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Secured Transaction History: Protecting Holmes' Notes Through the Conditional Sales Acts

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Recommended Citation

George Lee Flint, Jr., Secured Transaction History: Protecting Holmes' Notes Through the Conditional Sales Acts, 44 St. Mary's L. J. 317 (2013).

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ARTICLE

SECURED TRANSACTION HISTORY: PROTECTING HOLMES' NOTES THROUGH THE CONDITIONAL SALES ACTS

GEORGE LEE FLINT, JR.*

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PRELUDE

On May 31, 1860, Thomas E. Billington, a wagon maker from Antwerp, New York, purchased a horse from Mrs. Catherine Comins, from Le Ray, taking the horse and giving Mrs. Comins his \$100 note, payable to her or bearer in five months with interest.¹ At the bottom of the note was a memorandum signed by Thomas Billington saying, "Given for one bay horse. The said Mrs. Comins holds the said horse as her property until the

1. These facts come from *Wait v. Green (Wait I)*, 35 Barb. 585 (N.Y. Gen. Term 1862), *aff'd*, 36 N.Y. 556, 556 (1867). See U.S. NAT'L ARCHIVES & RECORDS ADMIN., Census of Antwerp, Jefferson Cnty., N.Y., at 394 (1860), available at <http://www.heritagequestonline.com> (providing the name, age, and occupation of Thomas E. Billington); see also *id.*, Census of Le Ray, Jefferson Cnty., N.Y., at 344 (providing the names, ages, and occupations of Guy Comins and Catherine Comins).

above note is paid.”² By adding this memorandum to the note, it became a Holmes’ note.³ In 1860 New York, this conditional sales transaction, which reserved title in the vendor until full payment, was a method of selling goods on the installment plan and retaining a security interest in the seller to guarantee payment by the vendee.⁴

Early in June 1860, Thomas Billington, claiming to be the owner of the horse, sold the horse to Charles S. Green, a farmer from Antwerp, in exchange for another horse and \$65.⁵ Mr. Billington did not disclose anything to Mr. Green about how he had acquired the bay horse.⁶

During that same June of 1860, Mrs. Comins, desiring to convert the Billington debt to her into present value, delivered the Billington note to Isaac Wait, a joiner from Pamela.⁷ Mr. Wait paid less than the face value of the Billington note, which reflected the time value of his money and the possibility that Mr. Billington might default.⁸ Mrs. Comins also received some personal property in this transaction.⁹ In September 1860, one month before the note’s due date, Mr. Wait learned of the sale of the horse by Mr. Billington to Mr. Green.¹⁰ Mr. Wait approached Mr. Green, showed Mr. Green the note with the memorandum, and demanded either the horse or payment for the horse.¹¹ Mr. Green refused.¹²

Mr. Wait hired Levi H. Brown, a lawyer from Watertown, who commenced a replevin action to recover his horse along with damages for its detention.¹³ Mr. Green’s response, filed by his lawyer, James F. Starbuck of Watertown, argued that, having purchased the bay horse in good faith and paid valuable consideration to Mr. Billington, he was now

2. *Wait I*, 35 Barb. at 586.

3. See *infra* notes 316–321 and accompanying text (detailing origin of the term “Holmes’ note”).

4. See *Wait I*, 35 Barb. at 588 (explaining the time when title passes between parties to a transaction).

5. *Id.* at 586. See U.S. NAT’L ARCHIVES & RECORDS ADMIN., CENSUS OF ANTWERP, JEFFERSON CNTY., N.Y., at 378 (1860), available at <http://www.heritagequestonline.com/> (providing the name, age, and occupation of Charles S. Green).

6. *Wait I*, 35 Barb. at 586.

7. *Id.*, see U.S. NAT’L ARCHIVES & RECORDS ADMIN., CENSUS OF PAMELIA, JEFFERSON CNTY. N.Y., at 799 (1860), available at <http://www.heritagequestonline.com/> (providing age and record of Isaac Wait).

8. *Wait I*, 35 Barb. at 586.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. See *id.* at 585–86 (listing the attorneys representing the plaintiff and defendant); see also U.S. NAT’L ARCHIVES & RECORDS ADMIN., CENSUS OF WATERTOWN, JEFFERSON CNTY., N.Y., at 567 (1860), available at <http://www.heritagequestonline.com/> (providing age, occupation, and city of residence of Levi Brown).

the owner of the horse.¹⁴ The well-settled law of New York was that a vendor under a conditional sales agreement held title to the item sold, even against a good faith purchaser.¹⁵ Accordingly, as the successor to that vendor, Mr. Wait should be entitled to recover.¹⁶ So, under the direction of the circuit justice, the jury gave a verdict for Mr. Wait and determined \$75 in damages for the detention of the horse.¹⁷ Upon these findings, Mr. Wait moved for judgment.¹⁸

However, in 1862, the Supreme Court for the Fifth Judicial District of New York, which is the appellate court encompassing Jefferson County, composed of Justices William F. Allen, Le Roy Morgan, Joseph Mullin, and William Johnson Bacon, decided otherwise.¹⁹ The citizenry of New York at that time included numerous retailers and middlepersons engaged in the distribution of goods.²⁰ Consequently, the politicians of New York generally despised security interests that might upset that distribution.²¹ A security interest in a retailer's inventory items would hinder purchaser sales if the secured party attempted to enforce its security interest against the purchaser.²² Between 1812 and 1833, these politicians declared several

14. *Wait I*, 35 Barb. at 586–88; see also U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF WATERTOWN, JEFFERSON CNTY., N.Y., at 573 (1860), available at <http://www.heritagequestonline.com/> (providing age, occupation, and city of residence of James F. Starbuck).

15. See, e.g., *Brewster v. Baker*, 20 Barb. 364, 369–70 (N.Y. Gen. Term 1855) (finding in an action for value case, for the vendee's good faith buyer against vendor's buyer because the vendee had no title to transfer).

16. *Wait I*, 35 Barb. at 586.

17. *Id.*

18. *Id.*

19. See *id.* (listing the justices of the court and rendering a decision); U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF THE 4TH WARD OF UTICA, ONEIDA CNTY., N.Y., at 563 (1860), available at http://www.heritagequestonline.com (providing the city of residence, occupation, and age of Justice Bacon); *id.* at Census of the 5th Ward of Syracuse, Onadaga Cnty., N.Y., at 460 (1860) (providing the city of residence, occupation, and age of Justice Morgan); *id.* at Census of Watertown, Jefferson Cnty., N.Y., at 733 (1860) (providing the city of residence, occupation, and age of Justice Mullin); *id.* at Census of the 1st Ward of Oswego, Oswego Cnty., N.Y., at 925 (1860) (providing the city of residence, occupation, and age of Justice Allen).

20. See generally George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 311 (1999) (detailing the various interest groups involved with the chattel mortgage acts in the northeastern states).

21. See *id.* at 355–62 (1999) (examining the legislative and judicial battles over holding the chattel mortgage security devices per se fraudulent); see also *Zartman v. First Nat'l Bank of Waterloo*, 82 N.E. 127, 129 (N.Y. 1907) (holding against the use of chattel mortgages in inventory).

22. See George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 363–65 (1999) (examining the legislative and judicial battles over holding the chattel mortgage security devices per se fraudulent); see also *Zartman*, 82 N.E. at 129 (ruling against the presence of chattel mortgages in inventory).

times that the chattel mortgage security device was per se fraudulent.²³ They sought to enable retailers to grant good title to their purchasers for goods sold, regardless of security interests protecting retailers' lenders.²⁴ Thus, New York courts protected the good faith purchaser who purchased from a vendee who fraudulently acquired the personalty from a vendor; i.e., the vendor had the intent to transfer the property, but not feloniously. In other words, the vendor lacked the intent to transfer and the property was acquired by theft.²⁵ The New York supreme court saw no reason to distinguish between a sale and a conditional sale, so it created an exception from the title rule favoring the vendor for the good faith purchaser.²⁶ However, this exception did not apply to judgment creditors and voluntary assignments.²⁷

In 1867, the New York Court of Appeals affirmed the *Wait v. Green*²⁸ decision based on sales cases, none of which involved a conditional sale, except possibly a subsequent decision made by the same lower court involved in the *Wait* case concerning conditional delivery.²⁹

I. INTRODUCTION

Law professors should become familiar with the history of their legal subject in order to understand the underlying reasons behind the rules they teach.³⁰ The sheer quantity of ways to take a security interest in personalty³¹ complicates the task for those teaching secured

23. See George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 355–65 (1999) (describing the battle in New York from 1812 to 1833, led by James Kent, to declare the chattel mortgage as per se fraudulent to benefit the back country retailers). Even as late as 1907, New York's highest court still found chattel mortgages in inventory as per se fraudulent. See *Zartman*, 82 N.E. at 129.

24. See George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 356–65 (1999) (examining the legislative and judicial battles over the holding that the chattel mortgage security devices were per se fraudulent).

25. See *Mowrey v. Walsh*, 8 Cow. 238, 245 (N.Y. Sup. Ct. 1828) (holding in favor of protecting a good faith purchaser).

26. See *id.* (“On the whole, therefore, I am of [the] opinion that the innocent purchaser for valuable consideration must be protected . . .”).

27. *Id.*

28. *Wait v. Green (Wait II)*, 36 N.Y. 556 (1867).

29. *Id.* at 556–58; see *W. Transp. Co. v. Marshall*, 37 Barb. 509, 514–16 (N.Y. Gen. Term 1862), *aff'd*, 4 Abb. Dec. 575 (N.Y. 1867) (deciding a case which involved the conditional sale of a large quantity of grain).

30. See Douglas J. Whaley, *Teaching Law: Advice for the New Professor*, 43 OHIO ST. L.J. 125, 128 (1980) (explaining that concentrating on history builds a thorough understanding of a particular area of the law).

31. Before the 1994 amendment to Article 9 of the Uniform Commercial Code, it listed the

transactions.³² The most prominent characteristic of Anglo-American secured transaction law is that there must be some filing in the public records to obtain court enforcement against third parties of the non-possessory secured transaction.³³ The possible methods for creating a security interest in the nineteenth century resulted in the adoption of more than one type of filing statute.

Legislatures designed the earliest set of recording statutes for the chattel mortgage.³⁴ In return for a lender's loan of money, the borrower delivered a promissory note for the loan and sold personalty items to the lender as security for the loan, which was subject to a condition defeasance if the borrower timely paid the note.³⁵ For a chattel mortgage, the lender owns the items of personalty.³⁶ However, the working borrower needed the personalty for the operation of the borrower's business.³⁷ As a result, the lenders often left the items of personalty in the borrower's possession, thus resulting in a non-possessory secured transaction.³⁸ Consequently, people dealing with the borrower—such as a purchaser of a personalty item or a sheriff levying on the items to satisfy the borrower's creditor's judgments—would remove the personalty from the borrower's possession, thereby interfering with the lender's ability to recover the value of its loan

various methods in the scope provision. *Compare* U.C.C. § 9-102(2) (1992) (“[P]ledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security . . .”), *with id.* § 9-109(a)(1) (2011) (disregarding the form of security interest).

32. A secured transaction ensures lenders' repayment. In return for the loan, the lender gets an interest in the borrower's personalty. *See id.* § 1-201(35) (defining a security interest). Secured transactions do not include security interests in realty, the subject of mortgages. *See id.* § 9-109(d)(11) (identifying the scope of the Article). 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 id.* § 9-313, cmt. 3.

33. George Lee Flint, Jr. & Marie Juliet Alfaró, *Secured Transactions History: The Impact of Southern Staple Agriculture on the First Chattel Mortgage Acts in the Anglo-American World*, 30 OHIO N.U. L. REV. 537, 540 (2004). “Not all legal jurisdictions follow this example. Roman law recognized the transaction without any filing. The Napoleonic Code banned the transaction.” *Id.* (citing 14 S. P. SCOTT, *THE CIVIL LAW INCLUDING THE TWELVE TABLES, THE INSTITUTES OF ULPAN, THE OPINIONS OF PAULUS, THE ENACTMENTS OF JUSTINIAN, AND THE CONSTITUTION OF LEO 267* (Central Trust Co. 1973) (1932); FRANCE, CODE NAPOLEON arts. 2118, 2119 (Claiton's Book Store 1960) (1804)).

34. *See* George Lee Flint, Jr., *Secured Transactions History: The Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era*, 20 N. ILL. U. L. REV. 1, 5 (2000) (providing the times when the colonies, the states, and Great Britain adopted the chattel mortgage acts).

35. *See id.* at 3–6 (describing the development of the first chattel mortgage acts).

36. *Id.*

37. *Id.*

38. *Id.*

in the event of the borrower's non-payment of the loan.³⁹ Jurists described the situation as the "ostensible ownership problem"; where it appeared the borrower owned the personalty, but in fact did not.⁴⁰ Some historians have clouded the origin of the chattel mortgage acts by claiming the ostensible ownership problem meant courts found the chattel mortgage fraudulent and the chattel mortgage acts legalized the chattel mortgage if filed.⁴¹ The southern colonies adopted these acts as early as 1643 to facilitate the local trade of tobacco produced by planter-merchants.⁴² New England states began adopting these acts in 1832 to accommodate the sale of textile machinery on credit by the Boston Associates.⁴³ State legislatures passed both sets of these chattel mortgage acts attempting to provide a method to prevent the interference of levying judgment liens upon a chattel mortgagee's rights to the underlying collateral.⁴⁴

The same ostensible ownership problem exists for the conditional sale, such as the Comins–Billington transaction outlined above.⁴⁵ The conditional sale involves a sale of a personalty item in which the vendor retains ownership, namely title, until the vendee pays the purchase price evidenced by a promissory note; in the meantime the vendee retains

39. *Id.*

40. See NBD-Sandusky Bank v. Ritter, 471 N.W.2d 340, 345 (Mich. 1991) ("Moreover, when John Deere filed its financing statement, it cured any ostensible ownership problem created by Mr. Ritter's possession of the collateral."); George Lee Flint, Jr., *Secured Transactions History: The Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era*, 20 N. ILL. U. L. REV. 1, 1 n.3 (2000) (citing *Benedict v. Ratner*, 268 U.S. 353, 364–65 (1925)) (exemplifying this characterization).

41. 1 GRANT GILMORE, SECURITY INTEREST IN PERSONAL PROPERTY 24–26 (1965).

[L]egislatures left entirely to the courts the task of deciding what the law of chattel mortgages should be. Most courts, informed with a sense of history, concluded that a transaction which had for hundreds of years been recognized as a fraudulent conveyance was a fraudulent conveyance still. No court ever held a chattel mortgage act unconstitutional and, short of such a holding, it had to be recognized that the statutes, provided the filing provisions were complied with, validated to some extent, under some circumstances, some types of nonpossessory security interests in personal property.

Id. at 26.

42. See generally George Lee Flint, Jr., *Secured Transactions History: The Impact of Southern Staple Agriculture on the First Chattel Mortgage Acts in the Anglo-American World*, 30 OHIO N.U. L. REV. 537, 542 (2004) (providing history of chattel mortgage acts).

43. See George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 308 (1999) ("[T]he legislative response came the following year in the form of a chattel mortgage act requiring a public filing of the chattel mortgage for validity against third parties.").

44. See *id.* at 311 (describing issues debtors faced because they lacked preference).

45. See *Wait v. Green (Wait I)*, 35 Barb. 585, 586 (N.Y. Gen. Term 1862) (naming parties to the transaction).

possession of the item.⁴⁶ This security device is tailor-made for the sale of personalty on the installment method.⁴⁷ The vendor can convert the credit into cash by assignment of the promissory note secured by the conditional sale to a lender.⁴⁸ In the nineteenth century, the term "conditional sale," in addition to the retained title condition, also included sales subject to delivery conditions,⁴⁹ conditions defeasance,⁵⁰ and the right of repurchase.⁵¹ Courts treated the latter two conditions as involving a security interest subject to the filing requirements of the chattel mortgage acts.⁵² This Article will exclude these extraneous conditional sales transactions and limit the term conditional sale to those with the retained title condition.

The first appellate court decisions that considered the conditional sale provide a date before which parties used the conditional sale. The conditional sale appeared in the southeastern seaboard states shortly after the turn of the nineteenth century; Virginia courts considered a case in 1812 that stemmed from a conditional sale made in 1806.⁵³ By the 1820s, parties in the northeastern seaboard states were also using conditional sales, with Massachusetts courts considering a case that dealt with a conditional sale made in 1819.⁵⁴ Western states adopted the conditional sale much later, appearing in the southwestern states in the 1830s⁵⁵ and in

46. See George Lee Flint, Jr, *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 305 (1999) (noting the differences between a chattel mortgage and a conditional bill of sale).

47. See *id.* (describing a conditional bill of sale).

48. See *id.* (noting the differences between a chattel mortgage and a conditional bill of sale).

49. See, e.g., *Hussey v. Thornton*, 4 Mass. 405, 406 (1808) (clarifying the conditions relevant to the contract at issue); *W. Transp. Co. v. Marshall*, 37 Barb. 509, 514 (N.Y. Gen. Term 1862), *aff'd*, 4 Abb. Dec. 575 (N.Y. 1867) (discussing a contract stipulating payment upon delivery).

50. See, e.g., *Dabney v. Green*, 14 Va. 101, 102 (1809) ("[T]he paper, called by the complainant a defeasance, did not convert the said bill of sale into a mortgage . . .").

51. See, e.g., *Robertson v. Campbell*, 6 Va. 421, 427 (1800) ("For the deed was absolute; and he had only a right to re-purchase.").

52. See, e.g., *Potter v. Boston Locomotive Works*, 78 Mass. 154, 154 (1858) ("[T]he agreement was not recorded . . . [A] subsequent agreement gave the manufactures no additional right in the engines."); *Bullock v. Williams*, 33 Mass. 33, 34–35 (1834) (condition defeasance must be recorded under chattel mortgage act).

53. See *Randolph v. Randolph*, 17 Va. 99, 101 (1812) (explaining that property sold and delivered to a purchaser without a bill of sale vests title in the purchaser).

54. See *Marston v. Baldwin*, 17 Mass. 606, 606–07 (1822) (describing a conditional sale of rum and other goods).

55. See, e.g., *Gambling v. Read*, 19 Tenn. 281, 281 (1838) (examining the conditional sale of a female slave, secured by the bill of sale of another female slave); see also *Parmlee v. Catherwood*, 36 Mo. 479, 480 (1865) ("From the testimony it is abundantly shown that the sale was conditional, and was not to be complete or absolute till the condition was complied with; that is, until the property was paid for."). Residents of Alabama were aware of the conditional sale transaction in the 1840s.

the northwestern states in the 1850s.⁵⁶

To solve this ostensible ownership problem caused by the conditional sale, a second set of recording statutes, known as the conditional sales acts, evolved in the 1870s.⁵⁷ Under the common law, this security device differed significantly from the chattel mortgage, which warranted its own set of recording statutes.⁵⁸ Because the underlying transaction involved the sale of goods rather than a general lending secured by collateral that the borrower already owned, there was no right of redemption or an accounting for the vendee/borrower,⁵⁹ nor any right to a deficiency judgment for the vendor/lender.⁶⁰ Not all states recognized the conditional sale as a viable security device.⁶¹ For example, Pennsylvania

See Babcock v. Huntington, 9 Ala. 869, 869–70 (1846) (mentioning a conditional sale, made in Texas, where title did not vest until payment was completed); Caraway v. Wallace, 2 Ala. 542, 547–48 (1841) (attempting to change an absolute sale to one where title would not pass until the purchase price was secured).

56. *See, e.g.*, Thomas v. Winters, 12 Ind. 322, 323 (1859) (“It was a conditional sale to become absolute upon payment of consideration.”); Bailey v. Harris, 8 Iowa 331, 332 (1859) (ruling on the conditional sale of blacksmith’s tools); Hunter v. Warner, 1 Wisc. 126, 141–46 (1853) (recognizing that the seller retained the right to the property until the entire contract price was paid, while the buyer gained the right to possession subject to forfeiture if he defaulted in payment).

57. *See infra* notes 244–66 (describing the first wave of conditional sales acts).

58. The documents differed in that the chattel mortgage was a sale subject to a condition subsequent, meaning a sale had occurred but would become void in the event of non-payment, whereas the conditional sale was subject to a condition precedent, which meant that no sale occurred until the debt was paid. *See, e.g.*, Duke v. Shackleford, 56 Miss. 552, 554–55 (1879) (explaining the difference between conditions subsequent and conditions precedent as they relate to sales).

59. For a case involving redemption, *see*, for example, Chapman v. Turner, 5 Va. 280, 285–86 (1798) (ruling a pledge with repurchase was a conditional sale, and was not subject to redemption); *see also* Garrard Glenn, *The Conditional Sale at Common Law and As a Statutory Security*, 25 VA. L. REV. 559, 569 (1939) (“[W]hile the purchaser has no claim for a refund of instal[l]ments previously paid, on the other hand the vendor is allowed no claim for any balance that would otherwise have become due . . .”). For cases involving accounting, *see* Guilford, Wood & Co. v. McKinley, 61 Ga. 230, 232–33 (1878) (ruling the vendor did not need to return payments made); *Duke*, 56 Miss. at 553–55 (concluding that in an action for replevin, a vendor may recover without refund). *But see* Preston v. Whitney, 23 Mich. 260, 267–68 (1871) (deciding in a vendor’s action on the note for conditional sale, that it had no provision for forfeiture or right to keep payments, and the vendor was only entitled to the amount of use after repossession).

60. *See* Minneapolis Harvester Works v. Hally, 8 N.W. 597, 598 (Minn. 1881) (deciding that an action for deficiency could not be maintained); *see also* Garrard Glenn, *The Conditional Sale at Common Law and As a Statutory Security*, 25 VA. L. REV. 559, 570 (1939) (“One who holds a pledge or chattel mortgage is at liberty to sue the debt to judgment and at the same time retain the collateral, which thus will secure the judgment itself. Not so, however, with the conditional sale.”) (citation omitted).

61. *See* Stadtfeld v. Huntsman & Co., 92 Pa. 53, 55 (1879) (“It has long been an established rule in Pennsylvania, that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, is fraudulent and void . . .”); *see also* Martin v. Mathiot, 14 Serge. & Rawle 214, 215 (Pa. 1826) (“The cases which have generally

and Illinois rejected it as fraudulent, as did Louisiana under its version of the Napoleonic Code, which generally disallows mortgages on personalty.⁶²

This Article's aim is to determine when, where, and under what circumstances the first conditional sales acts arose, and to explain why

been brought before courts of justice, are those in which the seller has remained in possession; those have been adjudged fraudulent.”).

62. Because Pennsylvania regarded the conditional sale as fraudulent, the Pennsylvania Supreme Court refused to enforce it against third parties. *See In re Wylie*, 90 Pa. 210, 216 (1879) (stating that conditional sales are fraudulent); *Creps v. Dunham*, 69 Pa. 456, 460–61 (1871) (declining to allow a contingent sale to prevail over actual possession of the chattel); *Martin*, 14 Serge. & Rawle at 216 (asserting that possession is the defining characteristic of ownership); *see also In re Jenkins's Estate*, 8 Pa. D. & C. 743, 745 (1926) (finding that *Martin v. Mathiot* was still valid except as modified by a 1923 recording act that provided where documents should be recorded). Similarly, Illinois rejected the transaction when judgment liens challenged it. *See Ketchum v. Watson*, 24 Ill. 591, 592 (1860) (warning there must be a change of possession to pass title to protect third parties from fraud); *see also Harkness v. Russell*, 118 U.S. 663, 678 (1886) (discussing the error of the Pennsylvania-Illinois rule and citing cases that did not deal with the conditional sale, but rather conditional deliveries, chattel mortgages, and bailment leases); *Lucas v. Campbell*, 88 Ill. 447, 449 (1878) (refusing to honor a lease where monthly installment payments paid toward the purchase price would vest title upon full payment). *See generally* Garrard Glenn, *The Conditional Sale at Common Law and As a Statutory Security*, 25 VA. L. REV. 559, 566–67 (1939) (discussing Pennsylvania's and Illinois's application of the English bankruptcy laws). However, Illinois enforced the transaction against the parties to the transaction. *See, e.g., Latham v. Sumner*, 89 Ill. 233, 235–36 (1878) (declaring the vendor need not return payments made on breach of condition). Louisiana followed the French civil law, which forbade enforcement of chattel mortgages and conditional sales against third parties. *See LA. REV. CIV. CODE art. 3227* (1870) (recognizing that vendors may assert a privilege if the vendee retained possession of a movable item); *Chaffee v. Heyner*, 31 La. Ann. 594, 599 (1879) (refusing to enforce a foreign security interest against local inhabitants); *see also LA. CIV. CODE ANN. art. 3289* (1870) (declaring what may be mortgaged); George Lee Flint, Jr. & Marie Juliet Alfaró, *Secured Transactions History: The Impact of English Smuggling on the Chattel Mortgage Acts in the Spanish Borderlands*, 37 VAL. U. L. REV. 703, 746–49 (2003) (discussing conditional sales and chattel mortgages under Napoleonic law). In 1908, Louisiana ruled that under its version of the Napoleonic Code, the conditional sale is impossible. *Barber Asphalt Pav. Co. v. St. Louis Cypress Co.*, 46 So. 193, 194 (La. 1908) (stating that the civil code considers a sale complete as soon as there is an agreement, even though the good has not been delivered or paid for). There are no pre-1880 appellate cases in Louisiana dealing with a conditional sale. However, Louisiana did provide a privilege to vendors of movables over creditors of the vendee, provided the vendee still had the property. *See LA. CIV. CODE ANN. art. 3227* (1870); *see also Baldwin v. Young*, 17 So. 883, 883–84 (La. 1895) (recognizing the privilege even when the personalty is attached to real estate). Commentators criticize the Pennsylvania and Illinois rule because it follows the inapplicable English bankruptcy rule that banned reputed ownership. *See* Garrard Glenn, *The Conditional Sale at Common Law and As a Statutory Security*, 25 VA. L. REV. 559, 563–67 (discussing Pennsylvania's and Illinois' application of the English bankruptcy rule); *see also* Francis M. Burdick, *Codifying the Law of Conditional Sales*, 18 COLUM L. REV. 103, 103–04 (1918) (describing laws regarding conditional sales in Illinois and Pennsylvania). In Pennsylvania's defense, it was the only state to have a reputed ownership clause in its own insolvency laws, albeit from 1785 to 1792. *See* George Lee Flint, Jr., *Secured Transactions History: The Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era*, 20 N. ILL. U. L. REV. 1, 44–45 (2000) (discussing Pennsylvania's rejection of the chattel mortgage).

legislatures adopted them. This Article first examines the unsatisfactory explanations of past legal historians. The Article then examines the historical data by analyzing the reported American opinions concerning conditional sales to ascertain the precise circumstances that gave rise to the first conditional sales acts. The conditional sales transaction arose in the first half of the nineteenth century, primarily in connection with the sale of livestock.⁶³ When confronted with a battle between the vendor and a vendee's creditor or good faith purchaser, courts typically provided priority to the transaction with the vendor.⁶⁴ But in the late 1860s, a judicial development in New York threatened the rule for conditional sales, by providing an exception to vendor priority for good faith purchasers.⁶⁵ This exception could have potentially rendered an assignment of the conditional sale transaction to a farm lender worthless. The main tool to eliminate a good faith purchaser's interference with the conditional sale transaction is to provide notice.⁶⁶ Part IV reviews the earliest conditional sales acts and the scant legislative history for clues as to their origin. Farm states in northern New England, followed by the farm states of the Upper Mississippi Valley, adopted the first conditional sales acts in the early 1870s.⁶⁷ This Article then reviews the post-act court pronouncements for the passage of the conditional sales acts to reveal their shortcomings and accuracies. The primary concern was vendee fraud. Lastly, Part VI investigates the economic and political backgrounds of the respective states. Two assumptions aid this inquiry. First, legal change comes from the inability to achieve the desired result under the old rules. Regarding the conditional sale, change arose out of the vendor's title priority's inability to prevent interference from good faith purchasers and judgment liens. Second, legislative change only comes from the group with control of the legislative power. Therefore, those states with farm lender control of the legislatures would pass the legislation necessary to preserve their farm-funding technique.

63. See, e.g., *Wait v. Green (Wait II)*, 36 N.Y. 556, 556 (1867) (discussing vendor's rights against bona fide purchasers in a conditional sale of a horse).

64. See *id.* (ruling that in a conditional sale, when a vendor delivers chattel to a vendee, the vendor loses rights in the property with regard to the vendee's bona fide purchasers who had no notice of the conditional sale); see also *Ballard & Sampson v. Burgett*, 47 Barb. 646, 646 (N.Y. Gen. Term 1866), *aff'd*, 40 N.Y. 314 (1869) ("Possession alone is not sufficient to enable the person having it to transfer the title to personal property, by a sale even to a *bona fide* purchaser.").

65. See *Wait II*, 36 N.Y. at 556 (holding the vendor's right is superior to all but the vendee's bona fide purchasers).

66. See *id.* (urging that bona fide purchasers cannot have notice of the vendor's right).

67. See Francis M. Burdick, *Codifying the Law of Conditional Sales*, 18 COLUM. L. REV. 103, 103-04 (1918) (comparing the conditional sales acts passed by Iowa, Missouri, New York, and Vermont).

II. THE GILMORIAN MODEL

The historical explanation for the adoption of the conditional sales acts is woefully lacking. The one secured transactions scholar to provide much of an explanation, Grant Gilmore,⁶⁸ in his authoritative description of pre-Uniform Commercial Code secured transaction law,⁶⁹ confessed ignorance concerning the origins of the conditional sale transaction.⁷⁰ That unfamiliarity seriously tarnishes his explanation for the passage of the conditional sales acts.

A. *Theoretical Underpinnings*

Rather than examining the readily accessible appellate opinions data, Gilmore concocted a logical argument using a syllogism for those origins, dismissing judicial opinion as though it was irrelevant. He remarked:

This notable advance in contract theory [of Lord Mansfield's 1779 flexible theory of conditions],⁷¹ it is fair to assume, explains the distinction which the courts began to make between a sale absolute and a sale on condition.⁷² Granted that if a seller had agreed to make an absolute sale to

68. Grant Gilmore was a law professor at Yale University, respected legal historian, and a drafter of Article 9 of the Uniform Commercial Code, which deals 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 AGES OF AMERICAN LAW* (1977) and GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

69. See Guillermo A. Moglia Claps & Julian B. McDonnell, *Secured Credit and Insolvency Law in Argentina and the U.S.: Gaining Insight from a Comparative Perspective*, 30 GA. J. INT'L & COMP. L. 393, 396 n.5 (2002) (describing the regulation of security devices before the introduction of Article 9). "The most authoritative description of the complex regulation of security devices under pre-Article 9 U.S. law is presented in 1 GRANT GILMORE, *SECURITY INTEREST IN PERSONAL PROPERTY* §§ 1.1–8.8 (1965)." *Id.* See generally 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 66–68 (1965) (providing a history of security devices).

70. See, e.g., 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 63 (1965) (referring to conditional sales, Gilmore states that "[v]ague memories of common law origins persisted to cloud, blur and distort the process of decision").

71. See Bernard L. Shientag, *Lord Mansfield Revisited—A Modern Assessment*, 10 FORDHAM L. REV. 341, 353 n.28 (1941) (describing Lord Mansfield's theory of conditions). "[W]here mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other." *Boone v. Eyre*, 126 Eng. Rep. 160, 160 (K.B. 1777). Conversely, mutual covenants that only go to a part of the consideration are not mutual conditions, and may provide an independent ground for damages in a lawsuit. *Id.* For the conditional sale, the promise to pay and the promise to deliver ownership were described as mutual conditions. See, e.g., WILLIAM W. STORY, *A TREATISE ON THE LAW OF SALES OF PERSONAL PROPERTY* 444–45 (2d ed. 1853) (exemplifying this mutual condition).

72. See *Stone v. Grubham*, 80 Eng. Rep. 1079, 1079–80 (K.B. 1615) (describing the rights of a tenant when they have actual possession); see also George Lee Flint, Jr., *Secured Transactions History: The*

his buyer, then, once he had lost possession, he could be only a creditor for the price; nevertheless, if he had made the sale only on a *condition* that the buyer perform . . . on condition broken, the contract was at an end, the status quo ante should be restored and the seller, if he had lost possession of the goods, should get them back

We have sketched what came to be the recognized pattern of the common law conditional sale [I]t would be absurd to suppose that Lord Mansfield's theory of conditions led, as easily and naturally as we have suggested, to so sophisticated a creation. But the sequence of thought is a persuasive one⁷³ and, a [half-century] after Mansfield, the common law courts had pretty well worked out the result.⁷⁴

The common law uses title to determine priority—first in time wins.⁷⁵ Because the vendor retains the title, the vendor would be able to defeat a prior or subsequent vendee creditor as well as a subsequent good faith purchaser from the vendee.⁷⁶

Gilmore, inclined to find any device that creates an ostensible ownership problem as fraudulent, concluded that the conditional sale had no legitimate use without examining what the parties to the conditional sale used the transaction for, much less the identity of the parties.⁷⁷

The point should also be made that the conditional sale, in its early phase, was a theoretical construct, an ivory tower abstraction, and not in any sense

Fraudulent Myth, 29 N.M. L. REV. 363, 381–84 (1999) (distinguishing between an absolute conditional sale and a conditional sale).

73. This is not how business transactions normally develop. A proper example of the development of a normal business transaction is the bailment lease in Pennsylvania. *See infra* notes 123–28 and accompanying text (describing the bailment lease); *see also* *Myers v. Harvey*, 2 Pen. & W. 478, 481 (Pa. 1831) (holding that an agreement vesting title in bailee after payment was consistent with public policy); *Martin v. Mathiot*, 14 Serge. & Rawle 214, 216 (Pa. 1826) (exploring possession and conditional sales); *Clow v. Woods*, 5 Serge. & Rawle 275, 284 (Pa. 1819) (rejecting the chattel mortgage). *See generally* *Stone*, 80 Eng. Rep. at 1079–80 (K.B. 1615) (stressing that courts look at the nature of the sale when determining whether to enforce against third parties); George Lee Flint Jr., *Secured Transactions History: The Fraudulent Myth* 29 N.M. L. REV. 363, 381–84 (1999) (analyzing the absolute-conditional rule).

74. 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 66–67 (1965).

75. *See Rankin v. Scott*, 25 U.S. (12 Wheat.) 177, 179(1827) (expressing the universal principal “that a prior lien gives a prior claim, which is entitled to prior satisfaction . . . unless the lien be intrinsically defective, or be displaced by some act of the party holding it”).

76. *See, e.g., Coggill v. New Haven R.R. Co.*, 69 Mass. 545, 548–49 (1854) (declaring that “in the case of a conditional sale,” certain conditions must be met before title can pass from the vendor to the vendee, and then to a subsequent good faith purchaser).

77. Other legal historians claim the use of the conditional sale was to evade the chattel mortgage system, with its filings, redemptions, and accountings for excess. *See* DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY 40 (1987) (“A common means of evading the chattel mortgage system was the conditional sale.”).

a commercial reality.⁷⁸ It should also be remembered that the result achieved by conditional sale theory ran directly counter to one of the most firmly rooted doctrines of the common law: the protection of creditors against undisclosed interests in property. The conditional sale remained, through most of the nineteenth century, a matter for occasional judicial or scholarly speculation, of no commercial importance whatever.⁷⁹

The common law has no such principle protecting creditors from secret liens, much less good faith purchasers.⁸⁰ Even Gilmore's own work on good faith purchasers admitted the common law has no such rule, and traced the concept back to an 1824 British statute, which allowed factors to sell their principal's goods without authority.⁸¹ The statutes provided some relief.⁸² Legislators did not pass the chattel mortgage acts to protect creditors and good faith purchasers as Gilmore preferred, but to prevent interference with security interests by these individuals.⁸³ The chattel

78. If this were true, there would be no conditional sales opinions; the cases would never make it to litigation.

79. 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 67 (1965).

80. See U.C.C. § 2A-101 cmt. (2011) ("If the transaction creates a security interest disguised as a lease, the lessor will be required to file a financing statement There is no such requirement with respect to leases [of goods]."); see also *Myers v. Harvey*, 2 Pen. & W. 478, 481 (Pa. 1831) ("Retention of possession by the former owner of a chattel sold at sheriff's sale, is not an index of fraud."); George Lee Flint, Jr., *Secured Transactions History: The Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era*, 20 N. ILL. U.L. REV. 1, 2 (2000) (remarking that because historians did not investigate the development of non-possessory secured transactions, the assumption in Anglo-American jurisdictions was that such transactions were fraudulent prior to the enactment of pre-chattel mortgage law); George Lee Flint, Jr., *Secured Transactions History: The Fraudulent Myth*, 29 N.M. L. REV. 363, 364 (1999) (noting that according to Gilmore, non-possessory secured transactions were considered fraudulent prior to the nineteenth century because title and possession were separated). For the common law of the conditional sale in different contexts, see *infra* notes 196-204 and accompanying text (evaluating the conditional sale in different contexts).

81. See Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1057-58 (1954) ("The first English Act (4 Geo. IV, c. 83) was passed in 1824."); see also Factor's Act of 1889, 52 & 53 Vict. c. 45 § 9 (stating that under a conditional sale, a buyer's good faith purchaser has priority over the seller).

82. See Statute of Frauds of 1677, 29 Car. II, c. 3, § 13-15, reprinted in 5 STAT. OF THE REALM 839, 841 (London, Dawsons of Pall Mall, 1810-28) (decrying the secret lien problem in changing the effective dates for judgment statutes and recognizances); see also 4 W. & M., c. 16, reprinted in 6 STAT. OF THE REALM 404, 404-05 (Eng. 1962) (applying to land and establishing forfeiture of the equity of redemption as the penalty).

83. See George Lee Flint, Jr. & Marie Juliet Alfaró, *Secured Transactions History: The Impact of Southern Staple Agriculture on the First Chattel Mortgage Acts in the Anglo-American World*, 30 OHIO N.U. L. REV. 537, 553-73 (2004) (discussing legislative acts passed by the southern colonies in the seventeenth century); see also George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 303-08, 327-37 (1999) (analyzing chattel mortgage acts in the northern states in the early nineteenth century).

mortgage statutes merely preserved the pre-chattel mortgage act era's priority rule, assuming the lender filed the chattel mortgage.⁸⁴

B. *Illegitimate Functions*

Gilmore focused on two imagined evils of conditional sales that his mind could conceive. Historians that follow Gilmore⁸⁵ described these evils as two of the four reasons for the development of the conditional sale, albeit not commercial: (1) to avoid the drawbacks of the chattel mortgage with respect to the equity of redemption, and (2) usury.⁸⁶

The first Gilmorian iniquity used the conditional sale to extract money from the vendee.⁸⁷ This process avoids the chattel mortgage's equity of redemption, and has miniscule support in the conditional sales act appellate opinions as a reason for the development of the conditional sale.⁸⁸ The harshness Gilmore lamented operates as follows: if the conditional sales contract ended because of a broken condition, the vendor lost any contractual claim for the unpaid amounts, but could reclaim the item sold without refunding any moneys paid because the vendee had no

84. See George Lee Flint, Jr., *Secured Transactions History: The Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era*, 20 N. ILL. U. L. REV. 1, 5 (2000) ("The chattel mortgage acts required a public filing for the priority of the nonpossessory secured transaction."); see also George Lee Flint, Jr., *Secured Transactions History: The Fraudulent Myth*, 29 N.M. L. REV. 363, 363 (1999) (noting that northern states, as well as southern states, had similar acts).

85. See DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY xxv (1987) (alluding to the time spent as Gilmore's student).

86. See *id.* at 40–41 (describing the historical development of the conditional sale).

87. See 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 67–68 (1965) (describing one of the perceived iniquities presented by the conditional sale).

88. See *Weil v. State*, 21 N.E. 643, 643 (Ohio 1889) (confronting a constitutional challenge to the Ohio conditional sales act).

Oppression and hardship might, and probably did, grow out of such [conditional sale] contracts. Under them, a purchaser might pay the purchase price for the goods, except an insignificant sum, and failing, for any cause, to pay that, the vendor could reclaim the property, and retain the whole amount paid; thus depriving the purchaser of both the property and money. Consequences like these no doubt directed the attention of the legislature to the establishment of some equitable rule of adjustment between parties to such contracts.

Id. at 644. Gilmore most likely transferred concepts from the larger land transaction onto small personalty transactions. Cf. *Trucks v. Lindsey*, 18 Iowa 504, 505 (1865) (describing the use of a conditional sale in a land transaction as resorting to using "a device to defeat the equity of redemption"); *Turner v. Kerr*, 44 Mo. 429, 432 (1869) ("It may often happen that a creditor would consent to take an absolute title stipulating for a reconveyance, when he would reject a mortgage because of the delay and expense to which he might be subjected upon a foreclosure."). The conditional sales acts, however, did not affect the equity of redemption; they only required a filing.

theory on which to reclaim the moneys paid.⁸⁹ If the money paid exceeded the cost of money lent and the depreciation of the item reclaimed, this option became advantageous. Alternately, the other option was to waive the condition, treat the contract as valid, and sue for the price.⁹⁰ If the money paid did not exceed the cost of money lent plus the depreciation of the item, this option became advantageous.

The second atrocity concerned the vendor's evasion of usury.⁹¹ The evasion Gilmore deplored arises because the conditional sale is a sale, not a loan; therefore, it is subject to the usury statutes.⁹² All vendors need to do is raise the price, rather than the interest rate. The conditional sales appellate opinions provide no support for the assertion that vendors used the conditional sale to hide usury.⁹³

These two perceived evils are absent from appellate opinions concerning conditional sales with retained title because the standard reformulation of the chattel mortgage into an absolute sale with a repurchase condition, called a "conditional sale" by the early courts,⁹⁴ was used to avoid usury and extinguish the equity of redemption.⁹⁵ No lender needed to reshape his chattel mortgage into a conditional sale to escape the equity of redemption or usury because the lender only needed to replace the condition defeasance with the repurchase condition.⁹⁶

Gilmore and his followers provided two other reasons for the development of the conditional sale: to gain priority over the after-acquired property clause and to avoid chattel mortgage filing.⁹⁷ For years,

89. See 1 GRANT GILMORE, SECURITY INTERESTS IN REAL PROPERTY 66 (1965) (explaining the vendor's and vendee's respective rights in the event of a breach).

90. See *id.* ("[C]ontract law has always been hospitable to the idea of waiver.").

91. See *id.* at 68 ("[T]he conditional sale promised a way of avoiding . . . the crippling restrictions of the usury laws.").

92. *Id.* (recognizing that the use of conditional sales was limited to sales transactions to which usury laws do not apply).

93. Almost none of the pre-1880 conditional sale appellate opinions faced a usury charge. In the single pre-1880 opinion mentioning usury, the charge was dropped before trial. See Manning, *Bowman & Co. v. Keenan*, 73 N.Y. 45, 45-47 (1878) (mentioning an initial action for "usurious and void" notes).

94. See *Robertson v. Campbell*, 6 Va. 421, 427 (1800) ("Robertson's right in the present case, was only that of a conditional sale. For the deed was absolute; and he had only a right to repurchase."). This article excludes the repurchase condition from the term "conditional sale."

95. See *Moss v. Green*, 37 Va. 251, 261-62 (1839) (avoiding the equity of redemption); see also *Robinson v. Cropsey*, 6 Paige Ch. 480, 480-81 (N.Y. 1837) (deciding to construe as a mortgage not a conditional sale to prevent usury).

96. See 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 67-68 (1965) (discussing attempts to turn chattel mortgages into conditional sales).

97. See DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY 40 (1987) ("A common means of evading the

the after-acquired property clause was thwarted by the belief one could not sell what one lacked.⁹⁸ Therefore, it did not gain acceptance until the 1840s, though other states did not accept the idea until the 1880s,⁹⁹ and in some states, i.e. Maine and Wisconsin, until after the passage of their respective conditional sales acts, which occurred long after vendors began using the conditional sale.¹⁰⁰ Clearly, the after-acquired property clause had little to do with the development of the conditional sale.

The remaining reason for the use of the conditional sale, to avoid a chattel mortgage filing, possesses some support. Nevertheless, this is an ill-considered proposition because the litigation cost saved by filing to prevent any subsequent interests far outweighs the filing cost. Moreover,

chattel mortgage system was the conditional sale.”); 1 GRANT GILMORE, SECURITY INTERESTS IN REAL PROPERTY 68 (1965) (“[T]he conditional sale promised a way of avoiding both the filing requirements and the cumbersome foreclosure procedures of chattel mortgage law.”).

98. *See, e.g.*, *Pennock v. Coe*, 64 U.S. 436, 440–41, 23 How. 117 (1860) (recognizing the after-acquired property clause for railroad rolling stock, which was then classified as a fixture).

99. Numerous cases from a variety of jurisdictions demonstrate the judicial rejection of the after-acquired property clause. *See, e.g.*, *Walker v. Vaughn*, 33 Conn. 577, 583 (1866) (relying upon the validity of a mortgage for after-acquired property); *Borden v. Croak*, 22 N.E. 793, 795 (Ill. 1889) (holding that a lien on property did not include subsequently acquired merchandise based upon the vague description of personalty attached); *Allen v. McCalla*, 25 Iowa 464, 486–87 (1868) (noting changes in the laws regarding mortgages and reasoning that mortgages may be applied to after-acquired goods, such as stock in trade); *Long v. Hines*, 19 P. 796, 796 (Kan. 1888) (ruling that corn which had not yet been planted could not be subject to a valid mortgage); *Loth v. Carty*, 4 S.W. 314, 315 (Ky. 1887) (stating that after-acquired personal property was valid against the original mortgagor, but the right did not pass to subsequent creditors); *Chesley v. Josselyn*, 73 Mass. 489, 490 (1856) (holding that a mortgage failed to include stock of goods acquired after the sale); *Sawyer v. Long*, 30 A. 111, 112 (Me. 1894) (affirming that no legal title transfers for goods not presently owned); *State v. Tasker*, 31 Mo. 445, 451 (1862) (concluding a deed of trust referring to subsequently acquired machinery and tools was not completely void); *Steele v. Ashenfelter*, 59 N.W. 361, 361 (Neb. 1894) (refusing to permit a levy of after-acquired property of a transit and power company); *Smithurst v. Edmunds*, 14 N.J. Eq. 408, 414 (1862) (invalidating a lien because the furniture indicated was neither actually nor potentially owned at the time of the mortgage); *Beebe v. Richmond Light, Heat & Power Co.*, 35 N.Y.S. 1, 3–4 (Sup. Ct. 1895) (stating that only personal property in existence at the time of a mortgage was subject to the mortgage), *aff’d*, 38 N.Y.S. 395 (1896); *Welch v. Pittsburgh, Fort Wayne & Chi. R.R. Co.*, 2 Ohio Dec. Reprint 5, 13 (C.P. 1859) (explaining that common law held mortgages on after-acquired property void, but in equity, such mortgages were protected), *aff’d*, 11 Ohio St. 569 (1860); *Cook v. Corthell*, 11 R.I. 482, 483 (1877) (holding that because the grantor delivered the mortgaged after-acquired personalty to the grantee, the courts had no need to intervene even if the mortgage itself was invalid); *Phelps v. Murray*, 2 Tenn. Ch. 746, 754 (1877) (rejecting a mortgage that included after-acquired stock of goods as a matter of public policy); *Case v. Fish*, 15 N.W. 808, 8 10 (Wis. 1883) (repudiating the validity of a mortgage on after-acquired articles used for the manufacture of wagons).

100. *See infra* notes 253–259 and accompanying text (concerning Maine’s act); note 266 and accompanying text (concerning Wisconsin’s act).

Gilmore's followers admit filing is not burdensome.¹⁰¹ Textile equipment manufacturers did not mind filing; in fact, they sponsored the northeastern chattel mortgage acts that required filing after their 1831 real estate filings became ineffective.¹⁰² In 1857, when rolling stock constituted real estate, railroad companies made precautionary chattel mortgage filings in each town through which the road ran.¹⁰³ Additionally, the conditional sale developed in the northern states prior to their chattel mortgage acts, indicating such statutes did not give rise to the conditional sale.¹⁰⁴ However, much pre-conditional sales act litigation existed over whether courts should require vendors to record their conditional sales under the chattel mortgage acts.¹⁰⁵ This litigation resulted from the American adversarial tradition.¹⁰⁶ Lawyers attempted every possible argument to overturn the common law priority rule for conditional sales.¹⁰⁷ Nevertheless, a few courts referenced the possible use of the conditional sale to evade filing.¹⁰⁸ While evasion was not the origin of the conditional

101. See DOUGLAS G. BAIRD & THOMAS H. JACKSON, *CASES, PROBLEMS, AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY* 40 (1987) (noting that when the value for the property involved is taken into consideration, choosing a chattel mortgage may not seem burdensome).

102. See George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 346-55 (analyzing the position, political strength, and the tactics of the textile industry in sponsoring the chattel mortgage acts in the northeastern states).

103. See *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. 484, 485-86 (N.Y. 1857) (noting that the railroad company filed mortgages of all the property along the length of the line).

104. See, e.g., *Wheeland v. Swartz*, 1 Yeates 579, 579-80 (Pa. 1795) (evidencing the use of conditional sales as early as the late eighteenth century).

105. See, e.g., *Brewster v. Baker*, 20 Barb. 364, 368, 370-71 (N.Y. Gen. Term 1855) (finding it was error to treat the conditional sale as an unfiled chattel mortgage).

106. Cf. *Bailey v. Harris*, 8 Iowa 331, 332-33 (1859) (reversing the decision made by the appellate court which declared that because the conditional sale was not recorded, title vested in defendant); *Haven v. Emery*, 33 N.H. 66, 69 (1856) (noting there is no legal requirement for publishing or recording the conditional sale, and notice to the agent was adequate); *Ellison v. Jones*, 26 N.C. 48, 49 (1843) (holding that payment, which was not in the form of a mortgage, for a horse on a conditional sale did not need to be registered); *Buson v. Dougherty*, 30 Tenn. 50, 52 (1850) (finding that there is no need to record a conditional sale); *Warner v. Roth*, 2 Wyo. 63, 70-71 (1879) (declaring title remained in Warner even after a safe was assigned to Roth, a good faith purchaser who had no notice of the unrecorded conditional sale).

107. See *Sanders v. Keber & Miller*, 28 Ohio St. 630, 633 (1876) (arguing in favor of a good faith purchaser who tendered valuable consideration and did not have notice of the conditional sale; thus, because it was not a lease, it must have vested title in the original purchaser, leaving the vendor with only a right to reclaim); see also *Couse v. Tregent*, 11 Mich. 65, 66 (1862) (protesting that the statutes indicated public policy favors innocent third parties who purchase items subject to "secret transfers and liens" under "established elementary principles").

108. See *Sanders*, 28 Ohio St. at 641 (observing that the question of whether a conditional sale is a subterfuge of registry laws is for the legislature to decide); see also *Shaw v. Wilshire*, 65 Me. 485,

sale, some secured parties may have used the transaction to evade filing requirements to their detriment.

C. *Coming of Age As a Financing Device*

Given Gilmore's predisposition to disregard historical facts, he claimed that lawyers eventually put his theoretical construct to use as a security device for two financing situations: industrial equipment financing and consumer goods financing near the end of the nineteenth century.¹⁰⁹ Both of these fields did not use the conditional sale as a security device; instead, they relied upon the car trust¹¹⁰ and the bailment lease.¹¹¹

The car trust spawned a later set of recording statutes in the 1880s: the car trust acts.¹¹² Originally, jurists treated railroad rolling stock as a

490–91 (1876) (“After it became apparent that, in place of taking mortgages to secure the purchase money, sellers of chattels were making a practice of stipulating in the contract of sale that the property should remain theirs until the price was paid, and the court had held . . . that the statute did not extend to liens thus created because there was no mortgage from the debtor and no unconditional transfer of title from the vendor, the legislature again intervened with the requirement . . . invalidating every such agreement where a note is given for the purchase money, unless it is made and signed as part of the note and unless recorded like mortgages of personal property, when such note exceeds thirty dollars.” (internal citations omitted)).

109. See 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 67–68 (1965) (“The great mutation in the life of the conditional sale came when, shortly before the turn of the century, it was put to work, as a security device, in two unlike fields: in industrial equipment financing . . . and in consumer goods financing . . .”).

110. See Notes, *Federal Protection of Security Interests in Carriers' Mobile Equipment*, 71 HARV. L. REV. 1516, 1521–22 (1958) (noting that beginning in 1848, railroads developed the car trust as a security device.) A trustee would take title to a group of cars and then sell participation certificates to investors. *Id.* Under the “New York Plan,” the trustee entered into a conditional sale with the railroad, whereas under the “Philadelphia Plan,” the trustee entered into a lease with the railroad. *Id.* at 1522; see also *Hervey v. R.I. Locomotive Works*, 93 U.S. 664, 672 (1876) (affirming that an owner of an engine must record the sale under the chattel mortgage acts to retain a security interest); *Strong v. Taylor*, 2 Hill 326, 328–29 (N.Y. 1842) (regarding a contract for sale of a canal boat not as a mortgage, but rather as a conditional sale); *Haak v. Linderman & Skeer*, 64 Pa. 499, 501–02 (1870) (concluding a contract for sale of a house car was not a bailment but a conditional sale); *Lehigh Co. v. Field*, 8 Watts & Serg. 232, 241 (Pa. 1844) (concluding a contract for a canal boat represented a lease, leaving the ownership vested in the builder).

111. See *infra* notes 123–28 and accompanying text (describing the bailment lease); see, e.g., *Myers v. Harvey*, 2 Pen. & W. 478, 481 (Pa. 1831) (recognizing the validity of a bailment lease). *But see* *Murch v. Wright*, 46 Ill. 487, 488 (1868) (concluding a transaction for a piano was a conditional sale even though it purported to be a lease); *Couse*, 11 Mich. at 66–67 (“Couse sold to one Hamilton a piano forte, conditionally, or perhaps, to speak more correctly, agreed to sell it, and gave into his possession the instrument upon an agreement.”); *Pinkham v. Mattox*, 53 N.H. 600, 602 (1873) (affirming a contract for the sale of a sewing machine was a conditional sale); *White v. Singer Mfg. Co.*, 4 Ohio Dec. Reprint 118, 118 (Ct. Com. Pl. 1878) (referring to the lease of a sewing machine as a conditional sale).

112. See Act of Apr. 3, 1882, ch. 215, 1882 Md. Laws 317 (“[A]uthoriz[ing] conditional sales of Railroad Equipments and Rolling Stock”); see also *LOANS, BAILMENTS AND CONDITIONAL SALES OF*

fixture, i.e. part of the real estate, and so the car trusts did not require a filing under the chattel mortgage acts.¹¹³ Long-term real estate recordings worked. Unfortunately, the situation changed beginning in the 1850s and quickened in the 1870s as states adopted constitutional provisions and statutes that deemed railroad rolling stock personalty.¹¹⁴ Then in 1880, the United States Supreme Court declared the car trust a chattel mortgage that required a chattel mortgage filing to gain priority.¹¹⁵ But the lack of filing duration under the chattel mortgage acts caused problems for long-term installment purchases of railroad rolling stock.¹¹⁶ Some statutes had short duration limits for the chattel mortgage, instituting filing deadlines of two months to a few years.¹¹⁷ Other statutes had re-filing requirements after a year or so.¹¹⁸

Another problem with the chattel mortgage statutes was their lack of

RAILWAY ROLLING STOCK, 32d Gen. Assemb. (Ill. 1881) (providing for a valid lien against rolling stock if instrument is in writing and recorded); Act of Mar. 17, 1882, ch. 454, 1882 Ky. Laws 43–44 (“[P]rovid[ing] a security for manufacturers and vendors of railroad equipment and rolling stock in making conditional sales thereof.”); S.B. 43, 65th Gen. Assemb., 1st Sess. (Ohio 1882) (requiring recording or filing “in the office of the secretary of state” to “be valid against creditors or innocent purchasers”); Act of Mar. 17, 1882, ch. 106, 1882 W. Va. Laws 310–11 (regulating rolling stock and other conditional sales and loans, which all require a writing and filing of notice for validity against creditors and subsequent purchasers). *See generally* Francis Rawle, Car Trust Securities, Paper Read at the 8th Annual Meeting of the A.B.A. (Aug. 20th, 1885), at 26, *available at* <http://archive.org/details/cu31924018840847> (enumerating adoption dates of “acts relating to rolling stock contracts” across several states).

113. *See* Farmers’ Loan & Trust Co. v. Hendrickson, 25 Barb. 484, 485–86 (N.Y. Gen. Term 1857) (noting the railroad company executed and filed real estate mortgages in 1853 on engines and cars). *But cf.* 1 ISAAC REDFIELD, THE LAW OF RAILWAYS 534 (3d ed. 1867) (noting that railroads generally had no requirement to file, until the passage of the first conditional sales acts). *See generally* Francis Rawle, Car Trust Securities, Paper Read at the 8th Annual Meeting of the A.B.A. (Aug. 20th, 1885), at 17–18, *available at* <http://archive.org/details/cu31924018840847> (listing the states that required recording and those that did not require recordation for valid liens against creditors and good faith purchasers).

114. *See* Boston, Concord & Montreal R.R. v. Gilmore, 37 N.H. 410, 421–23 (1858) (rejecting the concept of rolling stock as fixtures unable to be attached separately from realty); *see also* 1 LEONARD A. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY 356 n.3 (3d ed. 1882) (listing codes and constitutional provisions that established the classification of rolling stock as realty, fixtures, and personalty).

115. *See* Heryford v. Davis, 102 U.S. 235, 244, 244–47 (1880) (rejecting the contract for railroad cars as a lease or as a conditional sale and holding the contract constituted a mortgage).

116. *See* Francis Rawle, Car Trust Securities, Paper Read at the 8th Annual Meeting of the A.B.A. (Aug. 20th, 1885), at 26, *available at* <http://archive.org/details/cu31924018840847> (noting the limited duration of validity given to recordation).

117. *See id.* (remarking that the validity of recordation is limited to short time periods, often from only two or three years in some states).

118. *See id.* (“In Arkansas, Kansas, Michigan, Minnesota, New Mexico, New York, Ohio, Nevada and Oregon, mortgages must be re-filed at the end of one year; in Wisconsin, at the end of two years; and in Dakota, at the end of three years.”).

uniformity. Some statutes required filing at the rolling stock's location when executing the transaction, while other statutes required filing wherever the rolling stock existed from time to time.¹¹⁹ Beginning in Illinois, corporations selling railroad equipment, led by the Baldwin Locomotive Works of Philadelphia,¹²⁰ sponsored the car trust recording acts to achieve the desired long-term duration and uniformity in filing standards.¹²¹ In short, the industrial equipment financing had little to do with the conditional sales acts. Just as in the cases of the southern and northern chattel mortgage acts, the lenders sponsored the acts.¹²²

The bailment lease, developed in Pennsylvania, allowed the buyer/lessee to lease goods with an option to purchase the goods during or at the expiration of the term of the lease.¹²³ Parties occasionally represented the rent by a series of notes, especially in the case of equipment.¹²⁴ Isaac Merrit Singer of the Singer Sewing Machine Company adapted the bailment lease to consumer goods financing by introducing the consumer

119. See *id.* (noting a wide variation in recording requirements among the states).

120. See George Gleason Bogert, *The Proposed Uniform Conditional Sales Act*, 3 CORNELL L. Q. 1, 9 (1917) ("These existing acts are said to have been passed as a result of the efforts of the Baldwin Locomotive Works and other corporations interested in the sale of railway equipment to railroads under conditional sale contracts, sometimes called 'equipment trust contracts.'").

121. The modern code has a five-year duration for filings, except for public-finance and manufactured home transactions, which have a thirty-year duration, and for transmitting utilities, including railroads, which have an indefinite duration. U.C.C. §§ 9-102(a)(80), 9-515(a), (b), (f), cmt. 2 (2011). Compare Act of Feb. 7, 1883, ch. 146, 1883 Del. Laws 211 (restricting contract term to ten years and stipulating recordation with secretary of state and in county of principal office of buyer or lessee), with Act of Apr. 3, 1882, ch. 215, 1882 Md. Laws 317 (limiting term to ten years and requiring filing in county of principal office). See also Act of Mar. 17, 1882, ch. 454, 1882 Ky. Laws 43 (authorizing a maximum term of ten years and filing with secretary of state in the clerk's office in the county of residence or principal office); S.B. 43, 65th Gen. Assemb., 1st Sess. (Ohio 1882) (stipulating filing with the secretary of state and remaining effective until "purchase money shall have been fully paid"). See generally LOANS, BAILMENTS AND CONDITIONAL SALES OF RAILWAY ROLLING STOCK, 32d Gen. Assemb. (Ill. 1881) (limiting to four years duration in each county). This was not much of an improvement over the prior two-year period of the chattel mortgage act.

122. See George Lee Flint, Jr. & Marie Juliet Alfaro, *Secured Transactions History: The Impact of Southern Staple Agriculture on the First Chattel Mortgage Acts in the Anglo-American World*, 30 OHIO N.U. L. REV. 537, 542-43 (2004) (outlining the history of secured transactions, beginning with the county court records of Accomack-Northampton, Virginia between 1632 and 1640).

123. Pennsylvanians needed some sort of non-possessory security interest and so turned to the modified lease. See, e.g., *Myers v. Harvey*, 2 Pen. & W. 478, 481 (Pa. 1831) (recognizing the bailment lease because Pennsylvania had rejected the conditional sale in *Martin v. Mathiot*, 14 Serge. & Rawle 214, 216 (1826)).

124. See, e.g., *Hervey v. R.I. Locomotive Works*, 93 U.S. 664, 665 (1876) (listing rent for a locomotive: 10% cash and three notes due at different times and in ascending amounts).

installment sale.¹²⁵ By the 1850s, factories could mass-produce consumer durables, but the average worker lacked sufficient money to make a purchase.¹²⁶ In 1856, to expand his market, Mr. Singer first proposed to “rent” a sewing machine to housewives and credit the rent to the purchase price.¹²⁷ Consequently, the first conditional sales acts passed by the several states also covered leases of goods.¹²⁸

Had these two fields, industrial equipment financing and consumer goods financing, played a role in passing the conditional sales acts, it would seem likely that the first conditional sales acts would have appeared in the railroad or manufacturing states—Pennsylvania for the Baldwin Locomotive Works or New York for the Singer Manufacturing Company, respectively. However, the fact that farm states passed the first conditional sales acts suggests farmers, or those lending to farmers by taking assignments of their conditional sales transactions, played a significant role in passage.¹²⁹

125. See Timothy J. Muris, *Payment Card Regulation and the (Mis)application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 529 (2005) (“Singer Sewing Machine Company was the first large scale issuer of installment credit for consumer sales, beginning in 1850.”).

126. See *Davis v. Emery*, 11 N.H. 230, 232 (1840) (observing that a conditional sale is a convenient method to purchase when the buyer lacks sufficient cash for an outright purchase).

127. See, e.g., Timothy J. Muris, *Payment Card Regulation and the (Mis)application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 529 (2005) (noting that in 1850, the Singer Sewing Machine Company became the first consumer driven issuer of installment credit on a large scale).

128. See 30 ARIZ. REV. STAT. ANN. § 2702 (1901) (requiring recordation of conditional sales and leases similar to chattel mortgages); see also 1 ALA. CODE § 1017 (1897) (regulating recordation of conditional sales and leases of personalty); Conditional Sales or Transfers of Personal Property, ch. 40, 1895 Wyo. Laws 80–81 (enacting requirements that conditional sales and leases of personalty be written and recorded); H.F. 47, 14th Gen. Assemb., Reg. Sess. (Ia. 1872) (“Requiring that conditional Sales of Personal Property be executed, acknowledged, and recorded like Mortgages of Personal Property, to be of any Validity as against bona fide Purchasers, Executions, and attaching Creditors.”); Act of Feb. 19, 1877, 1877 Neb. Laws 170–71 (“[P]revent[ing] the fraudulent transfer of personal property.”); H.B. 1051, 66th Gen. Assemb., Adjourned Sess. (Ohio 1885) (regulating conditional sales and leases of personalty through rates and filing requirements); H.B. 53, 3d Leg., Reg. Sess. (Wash. 1893) (stating regulations for conditional sales or leases of personalty against creditors and bona fide purchasers); cf. U.C.C. § 9-309 cmt. 3 (2011) (“No filing or other step is required to perfect a purchase-money security interest in consumer goods.”); *id.* § 9-324(a) (2011) (stating that generally “a perfected purchase-money security interest in goods . . . has priority over a conflicting security interest in the same goods”).

129. See generally H.F. 47, 14th Gen. Assemb., Reg. Sess. (Ia. 1872) (“Requiring that conditional Sales of Personal Property be executed, acknowledged, and recorded like Mortgages of Personal Property, to be of any Validity as against bona fide Purchasers, Executions, and attaching Creditors.”); Act of Mar. 16, 1870, ch. 143, 1870 Me. Laws 108 (requiring recordation of conditional sales of personalty valued over thirty dollars).

D. *Redundant Conditional Sales Acts*

Nevertheless, Gilmore intimated that a generation or two after the development of the conditional sale as a security device, judges and legislatures determined the transaction should be treated the same as a chattel mortgage.¹³⁰

Only two states, Kentucky in 1874¹³¹ and South Carolina in 1883,¹³² followed this Gilmorian model of requiring recordation of conditional sales under the chattel mortgage acts (by court decision rather than legislative action), both doing so after the adoption of the first conditional sales acts in other states.¹³³ The other states, not following the Gilmorian model, instead passed an additional set of filing statutes, but with significant differences from the supposedly modeled-upon chattel mortgage acts, e.g. different filings under different principles default

130. See 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 68 (1965) (“The reaction, judicial and legislative, over a generation or two, was predictable and sensible: now that the conditional sale was being used as a security device, it should be treated like a security device. That is to say, it should be treated like a chattel mortgage. In a majority of jurisdictions, filing statutes were passed . . .”). Judges are much more conservative than Gilmore depicts. Most did not treat conditional sales the same as chattel mortgages. When confronted with the argument that the conditional sale should be filed the same as a chattel mortgage, most judges decided no such requirement existed. See *Bailey v. Harris*, 8 Iowa 331, 332–33 (1859) (concluding that it was error to allow a conditional sale vendor to lose to a good faith purchaser because the transaction was not on record); *Haven v. Emery*, 33 N.H. 66, 69–70 (1856) (noting that because no law required notice by either registration or publication, notice to the agents was sufficient); *Grant v. Skinner*, 21 Barb. 581, 584 (N.Y. 1854) (deciding the lower court erred by instructing the jury that a conditional sale was a mortgage and that a good faith purchaser had priority because the sale was not recorded); *Ellison v. Jones*, 26 N.C. 48, 49 (1843) (holding that a conditional sale was executory and thus did not have to be recorded); *Buson v. Dougherty*, 30 Tenn. 50, 52 (1850) (affirming that no law requires a conditional sale be filed when challenged by a judgment lien). Common sense indicates that Gilmore’s intimation could not be correct. If the legislatures wanted to treat conditional sales as chattel mortgages, they would have just appended conditional sales to the chattel mortgage acts, rather than create entirely new statutes with different filing places and different default provisions.

131. See *Barney & Smith Mfg. Co. v. Hart*, 1 S.W. 414, 416 (Ky. 1886) (affirming that a contract for the construction of railroad cars must be filed and recorded for validity against creditors and bona fide purchasers); see also *Greer v. Church & Co.*, 76 Ky. 430, 435 (1877) (referring to registration statutes to secure a lien for a piano against judgment by innocent purchasers); *Vaughn v. Hopson*, 73 Ky. 337, 343 (1874) (concluding that conditional sales must be registered under chattel mortgage act for validity against good faith purchaser), *overruling* *Patton v. McCane*, 54 Ky. 555, 557–58 (1855) (deciding that no registration was required for a conditional sale to be valid against a good faith purchaser).

132. See *Herring & Co. v. Cannon*, 21 S.C. 212, 215 (1883) (requiring recordation of a conditional sale under the chattel mortgage act to be valid against a judgment lien), *overruling* *Dupree v. Harrington*, 16 S.C.L. 391 (1824).

133. See 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 68 (1965) (observing that courts began to treat conditional sales as chattel mortgages with respect to filing requirements, although the filing requirements differed).

procedures.¹³⁴ After determining that a conditional sale should be treated as a chattel mortgage, Gilmore could not provide an explanation for these differences other than jurists desiring to preserve conditional sales as a separate security device.¹³⁵

Gilmore provided no explanation of when or where legislatures first passed the conditional sales acts, much less who proposed them for passage or why (other than that they resembled a chattel mortgage, which did require a filing).¹³⁶ As everyone likely knows, businessmen, and the judges and legislators they help elect are resistant to change. No change will occur without some event spurring it, such as a decision in a neighboring state that, if adopted in the present jurisdiction, could upset the well-settled rule these businessmen relied on in shaping their transactions.¹³⁷ When a decision like *Wait* provides an exception to the usual common law conditional sale rule that the vendor takes over the judicial lien and a good faith purchaser, this would be an event sufficient to spur such change.¹³⁸

III. THE PRE-ACT AMERICAN DECISIONS

The use of the conditional sales transaction before the adoption of the conditional sales acts provides clues to the passage of those acts. However, interpretation of those clues requires caution. For instance, the evidence found in American appellate opinions contains two drawbacks.

First, the facts behind appellate opinions in the Anglo-American system are often bizarre, pathological, and atypical.¹³⁹ Parties do not litigate over

134. *See id.* (remarking that the files were not maintained with those of chattel mortgages, and were set up under a different theory; in essence, the default procedures differed).

135. *See id.* ("The very fact that the two devices were maintained as separate entities naturally led the courts to refined distinctions as to their 'true nature.'").

136. *See id.* ("[Whereas] the conditional sale promised a way of avoiding both the filing requirements and the cumbersome foreclosure procedures of the chattel mortgage law as well as the crippling restrictions of the usury laws.").

137. *See, e.g.,* George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 355-62 (1999) (discussing the roles of different interest groups in the legislative debate in New York state that resulted in the implementation of statutes that were hostile to chattel mortgages).

138. *Wait v. Green*, 46 How. Pr. 449, 450 (N.Y. 1867), *aff'g*, 35 Barb. 585 (N.Y. Gen. Term 1862). *See Mowrey v. Walsh*, 8 Cow. 238, 245 (N.Y. 1828) (reiterating protection of bona fide purchasers in transactions with vendors who fraudulently obtained title to property); *see also W. Transp. Co. v. Marshall*, 37 Barb. 509, 515 (N.Y. Gen. Term 1862) (interpreting the protection of bona fide purchasers in the context of the purchase of bills of lading).

139. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 62 (1960).

well-settled situations described in the legal rules.¹⁴⁰ Typical fact patterns result in settlement before reaching the appellate courts.¹⁴¹ Parties only fight over questionable cases that do not fit the accepted legal rule.¹⁴² So, the facts underlying some opinions might not provide an accurate depiction of accepted business practices during that era.¹⁴³ But the rule in general use is reflected in the opinions.¹⁴⁴ The party favored by that rule would advocate its application. The other party would advocate an exception. The court's rule usually modifies the 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 appellate opinions in the Anglo-American system are not readily available and are severely attenuated.¹⁴⁵ The American legal system employs an adversarial scheme.¹⁴⁶ As a result, parties only present those facts favorable to their position to the trial court.¹⁴⁷ Appellate lawyers further reduce these facts by disclosing to the appellate court only those facts important to their particular point on appeal.¹⁴⁸ The appellate judges then sift these facts to present only those facts necessary to support their opinion.¹⁴⁹

Before 1880, the various state reports included 210 appellate opinions dealing with the conditional sales transaction, most dating from before the passage of their respective conditional sales act.¹⁵⁰ Strikingly, Vermont

140. *See generally id.* ("Being cases at law, however, they indicate in the first instance not disputes in life, but quarrels before the courts. Now I have already argued that quarrels before the courts are but a minor fraction of the quarrels of life. I can go further and argue that quarrels in life are still a lesser fraction of life's business.")

141. *Cf. id.* at 63.

142. *Id.*

143. *See id.* at 65 (discussing "the difference between the rule of law" and "the way the court[s] interpreted the facts" (emphasis omitted)). The logical inference is that the opinions written by the court would illustrate the rule in general use.

144. *Id.* at 65–66.

145. *Id.* at 34–35.

146. *See id.* at 22 ("[O]ur system of law lets the parties fight their own battles, in the main. What they do not claim, they cannot have. What they do not or cannot prove, is irrelevant to the court.")

147. *See id.* ("We have not thus far . . . found out anything definite about the facts of the original event, about what really happened. We have the plaintiff's statement, we have the defendant's. But both may be mistaken, both may even be lying.")

148. *See id.* at 35 ("The two lawyers have again sifted—this time solely from the record of the trial—what seemed to bear on [the] points upon appeal.")

149. *See id.* ("Finally, with a decision already made, the judge has sifted through these 'facts' again, and picked a few which he puts forward as essential—and whose legal bearing he then proceeds to expound.")

150. *See infra* Section III(A)–(D) and accompanying text (listing opinions).

and Maine have the most appellate opinions of all states, 42 and 17 respectively; however, Iowa has a surprising 9 opinions, placing it sixth amongst states with conditional sales transaction cases adjudicated prior to 1880.¹⁵¹ Admittedly, these would become the first three states to adopt a conditional sales act.¹⁵² However, the disproportionate number of opinions from these states reflect either the vitality of the conditional sales transaction in these state's economies, or the litigiousness of their citizens.

To understand why the conditional sales acts arose in the 1870s requires: (1) A determination of who took advantage of the common law priority rule for the conditional sales transaction during the pre-conditional sales act era; and, (2) Determining their business practices with respect to the conditional sales transaction. The first aspect involves identifying the vendors, vendees, their courthouse opponents, and the item conditionally sold. The second aspect involves examining the form of the conditional sales transactions and the legal actions they engendered. Legislators, through passage of the conditional sales acts and their predecessor statutes, would endeavor to alleviate the problems revealed by this analysis.

A. *The Parties*

The relevant opinions seldom described the parties' occupations. When described, the occupations enumerated divide into six groups: commercial merchants, manufacturers, transporters, townspeople, farmers, and households.¹⁵³ Commercial merchants encompass wholesalers and bankers, while townspeople include retailers and lawyers.¹⁵⁴ Depending

151. The industrial states followed: New York with seventeen and Massachusetts and New Hampshire with fifteen each. The other states had considerably less: Indiana with nine, Georgia with eight, Michigan, Pennsylvania, and Missouri with seven each, Alabama with six, Tennessee with five, Kansas, North Carolina, South Carolina, Mississippi, and California with four each, Wyoming with three, Nebraska, Wisconsin, Minnesota, Virginia, Connecticut, Illinois and Kentucky with two each, and New Jersey, Ohio, Delaware, Maryland, Arkansas, Colorado, Oregon, Nevada, and the District of Columbia with one each.

152. See *infra* notes 253, 260, 263 and accompanying text (listing the first three states to adopt).

153. See George Lee Flint, Jr., *Secured Transactions History: The Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era*, 20 N. ILL. U.L. REV. 1, 9–13 (2000) (providing an analysis of the parties involved in the pre-chattel mortgage act appellate opinions).

154. See *Puffer v. Peabody*, 59 Ga. 295, 296 (1877) (identifying parties as "druggist" and "Manufacturer of Soda Water Apparatus," and classifying the case as involving a townsperson vendee and a manufacturer vendor); see also *Sargent v. Metcalf*, 71 Mass. 306, 306 (1855) (classifying claims of one carriage dealer against another carriage dealer, as a case involving a commercial merchant vendee and a commercial merchant vendor); *Stadtfeld v. Huntsman & Co.*, 92 Pa. 53, 53 (1879) (reviewing an action for replevin by a company "engaged in the furniture business," and classifying it as a case involving a townsperson vendor); *Rowan v. State Bank*, 45 Vt. 160, 160–61 (1872) (examining the right of a bank to seize property when its mortgagor fails to use the equipment

on the opinion's description of the occupation, a difficulty may arise in determining the occupation's group. For example, many opinions labeled the party as an unspecified "mercantile firm."¹⁵⁵ Those mercantile firms that resemble wholesalers appear as commercial merchants, those resembling retailers appear as townspeople, and those purchasing manufacturing equipment appear as manufacturers.¹⁵⁶

Of those opinions that do describe the parties' occupations, the majority (seventy) describe the vendee.¹⁵⁷ Of this meager selection of vendees, manufacturers, appeared in twenty-two of the seventy opinions (31%),¹⁵⁸ followed by townspeople in eighteen opinions (26%),¹⁵⁹ transporters in

to deliver on a contract necessary to pay the mortgage, which has been classified as a case involving a commercial merchant vendor and a manufacturer vendee).

155. *See, e.g.*, *Bradshaw v. Warner*, 54 Ind. 58, 58 (1876) (examining a transaction for a safe between an unspecified mercantile firm and an unclassified party); *see also* *Jones v. Albin Sons & Co.*, 53 Ga. 585, 586 (1875) (reviewing a dispute between two named companies regarding the purchase of a hearse); *Lane v. Borland*, 14 Me. 77, 77 (1836) (involving a transaction between an unspecified mercantile firm and an unclassified party for a horse); *Giddey v. Altman*, 27 Mich. 206, 206 (1873) (contracting for the purchase of a piano by a named company in exchange for four hundred newspaper subscription tickets); *Herring v. Hoppock*, 15 N.Y. 409, 410 (1857) (determining which individual had priority on a safe under a sheriff's levy while the safe remained in the possession of a named company); *Warner v. Roth*, 2 Wyo. 63, 64 (1879) (addressing the issue of a conditional sale of a safe that arose between a named company and an unspecified party).

156. *See* *Manning, Bowman & Co. v. Keenan*, 73 N.Y. 45, 47 (1878) (examining an action brought by a manufacturer vendor against a purchaser who was a silverware retailer); *see also* *Flanders & Huguenin v. Maynard*, 58 Ga. 56, 57–58 (1877) (reviewing an action for trover brought against a factor acting as a consignee for the purchaser); *Whitney v. McConnell*, 29 Mich. 12, 13 (1874) (pursuing an action for replevin brought by a mercantile firm resembling a retailer against a household vendee); *Griffin v. Pugh*, 44 Mo. 326, 326 (1869) (discussing an action of replevin by a purchaser of manufactured equipment); *Davis & Aubin v. John Bradley & Co.*, 24 Vt. 55, 56 (1851), *aff'd*, 28 Vt. 118 (1855) (considering an action for trover brought by a wholesaler of wool).

157. *See infra* notes 158–63 (listing cases).

158. There were twenty-two cases involving manufacturers as the described vendee: *Jones v. Pullen*, 66 Ala. 306 (1880); *Gluckauf v. Urton*, 19 Cal. 61 (1861); *Watertown Steam Engine Co. v. Davis*, 10 Del. 192 (Super. Ct. 1877); *Eaton v. Munroe*, 52 Me. 63 (1862); *Waterston v. Getchell*, 5 Me. 435 (1828); *Raddin v. Arnold*, 116 Mass. 270 (1874); *Day v. Bassett*, 102 Mass. 445 (1869); *Coggill v. Hartford & New Haven R.R. Co.*, 69 Mass. 545 (1854); *Duke v. Shackelford*, 56 Miss. 552 (1879); *Wangler v. Franklin*, 70 Mo. 659 (1879); *Griffin*, 44 Mo. 326; *Cochran v. Flint*, 57 N.H. 514 (1877); *Hawkins v. Brown & Jeffery*, 30 Barb. 206 (N.Y. Gen. Term 1859); *Grant v. Skinner*, 21 Barb. 581 (N.Y. Gen. Term 1854); *Creps v. Dunham*, 69 Pa. 456 (1871); *Jenkins v. Eichelberger*, 4 Watt. 121 (Pa. 1835); *Hilliard Flume & Lumber Co. v. Woods*, 1 Wyo. 396 (1878); *In re Binford*, 3 F. Cas. 394 (C.C. E.D. Va. 1879); *Bailey v. Henderson*, 2 F. Cas. 373 (D. Vt. 1878); *Kellogg v. Fox & Minogue*, 45 Vt. 348 (1873); *Davenport v. John G. Shants & Co.*, 43 Vt. 546 (1871); *Rowan v. Union Arms Co.*, 36 Vt. 124 (1863), *aff'd sub nom.* *Rowan v. State Bank*, 45 Vt. 160 (1872).

159. Eighteen cases described the vendee as townspeople: *George v. Tufts*, 5 Col. 162 (1879); *Tomlinson v. Roberts*, 25 Conn. 477 (1857); *Puffer*, 59 Ga. 295; *Goodwin v. May*, 23 Ga. 205 (1857); *Bradshaw*, 54 Ind. 58; *Lane*, 14 Me. 77 (1836); *Burbank v. Crooker*, 73 Mass. 158 (1856); *Dresser Mfg. Co. v. Waterston*, 44 Mass. 9 (1841); *Giddey*, 27 Mich. 206 (1873); *Manning*, 73 N.Y. 45; *Boon v. Moss*, 70 N.Y. 465 (1877); *Herring*, 15 N.Y. 409; *Staats v. Hodges, Hill & Den.* 211 (N.Y. 1843); *In re Wylie*,

fourteen opinions (20%),¹⁶⁰ and farmers in eight opinions (11%).¹⁶¹ The commercial merchant vendees¹⁶² and the households¹⁶³ trailed with four opinions (6%) each. These figures suggest that townspeople (purchasing finished inventory), manufacturers (purchasing unfinished inventory), and transporters (purchasing vehicles) were the primary beneficiaries of the conditional sale because it enabled them to purchase goods on credit. However, the much more numerous collateral descriptions suggest otherwise.¹⁶⁴ The collateral description opinions include the situations that omitted description of the vendee.

Opinions identifying the vendor number even fewer than those identifying the vendee: only fifty (24%) of the 210.¹⁶⁵ These opinions indicate a preponderance of commercial merchants, manufacturers, and townspeople as vendors. Commercial merchants appeared in sixteen of the fifty opinions (32%) selling predominately to townspeople and manufacturers.¹⁶⁶ Both manufacturer vendors, selling predominately to

90 Pa. 210 (1879); Waldron v. Haupt, 52 Pa. 408 (1866); Armington v. Houston, 38 Vt. 448 (1866); Fales v. Roberts, 38 Vt. 503 (1866); *Warner*, 2 Wyo. 396.

160. Putnam v. Lamphier, 36 Cal. 151 (1868); Ownes v. Hastings & Saxton, 18 Kan. 446 (1877); Patton v. McCane, 54 Ky. 555 (1855); Rogers Locomotive Works v. Lewis, 20 F.Cas. 1134 (C.C. Mo. 1877); Loring v. Loring, 64 Me. 556 (1875); Brown v. Haynes, 52 Me. 578 (1864); Blanchard v. Child, 73 Mass. 155 (1856); Marston v. Baldwin, 17 Mass. 606 (1822); Haven v. Emery, 33 N.H. 66 (1856); Tuthill v. Wheeler, 6 Barb. 362 (N.Y. Gen. Term 1849); Strong v. Taylor, 2 Hill 326 (N.Y. 1842); Martin v. Mathiot, 14 Serge. & Rawle 214 (Pa. 1826); Buson v. Dougherty, 30 Tenn. 50 (1850); Reed v. Rice, 25 Vt. 171 (1853).

161. Holman v. Lock, 51 Ala. 287 (1874); Hallowell v. Milne, 16 Kan. 65 (1876); Whitcomb v. Tower, 53 Mass. 487 (1847); Esty v. Aldrich, 46 N.H. 127 (1865); Houston v. Dyche, 19 Tenn. 76 (1838); Bucklin v. Beals, 38 Vt. 653 (1866); Hurd v. Fleming, 34 Vt. 169 (1861); Hunter v. Warner, 1 Wis. 141 (1853).

162. A commercial merchant vendee was described in the following cases: Flanders & Huguenin v. Maynard, 58 Ga. 56 (1877); Jones v. Albin Sons & Co., 53 Ga. 585 (1875); Sargent v. Metcalf, 71 Mass. 306 (1855); *Davis & Aubin*, 24 Vt. 55.

163. Courts described a household as the vendee in the following cases: Guilford, Wood & Co. v. McKinley, 61 Ga. 230 (1878); Benner v. Puffer 114 Mass. 376 (1874); Sanders v. Keber & Miller, 28 Ohio St. 630 (1876); Stadtfeld v. Huntsman, 92 Pa. 53 (1879).

164. See *infra* notes 177-95 and accompanying text (listing cases involving collateral).

165. See *infra* notes 157-64 (listing cases).

166. A commercial merchant vendor was described in the following cases: Fairbanks v. Eureka Co., 67 Ala. 109 (1880); Jowers v. Blandly, 58 Ga. 379 (1877); Jones, 53 Ga. 585; Goodwin v. May, 23 Ga. 205 (1857); Gaylor v. Dyer, 10 F. Cas. 120 (C.C.D.C. 1838); Owens v. Hastings & Saxton, 18 Kan. 446 (1877); Raddin v. Arnold, 116 Mass. 270 (1874); Benner, 114 Mass. 376; Burbank v. Crooker, 73 Mass. 158 (1856); Sargent, 71 Mass. 306; Ridgeway v. Kennedy, 52 Mo. 24 (1873); Jenkins v. Eichelberger, 4 Watts 121 (Pa. 1835); Price v. Jones, 40 Tenn. 84 (1859); Smith v. Sharpe, 45 Vt. 545 (1873); Rowan v. Union Arms Co., 36 Vt. 124 (1863), *aff'd sub nom.* Rowan v. State Bank, 45 Vt. 160 (1872); *Davis & Aubin*, 24 Vt. 55.

townspeople,¹⁶⁷ and townspeople, selling predominately to households,¹⁶⁸ appeared in thirteen opinions (26%) each, while farmers appeared in eight opinions (16%).¹⁶⁹ None of the vendors were identifiable as transporters or households. Transporters provide a service rather than sell a product, while households consume, rather than sell products. These figures do not suggest the Gilmorian model: manufacturers that sell rolling stock to railroads and manufacturers that sell goods to consumers, unless manufacturers used middleperson-dealers to sell to the end user.

Third parties were the least identified group in appellate opinions. Naming a sheriff or constable executing a lien, a bankruptcy trustee, or an assignee for benefit of creditors, obscured the identity of the creditor interfering with the conditional sale transaction to the detriment of the vendor.¹⁷⁰ Nevertheless, the opinions identified thirty-four of the third parties (16%). The commercial merchants¹⁷¹ and townspeople¹⁷²

167. The following cases list manufacturers as vendors: *George v. Tufts*, 5 Col. 162 (1879); *Watertown Steam Engine Co. v. Davis*, 10 Del. 192 (Super. Ct. 1877); *Puffer v. Peabody*, 59 Ga. 295 (1877); *Pash v. Weston*, 3 N.W. 713 (Iowa 1879); *Rogers' Locomotive Works v. Lewis*, 20 F. Cas. 1134 (C.C. W.D. Mo. 1877); *Dresser Mfg. Co. v. Waterston*, 44 Mass. 9 (1841); *Third Nat'l Bank of Syracuse v. Armstrong*, 25 Minn. 530 (1879); *Manning, Bowman & Co. v. Keenan*, 73 N.Y. 45 (1878); *Hawkins v. Brown & Jeffrey*, 30 Barb. 206 (N.Y. Gen. Term 1859); *Tuthill v. Wheeler*, 6 Barb. 362 (N.Y. Gen. Term 1849); *Cole, Leavitt & Co v. Howe*, 50 Vt. 35 (1877); *Allen v. Whittemore*, 1 F. Cas. 521 (D.C. Vt. 1876); *Burnell v. Marvin*, 44 Vt. 277 (1872).

168. These cases identify townspeople as the vendor: *Guilford, Wood & Co.*, 61 Ga. 230; *Waters v. Cox*, 2 Ill. App. 129 (1878); *Hanway v. Wallace*, 18 Ind. 377 (1862); *Thomas v. Winters*, 12 Ind. 322 (1859); *Hall v. Draper*, 20 Kan. 137 (1878); *Marston v. Baldwin*, 17 Mass. 606 (1822); *Whitney v. McConnell*, 29 Mich. 12 (1874); *Heard v. Dubuque Cnty. Bank*, 8 Neb. 10 (1878); *Boon v. Moss*, 70 N.Y. 465 (1877); *Sanders*, 28 Ohio St. 630; *Stadtfield*, 92 Pa. 53; *In re Wylie*, 90 Pa. 210 (1879); *Reed v. Rice*, 25 Vt. 171 (1853).

169. The following cases identified the vendor as a farmer: *Flanders & Huguenin v. Maynard*, 58 Ga. 56 (1877); *Hallowell v. Milne*, 16 Kan. 65 (1876); *Brown v. Haynes*, 52 Me. 578 (1864); *Waterston v. Getchell*, 5 Me. 435 (1828); *Whitcomb v. Tower*, 53 Mass. 487 (1847); *Wait v. Green (Wait I)*, 36 N.Y. 556 (1867); *Wait v. Green (Wait I)*, 35 Barb. 585 (N.Y. Gen. Term 1862); *Creps v. Dunham*, 69 Pa. 456 (1871); *Bucklin v. Beals*, 38 Vt. 653 (1866).

170. See, e.g., *George Lee Flint, Jr., Secured Transactions History: The Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era*, 20 N. ILL. U.L. REV. 1, 18–19 (2000) (discussing the involvement of different types of creditors for secured parties and the general population who were unable to secure their interests).

171. Commercial merchants were the identified third party in the following cases: *Putnam v. Lamphier*, 36 Cal. 151 (1868); *Watertown Steam Engine Co.*, 10 Del. 192; *Flanders & Huguenin*, 58 Ga. 56; *Dresser Mfg. Co.*, 44 Mass. 9; *Wangler v. Franklin*, 70 Mo. 659 (1879); *Haven v. Emery*, 33 N.H. 66 (1856); *In re Binford*, 3 F. Cas. 394 (C.C.E.D. Va. 1879); *Bucklin*, 38 Vt. 653; *Rowan*, 36 Vt. 124, *aff'd sub nom.* *Rowan v. State Bank*, 45 Vt. 160 (1872); *Davis & Aubin*, 24 Vt. 55 (1851), *aff'd*, 28 Vt. 118 (1855); *Hilliard Flume & Lumber Co. v. Woods*, 1 Wyo. 396 (1878).

172. Cases identifying townspeople as the third party were: *Jones & Albin Sons & Co.*, 53 Ga. 585 (1875); *Burbank v. Crooker*, 73 Mass. 158 (1856); *Sargent v. Metcalf*, 71 Mass. 306 (1855);

appeared in eleven opinions (32%) each. Households appeared in five opinions (15%),¹⁷³ manufacturers in three opinions (9%),¹⁷⁴ and farmers¹⁷⁵ and transporters¹⁷⁶ in two opinions (6%) each. Although there are too few identifiable interlopers to determine with certainty, these figures suggest that the common law rule damaged commercial merchants and townspeople the most, having made an unsecured lending of credit to the vendee or purchaser from the vendee without inquiring about the origins of the goods acquired.

B. *The Collateral*

However, the goods sold that were always identifiable revealed a different picture. At best, the collateral implicates the vendee. However, the middleperson dealer and the end user are both considered vendees, with small quantities suggesting the end user. Some collateral can have more than one type of end user. For example, all groups utilized the horse for transportation, but even if you remove horses from the picture, the results are astounding. Cases involving horses appeared in 45 opinions,¹⁷⁷

Cardinal v. Edwards, 5 Nev. 36 (1869); McFarland v. Farmer, 42 N.H. 386 (1861); Staats v. Hodges, Hill & Den. 211 (N.Y. Sup. Ct. 1843); Haak v. Linderman, 64 Pa. 499 (1870); Duncan v. Stone, 45 Vt. 118 (1872); Clark v. Wells, 45 Vt. 4 (1872); Fales v. Roberts, 38 Vt. 503 (1866); Riley A. Deming & Co. v. Lull, 17 Vt. 398 (1845).

173. Households were the identified third party in the following cases: Harrington v. King, 121 Mass. 269 (1876); Deyoe v. Jamison, 33 Mich. 94 (1875); Giddey v. Altman, 27 Mich. 206 (1873); Jillson v. Wilbur, 41 N.H. 106 (1860); Maynard v. Anderson, 54 N.Y. 641 (1873).

174. Manufacturers were the identified third parties in only three cases: Day v. Bassett, 102 Mass. 445 (1869); Barrett v. Pritchard, 19 Mass. 512 (1824); Ketchum v. Brennan, 53 Miss. 596 (1876).

175. The following cases identified farmers as third parties: Davis v. Emery, 11 N.H. 230 (1840); West v. Bolton, 4 Vt. 558 (1832).

176. The identified third parties in the following cases were transporters: Coghill v. Hartford & New Haven R.R. Co., 69 Mass. 545 (1854); Wayne & Wayne v. Sherwood, 14 Barb. 633 (N.Y. Gen. Term 1853).

177. The cases involving horses were as follows: Elmore v. Fitzpatrick, 56 Ala. 400 (1876); Holman v. Lock, 51 Ala. 287 (1874); Carroll v. Wiggins, 30 Ark. 402 (1875); Lucas v. Birdsey, 41 Conn. 357 (1874); Tomlinson v. Roberts, 25 Conn. 477 (1857); Boyer v. Ausburn, 64 Ga. 271 (1879); Ketchum v. Watson, 24 Ill. 591 (1860); Dunbar v. Rawles, 28 Ind. 225 (1867); Vanschoiach v. Farrow, 25 Ind. 310 (1865); Hanway v. Wallace, 18 Ind. 377 (1862); Shireman v. Jackson, 14 Ind. 459 (1860); Collins v. Bradbury, 64 Me. 37 (1875); Bunker v. McKenney, 63 Me. 529 (1874); Allen v. Delano, 55 Me. 113 (1867); Whipple v. Gilpatrick, 19 Me. 427 (1841); Lane v. Borland, 14 Me. 77 (1836); Tibbetts v. Towle, 12 Me. 341 (1835); Little v. Page, 44 Mo. 412 (1869); King v. Bates, 57 N.H. 446 (1876); McFarland v. Farmer, 42 N.H. 386 (1861); Kimball v. Jackman, 42 N.H. 242 (1860); Gaither v. Teague, 26 N.C. 65 (1843); Whitcomb v. Hungerford, 42 Barb. 177 (N.Y. Gen. Term 1864); Wait v. Green (*Wait I*), 35 Barb. 585 (N.Y. Gen. Term 1862), *aff'd*, 36 N.Y. 556 (1867); Clayton v. Hester, 80 N.C. 275 (1879); Parris v. Roberts, 34 N.C. 268 (1851); Ellison v. Jones, 26 N.C. 48 (1843); Martin v. Mathiot, 14 Serge. & Rawle 214 (Pa. 1826); Bennett v. Sims, 24 S.C.L. 421

leaving 165 opinions.

Farmers had the greatest presence in these opinions. Sixty-one opinions of the 165 opinions (37%) involved farm-related goods, revealing conditional sales purchases by farmers of oxen, cattle, mules (predominately in the South), sheep, wagons, agricultural machinery, and, in the ante-bellum South, slaves.¹⁷⁸ The remaining groups numbered almost equally, at less than half as much as the farmers. Twenty-nine opinions (18%) revealed townspeople's conditional sales purchases of various inventory items such as wool, millinery, rum, chaises, boarding house provisions, and various equipment such as safes, printing equipment, billiard tables, soda fountains, blacksmith's tools, hotel

(1839); *Reeves v. Harris*, 17 S.C.L. 563 (1830); *Dupree v. Harrington*, 16 S.C.L. 391 (1824); *Holmark v. Molin*, 45 Tenn. 482 (1868); *Houston v. Dyche*, 19 Tenn. 76 (1838); *Clark v. Hayward*, 51 Vt. 14 (1878); *Bedell v. Foss*, 50 Vt. 94 (1877); *Kelsey v. Kendall*, 48 Vt. 24 (1875); *Kent v. Buck*, 45 Vt. 18 (1872); *Clayton v. Scott*, 43 Vt. 553 (1871); *Hefflin v. Bell*, 30 Vt. 134 (1858); *White v. Langdon*, 30 Vt. 599 (1858); *Buckmaster v. Smith*, 22 Vt. 203 (1850); *Hunt v. Douglass*, 22 Vt. 128 (1849); *Smith v. Foster*, 18 Vt. 182 (1846); *Bigelow v. Huntley*, 8 Vt. 151 (1836); *Hunter v. Warner*, 1 Wis. 141 (1853).

178. The following cases involved oxen: *Helm v. Dumars*, 3 Cal. 454 (1853); *Brown v. Haynes*, 52 Me. 578 (1864); *Rawson v. Tuel*, 47 Me. 506 (1859); *George v. Stubbs*, 26 Me. 243 (1846); *Leighton v. Stevens*, 19 Me. 154 (1841); *Heath v. Randall*, 58 Mass. 195 (1849); *Vincent v. Cornell*, 30 Mass. 294 (1832); *Clay v. Bohonon*, 54 N.H. 474 (1874); *Ballard & Sampson v. Burgett*, 47 Barb. 646 (N.Y. Gen. Term. 1866), *aff'd*, 40 N.Y. 314 (1869); *Johnson v. Worden*, 47 Vt. 457 (1874); *Pollard v. Bates*, 45 Vt. 506 (1873); *Fuller v. Buswell*, 34 Vt. 107 (1861); *Collins v. Perkins*, 31 Vt. 624 (1859); *Martin v. Eames*, 26 Vt. 476 (1854). The cases involving cattle were: *Thomas v. Winters*, 12 Ind. 322 (1859); *Woodman v. Chesley*, 39 Me. 45 (1854); *Fifield v. Elmer*, 25 Mich. 48 (1872); *Pickett v. Bullock*, 52 N.H. 354 (1872); *Esty v. Aldrich*, 46 N.H. 127 (1865); *Bailey v. Colby*, 34 N.H. 29 (1856); *Davis*, 11 N.H. 230; *Taylor v. Finley*, 48 Vt. 78 (1875); *Bucklin v. Beals*, 38 Vt. 653 (1866); *Wilder v. Stafford*, 30 Vt. 399 (1858); *Root v. Lord*, 23 Vt. 568 (1851); *West*, 4 Vt. 558; *Gregory v. Morris*, 1 Wyo. 213 (1875). The cases involving wagons were: *Putnam v. Lamphier*, 36 Cal. 151 (1868); *Plummer v. Shirley*, 16 Ind. 380 (1861); *Techmeyer v. Waltz*, 49 Iowa 645 (1878); *Hallowell v. Milne*, 16 Kan. 65 (1876); *Boynton v. Libby*, 62 Me. 253 (1874); *Drew v. Smith*, 59 Me. 393 (1871); *Cardinal v. Edwards*, 5 Nev. 36 (1869); *Buson v. Dougherty*, 30 Tenn. 50 (1850); *Wright v. Vaughn*, 45 Vt. 369 (1873); *Duncan v. Stone*, 45 Vt. 118 (1872); *Burnell v. Marvin*, 44 Vt. 277 (1872); *Child v. Allen*, 33 Vt. 476 (1860); *Williams v. Porter*, 41 Wis. 422 (1877). The cases involving agricultural machinery were: *Pash v. Weston*, 3 N.W. 713 (Iowa 1879); *Knoulton v. Redenbaugh*, 40 Iowa 114 (1874); *Third Nat'l Bank of Syracuse v. Armstrong*, 25 Minn. 530 (1879); *Heard v. Dubuque Cnty. Bank*, 8 Neb. 10 (1878); *Aultman, Miller & Co. v. Mallory*, 5 Neb. 178 (1876); *Smith v. Sharpe*, 45 Vt. 545 (1873). The cases involving slaves were: *Corse v. Patterson*, 6 H. & J. 153 (Md. 1824); *Lewis v. Gilmer*, 11 Miss. 560 (1844); *Mount v. Harris*, 9 Miss. 185 (1843); *Crawley v. Littlefield*, 34 S.C.L. 154 (1848); *Gambling v. Read*, 19 Tenn. 281 (1838); *Randolph v. Randolph*, 17 Va. 99 (1812). The cases involving mules were: *Dudley v. Abner*, 52 Ala. 572 (1875); *Gluckauf v. Urton*, 19 Cal. 61 (1861); *Sims v. James*, 62 Ga. 260 (1879); *Vaughn v. Hopson*, 73 Ky. 337 (1874); *Robbins v. Phillips*, 68 Mo. 100 (1878). The cases involving sheep were: *Bryant v. Crosby*, 36 Me. 562 (1853); *Whitcomb v. Tower*, 53 Mass. 487 (1847); *Hurd v. Fleming*, 34 Vt. 169 (1861). One case involved a chaise: *Sawyer v. Shaw*, 9 Me. 47 (1832).

furniture, silverware, and hearses.¹⁷⁹ Twenty-eight opinions (17%) dealt with household goods, exposing householders' conditional sales purchases to be predominately musical instruments (e.g., organs and pianos), domestic sewing machines, household furniture, and watches.¹⁸⁰ Manufacturers appeared in twenty-five opinions (15%)¹⁸¹ with conditional

179. In several cases, the inventory item described was a safe: *Gaylor v. Dyer*, 10 F. Cas. 120 (C.C.D.C. 1838); *Hodson v. Warner*, 60 Ind. 214 (1877); *Bradshaw v. Warner*, 54 Ind. 58 (1876); *Warner v. Jameson*, 2 N.W. 951 (Iowa 1879); *Herring v. Hoppock*, 15 N.Y. 409 (1857); *Price v. Jones*, 40 Tenn. 84 (1859); *Warner v. Roth*, 2 Wyo. 63 (1879). Several cases involved the conditional sale of store equipment: *Fairbanks v. Eureka Co.*, 67 Ala. 109 (1880); *Jones v. Albin Sons & Co.*, 53 Ga. 585 (1875); *Goodwin v. May*, 23 Ga. 205 (1857); *Bailey v. Harris*, 8 Iowa 331 (1859); *Staats v. Hodges, Hill & Den*, 211 (N.Y. 1843); *Fairbanks, Brown & Co. v. Davis & Wright*, 50 Vt. 251 (1877). There were cases involving inventory items: *Sargent v. Metcalf*, 71 Mass. 306 (1855); *Marston v. Baldwin*, 17 Mass. 606 (1822); *Manning, Bowman & Co. v. Keenan*, 73 N.Y. 45 (1878); *Towner v. Bliss*, 51 Vt. 59 (1878); *Armington v. Houston*, 38 Vt. 448 (1866). There were cases that involved unspecified goods: *Burbank v. Crooker*, 73 Mass. 158 (1856); *Ridgeway v. Kennedy*, 52 Mo. 24 (1873); *Waldron v. Haupt*, 52 Pa. 408 (1866); *Riley A. Deming & Co. v. Lull*, 17 Vt. 398 (1845). There were three cases involving printing equipment: *Dresser Mfg. Co. v. Waterston*, 44 Mass. 9 (1841); *Boon v. Moss*, 70 N.Y. 465 (1877); *In re Wylie*, 90 Pa. 210 (1879). There were two cases involving soda fountains: *George v. Tufts*, 5 Col. 162 (1879); *Puffer v. Peabody*, 59 Ga. 295 (1877). There were two cases involving billiard tables: *In re Lyon*, 15 F. Cas. 1180 (D.C. Minn. 1872); *Allen v. Whittemore*, 1 F. Cas. 521 (D.C. Vt. 1876).

180. The following cases involved a conditional sale of a musical instrument: *Guilford, Wood & Co. v. McKinley*, 61 Ga. 230 (1878); *Latham v. Sumner*, 89 Ill. 233 (1878); *Waters v. Cox*, 2 Ill. App. 129 (1878); *Hall v. Draper*, 20 Kan. 137 (1878); *Sumner v. McFarlan*, 15 Kan. 600 (1875); *Deyoe v. Jamison*, 33 Mich. 94 (1875); *Whitney v. McConnell*, 29 Mich. 12 (1874); *Giddey v. Altman*, 27 Mich. 206 (1873); *Preston v. Whitney*, 23 Mich. 260 (1871); *Couse v. Tregent*, 11 Mich. 65 (1862); *Esty v. Graham*, 46 N.H. 169 (1865); *Maynard v. Anderson*, 54 N.Y. 641 (1873). Cases involving the conditional sale of sewing machines were as follows: *Sumner v. Wood*, 52 Ala. 94 (1875); *Domestic Sewing Co. v. Arthurhultz*, 63 Ind. 322 (1878); *Farrar v. Peterson*, 3 N.W. 457 (Iowa 1879); *Shaffer v. Sawyer*, 123 Mass. 294 (1877); *Pinkham v. Mattox*, 53 N.H. 600 (1873); *Cole v. Berry*, 42 N.J.L. 308 (1880). In the following cases, the item conditionally sold was household furniture: *Hegler v. Eddy*, 53 Cal. 597 (1879); *Harrington v. King*, 121 Mass. 269 (1876); *Benner v. Puffer*, 114 Mass. 376 (1874); *Parmlee v. Catherwood*, 36 Mo. 479 (1865); *Porter v. Pettengill*, 12 N.H. 299 (1841); *Sanders v. Keber*, 28 Ohio St. 630 (1876); *Stadtfield v. Huntsman & Co.*, 92 Pa. 53 (1879). Three cases involved the conditional sale of watches: *Mowbray v. Cady*, 40 Iowa 604 (1875); *Holt v. Holt*, 58 N.H. 276 (1878); *Jillson v. Wilbur*, 41 N.H. 106 (1860).

181. Six cases dealt with steam engines: *Jones v. Pullen*, 66 Ala. 306 (1880); *Watertown Steam Engine Co. v. Davis*, 10 Del. 192 (Super. Ct. 1877); *Jowers v. Blandy*, 58 Ga. 379 (1877); *Raddin v. Arnold*, 116 Mass. 270 (1874); *Duke v. Shackelford*, 56 Miss. 596 (1879); *Griffin v. Pugh*, 44 Mo. 326 (1869). Three cases dealt with saw mill machinery: *Cochran v. Flint*, 57 N.H. 514 (1877); *Cole, Leavitt & Co. v. Howe*, 50 Vt. 35 (1877); *Davenport v. John G. Shants & Co.*, 43 Vt. 546 (1871). Four cases dealt with various types of machinery: *Day v. Bassett*, 102 Mass. 445 (1869); *Ketchum v. Brennan*, 53 Miss. 596 (1876); *In re Binford*, 3 F. Cas. 394 (C.C. Va. 1879); *Rowan v. Union Arms Co.*, 36 Vt. 124 (1863), *aff'd sub nom. Rowan v. State Bank*, 45 Vt. 160 (1872). Four cases dealt with various other types of manufacturing inventory: *Eaton v. Munroe*, 52 Me. 63 (1862); *Creps v. Dunham*, 69 Pa. 456 (1870); *Jenkins v. Eichelberger*, 4 Watt. 121 (Pa. 1835); *Kellogg v. Fox & Minogue*, 45 Vt. 348 (1873). Two cases dealt with mills: *Baker v. Hall*, 15 Iowa 277 (1863); *Wangler v. Franklin*, 70 Mo. 659 (1879). Two cases dealt with shingle machinery: *Hawkins v. Brown &*

sales purchases of manufacturing equipment such as steam engines, saw mills, grinding mills, shingle machinery, and manufacturing inventory, such as logs and wool. The transporters appeared in nineteen opinions (10%)¹⁸² with purchases of canal boats, stagecoaches, locomotive engines, and stags (i.e., unspecified male animals) as beasts of burden, and transportation equipment (e.g., railroad ties and rails). The commercial merchants appeared in two opinions (1%).¹⁸³ Farmers were the vast majority of the vendees using the conditional sales as a means of purchasing needed goods.

Removing horses from consideration as not indicative of the vendee,¹⁸⁴ the starkest contrast lies between the value of items purchased by the townspeople, manufacturers, transporters, and households compared to the value of items purchased by the farmers. Setting the bar at \$200, 83% (five of six) of the transporters' purchases,¹⁸⁵ 80% (eight of ten) of the townspeople's purchases,¹⁸⁶ 75% (six of eight) of the manufacturers'

Jeffrey, 30 Barb. 206 (N.Y. Gen. Term 1859); *Grant v. Skinner*, 21 Barb. 581 (N.Y. Gen. Term 1854). Two cases dealt with logs: *Bailey v. Henderson*, 2 F.Cas. 373 (D.C. Vt. 1878); *Waterston v. Getchell*, 5 Me. 435 (1828). Two cases involved wool to a manufacturer: *Coggill*, 69 Mass. 545; *Barrett v. Pritchard*, 19 Mass. 512 (1824).

182. Several cases involved the conditional sale of canal boats: *Haynes v. Hart*, 42 Barb. 58 (N.Y. Gen. Term 1864); *Hutchings v. Munger*, 41 Barb. 396 (N.Y. Gen. Term 1864), *aff'd*, 41 N.Y. 155 (1869); *Brewster v. Baker*, 20 Barb. 364 (N.Y. 1855); *Wayne & Wayne v. Sherwood*, 14 Barb. 633 (N.Y. 1853); *Janes v. Osgood*, 6 N.Y. 233 (1852); *Tuthill v. Wheeler*, 6 Barb. 362 (N.Y. Gen. Term 1849); *Strong v. Taylor*, 2 Hill 326 (N.Y. 1842). Several cases involved railroads: *Owens v. Hastings & Saxton*, 18 Kan. 446 (1877); *Rogers' Locomotive Works v. Lewis*, 20 F. Cas. 1134 (C.C. W.D. Mo. 1877); *Haven v. Emery*, 33 N.H. 66 (1856); *Haak v. Linderman*, 64 Pa. 499 (1870); *Hilliard Flume & Lumber Co. v. Woods*, 1 Wyo. 396 (1876). Four cases involved a conditional sale of a stage coach: *Patton v. McCane*, 54 Ky. 555 (1855); *Blanchard v. Child*, 73 Mass. 155 (1856); *Clark v. Wells*, 45 Vt. 4 (1872); *Fales v. Roberts*, 38 Vt. 503 (1866). Two cases involved stags that were classified as beasts of burden: *Phelps v. Bemis*, 51 Vt. 487 (1879); *Reed v. Rice*, 25 Vt. 171 (1853). One case involved a ship: *Loring v. Loring*, 64 Me. 556 (1875).

183. The cases involving commercial merchants were: *Flanders & Huguenin v. Maynard*, 58 Ga. 56 (1877); *Davis & Aubin v. John Bradley & Co.*, 24 Vt. 55 (1851), *aff'd*, 28 Vt. 118 (1855).

184. The cases removed involving horses were: *Lucas v. Birdsey*, 41 Conn. 357 (1874); *Dunbar v. Rawles*, 28 Ind. 225 (1867); *Hanway v. Wallace*, 18 Ind. 377 (1862); *Shireman v. Jackson*, 14 Ind. 459 (1860); *Allen v. Delano*, 55 Me. 113 (1867); *Whipple v. Gilpatrick*, 19 Me. 427 (1841); *Tibbetts v. Towle*, 12 Me. 341 (1835); *King v. Bates*, 57 N.H. 446 (1876); *Whitcomb v. Hungerford*, 42 Barb. 177 (N.Y. Gen. Term 1864); *Martin v. Mathiot*, 14 Serge. & Rawle 214 (Pa. 1826); *Kelsey v. Kendall*, 48 Vt. 24 (1875); *Hefflin v. Bell*, 30 Vt. 134 (1858); *Buckmaster v. Smith*, 22 Vt. 203 (1850).

185. *Hutchings*, 41 Barb. 396; *Brewster*, 20 Barb. 364; *Tuthill*, 6 Barb. 362; *Strong*, 2 Hill 326; *Fales*, 38 Vt. 503; *Hilliard Flume & Lumber Co.*, 1 Wyo. 396.

186. *In re Lyon*, 15 F. Cas. 1180 (D.C. Minn. 1872); *Flanders & Huguenin*, 58 Ga. 56; *Jones v. Albin Sons & Co.*, 53 Ga. 585 (1875); *Bradshaw v. Warner*, 54 Ind. 58 (1876); *Sargent v. Metcalf*, 71 Mass. 306 (1855); *Marston v. Baldwin*, 17 Mass. 606 (1822); *Boon v. Moss*, 70 N.Y. 465 (1877); *Staats v. Hodges*, Hill & Den. 211 (N.Y. 1843); *Allen v. Whittemore*, 1 F. Cas. 521 (D.C. Vt. 1876); *Warner v. Roth*, 2 Wyo. 63 (1879).

purchases,¹⁸⁷ and 50% (six of twelve) of the households' purchases¹⁸⁸ exceeded \$200. For the farmers, only 22% (seven of thirty-two) of their purchases exceeded \$200.¹⁸⁹ The farmers used the conditional sales for small purchases on credit.

Because the opinions suggest the lesser-valued transactions constitute the primary use of the conditional sale, their documentation reveals the business practices associated with conditional sales. A clear pronouncement of the documentation of the conditional sale does not appear in all of these value opinions. The opinion language of "agreement" or "contract" does not differentiate between an oral transaction and one with written documentation. All opinions involving households¹⁹⁰ clearly described the documentation, with five short written contracts,¹⁹¹ four promissory notes with word notations denoting the good received and the title retention, constituting the Holmes' note,¹⁹²

187. *Baker v. Hall*, 15 Iowa 277 (1863); *Eaton v. Munroe*, 52 Me. 63 (1862); *Waterston v. Getchell*, 5 Me. 435 (1828); *Duke v. Shackelford*, 56 Miss. 552 (1879); *Griffin v. Pugh*, 44 Mo. 326 (1869); *Grant v. Skinner*, 21 Barb. 581 (N.Y. Gen. Term 1854); *Kellogg v. Fox & Minogue*, 45 Vt. 348 (1873); *Davenport v. John G. Shants & Co.* 43 Vt. 546 (1871).

188. *Hegler v. Eddy*, 53 Cal. 597 (1879); *Latham v. Sumner*, 89 Ill. 233 (1878); *Domestic Sewing Co v. Arthurhultz*, 63 Ind. 322 (1878); *Sumner v. McFarlan*, 15 Kan. 600 (1876); *Benner v. Puffer*, 114 Mass. 376 (1874); *Deyoe v. Jamison*, 33 Mich. 94 (1875); *Whitney v. McConnell*, 29 Mich. 12 (1874); *Parmlee v. Catherwood*, 36 Mo. 479 (1865); *Pinkham v. Mattox*, 53 N.H. 600 (1873); *Cole v. Berry*, 42 N.J.L. 308 (1880); *Maynard v. Anderson*, 54 N.Y. 641 (1873); *Sanders v. Keber*, 28 Ohio St. 630 (1876).

189. *Putnam v. Lamphier*, 36 Cal. 151 (1868); *Gluckauf v. Urton*, 19 Cal. 61 (1861); *Helm v. Dumars*, 3 Cal. 454 (1853); *Sims v. James*, 62 Ga. 260 (1879); *Plummer v. Shirley*, 16 Ind. 380 (1861); *Pash v. Weston*, 3 N.W. 713 (Iowa 1879); *Knoulton v. Redenbaugh*, 40 Iowa 114 (1874); *Vaughn v. Hopson*, 73 Ky. 337 (1874); *Boynton v. Libby*, 62 Me. 253 (1874); *Drew v. Smith*, 59 Me. 393 (1871); *Brown v. Haynes*, 52 Me. 578 (1864); *Sawyer v. Shaw*, 9 Me. 47 (1832); *Vincent v. Cornell*, 30 Mass. 294 (1832); *Fifield v. Elmer*, 25 Mich. 48 (1872); *Clay v. Bohonon*, 54 N.H. 474 (1874); *Pickett v. Bullock*, 52 N.H. 354 (1872); *Esty v. Aldrich*, 46 N.H. 127 (1865); *Davis v. Emery*, 11 N.H. 230 (1840); *Ballard & Sampson v. Burgett*, 47 Barb. 646 (N.Y. Gen. Term 1866), *aff'd*, 40 N.Y. 314 (1869); *Buson v. Dougherty*, 30 Tenn. 50 (1850); *Gambling v. Read*, 19 Tenn. 281 (1838); *Phelps v. Bemis*, 51 Vt. 487 (1879); *Taylor v. Finley*, 48 Vt. 78 (1875); *Pollard v. Bates*, 45 Vt. 506 (1873); *Smith v. Sharpe*, 45 Vt. 545 (1873); *Duncan v. Stone*, 45 Vt. 118 (1872); *Burnell v. Marvin*, 44 Vt. 277 (1872); *Bucklin v. Beals*, 38 Vt. 653 (1866); *Fuller v. Buswell*, 34 Vt. 107 (1861); *Collins v. Perkins*, 31 Vt. 624 (1859); *Wilder v. Stafford*, 30 Vt. 399 (1858); *West v. Bolton*, 4 Vt. 558 (1832).

190. See *supra* note 188 (listing cases involving household goods).

191. For a short contract, see, for example, *Lane v. Borland*, 14 Me. 77, 78 (1836) ("Bangor, January 4th, 1834. This certifies, that we, the firm of Washburn & Fling, bought a bay horse of Oliver Lane, of St. Albans, and the said horse shall remain in our hands until the said Lane receive his pay, then the said horse shall be our property, otherwise, shall be the property of said Lane, the payments become due, forty dollars in March and forty dollars in June with interest. /s/ George W. Washburn, /s/ Sanford Fling.")

192. For a promissory note with added words, see, for example, *Tibbetts v. Towle*, 12 Me. 341, 342-43 (1835) ("This may certify that I promise to pay Mr. James Tibbetts of Dexter, one hundred and twenty-two dollars and fifty cents, in June next, for a pair of oxen five years old—one red and

and three verbal agreements. For opinions dealing with non-horse farm livestock, the opinions clearly describe seven promissory notes with word notations, four verbal agreements, and three short written contracts.¹⁹³ For farm equipment, the opinions specify three contracts with notes, one short written agreement, and one verbal agreement.¹⁹⁴ The farmers' transactions ordinarily had short durations: thirty days, four months, seven months, eight months, one year (four times), fourteen months, and one long-term deal of two-and-a-half years.¹⁹⁵

The appellate opinions reveal three differences from the Gilmorian model. In the mid-nineteenth century, the conditional sale was principally an agricultural security device. Parties used it primarily for small credit transactions of short duration. They briefly documented the conditional sale transaction, denoting it with promissory notes, short written contracts or oral agreements.

C. *Type of Action*

An overwhelming number of these opinions dealt with actions concerning the common law priority rule favoring the vendor. These vendor opinions can be divided into two groups. First, the vendor contending with the vendee's purchaser, who had wrongfully taken the goods owned by the vendor, appeared in 69 of the 210 opinions (33%), and were primarily replevin actions to recover the goods¹⁹⁶ or trover

the other brindle; likewise a black mare eight years old, fifty dollars—and this certifies that the said Tibbetts holds the above cattle and mare till the above debt is paid, and the interest. The above cattle and mare are to be paid for in June next.”). For the origin of the term “Holmes’ note,” see *supra* notes 316–21 and accompanying text.

193. See *supra* note 189 (involving farmer actions).

194. *Id.*

195. *Id.*

196. The cases that were replevin actions, or other actions to recover goods, which found title in vendor are: *Fairbanks v. Eureka Co.*, 67 Ala. 109 (1880); *Elmore v. Fitzpatrick*, 56 Ala. 400 (1876); *Carroll v. Wiggins*, 30 Ark. 402 (1875); *Putnam v. Lamphier*, 36 Cal. 151 (1868); *Hodson v. Warner*, 60 Ind. 214 (1874); *Dunbar v. Rawles*, 28 Ind. 225 (1867); *Thomas v. Winters*, 12 Ind. 322 (1859); *Baker v. Hall*, 15 Iowa 277 (1863); *Bailey v. Harris*, 8 Iowa 331 (1859); *Hall v. Draper*, 20 Kan. 137 (1878); *Hallowell v. Milne*, 16 Kan. 65 (1877); *Sumner v. McFarlan*, 15 Kan. 600 (1875); *Patton v. McCane*, 54 Ky. 555 (1855); *Eaton v. Munroe*, 52 Me. 63 (1862); *Corse v. Patterson*, 6 H. & J. 153 (Md. 1824); *Sargent v. Metcalf*, 71 Mass. 306 (1855); *Coggill v. Hartford & New Haven R.R. Co.*, 69 Mass. 545 (1854); *Whitney v. McConnell*, 29 Mich. 12 (1875); *Couse v. Tregent*, 11 Mich. 65 (1862); *Ketchum v. Brennan*, 53 Miss. 596 (1876); *Griffin v. Pugh*, 44 Mo. 326 (1869); *Parmlee v. Catherwood*, 36 Mo. 479 (1865); *Maynard v. Anderson*, 54 N.Y. 641 (1873); *Ballard & Sampson v. Burgett*, 47 Barb. 646 (N.Y. Gen Term 1866), *aff'd*, 40 N.Y. 314 (N.Y. 1869); *Clayton v. Hester*, 80 N.C. 275 (1879); *Sanders v. Keber*, 28 Ohio St. 630 (1876); *Dupree v. Harrington*, 16 S.C.L. 391 (1824); *Halmark v. Molin*, 45 Tenn. 482 (1868). *But see* *Sumner v. Woods*, 52 Ala. 94, 94 (1875) (discussing the good faith purchaser rule for retinue involving a sewing machine); *Gluckauf v. Urton*,

actions to recover the value of the goods at the time of the wrongful taking.¹⁹⁷ The common law protected the vendor from such forms of fraud, leaving the good faith purchaser, the one dealing with the fraudster, to go after the culprit.¹⁹⁸ Some vendors used other actions, e.g., injunctions against foreclosure, trespass, conversion, and assumpsit, against the vendee's mortgagee.¹⁹⁹ With respect to the replevin actions,

19 Cal. 61, 61–62 (1861) (reversing judgment in favor of vendor because the vendor authorized the sale); *George v. Tufts*, 5 Colo. 162, 165–66 (1879) (holding a conditional sale void because it was not filed under the Chattel Mortgage Act); *Vaughn v. Hopson*, 73 Ky. 337 (1874) (involving sale through the use of a promissory note); *Robbins v. Phillips*, 68 Mo. 100, 100 (1878) (holding the vendor waived condition by waiting six months); *Jones v. Osgood*, 6 N.Y. 233, 236 (1852) (affirming judgment of replevin for a canal boat); *Stadtfeld v. Huntsman*, 92 Pa. 53, 54 (1879) (deciding replevin action to recover furniture).

197. The following cases involved trover actions that found title in the vendor: *Tomlinson v. Roberts*, 25 Conn. 477 (1857); *Sims v. James*, 62 Ga. 260 (1879); *Flanders & Huguerin v. Maynard*, 58 Ga. 56 (1877); *Brown v. Haynes*, 52 Me. 578 (1864); *Whipple v. Gilpatrick*, 19 Me. 327 (1841); *Lane v. Borland*, 14 Me. 77 (1836); *Tibbets*, 12 Me. 341; *Sawyer v. Shaw*, 9 Me. 435 (1832); *Dresser Mfg. Co. v. Waterston*, 44 Mass. 9 (1841); *Barrett v. Pritchard*, 19 Mass. 512 (1824); *Jillson v. Wilbur*, 41 N.H. 106 (1860); *Haven v. Emery*, 33 N.H. 66 (1856); *Staats v. Hodges, Hill & Den*. 211 (N.Y. 1843); *Gaither v. Teague*, 26 N.C. 65 (1843); *Houston v. Dyche*, 19 Tenn. 76 (1838); *White v. Langlon*, 30 Vt. 599 (1858); *Hilliard Flume & Lumber Co. v. Woods*, 1 Wyo. 396 (1876). *But see In re Binford*, 3 F. Cas. 394 (C.C.E.D Va. 1879) (deciding that vendee's mortgagee wins when good faith purchaser rule is applied); *Dudley v. Abner*, 52 Ala. 572, 577–79 (1875) (following Alabama's good faith purchaser rule); *Watertown Steam Engine Co. v. Davis*, 10 Del. 192 (Super. Ct. 1877) (deciding jury should determine fixture status). For a post-conditional sales act trover case, see, for example, *Kelsey v. Kendall*, 48 Vt. 24 (1875) (indicating the vendor has a lien in the proceeds for unfilled conditional sale because the buyer has actual notice).

198. See, e.g., *Lane*, 14 Me. at 81–82 (refusing to apply the commercial paper rule, and instead following the personalty title rule when confronted with two innocents dealing with the fraudulent vendee).

199. For conversion actions finding title in vendor, see *Holman v. Lock's Adm'r*, 51 Ala. 287, 288 (1874) (finding the trial court erred in not admitting evidence of a contract that would have shown defendant did not convert plaintiff's property); *Benner v. Puffer*, 114 Mass. 376, 378 (1859) (explaining that vendor had title to property until purchaser paid all money due to vendor); *Burbank v. Crooker*, 73 Mass. 158, 159 (1856) (ruling that vendor still had title to property though purchaser had no notice of the lien at the time of the purchase); *Rawson v. Tuel*, 47 Me. 506, 506 (1859) (holding that title was properly vested in seller); *Manning v. Keenan*, 73 N.Y. 45, 51 (1878) (recognizing that vendor's recovery on notes does not bar conversion action); *Bucklin v. Beals*, 38 Vt. 653, 660 (1866) (holding plaintiffs were not required to demand property before bringing suit where evidence was sufficient to show property's conversion). For assumpsit actions, see, for example, *Bryant v. Crosby*, 36 Me. 562, 571 (1853) (granting a new trial to allow defendant to prove consideration had not been paid); *Kimball v. Jackman*, 42 N.H. 242, 245 (1860) (finding that vendor's agent's conditional sale for money had and received constituted the amount due on the conditional sale note). For injunction against foreclosure, see, for example, *Goodwin v. May*, 23 Ga. 205, 206 (1857) (bringing action to prevent defendant mortgagee from selling property rightfully belonging to vendor); *Gambling v. Read*, 19 Tenn. 281, 282 (1838) (praying defendants be enjoined from selling slave and requesting that slave be retained by plaintiff as security for debt owed by defendant). For trespass actions finding title in vendor see, for example, *Waterston v. Getchell*, 5 Me. 435, 438 (1828) (finding defendant liable for trespass for taking logs that belonged to plaintiff).

two significant cases came out of New York in 1867, *Wait*²⁰⁰ and its companion case, *Western Transportation Co. v. Marshall*.²⁰¹ The New York court reversed the common law priority rule and recognized a good faith purchaser doctrine for the sale of a horse, but was subsequently rejected by the same New York court two years later.²⁰² New York has a history of protecting its retailers from their lenders' liens.²⁰³ This case could upset those transactions entered into based on the common law priority rule if adopted in other states, as Alabama and Kentucky courts did in the next decade.²⁰⁴

The second group of vendor actions dealt with the vendor contending with the vendee's judgment lien creditor or the sheriff, his stand-in, who wrongfully took the goods owned by the vendor by levying against the property of the debtor. These vendors appeared in 58 of the 210 opinions (28%), and again primarily involved replevin actions to recover the goods²⁰⁵ or trover actions to recover the value of the goods at the time of

For intestate administration see, for example, *Puffer v. Peabody*, 59 Ga. 295, 299 (1877) (reversing judgment for administrator, finding that sale of property to intestate was conditional only). For post-conditional sales act assumpsit cases, see, for example, *Bedell v. Foss*, 50 Vt. 94, 97 (1877) (bringing an action for assumpsit on buyer's promise to pay remainder, the court mandated a retrial to determine whether there was a promise and made no mention of filing).

200. See *Wait v. Green (Wait I)*, 35 Barb. 585 (N.Y. Gen. Term 1862), *aff'd*, 36 N.Y. 556, 558 (1867) (affirming judgment of lower court, which found defendant was a bona fide purchaser and his title was protected).

201. See *W. Transp. Co. v. Marshall*, 37 Barb. 509, 514 (N.Y. Gen. Term Ct. 1862) (discussing the conditional delivery of grain), *aff'd*, 4 Abb. Dec. 575 (N.Y. 1867), *overruled by* *Ballard & Sampson v. Burgett*, 40 N.Y. 314 (1869).

202. See *Wait I*, 35 Barb. at 588.

203. See *George Lee Flint, Jr., Secured Transactions History: The Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era*, 20 N. ILL. U. L. REV. 1, 52–57 (2000) (noting the high number of opinions dealing with secured transaction suits coming out of New York courts); see also *George Lee Flint, Jr., Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 339–40 (1999) (highlighting the statute as another ground to invalidate a non-possessory chattel mortgage).

204. See *Dudley v. Abner*, 52 Ala. 572, 576 (1875) (citing *Wait v. Green* and holding that bona fide purchaser's title was protected) *overruled by* *Sumner v. Woods*, 67 Ala. 139 (1880); *Vaughn v. Hopson*, 73 Ky. 337, 343 (1874) (overruling precedent in holding that bona fide purchaser acquired perfect title against original vendor).

205. Replevin actions or other actions to recover the goods appeared in the following cases: *Lucas v. Birdsey*, 41 Conn. 357 (1874); *Gaylor v. Dyer*, 10 F. Cas. 120 (C.C.D.C. 1838); *Waters v. Cox*, 2 Ill. App. 129 (1878); *Bradshaw v. Warner*, 54 Ind. 58 (1876); *Vanshoiach v. Farrow*, 25 Ind. 310 (1865); *Hanway v. Wallace*, 18 Ind. 377 (1862); *Mowbray v. Cady*, 40 Iowa 604 (1875); *Knoulton v. Redenbaugh*, 40 Iowa 114 (1874); *Owens v. Hastings & Saxton*, 18 Kan. 446 (1877); *Blanchard v. Child*, 73 Mass. 155 (1856); *Marston v. Baldwin*, 17 Mass. 606 (1822); *Drew v. Smith*, 59 Me. 393 (1871); *Leighton v. Stevens*, 19 Me. 154 (1841); *In re Lyon*, 15 F. Cas. 1180 (D.C. Minn. 1872); *Wangler v. Franklin*, 70 Mo. 659 (1879); *Rogers Locomotive Works v. Lewis*, 20 F. Cas. 1134 (C.C. W.D. Mo. 1877); *Aultman, Miller & Co. v. Mallory*, 5 Neb. 178 (1876); *Cardinal v. Edwards*, 5 Nev.

levy.²⁰⁶ Some vendors used other actions such as trespass, conversion, injunctions against levy, and bills of accounting.²⁰⁷ Some opinions involved Vermont's 1854 statute, which its legislature designed to bring some relief to the good faith purchaser. Under the statute, the good faith purchaser kept the goods, provided he or she paid the amount owed to the vendor.²⁰⁸ This statute indicated the legislative desire to insure the vendor received the entire payment for the credit extended but allowed the good faith purchaser to keep any excess at the good faith purchaser's

36 (1869); *Strong v. Taylor*, 2 Hill 326 (N.Y. 1842); *Warner v. Roth*, 2 Wyo. 63 (1879). *But see* *Helm v. Dumars*, 3 Cal. 454, 456–57 (1853) (prohibiting the vendor from recovering property because the transaction was not in writing which violated the statute of frauds). Three cases involved post-conditional sales act replevin: *Techmeyer v. Waltz*, 49 Iowa 645 (1878); *Boynton v. Libby*, 62 Me. 253 (1874); *Williams v. Porter*, 41 Wis. 422 (1877).

206. The trover action to recover the value of the goods cases were as follows: *George v. Stubbs*, 26 Me. 243 (1846); *Holt v. Holt*, 58 N.H. 276 (1878); *Esty v. Aldrich*, 46 N.H. 127 (1865); *McFarland v. Farmer*, 42 N.H. 386 (1861); *Porter v. Pettengill*, 12 N.H. 299 (1841); *Parris v. Roberts*, 34 N.C. 268 (1851); *Ellison v. Jones*, 26 N.C. 268 (1843); *Benner v. Sims*, 24 S.C.L. 421 (1839); *Buson v. Dougherty*, 30 Tenn. 50 (1850); *Johnson v. Worden*, 47 Vt. 457 (1874); *Pollard v. Bates*, 45 Vt. 506 (1873); *Armington v. Houston*, 38 Vt. 448 (1866); *Buckmaster v. Smith*, 22 Vt. 203 (1850); *Bigelow v. Hunting*, 8 Vt. 151 (1836). *But see* *Ketchum v. Watson*, 24 Ill. 591, 592 (1860) (applying Illinois' chattel mortgage act to invalidate conditional sale); *Waldron v. Haupt*, 52 Pa. 408, 411 (1866) (reversing trial court's judgment in favor of vendor and holding that public policy prevented vendor from maintaining an interest in the property once the vendor gave up possession); *Jenkins v. Eichelberger*, 4 Watt. 121, 123 (Pa. 1835) (identifying public policy reasons for divesting vendor of title once vendor no longer has possession). The post-conditional sales act trover cases were: *Warner v. Jameson*, 2 N.W. 951 (Iowa 1879); *Towner v. Bliss*, 51 Vt. 59 (1878); *Fairbanks, Brown & Co. v. Davis & Wright*, 50 Vt. 251 (1877); *Bailey v. Henderson*, 2 F. Cas. 373 (D.C. Vt. 1878).

207. For trespass actions to recover damages where the court found title in the vendor, see *Hurd v. Fleming*, 34 Vt. 169, 172–73 (1861) (determining a vendor cannot sue for trespass when time for payment has not yet elapsed). *But see* *Martin v. Mathiot*, 14 Serge. & Rawle 214, 215 (Pa. 1826) (establishing Pennsylvania's fraud rule). For a post-conditional sales act trespass case, see, for example, *Cole, Leavitt & Co. v. Howe*, 50 Vt. 35, 38 (1877) (determining that a vendor's memorandum was timely filed even though antedated). For a conversion action seeking to recover damages finding title in vendor, see, for example, *Herring v. Hoppock*, 15 N.Y. 409, 412 (1857) (affirming that defendant purchaser had no title to vendor's property even though he was a purchaser in good faith). For a bill for accounting, see, for example, *In re Wylie*, 90 Pa. 210, 216 (1879) (reiterating that a vendor cannot win against creditors under Pennsylvania fraud rule). For an injunction against levy, see, for example, *Randolph v. Randolph*, 17 Va. 99, 99 (1812) (allowing vendor to get injunction to prevent the sale of the property). For an example of the successful use of the common law rule as a defense in a suit by the vendee's creditor against the sheriff for not levying on vendor's goods, see, for example, *Riley A. Deming & Co. v. Tull*, 17 Vt. 398, 400 (1845) (recognizing earlier decisions which established that vendor's property could not be attached by vendee's creditors).

208. Outside the common law rule, and under the 1854 Vermont statute, which allowed the creditor to possess the goods provided the creditor paid the amount owing to the owner, the vendor won if the creditor did not comply. 1854 Vt. Acts & Resolves 15. *See generally* *Duncan v. Stone*, 45 Vt. 118, 123 (1872) (protecting the vendor by holding that attaching creditor had no right to vendor's property unless creditor made payment pursuant to the relevant statute).

option.

Of the remaining opinions, fifty-six opinions (27%) involved various upstream and downstream parties.²⁰⁹ These actions involved eight different situations. The more interesting actions involved the upstream persons because they indicate the fourth variance from the Gilmerian model; the assignment of the farmer's promissory notes to third parties.²¹⁰ These opinions involved the vendee against upstream persons,²¹¹ downstream persons against upstream persons,²¹² upstream

209. See *infra* notes 211–15 (listing cases).

210. *Id.*

211. Vendee actions against vendor's successors only involved one note assignment. See *Taylor v. Finley*, 48 Vt. 78, 82 (1875) (recognizing an action of replevin against vendor's note assignee, finding vendee can pay after it becomes overdue). For vendor's successor from levy, see *Woodman v. Chesley*, 39 Me. 45, 51 (1854) (deciding replevin against vendor's levy purchaser, who has same rights as vendor); *Tuthill v. Wheeler*, 6 Barb. 362, 364 (N.Y. Gen. Term 1849) (deciding an action of trover against vendor's judgment lien tax collector, finding vendee has no title to maintain suit). For vendor's agent, see *Pickett v. Bullock*, 52 N.H. 354, 354 (1872) (finding conditional sale waives vendee's prior lien for keeping cows); *West v. Bolton*, 4 Vt. 558, 563 (1832) (rejecting trespass action against vendor's agents; vendee who did not timely pay has no right against vendor). For vendor successors from resale of the good after condition is broken, see *Deyoe v. Jamison*, 33 Mich. 94, 95 (1875) (addressing vendee's replevin action against vendor's second buyer after vendor's levy against good faith purchaser; second buyer waived condition by refusing tender of payment); *Hutchings v. Munger*, 41 Barb. 396, 401 (N.Y. Gen. Term 1864), *aff'd*, 41 N.Y. 155 (1869) (deciding a case of conversion against vendor's second buyer after the condition was broken, and finding that vendee tendered payment before the sale, so vendor's sale was wrongful); *Hunter v. Warner*, 1 Wis. 141, 147–48 (1853) (evaluating an action of replevin, and finding no title in the vendee because he broke the condition).

212. Only one case involved downstream persons against vendor's note assignee. See *Brewster v. Baker*, 20 Barb. 364, 368–69 (N.Y. Gen. Term 1855) (reversing an action by vendor's assignee for value against vendee's buyer, holding vendee has no title to transfer). For vendor's successors from levy, see *Child v. Allen*, 33 Vt. 476, 479 (1860) (concluding that in an action for vendee's buyer's trespass against vendor's judgment lien sheriff that vendor's title was not affected by attachment); *Collins v. Perkins*, 31 Vt. 624, 628 (1859) (deciding an action for vendee's buyer's trespass against vendor's judgment lien sheriff, finding sheriff liable for the use and selling of property). For vendor's agent, see *Pash v. Weston*, 3 N.W. 713, 714 (Iowa 1879) (reversing lower court's decision for vendee's buyer's replevin action against vendor's agent, finding that late filing does not constitute notice, and there was no evidence that the vendee was a party to the filing); *Davis & Aubin v. John Bradley & Co.*, 24 Vt. 55, 60–61 (1851), *aff'd*, 28 Vt. 118 (1855) (affirming judgment on vendee's buyer's trover action against vendor's shipper, holding in favor of attachment by vendee's judgment lien, noting that party cannot turn an absolute sale into conditional sale on oral evidence). For vendor successors from resale of the good after condition is broken, see *King v. Bates*, 57 N.H. 446, 449 (1876) (upholding jury verdict on vendee's buyer's replevin action against vendor's second buyer, holding that vendee paid before second buyer so title in vendee's buyer); *Smith v. Sharpe*, 45 Vt. 545, 548 (1873) (finding title in trustee); *Clark v. Wells*, 45 Vt. 4, 7 (1872) (allowing repairman to sue for wheels that he added); *Reed v. Rice*, 25 Vt. 171, 177 (1853) (concluding that conditional sale was undone before trial by vendee's purchaser paying).

persons against the vendee,²¹³ upstream persons against downstream persons,²¹⁴ and downstream persons against the vendor.²¹⁵

213. Vendor successor actions against the vendee involved four note assignments. *See* *Domestic Sewing Mach. Co. v. Arthurhultz*, 63 Ind. 322, 326 (1878) (deciding vendor's assignee's replevin action, finding title in vendor); *Collins v. Bradbury*, 64 Me. 37, 39 (1875) (involving vendor's note and assignee's action on note, finding note is negotiable, so vendor can sue based on the note); *Third Nat'l Bank of Syracuse, N.Y. v. Armstrong*, 25 Minn. 530, 532 (1879) (reviewing a case on vendor's note and assignee's action on note, finding the note was not negotiable, so assignee could not sue on it); *Heard v. Dubuque Cnty. Bank*, 8 Neb. 10, 14 (1878) (affirming a case involving vendor's note and assignee's action on note, concluding the note was not negotiable due to condition on payment). For vendor's agent, see *Jowers v. Blandy*, 58 Ga. 379, 383 (1877) (involving vendor's agent's trover action, allowing title in vendor even when reserved in agent for vendor). For vendor's heir, see *Crawley v. Littlefield*, 34 S.C.L. 154, 156-57 (1848) (reviewing vendor's heir's trover action, noting statute of limitations does not begin until a demand is made). For assignment of bailment lease cases, see *Fairbank v. Phelps*, 39 Mass. 535, 540 (1839) (addressing a trover action brought by assignee for benefit of creditors, finding levy before lease term was over, so there was no right to possession); *Goodell v. Fairbrother*, 12 R.I. 233, 236 (1878) (enforcing judgment of lower court in trover action by sewing machine company assignee of vendor of piano, holding that vendee has no interest after the condition is broken).

214. Vendor successor actions against the vendee's successor involved eight note assignments. *See* *Hegler v. Eddy*, 53 Cal. 597, 599 (1879) (deciding vendor's assignee wins replevin action against vendee's buyer as title was in vendor's successor); *Lewis v. Gilmer*, 11 Miss. 560, 563-64 (1844) (considering a right to try title under the southern fraudulent conveyance statute, holding in favor of judgment lien because vendor's assignee did not record the conveyance in time); *Mount v. Harris*, 9 Miss. 185, 196 (1843) (concluding that assignee of entire contract can obtain an injunction against levy because title was in vendor's successor); *Esty v. Graham*, 46 N.H. 169, 170 (1865) (ruling that assigned note carries assignors interest); *Boon v. Moss*, 70 N.Y. 465, 475-76 (1877) (allowing vendor's assignee to obtain rights to vendee's successor partnership's goodwill, subscription list, and firm name, as title was in vendor); *Wright v. Vaughn*, 45 Vt. 369, 371 (1873) (accepting that vendor's note assignee loses trespass action against vendee's judgment lien when vendor changed contract from absolute sale to conditional sale); *Burnell v. Marvin*, 44 Vt. 277, 280 (1872) (clarifying that as owner against vendee's judgment lien, vendor's note buyer can sue for trover). *But see* *Wait v. Green (Wait I)*, 35 Barb. 585, 587-88 (N.Y. Gen. Term 1862) (ruling that on a vendor's note, assignee loses in a replevin action against vendee's buyer after New York established the good faith purchaser rule), *aff'd*, 36 N.Y. 556 (1867). For post-conditional sales act note assignments, see *Allen v. Whittemore*, 1 F. Cas. 521, 521 (D.C. Vt. 1876) (stating that bankruptcy trustee must pay on conditional sale notes); *Clark v. Hayward*, 51 Vt. 14, 19 (1878) (granting that vendor's colt was protected because the mare's progeny was legally included in the note). For vendor successors from resale of the good after condition is broken, see *Raddin v. Arnold*, 116 Mass. 270, 271-72 (1874) (holding that vendor's second buyer after breach of condition loses conversion to vendee's lease assignee because goods affixed to reality are no longer chattels); *Reeves v. Harris*, 17 S.C.L. 563, 567 (1830) (allowing vendor to sell horse in vendee's possession upon non-payment by vendee because sold with vendee's consent); *Smith v. Foster*, 18 Vt. 182, 185 (1846) (concluding that vendor's second purchaser of interest in good prevails in a trover action as title was in vendor).

215. For actions by those claiming through vendee against vendor, see *Day v. Bassett*, 102 Mass. 445, 445 (1869) (noting in a trespass action by vendee's buyer, title passed to buyer when vendee subsequently tendered payment); *Giddey v. Altman*, 27 Mich. 206, 212 (1873) (detailing vendee's buyer's replevin action, and explaining that because the vendor failed to declare the contract void, the good faith purchaser wins); *Fifield v. Elmer*, 25 Mich. 48, 51 (1872) (concluding in a vendee's buyer's trover, title was in vendor); *Little v. Page*, 44 Mo. 412, 415 (1869) (determining that

Vendors converting their vendees' debt to immediate value by assignment to those willing to risk the vendee's insolvency, accelerated in the 1870s.²¹⁶ In the farm states, local village merchants, acting as private bankers, provided lending services on discounted promissory notes because of the capital requirements for incorporated state and national banks.²¹⁷ Rural merchants bought agricultural commodities from farmers and provided them with cloth, ironware, and crockery, while local merchants extended them credit and served as their bankers by keeping farmers' deposits in their safes.²¹⁸ By the 1870s these local merchants had advanced to discounting promissory notes held by farmers and secured by the conditional sale. The other opinions involved the vendee against downstream persons,²¹⁹ downstream persons against the vendee,²²⁰ and downstream persons against other downstream persons.²²¹

The other twenty-six opinions (12%) involved lawsuits between the parties to the conditional sales agreement and, therefore, did not involve

in vendee's buyer's action to recover personalty, title was in vendor); *Cochran v. Flint*, 57 N.H. 514, 546 (1877) (denying a bill for an injunction that would have prevented removal by vendee's prior mortgagee on the attached fixture without vendor's consent); *Bailey v. Colby*, 34 N.H. 29, 39 (1856) (explaining that trespass by vendee's buyer, on tender of price, has title); *Haynes v. Hart*, 42 Barb. 58, 60 (N.Y. Gen. Term 1864) (stating that under vendee's assignee's action to recover amounts paid, assignee cannot maintain suit after vendee's default in payment); *Grant v. Skinner*, 21 Barb. 581, 584 (N.Y. Gen. Term 1854) (announcing that under vendee's judgment lien's buyer's action for value against vendor as judgment lien, no title was in vendee); *Haak v. Linderman*, 64 Pa. 499, 501-02 (1870) (finding that sheriff's interpleader action before levy with the vendor as plaintiff, but brought by vendee's judgment lien, conditional sale was void against creditor under Pennsylvania law); *Phelps v. Bemis*, 51 Vt. 487, 489 (1879) (describing a trover action by vendee's judgment lien, which was retried as there was some evidence showing there was no lien, vendor retook possession due to an unfiled and structured deal to avoid filing); *Davenport v. John G. Shants & Co.*, 43 Vt. 546, 552-53 (1871) (explaining that under a bill to foreclose by vendee's mortgagee, priority is based on the following order: fixtures on prior realty mortgage, vendor's lien, subsequent realty mortgage); *Rowan v. Union Arms Co.*, 36 Vt. 124, 137 (1863) (permitting vendee's buyer to pay the remaining amount owed for possession of the goods under 1854 Vt. Statute, No. 12, 1854 Vt. Laws 15), *aff'd sub nom.* *Rowan v. State Bank*, 45 Vt. 160 (1872).

216. *Cf. supra* notes 212-15 (involving various types of vendors).

217. *See* GEORGE E. BARNETT, *STATE BANKING IN THE UNITED STATES SINCE THE PASSAGE OF THE NATIONAL BANK ACT* 56 (1902) (proclaiming that because of the title examination and mortgage preparation costs for real estate security, one-year loans to farmers were cost-prohibitive, so local merchants provided farmers credit). Capital requirements for national banks (\$50,000) and state incorporated banks (\$10,000) caused banking to be left largely to private bankers, because they had no capital requirements in Missouri before 1877. *Id.* at 80, 85, 87.

218. R. DOUGLAS HURT, *AMERICAN AGRICULTURE: A BRIEF HISTORY* 150 (1994).

219. *See* *Harrington v. King*, 121 Mass. 269, 271 (1876) (accepting that vendee has sufficient title with vendor's consent to maintain conversion action).

220. *See* *Ridgeway v. Kennedy*, 52 Mo. 24, 24 (1873) (concluding that title remained in vendor).

221. *See* *Jones v. Albin Sons & Co.*, 53 Ga. 585, 588 (1875) (concluding that when vendor takes mortgage in ignorance, vendor's title is unaffected).

the common law priority rule.²²² However, half involved the rules that Gilmore deplored. Vendor actions under replevin for return of the goods appeared in six opinions,²²³ while vendor actions under trover for the value of the goods appeared in five opinions,²²⁴ both of which were denounced by Gilmore as reclaiming the goods and keeping the moneys paid without refund.²²⁵ Vendor actions under assumpsit (the contract action) for the price, decried by Gilmore as suing for the price when the fair market of the goods had declined,²²⁶ appeared in three opinions.²²⁷

D. *Bailment-Lease Opinions*

The results for the bailment-lease, involved in forty-four pre-1880 opinions, differed in two aspects. First, the number of opinions involving household goods exceeded those dealing with farm goods. Household goods appeared in fourteen opinions (32%),²²⁸ farm goods in twelve opinions (27%),²²⁹ townspeople's goods in ten opinions (23%),²³⁰

222. *Jones v. Pullen*, 66 Ala. 306 (1880); *Boyer v. Ausburn*, 64 Ga. 271 (1879); *Guilford, Wood & Co. v. McKinley*, 61 Ga. 230 (1878); *Singer Mfg. Co. v. Treadaway*, 4 Ill. App. 57 (1879); *Latham v. Sumner*, 89 Ill. 233 (1878); *Plummer v. Shirley*, 16 Ind. 380 (1861); *Shireman v. Jackson*, 14 Ind. 459 (1860); *Farrar v. Peterson*, 3 N.W. 457 (Iowa 1879); *Loring v. Loring*, 64 Me. 556 (1875); *Bunker v. McKenny*, 63 Me. 529 (1874); *Allen v. Delano*, 55 Me. 113 (1867); *Shaffer v. Sawyer*, 123 Mass. 294 (1877); *Heath v. Randall*, 58 Mass. 195 (1849); *Vincent v. Cornell*, 30 Mass. 294 (1832); *Preston v. Whitney*, 23 Mich. 260 (1871); *Duke v. Shackelford*, 56 Miss. 552 (1879); *Clay v. Bohonon*, 54 N.H. 474 (1874); *Pinkham v. Mattox*, 53 N.H. 600 (1873); *Davis v. Emery*, 11 N.H. 230 (1840); *Whitcomb v. Hungerford*, 42 Barb. 177 (N.Y. Gen. Term 1864); *Hawkins v. Brown & Jeffery*, 30 Barb. 206 (N.Y. Gen. Term 1859); *Kent v. Buck*, 45 Vt. 18 (1872); *Fuller v. Buswell*, 34 Vt. 107 (1861); *Martin v. Eames*, 26 Vt. 476 (1854); *Root v. Lord*, 23 Vt. 568 (1851); *Gregory v. Morris*, 1 Wyo. 213 (1875).

223. *Jones*, 66 Ala. 306; *Plummer*, 16 Ind. 380; *Bunker*, 63 Me. 529; *Allen*, 55 Me. 113; *Shaffer*, 123 Mass. 294; *Duke*, 56 Miss. 552.

224. *Boyer*, 64 Ga. 271; *Vincent*, 30 Mass. 294; *Kent*, 45 Vt. 18; *Root*, 23 Vt. 568. *But see* *Kellogg v. Fox*, 45 Vt. 348, 353 (1873) (declining to allow vendor to sue vendee for partnership property).

225. 1 GRANT GILMORE, SECURITY INTEREST IN PERSONAL PROPERTY 66 (1965).

226. *Id.*

227. *Clay*, 54 N.H. 474; *Pinkham*, 53 N.H. 600; *Fuller*, 34 Vt. 107.

228. *Kohler v. Hayes*, 41 Cal. 455 (1871); *Lucas v. Campbell*, 88 Ill. 447 (1878); *Murch v. Wright*, 46 Ill. 487 (1868); *Mosely v. Shattuck*, 43 Iowa 540 (1876); *Greer v. Church & Co.*, 13 Bush. 430 (Ky. App. 1877); *Chase v. Ingalls*, 122 Mass. 381 (1877); *Smith v. Lozo*, 3 N.W. 227 (Mich. 1879); *Sumner v. Cottey*, 71 Mo. 121 (1879); *Sargent v. Gile*, 8 N.H. 325 (1836); *White v. Singer Mfg. Co.*, 4 Ohio Dec. Reprint 118 (Ct. Com. Pl. 1878); *Singer Mfg. Co. v. Graham*, 8 Or. 17 (1879); *Crist v. Kleber*, 79 Pa. 290 (1875); *Goodell v. Fairbrother*, 12 R.I. 233 (1878); *Kimball v. Post*, 44 Wis. 471 (1878).

229. *Hughes v. Kelly*, 40 Conn. 148 (1873); *Clark v. Hale*, 34 Conn. 398 (1867); *Hart v. Carpenter*, 24 Conn. 427 (1856); *Galvin v. Bacon*, 11 Me. 28 (1833); *Fairbank v. Phelps*, 39 Mass. 535 (1849); *Van Hoozer v. Cory*, 34 Barb. 9 (N.Y. Gen. Term 1860); *Chamberlain v. Smith*, 44 Pa. 431 (1863); *Myers v. Harvey*, 2 Pen. & W. 478 (Pa. 1831); *Dunham v. Lee*, 24 Vt. 432 (1852); *Bradley v.*

transporter's goods in six opinions (14%),²³¹ and manufacturer's machinery in two opinions (5%).²³² Second, the largest number of opinions, ten, came from Pennsylvania, which recognized the bailment-lease but rejected the conditional sale.²³³ As with the conditional sale, the common law rule provided lessor priority over creditors and good faith purchasers, except in Illinois, where courts considered the transaction a chattel mortgage requiring a filing under the chattel mortgage act, and in Kentucky, where the good faith purchaser rule dominated.²³⁴

Arnold, 16 Vt. 382 (1844); Walker v. McNaughton, 16 Vt. 388 (1844); Grant v. King, 14 Vt. 367 (1842).

230. Cragin v. Coe, 29 Conn. 51 (1860); Singer Mfg. Co. v. Treadaway, 4 Ill. App. 57 (1879); Stevens v. Older, 26 La. Ann. 634 (1874); Currier v. Knapp, 117 Mass. 324 (1875); Neidig v. Eifler, 18 Abb. Pr. 353 (N.Y. 1865); Person v. Civer, 29 How. Pr. 432 (N.Y. 1865); Enlow v. Klein, 79 Pa. 488 (1875); Rowe v. Sharp, 51 Pa. 26 (1865); Price v. McCallister, 3 Grant 248 (Pa. 1858); Clark v. Jack, 7 Watts 375 (Pa. 1838).

231. Fosdick v. Schall, 99 U.S. 235 (1878); Hervey v. R.I. Locomotive Works, 93 U.S. 664 (1876); Forbes v. Marsh, 15 Conn. 384 (1843); Pittsburgh Locomotive & Car Works v. State Nat'l Bank of Keokuk, 19 F. Cas. 785 (C.C. Iowa 1875); Farmers Bank v. McKee, 2 Pa. 318 (1845); Lehigh Co. v. Field, 8 Watts & Serg. 232 (Pa. 1844).

232. Miller v. Steen, 30 Cal. 402 (1860); Henry v. Patterson, 57 Pa. 346 (1868).

233. Connecticut and Illinois had five opinions each; Vermont had four opinions; Massachusetts and New York had three opinions each; California and Iowa had two opinions each; and Maine, New Hampshire, Michigan, Ohio, Missouri, Louisiana, Kentucky, Wisconsin, Rhode Island, and Oregon had one opinion each. See *supra* notes 228–32 (listing cases).

234. The following cases were replevin actions by lessor that used the common law rule: Kohler v. Hayes, 41 Cal. 455 (1871); Hughes, 40 Conn. 148; Galvin, 11 Me. 28; Neidig, 18 Abb. Pr. 353; Crist v. Kleber, 79 Pa. 290 (1875); Myers, 2 Pen. & W. 478. But see Hervey, 93 U.S. 664, 671–74 (finding Illinois law did not comply with chattel mortgage act); Singer Mfg. Co., 4 Ill. App. at 60 (finding title remained with lessor); Murch v. Wright, 46 Ill. 487, 488–89 (1868) (lessor loses to lessee's judgment lien, lessor lien fraudulent); Greer v. Church & Co., 13 Bush. 430, 433–35 (Ky. App. 1877) (finding the use of a lease was to avoid filing, the good faith purchaser rule should be used, and the lessor loses to lessee's buyer); Price v. McCallister, 3 Grant 248, 249–50 (Pa. 1858) (holding that the lessor loses to lessee's landlord; the rent rule is that goods on premises are subject to distress for rent). The following cases were trover actions by a vendor using the common law rule: Clark, 34 Conn. 398; Cragin, 29 Conn. 51; Hart, 24 Conn. 427; Forbes, 15 Conn. 384; Smith v. Lozo, 3 N.W. 227 (Mich. 1879); Sargent v. Gile, 8 N.H. 325 (1836); Singer Mfg. Co. v. Graham, 8 Or. 17 (1879); Lehigh Co., 8 Watts & Serg. 232; Bradley, 16 Vt. 382; Grant, 14 Vt. 367. The following cases were trespass actions by a vendor using the common law rule: Van Hoozer, 34 Barb. 9; Chamberlain, 44 Pa. 431; Clark, 7 Watts 375; Dunham, 24 Vt. 432. The following were cases involving conversion actions by a vendor using the common law rule: Mosely v. Shattuck, 43 Iowa 540 (1876); Sumner v. Cottey, 71 Mo. 121 (1879); Person, 29 How. Pr. 432. The following cases involved sheriff interpleader actions using the common law rule: Stevens, 26 La. Ann. 634; Enlow, 79 Pa. 488; Henry, 57 Pa. 346. The following cases were actions by lessee using the common law rule: Farmer's Bank of Buck Cnty. v. McKee, 2 Pa. 318 (1845); Walker v. McNaughton, 16 Vt. 388 (1844). The following case was a foreclosure case brought by lessee's prior mortgagee: Fosdick, 99 U.S. 235. The following cases involved various other actions: Miller, 30 Cal. 402; Lucas v. Campbell, 88 Ill. 447 (1878); Chase v. Ingalls, 122 Mass. 381 (1877); Currier v. Knapp, 117 Mass. 324 (1875); White v. Singer Mfg. Co., 4 Ohio Dec. Reprint 118 (Ct. Com. Pl. 1878). The following cases involved actions brought under

E. *Origin of the Conditional Sale*

Opinions decided prior to 1841 emphasize the general trend of farmers using the conditional sale for livestock purchases. There are twenty pre-1840 opinions.²³⁵ Of the nine opinions mentioning the value of the goods, all except one involve amounts under \$200.²³⁶ Fifteen opinions (75%) deal with farming, of which ten concern livestock.²³⁷ The documentation type reverses that of later transactions, with domination by oral transactions in four opinions,²³⁸ all in the South, and promissory notes with notations and small contracts in three opinions each.²³⁹

These numbers reverse the corresponding numbers for chattel mortgages, where in the pre-chattel mortgage era of the North, the commercial merchants and manufacturers dominated the opinions, with the townspeople and farmers in the minority.²⁴⁰ Clearly, commercial

their respective conditional sales acts: *Pittsburgh Locomotive & Car Works*, 19 F. Cas. 785; *Kimball v. Post*, 44 Wis. 471 (1878). The following case involved a trover action brought by lessor's assignee using the common law rule: *Goodell v. Fairbrother*, 12 R.I. 233 (1878). *But see Fairbank*, 39 Mass. at 539-40 (1849) (holding the good faith purchaser had no right of possession).

235. *Gaylor v. Dyer*, 10 F. Cas. 120 (C.C. D.C. 1838); *Lane v. Borland*, 14 Me. 77 (1836); *Tibbetts v. Towle*, 12 Me. 341 (1835); *Sawyer v. Shaw*, 9 Me. 47 (1832); *Waterston v. Getchell*, 5 Me. 435 (1828); *Corse v. Patterson*, 6 H. & J. 153 (Md. 1824); *Vincent v. Cornell*, 30 Mass. 294 (1832); *Barrett v. Pritchard*, 19 Mass. 512 (1824); *Marston v. Baldwin*, 17 Mass. 606 (1822); *Davis v. Emery*, 11 N.H. 230 (1840); *Jenkins v. Eichelberger*, 4 Watt. 121 (Pa. 1835); *Martin v. Mathiot*, 14 Serge. & Rawle 214 (Pa. 1826); *Bennett v. Sims*, 24 S.C.L. 421 (1839); *Reeves v. Harris*, 17 S.C.L. 563 (1830); *Dupree v. Harrington*, 16 S.C.L. 391 (1824); *Gambling v. Read*, 19 Tenn. 281 (1838); *Houston v. Dyche*, 19 Tenn. 76 (1838); *Bigelow v. Hundley*, 8 Vt. 151 (1836); *West v. Bolton*, 4 Vt. 558 (1832); *Randolph v. Randolph*, 17 Va. 99 (1812).

236. *Sawyer*, 9 Me. at 47 (1832) (\$168); *Tibbetts*, 12 Me. at 341 (\$172); *Waterston*, 5 Me. at 435 (\$107); *Vincent*, 30 Mass. at 294 (\$50); *Davis*, 11 N.H. at 230 (\$50); *Martin*, 14 Serge. & Rawle at 214 (\$60); *Gambling*, 19 Tenn. at 281 (\$150); *West*, 4 Vt. at 558 (\$18). *But see Gaylor*, 10 F. Cas. at 120 (C.C.D.C. 1838) (identifying a case in trover that was worth \$594).

237. *See Tibbetts*, 12 Me. at 341 (selling a mare); *Lane*, 14 Me. at 77 (selling a horse); *Vincent*, 30 Mass. at 294 (selling oxen); *Davis*, 11 N.H. at 230 (selling a cow); *Bennett*, 24 S.C.L. at 421 (selling a mare); *Reeves*, 17 S.C.L. at 563 (selling a horse); *Dupree*, 16 S.C.L. at 391 (selling a horse); *Houston*, 19 Tenn. at 76 (selling a horse); *West*, 4 Vt. at 558 (selling a cow); *Bigelow*, 8 Vt. at 151 (selling a pair of horses).

238. *Bennett*, 24 S.C.L. at 421 (identifying a case that involved an oral contract for a conditional sale of a mare); *Gambling*, 14 Serge. & Rawle at 214 (identifying a case that involved an oral contract for a conditional sale of a slave); *Randolph*, 17 Va. at 99 (identifying a case that involved an oral contract for a conditional sale of a slave); *West*, 4 Vt. at 558 (identifying a case that involved an oral contract for a conditional sale of a cow).

239. *Lane*, 14 Me. at 77 (providing an example of a farmer's conditional sale of his horse); *Tibbetts*, 12 Me. at 341 (providing an example of a farmer's conditional sale of his yoke of oxen); *Vincent*, 30 Mass. at 294 (providing an example of a farmer's conditional sale of his cow).

240. *See George Lee Flint, Jr., Secured Transactions History: The Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era*, 20 N. ILL. U.L. REV. 1, 9-21 (2000) (comparing the

merchants and manufacturers used chattel mortgages, while farmers and townspeople used conditional sales. Courts found no reason to apply chattel mortgage rules to different situations. Farmers used conditional sales for small, short-term transactions. The reason was simple. The conditional sales involved a convenient method to purchase an item when the buyer lacked sufficient cash for an outright purchase.²⁴¹ The vendor was typically a local person or friend, not a commercial merchant or manufacturer who did not know the borrower. Parties typically made deals orally, or with minimal documentation, namely a promissory note with a notation of the transaction or a short contract. Short-term lenders frequently converted the debt represented by the conditional sale to value by assigning the conditional sale to a local investor.

The surprising fact arising from the appellate opinions, for those steeped in Gilmoreian industrial theory, is that vendors used the conditional sale long before Gilmore would allow.²⁴² Farming communities used the conditional sale because it was a great deal to sell horses and oxen on credit. The opinions encouraged the common law rule of giving credit and to permitting its assignment, thus providing priority to the conditional sale vendor and its assignee over the other claimants to the goods sold.²⁴³ A threat to the status quo of farm lending would likely engender a farm state reaction that would preserve that lending.

IV. THE CONDITIONAL SALES ACTS

The failure of the traditional legal historians to explain a legal development adequately, such as the passage of the conditional sales acts, encourages inquiry into their legislative history to find an explanation. State legislatures enacted conditional sales acts in four waves: the first beginning in 1870, the second in the late 1870s, the third in the 1880s, and

larger amount of industry-related cases that arose in the early nineteenth century with the smaller amount of non-commercial cases).

241. See *Davis*, 11 N.H. at 232 (“Sales of property are frequently made in the mode attempted in this case, and it is important that the respective rights of the parties to contracts of this description should be distinctly understood. Such contracts that parties are fairly enter into on reasonable terms, may afford a convenient means of purchase of property by those unable to advance at once the property is its full value. But to make it a contract at all available for the benefit of the proposed purchaser, he must have important rights under it, as well as the owner of the property, and should have a liberal opportunity to complete any purchase contemplated by the parties.”).

242. 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 25 (1965) (describing the use of conditional sales by various merchants in the eighteenth century).

243. See Garrard Glenn, *The Conditional Sale at Common Law and As a Statutory Security*, 25 VA. L. REV. 559, 559 (1939) (describing the wide use of the conditional sale and how courts widely approved of it).

the fourth in the 1890s. To eliminate the potential impact of the 1867 New York cases of *Wait* and *Western Transportation Co.*, Maine and Vermont passed the first conditional sales acts on March 16, 1870, and November 22, 1870, respectively.

A. *The First Wave New England Statutes*

The first wave of conditional sales acts consisted of five statutes, two passed in northern New England in 1870 and three passed in the Upper Mississippi Valley in 1872 and 1873:

Year	State	Location of Filing
1870	Maine ²⁴⁴	Recording as for mortgages on personalty
	Vermont ²⁴⁵	Town clerk where vendee resides
1872	Iowa ²⁴⁶	Recording as for chattel mortgages
1873	Minnesota ²⁴⁷	Town clerk where vendee resides
	Wisconsin ²⁴⁸	Town clerk where vendee resides

These states were farm states²⁴⁹ with none of the acts coming from the manufacturing states mandated by the Gilmorian model. Wisconsin, the

244. Act of Mar. 16, 1870, ch. 143, 1870 Me. Acts 108 ("An act to provide for the recording of certain contracts.").

245. Act of Nov. 22, 1870, No. 63, 1870 Vt. Acts 103 ("An Act Related To Liens Reserved On Property Sold.").

246. Act of Apr. 18, 1872, ch. 140, 1872 Iowa. Acts 63 ("An Act Requiring that conditional Sales of Personal Property be executed, acknowledged, and recorded like Mortgages of personal Property, to be of any Validity as against bona fide Purchasers, Executions, and attaching Creditors.").

247. Act of Mar. 10, 1873, ch. 65, 1873 Minn. Acts 185–86 ("An act to provide for filing certain notes or other evidences of indebtedness or contracts in the office of town clerks.").

248. See Act of Mar. 11, 1873, ch. 113, 1873 Wis. Acts 146 ("An Act to prevent frauds in the sale of property.").

249. FRANCIS A. WALKER, COMPENDIUM OF THE NINTH CENSUS 594 (1870), available at www.hathitrust.org. The percentage of farmers is computed by dividing those engaged in farming by the total in all occupations for each state. The result is as follows: Iowa (210,263/344,276 or 61.1%); Kansas (73,228/123,852 or 59.1%); Minnesota (75,810/132,657 or 56.7%); Wisconsin (159,667/292,808 or 54.5%); Vermont (57,983/108,763 or 53.3%); Nebraska (23,115/43,837 or 52.7%); Missouri (263,918/505,556 or 52.2%); Illinois (376,441/742,015 or 50.7%); Ohio (397,024/840,889 or 47.21%); Michigan (187,211/404,164 or 46.3%); Indiana (206,777/459,368 or 45.0%); Oregon (13,248/30,651 or 43.2%); Maine (82,011/208,225 or 39.3%); New Hampshire (46,573/120,168 or 38.7%); Pennsylvania (260,051/1,020,544 or 25.5%); New York (374,323/1,491,018 or 25.1%); Connecticut (43,653/193,421 or 22.7%); New Jersey (63,128/296,036 or 21.3%); California (47,863/238,638 or 20.1%); Rhode Island (11,780/88,574 or 13.3%); Massachusetts (72,810/570,884 or 12.8%); and Nevada (2,070/26,911 or 7.7%). See also CHARLES E. CLARK, MAINE: A BICENTENNIAL HISTORY 92 (1977) (stating that 55,000 of Maine's 298,000 citizens were farmers).

last of these five states, became the first to include the word “fraud” or “fraudulent” in the title of its act, strongly suggesting that fraud did not spawn these acts.²⁵⁰ The fraud of not notifying subsequent purchasers and levying interests concerned the Wisconsin legislators.²⁵¹ Wisconsin’s conditional sales act rendered such fraud impossible by providing for the previously undisclosed notice.²⁵²

On March 16, 1870, Maine became the first state to pass a conditional sales act.²⁵³ This statute followed the Gilmorian scenario; it required a filing with the chattel mortgages, but only for promissory notes over \$30.²⁵⁴ It also provided a filing exception for small transactions (albeit smaller than those exhibited in the pre-conditional sales act appellate opinions), and did not subject the conditional sale to the other provisions applicable to chattel mortgages. The Maine conditional sale statute provided:

No stipulation in a note for more than thirty dollars that the goods and chattels for which the note is given shall remain the property of the payee until payment, shall be valid against any other person than the parties thereto, unless possession of such property is retained by the payee or the note is recorded in the same place and manner as mortgages of personal property.²⁵⁵

The other first wave conditional sales acts did not provide for the small transaction exception.

Prior to this, in 1869, Maine passed a statute entitled “An Act in Relation to Conditional Sales of Personal Property” aimed at the oral documentation problem by requiring the conditional sale be written on the

250. See Act of Mar. 11, 1873, ch. 113, 1873 Wis. Acts 146 (“An Act to prevent frauds in the sale of property.”).

251. *Id.*

252. *Id.*

253. Act of Mar. 16, 1870, ch. 143, 1870 Me. Acts 108 (“An act to provide for the recording of certain contracts.”).

254. The legislature corrected this oversight in the following year, extending the filing to agreements for which a note is given. *Id.* “No agreement that that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee till the note is paid, is valid, unless it is made and signed as a part of the note; nor when it is so made and signed in a note for more than thirty dollars, unless it is recorded like mortgages of personal property.” *Id.*; see also *Boynton v. Libby*, 62 Me. 253, 254 (1874) (quoting the language of the Maine act regarding the recording of certain contracts). The revised statutes omitted the validity between the parties, so the legislature made a correcting amendment on February 20, 1874, adding “except as between the original parties to said agreement” after “dollars.” See Act of Feb. 20, 1874, ch. 181, 1874 Me. Acts 128–29 (amending the language of the statute so as to emphasize the validity between parties).

255. Act of Mar. 16, 1870, ch. 143, § 1, 1870 Me. Acts 108 (“An act to provide for the recording of certain contracts.”).

note signed by the vendee.²⁵⁶ This statute suggests the Maine legislature's concern involved encouraging the assignment of the promissory note, by providing documentation of the note's security interest. The conditional sales act would further enhance that encouragement by warding off interlopers (good faith purchasers and judgment liens) that could seriously increase the discount involved in the assignment.

This very first conditional sales act contradicts Gilmore's tale. His explanation of the use of the conditional sales involved two transactions.²⁵⁷ This act covers neither. No mention is made of conditional sales of locomotives, because at the time, the law considered locomotive fixtures a part of real estate, and not personalty.²⁵⁸ Additionally, for small consumer goods, this conditional sales act provided an exception.²⁵⁹

On November 22 of the same year, Vermont became the second state to adopt a conditional sales act. This statute made no reference to chattel mortgages, and required filing with the town clerk:

No lien reserved upon personal property sold conditionally and passing into the hands of the conditional purchaser, shall be valid against attaching creditors or subsequent purchasers, unless the vendor of such property shall take a written memorandum signed by the purchaser, witnessing such lien, and the sum due thereon, which memorandum shall be recorded in the town clerk's office of the town where the purchaser of such property resides,

256. See Act of Feb. 4, 1869, ch. 11, 1869 Me. Acts 9 ("An act in relation to conditional sales of personal property: . . . No agreement or stipulation hereafter made shall be valid, whereby the title to personal property, bargained and delivered, shall remain the property of the payee of a note given therefore, unless the agreement or stipulation is in writing and made part of the note, and signed by the payor or his lawful agent.").

257. See 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 68-69 (1965) (describing the two separate transactions of the conditional sale).

258. See *The Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. 484, 484-85 (N.Y. Gen. Term 1857) (summarizing how a railroad filed real estate mortgages in 1853 on engines and cars); FRANCIS RAWLE, CAR TRUST SECURITIES, AMERICAN BAR ASSOCIATION TRANSACTIONS, at 17-18 (1885) (discussing the states' differing perspectives on a conditional sale regarding locomotives); 1 ISAAC REDFIELD, THE LAW OF RAILWAYS 590 (1867) (determining railroads generally had no requirement to file, because they were seen as fixtures); see also *Boston, C. & M.R.R. v. Gilmore*, 37 N.H. 410, 410-13, 423 (1858) (discussing the change in law with regard to locomotives as personalty after changes in the law concerning conditional sales of property).

259. The \$30 exemption does not cover sewing machines and pianos. A sewing machine costs about \$100 and a piano costs several hundred dollars. See, e.g., *Pinkham v. Mattox*, 53 N.H. 600, 600-01 (1873) (stating a conditional sale applied to a sewing machine); *Maynard v. Anderson*, 54 N.Y. 641, 641 (1873) (explaining that a conditional sale applied to a piano).

within thirty days after such property shall be delivered to such purchaser.²⁶⁰

Sixteen years earlier, Vermont passed legislation ensuring the vendor received full payment for the conditional sale when a good faith purchaser bought the item.²⁶¹ The 1854 statute allowed the good faith purchaser to keep the item as long as it paid the outstanding amount due the vendor.²⁶² This statute suggests the Vermont legislature's concern involved encouraging the assignment of the promissory note by providing full payment on the promissory note. The conditional sales act would further enhance that encouragement by warding off the other type of interlopers (judgment liens) that could seriously increase the discount involved in the assignment.

B. *The First Wave: Upper Mississippi Valley Statutes*

A year-and-a-half later, the states of the Upper Mississippi Valley began to pass conditional sales acts. On April 18, 1872, Iowa followed the Gilmorian scenario by requiring a filing in the same manner as chattel mortgages, but without subjecting the conditional sale to the other provisions concerning chattel mortgages. The Iowa statute covered the conditional sale, as well as the bailment lease:

That no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee, or lessee, in actual possession, obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged, and recorded, the same as chattel mortgages.²⁶³

The following year, on March 10, 1873, Minnesota adopted a lengthy, six-sectioned conditional sales act:

Every note of hand or other evidence of indebtedness or contract, the conditions of which are that the title or ownership to the property for which said note or other evidence of indebtedness or contract is given, remains in

260. Act of Nov. 22, 1870, No. 63, § 1, 1870 Vt. Acts 103 ("An Act Relating To Liens Reserved On Property Sold.").

261. Act of Nov. 10, 1854, No. 12, 1854 Vt. Laws 15–16 ("An Act in Relation To Liens And Chattels Mortgaged.").

262. *Id.*

263. Act of Apr. 18, 1872, ch. 140, 1872 Iowa. Acts 69 ("An Act Requiring that conditional Sales of Personal Property be executed, acknowledged, and recorded like Mortgages of personal Property, to be of any Validity as against bona fide Purchasers, Executions, and attaching Creditors.").

the vendor, shall be absolutely void as against the creditors of the vendee, and as against subsequent purchasers and mortgagees in good faith, unless the note or other evidence of indebtedness or contract, or true copies thereof, or if said contract be oral, then a memorandum expressing the terms and conditions thereof be filed as hereinafter provided.²⁶⁴

Section 2 called for filing with the town clerk where the vendee resided; section 3 provided a time limit for the filed lien (meaning the lien would become invalid upon failure to enforce the lien within the time limit) of one year beyond the note's due date; section 4 provided that copies certified by the clerk could be used as evidence in court; and section 5 provided for a withdrawal method.²⁶⁵

The following day, on March 11, 1873, Wisconsin adopted a conditional sales act, also calling for a filing with the town clerk and providing the same time limit to the lien as did Minnesota:

No contract or agreement for the sale of personal property, by the terms of which the title or right of property is to remain in the vendor, and the possession thereof in the vendee, until the purchase price is paid, or other conditions of sale are complied with, shall be valid against any other person than the parties thereto, unless such contract or agreement shall be reduced to writing, and the same or a copy thereof shall be filed in the office of the town clerk of the town where said vendee resides, or if he shall not be a resident of the state, then in the town where such contract or agreement is made, and such town clerk shall . . . receive the same compensation therefor[e] as is provided by law for filing chattel mortgages: *provided*, that the effect of such filing shall not extend beyond one year from maturity of the contract price, or consideration therein reserved.²⁶⁶

C. *The Second Wave Statutes*

The second wave states, two states adjacent to those in the Upper Mississippi Valley, enacted their conditional sales acts in 1877.

<u>Year</u>	<u>State</u>	<u>Location of Filing</u>
1877	Nebraska ²⁶⁷	County clerk where vendee lives
	Missouri ²⁶⁸	Recording as for chattel mortgages

264. Act of Mar. 10, 1873, ch. 65, § 1, 1873 Minn. Acts 185–86 (“An act to provide for filing certain notes or other evidences of indebtedness or contracts in the office of town clerks.”).

265. *Id.*

266. See Act of Mar. 11, 1873, ch. 113, § 1, 1873 Wis. Acts 146 (“An Act to prevent frauds in the sale of property.”).

267. See Act of Feb. 19, 1877, § 1, 1877 Neb. Acts 170 (“An Act to prevent fraudulent transfer of personal property.”).

On February 19, 1877, Nebraska adopted its conditional sales act, calling for filing with the county clerk and providing the same time limit to the lien as Minnesota and Wisconsin:

That no sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee, in actual possession, obtained in pursuance of such sale, contract or lease, without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which such vendee or lessee resides All such sales and transfers shall not remain valid against purchasers in good faith, or judgment or attaching creditors without notice, for a longer period than one year, unless such vendor or lessor shall, within thirty days prior to the expiration of one year from the date of such sale or transfer, file a copy thereof, verified as aforesaid, in the office of said clerk²⁶⁹

On March 15, 1877, Missouri passed the last of the first wave's conditional sales acts by amending its fraudulent conveyance statute, adding the following words at the end of Section 10 of Chapter 107:

[N]o sale of goods and chattels, where possession is delivered to the vendee, shall be subject to any condition whatever as against creditors of the vendee, or subsequent purchasers from such vendee in good faith, unless such condition shall be evidenced by writing, executed and acknowledged by the vendee, and recorded as now provided in cases of mortgages of personal property.²⁷⁰

D. *The Third and Fourth Wave Statutes*

Of the twelve states that made up the third wave, ten states, located in the northeast and south, enacted their conditional sales acts in the 1880s, from 1881 to 1889:

268. Compare Act of Mar. 15, 1877, ch. 107, 1877 Mo. Acts 320 (amending Section 10 of Chapter 107 to read: "[N]o sale of goods and chattels, where possession is delivered to the vendee, shall be subject to any condition whatever as against creditors of the vendee, or subsequent purchasers from such vendee in good faith unless such condition shall be evidenced by writing, executed and acknowledged by the vendee, and recorded as now provided in cases of mortgages of personal property"), with A.F. DENNY, THE GENERAL STATUTES OF THE STATE OF MISSOURI 440 (1866) (citing Section 10 of chapter 107 on fraudulent conveyances).

269. See Act of Feb. 19, 1877, § 1, 1877 Neb. Acts 170–71 ("An Act to prevent fraudulent transfer of personal property.")

270. Act of Mar. 15, 1877, ch. 107, 1877 Mo. Acts 320.

Year	State	Location of Filing
1881	Georgia ²⁷¹	Recording as for chattel mortgages
1882	W. Virginia ²⁷²	County clerk where goods are located
1883	N. Carolina ²⁷³	Recording as for chattel mortgages
1884	New York ²⁷⁴	Town clerk where vendee lives
1885	Ohio ²⁷⁵	Town clerk where vendee lives
	Texas ²⁷⁶	Recording as for chattel mortgages
	New Hampshire ²⁷⁷	Town clerk filing where vendee lives
1887	Virginia ²⁷⁸	County clerk where goods are located
1889	Kansas ²⁷⁹	Deed filing where goods are located
	New Jersey ²⁸⁰	County clerk where vendee lives

Two states, New York and New Jersey, only invalidated unregistered conditional sales for subsequent purchasers (including subsequent

271. See Act of Sept. 27, 1881, No. 293, 1881 Ga. Acts 143-44 ("An Act to require the conditional sales of personal property to be evidenced in writing, and for other purposes.").

272. See Act of Mar. 17, 1882, ch. 106, 1882 W. Va. Acts 310-11 ("An Act to amend and reenact section three of chapter seventy-four of the code of West Virginia.").

273. See Act of Mar. 12, 1883, ch. 342, 1883 N.C. Acts 511 ("An Act to require the conditional sales of personal property where title is retained to be registered.").

274. See Act of May 21, 1884, ch. 315, 1884 N.Y. Acts 380 ("An Act requiring contracts for the conditional sale of personal property on credit to be filed in the town clerks' and other offices."). The New York statute did not remain intact very long. In 1894, the legislature exempted a long list of personalty from the statute, primarily items used by consumers and farmers. See Act of May 8, 1894, ch. 420, 1894 N.Y. Acts 861 (exempting "household goods, pianos, organs, scales, engines, boilers and portable furnaces, and boilers for heating purposes, portable saw mills and saw machines, threshing machines and horse powers, mowing machines, reapers and harvesters and grain drills, with their attachments; vehicles, coaches, hearses, carriages, buggies and phaetons, bicycles and tricycles of all kinds, and any other device for locomotion by human power").

275. See Act of May 4, 1885, H.B. No. 1051, 1885 Ohio Acts 238 (making it a misdemeanor to fail to file instruments pertaining to conditional sales and sales of personal property).

276. See Act of Mar. 31, 1885, ch. 78, 1885 Tex. Acts 76 ("An Act to regulate reservations in sales of personal property.").

277. See Act of Aug. 12, 1885, ch. 30, 1885 N.H. Acts 245 ("An Act providing that all liens reserved on personal property sold conditionally and passing into the hands of the purchaser shall be evidenced in writing and recorded.").

278. See CODE OF VA. § 2462 (1887) (requiring sales and contracts to be evidenced by a writing and admitted to record; also mandating railroad rolling equipment filing with marginal notes of railroad rolling equipment filing acts of 1883); see also *McComb v. Donald's Adm'r*, 5 S.E. 558, 561-62 (Va. 1888) (holding unrecorded mortgages are void so subsequent purchasers acquire no title against the original vendor).

279. See Act of Mar. 1, 1889, ch. 255, 1889 Kan. Acts 387 ("An act to regulate the recording of title notes or evidences of conditional sales.").

280. See Act of May 9, 1889, ch. 271, 1889 N.J. Acts 421 ("An Act requiring contracts for the conditional sale of personal property to be recorded.").

mortgagees), and not for previous creditors (judgment liens).²⁸¹ Massachusetts only went so far as to pass an act in 1884 giving a vendee of furniture or other household effects under a conditional sale the right of redemption.²⁸² Tennessee was the only state to pass an act in 1889 providing for a foreclosure sale with the excess proceeds, if any, to go to the purchaser.²⁸³

The fourth wave jurisdictions, four states, five territories, and one district, predominately in the west and south, adopted their conditional sales acts between 1893 and 1901:

<u>Year</u>	<u>State</u>	<u>Location of Filing</u>
1893	S. Dakota Terr. ²⁸⁴	County registrar of deeds where vendee resides
	Washington ²⁸⁵	County auditor where vendee resides
	Connecticut ²⁸⁶	Town clerk where vendee resides
1895	Wyoming Terr. ²⁸⁷	County clerk where goods are located
	N. Dakota Terr. ²⁸⁸	County registrar where goods are
1896	Alabama ²⁸⁹	County probate judge where vendee resides

281. *See id.* (“An Act requiring contracts for the conditional sale of personal property to be recorded.”); Act of May 21, 1884, ch. 315, 1884 N.Y. Acts 380 (“An Act requiring contracts for the conditional sale of personal property on credit to be filed in the town clerks’ and other offices.”). The District of Columbia and Montana later followed this approach. *See* Deeds of Chattels Act of 1901, ch. 854, 31 Stat. § 547 (1901) (requiring conditional sales of chattels to be in writing and recorded); Act of Mar. 3, 1899, S.B. No. 91, 1899 Mont. Acts 124 (“An Act To Provide For the Filing Of Contracts, Notes And Instruments For The Sale Of Personal Property Where Title Is To Remain In The Vendor Until Purchase Price Is Paid.”).

282. *See* Act of June 2, 1884, ch. 313, 1884 Mass. Acts 342 (“An Act concerning conditional sales of furniture or other household effects.”).

283. *See* Act of Mar. 15, 1889, ch. 81, 1889 Tenn. Acts 117 (“An Act to provide a remedy for purchaser and seller in conditional sales of personal property.”).

284. *See* Act of Feb. 20, 1893, ch. 36, 1893 S.D. Terr. Acts 56 (“[F]iled with the register of deeds of the county where the vendee resides.”).

285. *See* Act of Mar. 10, 1893, ch. 106, 1893 Wash. Acts 253 (“An Act in relation to conditional sales and leases of personal property.”).

286. *See* Act of May 25, 1893, ch. 147, 1893 Conn. Acts 287 (“An Act concerning Conditional Sales of Personal Property.”).

287. *See* Act of Feb. 5, 1895, ch. 40, 1895 Wyo. Terr. Acts 80 (“An Act requiring all conditional sales or transfers of personal property to be in writing, and that such writing be made a matter of record.”).

288. *See* N.D. TERR. CODE § 4732 (1895), at 876 (listing in Article 3 for Mortgages of Personal Property, with no marginal source provided).

289. CODE OF ALA. § 1017 Ala. (1897), at 367 (requiring conditional sales of personal property to be filed with a probate judge). *But cf.* *Ensley Lumber Co. v. Lewis*, 25 So. 729, 730–31 (Ala. 1899) (finding that as of March 16, 1896, no recording statute for conditional sales existed).

1897	Oklahoma Terr. ²⁹⁰	County registrar of deeds where goods are located
1899	Montana ²⁹¹	County clerk where goods are located
1901	Arizona Terr. ²⁹²	County recorder where goods are located
	Dist. of Columbia ²⁹³	Recording as for chattel mortgages

Tennessee added to its meager effort to pass an act in 1899 requiring the conditional sale to be in writing.²⁹⁴

E. *Legislative History*

The legislative history of the first wave conditional sales acts confirms the origins of the conditional sales transaction and provides several clues to the origin of the conditional sales acts. Ordinarily, legislative history consists of gubernatorial messages, bills, hearings, committee reports, legislative debates, and preambles, as well as legislative journals and statutory titles.²⁹⁵ For the farm states during the Gilded Age (the time spanning roughly from 1877 to 1893), this material suffers from two drawbacks. First, legislatures frequently did not preserve records of many of these proceedings. State legislative journals in the Gilded Age seldom mention proposed amendments and do not mention bill wording, floor debates, or committee proceedings.²⁹⁶ With rare exceptions, they merely provide perfunctory bill titles and conclusions, without actually providing any details.²⁹⁷ Second, when records do exist, they are difficult to access.

290. See Act of Mar. 6, 1897, ch. 26, 1897 Okla. Terr. Acts 220 ("An Act requiring that all evidences of a conditional sale of property shall be recorded before becoming effective.").

291. See Act of Mar. 3, 1899, S.B. No. 91, 1899 Mont. Acts 124 (providing for filings for the sale of personal property).

292. Compare ARIZ. TERR. REV. CODE tit. 30, § 2702 (1901), at 719 (requiring contracts for the sale of personal property to be filed with the county recorder), with *id.* § 2036 (1887) (lacking language on filing contracts).

293. See Deeds of Chattels Act of 1901, ch. 854, 31 Stat. § 547 (1901) (requiring conditional sales of chattels to be in writing and recorded).

294. See Act of Jan. 26, 1899, ch. 15, S.B. No. 30, 1899 Tenn. Acts 24 ("An Act to regulate the retention of title in conditional sales of personal property, and require that such retention of title in conditional sales of personal property shall not be legal or valid, unless evidenced by written contract.").

295. See 2A NORMAN SINGER, SUTHERLAND STATUTORY CONSTRUCTION 283–346 (4th ed. 1984) (detailing extrinsic aids to interpretation).

296. See *id.* at 318 (acknowledging many states do not retain an official verbatim record of committee hearings).

297. See *id.* at 313 (observing that with "most state statutes there [are] no standing committee report[s] which [are] of any interpretive value").

For the Gilded Age, the legislative materials consisted predominately of legislative journals and statutory titles.

1. Maine

The legislative history of Maine reveals lawyers' interest in passing the conditional sales acts and the agricultural origin of the transaction. In Maine, the first state to pass a conditional sales act, the bill arose in the state's senate. The year before, in 1869, the Maine legislature required that parties write the conditional sales agreement on the underlying promissory notes.²⁹⁸ On January 12, 1870, Senator Thomas Brackett Reed, a Republican attorney from Portland, Cumberland County, Maine, and the future Speaker of the United States House of Representatives, moved "[t]hat the Committee on the Judiciary be instructed to inquire into the expediency of requiring a record of notes containing stipulations that the chattels for which notes are given shall remain the property of the payee until payment."²⁹⁹ Maine used a committee system where members of both the house and the senate served on the important standing committees, such as the Committee on the Judiciary. Only lawyers served on the Maine Committee on the Judiciary.³⁰⁰ The next day, the Maine House concurred in the order to the Committee on the Judiciary.³⁰¹ Later

298. See Act of Feb. 4, 1869, ch. 11, 1869 Me. Acts 9 ("An Act in relation to conditional sales of personal property.").

299. H.R. JOURNAL, 49th Leg., at 66 (Me. 1970). Thomas Brackett Reed, born in Portland, Maine on October 18, 1839, died December 7, 1902 in Washington, D.C. He was a Republican, and an attorney who was serving his only term as a state senator in 1870. Reed was admitted to the bar in 1865. He served twice as a state representative in 1868 and 1869, later as attorney general of Maine from 1870 to 1872, as city solicitor of Portland from 1874 to 1877, as congressman from 1877 to 1899, and as Speaker of the House 1889 to 1891 and 1895 to 1899. See ANDREW R. DODGE, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, at 1794 (2005). He appeared in his father's household in the 1870 census, Thomas B. Reed (Sr.), as Thomas B. Reed, age 30, a lawyer with \$2,500 in realty. See U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF 7TH WARD, PORTLAND, CUMBERLAND CO., ME., at 274 (1870).

300. See S. JOURNAL, 49th Leg., at 53 (Me. 1870), available at <http://books.google.com/books?id=ebr1IJA-Fd8C&printsec=frontcover#v=onepage&q&f=false> (detailing the members of the Committee of the Judiciary). Members of the senate were: Stephen D. Lindsey, lawyer, of Somerset; Marquis D.L. (Mark R.) Lane, lawyer, of Cumberland; and Thomas Brackett (Thomas B.) Reed, lawyer, of Cumberland. Members of the house were: Charles R. (Ches. R.) Whidden, lawyer, of Calais; Lewis Barker, lawyer, of Stetson; Edwin B. Smith, lawyer, of Saco; Percival Bonney (Bonny), lawyer, of Portland; Hiram Bliss, Jr., lawyer, of Washington; Cyrus M. Powers, lawyer, of Houlton; and T.W. (Thomas W.) Vose, lawyer, of Winterport. Their names and occupations come from U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF MAINE (1870), available at <http://www.heritagequestonline.com/hqoweb/library/do/index> (listing census data, including occupations of Maine legislators in 1870). Parentheticals reflect Heritage Quests' index spelling.

301. H.R. JOURNAL, 49th Leg., at 66 (Me. 1870).

that day, the house initiated its own proposal to handle the situation. Upon the motion of Representative Asher H. Barton, a wealthy farmer,³⁰² the house ordered “[t]hat the Committee on the Judiciary inquire into the expediency of amending chapter 11 of the laws of 1869, entitled ‘an act in relation to conditional sales of personal property.’”³⁰³ The statute slated for amendment was the statute requiring the parties to write the conditional sales agreement on the promissory notes.³⁰⁴ The journals of Maine’s Senate and House did not record any proposed house amendment to the 1869 statute. Two months later on March 9, 1870, Senator Reed reported to the senate from the Committee on the Judiciary on the “order relating to recording ‘Holmes’ notes,’ so called,”³⁰⁵ his bill for “an act to provide for the recording of certain contracts.”³⁰⁶ On March 11, the Maine house received that same report of the Committee on the Judiciary.³⁰⁷ On March 14, Senator Reed reported to the senate that the legislation on Maine house’s order with regard to the proposed amendment to Chapter 11 of the laws of 1869 was inexpedient.³⁰⁸ His recordation bill handled the situation. On March 15, the house received the same report, that their order to amend the 1869 statute was inexpedient.³⁰⁹ That same day, the house passed the recordation bill, had the speaker sign it, and sent it to the senate.³¹⁰ On March 16, 1870, the Maine Senate passed it for enactment in concurrence.³¹¹

Thomas Bracket Reed, an attorney since 1865 and sponsor of the Maine

302. Asher H. Barton, aged 51, appeared in the 1870 census of Benton, Kennebec Co., Me., as a farmer and representative in the legislature, with \$30,000 in realty and \$8,000 in personalty. *See* U.S. NAT’L ARCHIVES & RECORDS ADMIN., CENSUS OF BENTON CO., ME., at 138 (1870).

303. H.R. JOURNAL, 49th Leg., at 68 (Me. 1870) (sending orders to the senate); S. JOURNAL, 49th Leg., at 73 (Me. 1870), available at <http://books.google.com/books?id=ebr1lJA-Fd8C&printsec=frontcover#v=onepage&q&f=false> (providing that house orders were severally read and passed in concurrence on January 14th).

304. *See* Act of Feb. 4, 1869, ch. 11, 1869 Me. Laws 9 (requiring conditional sales agreements be written on promissory notes).

305. S. JOURNAL, 49th Leg., at 320–21 (Me. 1870).

306. *See id.* at 320–21, 328 (Mar. 9: reported, read the bill once, and ordered its second reading; Mar. 10: read the bill the second time and passed it to be engrossed in concurrence).

307. *See* H.R. JOURNAL, 49th Leg., at 338, 351 (Me. 1870) (Mar. 11: received report, accepted the report in concurrence, and read the bill twice; Mar. 14: read the recordation bill a third time and passed it for engrossment).

308. *See* S. JOURNAL, 49th Leg., at 342 (Me. 1870) (arguing the Maine House’s order to amend Chapter 11 was inexpedient).

309. *See* H.R. JOURNAL, 49th Leg., at 352 (Me. 1870) (recording the house received the same report as the senate).

310. *See id.* at 355 (passing the bill in the house on the same day as it was received).

311. *See* S. JOURNAL, 49th Leg., at 351, 404 (Me. 1870) (Mar. 15: Committee on Engrossed Bills reported the recordation bill engrossed, passed; listing it as a bill passed).

bill, had six cases before the courts of Maine prior to the passage of Maine's conditional sales act that appear in the reports of the Supreme Court of Maine.³¹² These reported opinions reveal that he represented creditors and debtors.³¹³ Only two cases involved creditors, with Senator Reed representing a local holder of a promissory note and a local bankrupt trader.³¹⁴ The other lawsuits involved insurance contracts and admiralty libel actions.³¹⁵ His experiences would make him knowledgeable of the legal risks involved with promissory notes.

The origin of the term "Holmes' note," used by Thomas Bracket Reed during the passage of the bill, confirms the agricultural use of the conditional sales.³¹⁶ "Holmes' notes" derived from Ebenezer Rawson Holmes of Hebron, Oxford County, Maine.³¹⁷ James Holmes leased his oxen, cattle, and sheep to settlers clearing the forests because few had the means of stocking their farms.³¹⁸ When Ebenezer Holmes inherited the leases, he cancelled them and sold the livestock to the farmers, often for promissory notes.³¹⁹ In the 1830s, he began the custom of inserting a proviso in the notes that the livestock remained Mr. Holmes' property

312. *See* Spaulding v. N.Y. Life Ins. Co., 61 Me. 329, 329 (1870) (representing a Maine agent of a New York insurance company that lost renewal commissions after the agency terminated him, although industry custom was to the contrary); Wagener v. Minot, 28 F. Cas. 1323, 1323 (D. Me. 1870) (representing a ship master who was found liable for assault and battery upon an insubordinate seaman who was on duty at the wheel); *In re* W.D.B., 29 F. Cas. 480, 480 (D. Me. 1869) (representing client that was awarded towing and damage costs for towing a wrecked ship to Portland); Bailey v. Hope Ins. Co., 56 Me. 474, 482 (Me. 1869) (representing a Rhode Island insurance company with a Maine agent that lost on assumpsit based on an insurance policy claim for fire loss to a New Hampshire hotel because a policy condition violated Maine statutory law); *In re* Gay, 10 F. Cas. 105, 107 (D. Me. 1868) (representing a trader who was denied discharge under the Bankruptcy Act of 1867 for engaging in fraudulent preference); Tillock v. Webb, 56 Me. 100, 101 (Me. 1868) (representing a creditor who lost the case because contracts were void on Sundays).

313. *See supra* note 312 (listing cases argued and parties represented).

314. *See In re Gay*, 10 F. Cas. at 107 (representing a trader who was denied discharge for engaging in fraudulent preference); *Tillock*, 56 Me. at 101 (representing a creditor who lost the case).

315. *See supra* note 312 (listing cases argued and parties represented).

316. *See The Facts About the "Holmes Note"*, 12 LAW NOTES 1, 188 (1909) (detailing the history of the term "Holmes' note" and its agricultural uses).

317. *See "United States Census, 1870," ER Holmes in Household of ER Holmes, Maine, United States, FAMILY SEARCH*, <http://familysearch.org/pal:/MM9.1.1/M6DP-F6H> (last visited Dec. 1, 2012) (providing facts on E.R. Holmes from Maine). E.R. Holmes, aged 68, appeared on the 1870 census of Oxford, Oxford Cnty., Me., as a wealthy farmer owning \$5,000 in real estate and \$6,300 in personal property along with his wife Louisa, three adult children, and three hired hands. *See* U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF OXFORD, OXFORD CO., ME., at 292 (1870).

318. *The Facts About the "Holmes Note"*, 12 LAW NOTES, 1, 188 (1909).

319. *Id.* at 189.

until payment of the note.³²⁰ Others adopted the form, labeling them "Holmes' notes."³²¹

2. Vermont

The legislative history of Vermont confirms the lawyer interest in passing the conditional sales acts. Senator William M. Pingry, a Republican attorney, from Weathersfield, Windsor County, Vermont, introduced Vermont's second conditional sales act, on November 11, 1870, Senate Bill 108, entitled "An Act Relating to Liens Reserved On Property Sold."³²² The Vermont Senate referred the bill that day to the Committee on the Judiciary, which Senator Pingry served on.³²³ On November 15, 1870, the committee reported favorably on the bill.³²⁴ The next day, the Vermont Senate passed the bill.³²⁵ On November 17, 1870, the Vermont house received Senate Bill 108 from the Vermont Senate and referred the bill to the House Committee on the Judiciary.³²⁶ On November 22, 1870, Representative Lewis H. Bisbee, a lawyer from

320. *Id.*

321. Maine lawyers continued to use the term into the late nineteenth century. *See* Field v. Gellerson, 80 Me. 270, 272 (Me. 1888) (referencing the use of the term "Holmes' Note" by Maine lawyers into the late nineteenth century). In 1891, the Maine legislature deleted the "in a note for more than thirty dollars" from the conditional sales act with "[a]n Act to amend section five of chapter one hundred and eleven of the Revised Statutes, relating to recording of Holmes' notes." *See* Act of Feb. 5, 1891, ch. 11, 1891 Me. Acts 9 (affirming goods sold and delivered with a note shall remain payee's in void unless recorded in a note).

322. *See* Act of Nov. 22, 1870, No. 63, 1870 Vt. Laws 103 ("No lien upon personal property shall be valid unless the lien be in writing and recorded in the town clerk's office within thirty days from time of sale."). William M. Pingry was born in Salisbury, New Hampshire, on May 28, 1806. He was a Baptist, a Republican, and an attorney, serving his fifth term as a state senator in 1870. *See* S. JOURNAL, Biennial Sess., at 343 (Vt. 1870). He was admitted to the bar in Caledonia County, Vermont, in 1832, practiced law in Washington County, Vermont, until 1841, married his first wife, Lucy G. Brown, in Waitsfield, Washington County, Vermont, on May 26, 1836, and married his second wife, Lucy Cornelia Carpenter, in Weathersfield, Windsor County, Vermont, on February 12, 1868. He appeared in the 1870 and 1880 censuses of Weathersfield, Windsor County, Vermont, as a lawyer, aged 64, with wife Lucy in 1870, and as an assistant judge of the county court with wife Lucy C. Pingry and daughter Anna R. Richardsen in 1880. *See* HAMILTON CHILD, GAZETEER OF WASHINGTON COUNTY, VT., 1789-1889, at 84-86 (William Adams ed. 1889); *International Genealogical Index*, FAMILY SEARCH (last visited Dec. 1, 2012); U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF 1870, WEATHERSFIELD, WINDSOR CO., VT., at 589 (1870); U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF 1880, WINDSOR CO., VT., at 321C (1880).

323. *See* S. JOURNAL, Biennial Sess., at 11 (Vt. 1870) (signifying Mr. Pingry as a member of the Judiciary Committee).

324. *See id.* at 194 (Nov. 15: reporting in favor of Senate Bill 108 and ordering it engrossed and read a third time).

325. *See id.* at 210 (Nov. 16: engrossed, read a third time, and passed).

326. *See* H.R. JOURNAL, Biennial Sess., at 309 (Vt. 1870) (Nov. 17: received the bill; bill is read and submitted to Judiciary Committee).

Newport, Orleans County, Vermont, from the House Committee on the Judiciary reported in favor of the passage of Senate Bill 108.³²⁷ The Vermont House passed it in concurrence.³²⁸ On November 22, 1870, both houses of the legislature presented the bill to the Vermont governor for approval, and it was subsequently received.³²⁹

William M. Pingry, attorney since 1832 and sponsor of the Vermont bill, had seven cases before the courts of Vermont prior to the passage of Vermont's conditional sales act that appear in the reports of the Supreme Court of Vermont, revealing the sort of clients he represented. Senator Pingry generally represented lenders and their successors, with the more recent, in 1863 and 1870, involving promissory note assignments.³³⁰ Occasionally he represented the debtor.³³¹ Senator Pingry's law practice enlightened him concerning legal issues of promissory notes, their security, and more recently, their assignment.

327. *See id.* at 359 (listing Mr. Bisbee as the committee member who reported the passage of the Bill). Lewis H. Bisbee appeared on the 1870 census of Newport, Orleans Co., Vt., aged 31, attorney with \$5,000 in realty and \$500 in personalty. *See* U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF NEWPORT, ORLEANS CO., VT., at 229 (1870).

328. *See* H.R. JOURNAL, Biennial Sess., at 359 (Vt. 1870) (Nov. 21: bill is read the third time and passed in concurrence); S. JOURNAL, Biennial Sess., at 266 (Vt. 1870) (receiving word of passage of the bill in the house).

329. *See* S. JOURNAL, Biennial Sess., at 283 (Vt. 1870) (reporting the bill as signed and presented to the governor); H.R. JOURNAL, Biennial Sess., at 396 (Vt. 1870) (reporting the receipt of the governor's signature).

330. *See* Chapman v. Comings, 43 Vt. 16, 19–20 (1870) (losing half of assignee's interest in estate administrators proceeds from estate sale due to recognition by the court of a prior agreement between administrator and debtor to split the difference between amount due and what had been paid on debtor's note); Alford v. Baxter, 36 Vt. 158, 160–64 (1863) (winning for client, payee of promissory note from three sureties, because a new law allowed discharge of one surety without discharging the remainder); *Ex parte* Davis, 18 Vt. 401, 403–05 (1846) (losing lender's plea to prevent flight by keeping debtor in prison based on court's decision that there was insufficient evidence to prolong incarceration under habeas corpus); Lockwood v. Hoskisson, 18 Vt. 37, 38–39 (1843) (winning a book account lawsuit for laborer against employer who agreed to repay promissory note issued by labor to manufacturer for the amount of services but refused to pay after manufacturer mistakenly recovered amount owed from laborer's account).

331. *See* Bingham v. Town of Springfield, 41 Vt. 32, 38–41 (1868) (losing against military deserter's claim for enlistment bounty on grounds that client and Bingham signed a contract to meet the town's enlistment quota by enrolling, not for Bingham to fulfill a distinctly separate contract with the federal government by completing his service requirement); Lovejoy v. Whipple, 18 Vt. 379, 382–84 (1846) (losing on behalf of debtor who signed promissory note on Sunday, contra statute, but did not deliver note on Sunday, thereby rendering note valid and actionable within the law); Onion v. Clark, 18 Vt. 363, 364 (1846) (defeating partition petition for levy on behalf of tenants in common, one of whom filed for bankruptcy under federal law prior to levy).

3. Iowa

The legislative history of Iowa provides strong evidence that the Gilmore scenario is incorrect. In Iowa, the third state to adopt a conditional sales act, Senator William H. Fitch, a Republican farmer from Calhoun County, Iowa, introduced Senate File No. 47, "A bill for an act to protect persons in the possession of personal property[.]" on January 24, 1872.³³² The title indicates this farmer intended to protect good faith purchasers and levying creditors as called for by Gilmore. This farmer, more importantly, reflects the infection in farm states of the New York good faith purchaser rule of *Wait*.³³³ The Iowa Senate referred the bill to the Iowa Senate Committee on the Judiciary.³³⁴ That committee, composed only of lawyers, could not tolerate the bill.³³⁵ A month later on February 22, 1872, Senator James S. Hurley,³³⁶ a Republican lawyer from Wapello County and chair of the Iowa Senate Committee on the Judiciary, reported that the committee had considered the bill, made a substitution for the original bill, and recommended the substitute pass.³³⁷ The Senate Journal did not report the substance of the substitute other than that the title was also amended.³³⁸ The Senate Journal did not specify the new title. Two weeks later, on March 12, 1877, the Iowa Senate passed the substitute bill.³³⁹

332. S. JOURNAL, 14th Sess., at 64 (Iowa 1872).

333. See *supra* notes 1–29 and accompanying text (describing the history behind the New York good faith purchaser rule).

334. See S. JOURNAL, 14th Sess., at 64 (Iowa 1872) (reading the bill two times and then referring it to the Committee on the Judiciary).

335. The Senate Committee on the Judiciary consisted of Senators Hurley, McKean, Claussen, Fairall, Burke, Willett, Stone, Russell, and McCoid. See *id.* at 23. These men were all lawyers. *Infra* note 352. Of these Senators, Burke and McKean voted against the final bill, and Russell did not vote. *Id.*

336. James S. Hurley, a native of Champaign County, Ohio, was born on May 18, 1829. He came to Wapello, Louisa County, Iowa, in 1840. He entered law school in 1853 and was admitted to the bar in 1854. He served four terms as a Republican state senator. He appeared in the 1870 census in Wapello, aged 39, born in Ohio, as a state senator, with \$7,200 in realty and \$1,700 in personalty, along with wife Martha, and on the 1880 census in Wapello, aged 51, born in Ohio, as a lawyer, with wife Martha. See *Senator James Hurley*, IOWA LEGISLATURE (last visited Dec. 1, 2012), available at <http://www.legis.iowa.gov/Legislators/legislator.aspx?Ga=14&PID=5017>; U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF WAPELLO, LOUISA CO., VT., at 229 (1880).

337. See S. JOURNAL, 14th Sess., at 175 (Iowa 1872) (Feb. 22: "Your committee on judiciary to whom was referred S.F. No. 47, [a] bill for [an] act to protect persons in the possession of personal property, beg leave to report that they have had the same under consideration and have instructed me to report the following substitute for the original bill, with the recommendation that the substitute . . . pass. James S. Hurley, *Chairman*. Passed on file.").

338. See *id.* at 300 (referring to the substitute, but not explicitly naming it).

339. See *id.* (Mar. 12: passing with 33 yeas, 7 nays, and 10 absent or not voting).

The bill's new title, and hence what the Iowa Senate Committee on the Judiciary found reprehensible, became obvious in the Iowa House. The Iowa Senate sent the "[s]ubstitute for [Senate File] No. 47, A bill for an act requiring that conditional sales of personal property be executed, acknowledged, and recorded like mortgages of personal property, to be of any validity as against bona fide purchasers, [executions, and attaching creditors]," to the Iowa House on March 13, 1872, for concurrence.³⁴⁰ The senate committee reversed the original bill so it did not protect good faith purchasers, but instead protected the vendor by eliminating the possibility of a good faith purchaser with a filing requirement.³⁴¹ That same day, the Iowa House referred it to the Iowa House Committee on the Judiciary, which was composed only of lawyers.³⁴² On April 8, 1872, Representative Washburn A. Stow, a Democrat attorney from the Committee on the Judiciary,³⁴³ reported back and recommended that it be

S.F. No. 47, A bill for an act to protect persons in the possession of personal property, with report of committee recommending substitute, was taken up and considered. The substitute was adopted. Senator Willett moved to suspend the rule and read the bill a third time. On the question, "Shall the bill pass?" The yeas were—Senators Allen, Beardsley, Bemis, Burke, Campbell, Claussen, Crary, Dague, Fairall, Fitch, Gault, Havens, Howland, Ireland, Kephart, Larrabee, Leavitt, Maxwell, McCoid, McCormack, McCulloch, Miles, Richards, Russell, Shane, Stone, Stuart, Taylor, Vale, West, Willett, Wonn, and Young—33. The nays were—Senators Converse, Dashiell, Dysart, Kinne, McKean, Murray and Smith—7. Absent or not voting—Senators Atkins, Boomer, Chambers, Hurley, Ketcham, Lowry, McIntyre, McNutt, Merrill and Read—10. So the bill passed and the title was amended and agreed to.

Id.

340. See H.R. JOURNAL, 14th Sess., at 412 (Iowa 1872) (announcing the request for concurrence on senate bills and resolutions on March 13th).

341. *Id.* at 625 (indicating necessity for conditional sales of property to be recorded).

342. See *id.* at 426 (Mar. 13: read twice and referred). The Iowa House Committee on the Judiciary consisted solely of lawyers: "Pratt, Green, Williams, Clark of Benton, Heberling, Wood of Clay, Rice, Leahy, Ainsworth, Duncombe, Merrell, Hall, O'Donnell," and Stow. See *id.* at 89, 101 (designating Stow as a committee member); *infra* note 350 (detailing the occupations of representatives of the Iowa House Committee on the Judiciary). Of these, only Duncombe voted against the final bill.

343. Washburn A. Stow, born in Waybridge, Vermont, July 8, 1842, died in Omaha, Nebraska, October 21, 1887, was a Democrat who came to Iowa, was admitted to the bar in 1866, practiced law in Waverly, Bremer County, Iowa, married Eliza M. Tyler on July 5, 1868. He came to Hamburg, Fremont County, Iowa, in 1870, and in 1873, he formed a law partnership with J.M. Hammond and served as Mayor of Hamburg in 1875 and 1878. Stow appeared in the 1880 census of Hamburg, Fremont County, Iowa, as an attorney at law, aged 38, born in Vermont, with wife Eliza M., and moved to Omaha, Nebraska, in 1882, where he practiced law and served as a Nebraska state senator in 1886 and 1887. U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF HAMBURG, FREMONT CO., IOWA, at 131 (1880); see *Representative Washburn Stow*, IOWA LEGISLATURE, <https://www.legis.iowa.gov/Legislators/legislator.aspx?GA=14&PID=5051> (last visited Dec. 1, 2012) (providing a biography of Representative Stow until 1887); see also *Death of Hon. W. A. Stow*, COUNCIL BLUFFS NONPAREIL, 2d ed., Oct. 22, 1887, at 3 (chronicling his life outside of Iowa).

amended in its entirety, except the enacting clause, and with a newspaper publication clause.³⁴⁴ Five days later, on April 13, 1872, the Iowa House considered the recommendation.³⁴⁵ Upon the motion of Representative Frank G. Clark, a Republican attorney from Benton County, Iowa,³⁴⁶ the Iowa House struck the second section of the amendment, the publication clause.³⁴⁷ Upon the motion of Representative Benton J. Hall,³⁴⁸ the Iowa House added the words “obtained in pursuance thereof” after the word “possession.”³⁴⁹ The Iowa House then passed the bill sixty-two to three, with thirty-five absent or excused.³⁵⁰

344. See H.R. JOURNAL, 14th Sess., at 625 (Iowa 1872) (Apr. 8: reporting changes to the bill).

1st. Strike out all after the enacting clause, and enact the following:

“That no sale, contract, or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession, without notice; unless the same is in writing executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages.[”]

Section 2. This act being deemed by the General Assembly of immediate importance, shall take effect and be in force from and after its publication in the Daily State Register and the Daily State Leader, newspapers published at Des Moines, Iowa.

Id.

345. See *id.* at 722 (Apr. 13: “A bill for an act requiring the conditional sales of personal property, &c., with report of committee recommending a substitute, was taken up and considered.”).

346. See *Representative Frank Clark*, IOWA LEGISLATURE (last visited Dec. 1, 2012), available at <https://www.legis.iowa.gov/Legislators/legislator.aspx?GA=14&PID=4991> (providing a biography of Representative Clark).

347. See H.R. JOURNAL, 14th Sess., at 722 (Iowa 1872) (Apr. 13: “Mr. Hall moved to amend as follows: Insert after the word ‘possession’ ‘obtained in pursuance thereof.’ The amendment was adopted. The substitute was adopted.”).

348. See *Representative Benton Hall*, IOWA LEGISLATURE (last visited Dec. 1, 2012), available at <https://www.legis.iowa.gov/Legislators/legislator.aspx?GA=14&PID=4349> (providing a biography of Representative Hall).

349. See H.R. JOURNAL, 14th Sess., at 722 (Iowa 1872) (Apr. 13: “Mr. Hall moved to amend as follows: Insert after the word ‘possession’ ‘obtained in pursuance thereof.’ The amendment was adopted. The substitute was adopted.”).

350. See *id.* (Apr. 13: “Mr. Hall moved that the rule be suspended, that the bill be considered engrossed, and read a third time now. The motion prevailed, and the bill was read a third time.”). The votes were as follows: the sixty-two yeas: Lucian L. Ainsworth (L.L. Arnsworth) of West Union, lawyer; Amos R. (A.R.) Appleton of Sioux City, mill owner; John Beatty of Jasper County, farmer; John (J.) Beresheim of Pottawattamie County, merchant; Knut Bergh (Norwegian) of Winneshiek County, professor; William W. Blackman (W.W. Buckman) of Mitchell County, physician, druggist, and surgeon; Fletcher Blake of Buena Vista County, manufacturer; Isaac Blakely of Davis County, farmer; Peter Bonewitz of Jones County, farmer; Caleb Booth of Dubuque, Sec. & Treas. R.R. Co. (banker); Edward Campbell of Jefferson County, farmer; John Carver of Wapello County, farmer; John Christoph (Bavarian) of Dubuque County, farmer; Frank G. (F.G.) Clark of Benton County, lawyer; John C. Clarke of Iowa County, farmer; James Crawford of Wayne County, farmer; Warren Danforth of Winneshiek County, farmer; Frances (Franklin) Davis of Adams County, lawyer; Elmus Day of Muscatine County, farmer; Henry Dayton of Allamakee County, lawyer; Ira E. Draper of Jasper County, merchant (banker); Samuel (S.B.) Dumont of Butler County, farmer; Francis A.

On April 16, 1872, the Iowa Senate received the Iowa House's substitute bill for concurrence.³⁵¹ That same day the Iowa Senate voted

Duncan of Louisa County, farmer; David T. Durham of Marion County, farmer; Lauren F. (L.F.) Ellsworth of Mahaska County, minister; Charles J.A. (C.J.A.) Ericson of Boone County, retired merchant (banker); William C. Evans of Muscatine County, farmer; Robert Flenniken of Clayton County, millwright; Joseph H. Freeman of Scott County, farmer; Marshall (M.) Goodspeed of Washington County, nursery man; John W. Green of Davenport, attorney at law; Benton J. (B.J.) Hall of Burlington, attorney at law; John M. Hanson of Henry County, farmer; George C. Heberling of Jackson County, lawyer; William Hopkirk of Jefferson County, farmer; John P. Irish of Iowa City, editor; Andrew Johnston of Ringgold County, farmer; William Litzenberg of Linn County, wheelwright; David (D.J.) McCoy of Lucas County, farmer; Nathaniel A. Merrell of Clinton County, attorney at law; Claudius B. Miller of Appanoose County, farmer; Joshua G. (J.G.) Newbold of Henry County, farmer; Frederick O'Donnell (Fred Odonnell) of Dubuque County, lawyer; Charles G. Perkins of Monona County, farmer; Henry O. Pratt of Charles City, lawyer; William Reed of Cedar County, farmer; James Rice of Clarke County, lawyer; George Rule of Clinton County, miller; Andrew (T.) Sandry of Allamakee County, farmer; Conrad Schweer of Lee County, farmer; James A. Skillen (Skiller) of Bremer County, farmer; Eli M. (E. Mat.) Stedman of Benton County, Ret. Dry Goods & Gro.; Washburn Stow (Walter A. Ston) of Fremont County, lawyer; Robert Struthers of Pocahontas County, farmer; John Tasker of Jones County, farmer; Fred Teale of Decatur County, nursery man; John O. Tufts of Cedar County, farmer; James M. Tuttle of Polk County, pork packer; Hugo G. Van Meter of Dallas County, proprietor grist mill; James L. Williams of Marshall County, lawyer (banker); Henry B. Wood of Clay County, lawyer; John R. Wright of Van Buren County, farmer; the three nays: Cicero (C.) Close of Blackhawk County, farmer; William McAllister (W.L. Mcalister) of Mahaska County, M.D.; Appler R. Wright of Mills County, farmer; the thirty-five excused: Webster (Wm) Ballinger of Lee County, lawyer; James Beauty of Clarence, Cedar County, farmer; Lewis O. Bliss of Hardin County, merchant; William Butler of Page County, stock broker; Samuel T. (S.T.) Caldwell of Wapello County, dry goods merchant ret.; Phineas Cadwell of Harrison County, farmer; Leander E. (L.E.) Cardell of Poweshiek County, farmer; David Davisson of Madison County, physician; John F. (J.F.) Duncombe of Webster County, lawyer; John H. Gear of Burlington, Des Moines County, wholesale grocer; Darius Hanan (Hamrah) of Chickasaw County, lawyer; Sumner B. Hewitt (or Hewett) of Wright County, farmer; James Hilton of Monroe County, farmer; Joseph (Joseph M.) Hovey of Buchanan County, Justice of the Peace; John A. Kasson of Des Moines, Polk County, lawyer; Benjamin F. Keables, of Marion County, physician; Michael A. Leahy of Pocahontas County, farmer; John (John M.) Lee of Warren County, carpenter; George M. Maxwell of Story County, variety store; Joseph McClure of Linn County, farmer; Oliver Mills of Cass County, county banker; John Morrison, Jr. of Keokuk County, farmer; George Paul of Johnson County, farmer; Cornelius T. Peet of Delaware County, farmer; Louis Reuther of Clayton County, laborer; Mathias J. Rohlfs of Scott County, farmer; David Secor of Winnebago County, farmer; Erastus M. (E.M.) Stewart of Lee County, farmer; James T. Van Deventer of Clinton County, retired lawyer; George B. Van Saun (George B. Van Faun) of Black Hawk County, grain dealer (banker); Samuel Whitten of Van Buren County, physician; Charles H. Wilson of Washington County, hardware merchant; Mr. Speaker James Wilson of Tama County, farmer; John F. Wilson of Keokuk County, farmer; William K. Wood of Story County, farmer. Legislator's occupations came from Iowa's legislative website. See IOWA LEGISLATURE, <https://www.legis.iowa.gov/Legislators/historicalinfo.aspx> (last visited Dec. 1, 2012) (select "House"; then search "1872").

351. S. JOURNAL, 14th Sess., at 575 (Iowa 1872).

Also that the House has passed Substitute for S.F. No. 47, [a] bill for an act requiring that conditional sales of personal property be executed, acknowledged[,] and recorded like mortgages of personal property to be of any validity against bona fide purchasers, executions[,] and attaching creditors, with the following [amendments], in which the concurrence of the

in favor of the concurrence.³⁵² On April 17, 1872, Representative Knut Bergh, an agricultural professor³⁵³ from the Committee on Enrolled Bills, reported the printer correctly enrolled the bill.³⁵⁴ On April 18, 1872, Representative Bergh reported in the house, and Senator Alonzo Converse in the senate, that they presented the bill to the Iowa Governor for his

Senate is asked: Strike out all of the enacting claim, and insert the following:

Sec. 1. That no sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession, obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendee or lessee, acknowledged[,] and [recorded] the same as chattel mortgages.

Id.

352. *See id.* at 585 (Apr. 16: "Substitute for S.F. No. 47, [a] bill for an act requiring that conditional sales of personal property be executed, acknowledged and recorded like mortgages of personal property to be of any validity as against bona fide purchasers, executions and attaching creditors, with the House amendments was taken up and considered. On the question: 'Shall the Senate concur in the House amendments?' . . . [there were thirty yeas, eleven nays, and nine not voting s]o the Senate concurred in the House amendments."). The votes were as follows: the thirty yeas: Charles Atkins of Monona County, dry goods merchant; Albert Boomer of Delaware County, physician; Hans R. Claussen of Scott County, attorney at law; Joseph Dysart of Tama County, farmer; Samuel H. Fairall of Johnson County, lawyer; William H. Fitch of Calhoun County, farmer; Edward J. Gault of Appanoose County, farmer; Joseph W. Havens of Keokuk County, editor; Elisha A. Howland of Franklin County, real estate agent; James Hurley of Louisa County, lawyer; Alexander B. Ireland of Clinton County, physician; Samuel H. Kinne of Allamakee County, attorney; William Larrabee of Fayette County, merchant miller; John H. Leavitt of Black Hawk County, banker; Robert Lowry of Scott County, farmer; George W. Maxwell of Story County, variety store; Moses A. McCoid of Jefferson County, lawyer; John L. McCormack of Marion County, editor; E.S. McCulloch of Lee County, farmer; Joseph H. Merrill of Wapello County, wholesale grocer; Benjamin F. Murray of Madison County, lawyer; Martin Read of Wayne County, lawyer; John Shane of Benton County, lawyer; Elisha T. Smith of Taylor County, banker; Lewis W. Stuart of Jackson County, miller; R. Howe Taylor of Marshall County, retail druggist; Jacob G. Vale of Van Buren County, lawyer; John P. West of Henry County, farmer; George R. Willett of Winneshiek County, lawyer; and James A. Young of Mahaska County, county treasurer; the eleven nays: Charles Beardsley of Des Moines County, editor; John E. Burke of Bremer County, lawyer; Frank T. Campbell of Jasper County, book and store merchant; John C. Chambers of Cedar County, store keeper; Alonzo Converse of Butler County, farmer and lawyer; Oliver W. Crary of Clayton County, farmer; John McKean of Jones County, lawyer; Samuel McNutt of Muscatine County, farmer; Joseph D. Miles of Washington County, physician; Benjamin B. Richards of Dubuque County, real estate agent; and Horatio A. Wonn of Davis County, farmer; the nine absent or not voting: Benjamin Allen of Polk County, banker; George W. Bemis of Benton County, dry goods merchant; Robert A. Dague of Clarke County, editor; Mark A. Dashiell of Warren County, physician; Ezekiel B. Kephart of Linn County, president of Wesleyan College; James P. Ketcham of Iowa County, lumber dealer; J.S. McInryre; John J. Russell of Greene County, lawyer; and John Y. Stone of Mills County, lawyer. Legislators' biographical information came from Iowa's legislative website. IOWA LEGISLATURE, <https://www.legis.iowa.gov/Legislators/historicalInfo.aspx> (last visited Dec. 1, 2012) (select "Senate"; then search "1872").

353. IOWA LEGISLATURE, <https://www.legis.iowa.gov/Legislators/historicalInfo.aspx> (last visited Dec. 1, 2012) (select "House"; search "1872").

354. *See* H.R. Journal, 14th Sess., at 770–71 (Iowa 1872) (Apr. 17).

approval.³⁵⁵

The two lawyers sponsoring the substitute bills in the senate and house had experience with lawsuits involving debts. James S. Hurley, an attorney since 1854³⁵⁶ and sponsor of the Iowa Senate's substitute bill, had eight cases; Washburn A. Stow, an attorney since 1866³⁵⁷ and sponsor of the Iowa House's substitute bill, had three cases, all before the courts of Iowa prior to the passage of Iowa's conditional sales act, that appear in the reports of the Supreme Court of Iowa, revealing the sort of clients they represented. Senator Hurley possessed experience in land transactions involving good faith purchasers battling secret oral mortgages and subsequent mortgage releases.³⁵⁸ Representative Stow represented a foreclosing mortgagee, a mechanic enforcing a mechanic's lien, and a purchaser of cattle against an agister's lien.³⁵⁹ These actions would suggest some familiarity with the legal problems of creditors in claiming debts.

355. *See id.* at 786–87 (reporting Senate File No. 47 had been submitted to the Governor for approval); S. JOURNAL, 14th Sess., at 626–27 (Iowa 1872) (reporting similarly).

356. *See supra*, note 352 (noting Senator Hurley was admitted to the bar in 1854).

357. *See supra*, note 350 (noting Senator Stow was admitted to the bar in 1866).

358. Senator Hurley was involved in the following cases: *Arthur v. Thomas*, 35 Iowa 591, 591–92 (1872) (asserting a jury verdict based on conflicting evidence will not be disturbed on appeal); *Barnes v. McDaniels*, 35 Iowa 381, 381–82 (1872) (explaining the grant of a new trial was not error when plaintiff's denial was given to the clerk, but not filed); *Cowins v. Tool*, 36 Iowa 82, 84–87 (1872) (finding no evidence to support a charge of fraud in the administration of an estate); *Marshall v. Sloan*, 35 Iowa 445, 446–48 (1872) (holding mandamus is not available against school directors when there is an adequate remedy on appeal); *Thompson v. Linn*, 35 Iowa 361, 363 (1872) (holding mandamus will not issue to compel a school district to sign a contract for employment of an individual the district does not wish to employ); *Cowin v. Toole*, 31 Iowa 513, 515 (1871) (noting an action for fraud is not barred by the statute of limitations when the fraud was discovered within five years of the commencement of the action); *Key v. McCleary*, 25 Iowa 191, 191–93 (1868) (holding a conveyance purporting to be a deed may be shown by parol evidence to be a mortgage); *McClure v. Burris*, 16 Iowa 591, 593 (1864) (stating that where two purchasers are found by courts to hold title to the same land, the title will be quieted in the name of the second purchaser if the first did nothing to provide notice of his interest); *State v. Fleming*, 13 Iowa 443, 443–44 (1862) (holding if the right to appeal is not exercised within one year of a final judgment, it is waived).

359. Representative Stow was involved with the following cases: *Drain v. Doggett, Bassett & Hills*, 41 Iowa 682, 682–84 (1875) (representing a lender who had taken a security in a third party's promissory note; issue was acceptance of an insolvent insurance company's draft payment on the note); *McCoy v. Hock*, 37 Iowa 436, 436–37 (1873) (announcing that an agister may retain possession of cattle until he is paid for keeping them); *Burdick v. Moon*, 24 Iowa 418, 419 (1868) (reversing a dismissal of Stow's client's action to enforce mechanic's lien for work and labor performed on a wife's house under contract with husband as wife's agent with her consent); *Moores v. Ellsworth*, 22 Iowa 299, 300 (1867) (commenting that Stow's client's action to foreclose on a mortgage to pay two promissory notes against the executors on an estate was not waived by proving the claim in probate court).

Of those senators voting, 73% favored the bill.³⁶⁰ Of the various occupational groups, 100% of manufacturers (millers) favored the bill, 80% of commercial merchants favored the bill, while 72% of townspeople, and 67% of farmers favored the bill.³⁶¹ Of the occupational groups with significant representation (i.e., over two), the largest percentages in favor of the bill came from bankers (100%), millers (100%), and lawyers (77%).³⁶² This suggests those behind the conditional sales acts were those who provided credit to farmers, namely bankers, merchant investors, and their lawyers. They introduced the bill and shepherded it to passage.

4. Minnesota

The Minnesota effort to pass a conditional sales act reveals private banker support. Representative Simeon Potter Child,³⁶³ a Republican from Blue Earth, Faribault County, Minnesota, introduced the fourth conditional sales act on February 7, 1873, entitled “[a] bill to provide for filing certain notes, contracts or other evidences of indebtedness in the office of town clerks.”³⁶⁴ Mr. Childs “engaged in private banking, real estate[,] . . . collections[, and] also opened a brick yard and manufactured brick for a number of years.”³⁶⁵ The Minnesota House referred the bill to the Committee on the Judiciary.³⁶⁶ On February 15, 1873, Representative George Potter Wilson, a lawyer from Winona, Winona County, Minnesota, of the Committee on the Judiciary reported the committee’s recommendation to pass the bill with the Minnesota House adopting its report.³⁶⁷ On February 25, 1873, the Minnesota House passed it, with

360. See *supra* note 352 (listing information about the various senators).

361. *Id.*

362. *Id.*

363. See U.S. NAT’L ARCHIVES & RECORDS ADMIN., CENSUS OF BLUE EARTH CITY, FARIBAULT CNTY., MINN., at 1205 (1870) (listing census information for Simeon Child); U.S. NAT’L ARCHIVES & RECORDS ADMIN., CENSUS OF BLUE EARTH CITY, FARIBAULT CNTY., MINN., at 96A (1880) (listing census information for Simeon Child); *Minnesota Legislators Past and Present*, MINN. LEGIS. REFERENCE LIBR., <http://www.leg.state.mn.us/legdb/fulldetail.aspx?ID=11635> (citing C.L. HALL, BIOGRAPHICAL SKETCHES OF THE OFFICERS OF THE STATE GOVERNMENT OF MINNESOTA AND THE 19TH MINNESOTA STATE LEGISLATURE 32 (1877)) (last visited Dec. 1, 2012) (noting that Child was a “staunch Republican”).

364. See H.R. JOURNAL, 15th Sess., at 172 (Minn. 1873) (showing that H.F. No. 212 was read for the first time and referred to committee).

365. See JAMES ERWIN CHILD, CHILD’S HISTORY OF WASECA COUNTY, MINNESOTA 784 (1905) (listing the various occupations of Representative Child).

366. See *id.* at 172 (Minn. 1873) (referring the bill).

367. See *id.* at 218 (noting the house adopted the committee’s report recommending the bill should pass). Biographical information for Representative Wilson appears on Minnesota’s Legislative Reference Library website. *Minnesota Legislators Past and Present*, MINN. LEGIS. REFERENCE LIBR.,

fifty-seven yeas and twenty-three nays.³⁶⁸ The Minnesota Senate adopted the bill on March 5, 1873.³⁶⁹ On March 6, 1873, the Minnesota House enrolled the bill.³⁷⁰

The private banker's concern was more acute than a lawyer's. A private banker would have his own money at risk. Banks made profits discounting promissory notes by making discounted loans with promissory notes as security.³⁷¹ Courts held the conditional sale note with the title retention negotiable; so the assignee could successfully enforce the

<http://www.leg.state.mn.us/legdb/search.aspx?search=sessionsearch> (last visited Dec. 1, 2012) (select "15th, 1873"; select "House") (listing biographical information for Representative George Wilson).

368. See H.R. JOURNAL, 15th Sess., at 354 (Minn. 1873) (listing the house members who voted for and against the bill). The votes were as follows: the fifty-seven yeas came from Adams, farmer; Anderson, county auditor; Armstrong, farmer; Baasen, lawyer; Baldwin, farmer; Beatty, farmer; Benz, liquor dealer; Brower, county auditor; Campbell, farmer; Carpenter, banker; Castle, wholesaler; Child H.A., lawyer; Child S.P., private banker; Clarke, farmer; Cox, lawyer; Devereaux, farmer; Dunham, lumbering; Durant, steamboat pilot; Du Toit, printer; Fletcher, mercantile business; Fuller, farmer; Gesner, former broker; Greenleaf, mercantile business; Hanson, farmer; Hobbs, real estate; Huginin, merchant; Jenks, railroad agent; Johnson, T., farmer; Knappen, lawyer; Lindsay, mercantile business; McCann, lumbering; Meacham, farmer; Mealey, mercantile business; Miller H.H., printer; Miller S., railroad land agent; Osmundson, farmer; Pfaff, milling; Pirtz, farmer; Rice, farmer; Rockwell, farmer; Rogers J.N., lawyer; Rosendahl, farmer; Ryder, lumbering; Saufferer, farmer; Schnell, merchant; Sencerbox, former banker; Stowe, farmer; Swanstrom, lumbering; Tirrell, farmer; Thompson A., farmer; Trisler, farmer; Van Dyke, lawyer; Wilkins, farmer; Williston, lawyer; Wilson, lawyer; Wing, farmer; and the Speaker (Hall), merchant. The twenty-three nays came from Adley, hotel keeper; Buchmann, builder; Becker, farmer; Benson, farmer; Berry, farmer; Brandt, farmer; Charles, farmer; Colquhoun, farmer; Corey, farmer; Daniel, dairyman; Finhart, farmer; Hopkins, lumbering; Howe, civil engineer; Lewis, grain trade; McCracken, farmer; Neville, mercantile business; Norsving, farmer; Peterson, Baptist minister; Seager, lawyer; Stimson, farmer; Tibbets, United Brethren minister; Westcott, farmer; and Wheeler, farmer. Finally, the twenty-six not listed as voting were Ameson, farmer; Barto, lawyer; Beard, farmer; Blake, civil engineer; Brainard, dairy farmer; Chadderdon, lawyer; Commerford, editor; Cooper, grain merchant; Demeules, merchant; Dilley, clerk; Felton, merchant; Ficker, farmer; Flom, farmer; Frink, farmer; Gaskill, physician; Hawks, lumberman; Kellet, merchant; Kelley, farmer; Krebs, teacher; Mealey, merchant; Reed, farmer; Rich, lumberman; Rieland, farmer; Rodgers, blacksmith; Swain, farmer; and Thompson, J., farmer. Biographical information for the representatives appears on Minnesota's Legislative Reference Library website. *Minnesota Legislators Past and Present*, MINN. LEGIS. REFERENCE LIBR., <http://www.leg.state.mn.us/legdb/search.aspx?search=sessionsearch> (last visited Dec. 1, 2012) (select "15th, 1873"; select "House").

369. See H.R. JOURNAL, 15th Sess., at 493 (Minn. 1873) (informing the Speaker of the House that the Minnesota Senate had passed House File No. 212).

370. See *id.* at 593 (confirming H.F. No. 212 was correctly enrolled).

371. Cf. 1876 Minn. Laws, ch. 92 § 1 (amending Minnesota's banking statute to include the purchase of notes); Banks and Banking, 1866 Minn. Laws, ch. 33 § 13 (authorizing the discounting of debt instruments to carry on banking activities in Minnesota); see also National Banking Act, ch. 106, 13 U.S. Stat. 101 (1864) (authorizing the discounting of promissory notes and other evidences of debt in order to carry out the business of banking); *Farmers & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 206 (1876) (noting banks were not authorized to purchase until 1876).

note.³⁷² A challenge to the enforceability of the conditional sale notes, such as eliminating the priority rule in favor of the vendor's successor, often a private banker, could have seriously curtailed this aspect of the business by endangering the collateral for discounted loans based on conditional sales notes.

The Minnesota legislative website provides the occupations of past members.³⁷³ Because the Minnesota House Journal provided the names of those voting for and against the bill, the occupations of those in favor and against readily appear. Of those voting, 71% favored the bill.³⁷⁴ No occupation was recognizable as a manufacturer or householder. Of the other groups, 100% of transporters favored the bill, as did 93% of retail townspeople, 83% of commercial merchants, 53% of farmers, and 44% of non-retail townspeople.³⁷⁵ Of the occupational groups with significant members (i.e., over four), the largest favorable percentages came from the bankers (100%), merchants (100%), lawyers (89%), mercantile businessmen (80%), and lumber dealers (75%).³⁷⁶ Obviously, those who provided credit to the farmers, namely bankers, merchant investors, and their lawyers, advocated the conditional sales acts. Like the Iowa legislators, they introduced the bill and shepherded it to passage.

5. Wisconsin

In Wisconsin, the fifth state to adopt a conditional sales act, legislators introduced the "bill to prevent frauds in the sale of personal property" in

372. See, e.g., *Collins v. Bradbury*, 64 Me. 37, 38–39 (1875) (holding a note for a colt that was payable for a specific sum of money is negotiable); see also *Arnold v. Rock River Valley Union R.R. Co.*, 5 Duer 207, 214–15 (N.Y. Super. 1856) (holding a note is not rendered non-negotiable by lack of a stamp for a mortgage); U.C.C. § 3-106(b) (2003) (stating a reference to collateral does not render an agreement conditional). But see *Third Nat'l Bank of Syracuse v. Armstrong*, 25 Minn. 530, 533 (1879) (holding a note non-negotiable when it was issued for a conditional sale).

373. See *Minnesota Legislators Past and Present*, MINN. LEGIS. REFERENCE LIBR., <http://www.leg.state.mn.us/legdb/search.aspx?search=sessionsearch> (last visited Dec. 1, 2012) (select "15th, 1873"; select "House") (listing biographical information of members of the house). However, there is some occupational ambiguity. Commercial merchants include those in the "mercantile business," while townspeople were labeled "merchants."

374. See H.R. JOURNAL, 15th Sess., at 354 (Minn. 1873) (listing the legislators who voted for and against the bill).

375. See *id.* (providing voting information); *Minnesota Legislators Past and Present*, MINN. LEGIS. REFERENCE LIBR., <http://www.leg.state.mn.us/legdb/search.aspx?search=sessionsearch> (last visited Dec. 1, 2012) (select "15th, 1873"; select "House") (listing occupations).

376. See H.R. JOURNAL, 15th Sess., at 354 (Minn. 1873) (listing those legislators voting for and against the bill); *Minnesota Legislators Past and Present*, MINN. LEGIS. REFERENCE LIBR., <http://www.leg.state.mn.us/legdb/search.aspx?search=sessionsearch> (last visited Dec. 1, 2012) (select "15th, 1873"; select "House") (listing occupations).

the Wisconsin House.³⁷⁷ On February 24, 1873, the Wisconsin House sent the bill to the Wisconsin Senate for concurrence.³⁷⁸ The Wisconsin Senate referred it to the Judiciary Committee.³⁷⁹ The following day, the Judiciary Committee reported the bill back to the senate with amendment and recommended the bill pass with the amendments.³⁸⁰ On February 26, 1873, the Wisconsin Senate met in a committee of the whole and reported that the Wisconsin Senate had agreed to the bill as amended.³⁸¹ On March 3, 1873, the Wisconsin House informed the Wisconsin Senate they had concurred with the senate amendments to the bill.³⁸² On March 10, 1873, the President of the Wisconsin Senate signed the bill, the Speaker of the Wisconsin House having previously signed it.³⁸³

6. Nebraska

Although Nebraska was a second wave state, its experience is even more telling against the Gilmorian position. That experience clearly rejected the approach of providing protection to creditors and the good faith purchasers. The good faith purchaser deals with the fraudulent vendee when the vendee commits the fraud, not the vendor.³⁸⁴ The Nebraska House considered four bills relating to the subject of conditional sales. The first and most virulent one, “an act to declare void conditional sales of personal property as against innocent purchasers and from creditors of the vendee,” introduced by Representative W.C. Griffith, a stock dealer from Lincoln, Lancaster County, Nebraska,³⁸⁵ did not get beyond the Committee of the Judiciary’s recommendation that the bill not

377. See S. JOURNAL, 26th Sess., at 284 (Wis. 1873) (introducing a conditional sales bill that passed in the house).

378. See *id.* at 284 (asking for a concurrence from the senate in No. 204, A.).

379. See *id.* at 287 (referring No. 204, A. to the judiciary committee).

380. See *id.* at 308–09 (reporting No. 204, A. back to the senate with recommended amendments).

381. See *id.* at 320, 339 (indicating the senate’s agreement to No. 204, A.).

382. See *id.* at 383 (indicating the assembly concurred in the senate’s amendments to No. 204, A.).

383. See *id.* at 446, 448 (recording the presentation of the bill to the President of the senate for his signature).

384. See *e.g.*, *Coggswell v. Griffith*, 36 N.W. 538, 543 (Neb. 1888) (holding a bona fide purchaser must deal with a fraudulent vendee when the vendee commits the fraud).

385. See U.S. NAT’L ARCHIVES & RECORDS ADMIN., Census of Lincoln, Lancaster Cnty., Neb., at 24 (1870) (listing 1870 census information for Representative Griffith); U.S. NAT’L ARCHIVES & RECORDS ADMIN., Census of Lincoln, Lancaster Cnty., Neb., at 22 (1880) (listing 1880 census information for Representative Griffith).

pass.³⁸⁶ No doubt Representative Griffith, as a purchaser of cattle, desired to terminate any security interest from a conditional sale to his seller.³⁸⁷ Again, an American legislative body refused to protect good faith purchasers as called for by Gilmore. Instead, the legislature turned to the destruction of good faith purchaser status. The other three bills dealt with filing and recording certain promissory notes, conditional transfers of personalty, and transfers of personalty.³⁸⁸ The house passed all three of these late in the session.³⁸⁹ The senate read them twice and referred them to the general file where they languished.³⁹⁰

Two bills from the Nebraska Senate relating to the subject of conditional sales, however, did become statutes,³⁹¹ providing the reason why the Nebraska House recording bills stalled. Senator Peter Wilbert Birkhauser, a miller born in Prussia, residing in Salem, Nebraska,³⁹² introduced the first bill, “[A]n act to prevent fraudulent transfer of

386. See H.R. JOURNAL, 14th Sess., at 130 (Neb. 1877) (introducing HR No. 12 for the first reading); *id.* at 142 (Neb. 1877) (referring HR No. 12 to the judiciary committee); *id.* at 183 (reporting the judiciary committee recommended the bill not pass) (the author's notes on file indicate that the author viewed the source, but the *St. Mary's Law Journal* has been unable to obtain a copy of the source from the Nebraska State Historical Society due to its advanced age and fragile state).

387. *But see Coggswell*, 23 Neb. 334 (holding a bona fide purchaser must deal with a fraudulent vendee when the vendee commits the fraud).

388. See H.R. JOURNAL, 14th Sess., at 167 (Neb. 1877) (Jan. 11: H.R. 67 Mr. Thos. A. Healey introducing a bill which would require promissory notes be recorded in certain cases) (the author's notes on file indicate that the author viewed the source, but the *St. Mary's Law Journal* has been unable to obtain a copy of the source from the Nebraska State Historical Society due to its advanced age and fragile state); *id.* at 235 (describing H.R. 123 as a bill for which would provide for filing and recording conditional transfers of personal property; and H.R. 124 as a bill which would provide for filing and recording of a transfer of personal property) (the author's notes on file indicate that the author viewed the source, but the *St. Mary's Law Journal* has been unable to obtain a copy of the source due to its advanced age and fragile state).

389. See *id.* at 561–62, 596 (recording passage) (the author's notes on file indicate that the author viewed the source, but the *St. Mary's Law Journal* has been unable to obtain a copy of the source from the Nebraska State Historical Society due to its advanced age and fragile state); see 1877 Neb. Acts (listing session laws but omitting names of voting members of the legislature).

390. See S. JOURNAL, 14th Reg. Sess., at 664, 689, 691–92, 704, 707 (Neb. 1877) (recording legislative action on H.R. 67, 123, and 124) (the author's notes on file indicate that the author viewed the source, but the *St. Mary's Law Journal* has been unable to obtain a copy of the source from the Nebraska State Historical Society due to its advanced age and fragile state).

391. See 1877 Neb. Acts 5 (making selling, transferring, disposing, or removing out of the county mortgaged personalty without the consent of the mortgagee with intent to deprive the mortgagee a felony with a prison term not exceeding 10 years; approved Feb. 13, 1877); *id.* 170 (approving the conditional sales act February 19, 1877).

392. See U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF SALEM, RICHARDSON CNTY., Neb., at 112 (1870) (listing Peter W. Birkhauser in the 1870 census).

personal property,” a recordation bill on January 9, 1877.³⁹³ Lawyers did not draft the bill, and the Senate’s Committee on the Judiciary—chaired by Senator Sam M. Chapman,³⁹⁴ a lawyer of Plattsmouth, Nebraska—recommended its indefinite postponement.³⁹⁵ Nine days later, the senate as a whole, recognizing the importance of the bill, ended the postponement and recommitted the bill to the Committee on the Judiciary with instructions to perfect the bill.³⁹⁶ On February 9, 1877, after lawyers redrafted the bill, Senator Chapman provided a substitute bill as an amendment with the recommendation for passage.³⁹⁷ On February 9, 1877, the senate passed the bill twenty-five to zero with five abstentions.³⁹⁸ The Nebraska House then passed the recordation bill, which barred the existence of a good faith purchaser, on February 15, 1877, with a seventy-four to three vote and seven abstentions.³⁹⁹ On February 15, 1877, after the Joint Committee on Engrossed and Enrolled Bills reported the bill examined, the President of the senate signed the bill, and the senate sent the bill to the Governor for his signature.⁴⁰⁰

The Nebraska Senate’s second bill reveals this heinous offense: a vendee could fraudulently transfer property subject to a conditional sale to the detriment of the vendor.⁴⁰¹ Those who lent secured conditional sales notes to farmers were injured by this dastardly act and acted to end this travesty. On January 16, 1877, Senator Edmund C. Carns, a grain dealer of Seward County, Nebraska,⁴⁰² introduced a “bill for an act for the

393. See S. JOURNAL, 14th Reg. Sess., at 148 (Neb. 1877) (the author’s notes on file indicate that the author viewed the source, but the *St. Mary’s Law Journal* has been unable to obtain a copy of the source from the Nebraska State Historical Society due to its advanced age and fragile state).

394. See U.S. NAT’L ARCHIVES & RECORDS ADMIN., CENSUS OF PLATTSMOUTH, CASS CNTY., NEB., at 92 (1870) (describing Samuel M. Chapman, aged 29, attorney at law, with \$500 realty and \$2,000 in personalty).

395. See S. JOURNAL, 14th Reg. Sess., at 150, 171, 202–03 (Neb. 1877) (recording the bill as read, referred to the judiciary committee, and the judiciary committee reporting the recordation bill be indefinitely postponed).

396. See *id.* at 270, 273 (recommitting the bill).

397. See *id.* at 385 (providing Senator Chapman’s report on the bill).

398. See *id.* at 497 (recommending the bill be passed); *id.* at 558–59 (reading the bill and voting on it).

399. See H.R. JOURNAL, 14th Reg. Sess., at 766 (Neb. 1877) (voting to pass the bill).

400. See S. JOURNAL, 14th Reg. Sess., at 849 (Neb. 1877) (sending the bill to the governor for his signature).

401. The governor approved the criminal statute on February 13, 1877. See 1877 Neb. Acts 5 (codifying the criminal statute).

402. See U.S. NAT’L ARCHIVES & RECORDS ADMIN., CENSUS OF SEWARD, SEWARD CNTY., NEB., at 445 (1880) (listing E.C. Carns, age 36, as a grain dealer); see also WILLIAM W. COX, HISTORY OF SEWARD COUNTY, NEBRASKA 248 (1888) (stating Edmund C. Carns was born in Pennsylvania in

punishment of persons for the sale, transfer, disposal or removal of personal property under mortgage.”⁴⁰³ This bill made it a felony to remove personalty from the county by certain specified transactions without the consent of the mortgagee and with the intent to deprive a mortgagee of his or her property; the crime was punishable by up to ten years in prison.⁴⁰⁴ Nebraska already had a chattel mortgage statute,⁴⁰⁵ so the only mortgage on personalty capable of fraudulent transfer (a secret lien) was the conditional sale or an unrecorded chattel mortgage.⁴⁰⁶ It became obvious that Senator Carn’s concern dealt with the conditional sale when the Senate Committee on the Judiciary amended the bill to give it the same title as the recordation bill for conditional sales.⁴⁰⁷ On February 6, 1877, the senate passed the criminal bill twenty-four to one with five abstentions.⁴⁰⁸ Subsequently, the house passed the criminal bill on February 12, 1877, with a seventy-four to nothing vote and ten abstentions.⁴⁰⁹ Instead of protecting good faith purchasers, the legislators protected the vendor from the defalcating vendee.

7. Missouri

Missouri was also a second wave state, but its result confirms the Nebraska experience. The heinous act was the vendee’s commission of fraud. The Missouri House considered and passed House Bill 149 (the Missouri Conditional Sales Act), which was entitled, “[An act] to amend section ten (10) of chapter one hundred and seven (107) of the General Statutes of Missouri.”⁴¹⁰ Meanwhile, the Missouri Senate considered “[a]n act to prevent the mortgagor or grantor in trust deeds of personal property from the fraudulent use or disposition of such property, and to

1844, served as a soldier in Minnesota, eventually settled in Seward in 1873, served as a Nebraska state senator, and was elected Lieutenant Governor in 1878 and 1880.

403. See S. JOURNAL, 14th Reg. Sess., at 192 (Neb. 1877) (introducing the bill).

404. See *id.* (criminalizing the action).

405. See E. ESTABROOK, THE REVISED STATUTES OF THE TERRITORY OF NEBRASKA 294–95 (1866) (providing the language of the chattel mortgage statute in section 73).

406. See *id.* (failing to address secret liens stemming from conditional sales or unrecorded chattel mortgages).

407. Cf. S. JOURNAL, 14th Reg. Sess., at 340 (Neb. 1877) (amending the bill).

408. See *id.* at 453 (documenting the vote).

409. See H.R. JOURNAL, 14th Reg. Sess., at 398, 421, 432, 540, 599, 604, 620 (Neb. 1877) (detailing the bill’s passage); see also S. JOURNAL, 14th Reg. Sess., at 637, 687, 699, 714 (Neb. 1877) (documenting passage of the bill).

410. The bill referenced Missouri’s fraudulent conveyance statute. Act of Mar. 15, 1877, ch. 107, 1877 Mo. Acts 320.

declare a punishment therefor[e].”⁴¹¹ The Missouri Senate passed this bill on February 26, 1877.⁴¹² Broader than the Nebraska act, the Missouri act made destroying, selling, or disposing of personalty by a mortgagor or grantor “for the purpose of defrauding the mortgagee or trustee[,] or beneficiary,” in the form of a deed of trust, a misdemeanor punishable by a prison term of up to one year and a fine not exceeding \$100.⁴¹³

Two days earlier, the Missouri Senate received the House Bill No. 149 amending the fraudulent conveyance act.⁴¹⁴ On February 27, 1877, the senate referred House Bill No. 149 to the Missouri Senate’s Committee on Judiciary.⁴¹⁵ On March 6, 1877, Senator William B. Thompson, of the Committee on Judiciary, reported that the committee had considered House Bill No. 149 and recommended its passage.⁴¹⁶ On March 12, 1877, the senate passed it twenty-one to six with one abstention.⁴¹⁷ The bill became Missouri’s conditional sales act.

The legislative histories of these states reflect the agricultural origins of the conditional sale. Further, the legislative history of the first conditional sales act refers to Holmes’ notes, a term describing a method of selling livestock on credit in westernmost Maine in the 1830s.⁴¹⁸ These legislative histories strongly suggest that those who were the most concerned about the conditional sale were bankers, lawyers, and town merchants. These groups strongly supported the conditional sales act in Iowa and Minnesota. Lawyers introduced the first three conditional sales

411. See S. JOURNAL, 29th Gen. Assemb., Reg. Sess. at 68, 70, 75, 133, 136, 160, 162 (Mo. 1877) (documenting the introduction, committee referral, and readings of Senate Bill 86).

412. See *id.* at 164, 169–70 (detailing passage of the bill).

413. See 1877 Mo. Acts 236 (“An act to prevent the mortgagor or grantor in trust deeds of personal property, from the fraudulent use or disposition of such property, and to prevent the mortgagor or grantor from disposing of the same without the written consent of the mortgagee or trustee, and without informing the person to whom the same is sold of such mortgage or trust deed.”).

414. See S. JOURNAL, 29th Gen. Assemb., Reg. Sess. at 160–61 (Mo. 1877) (“I am instructed by the House of Representatives to inform the Senate that there has been introduced into and passed the House, House bill No. 149, entitled [“]An act to amend section 10 of chapter one hundred and seven (107) of the General Statutes of Missouri.[”]”); *id.* at 164, 166 (“The following House bills were taken up and read the first time: . . . 149 . . .”).

415. See *id.* at 176 (“House bills Nos. . . . 149 . . . were read and referred to the Committee on Judiciary.”).

416. See *id.* at 203 (“Sen. Thompson, from the Committee on Judiciary, submitted the following report: Mr. President: Your committee, to whom was referred House bill No. 149, beg leave to report that they have considered the same, and recommend that they do pass; which was read, and ordered to its third reading on [tomorrow].”).

417. See *id.* at 219 (recording passage and votes of senators).

418. See *supra* notes 316–21 and accompanying text (explaining the origins of the term “Holmes’ note”).

acts to their respective legislatures in Maine, Vermont, and Iowa, with the fourth in Minnesota introduced by a private banker. The one lawyer sponsor with long legal experience also had an extensive background with promissory note assignments. Farmers turned their credit lending into immediate value by assigning the notes to lawyers, bankers, and town merchants for cash, goods, or services. The legislators had no desire to protect good faith purchasers. Bills to protect the good faith purchaser, arising in Iowa and Nebraska and proposed by a farmer and a stock dealer, met ignominious ends at the hands of the legislators. The offense these legislators desired to punish lay with preventing the embezzling vendee from committing fraud. The legislators behind the second wave of acts in Nebraska and Missouri also passed criminal statutes for those vendees transferring to a good faith purchaser with intent to damage the vendor. Any benefit to a potential good faith purchaser was merely incidental.

V. COURT AND PRIOR HISTORICAL EXPLANATIONS FOR THE PASSAGE OF THE CONDITIONAL SALES ACTS

After the passage of the first wave of conditional sales acts, the courts in those states, in seven opinions prior to 1890 including two opinions in Missouri, which was a second wave state during the same time period, provided three explanations for the passage: to treat the conditional sale as a chattel mortgage, to protect good faith purchasers, and to prevent vendee fraud.⁴¹⁹ Twentieth century legal historians, however, only propounded two of these suggestions, overlooking the legislative history's support for the third.

A. *Jurists' Refusal to Treat Conditional Sales As Chattel Mortgages*

First, legislators passed the conditional sales acts to reverse appellate opinions that held that the respective state's chattel mortgage acts did not

419. For Iowa, see *Warner v. Johnson*, 21 N.W. 483, 483–84 (Iowa 1884) (benefiting judgment liens and good faith purchasers). For Maine, see *Shaw v. Wilshire*, 65 Me. 485, 487–92 (1876) (demonstrating the evasion of the chattel mortgage acts). For Minnesota, see *Dyer v. Thorstad*, 29 N.W. 345, 345–46 (Minn. 1886) (examining the role of sufficient notice, whether actual or constructive, in preventing vendee fraud). For Missouri, see *Eidson v. Hedger*, 38 Mo. App. 52, 55–57 (1889) (*per curiam*) (using Missouri's conditional sales statute to protect good faith purchasers); *Peev v. Spencer*, 2 S.W. 434, 434–35 (Mo. 1886) (discussing the prevention of vendee fraud). For Vermont, see *Cole, Leavitt & Co. v. Howe*, 50 Vt. 35, 37–38 (1877) (concerning benefit judgment liens and good faith purchasers); *Fairbanks, Brown & Co. v. Davis & Wright*, 50 Vt. 251, 254–57 (1877) (regarding recordation of a contract to provide adequate notice to subsequent purchasers and prevent vendee fraud). For Wisconsin, see *Kimball v. Post*, 44 Wis. 471, 475–77 (1878) (acknowledging that the purpose of the statute was to protect good faith purchasers); *Williams v. Porter*, 41 Wis. 422, 427–28 (1877) (treating conditional sales the same as chattel mortgages).

require a filing of a conditional sale.⁴²⁰ In 1876, opinions from Maine, the first state to pass a conditional sales act, and Wisconsin, the fifth state to pass one, lend some support to this twentieth century position. Justice William G. Barrow of Maine opined:

After it became apparent that, in place of taking mortgages to secure the purchase money, sellers of chattels were making a practice of stipulating in the contract of sale that the property should remain theirs until the price was paid, and the court had held . . . that the [chattel mortgage] statute did not extend to liens thus created because there was no mortgage from the debtor and no unconditional transfer of title from the vendor, the legislature again intervened with the requirement now embodied in [the conditional sales act], invalidating every such agreement where a note is given for the purchase money, unless it is made and signed as part of the note and unless recorded like mortgages of personal property, when such note exceeds thirty dollars.⁴²¹

In 1877, Justice William P. Lyon of Wisconsin stated: “The manifest object of the statute is to place . . . [the conditional sale] on the footing of chattel mortgages; and if a contract of that kind is not reduced to writing and filed in the proper office, it is void as to third persons”⁴²² But, both states lacked an appellate opinion to reverse.⁴²³

These historians correctly noted that the nineteenth century jurists would tolerate the secret lien problem for the conditional sale. Of those lawyers who argued conditional sales were the same as chattel mortgages, where parties have to file them under the previously adopted chattel mortgage acts, most lost.⁴²⁴ Worse yet, only one of the first five states to pass a conditional sales act, Iowa, had previously confronted the issue,⁴²⁵ suggesting that for the states adopting conditional sales acts the chattel mortgage filing was not the issue. Only after passage of the first conditional sales acts did any jurist express dissatisfaction with the refusal

420. See Garrard Glenn, *The Conditional Sale at Common Law and As a Statutory Security*, 25 VA. L. REV. 559, 578 (1939) (noting Maine passed a recording act because courts held that statutes already in existence did not extend to liens on chattel mortgages).

421. *Shaw*, 65 Me. at 490–91.

422. *Williams*, 41 Wis. at 428.

423. *But cf. infra* notes 427–39 and accompanying text (providing decisions from other states regarding conditional sales).

424. See, e.g., *Grant v. Skinner*, 21 Barb. 581, 584 (N.Y. Gen. Term 1854) (determining it was error to instruct the jury that the transaction was a chattel mortgage and that a good faith purchaser had greater right to the property because the transaction was not filed).

425. See, e.g., *Bailey v. Harris*, 8 Iowa 331, 332–33 (1859) (finding it was error to rule that the conditional sale vendor loses to a good faith purchaser because the transaction was not on record).

to permit conditional sales filings under the chattel mortgage acts.⁴²⁶

The earliest of these opinions disallowing a chattel mortgage filing appeared in 1843.⁴²⁷ The Supreme Court of North Carolina had no difficulty in determining that a conditional sale needed no filing for validity (and priority) against a buyer's creditor's judgment liens.⁴²⁸ After all, a conditional sale is a sale to the buyer/borrower, not a sale to the seller/lender as for a mortgage. During the next decade, several courts found similarly: 1850 in Tennessee,⁴²⁹ 1854 in New York,⁴³⁰ 1856 in New Hampshire,⁴³¹ 1857 in Georgia,⁴³² 1859 in Iowa,⁴³³ one of the early states passing a conditional sales act, and in 1862 in Michigan⁴³⁴—while leaving the issue of changing the rule to the legislature. Even after the initial states passed their conditional sales acts, the trend continued: in 1875 for Kansas,⁴³⁵ 1876 in Ohio⁴³⁶ (while leaving the issue of changing the rule to the legislature), 1877 in Missouri (once for a conditional sale⁴³⁷

426. *See, e.g.*, *George v. Tufts*, 5 Col. 162, 165 (1879) (describing various courts' treatment of filing conditional sales under chattel mortgage acts).

427. *See* *Ellison v. Jones*, 26 N.C. 48, 49 (1843) (per curiam) (determining because the transaction was a conditional sale, and not a mortgage, it did not need to be filed).

428. *See id.* (ruling in favor of the vendor in a conditional sale that was not filed).

429. *See* *Buson v. Dougherty*, 30 Tenn. 50, 51–52 (1850) (declaring there was no error in a jury instruction that stated a conditional sale need not be registered).

430. *See* *Neidig v. Eifler*, 18 Abb. Pr. 353, 354 (N.Y. Sup. Ct. 1865) (concluding a chattel mortgage filing would be irrelevant and rendering judgment in favor of a bailor over a good faith purchaser); *Grant v. Skinner*, 21 Barb. 581, 584 (N.Y. Gen. Term 1854) (identifying error in instructing a jury that the transaction was a chattel mortgage, rather than a conditional sale, and a good faith purchaser had priority because it was not filed).

431. *See* *Haven v. Emery*, 33 N.H. 66, 69–70 (1856) (deciding that for a conditional sale, the "law provided no method of giving general notice by registration or publication," and thus notice to an agent sufficed for notice to the principal).

432. *See* *Goodwin v. May*, 23 Ga. 205, 209–10 (1857) (upholding a conditional sale against a subsequent good faith purchaser (mortgagee) and stating, "There is nothing in the fact that the contract was not reduced to writing and recorded").

433. *See* *Bailey v. Harris*, 8 Iowa 331, 332–33 (1859) (holding it was error to rule that a conditional sale vendor lost to a good faith purchaser because the transaction was not recorded).

434. *See* *Couse v. Tregent*, 11 Mich. 65, 68 (1862) (determining the secret lien problem may exist with conditional sales as it does with chattel mortgages, but left the matter for the legislature to decide and affirmed a judgment for the vendor as opposed to the good faith purchaser).

435. *See* *Sumner v. McFarlan*, 15 Kan. 600, 601–02 (1875) (declaring neither the chattel mortgage statute, nor the statute of frauds helped the good faith purchaser).

436. *See* *Sanders v. Keber & Miller*, 28 Ohio St. 630, 640–42 (1876) (leaving the issue of whether conditional sales defeat the purpose of chattel mortgage acts to the legislature and affirming judgment for a vendor over a good faith purchaser).

437. *See* *Rogers Locomotive Works v. Lewis*, 20 F. Cas. 1124, 1135 (W.D. Mo. 1877) ("It may be that the registry laws, if wisely framed, ought to extend to such a case as this [conditional sale], and to require the seller to place the evidence of his rights on record, and accordingly we find that some of the states have recently passed enactments of the character suggested. But there is no such legislative requirement in Missouri.")

while leaving the issue of changing the rule to the legislature and once for a bailment-lease),⁴³⁸ and 1879 in Wyoming.⁴³⁹

Only after the passage of the first conditional sales acts in a few jurisdictions did it dawn on any court that courts should require some filing for conditional sales. In 1874, a Kentucky court recognized priority for a vendee and their good faith purchaser over the vendor under a conditional sale due to the secret lien problem and intimated that parties could create a lien for a conditional sale by filing in the conveyance or mortgage records.⁴⁴⁰ In 1876, and again in 1878, the United States Supreme Court, under Illinois law, which did not recognize the conditional sale as viable,⁴⁴¹ found the state's substitute device, a bailment lease,⁴⁴² required a chattel mortgage filing for priority over judgment liens and good faith purchasers (mortgagees).⁴⁴³ In 1879, a Colorado court held void a conditional sale with respect to a good faith purchaser (a mortgagee) because the vendor had not filed it under the chattel mortgage act.⁴⁴⁴

The one case where the vendor acted as Gilmore would have him (i.e., treated the conditional sale as a chattel mortgage), did not turn out the way Gilmore hypothesized.⁴⁴⁵ The conditional sale vendor filed as a chattel mortgage,⁴⁴⁶ yet a good faith purchaser took the goods. The Alabama

438. See *Sumner v. Cottey*, 71 Mo. 121, 125–26 (1879) (rejecting a good faith purchaser's argument that the bailment lease was not recorded, and affirming judgment for the vendor).

439. See *Warner v. Roth*, 2 Wyo. 63, 69, 71 (1879) (discounting a good faith purchaser's argument that the conditional sale was not recorded as a chattel mortgage).

440. See *Vaughn v. Hopson*, 73 Ky. 337, 343 (1874) (explaining a lien could be created for a conditional sale by recording it in conveyance or mortgage records).

441. See *supra* note 62 and accompanying text (providing an overview of Illinois's rejection of the conditional sale).

442. See *supra* note 123–28 and accompanying text (discussing bailment leases).

443. See *Fosdick v. Schall*, 99 U.S. 235, 250–51 (1878) (involving a good faith purchaser); *Hervey v. R. I. Locomotive Works*, 93 U.S. 664, 672–73 (1876) (involving a judgment lien).

444. See *George v. Tufts*, 5 Colo. 162, 165–66 (1879) (voiding a conditional sale because the vendor failed to file it).

445. See *Fairbanks, Morse & Co. v. Eureka Co.*, 67 Ala. 109, 113–14 (1880) (favoring the vendor's rights to property in a conditional sale though no *adequate* notice was provided to a subsequent good faith purchaser).

446. The reason the vendor filed the conditional sale under the chattel mortgage laws was that, in 1875, two Alabama courts suggested the conditional sale was in the nature of a chattel mortgage, which required a filing. See *Dudley v. Abner*, 52 Ala. 572 (1875) (affirming a judgment for the good faith purchaser because the nature of the transaction was that of a chattel mortgage and no notice was given); *Sumner v. Woods (Sumner I)*, 52 Ala. 94 (1875) (reversing judgment for a good faith purchaser because he failed to prove he was a bona fide purchaser without notice, i.e. that there was no conditional sales filing in the chattel mortgage records). Both of these decisions were overruled in 1880 as contrary to well-established Alabama law. See *Sumner v. Woods (Sumner II)*, 67 Ala. 139 (1880) (reversing the second judgment for a good faith purchaser and overruling *Sumner I* and *Dudley*

court in 1880, considerably prior to the passage of the Alabama conditional sales act in 1896,⁴⁴⁷ recognized a filing not required by statute provides no notice and determined that the conditional sale vendor did not need to file and had priority over the good faith purchaser.⁴⁴⁸ The judicial opinion provided little to no support for Gilmore's judicial scenario of treating the conditional sale as a chattel mortgage.

Several southern states had a provision in their fraudulent conveyance statute that covered long-term installment purchases requiring a filing after the expiration of a lengthy time period.⁴⁴⁹ Even under these statutes, southern courts found no requirement under any other statute or principle to file conditional sales until the expiration of the specified period contained in the fraudulent conveyance statute.⁴⁵⁰

Grant Gilmore's idea that jurists and legislators decided after a generation or two to treat the conditional sale the same as a chattel mortgage is clearly overbroad. If jurists truly felt that way, then they should require a chattel mortgage filing for the conditional sale. The majority of the cases, however, determined the opposite: a conditional sale did not require a filing under the chattel mortgage acts.⁴⁵¹ The jurists

to the extent that those decisions were inconsistent with the conditional sales rule that the vendor has priority over a good faith purchaser).

447. CODE OF ALA. § 1017 (1897), at 367; *see also* *Ensley Lumber Co. v. Lewis*, 25 So. 729, 730 (Ala. 1899) (recognizing there was no recording statute for conditional sales as of March 16, 1896).

448. *See Fairbanks, Morse & Co.*, 67 Ala. at 114 ("The contract was recorded; but the record, not being authorized by statute, does not afford notice to the world; and so it was claimed by the appellee, who purchased from the vendee, without notice of the contract by which he acquired possession."); *see also Sumner II*, 67 Ala. at 142 (reversing a judgment that favored the good faith purchaser).

449. *See, e.g.*, 1823 Fla. Territory Acts 67 § 4 ("[W]here any reservation . . . by way of condition . . . in goods and chattels . . . remained in another, . . . the same shall be taken as . . . to be fraudulent . . . unless such loan, reservation . . . were declared by . . . deed in writing, proved and recorded as aforesaid.").

450. Kentucky's fraudulent conveyance statute had a five-year period. Under this statute, Kentucky determined that a conditional sale need not be filed until the expiration of the five-year period. *See Patton v. McCane*, 54 Ky. 555, 557-58 (1855) (finding that the good faith purchaser jury instruction was in error because the fraudulent conveyance statute, which required a filing, had not reached its five-year expiration period). Mississippi's fraudulent conveyance statute had a three-year period. Under this statute, Mississippi determined that a conditional sale need not file until the expiration of the three-year period. *See Ketchum v. Brennan*, 53 Miss. 596, 607 (1876) (determining that a vendor did not have to file within the three-year period). Florida amended its statute in 1859 to provide for a two-year period, and a failure to file a conditional sale after the expiration of the period allowed a judgment lien to have priority. *See Hudnall v. Paine*, 21 So. 791, 794 (1897) (recognizing the two-year period).

451. Most statutes similarly treated the conditional sale differently than the chattel mortgage, with only seven of the first twenty-seven jurisdictions adopting conditional sales acts providing that

opposed the idea.

Even if modern historians accept the twentieth century position, probably concocted to support early-twentieth century efforts to eliminate the distinction amongst the various nonpossessory security devices,⁴⁵² there would remain finding the reason legislators would overturn the wisdom of the jurists. This position also overlooks the post-conditional sales acts judicial pronouncement: the justices only advocated filing, not the other trappings of the chattel mortgage such as the removal of the avoidance of the equity of redemption and usury evasion.

B. *Protection of the Good Faith Purchaser*

The second twentieth century historical claim asserted that legislators desired to protect the good faith purchaser from the secret lien created by the conditional sale.⁴⁵³ Opinions from Iowa, the third state to adopt a conditional sales act, and Wisconsin, the fifth state, support this twentieth century position.

In 1884, Justice Joseph Rea Reed of Iowa opined:

It was doubtless to prevent the injustice that parties were sometimes enabled to practice under the rule established by these cases that the section was enacted It is very clear that this statute in no manner changes, as between themselves, any of the rights of the immediate parties to a conditional transfer of property that are created or reserved by their contract. But it is the rights and interests of the creditors of, or purchasers from, the vendee which was intended to be protected by it.⁴⁵⁴

the filing was to be the same as for chattel mortgages. *See supra* notes 244–48, 267–68, 271–80, 284–93 and accompanying text (detailing passage of the conditional sales acts).

452. *See* Francis M. Burdick, *Codifying the Law of Conditional Sales*, 18 COLUM. L. REV. 103, 107 (1918) (“[I]t was suggested that the act be discarded, and in its place a brief statute be recommended, to the effect that every conditional sale be declared a chattel mortgage, and be subject to existing statutes on that topic.”).

453. *See* Francis M. Burdick, *Codifying the Law of Conditional Sales*, 18 COLUM. L. REV. 103, 105 (1918) (“The object of these statutes was judicially declared to be, ‘to prevent secret and unrecorded transactions and contract of sale from being used to the detriment of unsuspecting creditors of, or purchasers from, the vendee of personal property apparently the owner thereof.’” (quoting *Coover v. Johnson*, 86 Mo. 533, 538 (1885))); Garrard Glenn, *The Conditional Sale at Common Law and As a Statutory Security*, 25 VA. L. REV. 559, 577 (1939) (discussing the protection of good faith purchasers).

454. *Warner v. Johnson*, 21 N.W. 483, 483–84 (Iowa 1884). *But see* *Myer v. W. Car Co.*, 102 U.S. 1, 7 (1880) (quoting appellant’s brief: “The purposes of the statute are to be considered. Like all similar legislation which aims at prohibiting the separation of the apparent or reputed title from the real ownership, it is to be construed for the prevention of fraud upon creditors and others, who rely upon the apparent ownership, which the possession and use of chattels indicate. Had an actual purchaser bought and paid for the cars, there can be no question that his title would be sustained as against the real owner, and the statute expressly puts ‘any creditor’ in the same position [T]he principle of such statutes is that a divorce of the apparent ownership, manifested by possession, from

In 1878, Justice David Taylor of Wisconsin concluded:

The object of the statute is to protect those dealing with the possessor of personal property against secret trusts or claims of those having no connection with the possession and no apparent connection with the title, and not to protect those making no claim thereto by purchase or assignment from the party in possession. In other words, it was not intended for the protection of mere trespassers.⁴⁵⁵

The judicial opinions, rendered by judges and not legislators,⁴⁵⁶ reflect little desire to provide that protection. The almost universal rule was the conditional sale vendor had priority over the vendee's good faith purchaser. Almost all of these opinions come from the northern states.⁴⁵⁷ Many of these opinions occurred in the first three states to adopt a conditional sales act—Maine, Vermont, and Iowa—suggesting good faith purchasers felt aggrieved enough to challenge their jurists.⁴⁵⁸

The earliest of these opinions⁴⁵⁹ established the priority of the vendor over the good faith purchaser, with Massachusetts in 1824,⁴⁶⁰ Indiana in 1859,⁴⁶¹ Maine in 1864,⁴⁶² Missouri in 1865,⁴⁶³ Michigan in 1874,⁴⁶⁴

the actual ownership, shall not avail as against creditors who rely upon the possession.”); *Nat'l Cash Register Co. v. Maloney*, 64 N.W. 618, 619 (Iowa 1895) (“This statute was enacted to prevent the injustice to subsequent purchasers which might result by reason of a transfer of the possession of property, by way of sale, with a secret reservation of the title in the seller.”).

455. *Kimball v. Post*, 44 Wis. 471, 476 (1878).

456. See *supra* notes 377–83 and accompanying text (exemplifying a judicial response to protecting the good faith purchaser).

457. See *infra* notes 459–83 (listing cases).

458. See *id.* (listing cases).

459. Opinions dealing with conditional delivery, consignments, and retained liens are omitted. For opinions dealing with bailment leases, see *infra* note 467–74 and accompanying text (listing cases).

460. See *Coggill v. Hartford & New Haven R.R. Co.*, 69 Mass. 545, 546–50 (1854) (holding vendor held priority over vendee's bailee and rejecting a good faith purchaser proposition); *Barrett v. Pritchard*, 19 Mass. 512, 515–17 (1824) (establishing priority of vendor over vendee's mortgagee, and holding that until the sale was paid for, vendor defeats vendee's creditors).

461. See *Bradshaw v. Warner*, 54 Ind. 58, 61 (1876) (holding vendor had priority over good faith buyer); *Dunbar v. Rawles*, 28 Ind. 225, 229–31 (1867) (announcing vendor had priority over a good faith buyer); *Thomas v. Winters*, 12 Ind. 322, 323–24 (1859) (establishing priority of vendor over good faith buyer, and holding that title does not pass until paid).

462. See *Brown v. Haynes*, 52 Me. 578, 580–84 (1864) (finding vendor had priority over a good faith purchaser (citing *Coggill*, 69 Mass. 545)).

463. See *Wangler v. Franklin*, 70 Mo. 659, 660–61 (1879) (holding vendor had priority over good faith purchaser (citing *Robbins v. Philips*, 68 Mo. 100 (1878)); *Robbins*, 68 Mo. at 100–01 (holding vendor had priority over good faith purchaser (citing *Parmlee v. Catherwood*, 36 Mo. 479 (1865); *Little v. Page*, 44 Mo. 412 (1869))); *Little*, 44 Mo. at 413–15 (holding vendor had priority over second good faith purchaser (citing *Parmlee*, 36 Mo. 479)); *Parmlee*, 36 Mo. at 480–81 (establishing priority of vendor over good faith purchaser, and rejecting contrary New York cases).

Iowa (refusing to apply its 1872 conditional sales act retroactively to a 1872 pre-code transaction),⁴⁶⁵ and Ohio⁴⁶⁶ in 1876. A second set of opinions (most earlier in time for the same state, except for Indiana) asserted the priority of the vendor over the judgment lien, with Vermont in 1836,⁴⁶⁷ New York in 1842,⁴⁶⁸ Maine in 1846,⁴⁶⁹ New Hampshire in 1861,⁴⁷⁰ Missouri in 1873,⁴⁷¹ Indiana in 1876,⁴⁷² and New Jersey in 1880.⁴⁷³ A similar result occurred for the bailment lease in New Hampshire in 1836,⁴⁷⁴ Connecticut in 1843,⁴⁷⁵ Massachusetts in 1877,⁴⁷⁶ and Missouri in 1879.⁴⁷⁷

Only two states' courts flirted with protecting good faith purchasers, but

464. *See* *Whitney v. McConnell*, 29 Mich. 12, 13–14 (1874) (holding vendor had priority over vendee's pledge (citing *Couse v. Tregent*, 11 Mich. 65 (1862))); *Couse*, 11 Mich. at 66–68 (establishing priority of vendor over good faith purchaser).

465. *See* *Moseley v. Shattuck*, 43 Iowa 540, 541–44 (1876) (establishing priority of vendor over good faith purchaser, and holding conditional sales act does not apply retroactively).

466. *See* *Sanders v. Keber & Miller*, 28 Ohio St. 630, 637–42 (1876) (establishing priority of vendor over good faith purchaser (citing *Coggill*, 69 Mass. 545)).

467. *See* *Duncan v. Stone*, 45 Vt. 118, 118–24 (1872) (explaining that vendor had priority over judgment lien constable); *Armington v. Houston*, 38 Vt. 448, 448–53 (1866) (clarifying that vendor had priority over judgment lien constable); *Fales v. Roberts*, 38 Vt. 503, 507–09 (1866) (providing that vendor had priority over judgment lien deputy sheriff); *Hefflin v. Bell*, 30 Vt. 134, 135–38 (1858) (proclaiming vendor had priority over judgment lien sheriff); *Buckmaster v. Smith*, 22 Vt. 203, 203–04 (1850) (indicating vendor had priority over judgment lien); *Smith v. Foster*, 18 Vt. 182, 184–86 (1846) (holding vendor had priority over judgment lien); *Bigelow v. Huntley*, 8 Vt. 151, 151–55 (1836) (establishing priority of vendor over judgment lien sheriff).

468. *See* *Herring v. Hoppock*, 15 N.Y. 409, 411–13 (1857) (holding vendor had priority over judgment lien purchaser (citing *Strong*, 2 Hill 326)); *Strong v. Taylor*, 2 Hill 326, 327–29 (N.Y. 1842) (stating priority of vendor over judgment lien sheriff's bailee (citing *Barrett v. Pritchard*, 19 Mass. 512 (1824))).

469. *See* *George v. Stubbs*, 26 Me. 243, 247–50 (1846) (establishing vendor's priority over judgment lien constable).

470. *See* *McFarland v. Farmer*, 42 N.H. 386, 389–92 (1861) (describing vendor's priority over judgment lien sheriff).

471. *See* *Ridgeway v. Kennedy*, 52 Mo. 24, 24–26 (1873) (detailing vendor's priority over judgment lien).

472. *See* *Bradshaw v. Warner*, 54 Ind. 58, 60–62 (1876) (affirming vendor's priority over judgment lien constable).

473. *See* *Cole v. Berry*, 42 N.J.L. 308, 308–15 (1880) (advancing vendor's priority over judgment lien constable).

474. *See* *Sargent v. Gile*, 8 N.H. 325 (1836) (declaring bailor's priority over good faith purchaser).

475. *See* *Hart v. Carpenter*, 24 Conn. 427, 430–31 (1856) (reporting vendor's priority over good faith purchaser (citing *Forbes v. Marsh*, 15 Conn. 384 (1843))); *Forbes*, 15 Conn. at 385, 393–400 (establishing vendor's priority over judgment lien sheriff).

476. *See* *Chase v. Ingalls*, 122 Mass. 381, 381–83 (1877) (analyzing priority of vendor over judgment lien sheriff).

477. *See* *Sumner v. Cottey*, 71 Mo. 121, 121–26 (1879) (noting priority of vendor over good faith purchaser).

shortly thereafter reverted to the general rule. The New York effort came with the *Wait* opinion⁴⁷⁸ in 1867, declaring good faith purchasers, but not creditors, had priority over the conditional sales vendor. Two years later, the highest court in New York returned to the rule that gave the conditional sales vendor priority, distinguishing the prior opinion as involving a chattel mortgage.⁴⁷⁹ The Alabama effort came in 1875 by determining that a conditional sale required filing as a chattel mortgage so that for an unfiled conditional sale, the good faith purchaser only needed to show the absence of actual notice of the conditional sale.⁴⁸⁰ The Alabama court overruled these opinions in 1880 and reverted to the rule that gave the conditional sales vendor priority over good faith purchasers.⁴⁸¹

After the initial adoption of conditional sales acts in some states, two

478. See *Wait v. Green (Wait II)*, 36 N.Y. 556, 556–57 (1867) (“When chattels are thus sold and delivered conditionally, the vendor’s right to the property remains good as against the vendee and his voluntary assignee, and others who purchase with knowledge of the condition, but not as against *bona fide* purchasers from the vendee.”), *aff’d* 35 Barb. 585 (N.Y. Gen. Term 1862); see also *W. Transp. Co. v. Marshall*, 6 Abb. Pr. (n.s.) 280, 283 (N.Y. 1867) (applying the same rule but for conditional delivery case), *aff’d* 37 Barb. 509 (N.Y. Gen. Term 1862). Shortly after the opinion, courts in other states began to see the argument made on behalf of good faith purchasers against the conditional sale. See *Dudley v. Abner*, 52 Ala. 572, 576 (1875) (citing *Wait II* in support of opinion changing Alabama law to recognize right of good faith purchaser) *overruled by* *Sumner v. Woods*, 67 Ala. 139 (1880); *Ketchum & Cummings v. Brennan*, 53 Miss. 596, 602 (1876) (citing *Wait II* in brief of the good faith purchaser, but failing to persuade the judges against conditional sales rule); *Little v. Page*, 44 Mo. 412, 412 (1869) (citing *Wait II* in brief of losing good faith purchaser); *Parmlee v. Catherwood*, 36 Mo. 479, 480–81 (1865) (acknowledging contrary New York rule, but determining the conditional sale rule is the better); *Cardinal v. Edwards*, 5 Nev. 36, 40 (1869) (citing *Wait II* in brief of losing vendor attempting to convince court to reverse judgment for judgment lien); *Sanders v. Keber & Miller*, 28 Ohio St. 630, 635–40 (1876) (finding *Wait II* unpersuasive with regard to right of good faith purchaser because it was overruled in New York); *Warner v. Roth*, 2 Wyo. 63, 68 (1879) (citing *Wait II* in brief of winning good faith purchaser, but failing to prevent reversal under conditional sales rule); see also *Williamson v. Russell*, 39 Conn. 406, 410 (1872) (citing *Wait II* in brief of winning good faith purchaser in fraudulent vendee cases); *Woodruff & Beach Iron Works v. Adams*, 37 Conn. 233, 236 (1870) (citing *Wait II* in brief of winning good faith purchaser); *Hirschorn v. Canney*, 98 Mass. 149, 151–52 (1867) (rejecting the argument in conditional delivery cases because Massachusetts law governed and not New York law); *Old Dom. S.S. Co. v. Burckhardt*, 72 Va. 664, 682 (1879) (citing *Wait II* to support opinion for good faith purchaser in fraudulent vendee case).

479. See *Ballard & Sampson v. Burgett*, 40 N.Y. 314, 316, 319, 321, 324, 327 (1869) (giving of the *Wait II* note with the title retention language interpreted as giving title to the vendee and taking the note as security in the nature of a chattel mortgage), *aff’d*, 40 N.Y. 314 (1869).

480. See *Sumner v. Woods*, 52 Ala. 94, 95–96 (1875) (“It was incumbent upon the defendant to show that he was a *bona fide* purchaser *without notice*.”), *overruled by* *Sumner*, 67 Ala. 139 (1880); *Dudley*, 52 Ala. at 574–82 (1875) (holding conditional sale was void as against the *bona fide* purchaser without regard to registration laws), *overruled by* *Sumner*, 67 Ala. 139.

481. *Fairbanks, Morse & Co. v. Eureka Co.*, 67 Ala. 109, 111–14 (1880) (holding vendor prevails over good faith purchaser); *Sumner*, 67 Ala. at 141–42 (holding vendor prevails over good faith purchaser).

other states flirted with the good faith purchaser rule by finding technical reasons to thwart the vendor: the condition is waived by either an absolute delivery of the goods⁴⁸² or a failure to declare the contract void.⁴⁸³

If protection of the good faith purchaser was the goal, the legislators could follow these aberrational opinions and give the good faith purchaser priority, as the British did in 1889.⁴⁸⁴ However, they did not. Instead, they rejected that approach when proposed. In 1873, the Iowa Senate contemplated “[a] bill for an act to protect persons in the possession of personal property.”⁴⁸⁵ The bill was amended in its entirety into the recording statute.⁴⁸⁶ In 1877, the Nebraska House considered “[a] bill for an act to declare void conditional sales of personal property as against innocent purchasers from and creditors of the vendee.”⁴⁸⁷ The Nebraska House adopted the report of the House Judiciary Committee, which advised the bill not pass.⁴⁸⁸

But at least this twentieth century historical explanation reaches the prime problem. The situation arose because the vendee committed fraud on two innocent parties, the vendor and the subsequent creditor or good faith purchaser. The issue then, as explained by a Maine justice regarding a

482. *See* Vaughn v. Hopson, 73 Ky 337, 341 (1874) (“Every absolute delivery of goods sold on condition is presumptive evidence of a waiver of the condition by the vendor, and of an intention on his part to rely wholly on the personal security of the vendee for the payment of the price of the goods; that after actual delivery (although as between the parties to the sale such delivery may be conditional) a [bona fide] purchaser from the vendee gets a perfect title.”) (quoting Smith v. Lynes, 5 N.Y. 46 (1851)) (internal quotation marks omitted).

483. *See* Giddey v. Altman, 27 Mich. 206, 211 (1873) (concluding the vendor “was not entitled to possession of the [property] when he took it, unless he had previously exercised his right to declare the contract of sale terminated”).

484. *See* Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 Yale L.J. 1057, 1058 n.1 (1954) (“The first English Act (4 George IV, c. 83) was passed in 1824.”); *see also* Factor’s Act of 1889, 52 & 53 Vict. c. 45 § 9 (stating a buyer’s good faith purchaser under a conditional sale has priority over the seller).

485. *See* S. JOURNAL, 14th Gen. Assemb., at 64 (Iowa 1872) (“By Senator Fitch: S.F. No. 47, A bill for an act to protect persons in possession of personal property. Read first and second time, and referred to Committee on Judiciary.”).

486. *See id.* at 300 (Iowa 1872) (“S.F. No. 47, A bill for an act to protect persons in the possession of personal property, with report of committee recommending substitute, was taken up and considered. The substitute was adopted.”).

487. *See* H.R. JOURNAL, 14th Reg. Sess., at 130 (Neb. 1877) (“By Mr. Griffith, House Roll No. 12, A bill for an act to declare void conditional sales of personal property as against innocent purchasers from and creditors of the vendee. Read first time and ordered to a second reading[.]”).

488. *See id.* at 183–84 (Neb. 1877) (“The report of the judiciary committee was taken up and disposed of as follows: House Roll No. 12, A bill for an act to declare void conditional sales of personal property as against innocent purchaser from, and creditors of, the vendee. Your committee report the same back, with the recommendation that it do not pass. On motion, the report to the committee was adopted.”).

conditional sale as early as 1836, was: should the rule favor the vendor because the good faith purchaser/judgment lien failed to inspect the vendee's chain of title, or favor the vendee because the vendor in trusting the vendee created the opportunity for the vendee to commit fraud?⁴⁸⁹ In short, the twentieth century historians may have imputed a purpose from a beneficial result.

C. *Prevention of Vendee Fraud*

Twentieth century historians, due to their conviction that the conditional sales transaction is immoral, overlooked the prevention of the fraud of the vendee. Most of the post-conditional sales act opinions stated prevention of fraud as the purpose behind the conditional sales acts: two opinions from Vermont, the second state to pass a conditional sales act, one from Minnesota, the fourth state, and two from Missouri, the sixth state. In 1877, Chief Justice Isham Pierpoint opined a notice purpose: "The object of the statute . . . is, not to make the instruments valid and binding between the parties, but to give notice to all the world of the true state of the titles."⁴⁹⁰

In 1881, Justice Jonathan Ross of Vermont stated more clearly the purpose of the notice requirement is to end the cost of litigation by the vendor seeking to recover the property or its value:

It has always been considered that upholding such conditional sales infringed considerably upon the common law rule that possession of personal property is evidence of its ownership. It clothed the purchaser with apparent ownership, and so often furnished him with the means of obtaining a false credit; and was sometimes, doubtless, used by the dishonest debtor to cover up his property, and, by secret trusts, to place it beyond the reach of

489. See *Lane v. Borland*, 14 Me. 77, 81-82 (1836) ("[W]e perceive no reason to doubt that the transaction was fair, and free from fraud on the part of the [vendor]. It does not appear, that he had any reason to suspect, that [the vendees] would make the fraudulent use they did of the bill of sale he gave them. It was a fraud upon him, as well as upon the purchaser, bringing into jeopardy the interest of both, and subjecting them to the hazard and expense of a lawsuit. But it is said the [vendor] ought to lose his horse; because by his bill of sale, he enabled [vendees] to commit a fraud. This consequence could not have been meditated or designed by him It contributed to enable [vendees] to deceive a purchaser; and purchasers are often deceived by the evidence of property, arising from possession alone, without impairing the title of those, who may have entrusted the fraudulent party with such possession. As the law now is, the purchaser of personal property, is always exposed to the [e]ncumbrance of a secret mortgage. From the bill of sale, the purchaser had reason to believe, that the former owner of the horse had transferred his title; but he would learn from the same paper that it was not paid for, and he ought to have known, that he incurred the hazard of a mortgage, made to secure him or some other person.').

490. *Fairbanks, Brown & Co. v. Davis & Wright*, 50 Vt. 251, 255 (1877).

his creditors; attaching creditors and subsequent purchasers were also frequently involved in litigation with prior conditional vendors.

Whatever may have been the evils intended to be reached by the passage of the acts named, it is apparent the legislature intended that such sales should be invalid against such creditors and purchasers, unless the provisions of the act were complied with.⁴⁹¹

Justice Daniel A. Dickinson of Minnesota in 1886 reiterated the notice purpose to prevent vendee fraud:

We consider the manifest purpose of the statute to be to afford notice (in respect to property sold upon condition) that the title remains in the vendor; the object being to thus protect those who otherwise might be defrauded. This is in accordance with the construction which has ordinarily been placed upon similar statutes, and upon registry laws generally.⁴⁹²

In 1885, Justice Thomas Adiel Sherwood of Greene County, Missouri, affirmed the prevention of vendee fraud:

It cannot be doubted that the legislature, by these sections, intended to make a radical change in the law relating to conditional sales of personal property, and to prevent secret and unrecorded transactions and contracts of sale from being used to the detriment of unsuspecting creditors of, or purchasers from, the vendee of personal property apparently the owner thereof. This I regard as the whole object, purpose and scope of the law, as it now stands.⁴⁹³

491. *Bugbee v. Stevens*, 53 Vt. 389, 392 (1881). *But see* *Cole, Leavitt & Co. v. Howe*, 50 Vt. 35, 36 (1877) (asserting in brief of defendant that “[t]his statute was not made for the benefit of either party to the contract, but for the benefit of attaching creditors and subsequent purchasers”).

492. *Dyer v. Thorstad*, 29 N.W. 345, 346 (Minn. 1886).

493. *Coover v. Johnson*, 86 Mo. 533, 538 (1885); *see also* *Knoop ex rel. Miller v. Nelson Distilling Co.*, 26 Mo. App. 303, 316 (1887) (“The [conditional sales act] rests upon the same considerations as other statutes requiring the registration of certain instruments of conveyance, and the settled construction of these statutes is, where not so expressed in terms, that they are intended to give notice to *subsequent* purchasers and mortgagees of the vendor of the change of title to the property, which has taken place.”); *Defiance Mach. Works v. Trisler*, 21 Mo. App. 69, 72 (1886) (“That policy is, that a person shall not be allowed, by the possession of personal property which does not belong to him, or upon which another has a secret lien, to acquire a false credit to the injury of those who may deal with him, either by giving him credit, or by becoming purchasers of the property.”). *But see* *Eidson v. Hedger*, 38 Mo. App. 52, 55 (1889) (asserting the common law “rule was so abused,—innocent purchasers were so often deprived of property, bought of those in possession, and apparently the owners, because of some secret understanding between the one in possession and the former owner,—that the legislature in 1877 amended the old [fraudulent conveyance act]” in order to prevent vendor fraud); *Collins v. Wilhoit*, 35 Mo. App. 585, 587 (1889) (disagreeing with the assertion in respondent’s brief that the “case rest[ed] upon the [conditional sales act], which was intended to protect subsequent creditors and subsequent purchasers in good faith, of the vendee”).

Justice Francis Marion Black of Jackson County, Missouri, in 1885 confirmed this rationale:

No doubt the act of 1877 was designed to and does work a radical change in the law as respects these conditional contracts and leases As was said [by Justice Sherwood above; the conditional sales] act of 1877 was intended to prevent secret and unrecorded contracts of sales from being used to the detriment of unsuspecting creditors or purchasers from the vendee.⁴⁹⁴

These pronouncements indicate the statutory purpose was to protect the vendor against vendee fraud. Vendee fraud would occur when the vendee sells vendor's property to a good faith purchaser or allows a judgment lien to levy on the vendor's property. Without the recording, the vendor must bring a replevin action or sue for trover, both at the courthouse, unless the vendor is a skilled negotiator and can convince the good faith purchaser or sheriff to surrender the property. The recording ensured that no good faith purchaser could exist, much less a valid levy. The vendor is saved the hassle and cost of litigation to recover the property. A beneficiary of this filing would be the other innocent party, the vendee's potential good faith purchaser and the vendee's judgment creditors.

This purpose to protect the vendor from vendee fraud comports with the post-conditional sales act decisions and the earlier Vermont legislation that protected vendors against vendees' judgment liens. After Vermont passed its conditional sales act, it dealt with the issue of late filing (the vendor handed the documents timely, but the clerk did not timely record)⁴⁹⁵ and creditor back-dating (on the note to reflect the calculation of interest).⁴⁹⁶ If protecting good faith purchasers and subsequent creditors was the goal, these courts should not have tolerated the secret liens, albeit for short time periods. As to the legislative effort, in 1854, to ensure the vendor under a conditional sale obtained his full price, the Vermont legislators required attaching vendee creditors to pay or tender to the vendor the residue of the vendee's purchase money within ten days

494. *Peet v. Spencer*, 2 S.W. 434, 435 (Mo. 1886).

495. *See Fairbanks, Brown & Co.*, 50 Vt. at 256–57 (1877) (holding a written contract of sale was deemed to have been recorded in the clerk's office on the date it was given to the clerk's agent for that purpose).

496. *See Cole, Leavitt & Co.*, 50 Vt. at 38 ("The description given of the notes is no part of the memorandum, except as being descriptive of the sum due, and the time when the memorandum was given must be determined independently of the date of the notes described.").

after the attachment.⁴⁹⁷ This statute clearly indicates vendors, not subsequent creditors or good faith purchasers, receive state aid. So naturally, when the threat came from the other third party to the transaction (i.e., the good faith purchaser through the spread of the *Wait*⁴⁹⁸ opinion to other states), the vendors and their legislators had to react.

VI. PASSAGE OF THE CONDITIONAL SALES ACTS

Because the conditional sales transaction aided the financing of farmers, the ones potentially threatened by the *Wait* good faith purchaser rule were those lending to the farmers using the conditional sales note as security. The states with a majority of farmers could possibly prevent that damage by defeating the good faith purchaser status by a filing of notice of the conditional sales transaction. Eight northern states possessed a majority of farmers in 1870: Iowa, Kansas, Minnesota, Wisconsin, Vermont, Nebraska, Missouri, and Illinois.⁴⁹⁹ This list includes four out of the five

497. See Act of Nov. 10, 1854, No. 12, 1854 Vt. Laws 15 (“[A]ny creditor of the vendee may attach or levy his execution upon said property, and, upon payment, or tender, to the vendor, his agent or attorney, within ten days after such attachment, or levy, of the residue of such purchase money, remaining unpaid, may hold the said property discharged from the claim of such vendor thereon.”); see also *Towner v. Bliss*, 51 Vt. 59, 61 (1878) (addressing interplay between the 1854 statute and the 1870 recording statute); *Duncan v. Stone*, 45 Vt. 118, 122–24 (1872) (holding property stolen from constable is no defense); *Fales v. Roberts*, 38 Vt. 503, 507–09 (1866) (deciding a vendee creditor must pay vendor within ten days of attachment, even if the due date had yet to come); *Rowan v. Union Arms Co.*, 36 Vt. 124, 139–41 (1863) (determining a creditor can compel accounting to determine residue of purchase money); *Hefflin v. Bell*, 30 Vt. 134, 137 (1858) (declaring an improper tender by judgment lien was insufficient).

498. See *supra* notes 1–29 and accompanying text (detailing the facts and circumstances of the *Wait* opinion).

499. See FRANCIS A. WALKER, COMPENDIUM OF THE NINTH CENSUS (June 1, 1870) 594 (Wash. Gov’t Printing Office 1872) (listing total employed persons by state and total engaged in agriculture). The percentage of farmers can be computed by dividing those engaged in farming by the total in all occupations for each state. The result is as follows: Iowa (210,263/344,276 or 61.1%), Kansas (73,228/123,852 or 59.1%), Minnesota (75,157/132,657 or 56.7%), Wisconsin (159,687/292,808 or 54.5%), Vermont (57,983/108,763 or 53.3%), Nebraska (23,115/43,837 or 52.7%), Missouri (263,918/505,556 or 52.2%), Illinois (376,441/742,015 or 50.7%), Ohio (397,024/840,889 or 47.21%), Michigan (187,211/404,164 or 46.3%), Indiana (206,777/459,369 or 45%), Oregon (13,248/30,651 or 43.2%), Maine (82,011/208,225 or 39.3%), New Hampshire (46,573/120,168 or 38.7%), Pennsylvania (260,051/1,020,544 or 25.5%), New York (374,323/1,491,018 or 25.1%), Connecticut (43,653/193,421 or 22.7%), New Jersey (63,128/296,036 or 21.3%), California (47,863/238,648 or 20.1%), Rhode Island (11,780/88,574 or 13.3%), Massachusetts (72,810/579,884 or 12.6%), and Nevada (2,070/26,911 or 7.7%). The list does not include southern states because their recording statutes also encompassed sales of personalty. George Lee Flint, Jr., & Marie Juliet Alfaro, *Secured Transactions History: The First Chattel Mortgage Acts in the Anglo-American World*, 30 WM. MITCHELL L. REV. 1403, 1406–07 (2004). Some southern states had fraudulent conveyance statutes that also required recording after a number of years of personalty

states of the first wave of states that passed the conditional sales acts, and both states of the second wave to pass the acts.⁵⁰⁰ Of the two interlopers, Illinois and Kansas, Illinois did not recognize the conditional sale as a valid transaction.⁵⁰¹ Maine, the remaining first wave state, did not appear on the list. One of its major industries, however, involved acquisition of oxen from farmers to haul logs over snow to the banks of ice-covered rivers.⁵⁰² If the farm financiers in these farm states also possessed political power in the respective legislature, the potential threat of the *Wait* opinion would cease.

A. *Maine*

In the late 1860s, Maine's industries included lumber manufacturing, shipbuilding, and textile manufacturing. Lumbering was the principal Maine export in the nineteenth century.⁵⁰³ Lumbermen would toil in the forests during December through March, cutting pine trees and skidding them over the snow by oxen and horse sled to the riverbank, so that when the snow melted, the logs could be tumbled into the river and floated to a sawmill near a port.⁵⁰⁴ Although the lumbering industry had moved to Wisconsin and Minnesota in the 1850s and cutting spruce for pulp mills manufacturing paper was developing in the late 1860s, the late 1860s and early 1870s still produced record lumber exports.⁵⁰⁵ Shipbuilding climaxed in the 1850s and declined considerably after the panic of 1857.⁵⁰⁶ Textile mills had spilled over from Boston Associates' New Hampshire operations.⁵⁰⁷ But Maine's farmers remained the state's main

transactions involving a change of possession without a transfer of ownership. *See supra* notes 449–50 and accompanying text (exemplifying some of the southern states that had fraudulent conveyance statutes with recording requirements).

500. *See supra* notes 244–49, 267–70 (describing the second wave).

501. *See Ketchum v. Watson*, 24 Ill. 591, 592 (1860) (“To pass the title as between third persons, there must be a change in possession, so that others may not be deceived and defrauded by the appearance of ownership in one, while the title is really in another.”); *see also Lucas v. Campbell*, 88 Ill. 447, 448–52 (1878) (holding a written transaction with monthly advances toward a purchase is not a lease, but a sale); *Murch v. Wright*, 46 Ill. 487, 488–89 (1868) (declaring the transaction a conditional sale, even though “made to assume the form of a lease”).

502. *See* CHARLES E. CLARK, MAINE: A BICENTENNIAL HISTORY 92 (1977) (“Four months out of the year, December to March, woodsmen lived in the forest, cut pine logs, skid[d]ed them over snow by ox and horse sled, and piled them by the river bank.”).

503. *Id.*

504. *Id.*

505. *Id.* at 136.

506. *Id.* at 104.

507. *Id.* at 93, 135.

economic force, both by value of property and number of employees.⁵⁰⁸

These four groups were well-represented in the Maine Senate of 1870, in which the first conditional sales bill arose.⁵⁰⁹ Of the thirty-one senators, ten were farmers (32%), five were manufacturers (16%) with four in lumber and one in textiles, and three were transporters (10%) with two in shipbuilding.⁵¹⁰ The retail townspeople were more numerous, with twelve (39%), including six lawyers, five unspecified merchants, and one grocer, all of the groups likely to lend to farmers taking the Holmes' note as security.⁵¹¹ The two commercial merchants (6%) consisted of a lumber merchant and corn and flour dealer.⁵¹²

The farmers and their lenders also dominated the Maine House, but in reverse numbers.⁵¹³ Farmers comprised 56 of the 147 representatives

508. S. JOURNAL, 49th Leg., at 44 (Me. 1870).

509. *See id.* at 3–4 (listing 31 senators: Samuel Hanson of Buxton, clothing manufacturer; John B. Nealley of South Berwick, farmer; Joseph C. Roberts of Waterborough, grocer; Marquis D.L. Lane of Standish, lawyer; Charles E. Gibbs of Bridgton, teamster; Henry Carvill of Brunswick, merchant; Thomas B. Reed of Portland, farmer; William W. Bolster of Dixfield, lawyer; Thomas P. Cleaves of Brownfield, lawyer; Daniel Holland of Lewiston, farmer; Edwin R. French of Chesterville, farmer; J(acob) P. Morse of Bath, shipbuilder; Thomas S. Lang of Augusta, lumberman; Joshua Gray of Gardiner, manufacturer of lumber; George E. Minot of Belgrade, farmer; Stephen D. Lindsey of Norridgwock, attorney at law; Luther H. Webb of Hartland, merchant; John G. Mayo of Dover, farmer; Thomas R. Kingsbury of Bradford, merchant; Charles Buffum of Orono, lumber manufacturer; Timothy Fuller of Lincoln, farmer, Benjamin D. Metcalf of Damariscotta, ship builder, Philander J. Carlton of Camden, merchant; Ruggles S. Torry of St. George, sailor; T.H. Cushing of Wintersport, lumber merchant; Lorenzo Garcelon of Troy, farmer; John A. Buck of Orland, corn and flour dealer; Hiram S. Bartlett of Trenton, farmer; F. Loring Talbot of East Machias, lumber manufacturer; Putnam Rolf of Princeton, merchant; Samuel W. Collins of Lyndon, farmer); *see also* U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF MAINE (1870), available at <http://www.heritagequest.com> (providing occupations of senators).

510. *See supra* note 509.

511. *See id.*

512. *See id.*

513. *See* H.R. JOURNAL, 49th Leg., at 46–56 (Me. 1870) (listing 147 representatives: John Quincy Adams of Biddeford, lawyer; John Q. (John L.) Adams of Mayfield, farmer; George Alexander of Belmont, farmer; Winkworth S. Allan of Corinna, farmer; John S. Ames of Jefferson, farmer; Joseph Baker of Augusta, attorney at law; Lewis Barker of Stetson, lawyer; Orrin Bartlett of Harrison, clergyman; Asher H. Barton of Benton, farmer and representative in the legislature; Edwin R. Bean of Corinth, farmer; Samuel R. Bearce of Lewiston, lumber dealer and manufacturer; Zebulon H. Bearce of Turner, farming and representative in the legislature; Thomas H. Berry of Buxton, works in sawmill; George S. Berry of Damariscotta, apothecary; Sidney W. Bird of Rockland, merchant and manufacturer of lime; Granville Blake of Auburn, salesman in furniture store; Hiram Bliss, Jr., of Washington, lawyer; Percival Bonney (Bonny) of Portland, lawyer; Thaddeus F. (T.F.) Boothby of Embden, farmer; David Boyd of Newcastle, keeps country store; Samuel M. Brackett of Cumberland, farmer; Alden (Aldon) Bradford of Eastport, dealer and manufacturer of clothing; Henry Brawn (Brown) of Old Town, lumber manufacturer; William H. (Wm. H.) Brown of Anson, hotel keeper; Caleb U. (Caleb V.) Burbank of Acton, farmer; Henry H. Burgess of Portland, dealer in paints and oils; John H. Burnham of Biddeford, brass and iron foundry; Samuel W. (Saml. W.)

Campbell of Deer Isle, farmer; James H. Chamberlain of Ellsworth, ret'd. merchant; Abner B. Chase of Winn, Rt. Grocer; Alden Chase of Woodstock, farmer; Harvey D. Clark of Holden, farming; Gustavus Clark of Readfield, farmer; Cyrus Cole of Cape Elizabeth, retired merchant; Charles (Chas) Cornforth (Conforth) of Fairfield, farmer; James Cotton of Troy, farmer; Enoch Cousens (Cousins) of Kennebunkport, retail grocer; Charles Cox of East Machias, wheelright and representative to legislature; Robert Crockett of Rockland, master mariner; John S. Cushing of Sidney, physician; Washington L. Daggett of Strong, merchant; Horatio N. Darling of Lincoln (Patten), farmer; E. Adams (E.A.) Davis of Lubec, mason; A.J. (Adoniran J.) Dearborn of Falmouth, farmer; John A. Dennett of South Berwick, farmer; William (Wm.) Dickey of Fort Kent, no occupation listed; Orrin (Owen) Douglass of Naples, farmer; Edward A. (Edwin A.) Duncan of Kittery, brick layer; James Dunning of Bangor, president of bank; Alanson B. (A.B.) Farwell of Augusta, lawyer; Levi H. Folsom of Skowhegan, retired lumberman; Isaac Foster of Argyle, farmer; James Foss of Abbot, shovel handle man.; Michael F. Gannett of Bath, grocer and farming utensils; Rufus Gates of Robbinston, farmer; Joseph G. Gott (Gatt) of Leeds, farmer; Samuel L. Gould of Albany, clergyman; Leonard F. (Lenord) Green of Wilton, farmer; Austin Greenleaf of Edgcomb, representative in legislature; William L. Guptill of Gouldsboro, blacksmith; John S.P. Ham of Lewiston, produce dealer; J.S. (James) Hamilton of Orono, lumberman; Henry E. Hammond of Paris, farmer; George W. (G.W.) Hammond of Westbrook, agent paper mill; Roscoe G. Harding of Gorham, grocer (retired); Williard P. (William P.) Harriman of Belfast, lawyer; William L. Hathorn (house of Going Hathorn) of Pittsfield, lumberman; Sylvanus T. Hinks of Bucksport, house carpenter; Samuel A. Holbrook of Freeport, merchant; George S. Holman of Dixfield, dry goods ret.; Harrison (Harison) Hume of Cherryfield, lawyer; Samuel F. Humphrey of Bangor, lawyer; Daniel W. Hussey (Huzzy) of Sangerville, farmer; William Irish of Sherman, farmer; George P. (Geo. P.) Jones of Norway, dentist; Coan Jordan of Brunswick, farmer; Marshall Jordan (Jordan) of Minot, merchant; Israel G. Kimball of Bethel, farmer and representative to legislature; John W. Lane of Hollis, farmer; Andrew Leighton of Yarmouth, farmer; James Lewis of Liberty, farmer; Warren R. Lewis of Pittston, farmer; Albert O. Libbey (Libby) of Limerick, dry goods merchant; Benjamin H. (Benj. H.) Lord of Lebanon, carpenter; John T. Main of Unity, physician; Jonathan H. (John H.) Marín of Rumford, farmer; John C. Mason of Hiram, farmer; John May of Winthrop, farmer; Ebenezer H. (Eben. H.) Mayo of Windham, makes barrels; Alexander (Alex) McDougal of Meddybemps, farmer; William McGilvery of Searsport, ship builder; Cyrus McKown (McCown) of Boothbay, ship owner; John McLain of New Vineyard, farmer; Daniel M. Means of Sedgwick, farmer; John Mears of Bristol, shoe maker; Frank B. Mildram of Wells, unlocated; Abraham C. Milliken of Tremont, without occupation; George V. Mills of Brooksville, farmer; Moses S. (Morres S.) Moulton of Porter, representative; Charles Newcomb of Brewer (Orrington), engineer; A.E. (Alfred E.) Nickerson of Swanville, school teacher; Ezra Pray of Albion, farmer; Daniel C. (D.C.) Palmer of Gardiner, sawyer of lumber; James F. Patten of Bath, merchant; William S. (William P.) Peavey of Whiting, merchant; Major A. (Mayer A.) Phillips of Weld, clerk in store; John Pierce of Machias, lumberman; Edward Plummer of Lisbon, lumber dealer; Cyrus M. Powers of Houlton, lawyer; Robert Purinton (Purington) of Bowdoinham, ship builder; A. Judson (A.J.) Ray of Harrington, carpenter; Isaac Reed of Waldoboro, ship builder; Kerwin W. (Kervin W) Riggs of Georgetown, grocery trader; Robert Sargent of Hermon, brick mason; Albert N. Sawyer of Gray, farmer; Isaac W. Sherman of Camden, master mariner; Calvin W. Sherman of Islesboro, mariner; John M. Skinner of St. Albans, farmer and lumberer; Joseph O. Smith of Hodgdon, merchant; Oramandel (Ora P.) Smith of Litchfield, farmer; Harrison G.O. Smith of Parsonsfield, farmer; Edwin B. Smith of Saco, lawyer; Edwin Smith, Jr., of Warren, conveyance; Joseph W. Spaulding of Richmond, lawyer; Daniel Stickney of Preque Isle, editor and publisher; James M. Stone of Kennebunk, lawyer; Lemuel H. Stover of Harpswell, farmer; James G. Sturgis of Standish, physician; Isaac F. Thompson of Hallowell, deputy sheriff; George R. (G.R.) Thurlough of Newburg, farmer; Stephen L. Tobey of Athens, farmer; Thomas E. Twitchell of Portland, grocer; T.W. (Thomas W.) Vose of Winterport, lawyer; Nahum (Nahin) Warren of Veazie, farmer; Samuel Wasson of Surry, farmer; Joshua W. Waterhouse of Portland, retail merchant, Alfred Watts of

(38%).⁵¹⁴ The retail townspeople included thirty-five more (24%) with thirteen lawyers and eight unspecified merchants.⁵¹⁵ Less numerous were the non-retail townspeople with twenty-three (16%), the manufacturers with ten (7%), the transporters with eight (5%), all in shipping, and the commercial merchants, including one banker and the households each with seven (5%).⁵¹⁶

These numbers suggest the groups lending to farmers, lawyers, and shop-owning merchants, allied with a few farmers could dominate both the Maine Senate and Maine House. But such alliances in Maine during the Gilded Age were unnecessary. After 1856, the Republican Party in Maine dominated the legislature and governorship, typically by two-to-one margins and sometimes four-to-one margins in the Maine house, and several times, the entire Maine Senate.⁵¹⁷ The collapse of the Democratic Party over slavery tied to the Republican acceptance of a liquor prohibition plank to appeal to the moralistic Maine political culture produced that dominance.⁵¹⁸ These Republicans desired to nurture and expand the nation's economy.⁵¹⁹ Nationally, that nurturing "meant a protective tariff], 'sound money,' governmental promotion of railroads, homesteading in the West, support for a revitalized merchant marine, [and] an expanded navy."⁵²⁰ Locally, it meant protecting discounted lending on Holmes' notes to the area's principal economy: agriculture. Therefore, when a threat arose to that lending as posed by the New York good faith purchaser rule typified by *Wait* in the late 1860s, these groups could easily

Thomaston, retired master mariner; George H. Wentworth of North Berwick, farmer; Andrew J. Weston of Poland, farmer; John C. Wheeler of Chesterville, farmer; Charles R. (Ches. R.) Whidden of Calais, lawyer; Daniel White of Bangor, jeweler; Josiah Whitehouse of St. George, huckster; John Whitney of Exeter, farmer; Isaac Wilder of Fort Fairfield (Washburn), millwright and farmer; Miles Wilson (Willson) of Bradford, farmer; Roland M. (Rowland M.) Young of Hancock, insurance agent; see also U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF MAINE (1870), available at www.heritagequest.com (providing occupations for Allen, Boyd, Brackett, Wentworth, and White) (parentheticals reflect Heritage Quests' index spelling).

514. See *supra* note 513 (providing occupations of each representative organized by state and county).

515. *Id.*

516. *Id.*

517. See MATTHEW C. MOEN, KENNETH T. PALMER & RICHARD JOHN POWELL, CHANGING MEMBERS: THE MAINE LEGISLATURE IN THE ERA OF TERM LIMITS 20 (2005).

518. KENNETH T. PALMER, G. THOMAS TAYLEOR & MARCUS A. LIBRIZZI, MAINE POLITICS AND GOVERNMENT 26–27 (1992).

519. PAUL T. BURLIN, IMPERIAL MAINE AND HAWAII: INTERPRETATIVE ESSAYS IN THE HISTORY OF NINETEENTH-CENTURY AMERICAN EXPANSION 163 (2006).

520. *Id.*

take care of the problem by eliminating the good faith purchaser through notice. The result was the first conditional sales act.

B. *Vermont*

In the late 1860s, Vermont's economy was more agriculturally oriented than Maine. Only one out of every thirty persons worked in manufacturing.⁵²¹ The principal farm product was wool, fostered by high tariffs between 1828 and 1857, with some farmers devoted exclusively to raising sheep and providing wool for local woolen mills.⁵²² Demand for other farm products, such as cheese, butter, and eggs, encouraged country stores to become middlemen in gathering these products for export when the railroads provided transportation to out-of-state urban centers.⁵²³

The occupations of the members of the Vermont Senate of 1870 in which the second conditional sales bill arose reflected this skewed economy.⁵²⁴ Thirteen of the thirty senators (43%) numbered among the retail townspeople, with ten lawyers.⁵²⁵ Next came farmers with nine (30%).⁵²⁶ The non-retail townspeople trailed with four (12%), the manufacturers with three (10%), the commercial merchants with three (10%), and the transporters with one (3%).⁵²⁷ One Senator had an

521. EDWARD DAY COLLINS, A HISTORY OF VERMONT 222 (1903).

522. *See id.* at 214 (attributing increased wool production in Vermont to high wool prices resulting from federal tariffs); SAMUEL B. HAND, THE STAR THAT SET: THE VERMONT REPUBLICAN PARTY, 1854-1974, at 2 (2002) (stating that in the 1830s, sheep raising in Vermont "reached the proportions of the craze").

523. EDWARD DAY COLLINS, A HISTORY OF VERMONT 221 (1903).

524. *See* S. JOURNAL, Biennial Sess., at 3-9 (Vt. 1869) (listing the 30 senators as George W. Grandey of Vergennes, lawyer; Calvin Hill of Middlebury, saddler; Abraham B. Gardner of Pownal, farmer; William T. Horrobin, of Bennington, overseer; Jonathan Ross of St. Johnsbury, lawyer and farmer; John M. Martin of Peachem, farmer; George G. Benedict of Burlington, editor; Frederick C. Kennedy of Colchester, agent of woolen mill; George W. Brownell, farmer; John W. Hartshorn of Lunenburg, cattle dealer; R. James Saxe of St. Albans, merchant; Dana R. Bailey of St. Albans, lawyer; Arvin A. Brown of Richford, farmer; Alexander K. Hibbard of North Hero, farmer; Asa R. Camp of Stowe, merchant; Heman A. White of Washington, lawyer; Harry H. Niles of Thetford, physician; Jerry E. Dickerman of Derby, lawyer; E. Plumby Colton of Irasburg, joiner; George A. Merrill of Rutland, steamboat; Lucius Copeland of Middletown, farmer; Rodney C. Abell of W. Haven, farmer and lawyer; Charles H. Health of Plainfield, attorney; J.H. Hastings of Waitsfield, farmer; Heman Carpenter of Northfield, lawyer; Charles B. Eddy of Rockingham, farmer and lawyer; William W. Lynde of Marlboro, merchant; William M. Pingry of Weathersfield, lawyer; Albert G. Dewey of Hartford, cloth manufacturer; William Collamer of Woodstock, lawyer); *see also* U.S. NAT'L ARCHIVES & RECORDS ADMIN., CENSUS OF VERMONT (1870), available at www.heritagequestonline.com (providing occupations).

525. *Id.*

526. *Id.*

527. *Id.*

undetermined occupation.⁵²⁸

Similar to the Maine House, farmers dominated the Vermont House, but to a greater extent.⁵²⁹ Of the 234 representatives, 136 were farmers

528. *Id.*

529. See MANUAL OF THE LEGISLATURE OF VERMONT, FOR THE YEARS 1870–71, at 17–28 (1870), available at <http://hdl.handle.net/2027/uc1.b3141699> (listing 234 house members: Edward Gorham of Addison, farmer; John O. Hamilton of Bridport, farmer; Jonathan B. Dike of Bristol, farmer; Julius B. Benedict of Cornwall, farmer; J. Warren Barnes of Ferrisburgh, farmer; Edward J. Brown of Goshen, farmer; Horatio N. Bull of Hancock, farmer; William Powers of Leicester, manufacturer; Howard Clark, 2nd of Lincoln, butcher; James M. Slade of Middlebury, merchant; George F. Skiff of Monkton, farmer; Ezra C. Smith of New Haven, farmer; Rodney F. White of Orwell, farmer; Josiah S. Tappan of Panton, farmer; Parsons Billings of Ripton, farmer; Horace Thomas of Salisbury, farmer and mechanic; Julius N. North of Shoreham, farmer; Albert Orvis of Starksboro, farmer; Paschal Maxfield of Vergennes, physician; Harry Evers of Waltham, farmer; John Brittell of Weybridge, farmer; Ashael H. Hubbard of Whiting, farmer; Aaron G. McKee of Arlington, farmer; Luther R. Graves of Bennington, banker; William A. Tyrel of Dorset, marble dealer; George Eddy of Glastenbury, lumberman; James S. Thomson of Landgrove, farmer; Mason S. Colburn of Manchester, leather manufacturer; Jonathan Hapgood of Peru, farmer; Thomas Rickards of Pownal, manufacturer; Daniel Carpenter of Readsboro, farmer; George Hopkins of Rupert, farmer; Elisha B. Hurd of Sandgate, mechanic; Joseph Crosier of Searsburgh, carpenter; Seth W. Munroe of Shaftsbury, farmer; James R. Houghton of Stamford, manufacturer; Giles B. Bacon of Sunderland, farmer; Austin P. Graham of Winhall, manufacturer; Amos Aldrich of Woodford, lumberman; L. Downer Hazen of Barnet, merchant; Jesse Marshall of Burke, farmer; Abial C. Palmer of Danville, farmer; Almon L. Clark of Groton, miller; Levi R. Goodrich of Harkwick, farmer; Joseph Nickerson of Kirby, farmer; Isaac W. Sanborn of Lyndon, farmer; Marshall W. Stoddard of Newark, farmer; Orman P. Hooker of Pescham, farmer; James Dickey of Ryegate, farmer; William L. Pearl of Sheffield, merchant; Harvey N. Kingsbury of Stannard, farmer; Franklin Fairbanks of St. Johnsbury, manufacturer; Nahum K. Campbell of Sutton, drover and farrier; Lyman Damon of Walden, clergyman; Ezra A. Parks of Waterford, farmer; Jesse G. Gray of Wheelock, farmer; Francis E. Briggs of Bolton, mechanic; Walter Carpenter of Burlington, physician; Alanson Edgerton of Charlotte, bridge builder; Alonzo J. Stevens of Colchester, mechanic; Asa Brigham of Essex, farmer; Noble L. Partch of Hinesburgh, farmer; Alfred E. Bates of Huntington, farmer; Adrian S. Lee of Jericho, dentist; Ransom A. Jones of Richmond, tanner; Albert G. Whittemore of Milton, attorney; Lee Tracy of Shelburne, wool dealer; Lemuel S. Drew of South Burlington, farmer; Tiras Isham of St. George, farmer; Patrick Barrett of Underhill, farmer; Solomon H. Macomber of Westford, farmer; William B. Douglas of Williston, farmer; Nelson Snow of Bloomfield, farmer; Levi Pinney of Brighton, farmer; Andrew J. Taylor of Brunswick, farmer; Harvey H. Lucas of Canaan, farmer; Charles Chase of Concord, boot and shoe dealer; Oscar T. Walter of East Haven, farmer; Marcus L. Reed of Granby, farmer; William C. Washburn of Guildhall, carpenter and joiner; Frank L. Hadlock of Lemington, farmer; Luther A. Nichols of Lunenburg, farmer; John W. Webb of Maidstone, farmer; Samuel P. Kneeland of Victory, lumberman; Ira F. Dean of Bakersfield, merchant; Ethan A. Hull of Berkshire, farmer; Daniel B. Stetson of Enosburgh, merchant; George A. Ballard of Fairfax, attorney; James M. Soule of Fairfield, farmer; Harvey Olmsted of Franklin, farmer; Cephas A. Hotchkiss of Georgia, farmer; Henry Baxter of Highgate, physician; Heman Hopkins, Jr. of Montgomery, farmer; William C. Brown of Richford, farmer; Samuel B. Green of Sheldon, merchant; Edward A. Smith of St. Albans, manufacturer; George M. Hall of Swanton, physician; Edwin H. Landon of Alburgh, farmer; Sereno G. Macomber of Grand Isle, farmer; Henry H. Goodsell of Isle La Motte, farmer; Amasa B. Hazen of North Hero, farmer; Benajah Phelps of South Hero, merchant; Luther H. Hurlburt of Belvidere, merchant; Edward P. Mudgett of Cambridge, farmer; Edwin C. White of Eden, mechanic; David Cook of Elmore, farmer; Carroll S. Page of Hydepark, merchant;

John Holmes of Johnson, farmer; Charles R. Page of Morristown, merchant; Vernon Wilkins of Stowe, butcher; Elias Willey of Waterville, farmer; Earl Guyer of Wolcott, manufacturer; Henry C. McDuffee of Bradford, surveyor; William H. Nichols of Braintree, farmer; Zadoc P. Fuller of Brookfield, farmer; Lyman G. Hinckley of Chelsea, attorney; S. Dana Huntington of Corinth, farmer; Perley Mason of Fairlee, farmer; John Bailey, Jr. of Newbury, farmer; James Houghton of Orange, farmer; Nathan S. Clark of Randolph, farmer; Nathan B. Cobb of Strafford, farmer; Harvey Dodge of Thetford, farmer; Horace White of Topsham, farmer; Nathaniel H. Austin of Tunbridge, farmer; Moses Spear of Vershire, farmer; B.W. Bartholomew of Washington, banker; Edwin S. Cook of West Fairlee, stage producer; Henry D. Abbott of Williamstown, farmer; Enoch Rowell of Albany, farmer; William W. Grout of Barton, attorney; Samuel R. Jenkins of Brownington, farmer; Andrew J. Lang of Charleston, farmer; Daniel P. Walworth of Coventry, farmer and merchant; Charles Chamberlin of Craftsbury, farmer; Charles Lunt of Derby, farmer; Sidney K.B. Perkins of Glover, clergyman; Josiah C. Robinson of Holland, farmer; George B. Brewster of Irasburgh, farmer; T. Abel Chase of Jay, merchant; Harry B. Parker of Lowell, farmer; Richard Maplesden of Morgan, farmer; Lewis H. Bisbee of Newport, attorney; Louis Shedd of Salem, farmer; M. Kennedy, Jr. of Troy, farmer; Edson Farman of Westfield, farmer; William Silsby of Westmore, farmer; Loyal C. Kellogg of Benson, attorney; Zachariah Clark of Brandon, tobacconist; Pitt W. Hyde of Castleton, manufacturer; Hiram F. Baird of Chittenden, farmer; Linus F. Colvin of Clarendon, farmer; Eletcher R. Hawley of Danby, artist; Horace G. Wood of Fair Haven, attorney; Sam. W. St. John of Hubbardton, farmer; Leonard W. Day of Ira, farmer; Ezra Edson of Mendon, blacksmith; Roswell Buel of Middletown, attorney; Aaron W. Cook of Mount Holly, farmer; Silas G. King of Mount Tabor, carpenter and joiner; Jerome C. Bromley of Pawlet, attorney; Joel Ranney of Pittsfield, farmer; Carlos A. Hitchcock of Pittsford, sheriff and insurance agent; John B. Beaman of Poultney, attorney; Charles H. Joyce of Rutland, attorney (Speaker); Richard D. Estabrooks of Sherburne, farmer; Napoleon B. Smith of Shrewsbury, farmer; James K. Foster of Sudbury, farmer; Lansford W. Congdon of Wallingford, farmer; Rodney M. Lewis of Wells, manufacturer; Rollin Hitchcock of West Haven, farmer; William E. Whitcomb of Barre, millwright and iron foundry; Abraham H. Holt of Berlin, farmer; Theron L. Lance of Cabot, farmer; Jesse J. Ridley of Duxbury, lumberman; James A. Coburn of East Montpelier, farmer; Azro D. Bragg of Fayston, farmer; George Wooster of Marshfield, merchant; Jarvil C. Leland of Middlesex, farmer; Joseph Poland of Montpelier, editor and publisher; Lorenzo D. Hills of Moretown, farmer; David W. Hadley of Northfield, farmer; Joseph Lane of Plainfield, farmer; Erastus N. Spaulding of Roxbury, lumberman; Hiram Carleton of Waitsfield, attorney; James Cardell of Warren, merchant; Frank E. Ormsby of Waterbury, farmer; Nathaniel C. McKnight of Woodbury, farmer; Phineas A. Kemp of Worcester, farmer; Jervine O. Kingsley of Athens, farmer; Edward Crosby of Brattleboro, merchant; Erastus Whitney of Brookline, farmer; Laban Jones Jr. of Dover, farmer; Stephen L. Dutton of Dummerston, farmer; Francis Phelps of Grafton, hotel and livery keeper; Rodney B. Field of Guilford, merchant; Alpheus H. Stone of Halifax, farmer; Charles S. Clark of Jamaica, mechanic; Charles M. Adams of Marlboro, farmer; Dana D. Dickinson of Newfane, manufacturer; Samuel E. Wheat of Putney, farmer; Elliot R. Osgood of Rockingham, manufacturer; Sumner Curtis of Somerset, farmer; Jacob B. Grout of Stratton, farmer; Philip H. Rutter of Townshend, farmer; John Hunt of Vernon, farmer; David H. Eager of Wardsboro, farmer; Ralph S. Safford of Westminster, merchant; Lucius P. Mowry of Whitingham, farmer; Oscar E. Butterfield of Wilmington, attorney; Jason D. Jones of Windham, mechanic; Albert E. Stannard of Andover, farmer; Rollin C. Sherwin of Baltimore, farmer; Salmon C. Thayer of Barnard, farmer; Augustus M. Marsh of Bethel, farmer; William C. Bugbee of Bridgewater, carpenter and joiner; Horatio S. Pierce of Cavendish, merchant; Hugh Henry of Chester, attorney; Noah B. Safford of Hartford, farmer; Edwin H. Bagley of Hartland, tinsmith; Ervin J. Whitcomb of Ludlow, merchant; Charles A. Scott of Plymouth, physician; John Brockway of Pomfret, farmer; Hiram F. Thomas of Reading, merchant; Charles Morgan of Rochester, general dealer; Cyrus B. Drake of Royalton, retired clergy; W. H.H. Walbridge of Sharon, clerk; Frederick G. Field of Springfield, merchant; Ezra M. Collom of Stockbridge, furniture dealer; Charles Amsden of Weathersfield, manufacturer; Joseph C.

(58%).⁵³⁰ Trailing were the forty-one retail townspeople (18%) with twenty-five merchants and fifteen lawyers, the non-retail townspeople with thirty (13%), the manufacturers with fourteen (6%), and the commercial merchants with thirteen (6%), including five lumbermen.⁵³¹ These numbers suggest the people who lent to the farmers (the retail townspeople), in addition to the farmers themselves, could easily control both the Vermont Senate and House.

By 1870, Vermont had become a one-party state under the Republican Party.⁵³² The Democratic Party's tariff reductions in the 1850s, which had devastated Vermont's woolen industry, when coupled with their acquiescence to slavery, lead to the Democratic Party's demise in Vermont.⁵³³ When the remainder of the Whig Party joined with the Republicans in 1855, the Republican majorities were overwhelming, with twenty-nine of thirty senators and 145 of 206 house members being Republican.⁵³⁴ So when the good faith purchaser concept, embodied in *Wait*, threatened discounted lending on notes for agriculture, the state's principal economy, the retail merchants and farmers could easily remove the problem.⁵³⁵ The result was the second conditional sales act.

C. Iowa

In Iowa, all was geared in favor of the farmer. Iowa farming differed from that of New England subsistence farming. Iowa farmers could acquire land from the government for specie, but had to borrow the specie at high interest rates.⁵³⁶ Instead of rock removal, the Iowa farmer had to get rid of the grass' matted root system, which required a gigantic wheel-mounted machine with a wooden moldboard, covered with iron, pulled by several yoke of oxen, and "could cut a furrow two feet wide."⁵³⁷ The high cost of acquiring the land and preparing it for farming posed the Iowa farmer with an ultimatum—become a commercial farmer or

Fenn of Weston, farmer; Daniel Benjamin of West Windsor, farmer; Jonathan B. Farnsworth of Windsor, attorney; Lorenzo Richmond of Woodstock, insurance agent).

530. *Id.*

531. *Id.*

532. See SAMUEL B. HAND, *THE STAR THAT SET: THE VERMONT REPUBLICAN PARTY, 1854–1974*, at 3, 17 (2002) (“[T]he Republican party was so inclusive that fusion among rival factions offered no threat to its dominance.”).

533. See *id.* at 2, 3, 17 (detailing the Democratic Party's fall).

534. See *id.* at 3, 17 (describing the Whig Party's fall).

535. *Wait v. Green (Wait II)*, 36 N.Y. 556, 556–57 (1867).

536. See JOSEPH FRAZIER WALL, *IOWA: A BICENTENNIAL HISTORY* 122 (1978) (“[E]ven the most successful farmers had difficulty accumulating [the] amount of acceptable specie.”).

537. See *id.* at 124 (describing Iowa farming).

perish.⁵³⁸ The towns existed to supply the needs of these Iowa farmers: with “a mill, [a] general store,” post office, blacksmith, and houses for merchants.⁵³⁹ Similarly, the townsmen lured the railroad companies to their towns, knowing the railroads would provide farmers with a market because the nearest rail station had grain elevators and stockyards, which allowed farmers to purchase goods from the merchants while in town.⁵⁴⁰ Because Iowa had little industry to begin with, due to the railroad and the rapid development of banks, it did not develop in urban centers on the Mississippi River, but in the small towns near the farms.⁵⁴¹ Consequently, the industry focused on processing farm produce: meatpacking, grain milling, and manufacturing farm implements.⁵⁴²

The lower house of the Iowa legislature, which amended the senate's third conditional sales bill in its entirety, mirrored these demographics.⁵⁴³ Of the one hundred members, the farmers numbered the most with fifty (50%).⁵⁴⁴ The retail townspeople had twenty-eight members (28%) with twenty lawyers and four merchants.⁵⁴⁵ Commercial merchants numbered four, (4%) which included a banker, a stockbroker, a grain dealer, and a wholesale grocer.⁵⁴⁶ Two of the lawyers and two of the merchants later became bankers, suggesting that they lent to farmers.⁵⁴⁷ The six manufacturers (6%) included four millers and one pork packer while the eleven non-retail townspeople (11%) included five physicians.⁵⁴⁸

The Iowa Senate, which replaced a good faith purchaser protection statute with a recording statute, became another senate body with retail townspeople dominance over the farmers.⁵⁴⁹ Of the fifty senators, twenty-one were retail townspeople (42%) with fifteen lawyers, followed by ten non-retail townspeople (20%) with four physicians, and nine farmers (18%).⁵⁵⁰ Rounding out the group were seven commercial merchants (14%) with three bankers, two manufacturers (4%), and one

538. *See id.* at 123 (“[T]he Iowa farmer was a commercial not a mere subsistence farmer.”).

539. *See id.* at 138–39 (describing Iowa towns).

540. *See id.* at 141 (illustrating railroad towns in Iowa).

541. *See id.* (examining railroads in Iowa).

542. *See id.* (explaining how “agricultural-related products quickly dominated . . . on Iowa’s list of manufactured goods”).

543. *See supra* note 350 (listing members of the house).

544. *Id.*

545. *Id.*

546. *Id.*

547. *See id.* (enumerating biographical information for Booth, Draper, Erickson, and Williams).

548. *Id.*

549. *See supra* note 352 (documenting the senate members’ occupations).

550. *Id.*

with an unknown occupation.⁵⁵¹ Again, an allegiance consisting of the retail townspeople and a few farmers possessed the political power.

The townsmen dominated the Iowa legislature far beyond their numbers.⁵⁵² “[T]he town merchant, banker, lawyer, and physician,” not the farmer, molded Iowa.⁵⁵³ The townsmen maintained loyalty to the Republican Party, believing in laissez-faire and free enterprise, and fearing big business, big government, and big unions.⁵⁵⁴ This dominance arose at the end of the Civil War, providing Iowa with a one-party Republican state for over a hundred years.⁵⁵⁵ Therefore, when the threat of the potential good faith purchaser, posed by *Wait*, threatened their lending to farmers through discounted loans backed by promissory notes from conditional sales, the result was the third conditional sales act.

D. Minnesota

Minnesota differed both economically and politically from the other early states adopting the early conditional sales acts. Its economy started with commercial lumbering in the forests, stretching southwest of Duluth and up along the Mississippi, by transporting both personnel and techniques from New England’s forests, cutting pine trees during the winter and dragging the logs to the river for floating downriver to the sawmills in Minneapolis when the ice melted.⁵⁵⁶ The second wave of settlement came to the southeastern prairie with the immigration of “descendants of New England” puritans arriving “from upstate New York,” Wisconsin, and Illinois seeking the cheap land from the government and “with a desire to become economically successful.”⁵⁵⁷ Again, the cost of preparing the prairie meant they needed a commercial crop, so they switched from corn to exportable spring wheat in the 1850s using mechanical reapers and horse-drawn threshers.⁵⁵⁸ This cash crop

551. *Id.*

552. See JOSEPH FRAZIER WALL, IOWA: A BICENTENNIAL HISTORY 150 (1978) (illustrating how “the townspeople have . . . dominated the state legislature”).

553. See *id.* (“[I]t has been the influential people in Iowa’s small towns who have molded the state in their own image.”).

554. See *id.* at 149–50 (describing how “laissez-faire and the free-enterprise system are most fervently . . . believed in”).

555. *Id.* at 154 (illustrating Republican dominance).

556. See WILLIAM E. LASS, MINNESOTA: A BICENTENNIAL HISTORY 77, 141, 148 (1977) (depicting the early lumber industry in Minnesota).

557. See DANIEL JUDAH ELAZAR, VIRGINIA GRAY & WYMAN SPANO, MINNESOTA POLITICS & GOVERNMENT 9 (1999) (describing Minnesota’s settlers).

558. See WILLIAM E. LASS, MINNESOTA: A BICENTENNIAL HISTORY 129, 131–32 (1977) (detailing the switch from corn to wheat).

required flourmills, which were financed by lumber fortunes in Minneapolis.⁵⁵⁹

The Minnesota house that introduced the fourth conditional sales bill reflected this dichotomy.⁵⁶⁰ Of the 106 members of the Minnesota house, forty-nine (46%) were farmers.⁵⁶¹ Twenty-one (20%) were commercial merchants, including six lumber merchants, five merchant businessmen, and four bankers.⁵⁶² Eighteen (17%) were retail townspeople, including eleven lawyers and seven merchants.⁵⁶³ Trailing in number were fifteen non-retail townspeople (14%) and three transporters (3%).⁵⁶⁴

The Minnesota Senate reflected the same make-up as the other conditional sales states, namely, strong retail representation and less strong farm representation.⁵⁶⁵ Of the forty-one senators, fourteen comprised the retail townspeople (34%) with seven merchants and five lawyers, while twelve made up the farmers (29%).⁵⁶⁶ Commercial merchants numbered seven (17%) with three lumbermen, while non-retail townspeople numbered six (15%) and manufacturers numbered two (5%).⁵⁶⁷

The political situation in Minnesota differed from the other states. Democrats dominated Minnesota territorial politics until statehood in 1858 due to federal patronage delaying the appearance of the Republican Party's

559. *See id.* at 132, 136, 151 (summarizing the development of flour mills).

560. *See supra* note 368 (listing the House members' occupations).

561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. *See Minnesota Legislators Past and Present*, MINN. LEGIS. REFERENCE LIBR., <http://www.leg.state.mn.us/legdb/search.aspx?search=sessionsearch> (last visited Dec. 1, 2012) (select "15th, 1873"; select "Senate") (listing the forty-one senators: H.H. Atherton, merchant; George Washington Batchelder, merchant; Luther Loren Baxter, lawyer; Samuel S. Beman, attorney; Henry C. Burbank, merchant; Levi Butler, lumberman; Reuben J. Chewning, farmer; Amos Coggsell, lawyer; Charles E. Cutts, farmer; Thomas H. Everts, physician; Charles Hinman Graves, merchant; John O. Haven, farmer; J.S.G. Honer, farmer; Lucius Frederick Hubbard, grain dealer; Edward Harrison Hutchins, tinsmith; T.G. Johnsrud, private banker; Robert Bruce Langdon, builder; Jonas Lindall, merchant; John Louis MacDonald, lawyer; John F. Meagher, merchant; William Meighen, farmer; John G. Nelson, farmer; John Nicols, iron trade; N.K. Nobel, grocery; John W. Peterson, farmer; John Sargent Pillsbury, hardware merchant; Henry Poehler, mercantile business; O.S. Porter, hotel keeper; Andrew Railson, farmer; Edmund Rice, lawyer; William D. Rice, farmer; G.A. Ruckoldt, farmer; Dwight May Sabin, lumberman; William H. Stevens, manufacturer; Marshall B. Stone, farmer; Freeman Talbot, farmer; Edward Thompson, lumberman; William G. Ward, civil engineer; John P. Waste, physician; Milo White, merchant; James G. Whittemore, physician).

566. *Id.*

567. *Id.*

ascendance.⁵⁶⁸ Once the ascendancy took hold, dissidents constantly challenged the Republican Party establishment and sometimes would win if they allied with the remnants of the Democratic Party.⁵⁶⁹ In 1868, a Republican Congressman allied himself with the Republican Radicals to challenge the state Republican Party establishment, though a split vote permitted the election of a democrat congressman.⁵⁷⁰ In 1869, a Temperance Party arose and ran a close second for governor due to ignorance of the issues by the Republican Party.⁵⁷¹ Thus, when the farmers organized granges in 1869 to oppose high, discriminatory railroad rates and fraudulent grain weighing and grading by grain elevators, the Republican Party gave the farmers serious attention.⁵⁷² The result was a granger law in 1871 that created a railroad commissioner and set railroad rates.⁵⁷³ In this political atmosphere, a challenge to farm lending for both livestock and machinery from the New York good faith purchaser rule, evidenced by *Wait*, would lead to the fourth conditional sales act.

E. *Wisconsin*

Wisconsin and Minnesota were in similar economic situations, but Wisconsin was more developed. “The northern two-thirds of” the state possessed pine forests that attracted the New England lumbermen, while the southern one-third had prairie grass that attracted northern farmers; there were also lead mines in the southwest that attracted Missouri miners.⁵⁷⁴ The lumbermen had earned fortunes floating pine logs down the Chippewa River to the Mississippi sawmills and down the Fox River to the Great Lakes sawmills.⁵⁷⁵ Due to the farming start-up costs, farmers went commercial with spring wheat as soon as possible. They produced

568. See DANIEL JUDAH ELAZAR, VIRGINIA GRAY & WYMAN SPANO, MINNESOTA POLITICS & GOVERNMENT 21 (1999) (describing the “Republican ascendancy”).

569. See *id.* at 21–22 (exploring how “Populist-Progressive parties won elections”).

570. See THEODORE C. BLEGEN, MINNESOTA: A HISTORY OF THE STATE 290 (2d ed. 1975) (“Andrews and Donnelly split the Republican vote, with the result that a Democrat . . . [triumph], though he polled 8000 fewer votes than his Republican opponents combined.”).

571. *Id.* at 291 (describing the Temperance Party formation).

572. See WILLIAM E. LASS, MINNESOTA: A BICENTENNIAL HISTORY 165 (1977); THEODORE C. BLEGEN, MINNESOTA: A HISTORY OF THE STATE 292 (2d ed. 1975) (“The Grangers worked for reasonable railroad rates, opposed discriminations, and favored railroad regulation through state laws.”).

573. See THEODORE C. BLEGEN, MINNESOTA: A HISTORY OF THE STATE 292 (2d ed. 1975) (“By state law maximum fares and rates were prescribed, and the office of railroad commissioner was established.”).

574. See RICHARD NELSON CURRENT, WISCONSIN: A BICENTENNIAL HISTORY 9, 14, 110 (1977) (detailing the state’s landscape).

575. See *id.* at 109 (“Circumstances favored Wisconsin as a lumbering state.”).

larger crop harvests by buying or renting horse-drawn mechanical McCormick reapers that were manufactured in Chicago, Illinois. They also used horse-powered Case threshing machines manufactured locally in Racine, Wisconsin, thereby spawning a small scale milling industry and grain-exporting business throughout the Great Lakes.⁵⁷⁶ However, by the 1870s, legislators became concerned about the serious depletion of the forests. Around this time, farmers began experimenting with alternative crops, primarily hops and wool, but later dairy products, to replace the wheat crops that exhausted the soil of its nitrogen.⁵⁷⁷

Politically, Wisconsin differed from the other states participating in the first wave of conditional sales acts. Wisconsin had a significant immigrant population that, with their American-born children, equaled the Yankee element in numbers.⁵⁷⁸ Due to the influx of German and Irish immigrants in the 1870s, one-quarter of the population was Catholic.⁵⁷⁹ Their culture clashed with the Puritanical sabbatarian and temperance movements favored by the Yankee dominance in the Republican Party, so the Catholic elements sided with the Democrat Party.⁵⁸⁰ Nevertheless, the Republican Party could dominate if they appealed to the German Lutherans' hostility towards Catholicism and "avoided nativistic and moralistic platforms."⁵⁸¹ The Republican Party's departure from this procedure by the legislature that passed the conditional sales act in 1873, resulted in the only one-year break in their thirty-five year dominance in Wisconsin.⁵⁸²

The 1873 Wisconsin legislative manual lists the thirty-three members of the Wisconsin Senate and the ninety-nine members of the Wisconsin

576. *See id.* at 68, 70 (describing the transition into the wheat industry and its prosperity in Wisconsin).

577. *See id.* at 22–23, 71 ("Wheat growing exhausted the soil of its nitrogen [so] some farmers did experiment[s] with new products.").

578. *See id.* at 36 (describing the significant immigrant population of Wisconsin).

579. *See id.* at 40 ("[In] 1870 the Catholics, with almost a fourth of all the church members, could claim to be the largest of the state's religious groups.").

580. *See id.* at 48 (describing the political affiliations of the Catholics in Wisconsin).

581. *See id.* at 50 (stating the Republican party "could hold on to its immigrant Lutheran following—and thereby hold on to its control of the state—only so long as it avoided nativistic and moralistic platforms").

582. *See id.* at 51 (noting the passage of the temperance law); *see also* A.J. TURNER, THE LEGISLATIVE MANUAL FOR THE STATE OF WISCONSIN 1874 at 472–73, 474–76 (1874), available at <http://www.hathitrust.org> (stating the senate was composed of seventeen Republicans, thirteen Democrats, two Liberal Republicans, and one Reformed, and the house was composed of forty-two Democrats, forty-one Republicans, ten Liberal Republicans, two Reformed, two Independents, and one Free Thinker).

House, along with their occupations, birthplaces, and party affiliation.⁵⁸³

583. See A.J. TURNER, THE LEGISLATIVE MANUAL FOR THE STATE OF WISCONSIN 1873, at 457, 459–61 (Atwood & Culver 1874), available at <http://www.hathitrust.org> (describing the composition of the Wisconsin legislature). The senate was composed of Orrin Bacon, miller and woolen manufacturer, Mass., Rep.; Robert H. Baker, manufacturer, Wis., Rep.; William Blair, machinist, Scot., Rep.; Orlando Brown, farmer, N.Y., Lib.; Samuel D. Burchard, manufacturer, N.Y., Dem.; Francis Campbell, farmer, Ir., Rep.; Frederick W. Cotzhausen, lawyer, Ger., Dem.; Horatio N. Davis, banker, N.Y., Rep.; Romanzo E. Davis, farmer, N.Y., Lib.; Henry L. Eaton, farmer, N.Y., Rep.; Walter S. Greene, miller and lumberman, N.Y., Dem.; William H. Hiner, iron manufacturer, Pa., Rep.; Gideon C. Hixon, lumberman, Vt., Rep.; John C. Holloway, banker, N.Y., Rep.; Joseph E. Irish, clergyman, N.Y., Rep.; John A. Johnson, merchant, Nor., Rep.; Evan O. Jones, agricultural implements, Wales, Rep.; George Kreis, manufacturer, Fr., Dem.; Myron P. Lindsley, lawyer, N.Y., Rep.; Francis Little, farmer, Ir., Rep.; Myron H. McCord, lumberman, Pa., Rep.; Robert McCurdy, lumberman, N.B., Rep.; John L. Mitchell, farmer, Wis., Dem.; William Nelson, editor, Scot., Rep.; Patrick H. O'Rourke, lawyer, Wis., Dem.; Robert L.D. Potter, lawyer, N.Y., Rep.; Samuel Pratt, farmer, Mass., Rep.; John B. Quimby, lawyer, Ir., Dem.; Adam Schantz, farmer and merchant, Ger., Dem.; Carl H. Schmidt, editor, Ger., Dem.; Thomas B. Scott, lumberman, Scot., Rep.; Joseph G. Thorp, merchant and lumberman, N.Y., Rep.; and Joseph Wagner, farmer, Ger., Dem.. The house had James H. Allen, prop. of Sparta Mineral Well, N.Y., Rep.; William H. Armstrong, lawyer and farmer, Ill., Rep.; Sherman Bardwell, merchant, N.Y., Rep.; Henry D. Barron, lawyer, N.Y., Rep.; William P. Bartlett, lawyer, Me., Rep.; William H. Bartran, physician, N.Y., Rep.; John A. Becher, real estate dealer and money broker, Ger., Rep.; Mortiz N. Becker, produce dealer, Ger., Dem.; Adelbert E. Bleekman, lawyer, N.Y., Rep.; Julius Bodenstab, farmer, Ger., Lib.; Henry C. Brace, farmer, Mass., Rep.; Samuel S. Brannan, editor, N.Y., Rep.; Seth W. Button, lawyer, Mich., Rep.; Charles A. Cady, farmer, N.Y., Rep.; Columbus Caldwell, farmer, N.Y., Rep.; Charles E. Chamberlin, dentist, N.Y., Dem.; Dustin G. Cheever, farmer, Vt., Rep.; Satterlee Clark, lawyer, Wash. D.C., Dem.; David R. Clements, lumberman, N.Y., Rep.; William H. Clise, farmer, Va., Rep.; Hiram H. Cornwell, farmer and teacher, N.Y., Rep.; Joseph S. Curtis, lawyer, Ohio, Rep.; Peter Daane, Jr., merchant, Holl., Rep.; John W. Davis, banker, Wales, Dem.; Orsamus S. Davis, wagon maker and farmer, Vt., Rep.; Patrick Devy, cooper and farmer, Ir., Dem.; Denis Dewane, farmer, Ir., Dem.; Carlos L. Douglass, farmer and manufacturer, N.Y., Rep.; Peter Doyle, book-keeper, Ir. Dem.; John Elkins, watchmaker, N.H., Rep.; John M. Evans, physician, Vt., Rep.; Asahel Farr, surgeon, Vt., Rep.; Truman M. Fay, farmer, N.Y., Dem.; Eugene K. Felt, farmer, N.Y., Rep.; Appollos D. Foote, merchant and farmer, N.Y., Rep.; Carleton Foster, manufactures lumber, N.Y., Rep.; Wilfred C. Fuller, farmer, N.Y., Dem.; David C. Fulton, real estate dealer and speculator, N.Y. Lib.; Charles R. Gibbs, farmer, N.Y., Rep.; Ferdinand Gnewuch, farmer, Ger., Dem.; Horace E. Houghton, lawyer, N.Y., Rep.; Richard W. Hubbell, lawyer, N.Y., Rep.; Christopher Hutchinson, lead ore smelter and farmer, Eng., Rep.; Norman L. James, merchant, N.H., Rep.; Peter Jerman, farmer, Nor., Rep.; Jonathan Kellogg, merchant, N.Y., Rep.; Charles S. Kelsey, mechanic, N.Y., Rep.; Otto Kerl, farmer, Ger., Dem.; Robert Lees, farmer, Scot., Dem.; Frank Leland, editor, N.Y., Rep.; Rensselaer M. Lewis, commission grain merchant, N.Y., Lib.; Alonzo A. Loper, farmer, N.Y., Rep.; Jonathan Luchsinger, farmer, Switz., Rep.; Thomas Lynch, grain merchant, Wis., Dem.; Thomas McConnell, editor, Ind., Rep.; James McGrath, contractor, Ir., Dem.; Alex McMillan, lumberman, Can., Rep.; Edward E. Merritt, editor, Vt., Rep.; Jonathan Monteith, farmer, Scot., Rep.; Henry F.C. Nichols, lumberman, N.H., Rep.; James W. Ostrander, furniture manufacturer, N.Y., Rep.; Henry L. Palmer, lawyer, Pa., Dem.; Francis G. Parks, real estate and insurance agent, Vt., Rep.; Henry A. Patterson, lawyer, N.Y., Rep.; James H. Persons, farmer, N.Y., Rep.; Daniel L. Plumer, banker and real estate dealer, N.H., Lib.; Jonathan L. Porter, farmer, N.Y., Rep.; Albert E. Pound, lumberman, Pa., Rep.; Otto Puhlman, miller, Ger., Dem.; George W. Putnam, farmer and nurseryman, Vt., Rep.; Joseph Rankin, general business, N.J., Dem.; David Rhoda, farmer, N.Y., Rep.; Corydon L. Rich, farmer, N.Y., Dem.;

The Wisconsin legislature reflected the ethnic background of the state. Membership in the house was 33% foreign-born, with fifteen German members and six Irish members.⁵⁸⁴ The senate had fourteen (42%) foreign-born members, with four German members and three Irish members.⁵⁸⁵ Nevertheless, the Republican Party held overwhelming majorities in both the senate with 60% and the house with 67%.⁵⁸⁶

The Wisconsin bill arose in the house, where farmers had thirty-three of the ninety-nine members (33%), while the retail townspeople had twenty-two (22%) members, fourteen of which were lawyers and eight were merchants, the non-retail townspeople numbered seventeen (17%) with four editors, three physicians and accountants each, and two insurance agents.⁵⁸⁷ The commercial merchants numbered fourteen (14%) with six lumbermen, two bankers, and two grain merchants, while the manufacturers numbered thirteen (13%) with four millers.⁵⁸⁸ In the Wisconsin Senate, the commercial merchants with six lumbermen and two bankers and farmers both numbered eight (24%), while the retail townspeople with five lawyers and two merchants and the manufacturers both numbered seven (21%).⁵⁸⁹ The non-retail townspeople numbered three (10%).⁵⁹⁰ Again, those lending to farmers, merchants, bankers, and lawyers, allied with sufficient numbers of farmers, could pass a conditional sales bill when challenged by the good faith purchaser threat from New York.

Richard Richards, farmer and stock grower, Wales, Rep.; William Robinson, farmer, Eng., Rep.; Jonathan A. Roemer, merchant, Ger., Dem.; William E. Rowe, farmer and miller, Eng., Lib.; Jonathan Runkel, merchant, Ger., Dem.; Jacob Sander, cattle dealer, Ger., Lib.; Casper M. Sanger, tanner, Ger., Lib.; Hiram W. Sawyer, lawyer, N.H., Dem.; David F. Sayre, farmer, N.J., Rep.; Galen B. Seaman, lawyer, N.Y., Rep.; Dennis Short, farmer, Ir., Dem.; De Wayne Stebbins, book-keeper, N.Y., Rep.; Casper H. Steinfort, farmer, Ger., Lib.; Jonathan B. Stemper, insurance agent, Ger., Dem.; Thomas G. Stephens, smelting, Eng., Lib.; J. Henry Tate, merchant, Vt., Rep.; Oliver W. Thornton, farmer, N.Y., Rep.; Thomas Tobin, farmer, Ir., Dem.; Isaac W. Van Schaick, miller, N.Y., Rep.; Levi B. Vilas, retired lawyer, Vt., Dem.; Thomas Wall, lumberman, N.Y., Dem.; Baruch S. Weil, farmer, Fr., Dem.; Gottlob E. Weiss, accountant, Ger., Dem.; Alson Wood, miller, Vt., Rep.; John Young, farmer, Ohio, Rep.; Adolph Zimmermann, brewer, Ger., Dem.; and Charles R. Zorn, farmer, Ger., Dem.

584. *Id.* at 459–61.

585. *Id.* at 457.

586. *Id.* at 457, 459–61.

587. *Id.* at 459–61.

588. *Id.*

589. *Id.* at 457.

590. *Id.*

Farmers and their lenders—who were predominantly non-retail townspeople and commercial merchants—held the political power in the first wave of states to pass conditional sales acts. These groups could have their lending, secured by Holmes' notes, destroyed by the New York good faith purchaser rule typified by *Wait*. The conditional sales acts protected that lending by ensuring there would be no good faith purchasers of the item sold on credit underlying the Holmes' note. That political power resulted in the passage of the first five conditional sales acts.

VII. CONCLUSION

The conditional sales transaction arose in the early nineteenth century as a device to purchase farm goods, primarily horses. The transactions before the appellate courts rarely involved Gilmorian locomotives and pianos. Parties preformed these latter sales through a form of the bailment lease, the equipment trust, or hire purchase, not the conditional sale. Half of the appellate opinions concerning the conditional sale before 1880 dealt with the conditional sale of farm goods, and 42% involved horses with or without wagons, which was the mode of transportation in the nineteenth century.⁵⁹¹ The reason is obvious. It provides a method of allowing a credit purchase for a relatively inexpensive item, but one beyond the immediate cash capabilities of the vendee. Most were short-term obligations. The item sold provided the security of repayment in the event the vendee was unable to complete payment in a timely manner.

Not only did the conditional sales transaction involve short-term credit, but it encompassed relatively small amounts.⁵⁹² Vendors used the transaction to sell items that frequently cost less than \$200, an amount that a vendee could pay relatively quickly. Promissory notes, oral agreements, and sometimes short, one-paragraph written contracts, documented the transactions, as they appeared in the appellate opinions.⁵⁹³

Those legal actions that attempted to recover the item sold, or its value, from a good faith purchaser or a judgment lien appear in an overwhelming number of the appellate opinions (87%), and are approximately equally split between the two types of interlopers to the conditional sales

591. *See supra* notes 177–78 and accompanying text (noting there were forty-five cases involving horses plus sixty-one involving other farm goods out of 210 opinions).

592. *See supra* notes 184–89 and accompanying text (pointing out the relatively small amounts in question in conditional sales transaction cases).

593. *See supra* notes 190–95 and accompanying text (citing cases based on promissory notes, oral agreements, and short written contracts).

transaction.⁵⁹⁴ Almost all of these opinions upheld the common law priority rule, which Gilmore refused to accord the label common law. That rule followed the common law principle in favor of the first in time transaction, and for the conditional sale, the transaction of the vendor. *Wait* served as the lone exception, where New York courts in 1867 tried to change the rule to favor a good faith purchaser.

Of those legal actions involving upstream purchasers, those whose title derived from the vendor's title (42%), which was a significant portion, involved assignments of the promissory note.⁵⁹⁵ Obviously, the vendor, to meet its own needs for cash, sold the note representing the conditional sale at a discount to a local moneylender, the unincorporated private banker. The litigation with the vendee's subsequent interlopers would increase the cost of these discounts, requiring the private bankers to include the possible cost of litigation in the discount. The possibility of the good faith purchaser winning the litigation under a state's adoption of the New York rule of *Wait* would raise the discount even further to account for the possibility of a total loss of the collateral.

Only a handful of the litigation between vendor and vendee approached the evils propounded by Gilmore.⁵⁹⁶ Barely 4% of the cases involved the action for the price, rued by Gilmore when the value of the item fell below the amount owed, or reclaiming the item, vilified by Gilmore for refusing a refund of any amount paid. The opinions made no references to these two Gilmorian evils. None of the opinions involved the other Gilmorian evils of avoiding the equity of redemption or usury that would have arisen with the use of a chattel mortgage.

These private bankers, town merchants, and their allies had, before the passage of their state's respective conditional sales act, flexed their legislative power and obtained statutory assistance to enhance the value of the conditional sale's promissory note. Vermont had an 1854 statute requiring the good faith purchasers to pay the amount owed to the vendor before the vendee could keep the item purchased.⁵⁹⁷ In 1869, Maine required the conditional sale note to be in writing, thereby facilitating its

594. See *supra* notes 196–221 and accompanying text (referencing sixty-nine cases involving the good faith purchaser, fifty-eight cases involving the judgment lien, plus fifty-six cases involving upstream and downstream persons out of 210 opinions).

595. See *supra* notes 210–15 and accompanying text (citing cases involving upstream purchasers and promissory notes).

596. See *supra* notes 222–27 and accompanying text (referring to vendor actions for replevin and trover).

597. See *supra* note 260 and accompanying text (citing the Vermont statute).

assignment.⁵⁹⁸ Iowa and Nebraska rejected a bill to codify the *Wait* rule in favor of the good faith purchasers.⁵⁹⁹ Most notably, during the same term as the passage of their conditional sales acts, Nebraska and Missouri passed a statute criminalizing the vendee who directly or indirectly (by sale), without consent, and with the intent to deprive the vendor of its lien, removed the vendor's personalty from the county.⁶⁰⁰

Beginning in 1870, the farm states, not the Gilmorian industrial states, which were controlled overwhelmingly by Republicans desirous of fostering commerce, passed their conditional sales acts to eliminate the threat to farm financing posed by a retail state's good faith purchaser rule.⁶⁰¹ Revealing a concern for the financing of farmers, the Maine act only applied to promissory notes, the Holmes' note used in Oxford County, Maine, since the 1830s for livestock sales, while the Minnesota act mentioned the same promissory note. With respect to oral deals, the Vermont act applied to reserved liens and required the vendor to file a memorandum of the deal; the Minnesota act also allowed a memorandum filing for oral deals; and Wisconsin required conditional sales to be in writing. Only Iowa mentioned the lease, applicable to Gilmore's locomotive equipment trusts and consumer hire-purchase contracts.

Lawyers and private bankers sponsored the first wave of bills that became the respective conditional sales acts. Not a single Gilmorian railroad locomotive or consumer goods manufacturer were among the lot. The private banker was Minnesota's Senator Simeon Potter Child. The lawyers were Maine Senator Thomas Brackett Reed, later Speaker of the United States House; Vermont Senator William Morrill Pingry; Iowa Senator James S. Hurley; and Iowa Representative Washburn A. Stow, the lone Democrat. Each of these lawyers all had clients dealing with creditors before their respective state supreme courts. Reed and Stow had clients dealing with promissory notes. Pingry's clients engaged in note assignments while Hurley's clients confronted secret liens. Only the Iowa lawyers represented good faith purchasers at the appellate level, yet they replaced a bill to codify the *Wait* rule with a bill to enact Iowa's conditional sales act. The Gilmorian good faith purchasers and sheriffs levying

598. See *supra* note 255 and accompanying text (noting that Maine law required the conditional sale note to be in writing).

599. See *supra* notes 332–37, 384–88 and accompanying text (citing legislative documents detailing the motivation behind Nebraska and Iowa's rejection of a bill to codify the *Wait* rule).

600. See *supra* notes 403–13 and accompanying text (detailing the history and context of the statutes that criminalized vendees who removed the vendor's personalty out of the county).

601. See *supra* notes 244–48, 499–502 and accompanying text (referencing the farm states' conditional sales acts and other explanatory material).

judgments lacked power in the legislative halls. However, those lending to farmers possessed sufficient legislative power to preserve their priority rule against the *Wait* attack.

Minnesota's legislative journals provided the names of those voting in favor and against state bills, and census records provided their occupations.⁶⁰² For the state's passage rate of 71%, 100% of the bankers, 89% of the lawyers, 87% of the merchants, and 86% of the commercial merchants voted in favor of the bill, while only 63% of the protected farmer-vendors did. Obviously, those purchasing the conditional sale notes from the farmers eagerly eliminated the possibility of becoming a good faith purchaser by providing notice, thereby avoiding the status as a good faith purchaser.

Appellate opinions subsequent to the conditional sales acts' passage confirm the program to destroy good faith purchaser status.⁶⁰³ Vermont, Minnesota, and Missouri judges concluded that the evil their respective legislature intended to stop was the fraud committed by dishonest vendees to the detriment of both vendors and the good faith purchasers. Gilmore saw the problem as one with two innocents, the vendor, and the good faith purchaser. Rather than follow the common law rule or the commercial paper rule to select which of the two innocents bears the loss, Gilmore preferred to protect the good faith purchaser. The legislators, however, saw the problem as one of interference of the enjoyment of a property right in the vendor by the interloper good faith purchaser and judgment lien. Notice is all that is required to protect the vendor. Therefore, the respective legislatures intended to prevent secret liens and end wasteful litigation to recover personalty by providing an avenue for that notice. The good faith purchaser and judgment lien, to the extent they are observant, can protect themselves by observing that notice.

In contrast, Gilmore regarded the non-possessory secured transaction as some sort of evil. According to Gilmore, legislatures, for an unknown reason, legitimated previously illegal chattel mortgages with passage of the chattel mortgage acts. When lenders evaded Gilmore's perceived ill effects of the chattel mortgage acts through the conditional sale, legislators punished the lenders with a conditional sales filing. That cannot be the true story.

The people with political clout are unlikely to be Gilmore's general

602. See *supra* notes 373–76 and accompanying text (citing the source of information for voter records and occupations).

603. See *supra* notes 490–507 and accompanying text (revealing cases and legislation that sought to destroy the good faith purchaser status).

creditors, who are too lazy to get a security interest, or good faith purchasers of second hand goods, who are too lazy to look into origins. Legislatures passed the conditional sales acts for the same reason they passed the chattel mortgage acts. Legislators passed the chattel mortgage acts in New England in the 1830s because the old common law rule, the rebuttable rule, could not forestall interference by judgment liens with the legitimate business transaction of lending, and realty recording failed to provide the desired notice.⁶⁰⁴ Similarly, for the conditional sale, the common law vendor priority rule could not forestall interference with the legitimate business transaction of selling on credit, and recording under the chattel mortgage acts failed to provide the desired notice. Thus, legislatures required filing of conditional sales in order to protect the transaction from interference by good faith purchasers and judgment liens, but not under the chattel mortgage acts. Legislatures passed conditional sales acts recognizing and preserving the transaction's unique features. Not until the modern code, adopted after Gilmore taught that these transactions are evil, do we get the Gilmorian features of treating conditional sales the same as chattel mortgages with foreclosure procedures and accounting of excesses.⁶⁰⁵ The modern code also requires filing for consignments, leaving only leases of goods without an avenue for recording.⁶⁰⁶

604. See George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 341–47 (1999) (discussing how “[t]he chattel mortgage acts would remove [the] threat” of previous legislation).

605. See U.C.C. § 1-201(b)(35) (2011) (defining security interests as including conditional sales and consignments).

606. See *id.* § 2A-101 cmt. (explaining the requirements for filing consignments).

