolute form and nine percent concerned a security interest created orally.¹⁵⁰

In contrast, loans made to the other groups reflected much more careful documentation, but with no group standing out. Of the shipping loans, secured parties crafted nineteen percent of the security interests in absolute form and sixteen percent referred to a security interest created orally.¹⁵¹ For loans to the farmers, the secured parties made twenty-one percent of the security interests in absolute form and eleven percent related to a security interest created orally.¹⁵² For loans to the manufacturers, the secured parties

150. From endorsers, *see* *Bartels v. Harris*, 4 Me. 146 (1826) (absolute); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829); *Weller v. Wayland*, 17 Johns. 102 (N.Y. Sup. Ct. 1819) (absolute). From traders, *see* *Smith v. Putney*, 18 Me. 87 (1841); *Hunt v. Holton*, 30 Mass. (13 Pick.) 216 (1832). From the farmer, *see* *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826). From the manufacturer, *see* *Patten v. Smith*, 5 Conn. 196 (1824). From retailers, *see* *Shumway v. Rutter*, 24 Mass. (7 Pick.) 56 (1828) (absolute, oral); *Jackson v. Dean*, 1 Doug. 519 (Mich. 1845); *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (absolute); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810).

151. From endorsers, *see* *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 19 Mass. (2 Pick.) 249 (1824) (absolute); *Badlam v. Tucker*, 18 Mass. (1 Pick.) 389 (1823); *Putnam v. Dutch*, 8 Mass. (7 Tyng) 286 (1811); *M'Intyre v. Scott*, 8 Johns. 159 (N.Y. Sup. Ct. 1811) (absolute, oral); *Dawes v. Cope*, 13 Pa. (4 Binn.) 258 (1811). From traders, *see* *Harris v. D'Wolf*, 29 U.S. (4 Pet.) 147 (1830) (New York law); *Hurry v. The John and Alice*, 12 F. Cas. 1017 (C.C.D. Pa. 1805) (No. 6,923), *on retrial*, *Hurry v. Hurry's Assignees*, 12 F. Cas. 1015 (C.C.D. Pa. 1808) (No. 6,922); *Forbes v. The Hannah*, 9 F. Cas. 406 (Adm. Ct. D. Pa. 1786) (No. 4,925); *Peters v. Ballistier*, 20 Mass. (3 Pick.) 495 (1826); *Marston v. Baldwin*, 17 Mass. (16 Tyng) 606 (1822); *Hussey v. Thornton*, 4 Mass. (3 Tyng) 405 (1808) (absolute, oral); *Ring v. Franklin*, 2 Hall 1 (N.Y. Super. Ct. 1829) (absolute, oral); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1816); *Fisher v. Willing*, 23 Pa. (8 Serg. & Rawle) 118 (1822); *Jennings v. Insurance Co. of Pa.*, 13 Pa. (4 Binn.) 244 (1811); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791). From financial institutions, *see* *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (New York law); *Franklin Ins. Co. v. Lord*, 9 F. Cas. 712 (C.C.D. Mass. 1826) (No. 5,057); *United States v. Delaware Ins. Co.*, 25 F. Cas. 811 (C.C.D. Pa. 1823) (No. 14,942); *Portland Bank v. Stubbs*, 6 Mass. (5 Tyng) 422 (1810); *Portland Bank v. Stacey*, 4 Mass. (3 Tyng) 661 (1808); *Delaware Ins. Co. v. Archer*, 35 Pa. (3 Rawle) 216 (1832); *Insurance Co. of Pa. v. Duval*, 23 Pa. (8 Serg. & Rawle) 138 (1822). From ship sellers, *see* *Philips v. Ledley*, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096); *Gleason v. Drew*, 9 Me. 79 (1832); *Thorndike v. Stone*, 28 Mass. (11 Pick.) 183 (1831) (absolute, oral); *Thorn v. Hicks*, 7 Cow. 696 (N.Y. Sup. Ct. 1827); *Wendover v. Hogeboom*, 7 Johns. 308 (N.Y. Sup. Ct. 1811); *Kellogg v. Brennan*, 14 Ohio 72 (1846). From cargo shippers, *see* *The Mary*, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1832) (absolute, oral).

152. From endorsers, *see* *Johns v. Church*, 29 Mass. (12 Pick.) 557 (1832); *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837); *Patchin v. Pierce*, 12 Wend. 61 (N.Y. Sup. Ct. 1864); *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. Sup. Ct. 1832); *Bailey v. Burton*, 8 Wend. 339 (N.Y. 1831); *Hooben v. Bidwell*, 16 Ohio 509 (1847); *Spaulding v. Austin*, 2 Vt. 555 (1830) (absolute). From the trader, *see* *Look v. Comstock*, 15 Wend. 244 (N.Y. Sup. Ct. 1836). From farmers, *see* *Toby v. Reed*, 9 Conn. 216 (1832); *Ripley v. Dolbier*, 18 Me. 382 (1841); *Pickard v. Low*, 15 Me. 48 (1838); *Tibbetts v. Towle*, 12 Me. 341 (1835) (absolute); *Ulmer v. Hills*, 8 Me. 326 (1832) (absolute, oral); *Fletcher v. Willard*, 31 Mass. (14 Pick.) 464

obtained twenty-one percent of the security interests in absolute form and eleven percent comprised a security interest created orally.¹⁵³

Of the two less precise groups of debtors, the traders, selling in larger lots, dealt with the fewer transactions. So traders, to protect their secured borrowing, needed the rebuttable rule to enforce their secured party's nonpossessory secured transaction as intended. In contrast retailers, as victims of the traders' secured party, probably would lean towards the *per se* fraud rule.

B. MANUFACTURERS RISKED LOSS UNDER THE REBUTTABLE RULE

Examination of the loans made by the various secured party groups revealed that only manufacturers and institutional lenders prepared loan documentation carefully. They risked losing their nonpossessory secured transaction under the rebuttable rule.

For loans made by manufacturers fifteen percent of the security interests appeared in absolute form and eight percent involved a security interest created orally.¹⁵⁴ Almost all of this secured lending involved the sale of the factory and equipment or just the equipment. So manufacturers, both as borrowers against their equipment and as sellers of their manufactured equipment, took care.

(1833) (absolute, oral); *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522 (1827); *Myers v. Harvey*, 39 Pa. (2 Pen. & W.) 478 (1831); *Woodward v. Gates*, 9 Vt. 358 (1837); *Atwater v. Mower*, 10 Vt. 75 (1838); *Fletcher v. Howard*, 2 Aik. 115 (Vt. 1826).

153. From endorsers, *see* *Swift v. Thompson*, 9 Conn. 63 (1831); *Haskell v. Greely*, 3 Me. 425 (1825); *Jewett v. Warren*, 12 Mass. (11 Tyng) 300 (1815) (absolute, oral); *Passmore v. Eldridge*, 27 Pa. (12 Serg. & Rawle) 198 (1824) (absolute); *Clow v. Woods*, 20 Pa. (5 Serg. & Rawle) 275 (1819). From the trader, *see* *Jenkins v. Eichelberger*, 44 Pa. (4 Watts) 121 (1835). From manufacturer sellers, *see* *Wilbur v. Almy*, 53 U.S. (12 How.) 180 (1851); *Reed v. Jewett*, 5 Me. 96 (1827) (absolute, oral); *Macomber v. Parker*, 31 Mass. (14 Pick.) 497 (1833); *Merrill v. Hunnewell*, 30 Mass. (13 Pick.) 213 (1832); *Reed v. Upton*, 27 Mass. (10 Pick.) 522 (1830); *Flagg v. Dryden*, 24 Mass. (7 Pick.) 52 (1828); *Ayer v. Bartlett*, 23 Mass. (7 Pick.) 71 (1827); *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512 (1824); *Gale v. Ward*, 14 Mass. (13 Tyng) 352 (1817); *Langdon v. Buel*, 9 Wend. 80 (N.Y. Sup. Ct. 1832); *Rogers v. Dare*, *Wright* 136 (Guernsey County Ct. 1832) (absolute); *Tobias v. Francis*, 3 Vt. 425 (1830). From the bank, *see* *Brinley v. Spring*, 7 Me. 241 (1831).

154. To manufacturers, *see* *Wilbur v. Almy*, 53 U.S. (12 How.) 180 (1851); *Reed v. Jewett*, 5 Me. 96 (1827) (absolute, oral); *Macomber v. Parker*, 31 Mass. (14 Pick.) 497 (1833); *Merrill v. Hunnewell*, 30 Mass. (13 Pick.) 213 (1832); *Reed v. Upton*, 27 Mass. (10 Pick.) 522 (1830); *Flagg v. Dryden*, 24 Mass. (7 Pick.) 52 (1828); *Ayer v. Bartlett*, 23 Mass. (7 Pick.) 71 (1827); *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512 (1824) (sale of wool); *Gale v. Ward*, 14 Mass. (13 Tyng) 352 (1817); *Langdon v. Buel*, 9 Wend. 80 (N.Y. Sup. Ct. 1832); *Rogers v. Dare*, *Wright* 136 (Guernsey County Ct. 1832) (absolute); *Tobias v. Francis*, 3 Vt. 425 (1830). To retailers, *see* *Patten v. Smith*, 5 Conn. 196 (1824).

For loans made by financial institutions, eleven percent of the security interests possessed an absolute form, and eleven percent treated a security interest created orally.¹⁵⁵ Almost all of these secured lendings pertained to shippers.

In contrast, the other groups made less carefully documented loans. For loans made by retailers, sixty percent of the security interests had an absolute form and twenty percent dealt with a security interest created orally.¹⁵⁶ For loans made by endorsers, thirty-three percent of the security interests involved the absolute form and ten percent comprised a security interest created orally.¹⁵⁷ Farmers, shippers, and manufacturers dominated the debtor groups borrowing through endorsements. For loans made by shipowners, all shipping loans in rebuttable states, twenty-five percent of the security interests concerned the absolute form and twenty-five percent treated a security interest created orally.¹⁵⁸ For loans made by traders, twenty-five percent of the security interests related to the absolute form and twenty percent referred to

155. To the manufacturer, *see* *Brinley v. Spring*, 7 Me. 241 (1831). To shippers, *see* *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (New York law); *Franklin Ins. Co. v. Lord*, 9 F. Cas. 712 (C.C.D. Mass. 1826) (No. 5,057); *United States v. Delaware Ins. Co.*, 25 F. Cas. 811 (C.C.D. Pa. 1823) (No. 14,942); *Portland Bank v. Stubbs*, 6 Mass. (5 Tyng) 422 (1810); *Portland Bank v. Stacey*, 4 Mass. (3 Tyng) 661 (1808); *Delaware Ins. Co. v. Archer*, 35 Pa. (3 Rawle) 216 (1832); *Insurance Co. of Pa. v. Duval*, 23 Pa. (8 Serg. & Rawle) 138 (1822). To the trader, *see* *New England Marine Ins. Co. v. Chandler*, 16 Mass. (16 Tyng) 275 (1820).

156. To retailers, *see* *Shumway v. Rutter*, 24 Mass. (7 Pick.) 56 (1828) (absolute, oral); *Jackson v. Dean*, 1 Doug. 519 (Mich. 1845); *Bissel v. Hopkins*, 3 Cow. 166 (N.Y. Sup. Ct. 1824) (absolute); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810). To the trader, *see* *Ludlow v. Hurd*, 19 Johns. 218 (N.Y. Sup. Ct. 1821) (absolute).

157. To manufacturers, *see* *Swift v. Thompson*, 9 Conn. 63 (1831); *Haskell v. Greely*, 3 Me. 425 (1825); *Jewett v. Warren*, 12 Mass. (11 Tyng) 300 (1815) (absolute, oral); *Passmore v. Eldridge*, 27 Pa. (12 Serg. & Rawle) 198 (1824) (absolute); *Clow v. Woods*, 20 Pa. (5 Serg. & Rawle) 275 (1819). To shippers, *see* *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 19 Mass. (2 Pick.) 249 (1824) (absolute); *Badlam v. Tucker*, 18 Mass. (1 Pick.) 389 (1823); *Putnam v. Dutch*, 8 Mass. (7 Tyng) 286 (1811); *M'Intyre v. Scott*, 8 Johns. 159 (N.Y. Sup. Ct. 1811) (absolute, oral); *Dawes v. Cope*, 13 Pa. (4 Binn.) 258 (1811). To retailers, *see* *Bartels v. Harris*, 4 Me. 146 (1826) (absolute); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829); *Weller v. Wayland*, 17 Johns. 102 (N.Y. Sup. Ct. 1819) (absolute). To the trader, *see* *Ward v. Summer*, 22 Mass. (5 Pick.) 59 (1827). To farmers, *see* *Johns v. Church*, 29 Mass. (12 Pick.) 557 (1832); *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837); *Patchin v. Pierce*, 12 Wend. 61 (N.Y. Sup. Ct. 1834); *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. Sup. Ct. 1832); *Bailey v. Burton*, 8 Wend. 339 (N.Y. 1831); *Hooben v. Bidwell*, 16 Ohio 509 (1847); *Spaulding v. Austin*, 2 Vt. 555 (1830) (absolute).

158. To shippers, *see* *The Mary*, 16 F. Cas. 938 (C.C.D. Conn. 1824) (No. 9,187); *Philips v. Ledley*, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096); *Gleason v. Drew*, 9 Me. 79 (1832) (absolute, oral); *Thorndike v. Stone*, 28 Mass. (11 Pick.) 183 (1831); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1832) (absolute, oral); *Thorn v. Hicks*, 7 Cow. 696 (N.Y. Sup. Ct. 1827); *Wendover v. Hogeboom*, 7 Johns. 308 (N.Y. Sup. Ct. 1810); *Kellogg v. Brennan*, 14 Ohio 72 (1846).

a security interest created orally.¹⁵⁹ For loans made by farmers, twenty-three percent of the security interests appeared in absolute form and fifteen percent comprised a security interest created orally.¹⁶⁰

Although manufacturing lenders and institutional lenders both used accurate documentation, the manufacturers became the more adamant group. They attempted early to avoid the rebuttable rule's effects by using real estate mortgages,¹⁶¹ hoping the legal rules of realty would protect the nonpossessory secured transaction for factory machinery. But fixture law failed to consider machinery as a part of the real estate.¹⁶²

159. To the manufacturer, *see* *Jenkins v. Eichelberger*, 44 Pa. (4 Watts) 121 (1835). To traders, *see* *Harris v. D'Wolf*, 29 U.S. (4 Pet.) 147 (1830) (New York law); *Hurry v. The John and Alice*, 12 F. Cas. 1017 (C.C.D. Pa. 1805) (No. 6,923), *on retrial*, *Hurry v. Hurry's Assignees*, 12 F. Cas. 1015 (C.C.D. Pa. 1808) (No. 6,922); *Forbes v. The Hannah*, 9 F. Cas. 406 (Adm. Ct. D. Pa. 1786) (No. 4,925); *Peters v. Ballistier*, 20 Mass. (3 Pick.) 495 (1826); *Marston v. Baldwin*, 17 Mass. (16 Tyng) 606 (1822); *Hussey v. Thornton*, 4 Mass. (3 Tyng) 405 (1808) (absolute, oral); *Ring v. Franklin*, 2 Hall 1 (N.Y. Super. Ct. 1829) (absolute, oral); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1816); *Collins v. Myers*, 16 Ohio 547 (1847); *Fisher v. Willing*, 23 Pa. (8 Serg. & Rawle) 118 (1822); *Jennings v. Insurance Co. of Pa.*, 13 Pa. (4 Binn.) 244 (1811); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791). To retailers, *see* *Smith v. Putney*, 18 Me. 87 (1841); *Hunt v. Holton*, 30 Mass. (13 Pick.) 216 (1832). To traders, *see* *Whitwell v. Vincent*, 21 Mass. (4 Pick.) 449 (1827) (absolute, oral); *Rice v. Austin*, 17 Mass. (16 Tyng) 197 (1821) (absolute); *Lanfear v. Sumner*, 17 Mass. (16 Tyng) 110 (1821) (absolute, oral); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. Ch. 1835). To the farmer, *see* *Look v. Comstock*, 15 Wend. 244 (N.Y. Sup. Ct. 1836) (expartner).

160. To the retailer, *see* *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826). To the trader, *see* *Lane v. Borland*, 14 Me. 77 (1836). To farmers, *see* *Toby v. Reed*, 9 Conn. 216 (1832); *Ripley v. Dolbier*, 18 Me. 382 (1841); *Pickard v. Low*, 15 Me. 48 (1838); *Tibbetts v. Towle*, 12 Me. 341 (1835) (absolute); *Ulmer v. Hills*, 8 Me. 326 (1832) (absolute, oral); *Fletcher v. Willard*, 31 Mass. (14 Pick.) 464 (1833) (absolute, oral); *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522 (1827); *Myers v. Harvey*, 39 Pa. (2 Pen. & W.) 478 (1831); *Woodward v. Gates*, 9 Vt. 358 (1837); *Atwater v. Mower*, 10 Vt. 75 (1838); *Fletcher v. Howard*, 2 Aik. 115 (Vt. 1826).

161. *See* *Toby v. Reed*, 9 Conn. 216 (1832) (real estate mortgage for farm produce); *Swift v. Thompson*, 9 Conn. 63 (1831) (real estate deed for textile machinery); *Gale v. Ward*, 14 Mass. (13 Tyng) 352 (1817) (real estate mortgage for textile machinery); *Sturgis v. Warren*, 11 Vt. 433 (1839) (real estate mortgage for textile machinery); *Tobias v. Francis*, 3 Vt. 425 (1830) (real estate mortgage for textile machinery).

162. *See* *Swift v. Thompson*, 9 Conn. 63 (1831) (textile machinery standing, cleated, and nailed to floor deemed personalty for debtor's general creditor suing mortgagee); *see also* *Taffe v. Warnick*, 3 Blackf. 111 (Ind. 1832) (carding machine standing on floor is personalty for creditor suing debtor); *Union Bank v. Emerson*, 15 Mass. 159 (1818) (kettle in fulling-mill used for dyeing cloth, was set in brick so creditor could not remove it without injury, considered a fixture for mortgagee suing mortgagor's buyer); *Gale v. Ward*, 14 Mass. (13 Tyng) 352 (1817) (carding machines standing and later nailed to floor judged personalty for judgment lienholder suing sheriff); *Raymond v. White*, 7 Cow. 319 (N.Y. Sup. Ct. 1827) (tanner's vats and leaches attached by board tacked with nails considered personalty for mortgagee's buyer suing judgment lienholder); *Cresson v. Stout*, 17 Johns. 116 (N.Y. Sup. Ct. 1819) (carding machines cleated to floor amounted to personalty for mortgagee suing judgment lienholder); *Heermance v. Vernoy*,

In contrast, financial institutions generally lent through endorsements and deeds of trust with the trustee taking possession.¹⁶³ If a debtor became insolvent the financial institution could recover from the endorser. Moreover, the major financial institutions risking loss under the rebuttable rule comprised those making shipping loans to commercial merchants. The commercial merchant borrowing through such loans had earlier led to the adoption of the rebuttable rule.¹⁶⁴ Most of the early opinions replacing the absolute-conditional rule involved loans to commercial merchants, such as shippers. Besides, they had the benefit of an exception to the rebuttable rule for taking possession upon the ship's return.¹⁶⁵

C. RETAILERS FAVOR THE *PER SE* FRAUD RULE

During the pre-chattel mortgage act era, both Connecticut and New York used the heightened rebuttable rule, which for Connecticut operated as a *per se* fraud rule. So there existed significant opposition to recognizing the effect of nonpossessory secured transactions.

The identities of the groups who opposed the use of nonpossessory secured transactions are not readily apparent in the pre-chattel mortgage act opinions. Those opinions do reveal retailers as the most likely to poorly document their nonpossessory secured transactions. These retailers entered numerous sales transactions on credit and thus probably favored the *per se* fraud rule.

6 Johns. 5 (1810) (tanner's grinding stone attached by bolted iron bands taken for personalty for vendee suing vendor); Teaff v. Hewitt, 1 Ohio St. 511 (1853) (cleated wool manufacturing machinery was personalty for mortgagee suing debtor's judgment lienholder); Sturgis v. Warren, 11 Vt. 433 (1839) (wool manufacturing machinery attached by cleats, screws, and nails held personalty for secured party's assignee suing deputy sheriff); Tobias v. Francis, 3 Vt. 425 (1830) (carding machine connected by band for propulsion deemed personalty for secured party suing execution official).

163. For endorsements, see *supra* note 52 and accompanying text. For deeds of trust, see *New England Marine Ins. Co. v. Chandler*, 16 Mass. (16 Tyng) 275 (1820) (banks normally lent by deeds of trust).

164. See *Flint, Fraudulent Myth*, *supra* note 9, at 35-36 nn.152-57.

165. See *Putnam v. Dutch*, 8 Mass. (7 Tyng) 286 (1811) (intended to take possession in home port, not a neighboring Massachusetts port); *Portland Bank v. Stubbs*, 6 Mass. (5 Tyng) 422 (1810) (expected to take possession a reasonable time after learning of arrival); *Portland Bank v. Stacey*, 4 Mass. (3 Tyng) 661 (1808) (took possession as soon as learned of arrival); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1816) (took possession of ships on arrival in New York). See also *Harris v. D'Wolf*, 29 U.S. (4 Pet.) 147 (1830) (cargo on ship at sea, levied upon landing); *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (same); *Lanfear v. Sumner*, 17 Mass. (16 Tyng) 110 (1821) (attempted to take possession within one hour of arrival); *Peters v. Ballistier*, 20 Mass. (3 Pick.) 495 (1826) (cargo on ship at sea, sold overseas). Pennsylvania did not use the rebuttable rule, see *supra* notes 100-01 and accompanying text, and so Pennsylvania supplied no at sea exception opinions.

Clearly, the general creditors with judgment liens losing to the security interest would favor the *per se* fraud rule. But their stand-in for most of the actions, the sheriff who levied their lien, obscured their identity. Few of the eighty-nine opinions specifying both the secured party's and the debtor's occupation mentioned the grouping of the general creditor. And of the forty-eight opinions identifying the general creditor, too few helped. After eliminating the shipping opinions, since many early chattel mortgage statutes exempted these situations, only nineteen opinions remained. Most of these dealt with loans to shipowners or retailers.

But the clue to their identity appeared in the first New York post-chattel mortgage act opinion. This opinion clearly stated that the problem of good faith purchasers of the collateral losing to the secured party concerned the Justices.¹⁶⁶ Subsequent opinions usually phrased the objection to the security interest in terms of the debtor granting the interest immediately before insolvency proceedings to a friend or relative with a view to prevent the execution of a judgment lien but retaining the possession of the collateral.¹⁶⁷ Thereby both the friend and the judgment lienholder received nothing while the debtor enjoyed the collateral.¹⁶⁸ But of the nineteen pre-chattel mortgage opinions that identify both the secured party and the general creditor and do not involve shipping, the New York opinions seldom had a judgment lienholder as the general creditor.¹⁶⁹ Instead they involved a good faith

166. See *Wood v. Lowry*, 17 Wend. 492 (N.Y. Sup. Ct. 1837) (Bronson, J.) (stating that the debtor had it to trade and make profits from the sale of it; he treated the property as his own); see also *Walker v. Snediker*, 1 Hoff. Ch. 145 (N.Y. Ch. 1839) (stating that debtor made sales of part of the goods rather than deliver them to the secured party). The pre-chattel mortgage act opinions enunciating the heightened rebuttable rule contained similar objections, see *McLachlan v. Wright*, 3 Wend. 348 (N.Y. Sup. Ct. 1829) (Marcy, J.) (stating that the debtor not only had possession of the property, but used and disposed of it as the absolute owner); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829) (Savage, CJ.) (prohibiting the debtor from selling any of the articles mortgaged and from appropriating the money to his own use).

167. See *White v. Cole*, 24 Wend. 116 (N.Y. Sup. Ct. 1840) (Cowen, J.) (noting that all judges have seen cases where the debtor denuded himself of leviable assets by granting a nonpossessory security interest to a friendly creditor and as a trial witness lied about the amount of the debt to protect those assets); *Smith v. Acker*, 23 Wend. 653 (N.Y. 1840) (noting that New York legal history revealed a battle between a policy to cut off collusive sales and mortgages with a *per se* fraud rule and a policy to prevent hardship in individual cases with the rebuttable rule).

168. See *Butler v. Van Wyck*, 1 Hill 438 (N.Y. Sup. Ct. 1841) (Bronson, J., dissenting) (recognizing that debtors use recorded chattel mortgages made with friends to defeat judgment liens while retaining use of their assets without paying legitimate creditors or the friendly creditor).

169. The only one dealt with a defrauded supplier. See *M'Intyre v. Scott*, 8 Johns. 159 (N.Y. Sup. Ct. 1811).

purchaser.¹⁷⁰ These three opinions treated traders lending to retailers, two opinions, or to a farmer, one opinion.

So the problem transaction dealt with inventory as collateral and selling items from that inventory rather than defrauding judgment lienholders. The twelve opinions involving secured parties suing good faith purchasers to recover their property, or good faith purchasers suing secured parties for money, confirmed that this problem concerned the New York Justices. All of these opinions came from New York with four opinions; Maine with five opinions involving farmers after 1832; or from the West with three opinions after 1839.¹⁷¹ The absence of Massachusetts opinions suggests that Massachusetts judges had no problem with this type of transaction.

The conceptual problem involved the form of the chattel mortgage in the 1830's. As a sale subject to a defeasance condition, it would remain unsatisfied as long as the debtor continued to make his payments on the loan.¹⁷² For inventory serving as collateral, the debtor-seller had no ownership to transfer to a customer-buyer. All of the New York pre-chattel mortgage act opinions treating the good faith purchasers involved secured loans to a middleman-seller. A black and white rule enforcing the nonpossessory secured transaction would not eliminate the retailer's problem of purchasing from a trader's inventory with ownership in another, a note endorser lending secured to a trader. But the *per se* fraud rule would. So the group opposing the nonpossessory secured transaction became the retailer.

The problem faced by the retailer developed in the first decades of the nineteenth century. During the Colonial Era, the predominate distribution network from the English seller to the American consumer only involved

170. See *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. Sup. Ct. 1832) (farmer-debtor); *Lewis v. Stevenson*, 2 Hall 63 (N.Y. Super. Ct. 1829) (trustee-secured); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810).

171. For New York opinions, see *Murray v. Burtis*, 15 Wend. 212 (N.Y. Sup. Ct. 1836) (debtor-sloop seller, a partnership, selling to a store owner, secured original owner and a store owner); *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. Sup. Ct. 1832) (debtor-oxen seller, a partnership selling to a corporation, secured the purchase money endorser); *Lewis v. Stevenson*, 2 Hall 63 (N.Y. Super. Ct. 1829) (debtor-plate seller borrowed \$5000 to pay import duties; secured a friend); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810) (debtor-furniture seller pays \$425 annual rent, so probably a store operator; secured the landlord). For Maine opinions, see *Pickard v. Low*, 15 Me. 48 (1838) (oxen); *Lane v. Borland*, 14 Me. 77 (1836) (horse); *Tibbetts v. Towle*, 12 Me. 341 (1835) (oxen); *Lunt v. Whitaker*, 10 Me. 310 (1833) (livestock); *Sawyer v. Shaw*, 9 Me. 47 (1832) (chaise). For western opinions, see *Morris v. Grover*, 2 Ill. (1 Scam.) 528 (1840); *Hoober v. Bidwell*, 16 Ohio 509 (1847); *Hombeck v. Vanmetre*, 9 Ohio 153 (1839).

172. See LEONARD JONES, A TREATISE ON THE LAW OF MORTGAGES OF PERSONAL PROPERTY 527 (1881) (chattel mortgage involves no lien and has no equity of redemption like a mortgage on real estate, so ownership belongs with the mortgagor-lender).

predominantly one middleman, the American port merchant, who acted both as exporter-importer and retailer.¹⁷³ But under the Colonial distribution system credit came from the English agent and ownership of the traded goods lay with the port merchant. As an exporter the port merchant purchased export goods with import goods, specie, or colonial paper. The port merchant shipped the export goods on consignment to an English agent, who sold the goods less a commission and purchased the import goods less a commission from the proceeds and arranged for shipment back to America to the port merchant. Typically the English purchases cost more than the English sales, so the English agent extended credit to the American port merchant. The credit extensions did not involve security, since purchases of American goods by the port merchant on behalf of the English agents, less a commission to repay the credit extension, later in America ordinarily offset the credit. The port merchant maintained a store to dispose of both his imports and items received in kind upon the sale of imports to his customers, both customers and back country retailers. Since customers needed credit for their purchases, the port merchants granted purchase loans over six months to one year at the legal maximum interest of six percent. These credit transactions also typically did not involve security interests since the port merchant seldom made vigorous efforts to collect on the numerous small debts. Consequently, ownership of the goods sold lay with the seller, for exports, the port merchant to the English agent and, for imports, the port merchant to the customer.

But after 1815 the American distribution system began to reflect drastic changes.¹⁷⁴ A three-tiered system of wholesaler, jobber, both in the large cities, and retailer in the small towns replaced the all-purpose port merchant. The American factory replaced some English agents, once American manufactures became competitive with English manufactures after the 1816 tariff.¹⁷⁵ But under the Jacksonian distribution system credit came from the American wholesalers and jobbers, and the wholesalers frequently did not own the commodities handled, but acted as a conduit. Some former port merchants dropped retailing to become wholesalers, factors acting solely on consignments or commission merchants with some business in their own accounts. These wholesalers accepted only a few lines of goods either from a British exporter or a New England factory owner. They operated generally

173. C. JOSEPH PUSATERI, *A HISTORY OF AMERICAN BUSINESS* 49-52 (1984).

174. *See id.* at 109-115; HERMAN KROOS & CHARLES GILBERT, *AMERICAN BUSINESS HISTORY* 129-31 (1972); CAROLINE F. WARE, *THE EARLY NEW ENGLAND COTTON MANUFACTURE: A STUDY IN INDUSTRIAL BEGINNINGS* 161-93 (1931).

175. *See DALZELL, supra* note 31, at 36 (1816 tariffs passed to prevent English textile dumping).

on consignments since the volume became so large it exceeded the financial capacities of one firm. The jobber filled the gap between the wholesalers and the storekeepers. They purchased their own inventory from the wholesalers, sometimes on credit, and resold it as requested to local retailers. They offered credit terms up to one year, unavailable if the storekeeper had bought from the wholesaler. So the battle between those favoring and using security interests to protect their credit extensions to jobbers and those against security interests since they interfered with purchases from jobbers' inventory, also involved a geographical split between the large port, money centers and the rural back country.

This development did not occur in all northern states equally. It predominated in the two northeastern states with connections to the west, New York by canal and Pennsylvania by turnpike and canal.¹⁷⁶ New York came to dominate the import market due to its cotton factors' return cargos, its services as a center for British dumping, and its 1817 auction law insuring the lowest prices.¹⁷⁷ So the battle between these two interests would more likely occur in New York and Pennsylvania, rather than in Eastern New England.

Following the lead of the manufacturers, the endorsers and wholesalers claiming a nonpossessory security interest in the jobbers' inventory attempted to restructure the transaction to conform with the law then current. They appointed the debtor-jobber as their agent to sell items from their collateral and replace it with other purchased items through the power to dispose and the after-acquired property clause. Unfortunately, just as for the manufacturers' attempt to evade the rebuttable rule through fixtures, these clauses failed to operate successfully.¹⁷⁸ American legal theory held that a debtor could not grant a security interest in property not yet owned at the time of making the

176. CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815-1846* 41-43 (1991).

177. *See id.* at 41.

178. New York rejected the power to dispose. *See* *McLachlan v. Wright*, 3 Wend. 348 (N.Y. Sup. Ct. 1829) (brewery inventory); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829) (retail grocery inventory). After the passage of the chattel mortgage statutes, the power to dispose would become acceptable in Maine, Massachusetts, and Rhode Island. *See* *Abbott v. Goodwin*, 20 Me. 408 (1841) (country store inventory); *Briggs v. Parkman*, 43 Mass. (2 Met.) 258 (1841) (trader's inventory); *Jenckes v. Goffe*, 1 R.I. 511 (1851) (machine shop inventory). *See also* *Melody v. Chandler*, 12 Me. 282 (1835) (pre-chattel mortgage act for Maine). Yet the power to disposed continued to be unacceptable in New Hampshire and New York. *See* *Putnam v. Osgood*, 51 N.H. 192 (1871) (country store inventory); *Ranlett v. Blodgett*, 17 N.H. 298 (1845) (carriage maker's inventory); *Southard v. Benner*, 72 N.Y. 424 (1878) (lumberyard inventory); *Wood v. Lowry*, 17 Wend. 492 (N.Y. Sup. Ct. 1837) (dry goods inventory).

mortgage, the replacement collateral.¹⁷⁹ This result continued even after the adoption of the chattel mortgage acts.¹⁸⁰

IV. THE ENGLISH DECISIONS

The English opinion evidence suffered from many of the same drawbacks as the American opinion evidence. The facts involved atypical situations, not fitting well-settled rules. The facts remained obscured by the adversary system. But, unlike the American opinions, English opinions covered the entire period of interest. They commenced long before 1677. Unfortunately, collections of these opinions contained lacunae. England had no official reporting system until 1788.¹⁸¹ The private reporters only included opinions they deemed important. The opinions frequently referred to decisions found in no reporter. This article excluded most of these unreported opinions as too factually incomplete.

179. See *Letourno v. Ringgold*, 15 F. Cas. 409 (C.C.D. D.C. 1827) (No. 8,282) (chattel mortgage on stock of goods invalid against third party for goods purchased with proceeds after making the mortgage); *Wagner v. Watts*, 28 F. Cas. 1336 (C.C.D. D.C. 1819) (No. 17,040) (same); *Bonsey v. Ameer*, 25 Mass. (9 Pick.) 236 (1829) (chattel mortgage for financing buyer on ship under construction void against third party). The one exception from the rule was for things potentially in existence at the time of mortgaging, such as crops from planted seed or wool from sheep owned. See *Holly v. Brown*, 14 Conn. 255 (1841) (replacement type attached to printing equipment covered); *Macomber v. Parker*, 31 Mass. (14 Pick.) 497 (1833) (clay to brick covered by chattel mortgage).

180. See *Goodenow v. Dunn*, 21 Me. 86 (1842) (financing buyer of ship under construction), *overruled on this point by* *Abbot v. Goodwin*, 20 Me. 408 (1841) (allowing a chattel mortgage on lime bought from proceeds of sale of collateral); *Winslow v. Merchants' Ins. Co.*, 45 Mass. (4 Met.) 306 (1842) (machine shop goods); *Ranlett v. Blodgett*, 17 N.H. 298 (1845) (carriage maker's inventory); *Otis v. Sill*, 8 Barb. 102 (N.Y. Sup. Ct. 1849) (scythes, iron, steel, and coal); *accord* *Moody v. Wright*, 54 Mass. (13 Met.) 17 (1847) (tannery stock); *Jones v. Richardson*, 51 Mass. (10 Met.) 481 (1845) (stock in trade); *Pierce v. Emery*, 32 N.H. 484 (1856) (railroad bought cargo after mortgage not covered). The clause itself, however, did not invalidate the transaction. See *Jones v. Huggeford*, 44 Mass. (3 Met.) 515 (1842) (valid for stock in trade on hand at execution); *Briggs v. Parkman*, 43 Mass. (2 Met.) 258 (1841) (same). And Justice Joseph Story upheld the provision under the 1841 U.S. Bankruptcy Act, which recognized equitable as well as legal liens, claiming the after-acquired property clause created an equitable lien. See *Mitchell v. Winslow*, 17 F. Cas. 527 (C.C.D. Me. 1843) (No. 9,673) (cutlery stock in trade, based on *Abbot v. Goodwin*, *supra*); *Fletcher v. Morey*, 2 Story 555 (C.C.D. Mass. 1843) (inventory purchased under letter of credit, based on *Mitchell*). See also Bankruptcy Act of 1841, c.9, § 2, 5 STAT. 440-41 (1841).

181. HOLDSWORTH, *supra* note 17, at 424-34 (1788 for Common Pleas, 1789 for Chancery, and 1801 for the King's Bench).

The other major difference between American and English opinions involved the presence of bankruptcy statutes in England.¹⁸² These statutes, applicable only to merchant debtors, provided an additional ground to find the nonpossessory secured transaction fraudulent. The bankruptcy laws sought rateable distribution of the debtors property amongst all creditors. English secured parties in the seventeenth and eighteenth centuries held title to the collateral under a conditional deed or sale. If the court found the nonpossessory secured transaction valid, the collateral did not belong to the debtor and was not subject to rateable distribution. So the issue in many English opinions treated whether entry into the nonpossessory secured transaction amounted to an effort to avoid the bankruptcy statute's rateable distribution, a fraudulent transaction. Even so these opinions still revealed some information on the parties involved in the nonpossessory secured transaction and their practices.

The British reports contained thirty-four appellate opinions in England dealing with the nonpossessory secured transaction prior to 1840.¹⁸³ These opinions numbered so few in comparison with the American opinions since England had fewer appellate jurisdictions and since in the bankruptcy situation, typically before the Chancery, the courts used black and white rules applied by judges, the absolute-conditional rule and after 1749 the *per se* fraud rule. The English opinions seldom used the rebuttable rule until after 1800.¹⁸⁴ The rebuttable rule resulted in much of the American litigation.¹⁸⁵

These opinions exhibited two major differences from the American opinions. First, the opinions did not exhibit emergent manufacturers before 1835 or commoners, other than two farmers after 1815, as borrowers. Commercial merchants financed American manufacturers in New England.¹⁸⁶ In contrast, English manufacturers financed themselves internally.¹⁸⁷ American common people achieved political power between the Revolution

182. See Flint, *Fraudulent Myth*, *supra* note 9, at 37-46, for a discussion of the applicable English bankruptcy statutes, the major opinions decided under them, and the reason for their absence in America.

183. This numbering does not include assignment for benefit of creditors, genuine bottomry and respondentia bond, or pledge opinions. As in the case of northern states with late chattel mortgage acts, New Jersey and Pennsylvania, this article only considers the English opinions before 1840.

184. See *supra* note 96 and accompanying text for the absolute-conditional rule, the *per se* fraud rule, and the rebuttable rule.

185. See *supra* note 104 and accompanying text.

186. See *supra* note 32 and accompanying text.

187. 6 H.J. HABBAKUH & M. POTEON, EDS., *THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE* 297-98 (1965) (British merchants used accumulated capital to bring workers under one roof).

and the Jacksonian Era in most states.¹⁸⁸ Legislatures supported by their votes provided banks with charter provisions requiring them to lend to certain classes, such as farmers and mechanics.¹⁸⁹ In contrast, the English common people did not begin to gain political power until the Reform Bill of 1832.¹⁹⁰

The absence of manufacturers and commoners meant most decisions involved commercial merchants. The bankruptcy laws applied only to this class.¹⁹¹ The opinions reflected this fact. Eighteen English opinions (53%) involved bankruptcy law challenges to the nonpossessory secured transaction, where the concern did not involve priority but an effort to protect rateable distribution.¹⁹²

A. PARTIES AND STRUCTURE

The British opinions described the debtor in thirty-one opinions (91%). Traders and ship-owners dominated appearing in sixteen opinions.¹⁹³ Other opinions involved five brewers and distillers, three retail establishments, two

188. See, e.g., BENSON, *supra* note 131, at 10 (Regency and Anti-Regency parties used tactic of appealing to the masses to win elections by 1824 in New York).

189. See, e.g., HAMMOND, *supra* note 32, at 145-46 (Republican support of banks meant business opportunities not limited to aristocrats, but includes new entrepreneurs; Republican legislators awarded bank charters to their supporters, breaking Federalist banking monopolies); *id.* at 49 (Burr's bank); *id.* at 164 (Gallatin's bank).

190. See, e.g., COLIN RHYS LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY: A SURVEY 469-77 (1962).

191. See Flint, *Fraudulent Myth*, *supra* note 9, at 37-46.

192. See Carr v. Burdiss, 149 Eng. Rep. 1153 (Ex. 1835); Robinson v. M'Donnell, 106 Eng. Rep. 316 (K.B. 1818); Mair v. Glennie, 105 Eng. Rep. 823 (K.B. 1815); Horn v. Baker, 103 Eng. Rep. 555 (K.B. 1808); Manton v. Moore, 101 Eng. Rep. 858 (K.B. 1796); *Ex Parte* Batson, 29 Eng. Rep. 584 (Ch. 1791); Lempriere v. Pasley, 100 Eng. Rep. 262 (K.B. 1788); Atkinson v. Maling, 100 Eng. Rep. 249 (K.B. 1788); Hall v. Gurney, 99 Eng. Rep. 694 (K.B. 1784); Hassells v. Simpson, 99 Eng. Rep. 60n (K.B. 1781); Law v. Skinner, 96 Eng. Rep. 585 (C.P. 1775); Wilson v. Day, 97 Eng. Rep. 583 (K.B. 1759); Worsley v. Demattos, 97 Eng. Rep. 407 (K.B. 1758); *Ex parte* Mathews, 28 Eng. Rep. 176 (Ch. 1751); Ryall v. Rolle, 26 Eng. Rep. 107 (Ch. 1749); West v. Skip, 27 Eng. Rep. 1006 (Ch. 1749); Brown v. Heathcote, 26 Eng. Rep. 103 (Ch. 1746); Bourne v. Dodson, 26 Eng. Rep. 100 (Ch. 1740).

193. For shipowners, see Robinson v. M'Donnell, 106 Eng. Rep. 316 (K.B. 1818); Mair v. Glennie, 105 Eng. Rep. 823 (K.B. 1815); *Ex parte* Batson, 29 Eng. Rep. 584 (Ch. 1791); Lempriere v. Pasley, 100 Eng. Rep. 262 (K.B. 1788); Atkinson v. Maling, 100 Eng. Rep. 249 (K.B. 1788); Hall v. Gurney, 99 Eng. Rep. 694 (K.B. 1784); *Ex parte* Mathews, 28 Eng. Rep. 176 (Ch. 1751); Sansum v. Braggington, 27 Eng. Rep. 1132 (Ch. 1750); Buxton v. Snee, 27 Eng. Rep. 952 (Ch. 1748); Brown v. Heathcote, 26 Eng. Rep. 103 (Ch. 1746); Bourne v. Dodson, 26 Eng. Rep. 100 (1740). See also Carr v. Burdiss, 149 Eng. Rep. 1153 (Ex. 1835) (shipowner and soap manufacturer). For traders, see Reed v. Wilmont, 131 Eng. Rep. 223 (C.P. 1831); Jones v. Smith, 30 Eng. Rep. 679 (Ch. 1794), *rev'd*, 30 Eng. Rep. 683 (H.L. 1798); Hassells v. Simpson, 99 Eng. Rep. 60n (K.B. 1781); Bucknal v. Roiston, 24 Eng. Rep. 136 (Ch. 1704); Cole v. Davies, 91 Eng. Rep. 1383 (K.B. 1697).

manufacturers, two farmers, a note dealer, a captain, and a construction engineer.¹⁹⁴ An examination of the collateral related in thirty-three opinions (97%) revealed the same. Most opinions involved trade goods and ships.¹⁹⁵ Other opinions treated equipment, business furniture, farm produce, brazil wood, company stock, and construction materials.¹⁹⁶

But the opinions did not identify many secured parties and general creditors. Secured parties, identified in sixteen opinions (41%), included three merchants, three bankers, three relatives, two ship suppliers, two brewer partners, a shipowner, a landlord, and a canal company.¹⁹⁷ The bankruptcy

194. For brewers and distillers, *see* *Horn v. Baker*, 103 Eng. Rep. 555 (K.B. 1808) (distiller); *Steel v. Brown*, 127 Eng. Rep. 881 (C.P. 1808); *Worseley v. Demattos*, 97 Eng. Rep. 407 (K.B. 1758); *Ryall v. Rolle*, 26 Eng. Rep. 107 (Ch. 1749); *West v. Skip*, 27 Eng. Rep. 1006 (Ch. 1749). For the retailers, *see* *Martindale v. Booth*, 110 Eng. Rep. 180 (K.B. 1832) (tavern keeper); *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (C.P. 1800) (public house operator); *Meggot v. Mills*, 91 Eng. Rep. 1088 (K.B. 1697) (inn keeper). For manufacturers, *see* *Minshall v. Lloyd*, 150 Eng. Rep. 834 (Ex. 1837) (colliery operator); *Carr v. Burdiss*, 149 Eng. Rep. 1153 (Ex. 1835) (soap manufacturer). For farmers, *see* *Jezeeph v. Ingram*, 129 Eng. Rep. 609 (C.P. 1817); *Benton v. Thornhill*, 129 Eng. Rep. 60 (C.P. 1816). For the engineer, *see* *Manton v. Moore*, 101 Eng. Rep. 858 (K.B. 1796). For the note dealer, *see* *Wilson v. Day*, 97 Eng. Rep. 583 (K.B. 1759). For the ship captain, *see* *Reeves v. Capper*, 132 Eng. Rep. 1057 (C.P. 1838).

195. For trade goods *see* *Carr v. Burdiss*, 149 Eng. Rep. 1153 (Ex. 1834); *Steel v. Brown*, 127 Eng. Rep. 881 (C.P. 1808); *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (C.P. 1800); *Edwards v. Harben*, 100 Eng. Rep. 315 (K.B. 1788); *Hassells v. Simpson*, 99 Eng. Rep. 60n (K.B. 1779); *Law v. Skinner*, 96 Eng. Rep. 585 (K.B. 1775); *Wilson v. Day*, 97 Eng. Rep. 583 (K.B. 1759); *Worseley v. Demattos*, 97 Eng. Rep. 407 (K.B. 1758); *Ryall v. Rolle*, 26 Eng. Rep. 107 (Ch. 1749); *West v. Skip*, 27 Eng. Rep. 1006 (Ch. 1749); *Brown v. Heathcote*, 26 Eng. Rep. 103 (Ch. 1746); *Bucknal v. Roiston*, 24 Eng. Rep. 136 (Ch. 1709); *Cole v. Davies*, 91 Eng. Rep. 1383 (K.B. 1697). For ships, *see, e.g.*, *Reed v. Wilmont*, 131 Eng. Rep. 223 (C.P. 1831); *Robinson v. M'Donnell*, 106 Eng. Rep. 316 (K.B. 1818); *Mair v. Glennie*, 105 Eng. Rep. 823 (K.B. 1815); *Ex parte Batson*, 29 Eng. Rep. 584 (Ch. 1791); *Atkinson v. Maling*, 100 Eng. Rep. 249 (K.B. 1788); *Hall v. Gurney*, 99 Eng. Rep. 694 (K.B. 1784); *Ex parte Matthews*, 28 Eng. Rep. 176 (Ch. 1751); *Sansum v. Braggington*, 27 Eng. Rep. 1132 (Ch. 1750); *Buxton v. Snee*, 27 Eng. Rep. 952 (Ch. 1748); *Bourne v. Dodson*, 26 Eng. Rep. 100 (Ch. 1740).

196. For equipment, *see, e.g.*, *Reeves v. Capper*, 132 Eng. Rep. 1057 (C.P. 1838) (chronometer); *Minshall v. Lloyd*, 150 Eng. Rep. 834 (Ex. 1837) (steam engines); *Horn v. Baker*, 103 Eng. Rep. 555 (K.B. 1808) (still, vats). For business furniture, *see, e.g.*, *Martindale v. Booth*, 110 Eng. Rep. 180 (K.B. 1832); *Meggot v. Mills*, 91 Eng. Rep. 1088 (K.B. 1697). For farm produce, *see, e.g.*, *Jezeeph v. Ingram*, 129 Eng. Rep. 609 (C.P. 1817); *Benton v. Thornhill*, 129 Eng. Rep. 60 (C.P. 1816). For brazil wood, *see* *Lempriere v. Pasley*, 100 Eng. Rep. 262 (K.B. 1788). For stock shares, *see* *Jones v. Smith*, 30 Eng. Rep. 679 (Ch. 1794), *rev'd*, 30 Eng. Rep. 683 (H.L. 1798). For construction materials, *see* *Manton v. Moore*, 101 Eng. Rep. 858 (K.B. 1796).

197. For merchants, *see, e.g.*, *Martindale v. Booth*, 110 Eng. Rep. 180 (K.B. 1832); *Mair v. Glennie*, 105 Eng. Rep. 823 (K.B. 1815); *Ex parte Batson*, 29 Eng. Rep. 584 (Ch. 1791). For the bankers, *see, e.g.*, *Carr v. Burdiss*, 149 Eng. Rep. 1153 (Ex. 1834); *Hall v. Gurney*, 99 Eng. Rep. 694 (K.B. 1784); *Worseley v. Demattos*, 97 Eng. Rep. 407 (K.B. 1758). For the relatives, *see, e.g.*, *Minshall v. Lloyd*, 150 Eng. Rep. 834 (Ex. 1837) (mother); *Benton v. Thornhill*, 129 Eng. Rep. 60 (C.P. 1816) (brother-in-law); *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (C.P. 1800).

and estate administration situations, both involving stand-ins for general creditors, hid the identity of general creditors identified in five opinions (17%). Sixteen opinions dealt with bankruptcy assignees, executors, and unidentified judgment lienholders.¹⁹⁸ The identified general creditors included a banker, a lawyer, a purchaser, a brewer, and the debtor's sisters.¹⁹⁹

As in America, parties created most nonpossessory secured transactions by chattel mortgages, appearing in nineteen opinions (56%) or bills of sale, appearing in eleven opinions (32%).²⁰⁰ One opinion dealt with an assignment

For ship suppliers, *see, e.g.*, *Sansum v. Braggington*, 27 Eng. Rep. 1132 (Ch. 1750); *Buxton v. Snee*, 27 Eng. Rep. 952 (Ch. 1748). For brewers, *see, e.g.*, *Ryall v. Rolle*, 26 Eng. Rep. 107 (Ch. 1749); *West v. Skip*, 27 Eng. Rep. 1006 (Ch. 1749). For the shipowner, *see* *Reeves v. Capper*, 132 Eng. Rep. 1057 (C.P. 1838) (chronometer). For the landlord, *see* *Meggot v. Mills*, 91 Eng. Rep. 1088 (K.B. 1697). For the canal company, *see* *Manton v. Moore*, 101 Eng. Rep. 858 (K.B. 1796).

198. For bankruptcy trustees, *see, e.g.*, *Carr v. Burdiss*, 149 Eng. Rep. 1153 (Ex. 1834); *Reed v. Wilmot*, 131 Eng. Rep. 223 (C.P. 1831); *Robinson v. M'Donnell*, 106 Eng. Rep. 316 (K.B. 1818); *Mair v. Glennie*, 105 Eng. Rep. 823 (K.B. 1815); *Horn v. Baker*, 103 Eng. Rep. 555 (K.B. 1808); *Manton v. Moore*, 101 Eng. Rep. 858 (K.B. 1796); *Ex parte Batson*, 29 Eng. Rep. 584 (Ch. 1791); *Lempriere v. Pasley*, 100 Eng. Rep. 262 (K.B. 1788); *Atkinson v. Maling*, 100 Eng. Rep. 249 (K.B. 1788); *Hall v. Gurney*, 99 Eng. Rep. 694 (K.B. 1784); *Hassells v. Simpson*, 99 Eng. Rep. 60n (K.B. 1779); *Law v. Skinner*, 96 Eng. Rep. 585 (K.B. 1775); *Wilson v. Day*, 97 Eng. Rep. 583 (K.B. 1759); *Worseley v. Demattos*, 97 Eng. Rep. 407 (K.B. 1758); *Ryall v. Rolle*, 26 Eng. Rep. 107 (Ch. 1749); *Brown v. Heathcote*, 26 Eng. Rep. 103 (Ch. 1746); *Bourne v. Dodson*, 26 Eng. Rep. 100 (Ch. 1740). For estate executors, *see, e.g.*, *Edwards v. Harben*, 100 Eng. Rep. 315 (K.B. 1788); *Bucknal v. Roiston*, 24 Eng. Rep. 136 (Ch. 1709). For judgment lienholders, *see, e.g.*, *Martindale v. Booth*, 110 Eng. Rep. 180 (K.B. 1832); *Benton v. Thornhill*, 129 Eng. Rep. 60 (C.P. 1816); *Jones v. Smith*, 30 Eng. Rep. 697 (Ch. 1794), *rev'd*, 30 Eng. Rep. 683 (H.L. 1798); *Bamford v. Baron*, 100 Eng. Rep. 319 n(a) (K.B. 1788); *Cole v. Davies*, 91 Eng. Rep. 1383 (K.B. 1697).

199. *See* *Reeves v. Capper*, 132 Eng. Rep. 1057 (C.P. 1838) (attorney for unspecified client); *Minshall v. Lloyd*, 150 Eng. Rep. 834 (Ex. 1837) (bank partnership); *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (C.P. 1800) (purchaser); *West v. Skip*, 27 Eng. Rep. 1006 (Ch. 1749) (sisters); *Meggot v. Mills*, 91 Eng. Rep. 1088 (K.B. 1697) (brewer).

200. For mortgages, *see, e.g.*, *Minshall v. Lloyd*, 150 Eng. Rep. 834 (Ex. 1837); *Carr v. Burdiss*, 149 Eng. Rep. 1153 (Ex. 1834); *Reed v. Wilmot*, 131 Eng. Rep. 223 (C.P. 1831); *Jezeph v. Ingram*, 129 Eng. Rep. 609 (C.P. 1817); *Horn v. Baker*, 103 Eng. Rep. 555 (K.B. 1808); *Jones v. Smith*, 30 Eng. Rep. 697 (Ch. 1794), *rev'd*, 30 Eng. Rep. 683 (H.L. 1798); *Ex parte Batson*, 29 Eng. Rep. 584 (Ch. 1791); *Bamford v. Baron*, 100 Eng. Rep. 319 n(a) (K.B. 1788); *Atkinson v. Maling*, 100 Eng. Rep. 249 (K.B. 1788); *Hall v. Gurney*, 99 Eng. Rep. 694 (K.B. 1784); *Hassells v. Simpson*, 99 Eng. Rep. 60n (K.B. 1779); *Law v. Skinner*, 96 Eng. Rep. 585 (K.B. 1775); *Worseley v. Demattos*, 97 Eng. Rep. 407 (K.B. 1758); *Ex parte Matthews*, 28 Eng. Rep. 176 (Ch. 1751); *Sansum v. Braggington*, 27 Eng. Rep. 1132 (Ch. 1750); *Ryall v. Rolle*, 26 Eng. Rep. 107 (Ch. 1749); *Buxton v. Snee*, 27 Eng. Rep. 952 (Ch. 1748); *Brown v. Heathcote*, 26 Eng. Rep. 103 (Ch. 1746); *Bourne v. Dodson*, 26 Eng. Rep. 100 (Ch. 1740). For bills of sale, *see, e.g.*, *Martindale v. Booth*, 110 Eng. Rep. 180 (K.B. 1832); *Robinson v. M'Donnell*, 106 Eng. Rep. 316 (K.B. 1818); *Benton v. Thornhill*, 129 Eng. Rep. 60 (C.P. 1816); *Mair v. Glennie*, 105 Eng. Rep. 823 (K.B. 1815); *Steel v. Brown*, 127 Eng. Rep. 881 (C.P. 1808); *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (C.P. 1800); *Manton v. Moore*, 101 Eng.

and two with a written instrument.²⁰¹ Since parties drafted some title documents in absolute form, fifteen opinions (44%) described the supplemental documentation. Unlike America, this additional documentation usually involved other types of documents, such as: oral agreements, deeds of surrender of copyhold, warrants of attorney, bills of lading, and insurance policies, as well as bottomry bonds, bills of sale, and defeasance deeds.²⁰² And unlike America, most transactions occurred concurrently with the lending, fifteen opinions, (44%) or after the lending, fourteen opinions (41%).²⁰³

The British practice resembled the American practice. The secured party took the nonpossessory secured transaction when feeling insecure. The British courts regarded this as significant in the early opinions. They upheld

Rep. 858 (K.B. 1796); *Edwards v. Harben*, 100 Eng. Rep. 315 (K.B. 1788); *Bucknal v. Roiston*, 24 Eng. Rep. 136 (Ch. 1709); *Cole v. Davies*, 91 Eng. Rep. 1383 (K.B. 1697); *Meggot v. Mills*, 91 Eng. Rep. 1088 (K.B. 1697).

201. For assignments, *see Wilson v. Day*, 97 Eng. Rep. 583 (K.B. 1759). For written instruments, *see, e.g., Reeves v. Capper*, 132 Eng. Rep. 1057 (C.P. 1838); *Lempriere v. Pasley*, 100 Eng. Rep. 262 (K.B. 1788).

202. For oral agreements, *see, e.g., Robinson v. M'Donnell*, 106 Eng. Rep. 316 (K.B. 1818); *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (C.P. 1800); *Bamford v. Baron*, 100 Eng. Rep. 319 n(a) (K.B. 1788); *Cole v. Davies*, 91 Eng. Rep. 1383 (K.B. 1697); *Meggot v. Mills*, 91 Eng. Rep. 1088 (K.B. 1697). For bills of lading, *see, e.g., Mair v. Glennie*, 105 Eng. Rep. 823 (K.B. 1815); *Lempriere v. Pasley*, 100 Eng. Rep. 262 (K.B. 1788); *Brown v. Heathcote*, 26 Eng. Rep. 103 (Ch. 1746). For bottomry bonds, *see Bucknal v. Roiston*, 24 Eng. Rep. 136 (Ch. 1709). For a defeasance bond, *see Wilson v. Day*, 97 Eng. Rep. 583 (K.B. 1759). For warranty of attorney, *see Manton v. Moore*, 101 Eng. Rep. 858 (K.B. 1796). For bills of sale, *see Atkinson v. Maling*, 100 Eng. Rep. 249 (K.B. 1788); *Ex parte Matthews*, 28 Eng. Rep. 176 (Ch. 1751). For a deed of surrender, *see Reed v. Wilmot*, 131 Eng. Rep. 223 (C.P. 1831). For insurance policies, *see Ex parte Batson*, 29 Eng. Rep. 584 (Ch. 1791).

203. For current loans, *see, e.g., Reeves v. Capper*, 132 Eng. Rep. 1057 (C.P. 1838); *Horn v. Baker*, 103 Eng. Rep. 555 (K.B. 1808); *Jones v. Smith*, 30 Eng. Rep. 697 (Ch. 1794), *rev'd*, 30 Eng. Rep. 683 (H.L. 1798); *Steel v. Brown*, 127 Eng. Rep. 881 (C.P. 1808); *Hall v. Gurney*, 99 Eng. Rep. 694 (K.B. 1784); *Hassells v. Simpson*, 99 Eng. Rep. 60n (K.B. 1779); *Law v. Skinner*, 96 Eng. Rep. 585 (K.B. 1775); *Sansum v. Braggington*, 27 Eng. Rep. 1132 (Ch. 1750); *West v. Skip*, 27 Eng. Rep. 1006 (Ch. 1749); *Ryall v. Rolle*, 26 Eng. Rep. 107 (Ch. 1749); *Buxton v. Snee*, 27 Eng. Rep. 952 (Ch. 1748); *Brown v. Heathcote*, 26 Eng. Rep. 103 (Ch. 1746); *Bucknal v. Roiston*, 24 Eng. Rep. 136 (Ch. 1709); *Cole v. Davies*, 91 Eng. Rep. 1383 (K.B. 1697); *Meggot v. Mills*, 91 Eng. Rep. 1088 (K.B. 1697). For prior loans, *see Carr v. Burdiss*, 149 Eng. Rep. 1153 (Ex. 1834); *Reed v. Wilmot*, 131 Eng. Rep. 223 (C.P. 1831); *Robinson v. M'Donnell*, 106 Eng. Rep. 316 (K.B. 1818); *Jezeph v. Ingram*, 129 Eng. Rep. 609 (C.P. 1817); *Benton v. Thornhill*, 129 Eng. Rep. 60 (C.P. 1816); *Mair v. Glennie*, 105 Eng. Rep. 823 (K.B. 1815); *Ex parte Matthews*, 28 Eng. Rep. 176 (Ch. 1751); *Lempriere v. Pasley*, 100 Eng. Rep. 262 (K.B. 1788); *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (C.P. 1800); *Manton v. Moore*, 101 Eng. Rep. 858 (K.B. 1796); *Edwards v. Harben*, 100 Eng. Rep. 315 (K.B. 1788); *Atkinson v. Maling*, 100 Eng. Rep. 249 (K.B. 1788); *Wilson v. Day*, 97 Eng. Rep. 583 (K.B. 1759); *Bourne v. Dodson*, 26 Eng. Rep. 100 (Ch. 1740). For future loans, *see Martindale v. Booth*, 110 Eng. Rep. 180 (K.B. 1832); *Worseley v. Demattos*, 97 Eng. Rep. 407 (K.B. 1758).

those transactions that lacked this aspect in 1709 and in 1746 and specifically denigrating those that contained it.²⁰⁴

B. LITIGATION

Litigation, despite the overwhelming bankruptcy situation, resembled American litigation. Only thirty-two opinions involved third party challenges to the nonpossessory secured transaction. Trespass and trover actions, fourteen opinions (47%), even within bankruptcy proceedings, appeared frequently.²⁰⁵ But the English also used *assumpsit* actions in six opinions (19%) to recover monies for wrongful takings.²⁰⁶ The remaining actions involved accounting, bankruptcy, or remained unspecified.²⁰⁷

As in American litigation, there was a discontinuity in results. But rather than a geographical one, it involved time. The secured party won in all the opinions, both in bankruptcy and out of bankruptcy, before 1749. But after 1749 the secured party only won in seventy-two percent of the non-bankruptcy

204. See *Brown v. Heathcote*, 26 Eng. Rep. 103 (Ch. 1746) (showing that the common cases are where the creditor pretends to set up a demand for an old debt for a debtor in declining circumstances to obtain a preference by an assignment of the goods); *Bucknal v. Roiston*, 24 Eng. Rep. 136, *sub nom.* *Anon.*, 22 Eng. Rep. 407 (Ch. 1709) (keeping possession was not to give a false credit, as in other cases).

205. For trespass actions, see *Martindale v. Booth*, 110 Eng. Rep. 180 (K.B. 1832) (won); *Wilson v. Day*, 97 Eng. Rep. 583 (K.B. 1759) (lost; bankruptcy). For trover actions, see *Reeves v. Capper*, 132 Eng. Rep. 1057 (C.P. 1838) (won); *Minshall v. Lloyd*, 150 Eng. Rep. 834 (Ex. 1837) (lost); *Carr v. Burdiss*, 149 Eng. Rep. 1153 (Ex. 1834) (won; bankruptcy); *Robinson v. M'Donnell*, 106 Eng. Rep. 316 (K.B. 1818) (won; bankruptcy); *Benton v. Thornhill*, 129 Eng. Rep. 60 (C.P. 1816) (won); *Steel v. Brown*, 127 Eng. Rep. 881 (C.P. 1808) (won); *Horn v. Baker*, 103 Eng. Rep. 555 (K.B. 1808) (lost; bankruptcy); *Lempriere v. Pasley*, 100 Eng. Rep. 262 (K.B. 1788) (won; bankruptcy); *Bamford v. Baron*, 100 Eng. Rep. 319 n(a) (K.B. 1788) (lost); *Atkinson v. Maling*, 100 Eng. Rep. 249 (K.B. 1788) (won; bankruptcy); *Cole v. Davies*, 91 Eng. Rep. 1383 (K.B. 1697) (won); *Meggot v. Mills*, 91 Eng. Rep. 1088 (K.B. 1697) (won). The parentheticals show whether the secured won or lost. See *infra* note 208 and accompanying text for the analysis of this matter.

206. For *assumpsit* actions, see *Reed v. Wilmot*, 131 Eng. Rep. 223 (C.P. 1831) (won); *Mair v. Glennie*, 105 Eng. Rep. 823 (K.B. 1815) (lost; bankruptcy); *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (C.P. 1800) (won); *Edwards v. Harben*, 100 Eng. Rep. 315 (K.B. 1788) (lost); *Hall v. Gurney*, 99 Eng. Rep. 694 (K.B. 1784) (lost; bankruptcy); *Law v. Skinner*, 96 Eng. Rep. 585 (K.B. 1775) (lost; bankruptcy).

207. For accounting actions, see *Jones v. Smith*, 30 Eng. Rep. 697 (Ch. 1794) (won), *rev'd*, 30 Eng. Rep. 683 (H.L. 1798); *Bucknal v. Roiston*, 24 Eng. Rep. 136 (Ch. 1709) (won). For bankruptcy challenges, see *Ex parte Batson*, 29 Eng. Rep. 584 (Ch. 1791) (won); *Worseley v. Demattos*, 97 Eng. Rep. 407 (K.B. 1758) (lost); *West v. Skip*, 27 Eng. Rep. 1006 (Ch. 1749) (won); *Ryall v. Rolle*, 26 Eng. Rep. 107 (Ch. 1749) (lost); *Brown v. Heathcote*, 26 Eng. Rep. 103 (Ch. 1746) (won); *Bourne v. Dodson*, 26 Eng. Rep. 100 (Ch. 1740) (won). For unspecified actions, see *Jezepeh v. Ingram*, 129 Eng. Rep. 609 (C.P. 1817) (won); *Manton v. Moore*, 101 Eng. Rep. 858 (K.B. 1796) (won; bankruptcy); *Hassells v. Simpson*, 99 Eng. Rep. 60n (K.B. 1779) (lost; bankruptcy); *Ex parte Matthews*, 28 Eng. Rep. 176 (Ch. 1751) (won; bankruptcy).

opinions and won only fifty percent of the bankruptcy opinions.²⁰⁸ Ostensibly, the courts suddenly realized in 1749 that the reputed ownership clause devised in 1624 voided the nonpossessory secured transaction. Prior to 1749 the courts applied fraudulent conveyance law even in the bankruptcy situation. Under the 1571 Fraudulent Conveyance Act the test of validity only involved the honesty of the transaction.

Although not evident from the English opinions, the reason for the shift against the nonpossessory secured transaction mirrored the situation in America. The distribution system had developed sufficiently to bifurcate between wholesalers and retailers.²⁰⁹

So the English opinions confirm two facts readily apparent from the American opinions. First, the nonpossessory secured transaction developed as a mechanism to defeat judgment liens.²¹⁰ Consequently, secured parties tended to enter the transaction when a potential judgment lienholder threatened the debtor with lawsuit. Since the secured party obtained the nonpossessory secured transaction after lending, frequently, the documentation did not accurately reflect the transaction and required supplementation to establish it.

Second, there developed a group of people, the retailers, who opposed the use of the nonpossessory secured transaction as interfering with the availability to sell inventory in an era before the good faith purchaser doctrine. This group developed earlier in England than in America due to the mercantile system relegating America as a source of raw materials and ultimate consumers. But England differed from America in that England possessed an old bankruptcy statute that could provide the retailers with the *per se* fraud rule they desired. And the manufacturing group that would favor the nonpossessory secured transaction for purchase money sales of equipment lacked political power at the critical junction in 1750. When the manufacturers finally appeared in the opinions, they attempted the same techniques used by their American counterparts, namely fixture law. But they fared no better than their American counterparts.²¹¹

208. See *supra* notes 205-07.

209. See PHYLLIS DEANE, *THE FIRST INDUSTRIAL REVOLUTION* 256-59 (1965) (beginning to appear before the end of the eighteenth century).

210. See Flint, *Fraudulent Myth*, *supra* note 9, at 21-23 nn.86-89 (use of warrants of attorney to mimic the collusive judgment).

211. See *Minshall v. Lloyd*, 150 Eng. Rep. 834 (Ex. 1837).

CONCLUSION

The nonpossessory secured transaction evolved after 1677 as a competitor to the previously effective collusive judgment. The collusive judgment originally possessed two advantages: priority and speedy levy. Parties generally created the collusive judgment at the time of lending. But the 1677 Statute of Frauds destroyed the priority of the collusive judgment and statutes limited speedy levy to small transactions.²¹²

These conditions enabled a change in the lending practices in the non-collusive judgment market. In the early seventeenth century this market lent on the basis of the debtor's reputation or a substantial friendly guarantor and pledged personalty. When banks formed in late seventeenth century England and late eighteenth century America, they also lent on the basis of reputation and pledged personalty.²¹³ Before 1677 these guarantor lenders had little chance of defeating the priority of a collusive judgment, so they lent unsecured as co-debtors. But the 1677 Statute of Frauds opened the possibility of defeating the priority of a collusive judgment. The substantial guarantors gradually learned to enter into a nonpossessory secured transaction with their debtor friends. Debtors reserved pledges for bank loans, leaving the nonpossessory secured transaction for the guarantors. These transactions first appeared among shippers as they were the only ones with sufficient investable funds. Later when shippers got into manufacturing, they began to use the nonpossessory secured transaction in this industry, frequently for purchase money loans. The common masses also adopted the technique when their political power became sufficient to demand bank loans.

Parties used the Anglo-American nonpossessory secured transaction to defeat the judgment lienholder. In the eighteenth century, the secured party usually was a guarantor, for a bank or inventory supplier, or an equipment seller. But guarantors, new to taking security, generally did not acquire their security interest at the time of making the loan, as did the user of the collusive judgment. Instead they hastily obtained it from friendly debtors when they felt insecure, before the debtor became subject to a judicial lien or became insolvent. Consequently, their documentation frequently did not describe the transaction completely. Under the rebuttable rule, courts would accept supplementary documentation and allow a jury to decide the validity of the nonpossessory secured transaction. Sometimes juries would find valid

212. See Flint, *Fraudulent Myth*, *supra* note 9, at 23 n.91.

213. HABBAKKUH & POTEON, *supra* note 187, at 353 (showing that eighteenth century London bankers lent on personal bonds).

transactions fraudulent, sometimes they would find fraudulent transactions valid.

But the nonpossessory secured transaction of that era adhered to the single-owner theory. The nonpossessory secured transaction constituted a sale of the collateral from the debtor to the secured party, even though the debtor retained possession. This worked fine for those owning the goods and selling to the ultimate consumer, the port merchant in eighteenth century America. But when the distribution system bifurcated wholesalers and retailers, retailers who bought on credit suffered problems if they granted the wholesaler or some guarantor a nonpossessory secured transaction in their inventory. They did not have title to transfer to the ultimate customer. So after 1815 a tension grew between credit equipment sellers, who desired nonpossessory secured transactions to protect their sale, and retailers, who desired the freedom to sell to consumer buyers.

The rebuttable rule could not handle this new situation. Under the rebuttable rule enterprising parties could force legitimate nonpossessory secured transactions to risk a jury determination of invalidity, or encourage a jury to find a fraudulent nonpossessory secured transaction valid. Jury determination led certain groups to agitate for different priority rules. Commercial merchants, weak on documentation, defended the rebuttable rule. But equipment manufacturers and financial institutions, accurate in documentation, preferred a rule upholding the nonpossessory secured transaction without jury trial. Retailers, concerned about sales from encumbered inventory, desired to abolish the transaction, at least as it applied to inventory.

One could envision the following development. The chattel mortgage acts of the nineteenth century provided protection to the enterprise lenders at the expense of service providers and customers. Legislatures later authorized short lived statutory supplier liens to provide protection for certain service providers, at the expense of the secured creditors.²¹⁴ Similarly, the doctrine of the good faith purchaser, developed later in the same century,²¹⁵ provided

214. The laborers eventually obtained statutory liens advocated by their Workingmen's Parties in the early 1830's when adopted by the other major political parties. See, e.g., DIXON RYAN FOX, *THE DECLINE OF ARISTOCRACY IN THE POLITICS OF NEW YORK* 352-59 (1919) (demonstrating that in New York the Working Man's Party formed 1829 and disappeared when Anti-Masons and Tammany Hall advocate their program).

215. See GILMORE, *supra* note 6, at 39-47, 677-79. The states had various techniques. Some states banned chattel mortgages on stock in trade by statute. See JONES, *supra* note 172, at 345-47 (Pennsylvania, Connecticut, and Vermont among others). Other states banned chattel mortgages on stock in trade by case law. *Id.* at 348 (Illinois, Indiana, Minnesota, New Hampshire, New York, Ohio, and Wisconsin among others). While still other states left the fraud issue to the jury. See Annotation, *Validity of Chattel Mortgage Where Mortgagor is*

protection for certain buyers at the expense of the enterprise, which could no longer borrow on the basis of inventory. In the twentieth century tort victims have become judgment lienholders. They now seek protection. But rather than seek total recovery, provided they satisfy certain conditions, they seek percentage ratability with the secured creditors. Their judgments far exceed the assets of the business, not having contributed value directly to the enterprise, unlike supplier and customer judgment lienholders of the past.

Given Right to Sell, 73 A.L.R. 236 (1931) (Iowa, Michigan, and New Jersey among others). Finally, other states found a waiver of the mortgage in permitting the debtor to sell. See W.W. Allen, Annotation, *Chattel Mortgagee's Consent to Sale of Mortgaged Property as Waiver of Lien*, 97 A.L.R. 646 (1935) (Maine, Massachusetts, and Rhode Island among others).

