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SECURED TRANSACTIONS HISTORY: THE IMPACT OF TEXTILE MACHINERY ON THE CHattel MORTGAGE ACTS OF THE NORTHEAST

GEORGE LEE FLINT, JR.*

Prelude

In 1829 Charles Lee's dream for riches vanished. He was now an insolvent high-roller. His hopes of fortune had depended on a cotton cloth factory on the Willimantic Falls in Windham, Connecticut. His bankers at the New London Bank threatened him with debtor's prison unless he provided guarantors for prior loans.¹ Lee's friend and business associate Jabez Thompson agreed to guarantee Lee's notes at the bank, provided Lee mortgaged the factory. On August 7, 1829, Thompson endorsed \$9600 of Lee's notes at the bank. Thompson eventually paid the notes as they became due.²

On the same day, Lee mortgaged his land "with a cotton manufactory and all the machinery of every description" to Thompson.³ Lee had not permanently attached some of his machinery to the building. The spinning frames stood on the floor with cleats nailed around the feet to prevent their moving. The remaining machinery had iron plates attached to the floor by easily removed wood screws.

The Lee-Thompson mortgage created a security interest to help secure repayment of the debt owed to the secured party. The debtor's property, the collateral, served

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1. Connecticut did not abolish imprisonment for debt until 1842. See 1842 Conn. Pub. Acts 37; PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900, at 78 (1974) [hereinafter COLEMAN, DEBTORS AND CREDITORS].

2. This fact pattern follows *Swift v. Thompson*, 9 Conn. 63 (1831), except that the author has given Thompson and Swift fictional first names and added some specifics.

3. For the practice of putting both realty and personalty in the same mortgage instrument, see generally *Anthony v. Butler*, 38 U.S. (13 Pet.) 423 (1839) (describing a situation where a Rhode Island clerk maintains separate books for mortgages of both realty and personalty). For pre-chattel mortgage act instances, see *infra* note 210.

as security for the payment of a loan by the secured party. Parties to a transaction may create security interests both in realty (a mortgage) and in personalty (a secured transaction). The Lee-Thompson mortgage contained both aspects, with both land and equipment serving as collateral. This article's concern lies with the secured transaction. When a court enforces a security interest, it requires satisfaction of the secured party's debt before the debtor's other creditors receive anything from the collateral.⁴

Since Lee was insolvent, Thompson needed the assurance afforded by the mortgage. Thompson could expect the court to uphold this transaction as a preference. An insolvent debtor could prefer one creditor over another.⁵ Consequently, Thompson handed the mortgage to Lee for recordation in the real estate records on his return to Windham. Connecticut statutes required filing of real estate conveyances for validity against third parties.⁶ Lee recorded the deed at the townhouse in Windham on August 14, 1829.

But the Lee-Thompson mortgage spawned a problem. The mortgage did not specify who would possess and operate the factory. Thompson never bothered to travel to Windham; instead, he left Lee in possession. Secured transactions in the early nineteenth century differed depending on whether ownership remained with the debtor, a pledge, or devolved on someone else, such as the secured party or a trustee.⁷ The nonpossessory secured transaction enlarged the amount of collateral available to secure loans. Under a pledge, the secured party took possession of the debtor's collateral, subject to return upon the debt's proper payment. For a pledge, the collateral consisted of items not necessary to maintain the debtor's life or business.⁸ But under a nonpossessory secured transaction, the collateral often

4. For modern counterparts, see, for example, U.C.C. § 1-201(37) (1998) (defining security interest for personalty); § 9-104(j) (distinguishing mortgages from secured transactions); and § 9-301(4) (judgment lien creditor takes subject to perfected secured transaction).

5. Courts honored preferences outside of bankruptcy, even if insolvent. See, e.g., *Cook v. Swann*, 5 Conn. 140 (1823) (requiring mortgage); *Bartels v. Harris*, 4 Me. 146 (1826) (requiring bill of sale for trade stock); *Widgery v. Haskell*, 5 Mass. (5 Tyng) 144 (1809) (noting that rule does not apply to an assignment for the benefit of creditors; requiring, to secure, bill of sale of ship); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1817) (requiring, to secure, assignment of ships) *Lindle v. Neville*, 13 Serg. & Rawle 227 (Pa. 1825) (requiring mortgage).

6. See, e.g., CONN. STAT. tit. 56, ch. 1, § 9 (1821), 302 (requiring recordation in town where land lies); 1639 Conn. Laws ch. n.s., reprinted in 1 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 37 (James Harmond Trumbull ed., Hartford, Conn., Brown & Parsons 1850) [hereinafter PUBLIC RECORDS] ("[A]ll bargains or mortgages of land shall be accounted of no value until they be recorded.").

7. For modern counterparts, see, for example, U.C.C. § 9-102(2) (noting that security interests in personalty includes pledges and nonpossessory secured transactions). Modern law no longer recognizes this transfer of ownership. Instead, ownership remains with the debtor in all cases. See, e.g., U.C.C. § 9-105(d).

8. The early American statutes exempting certain personalty from attachment reflected this principle. See, e.g., CONN. STAT. tit. 2, § 74 (1821) (exempting necessary apparel, bedding, household furniture, arms, implements of trade, one cow, ten sheep, two swine, two cords of wood, limited meat, potatoes, and wool, and one stove); Act of Jan. 23, 1821, ch. 95, 1821 Me. Laws 332, 333 (exempting wearing apparel, beds and bedding, household utensils, tools of trade, school books, stoves, one cow, one swine, and ten sheep); Act of Mar. 13, 1806, ch. 100, 1806 Mass. Acts 119 (exempting wearing apparel, beds,

embodied items necessary to the debtor's ongoing business. With these items of collateral, the debtor could generate money to pay the debt. Thompson envisioned this when he left Lee in possession of the factory. Lee knew how to operate the factory, while Thompson did not.

There were two major security devices used for both possessory secured transactions and nonpossessory secured transactions by the early nineteenth century in the northeastern United States: the chattel mortgage and the conditional bill of sale.⁹ The secured party owned the collateral under both the chattel mortgage and the conditional bill of sale. The difference between the chattel mortgage and the conditional bill of sale involved redemption of the collateral. Under the chattel mortgage, the debtor retained equitable title for purposes of a redemption in an equity court for a reasonable period of time after default. A conditional bill of sale eliminated this right of redemption. Instead, the debtor had a right to repurchase, provided the debtor satisfied the payment conditions.¹⁰ Since the Lee-Thompson transaction involved a mortgage, Thompson owned the factory and the machinery.

To satisfy his remaining creditors, the day after recording the Lee-Thompson transaction, Lee assigned all his land and personalty "subject to such claims the mortgagees legally can have to the same" to Theophilus Swift as trustee for the benefit of creditors. An assignment for the benefit of creditors, although frequently described as given for security, does not constitute a secured transaction because it lacks any method of returning the collateral to the debtor.¹¹ Swift interpreted this language as meaning that the Lee-Thompson mortgage covered only the land and the building. He considered the machinery as personalty in possession of Lee, the debtor, possibly negating any legal claim of Thompson. So, Swift sued the mortgagee of the factory, Thompson, to recover the machinery's value for rateable division among all the creditors.

bedsteads, bedding, and necessary household utensils, necessary tools of trade, Bibles, school books in use, one cow and one swine); Act of June 16, 1807, 1807 N.H. Laws 19 (exempting wearing apparel, one bed, bedstead and bedding, Bible and school books in use, one cow, and one swine, and tools of trade up to \$20); Act of Mar. 14, 1851, 1851 N.J. Laws 278 (exempting household goods and tradesmen's tools up to \$200); Act of Apr. 18, 1815, ch. 227, 1815 N.Y. Laws 231 (exempting sheep, one cow, two swine, wearing apparel, bedding, cooking utensils, one table, six chairs, and eating utensils); Act of Apr. 16, 1829, no. 128, 1828 Pa. Laws 128 (exempting limited household utensils and implements of trade, wearing apparel, two beds and bedding, one cow, two hogs, six sheep, one stove, limited meat, potatoes, grain, and flax); Act of June 17, 1820, § 10, 1820 R.I. Pub. Laws 18, 22-23 (exempting furniture, bedding, implements of trade and husbandry, not exceeding \$150); Act of Mar. 9, 1797, ch. 12, 1797 Vt. Acts & Resolves 19, 29 (exempting necessary apparel and bedding).

9. For examples of the devices, see *Adams v. Wheeler*, 27 Mass. (10 Pick.) 199 (1830) (describing bill of sale for hay, horse, and cart as security device) and *Badlam v. Tucker*, 388 (1823) (describing chattel mortgage on brig as security device). Pennsylvania courts recognized a third device, the bailment lease. See *infra* notes 39-40 and accompanying text. Massachusetts banks used a fourth device for corporate stock, the deed of trust. See *infra* notes 48-49 and accompanying text.

10. See LEONARD JONES, A TREATISE ON THE LAW OF MORTGAGES OF PERSONAL PROPERTY 7-13 (Boston, Mass., Houghton, Mifflin & Co. 1881) [hereinafter LEONARD JONES, LAW OF MORTGAGES] (describing the distinction between chattel mortgage and bill of sale); *id.* at 196 (describing a reasonable time for redemption).

11. See *id.* at 285.

Swift's problem with the Lee-Thompson transaction was its fraudulent nature. Although nonpossessory secured transactions enlarge the available collateral, they permit debtor misdeeds not available with pledges. This is because the secured party or some third party has an interest in the collateral while it is still in the possession of the debtor. This separation ostensibly allows the debtor to create successive security interests in the collateral.¹² Debtor misdeeds arise when the debtor does not provide notice of prior security interests to subsequent creditors. Without this knowledge, potential creditors might undertake larger risks by lending on the misconception that they will receive satisfaction from a larger portion of the collateral than they will actually receive.

This situation permits the debtor to engage in two deceptive practices. First, the debtor could borrow from unsuspecting creditors more than he otherwise might on the basis of the collateral's value, perhaps in amounts totaling several times the collateral's value. This means that upon default the debtor might not have sufficient assets to satisfy all debts, causing creditors to lose money on their loans. Second, the debtor could prefer a general unsecured creditor over other general creditors by granting him a secret security interest in the collateral unbeknownst to the other general creditors. Thus, upon default, the collateral belongs to the preferred secured creditor, leaving the other general creditors with a considerably smaller recovery than they thought they would receive in the absence of the secret preference.

In challenging Thompson's secured transaction, Swift demanded the court to void the transaction as fraudulent under the Fraudulent Conveyance Statute for delaying, hindering, and defrauding creditors.¹³ The northeastern states had adopted versions of this English statute during the colonial era.¹⁴ The statute provided Thompson

12. For an eighteenth century English example of multiple mortgages on the same business property, see *Ryall v. Rolle*, 26 Eng. Rep. 107 (K.B. 1749), *sub. nom. Ryall v. Rowles*, 27 Eng. Rep. 1074 (K.B. 1750) (illustrating seven mortgages on stock in trade). When the law recognizes such successive interests as valid, it generally provides a rule to determine the priority among, or mandate the equality of, these multiple successive interests to handle the possibility that the value of the collateral amounts to less than all the loans secured by that collateral. Modern secured transaction law generally uses a first in time rule. See, e.g., U.C.C. § 9-312(5) (stating that the default rule is first in time). *But see id.* § 9-312(3)-(4) (allowing super-priority for a purchase money security interest). Modern bankruptcy law mandates a pro-rata sharing among unsecured creditors. See, e.g., 11 U.S.C. § 726(b) (1988) (allowing pro-rata sharing among the various claimants for individual liquidation).

13. See, e.g., Fraudulent Conveyance Act of 1571, 13 Eliz., ch. 5, § 1 (Eng.) ("Intent to delaye hynder or defraude creditors"), *reprinted in* 4 STATUTES OF THE REALM 537 (London, Dawsons of Pall Mall 1819); 14 Eliz., ch. 11, § 1 (1572) (Eng.) (reenacting the Fraudulent Conveyance Act of 1571), *reprinted in* 4 STATUTES OF THE REALM, *supra*, at 602; 29 Eliz., ch. 5, § 1 (1587) (Eng.) (perpetualizing the Act), *reprinted in* 4 STATUTES OF THE REALM, *supra*, at 709; Fraudulent Conveyance Act of 1585, 27 Eliz., ch. 4, *reprinted in* 4 STATUTES OF THE REALM, *supra*, at 769 (extending the Fraudulent Conveyance Act of 1571 to purchasers); 30 Eliz., ch. 18, § 3 (1588) (Eng.) (perpetualizing the extension), *reprinted in* 4 STATUTES OF THE REALM, *supra*, at 916.

14. For subsequent early-American adoptions of the fraudulent conveyance law, see, for example, *Bean v. Smith*, 2 F. Cas. 1143 (C.C.D.R.I. 1821) (No. 1,174) (adopting Rhode Island law), *The Watchman*, 29 F. Cas. 372 (D. Me. 1832) (No. 17,251), *Magniac v. Thompson*, 16 F. Cas. 451 (C.C.D. Pa. 1831) (No. 8,956) (adopting New Jersey law), *Fowler v. Frisbie*, 3 Conn. 320 (1820), *Goodwin v. Hubbard*, 15 Mass. (6 Tyng) 210 (1818), *Everett v. Read*, 3 N.H. 55 (1824), *Beals v. Guernsey*, 8 Johns.

with a defense to Swift's claim because the transaction was made for good consideration and in good faith.¹⁵ Although Thompson had obtained the preference through the transaction, he had provided notice. He recorded his mortgage in the realty records. Thus, Swift had actual prior notice of his transaction.

The *Swift v. Thompson* lawsuit involved the key issue of whether the court would enforce the Lee-Thompson transaction as a valid nonpossessory secured transaction. The court found that Swift had ample knowledge of the Thompson mortgage. His own deed mentioned it. Accordingly, the judge directed the jury to find for Thompson.

On Swift's appeal in the July Term of 1831, the Justices of the Connecticut Supreme Court of Errors applied Connecticut's heightened rebuttable rule for determining the validity of a nonpossessory secured transaction. The northeastern states during the pre-chattel mortgage act era used four rules to determine the validity of nonpossessory secured transactions. This article refers to the four as the absolute-conditional rule, the rebuttable rule, the heightened rebuttable rule, and the *per se* fraud rule.¹⁶ Some Jacksonian courts assigned different monikers to the four rules.

Under Connecticut's heightened rebuttable rule, the court must presume that a debtor's possession of personalty under a chattel mortgage amounts to fraud as a secret lien unless the secured party can explain the debtor's possession as fitting one of the exceptions recognized by the Supreme Court of Errors. Therefore, the heightened rebuttable rule could foster an additional fraud, namely perjury with respect to the explanation.¹⁷ The reference to the Lee-Thompson transaction in the Swift transaction, under the Connecticut rule, would not serve as an excuse. A court might find that Lee's possession made the Lee-Thompson transaction illegal. Difficulty in removing the machinery would not serve as an excuse; a party could have removed it without injury to the building. Thompson lost because the Supreme Court of Errors would not recognize a nonpossessory secured transaction as an excuse under the rule without additional circumstances.

By 1831, the textile industry comprised a major component of the American preindustrial economy in the northeast.¹⁸ Northeastern society needed to protect the

446 (N.Y. Sup. Ct. 1811) and *Lessee of Hartley v. M'Anulty*, 4 Yeates 95 (Pa. 1804).

15. See Fraudulent Conveyance Act of 1571, 13 Eliz., ch. 5, § 3 (Eng.), reprinted in 4 STATUTES OF THE REALM, *supra* note 13, at 537 ("[T]his Act . . . shall not extend . . . to . . . any Conveiance . . . made . . . hereafter . . . for good Consideration and bona fide, to any person . . .").

16. For an explanation of the absolute-conditional rule, the rebuttable rule, and the *per se* fraud rule, see *infra* notes 30, 33 and accompanying text.

17. The perjury came from a suborned debtor since the parties to a transaction could not testify at trial before the 1850s when statutes abolished the old common law prohibition against interested parties serving as witnesses. See 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 577 (1979) (noting that the first such statute for civil trials passed in Connecticut in 1849). Parliament passed the Statute of Frauds in 1677, requiring certain transactions in written form, else the court would not enforce them due to suborned perjury of nonparties. See Statute of Frauds of 1677, 29 Car. II, ch. 3 (Eng.), reprinted in 5 STATUTES OF THE REALM, *supra* note 13, at 246; GEORGE CAINES, AN INQUIRY INTO THE LAW MERCHANT OF THE UNITED STATES, OR LEX MERCATORIA AMERICANA 376 (New York, Isaac Collins & Son 1802).

18. See, e.g., WALTER W. ROSTOW, THE STAGES OF ECONOMIC GROWTH 54 (1971) (describing the

ability of that industry to obtain credit by offering its machinery as collateral security to continue the well being of a significant number of individuals dependent on that industry. Because the Connecticut courts, constrained by the doctrine of precedence¹⁹ to follow the heightened rebuttable rule, would not correct the situation in Thompson's case, the 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.

I. Introduction

Legal historians have espoused two modern theories of legal development. Neither theory alone proves helpful in explaining the adoption of the chattel mortgage acts in the northeastern United States in the 1830s.²⁰

One theory of legal development holds that those with political power shape a community's legal rules for their own economic benefit.²¹ Morton Horwitz applied this theory to explain the evolution of American legal rules for private law in the antebellum period. Horwitz found that antebellum legal changes benefitted commercial interests.²² These commercial interests controlled the legal community and the judges making the private law rules. But Horwitz's explanation is too simple to explain statutory developments in the Jacksonian period. One of those Jacksonian developments involved the passage of chattel mortgage acts by some northeastern states. Just as Arthur Schlesinger's attempt to explain Jacksonian politics in terms of the noncapitalistic common people struggling with business people proved too shallow,²³ Horwitz's thesis proves inadequate for the chattel mortgage acts.

The second theory suggests that the source of new legal rules comes from the adoption of rules from other, more developed legal systems.²⁴ Alan Watson

take-off stage of economic development in New England spawned by cotton-textile industry in 1820s).

19. The eighteenth century American precedential conception held that a body of pre-existing standards discoverable by judges through searching into the decisions of English courts determined all nonstatutory legal questions. See 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 50 (Julius Goebel ed., 1964) (illustrating the doctrine of precedence in a July 18, 1786 letter of James Kent, later Chief Justice of New York from 1804 to 1814 and Chancellor of New York from 1814 to 1823, to Simeon Baldwin). See generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 8-9 (1977). The heightened rebuttable rule became one of those standards.

20. For the northeastern chattel mortgage acts, see *infra* notes 106-32 and accompanying text.

21. See, e.g., E.J. MISHAN, COST-BENEFIT ANALYSIS: AN INTRODUCTION 127-37 (1971); C. Edwin Baker, *The Ideology of the Economic Analysis of the Law*, 5 PHILOS. & PUBLIC AFF. 5 (1975); E.J. Mishan, *Pareto Optimality and the Law*, 19 N.S. OXFORD ECONOMIC PAPERS 225 (1967).

22. See HORWITZ, *supra* note 19, at xvi-xvii, 140 (discussing that newly empowered groups welded legal rules to their own benefit in the antebellum period); see also ALBERT O. HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT 55-61 (1961).

23. Compare ARTHUR SCHLESINGER, JR., THE AGE OF JACKSON 30 (1946) (noting that eastern workingmen, western farmers, and southern planters politically opposed to the commercial northeast), with LEE BENSON, THE CONCEPT OF JACKSONIAN DEMOCRACY: NEW YORK AS A TEST CASE 4-11 (1961) (noting that businessmen and common people were in both the Democratic and Whig Parties in Jacksonian New York).

24. See, e.g., ALAN WATSON, THE EVOLUTION OF LAW 116 (1985) (discussing rural southern towns

explained much of the western European customary legal systems as having filled the gaps in their legal systems with rules from the Roman legal system.²⁵ However, this explanation also fails to deal adequately with the chattel mortgage acts. Roman law had no filing requirement for the nonpossessory secured transaction.²⁶ American real estate law, however, did have a recording requirement in use for over one-hundred-and-fifty years.

Through a detailed investigation, this article attempts to explain the reason the northeastern states adopted the chattel mortgage acts. Those few lawyers and legal historians who have speculated on the point reached improbable conclusions based on mistaken historical facts. Moreover, prior interpretations failed to provide a mechanism to explain the legislative action, the timing of the statutes, or the form of the statutes.

This article also aims to determine why these statutes arose in 1832 and not in a different year. As part of this inquiry, this work explains why New York and Rhode Island delayed, why Vermont and Maine waited until after the next economic downturn, and why New Jersey and Pennsylvania felt no compulsion to adopt them until much later. The article also examines why the acts took the form of transactional filing and omitted to specify priority rules or provide for filing deadlines.

This article reviews the interpretations of earlier legal historians to reveal their shortcomings and examines the reasonably accessible legislative histories of the early chattel mortgage acts for clues on which to base more accurate interpretations. Also examined are the post-chattel mortgage act opinions for pronouncements concerning the purpose of the chattel mortgage acts. Furthermore, the pre-chattel mortgage act legal literature for chattel mortgage act proposals will be reviewed. Finally, this article provides explanations for each northeastern state's adoption of its chattel mortgage act, or failure to adopt one, during the Jacksonian Era.

Two assumptions aid this inquiry. First, legal change comes from the inability to achieve the desired result under the old rules. Therefore, some discussion deals with attempts to avoid the deleterious effects of the old rule. Second, legislative change comes only from a group with control of the legislative power.

The nonpossessory secured transaction first appeared in Anglo-American jurisdictions during the late seventeenth century.²⁷ As the economy became more

adopting laws from the customs of Paris, Polish settlements from Madgeburg, and German tribes from Roman law).

25. See *id.* at 77-91 (discussing pre-Justinian Roman law on German customs in the fifth through seventh centuries); *id.* at 98-109 (noting Scots law in the seventeenth and eighteenth centuries); *id.* at 109-11 (recognizing German and French Codes in the eighteenth and nineteenth centuries).

26. See, e.g., Boris Kozolchuk, *The Mexican Land Registry: A Critical Evaluation*, 12 ARIZ. L. REV. 308 (1970) (noting that recording practices in civil law countries came from Germany of the Middle Ages, not Roman law); see also George Lee Flint, Jr., *Secured Transactions History: The Fraudulent Myth* 10 nn. 44-45 (Feb. 22, 1999) (draft of article, on file with author and *Oklahoma Law Review*) (forthcoming in 29 N. MEX. L. REV.) [hereinafter Flint, *Fraudulent Myth*].

27. For the history of the development of the nonpossessory secured transaction in Anglo-American jurisdictions, see Flint, *Fraudulent Myth*, *supra* note 26, at 22-24 nn.89-95.

complex with the appearance of middlemen, use of the nonpossessory secured transaction caused problems. First, the person who had title to the collateral had priority in the collateral. The priority for a nonpossessory secured transaction dated from the date of the sale — when title passed. A seller on credit thereby created a nonpossessory secured transaction by retaining title, the conditional bill of sale, or taking back title, the chattel mortgage. But his buyer, whether a wholesaler or retailer, had at best conditional title to transfer in a resale. This tension between the desires of the first seller for security and the desires of the ultimate buyer not to pay twice for the collateral led to legal conflict during the pre-chattel mortgage act era and afterwards.²⁸ This fact created one group of merchants desirous of outlawing the nonpossessory secured transaction: the retailers. Their position would remain until the development of the buyer-in-the-ordinary-course doctrine.²⁹

Second, nonpossessory secured transactions created a potential for debtor fraud. The potential for secret security interests led third parties injured by that secrecy to attack the nonpossessory secured transaction as fraudulent under the Fraudulent Conveyance Statute.³⁰ English courts developed two rules to handle this litigation. The older of the two, the absolute-conditional rule, developed when landowners controlled judicial assignments; this allowed the judge to determine whether the documents creating the nonpossessory secured transaction created an unconditional sale (the absolute sale), in which case the court voided the transaction, or a conditional sale, in which case the court upheld the transaction. The later of the two rules, the rebuttable rule, developed after the Statute of Frauds of 1677 authorized certain substitutions for written contracts in the sale of goods and when pro-commercial Whigs controlled judicial assignments. The rebuttable rule presumed debtor possession as fraudulent. The secured party, however, could rebut the presumption by showing evidence of a nonpossessory secured transaction and allowing the jury to determine its validity. Merchants during the eighteenth century generally extended credit with informal documentation. Consequently, they might have provided their debtor-buyer a title document in absolute form (without the defeasance or reconveyance condition) and required supplementation to demonstrate the defeasance or reconveyance condition in light of debtor possession. The rebuttable rule allowed this additional evidence to affect the outcome favorably. Merchants in the overseas trade thereby became supporters of the rebuttable rule.³¹

Courts in the northern United States followed these same two rules, plus two additional rules.³² Those states adopting the sale of goods provision of the Statute

28. For the pre-chattel mortgage act litigation, see generally George Lee Flint, Jr., *Secured Transactions History: The Northern Struggle to Defeat the Judgement Lien in the Pre-Chattel Mortgage Act Era 9-50* (Mar. 25, 1999) (draft, on file with author and *Oklahoma Law Review*) (forthcoming in *N. ILL. L. REV.*) [hereinafter Flint, Northern Struggle]. For examples of post-chattel mortgage act litigation, see *infra* notes 185-91 and accompanying text.

29. See Flint, Northern Struggle, *supra* note 28, at 57-61.

30. For the history of the treatment of these challenges in the English courts, see Flint, *Fraudulent Myth*, *supra* note 26, at 26-50.

31. For this reason, recordation of ship mortgages, made for their benefit, were permissive, not mandatory. See *infra* note 44 and accompanying text.

32. For a study of the litigation in the northern United States, see generally Flint, Northern Struggle,

of Frauds of 1677 (Massachusetts, New Hampshire, New York, Maine, and New Jersey) followed the rebuttable rule. Three of the states not adopting the sale of goods provision (Connecticut, Vermont, and Pennsylvania) initially followed the absolute-conditional rule. Rhode Island had no pre-chattel mortgage act opinions. When Connecticut and Vermont adopted the sale of goods provision in the early 1820s, however, their courts soon abandoned the absolute-conditional rule. Yet, courts in these states indicated some dissatisfaction with the rebuttable rule. Rather than adopt the rebuttable rule, these courts adopted the heightened rebuttable rule. Under the heightened rebuttable rule, the judges, not the jury, determined whether the rebuttal evidence was sufficient. Evidence was sufficient only if indicative of some exception adopted by the state's supreme court. Those supreme courts never allowed an exception for only a nonpossessory secured transaction. New York courts in the late 1820s attempted to replace their rebuttable rule with the heightened rebuttable rule, but the legislature overruled their effort.³³ Similar to Connecticut and Vermont, when Pennsylvania abandoned the absolute-conditional rule it was not for the rebuttable rule, but the *per se* fraud rule. When courts in two western states, Indiana and Illinois, first considered the nonpossessory secured transaction, they refused to adopt the rebuttable rule and instead adopted the absolute-conditional rule. There existed considerable opposition to the dominant rule, the rebuttable rule, in the 1820s and 1830s.

The group opposed to the rebuttable rule, but favoring the nonpossessory secured transaction, was the equipment sellers. By the early nineteenth century, the nonpossessory secured transaction had become popular with guarantors and sellers of equipment as a means of defeating the judgment liens of other creditors.³⁴ Banks and merchants lent on the basis of guarantors, typically wealthy merchants or shareholders. Since these individuals, as guarantors, had befriended the debtor, typically another merchant, manufacturer, or retailer, they could easily obtain the preference provided by the nonpossessory secured transaction. Sellers of equipment, which were typically sellers of textile machinery, sold the expensive equipment on credit secured by a nonpossessory secured transaction. Documentation of the preference provided by the nonpossessory secured transaction was most accurate for the manufacturers and financial institutions, as secured parties, and much less so for overseas merchants and retailers. Under the rebuttable rule, the equipment sellers risked losing the protection of their nonpossessory secured transaction by an adverse jury finding.

II. The Authorization Approach

Prior legal historians failed to provide an explanation for the statutory development of the chattel mortgage acts in the northeastern states. They assumed that pre-

supra note 28, at 36-50.

33. See N.Y. REV. STAT. tit. 2, § 5 (1829); see also *infra* notes 326-56 and accompanying text (discussing legislative history).

34. For an examination of the early use of the nonpossessory secured transaction, see Flint, Northern Struggle, *supra* note 28, at 50-61.

chattel mortgage act law banned the nonpossessory secured transaction as fraudulent. Consequently, earlier historians made no examination of the pre-chattel mortgage act documents for problems arising under any pre-chattel mortgage act rules.³⁵

A. *The Gilmorian Pronouncement*

Previous historians viewed the chattel mortgage acts as authorizing the nonpossessory secured transaction for the first time in Anglo-American jurisdictions. Their most prominent spokesman, Grant Gilmore,³⁶ provided the typical statement:

In this country the chattel mortgage was an exclusively statutory device. Statutes validating such mortgages, first enacted by the legislatures of the Eastern seaboard states from about 1820 on, went west with the country. . . . 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.³⁷

Gilmore's discussion of statutory authorization depicts an unlikely scenario. Businessmen, not using a security device for hundreds of years, would not likely request legislatures to legalize the device, since they would have developed some other device.

Those espousing the traditional *per se* fraud rule for chattel mortgages as fraudulent conveyances often cite the 1819 Pennsylvania opinion of *Clow v. Woods*.³⁸ Developments subsequent to *Clow* demonstrate the business mentality. The opinion approved of leasing personalty, which also separates ownership from possession of the personalty. Pennsylvanians thus developed the bailment lease, a lease used for security, as a nonpossessory secured transaction.³⁹ The bailment

35. See 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 24 (1965) [hereinafter GILMORE, PERSONAL PROPERTY]; Thomas D. Morris, *Society is not Marked by Punctuality in the Payment of Debts: The Chattel Mortgages of Slaves*, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 147, 150 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984).

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

37. 1 GILMORE, PERSONAL PROPERTY, *supra* note 35, at 26.

38. 5 Serg. & Rawle 275 (Pa. 1819); see also *id.* at 280 (holding that *Meggot* was wrongly decided but would have been valid had the landlord bought the furniture and leased it, rather than taken a security interest); *id.* at 28 (holding that a chattel mortgage is invalid as a fraudulent conveyance); *Meggot v. Mills*, 91 Eng. Rep. 1088 (K.B. 1697); BAIRD & JACKSON, *supra* note 36, at 21-23.

39. For bailment leases, see *Myers v. Harvey*, 2 Pen. & W. 478 (Pa. 1831) (recognizing the bailment lease), 1 GILMORE, PERSONAL PROPERTY, *supra* note 35, at 77-78 (stating bailment leases developed in 1831 after the conditional bill of sale also failed as a security device for Pennsylvania in 1825), and James A. Montgomery, *The Pennsylvania Bailment Lease*, 79 U. PA. L. REV. 920 (1931). See also *Martin v. Mathiot*, 14 Serg. & Rawle 214 (Pa. 1826) (rejecting the conditional bill of sale as security).

lease consists of two agreements: a lease for a term with rental payments approximating the purchase price, and a future sale or option to purchase for a nominal additional payment. Pennsylvanians used it to sell an object on credit.⁴⁰

Another northeastern state legislature passed a statute relating to chattel mortgages prior to the chattel mortgage act. In 1829, New York's legislature enshrined the rebuttable rule for mortgages on goods in its fraudulent conveyance statute.⁴¹ New York did not require a chattel mortgage act to legalize chattel mortgages.

The Gilmerian historians, not fathoming the existence of the nonpossessory secured transaction in the pre-chattel mortgage act period, theorized that the chattel mortgage acts appeared because the industrial revolution created wealth in business personalty.⁴² Again, Gilmore provided the suggestion:

We may hypothesize that the principal cause of the erosion and disappearance of a rule which had endured so long and served so well was the industrial revolution. The unprecedentedly rapid expansion of industrial facilities created an equally unprecedented demand for credit. The financing institutions which were the source of credit naturally desired security for the loans which they were invited, even compelled, to make. As industrialization progressed, personal rather than real property came to be the principal repository of wealth.⁴³

Events could not occur in the Gilmerian fashion. Valuable personalty arose prior to industrialization and forms amenable to security devices other than the nonpossessory secured transaction also developed before industrialization.

If the condition precedent to security devices in personalty is valuable personalty and the need for business credit, then shipping in the northeastern colonies during the eighteenth century should have prompted chattel mortgage acts. In fact, a permissive chattel mortgage act at the national level did accompany the growing shipping industry in the northeastern states. The United States, through a 1792

40. See Montgomery, *supra* note 39, at 921.

41. See N.Y. REV. STAT. tit. 2, § 5 (1829) ("Every . . . assignment of goods . . . by way of mortgage . . . shall be presumed to be fraudulent and void . . . unless it shall be made to appear [before a jury] . . . that [it] was made in good faith . . .").

42. See RAYMOND T. NIMMER & INGRID MICHELSON HILLINGER, COMMERCIAL TRANSACTIONS: SECURED FINANCING, CASES, MATERIALS, PROBLEMS 42 (1992) (stating that the industrial revolution resulted in chattel mortgage acts, which legalized otherwise fraudulent conveyances); RICHARD E. SPEIDEL ET AL., SECURED TRANSACTIONS: TEACHING MATERIALS 49 (1933) (stating that the industrial revolution caused the chattel mortgage acts of the 1820s, increasing personalty wealth and solving the fraudulent conveyance problem).

43. I GILMORE, PERSONAL PROPERTY, *supra* note 35, at 25. Gilmore refers to the industrial revolution; however, modern historians defer the industrial revolution in the United States to the 1850s, preceded by the transportation revolution lasting over fifty years. See, e.g., ROSTOW, *supra* note 18, at 36 (discussing the take-off in the United States caused by railroads). See generally GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION 1815-1860, at 208-93 (1951) (discussing the impact of the transportation revolution on manufacturing).

enactment, permitted registration of mortgages on ships and cargos, but did not require registration for validity.⁴⁴

Moreover, the appearance of corporate structure in the United States with the transportation revolution should suggest pledges of corporate stock by corporate guarantors as security, obviating the need for chattel mortgages.⁴⁵ In fact, the use of corporate stock as collateral became the standard method of securing loans from one of Gilmore's financing institutions in the northeastern states before the Jacksonian Era.⁴⁶ These financing institutions refused to lend against inventory and equipment.⁴⁷ Massachusetts banks, however, would lend on corporate stock.

The form the Massachusetts banks chose, however, did not involve the pledge, but rather the nonpossessory secured transaction. The first Massachusetts bank charter limited the amount of personalty the bank could hold directly, but allowed its sale of pledges.⁴⁸ The first Massachusetts bank thereby adopted the deed of trust. Creditors normally used the deed of trust in conjunction with family settlements.⁴⁹ The deed of trust operated the same as a chattel mortgage except ownership lay with a trustee, not the secured party. Ideally, the trustee held possession of the collateral; however, sometimes the debtor held the collateral, just as in any other nonpossessory secured transaction. But in all cases, the secured party lacked possession. Massachusetts bank charters after 1811 similarly contained

44. The American ship registry laws did not require filing for validity of chattel mortgages for ships and cargos since filing established the ship's nationality for receipt of certain custom privileges, not ownership. See Act of Feb. 18, 1793, §2, 1 STAT. 305 (1793) (coastal vessels); Act of Dec. 31, 1792, §2, 1 STAT. 287 (1792) (ocean vessels); *Star v. Knox*, 2 Conn. 215, 236-37 (1817).

45. See, e.g., *Jarvis v. Rogers*, 13 Mass. (13 Tyng) 105 (1816) (illustrating an example of a pledge to an individual of stock in New England Mississippi Land Co.); *Nourse v. Prime*, 4 Johns. Ch. 490 (N.Y. Ch. 1820) (illustrating a pledge to a stock exchange broker of stock in the United States Bank); *DeLisle v. Priestman*, 1 Browne 176 (Pa. 1810) (illustrating a pledge to an individual of stock in Phoenix Ins. Co. and Delaware Ins. Co.); see also *Childs v. Corp.*, 5 F. Cas. 622 (C.C.D. Vt. 1810) (No. 2,677) (illustrating a pledge to an individual of bill of exchange (private debt) under Vermont law); *Hamlin v. Mitchel*, 2 Root 297 (Conn. 1795) (illustrating a pledge to an individual of public securities [debt] of seven states). General incorporation statutes also allowed stock pledges. See 1837 Conn. Pub. Acts 49, 51 (allowing, under the joint stock corporation act, for stock deemed personal property); Act of Feb. 9, 1816, 1816 N.J. Laws 17, 20 (allowing under manufacturer incorporation statutes for stock deemed personal property); Act of Mar. 22, 1811, ch. 67, § 7, 1811 N.Y. Laws 151, 152 (allowing for stock deemed personal property under manufacturing incorporation statutes).

46. See *New England Marine Ins. Co. v. Chandler*, 16 Mass. (16 Tyng) 274 (1820) (concerning an assignment to a trustee of corporate stock as collateral, the standard bank practice; but here undelivered, therefore a nonpossessory secured transaction).

47. See Harold Livey, *The Financial Role of Merchants in the Development of U.S. Manufacturing 1815-1860*, in 9 *EXPLORATIONS IN ECONOMIC HISTORY* 63, 65 (1971) (noting banks lent only on strong collateral, usually government bonds or real estate mortgages); *id.* at 67 (noting banks would lend to wealthy merchants on their signatures).

48. See 1784 Mass. Acts 54-55 (limiting charter of Boston's Massachusetts Bank to 50,000 pounds).

49. See JOHN HABAKKUK, *MARRIAGE, DEBT, AND THE ESTATE SYSTEM: ENGLISH LANDOWNERSHIP 1650-1950*, at 326-27 (1994) (noting that trusts created after negotiation with creditors were a common method of retrenchment in eighteenth century).

this personalty limitation.⁵⁰ Massachusetts banks, therefore, continued the practice of the earlier bank and used the deed of trust with the bank's cashier as the trustee.

Industrialization alone did not produce the first valuable personalty, nor did it mandate recording of nonpossessory secured transactions. Gilmore is correct in his assertion that industrialization produced expensive manufacturing equipment. Textile machinery ran between \$125 for looms and \$2000 for double speeders in 1817. Each factory used numerous machines, so the total cost could run several thousand dollars, much more than the underlying land.⁵¹ But the use of chattel mortgage acts required more than mere valuable personalty. England industrialized in the eighteenth century, long before the industrialization of the United States in the mid-nineteenth century, yet survived until 1854 without a chattel mortgage act.⁵²

It is clear that the Gilmorian fraudulent scenario has no basis in the historical record.⁵³ So the current investigation treads unexplored ground.

B. The Federalist Era Rule: The Absolute-Conditional Rule

An examination of the pre-chattel mortgage act appellate court opinions in the northeastern states reveals two features interpretable as supportive of traditional history.⁵⁴ First, the facts described in some of the earliest opinions suggest a requirement of delivery to the secured party, destroying the nonpossessory secured transaction. Second, the nonpossessory secured transaction did not appear in the earliest reported opinions.

Gilmorians might interpret the delivery requirement as suggesting that courts recognized only the pledge, which has a delivery requirement, as the pre-chattel mortgage security device for personalty. Gilmorians could also interpret the absence of early opinions as indicating that fraudulent conveyance law voided the nonpossessory secured transaction during the pre-chattel mortgage era. Chattel mortgages arose only shortly before the passage of the chattel mortgage acts. However, the historical facts support another interpretation. The absolute-conditional rule, used by American courts before the adoption of the rebuttable rule, worked well to reduce litigation.

50. Compare Act of June 26, 1811, ch. 84, 1811 Mass. Acts 501 (granting the charter of Boston's State Bank without the limitation), with Act of June 22, 1792, ch. 6, 1792 Mass. Acts 199-200 (granting charter of Boston's Union Bank with a \$2 million limit).

51. See, e.g., GEORGE SWEET GIBB, *THE SACO-LOWELL SHOPS: TEXTILE MACHINERY BUILDING IN NEW ENGLAND 1813-1949*, at 47 (1950) (looms and double speeders); THOMAS R. NAVIN, *THE WHITIN MACHINE WORKS SINCE 1831*, at 98 (1950) (factories).

52. England passed the Bill of Sale Act in 1854. See Act of July 10, 1854, 17 & 18 Vict., ch. 36 (1854) (Eng.), reprinted in 46 *THE STATUTES OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, 17 & 18 VICT.*, at 140-43 (London, Her Majesty's Printer 1854).

53. See Flint, *Fraudulent Myth*, *supra* note 26, at 27, 61.

54. For an analysis of the pre-chattel mortgage act opinions, see generally Flint, *Northern Struggle*, *supra* note 28, at 9-50.

1. The Delivery Requirement

Of the twenty-three opinions involving delivery, eight referred to some form of substitute delivery such as permissive registry of ships, registry of real estate, viewing by an agent, or delivery of a portion of goods on behalf of all.⁵⁵ Two involved actual delivery to the secured party before the maturing of the dispute.⁵⁶ Five concerned excuses for not delivering the collateral to the secured party, and four of these five dealt with mortgaging ships while at sea.⁵⁷ They required possession by the secured party to occur as soon as possible after landing.⁵⁸ The

55. See *Starr v. Knox*, 2 Conn. 215 (1817) (illustrating a brig enrolled at New York custom house, where debtor continued as master); *Clark v. Richards*, 1 Conn. 54 (1814) (illustrating a sloop enrolled at New London custom house, where debtor continued as master); *Tucker v. Buffington*, 15 Mass. (15 Tyng) 477, 480 (1819) (describing ship at sea, sloop in Boston, enrolled at Portland custom house as substitute delivery); *Gale v. Ward*, 14 Mass. (14 Tyng) 352 (1817) (demonstrating machines too large to take out of factory without disassembly and recorded real estate mortgage as substitute delivery); *Jewett v. Warren*, 12 Mass. (12 Tyng) 300 (1815) (noting that logs on the river behind a boom that secured's agent viewed from hill as substitute delivery); *Weller v. Wayland*, 17 Johns. 102 (N.Y. Sup. Ct. 1819) (allowing 1000 cigars for goods, wares, merchandise, and household furniture of a tobacconist as substitute delivery); *M'Intyre v. Scott*, 8 Johns. 159 (N.Y. Sup. Ct. 1811) (explaining that a brig enrolled at New York custom house is substitute delivery); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810) (allowing one spoon for household furniture, goods, and chattels in house of tenant as substitute delivery).

Opinions of this sort continue after 1820, with the added situations of symbolic delivery by words, handing over a key, and laying hands on the collateral. See *Toby v. Reed*, 9 Conn. 216 (1832) (allowing recorded realty mortgage); *Swift v. Thompson*, 9 Conn. 63 (1831) (allowing recorded realty deed); *Haskell v. Greely*, 3 Me. 425 (1825) (allowing words at bank for machinery as substitute delivery); *Ward v. Sumner*, 22 Mass. (5 Pick.) 59 (1827) (allowing one piece of household furniture for symbolic delivery of all); *Homes v. Crane*, 19 Mass. (2 Pick.) 607 (1824) (noting that secured party laid hands on equipment left with debtor, thus consummating delivery); *Gordon v. Mass. Fire & Marine Ins. Co.*, 19 Mass. (2 Pick.) 249 (1824) (illustrating brig at sea while enrolled at Portland custom house as delivery); *Parks v. Hall*, 19 Mass. 206 (2 Pick.) (1824) (noting that giving a secured party a key to the loft where the wine was stored equated as delivery); *Badlam v. Tucker*, 18 Mass. (1 Pick.) 389 (1823) (illustrating a brig at sea, while enrolled at Boston custom house is delivery); *Fisher v. Willing*, 8 Serg. & Rawle 118 (Pa. 1822) (ship enrolled); *Sturgis v. Warren*, 11 Vt. 433 (1839) (allowing recorded realty mortgage); *Tobias v. Francis*, 3 Vt. 425 (1830) (allowing recorded realty mortgage).

56. See *Brown v. Bement*, 8 Johns. 96 (N.Y. Sup. Ct. 1811) (describing ownership of horse and chair passed to secured party after default); *Wendover v. Hogeboom*, 7 Johns. 308 (N.Y. Sup. Ct. 1810) (noting, where a coastal vessel is without entry at custom house, that delivery to debtor-purchaser cut off secured party-seller's interest).

57. See *Putnam v. Dutch*, 8 Mass. (8 Tyng) 287 (1811) (discussing intent to take possession in home port, not a neighboring Massachusetts port); *Portland Bank v. Stubbs*, 6 Mass. (6 Tyng) 423 (1810) (noting that party expected to take possession a reasonable time after learning of arrival); *Portland Bank v. Stacey*, 4 Mass. (4 Tyng) 661 (1808) (describing that party took possession as soon as learned of arrival); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. Ch. 1817) (noting that party took possession of ships on arrival in New York).

Opinions of this sort continue after 1820. See *Harris v. D'Wolf*, 29 U.S. (4 Pet.) 147 (1830) (interpreting N.Y. law, cargo on ship at sea, levied as landed); *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (New York law) (same); *Lanfear v. Sumner*, 17 Mass. (17 Tyng) 110 (1821) (describing attempt to take possession within one hour of arrival); see also *Peters v. Ballister*, 20 Mass. (3 Pick.) 495 (1826) (noting cargo on ship at sea, then sold overseas).

58. See *supra* note 57.

remaining case concerned wrongful possession by the debtor.⁵⁹ The other eight treated the more modern typical situation — possession by the debtor for purposes of use.⁶⁰ One judge, Levi Woodbury, later a U.S. Supreme Court Justice, explained the delivery requirement as arising from the prior confusion in the literature between pledges, which require delivery, and chattel mortgages, which do not.⁶¹

Those fifteen early opinions with various substitute delivery mechanisms constituted attempts to comply with the rebuttable rule. Six opinions were readily explainable,⁶² but the remaining opinions were more difficult to explain.⁶³

The Statute of Frauds for the sale of goods required a written document, part delivery, or symbolic delivery as evidence of the transaction. Accordingly, cautious creditors would often use more than one method to establish their conditional sale

59. See *Hussey v. Thornton*, 4 Mass. (4 Tyng) 405 (1808) (illustrating a party that took boxes of candles without providing security agreed).

60. See *Philips v. Ledley*, 19 F. Cas. 505 (C.C.D. Pa. 1805) (No. 11,096) (interpreting Pennsylvania law, sloop went on several trips after mortgaging in Philadelphia); *Hurry v. The John and Alice*, 12 F. Cas. 1017 (C.C.D. Pa. 1805) (No. 6,293) *on retrial*, 12 F. Cas. 1015 (C.C.D. Pa. 1808) (No. 6,922) (interpreting Pennsylvania law, vessel at sea to Philadelphia); *Forbes v. The Hannah*, 9 F. Cas. 406 (Adm. Ct. Pa. 1786) (No. 4,925) (interpreting Pennsylvania law, vessel at sea to Boston); *Haven v. Low*, 2 N.H. 13 (1819) (sloop operated on Exeter River after mortgaging on the Pascataqua River); *Clow v. Woods*, 5 Serg. & Rawle 275 (Pa. 1819) (illustrating tannery inventory and equipment in use in debtor's shop); *Jennings v. Insurance Co. of Pa.*, 4 Binn. 244 (Pa. 1811) (discussing a vessel at sea to Philadelphia); *Dawes v. Cope*, 4 Binn. 258 (Pa. 1811) (discussing a vessel at sea to Cadiz); *Morgan's Executors v. Biddle*, 1 Yeates 3 (Pa. 1791) (illustrating a ship and brig sent to Ostend from Philadelphia after mortgaging ship in Virginia and brig in Philadelphia).

61. See *Haven v. Low*, 2 N.H. 13, 16 (1819) (Woodbury, J.). Levi Woodbury (1789-1851) of Portsmouth, Rockingham County, served as Justice (1817-1823), Governor (1823-1824), U.S. Senator (1825-1831 & 1841-1845), Secretary of the Navy (1831-1834), Secretary of the Treasury (1834-1841), and Justice of the U.S. Supreme Court (1845-1851). See A.N. MARQUIS CO., WHO WAS WHO IN AMERICA, HISTORICAL VOLUME 1607-1896, at 594 (1963).

62. Four opinions involved ship registration situations, where federal law required registration for favorable custom duties, one situation involved realty registration, required by realty law, and one situation involved the debtor having wrongful possession. See *supra* note 44.

63. Four opinions involved the at-sea exception to the rebuttable rule, and five addressed compliance with the parol evidence portions of the Statute of Frauds for the sale of goods. For more on the at-sea exception, see *supra* note 57. For Statute of Frauds compliance, see *Jewett v. Warren*, 12 Mass. (12 Tyng) 300 (1815) (noting that logs were on the river behind a boom while secured's agent viewed from hill); *Weller v. Wayland*, 17 Johns. 102 (N.Y. Sup. Ct. 1819) (allowing 1000 cigars for goods, wares, merchandise, and household furniture of a tobacconist as delivery); *Brown v. Bement*, 8 Johns. 96 (N.Y. Sup. Ct. 1811) (noting ownership of horse and chair passed to secured party after default); *Wendover v. Hogeboom*, 7 Johns. 308 (N.Y. Sup. Ct. 1810) (noting, where coastal vessel is without entry at custom house, delivery to debtor-purchaser cut off secured party-seller's interest); and *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810) (allowing one spoon for household furniture, goods, and chattels in house of tenant as delivery). See also *Haskell v. Greeley*, 3 Me. 425 (1825) (explaining words at bank for machinery sufficient for delivery); *Ward v. Sumner*, 22 Mass. (5 Pick.) 59 (1827) (noting that one piece of household furniture for all is delivery); *Homes v. Crane*, 19 Mass. (2 Pick.) 607 (1824) (discussing that delivery included a secured party who laid hands on equipment left with debtor); *Parks v. Hall*, 19 Mass. (2 Pick.) 206 (1824) (allowing recognition of delivery where secured party had key to loft where wine stored).

and thus offered as evidence written documents as well as part delivery and symbolic delivery.

The compliance explains why these opinions arose only in Massachusetts and New York, and not in Connecticut or Pennsylvania. By 1800, only Massachusetts, New Hampshire, New Jersey, and New York had adopted that portion of the Statute of Frauds for a sale of goods. They adopted it during the Federalist era.⁶⁴ In contrast, Connecticut, Pennsylvania, Rhode Island, and Vermont had not yet adopted this rule, but Connecticut and Vermont adopted it in 1821 and 1823, respectively.⁶⁵

2. Absence of Early Opinions

The earliest opinions involving the nonpossessory secured transaction numbered eight before 1811 and, except for two opinions in 1786 and 1791, arose only after 1808.⁶⁶ Three of the five states with earlier reported opinions had their first nonpossessory secured transaction opinion long after the commencement of their reports. For example, New York's first opinion on the subject appeared in 1810, Connecticut's in 1814, and New Jersey's in 1820.⁶⁷

Five explanations for the absence of opinions in the earliest northeastern reports come to mind, two of which refute Gilmore's interpretation. First, parties only recently developed the nonpossessory secured transaction. Second, businessmen

64. See Statute of Frauds of 1677, 29 Car. 2, ch. 3, § 16 (Eng.), reprinted in 5 STATUTES OF THE REALM, *supra* note 13, at 839, 841; Act of June 20, 1788, ch. 18, 1788 Mass. Acts 712 (requiring compliance for transactions of at least ten pounds); Act of Nov. 26, 1794, ch. 496, 1794 N.J. Laws 942, 947 (requiring compliance for transactions of at least \$30); Act of Feb. 10, 1791, 1792 N.H. Laws 241 (same); Act of Feb. 26, 1787, ch. 44, 1787 N.Y. Laws 438, 442 (same); CAINES, *supra* note 17, at 376; see also Act for Prevention of Frauds and Perjuries, 1693 Mass. Acts ch. 15, reprinted in 1 MASSACHUSETTS GENERAL COURT, THE ACTS AND RESOLVES, PUBLIC AND PRIVATE OF THE PROVINCE PAST BY MASSACHUSETTS BAY, at 47 (Boston, Wright & Potter 1869); Act of May 2, 1719, ch. 2, 1719 N.H. Laws 127, reprinted in 2 LAWS OF NEW HAMPSHIRE 328 (Albert Stillman Batchelor ed., 1904).

65. See 1821 Conn. Pub. Acts 246 (requiring compliance for transactions over \$35); Act of Nov. 9, 1822, 1822 Vt. Acts & Resolves 11 (requiring compliance for transactions over \$40); 13 PUBLIC RECORDS, *supra* note 6, at 422 (stating that Connecticut adopted a Statute of Frauds in 1771 for certain transactions to be in writing, but omitted the sale of goods as one).

66. The eight earliest nonpossessory secured transaction opinions, all before 1811, include *Hurry v. The Jahn and Alice*, 12 F. Cas. 1017 (C.C.D. Pa. 1805) (No. 6,923), *on retrial*, 12 F. Cas. 1015 (C.C.D. Pa. 1808) (No. 6,922) (interpreting Pennsylvania law in regards to bottomry bond); *Forbes v. The Hannah*, 9 F. Cas. 406 (Adm. Ct. Pa. 1786) (No. 4,925) (same); *Portland Bank v. Stubbs*, 6 Mass. (6 Tyng) 423 (1810) (discussing a mortgage on ship and freight); *Hussey v. Thornton*, 4 Mass. (4 Tyng) 405 (1808) (discussing a conditional contract of sale for candles); *Portland Bank v. Stacey*, 4 Mass. (4 Tyng) 661 (1808) (discussing a conditional deed on schooner and cargo); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810) (discussing a conditional bill of sale on furniture); *Wendover v. Hogeboom*, 7 Johns. 308 (N.Y. Sup. Ct. 1810) (discussing a conditional agreement on vessel); and *Morgan's Executors v. Biddle*, 1 Yeates 3 (Pa. 1791) (discussing a bottomry mortgage).

67. For the late first opinions, see *Clark v. Richards*, 1 Conn. 54 (1814); *Hendricks v. Mount*, 5 N.J. Law 850 (1820); and *Barrow v. Paxton*, 5 Johns. 258 (N.Y. Sup. Ct. 1810). Massachusetts and Pennsylvania have shorter periods, just four years and eight years, respectively. See *Forbes v. The Hannah*, 9 F. Cas. 406 (Adm. Ct. Pa. 1786) (No. 4,925) (interpreting Pennsylvania law); *Hussey v. Thornton*, 4 Mass. (4 Tyng) 404 (1808).

knew courts would strike them down against third party claims as fraudulent conveyances and so avoided them. Third, creditors and debtors used other security devices before 1810. Fourth, lenders and borrowers used alternative dispute resolution techniques until 1810. Finally, the courts' prior rule worked so well that parties did not need to litigate. The latter two contradict Gilmore's thesis.

a) Recent Development Theory

The recent development theory seems inadequate. In the eighteenth century, several northeastern colonial opinions and statutes specifically mentioned chattel mortgages. In 1682, the Connecticut General Court upheld a chattel mortgage — a nonpossessory secured transaction but with possession in a third party, probably the debtor's agent — on a tannery's inventory and equipment against a levying judgment lien.⁶⁸ In 1705, the colonial Pennsylvania legislature passed an act with respect to recording mortgages on real estate, which included mortgages on real estate leases, described as a mortgage on personal property.⁶⁹ Debtor-lessee possession of the leased premises necessitated filing. The colonial New York legislature, in 1775, passed a permissive chattel mortgage act covering the nonpossessory secured transaction. It provided priority for multiple mortgages.⁷⁰

68. See 3 PUBLIC RECORDS, *supra* note 6, at 113. The report gave no explanation for third party possession, however, the debtor, a decedent's estate, must have had an administrator.

69. See Act of Jan. 12, 1705, ch. 136, § 4, 1705-06 Pa. Laws, reprinted in 2 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 206, 210 (Clarence M. Busch 1986) [hereinafter PENN. STAT.], reenacted by Act of Feb. 28, 1710, ch. 170 § 4, 1710-11 Pa. Laws, reprinted in 2 PENN. STAT., *supra*, at 349, 353; see also Bismark Bldg. & Loan Ass'n v. Bolster, 92 Pa. 123 (1879) (noting that statute applies only to leaseholds on realty as personalty and not leases of other personalty types); MARSHALL HARRIS, ORIGIN OF THE LAND TENURE SYSTEM IN THE UNITED STATES 336 (1970) (citing the statutes as applicable to all personalty).

70. See Act of Apr. 3, 1775, ch. 124, 1775 N.Y. Laws 208-09 ("[I]f any Person . . . shall . . . give any Bill of Sale in Writing by way of Mortgage or Collateral Security for any Goods, Chattels or effect whatsoever, for any Consideration not exceeding the Sum of One Hundred Pounds within the said Counties [Queens, Orange, Dutchess, Albany, Richmond, and Kings], to two or more Persons, at different Times, and any doubt or dispute shall arise about the priority of such Bill of Sale . . . the Bill of Sale first entered in the Register . . . shall be deemed and taken . . . to be the first and prior Bill of Sale . . ."). This statute did not apply in Charlotte, Tryon, Suffolk, Ulster, and Westchester Counties, the north, west, Long Island, and alternating strips on the Hudson River.

The Tories proposed the act. Samuel Gale, Tory of Orange County, see THOMAS JONES, HISTORY OF NEW YORK DURING THE REVOLUTIONARY WAR 37 (N.Y., N.Y. Historical Society 1879), asked leave to bring the "Bill to prevent Frauds by Bills of Sale, which shall be made and executed in the Counties therein mentioned" on January 19, 1775, which he presented on January 19. N.Y. Assembly J., Jan. Sess. 13, 15 (1775). The Assembly read it a second time and committed it to a committee of the whole on February 28. See *id.* at 56. The Committee reported some amendments and the Assembly agreed and read the bill on March 8. See *id.* at 72. The Assembly read the bill the third time, passed it, and sent Assemblymen Gale and Simon Boerum to obtain the Council's concurrence on March 8, 1775. See *id.* at 72. They presented it to the Council on March 10. See N.Y. Colony Legislative Council J., 31st Assm'y, 7th Sess. 1968 (1861). The Council read it a second time on March 13. On March 16, the Council resolved into a committee of the whole with Councilman Axtell reporting it with no amendments. See *id.* at 1973-74. The Council then read it a third time and passed it. See *id.* Councilman Henry White of the Council reported the Council's concurrence to the Assembly on March 17, 1775. See N.Y. Assembly J., *supra*, at 87.

But the American Revolution intervened before it received the Crown's enacting approval.⁷¹ Rhode Island, Massachusetts, New Hampshire, Connecticut, and New Jersey passed no comparable provision.⁷² Two northeastern courts, the Connecticut Supreme Court and the Vermont Supreme Court, claimed a long pedigree in their state for their pre-chattel mortgage act rule's application to nonpossessory secured transactions.⁷³ In addition, Pennsylvania courts upheld nonpossessory secured transactions as early as 1791 against a third party claim.⁷⁴ It is evident, then, that at least some northeastern states recognized the nonpossessory secured transaction in the eighteenth century.

Nonetheless, the bizarre facts in these opinions led one historian to conclude the nonpossessory secured transaction did not evolve until the late 1820s.⁷⁵ This historian interpreted opinions enforcing such transactions after 1820 as exceptions to a supposed rule voiding secured transactions. Consequently, he concluded that secured transactions did not become viable in America until the 1820s.⁷⁶

Valueless personalty, the reason supplied by Gilmore for the late development of chattel mortgages, does not comport with the historical data in the northeast. Shipping in the eighteenth century produced valuable ships and cargo. These items appeared in the earliest pre-chattel mortgage act opinions around 1810. Northeastern debtors therefore gave nonpossessory security interests in valuable

Simon Boerum (1724-1775) of Brooklyn, a farmer, miller, and Clintonian, served as a Continental Congressman in 1775. See A.N. MARQUIS CO., *supra* note 61, at 61.

Henry White (1732-1786) of New York City, Tory merchant and consignee of the East India Company, later lost his property to confiscation and fled to London. See *id.* at 575.

71. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 531 (Boston, Mass., Little, Brown & Co., 12th ed. 1884).

72. See generally JOHN D. CUSHING, THE FIRST LAWS OF THE STATE OF RHODE ISLAND (1983); PUBLIC RECORDS, *supra* note 6 (discussing Connecticut); 2 LAWS OF NEW HAMPSHIRE, *supra* note 64 (discussing New Hampshire); 1 MASSACHUSETTS GENERAL COURT, *supra* note 64 (discussing Massachusetts); DIVISION OF THE ARCHIVES AND HISTORY BUREAU MANAGEMENT, LAWS OF THE ROYAL COLONY OF NEW JERSEY (1977) (discussing New Jersey).

73. See *Swift v. Thompson*, 9 Conn. 63, 69 (1831) (noting the application of the heightened rebuttable rule for the last forty years for sale of goods by mortgage); *Weeks v. Wead*, 2 Vt. 64, 67 (1826) (noting the use of the absolute-conditional rule for fifteen years); *id.* at 70 (the conditional portion applicable to a mortgage of goods). For Connecticut, see *Hough v. Ives*, 1 Root 492 (Conn. 1793) (explaining that an absolute deed plus separate defeasance agreement for land constitutes fraud; the absolute-conditional rule).

74. See *Morgan's Executor v. Biddle*, 1 Yeates 3 (Pa. 1791).

75. See WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 253 n.100 (1975).

76. See *id.* (stating that the development of the market economy in the early nineteenth century led to new rules permitting security interests in personalty, citing only six Massachusetts cases between 1824 and 1830). This author, however, sometimes erred on points minor to his thesis. He asserted that the General Court passed the Massachusetts recognizance statute as a temporary measure. See *id.* at 148 (citing Act of May 15, 1781, ch. 36, 1781 Mass. Acts 57). The statute he cited has an expiration provision; however, the General Court repealed the act and replaced it with Massachusetts' current recognizance statute prior to that expiration. See Act of Oct. 19, 1782, ch. 21, 1782 Mass. Acts 171; MASS. GEN. LAWS ch. 256 (1992) (providing recognizances for debt).

personalty in distressing situations, such as danger in foreign ports,⁷⁷ but apparently not for local economically stressful events until Jefferson's embargo of 1807.⁷⁸ Banking history, and hence loan demand, mirrored this scenario. Only five banks were chartered between 1782 and 1791 due to the low level of economic activity. When foreign markets picked up after 1792, the number of banks rose to ninety-two by 1809. But when the domestic market began to grow after 1807, the number of banks rose to 338 by 1818.⁷⁹

b) *Fraudulent Theory*

The fraudulent theory also founders for numerous reasons. The lawyers in those northeastern states adopting the rebuttable rule, primarily Massachusetts and New York, tried to avoid the rebuttable rule by arguing the absolute-conditional rule instead of the *per se* fraud rule.⁸⁰ Under the absolute-conditional rule, a court upheld the nonpossessory secured transaction only if the debtor in possession comported with any conditions in the transaction. Those few lawyers that argued the *per se* rule did so through a misunderstanding, not realizing its limitation to bankruptcy or perhaps confusing it with the absolute portion of the absolute-conditional rule.⁸¹

The earliest cases in three northeastern states (Pennsylvania, Connecticut, and Vermont), before they settled on their final pre-chattel mortgage act rule, used the absolute-conditional rule in 1791, in 1814 and 1817, and in 1826, respectively.⁸²

77. See *infra* notes 110-11 and accompanying text for the use of bottomry and respondentia bonds.

78. See DOUGLAS NORTH, *THE ECONOMIC GROWTH OF THE UNITED STATES 1790-1860*, at 55 (1966) (describing the curtailment of shipping, shifting of moneys to manufacturing, and the manufacturing boom caused by the Embargo of 1807).

79. See JOSEPH VAN FENSTERMAKER, *THE DEVELOPMENT OF AMERICAN COMMERCIAL BANKING 1782-1837*, at 7 (1965).

80. See *Homes v. Crane*, 19 Mass. (2 Pick.) 607, 609 (1824) (recounting B. Sumner and W.R.P. Washburn arguing for rebuttable rule as applying only to the absolute portion of the rule); *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512, 513 (1824) (recounting L. Shaw arguing for absolute portion of the rule); *Parks v. Hall*, 19 Mass. (2 Pick.) 206, 208 (1824) (recounting Parks and F. Dexter arguing for absolute portion of the rule); *Badlam v. Tucker*, 18 Mass. (1 Pick.) 388, 394 (1823) (recounting Aylwin and Curtis arguing against both portions of the rule); *Bartlett v. Williams*, 18 Mass. (1 Pick.) 288, 290 (1823) (recounting Rand arguing for absolute portion of the rule); *Marston v. Baldwin*, 17 Mass. (17 Tyng) 606, 609 (1822) (recounting Townsend arguing for absolute portion of the rule); *Jewett v. Warren*, 12 Mass. (12 Tyng) 300, 302 (1815) (recounting Wilde arguing for absolute portion of the rule); *Hussey v. Thornton*, 4 Mass. (4 Tyng) 405, 406 (1808) (recounting Mellen arguing for absolute portion of the rule); *Barrow v. Paxton*, 5 Johns. 258, 260 (N.Y. Sup. Ct. 1810) (recounting Talbot arguing for the conditional portion of the rule); see also *Macomber v. Parker*, 31 Mass. (14 Pick.) 464, 465-66 (1833) (recounting Circuit Judge Shaw proposing jury instruction on absolute-conditional rule).

81. See *Putnam v. Dutch*, 8 Mass. (8 Tyng) 287, 289 (1811) (recounting Story arguing for *per se* fraud rule, with Pickering pointing out the bankruptcy rule does not apply in Massachusetts); *Haven v. Low*, 2 N.H. 13, 17 (1819) (illustrating Bartlett arguing for *per se* fraud rule, but citing absolute-conditional rule cases). Some courts regarded the absolute portion of the absolute-conditional rule as the *per se* fraud rule. See *Weeks*, 2 Vt. at 67.

82. See *Starr v. Knox*, 2 Conn. 215 (1817) (discussing that the supplemental agreement not admissible since conflicts with absolute bill of sale); *Clark v. Richards*, 1 Conn. 54 (1814) (same); *Morgan's Executors v. Biddle*, 1 Yeates 3 (Pa. 1791) (recognizing the at-sea exception to absolute

Even in England, the legal authority for the early American states,⁸³ the *per se* rule applied only in bankruptcy cases dealing only with merchants. In addition, those bankruptcy laws, in particular the reputed ownership clause, did not apply in any American state except Pennsylvania.⁸⁴

bottomry mortgage without debtor's possession clause); *Fletcher v. Howard*, 2 Vt. 115 (1826) (applying absolute portion of rule to pledge).

83. For state adoption of the English common law, see CONN. CONST. art. 10, § 5; MAINE CONST. art. X, § 1; *id.* art. VI; N.H. CONST. art. 90; Act of June 13, 1799, ch. 821 §§ 4-5, 1799 N.J. Laws 608; Act of Apr. 15, 1786, ch. 35, § 1, 1786 N.Y. Laws 247; Act of Feb. 10, 1777, ch. 2, § 2, 1777 Pa. Laws 3; and 1797 Vt. Acts & Resolves 4.

84. Between 1776 and 1784, eleven colonies adopted some provision for use of the English common law and the English statutes that did not conflict with local colonial legislation. See ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836, at 21, 24 (1964). Of the remaining two, Rhode Island did so in 1798 and Connecticut in 1818. *Id.* Each of the northeastern colonies, except Pennsylvania, adopted their own insolvency statutes. So the English bankruptcy law only possibly applied in Pennsylvania. For Connecticut, see COLEMAN, DEBTORS AND CREDITORS, *supra* note 1, at 78-79, 84 (adopting insolvency statutes in 1763 and 1853). For Massachusetts, see *id.* at 45-50 (adopting insolvency statutes in 1714, 1757, 1765 and 1838); and *Putnam v. Dutch*, 8 Mass. (8 Tyng) 287, 289 (1811) (recognizing English bankruptcy law does not apply in Massachusetts). Maine clearly adopted Massachusetts law. *Cottrill v. Myrick*, 12 Me. 222 (1835) (discussing those English laws recognized in Massachusetts as of 1819). For New Hampshire, see COLEMAN, DEBTORS AND CREDITORS, *supra* note 1, at 54-55, 63 (recognizing in 1715 no others laws except those of the United States); and *Coburn v. Pickering*, 3 N.H. 415 (1826) (noting the 1624 act does not apply in New Hampshire). For New Jersey, see COLEMAN, DEBTORS AND CREDITORS, *supra* note 1, at 134-35 (adopting insolvency statutes in 1771 and 1783); and *Vanuxen v. Hazethursts*, 4 N.J.L. 218 (1818) (discussing the 1542 statute and noting English bankruptcy statutes never extended to America). For New York, see COLEMAN, DEBTORS AND CREDITORS, *supra* note 1, at 109, 123-24 (adopting insolvency statutes in 1755 and 1784); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. Sup. Ct. 1823) (conceding the 1624 statute inapplicable to New York fraudulent conveyance law); and *Craig v. Ward*, 9 Johns. 197 (N.Y. Sup. Ct. 1812) (same). See also *Dale v. Cooke*, 4 Johns. Ch. 11 (N.Y. Ch. 1819) (recognizing 1732 statute applicable to set-off in statute); *Duncan v. Lyon*, 3 Johns. Ch. 351 (N.Y. Ch. 1818) (same); *Lansing v. Pendergast*, 9 Johns. 127 (N.Y. Sup. Ct. 1812) (noticing 1732 statute applicable to discharge in our 1789 act); *Frost v. Carter*, 1 Johns. Cas. 73 (N.Y. Sup. Ct. 1799) (same). For Rhode Island, see COLEMAN, DEBTORS AND CREDITORS, *supra* note 1, at 91, 93 (adopting insolvency statutes in 1745, 1756 and 1828). But see *Greene v. Darling*, 10 F. Cas. 1144 (C.C.D.R.I. 1828) (No. 5,765) (discussing Rhode Island law and noting 1732 statute set-off similar to Rhode Island statute). For Pennsylvania, see COLEMAN, DEBTORS AND CREDITORS, *supra* note 1, at 151, 153 (discussing application in 1785 and 1812). For Pennsylvania's use of English bankruptcy statutes, see *Price v. Ralston*, 2 Dall. 60, 61-62 (Pa. 1790) (applying a 1624 statute). See also *Pleasants v. Meng*, 1 U.S. (1 Dall.) 380 (C.P. Ct. of Phila. County 1788) (applying 1732 statute); *Wickersham v. Nicholson*, 14 Serg. & Rawle 118 (Pa. 1826) (applying 1604 statute). For the reputed ownership clause, see Act of Sept. 16, 1785, ch. 230, § 20, 1785 Pa. Laws 368. This act expired after seven years in 1793.

The United States Bankruptcy Act of 1800, which lasted for three years, did have a reputed ownership clause for which the courts applied the 1624 statute. See Bankruptcy Act of 1800, § 27, 2 Stat. 19, 28 (1800); *Sands v. Codwine*, 4 Johns. 536 (applying New York law in 1808); see also *Roosevelt v. Mark*, 6 Johns. Ch. 266 (N.Y. Ch. 1822) (applying 1732 statute); *Murray v. De Rottenham*, 6 Johns. Ch. 52 (N.Y. Ch. 1822) (applying 1705 statute and noting the 1800 U.S. act consolidated all the English bankruptcy statutes); *Kingston v. Wharton*, 2 Serg. & Rawle 208 (Pa. 1816) (same); *Blythe v. Johns*, 5 Binn. 247 (Pa. 1812) (same); *Ruggan v. West*, 1 Binn. 263 (Pa. 1808) (same).

c) *Alternative Security Device Theory*

Similarly, the alternative security device does not provide an adequate explanation. Opinions for pledges of personalty shared the same fate as opinions for chattel mortgages. Pledges also did not appear in early opinions. They numbered only seven before 1811.⁸⁵

In the Jacksonian Era, statutory recognizance could no longer serve as a security device due to the requirement to levy for priority. Statutory recognizance involved entry of a judgment in the court records prior to making the loan. The Statute of Frauds changed the priority date of the creditor's judgment lien against chattels from the time of the judgment's entry to the time the creditor actually delivered the writ of execution to the sheriff.⁸⁶ This gave significance to the time gap between the judgment's entry and the delivery of the writ of execution to the sheriff. The gap allowed a good faith purchaser of the personalty, including a chattel mortgagee, to have priority in the interim. Statutory recognizance thus declined in popularity.⁸⁷

85. For the late first opinions, see *Cortelyou v. Lansing*, 2 Cai. Cas. 200 (N.Y. Sup. Ct. 1805) (discussing depreciation notes); and *DeLisle v. Priestman*, 1 Browne 176 (Pa. 1810) (discussing stock). Massachusetts and Connecticut had shorter periods — only six years. See *Whiting v. McDonald*, 1 Root 444 (Conn. 1792) (discussing public securities); *Stevens v. Bell*, 6 Mass. (6 Tyng) 339 (1810) (discussing proceeds of sale held by third party trustee). New Jersey had no early pledge opinions. For the other three early pledge opinions before 1811, see *Childs v. Corp.*, 5 F. Cas. 622 (C.C.D. Vt. 1810) (No. 2,677) (discussing bill of exchange); *Clark v. Bull*, 2 Root 329 (Conn. 1795) (discussing potash equipment, utensils, and livestock); *Hamlin v. Mitchell*, 2 Root 297 (Conn. 1795) (discussing public securities).

86. See Statute of Frauds of 1677, 29 Car. II, ch. 3, § 15 (Eng.), reprinted in 5 STATUTES OF THE REALM, *supra* note 13, at 839, 841.

87. See W.F. JONES, THE FOUNDATIONS OF ENGLISH BANKRUPTCY: STATUTES AND COMMISSIONS IN THE EARLY PERIOD 30 (1979) (recognizing that statutory recognizance survived until the eighteenth century); Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 NW. UNIV. L. REV. 807, 828-29 (1986) (attributing their demise between 1640 and 1740 to the popularity of warrants of attorney to confess judgment). Nevertheless, statutory recognizances remained viable, if not popular, in the Northeastern United States as a mechanism to reduce the debtor's litigation costs for collections. See CONN. STAT. tit. 21, § 33 (1821) (requiring debtor's appearance and available only for debts under \$70); 1821 Maine Laws 270 (requiring debtor's appearance and writ of execution within three years of default); Act of Oct. 19, 11782, ch. 21, 1782 Mass. Acts 170 (requiring debtor's appearance and writ of execution within three years of default); Act of Dec. 20, 1808, 1808 N.H. Laws 24 (requiring debtor's appearance, debt under \$200, and writ of execution with stay); Act of Mar. 9, 1798, ch. 718, 1798 N.J. Laws 350 (requiring only on warrant of attorney for confession); Act of Mar. 20, 1801, ch. 32, 1801 N.Y. Laws 49 (on requiring only warrant of attorney for confession); 1806 Pa. Laws 348, § 28 (requiring only on warrant of attorney for confession and writ of execution with stay); Act of June 21, 1782, §12, 1782 Vt. Acts & Resolves 112 (noticing section 11 of act regulating process in civil actions, required debtor's appearance and available only for debt under 200 pounds). The American creditors obtained quick judgments, then awaited default to obtain the execution writ. See, e.g., *Averill v. Loucka*, 6 Barb. 20 (N.Y. Sup. Ct. 1849) (discussing warrant of attorney on July 1, 1846, judgment on July 11, 1846, and execution writ two years later on October 19, 1848). Rhode Island used bank process contained in the bank's statutory charter with an immediate execution writ issued upon default, obviating the need for a bank to obtain a judgment to collect on a debt due the bank. See *History of the Rhode Island Bank Process and the Terrible Works*

The New England states, however, had short periods between delivery to the sheriff and the levy, so it effectively became priority from the date of levy.⁸⁸ Later statutes and opinions confirmed this result.⁸⁹ The Middle Atlantic States passed statutes granting priority on the basis of delivery of the execution writ to the sheriff.⁹⁰ Under these statutes, courts ruled that stay orders to the sheriff destroyed the priority of delivery, thereby enabling the delay of the levy until default.⁹¹ Therefore, a creditor could not maintain priority for the statutory recognizance at a date before the debtor's default, allowing a nonpossessory secured transaction before default to have priority.

d) Alternative Dispute Theory

The late appearance of the nonpossessory secured transaction in the opinions due to an alternative dispute resolution mechanism, namely arbitration, also collapses. Parliament authorized arbitration in England by statute in 1698, and similar statutory or common law authorization followed in several northeastern American colonies and states with Pennsylvania in 1705, Connecticut in 1753, New York in 1768, Massachusetts in 1786, and New Jersey before 1797.⁹² Some legal

of the General Assembly in Connection with It, in BOOK NOTES, May 20, 1905, at 74, 76-77 (vol 22).

88. See *infra* note 89 for statutes and opinions suggesting an effective levy rule.

89. See CONN. STAT. tit. 2, § 73 (1821) (noting levy within 60 days), *confirmed by* Allyn v. Burbank, 9 Conn. 151 (1882) (noting overplus to other judgment liens); Act of Mar. 15, 1821, ch. 60, § 3, 1821 Me. Laws 220 (noting levy within 3 months), *confirmed by* Act of Mar. 15, 1821, ch. 60, § 20, 1821 Me. Laws 227 (noting overplus to other judgment liens in order of time); Act of Mar. 17, 1784, ch. 33, 1784 Mass. Acts 113 (noting levy within 3 months), *confirmed by* Act of Mar. 8, 1805, ch. 83, § 6, 1804 Mass. Acts 591, 595 (noting overplus to other judgment liens in order of time); Act of Feb. 11, 1792, 1792 N.H. Laws 79, 79-80 (noting form of writ of execution, and next court term, usually 3 months), *confirmed by* Act of July 3, 1822, ch. 59, § 7, 1822 N.H. Laws 7, 9 (noting overplus to other judgments liens in order of time for equity of redemption); Rogers v. Edmunds, 6 N.H. 70 (1832) (holding priority when first delivered if levied promptly); Act of Feb. 15, 1779, 1779 Vt. Acts & Resolves 137, 139 (noting levy within 60 days), *confirmed by* Act of Nov. 6, 1817, ch. 119, 1817 Vt. Acts & Resolves 102 (noting priority for personalty in hands of the sheriff).

90. See Act of Feb. 18, 1799, ch. 772, 1799 N.J. Laws 483; Act of Mar. 19, 1787, ch. 56, 1787 N.Y. Laws 467, 468; 1772 Pa. Laws 389, 390.

91. See Matthew v. Warne, 11 N.J.L. 295, 305 (1830) (discussing creditors' practice in New Jersey ordered the sheriff to stay execution writ); *id.* at 312 (condemning the practice as fraud and awarding priority to a subsequent execution writ that levied); Storm v. Woods, 11 Johns. 110 (N.Y. Sup. Ct. 1814) (holding stay order to sheriff waives priority); Eberle v. Mayer, 1 Serg. & Rawle 33 (Pa. 1829) (holding stay order to sheriff waives priority). Thus, priority effectively depended on the date of levy.

92. For England, see 9 Wm. 3, ch. 15 (1698) (Eng.), *reprinted in* 7 STATUTES OF THE REALM, *supra* note 13, at 369; see also P. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1928); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934).

For American colonies and states, see 1753 Conn. Pub. Acts 268, *reenacted* CONN. STAT. tit. 3 (1821); Act of Dec. 31, 1768, ch. 1363, § 1, 1768 N.Y. Laws 517, *reenacted* Act of Mar. 30, 1782, ch. 26, 1781 N.Y. Laws 440; Act of July 7, 1786, 1786 Mass. Acts 474 (discussing Referee Act); Act of Nov. 27, 1700, ch. 36, § 1, 1700 Pa. Laws, *reprinted in* 2 PENN STAT., *supra* note 69, at 43-44. See also Ford v. Potts, 6 N.J.L. 388 (1797) (using arbitration under the common law); William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U.L.Q. 193 [hereinafter William Jones, *Three Centuries*]; Anonymous, *Early American Arbitration*, 1 ARB. J. 51

historians claim arbitration sheltered commercial cases from the courts and lawyers unreceptive or unknowledgeable about commercial matters by providing binding dispute resolution outside of the court system.⁹³ These same historians assert that this shelter broke down after 1800, when courts deprived arbitrators of the ability to determine legal questions, namely the content of commercial law, and began reversing arbitration awards.⁹⁴ An examination of the arbitration cases reveals that its use, not for debt collection but for land contracts both before and after 1800, did not noticeably drop in terms of total cases.⁹⁵

Arbitration disputes involving nonpossessory secured transactions involved debtor-secured party disputes, rather than the secured party battling the sheriff executing a court's judgment lien. The debt instrument, not the security interest, resolved these debtor-secured party disputes so that few, if any, even mentioned the security interest. However, two such instruments from New York City did. In one 1781 dispute, the parties structured the security in a form similar to a deed of trust with the secured party disputing with the stakeholder over the proceeds from the sale of goods which served as collateral.⁹⁶ This situation involved a nonpossessory secured transaction since possession lay with the debtor's agent, the stakeholder. The other, a 1782 dispute for an unpaid account, directed the debtor to assign personalty he owned as a secured party then in the possession of third

(1946) (discussing Connecticut); George S. Odione, *Arbitration and Mediation Among the Early Quakers*, 9 ARB. J. 161 (1954).

New York's arbitration practice extended back to 1665 when the Duke's Laws provided for arbitration for debt or trespass under five pounds between neighbors, supposedly a carryover of the Dutch practice. See Eben Moglen, *Commercial Arbitration in the Eighteenth Century: Searching for its Transformation of American Law*, 93 YALE L.J. 135, 137 n.16 (1983).

New Hampshire allowed arbitration for small debts. See 1797 N.H. Laws 406 (debts under \$200). Maine adopted the Massachusetts rule. Act of Jan. 27, 1821, ch. 78, 1821 Me. Laws 293.

93. See HORWITZ, *supra* note 19, at 145-54.

94. See *DeHart v. Covenhaven*, 2 Johns. Cas. 402 (N.Y. Sup. Ct. 1801) (depriving award); *Allard v. Mauchon*, 1 Johns. Cas. 280 (N.Y. Sup. Ct. 1800) (reversing award); *Mansfield v. Doughty*, 3 Mass. (3 Tyng) 397 (1807) (reversing award); *Gross v. Zorger*, 3 Yeates 521 (Pa. 1803) (reversing award); *Pringle v. McClenachan*, 1 Dall. 486 (Pa. 1789) (reversing award); *William v. Craig*, 1 Dall. 313 (Pa. 1788) (reversing award). *Contra* *Allen v. Ranney*, 1 Conn. 569 (1816) (reversing, not even to adopt a better rule); *Parker v. Avery, Kirby* 353 (Conn. 1787) (reversing, not even if unreasonable); see also William Jones, *Three Centuries*, *supra* note 92, at 212-13 (commenting that, of the 300 arbitrations in the reporters from 1800 to 1920, few, if any involve merchants even for sales).

95. See William Jones, *Three Centuries*, *supra* note 92, at 193, 210-13. Of the two hundred nine printed arbitration dispositions from 1779 to 1789 in New York City, sixty-eight involved admiralty matters, predominantly prize disputes; thirty-two, bills and notes; twenty-eight, contractual matters; twenty-seven, sales disputes; and nineteen quasi-contractual matters, predominantly account disputes. Thirty-three other dispositions involved procedural matters. See generally CHAMBER OF COMMERCE OF THE STATE OF NEW YORK, EARLIEST ARBITRATION RECORDS OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK (1913) (containing the Committee of Arbitration minutes from 1779 to 1792) [hereinafter NEW YORK CHAMBER].

Creditors preferred the common law method for debt collection, not arbitration. See Francis, *supra* note 87, at 810-11.

96. See NEW YORK CHAMBER, *supra* note 95, at 53-54 (discussing *Price v. Davies*); *supra* note 49 and accompanying text for an explanation of the deed of trust.

parties' nonpossessory security interests. The personalty consisted of accounts and bills of exchange as security.⁹⁷ Thus, it appears that even arbitration opinions revealed use of the nonpossessory secured transaction in the eighteenth century.

e) The Old Rule Theory

The old rule theory remains. The court arguments of the northeastern lawyers described above identified that the prior rule which worked so well was the absolute-conditional rule. The reason is obvious. To divest a recalcitrant debtor of his or her property would require a court judgment and the ensuing levy by the sheriff. When the sheriff arrived to take the property on behalf of the judgment creditor, the opposing secured party, upon learning of the levy, could produce the written documentation for his nonpossessory secured transaction. The sheriff need only ascertain whether the documentation provided for the debtor's possession. If so, he was forced to withdraw. If not, the secured party withdrew. The parties did not need litigation because the sheriff and the secured party knew who would win at the courthouse under the absolute-conditional rule.

The absolute-conditional rule dominated the common law until each respective state adopted the Statute of Frauds for the sale of goods. The lone state never adopting the Statute of Frauds for the sale of goods, Pennsylvania, used the absolute-conditional rule in 1791 and never adopted the rebuttable rule.⁹⁸ And the two states with late adoption of the Statute of Frauds for the sale of goods, Connecticut and Vermont, used the absolute-conditional rule until 1817 and 1826 respectively for situations arising prior to adoption.⁹⁹ The Statute of Frauds for the sale of goods obsoleted the absolute-conditional rule. Under the Statute of Frauds for the sale of goods, a sale could occur through partial delivery or symbolic delivery. Therefore, a levying sheriff no longer had an accurate method of ascertaining the ultimate victor without a jury pronouncement on the evidence of delivery. The courts developed the rebuttable rule to handle this evidence. And the northeastern states had only recently enacted the Statute of Frauds for sale of goods during the Federalist Era.¹⁰⁰ Massachusetts in 1693 and New Hampshire in 1719, had adopted an earlier version of the Statute of Frauds for the sale of goods, but these two states did not have the problem of an absence of early opinions since their opinions started so late. It was not until after 1800 that the northeastern state courts had an opportunity to opine on the rebuttable rule which spawned the litigation reflected in the opinions.

Moreover, the northeastern states followed the English common law to the extent that it was not contradictory of their own common law or statutes.¹⁰¹ The English royal courts had reaffirmed the absolute-conditional rule in 1788 before

97. See *id.* at 91-92 (discussing *Williams v. Hoakesley*).

98. See *Flint, Northern Struggle*, *supra* note 28, at 37-38, 47-48.

99. See *id.* at 37-38.

100. See *supra* notes 64-65 and accompanying text.

101. See *supra* note 83.

bowing to the rebuttable rule in 1800.¹⁰² And the absolute-conditional rule stood as the more primitive.¹⁰³

III. The Chattel Mortgage Acts

The failure of the traditional legal historians to adequately explain a legal development, such as the passage of the northeastern chattel mortgage acts, encourages inquiry into their legislative history to find an explanation. The northeastern states enacted chattel mortgage acts in three waves: the first shortly after 1831, the second after the Panic of 1837, and the third considerably later.¹⁰⁴ To eliminate the *Swift v. Thompson*¹⁰⁵ result and reestablish order for lending on machinery, on March 22, May 29, and June 22 of 1832, the legislatures of Massachusetts, New Hampshire, and Connecticut passed their first chattel mortgage acts, followed by New York in 1833 and Rhode Island in 1834.¹⁰⁶

A. The Statutory Solution

The statutes of three of these states, Massachusetts, New Hampshire, and Rhode Island, resembled each other. These three chattel mortgage acts required public registration of the security devices used for a nonpossessory secured transaction to destroy the secrecy objection. Each of these statutes followed the respective realty recording act with one exception. The secured party filed the entire chattel mortgage with the city or town clerk where the debtor resided when he entered the transaction, not where the collateral lay. The Massachusetts statute, characteristic of the group, provided:

Sec. II. Be it further enacted, That it shall be the duty of said clerks, upon payment of their fees, to record mortgages of personal property, in a book to be by them respectively kept for that purpose, with the time when the same are received and recorded; and the fees of said clerks for recording such mortgages, and for certifying copies and for

102. Compare *Edwards v. Harben*, 100 Eng. Rep. 315 (K.B. 1788), with *Kidd v. Rawlinson*, 126 Eng. Rep. 1155 (C.P. 1800).

103. See *Jordan v. Turner*, 3 Blackf. 309 (Ind. 1833) (selecting the absolute-conditional rule over the rebuttable rule, despite its ancientness).

104. See *infra* notes 106-32 and accompanying text for the three waves.

105. 9 Conn. 63 (1831); see *supra* notes 1-19 and accompanying text.

106. For the first wave of northeastern chattel mortgage acts, see Act of May 29, 1832, ch. 7, 1832 Conn. Laws 377 ("An Act for the regulation of Civil Actions"); Act of Mar. 22, 1832, ch. 157, 1832 Mass. Acts 460 ("An Act to prevent Fraude in the transfer of Personal Property"); Act of June 22, 1832, ch. 80, 1832 N.H. Laws 58 ("An Act to prevent fraud in the transfer of personal property by mortgage"); Act of Apr. 29, 1833, ch. 279, 1833 N.Y. Laws 402 ("An Act requiring mortgages of personal property to be filed in the town clerks' and other offices"); and Act of Jan. 1834, 1834 R.I. Laws 53 ("An Act to prevent fraud in the transfer of personal property").

These acts contain two major differences from their modern successors. Modern secured parties merely file a notice, not the whole document, see U.C.C. § 9-402, and file where the collateral lies unless not easily identified by location due to its type, see U.C.C. § 9-103. But collateral in the debtor's possession lies where the debtor resides.

entering discharges, shall be the same, as are now allowed to registers of deeds for similar services.¹⁰⁷

The basic rule of the three similar statutes voided the nonpossessory secured transaction when challenged by creditors and purchasers. This constituted a major change in the prior common law. The Massachusetts statute, again, representative of the group, provided:

Sec. I. Be it enacted . . . [t]hat no mortgage of personal property, hereafter made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by the mortgagee, or unless the said mortgage be recorded in the office of the clerk of the city or town, where the mortgager shall reside at the time of making the same. Provided, that nothing herein contained shall affect any transfer of property under bottomry or respondentia bonds, or of any ship or goods at sea or abroad, if the mortgagee shall take possession thereof, as soon as may be after the arrival of the same in this Commonwealth.¹⁰⁸

The prior court opinions in these three New England states had generally enforced the nonpossessory secured transaction.¹⁰⁹ These statutes provided three exceptions to the basic rule of invalidity: one for recorded chattel mortgages, one for transactions with delivered collateral (the pledge), and one for bottomry and respondentia bonds. Merchants used bottomry bonds, loans on the security of the vessel, and respondentia bonds, loans on the security of the cargo, both entered into by the ship's master in a foreign port on behalf of the merchant, to raise money in case of necessity in a foreign port.¹¹⁰ They differed from chattel mortgages by conditioning repayment on the successful completion of the voyage, by bearing interest over the usury rate, and by creating a maritime lien enforceable in admiralty court.¹¹¹

The statutes also did not specify a priority for multiple instruments nor a time deadline for filing. Because the debtor transferred ownership, a priority rule became superfluous. The debtor had no legal interest left to transfer to a second secured party other than the right of redemption under a chattel mortgage or the

107. Act of Mar. 22, 1832, ch. 157, 1832 Mass. Acts 460. The New Hampshire and Rhode Island statutes contained the same language, except New Hampshire deleted "cities" and replaced "Commonwealth" with "state" in section I and added "of all such mortgages" after "discharges" and replaced "services" with "purposes" in section II while Rhode Island replaced "Commonwealth" with "state" in section I and deleted "upon payment of their fees," replaced "register of deeds" with "such clerks," and added at the end "in relation to other deeds" in section II. Act of June 22, 1832, ch. 80, 1832 N.H. Laws 58.

108. Act of Mar. 22, 1832, ch. 157, 1832 Mass. Acts 460.

109. For Massachusetts, New Hampshire, and Rhode Island pre-chattel mortgage act opinions, see Flint, *Northern Struggles*, *supra* note 28, at 9-50.

110. See GRANT GILMORE & CHARLES L. BLACK, *THE LAW OF ADMIRALTY* 632-33 (2d ed. 1975); CAINES, *supra* note 17, at 354.

111. See GILMORE & BLACK, *supra* note 110, at 632, 688.

right to repurchase under a conditional bill of sale. Legislators drafted the real estate recording statutes similarly, without priority provisions.¹¹² Legislators did not need filing deadlines since they drafted the real estate recording statutes to void mortgages unless filed.¹¹³ Courts therefore interpreted the chattel mortgage acts to mean that the chattel mortgage did not arise against third parties until filed.¹¹⁴ The chattel mortgage acts also provided for enforcement of the chattel mortgages between the parties, the debtor and the secured party, as did the realty recording statutes.¹¹⁵

These three similar statutes changed the prior law by banning some previously legitimate transactions, namely those not filed. They effectively required filing of the transaction documents of those previously legitimate transactions for which the parties might desire court enforcement. These statutes also changed the court's rule for filed chattel mortgages from a rebuttable presumption of fraud to an almost conclusive presumption of validity. A challenger could still attempt to show actual fraud, but this was a very difficult task. When the sheriff went to levy, the parties could easily determine the outcome in court without litigation and potential perjury over the explanation demanded by the prior law's rebuttable rule.

The New York statute resembled the three aforementioned statutes, but contained different language. New York's statute similarly required the secured party to file the entire chattel mortgage with the city or town clerk where the debtor resided when he entered the transaction: "Sec. II. The instruments mentioned in the preceding section shall be filed in the several towns and cities of this state where the mortgagor therein, if a resident of this state, shall reside at the time of the execution thereof . . ."¹¹⁶ The New York statute added provisions for filing against nonresidents where the property lay and for filing with the county clerk. But the major difference lay with the provision invalidating unfiled nonpossessory secured transactions. It contained much harsher language:

112. *See, e.g.*, CONN. STAT. tit. 56, ch. 1, § 9 (1821); Act of Feb. 20, 1821, ch. 36, 1821 Me. Laws 111; Act of Mar. 10, 1784, ch. 13, 1784 Mass. Acts 71; Act of Feb. 10, 1791, 1791 N.H. Laws 223, 225; Act of Mar. 18, 1775, ch. 706, 1775 Pa. Laws 412; Act of Mar. 25, 1797, 1797 Vt. Acts & Resolves 33. *But see* Act of June 5, 1820, 1820 N.J. Laws 141, 143 (concerning priority by order of filing); Act of Apr. 6, 1801, ch. 156, 1801 N.Y. Laws 390 (same).

113. *See, e.g.*, CONN. STAT. tit. 56, ch. 1, § 9 (1821); Act of Feb. 20, 1821, ch. 36, § 1, 1821 Me. Laws 111; Act of Mar. 10, 1784, ch. 13, 1784 Mass. Acts 71; Act of Apr. 6, 1801, ch. 156, 1801 N.Y. Laws 390; Act of Mar. 25, 1797, 1797 Vt. Acts & Resolves 33. *But see* Act of June 5, 1820, 1820 N.J. Laws 141, 142 (requiring filing within 15 days); Act of Mar. 18, 1775, ch. 706, 1775 Pa. Laws 412 (requiring filing within six months).

114. *See* Pond v. Skidmore, 40 Conn. 213, 222 (1873); Simpson v. McFarland, 35 Mass. (18 Pick.) 427, 430 (1836) (concerning seven month old chattel mortgage lost to judgment lien that attached three days before filing); Stowe v. Meserve, 13 N.H. 46, 48-49 (1842) (concerning two-week-old chattel mortgage lost to levy that occurred four days before filing); *see generally* FRANCIS HILLIARD, THE LAW OF MORTGAGES OF REAL AND PERSONAL PROPERTY 444, 480 (Boston, Mass., Little, Brown & Co., 3d ed. rev. 1864) (1856); LEONARD JONES, *supra* note 10, at 207, 214.

115. *See, e.g.*, CONN. STAT. tit. 56, ch. 1, § 9 (1821); Act of Feb. 20, 1821, ch. 36, § 1, 1821 Me. Laws 111; Act of Mar. 10, 1784, ch. 13, 1784 Mass. Acts 71, 72; Act of June 5, 1820, 1820 N.J. Laws 141, 142; Act of Apr. 6, 1801, ch. 156, 1801 N.Y. Laws 390.

116. Act of Apr. 6, 1801, ch. 156, 1801 N.Y. Laws 390.

Sec. I. Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section of this act.¹¹⁷

Prior court opinions in New York had generally enforced the nonpossessory secured transaction, but not as frequently as those of the Eastern New England states.¹¹⁸ The statute provided no exception for bottomry and respondentia bonds, as did the statutes of the three Eastern New England states, nor did it specify a priority for multiple instruments or a time deadline for filing. But New York Courts interpreted the statute to mean the chattel mortgage did not issue against third parties until filed.¹¹⁹ The New York statute also added four additional sections requiring annual refiling, allowing courts to receive a copy as court evidence, requiring numbering of chattel mortgages in New York and Albany (both the cities and counties), and specifying a six-cent fee for both filing and searching.

The Connecticut statute, considerably different, reflected an origin in *Swift v. Thompson*.¹²⁰ It applied only to manufacturing machinery. The Connecticut statute, rather than voiding the unfiled transaction, merely effectuated filed nonpossessory secured transactions. Its prior court opinions generally voided the nonpossessory secured transaction, except between the parties.¹²¹ The first section of that state's chattel mortgage act permitted the use of real estate deeds to mortgage both a cotton, woolen, or other manufactory along with its machinery provided the parties described the machinery.¹²² The section provided:

[W]henever the owner . . . of a cotton or woolen factory, or manufacturing establishment, shall mortgage the same . . . and such mortgage shall convey the machinery situated in . . . such establishment, giving a particular description of such machinery . . . then such mortgage shall be good and effectual to hold such machinery against subsequent

117. *Id.*

118. For New York pre-chattel mortgage act decisions, see Flint, Northern Struggle, *supra* note 28, at 9-50.

119. See *Goodhue v. Berrien*, 2 Sand. Ch. 630 (N.Y. 1845) (recognizing seven month delay in filing voided chattel mortgage with respect to intervening liens); *Smith v. Acker*, 23 Wend. 653, 657 (N.Y. 1840) (noting Sen. Verplanck, using the realty rule, stating that the delay in filing only voids chattel mortgage for intervening liens).

120. 9 Conn. 63 (1831).

121. For Connecticut pre-chattel mortgage act decisions, see Flint, Northern Struggle, *supra* note 28, at 9-50.

122. In 1838, Connecticut also added household furniture. See Act of , ch. 9, 1838 Conn. Pub. Acts 11.

purchasers, or attaching creditors . . . as effectually as if the same were a part of the real estate.¹²³

The second section permitted mortgaging such machinery without the real estate by recording in the same fashion as for realty deeds:

whenever the owner . . . of the machinery situated in, and used by any cotton or woolen factory, or manufacturing establishment, shall mortgage such machinery, *without the real estate* . . . in which such machinery shall be particularly described, and which shall be . . . recorded in all respects as is necessary in the cases of mortgages of lands, such mortgage shall be good and effectual, although the mortgagor or mortgagors shall retain possession of said machinery.¹²⁴

The remaining sections provided for levying on that machinery by recording when parties could not remove the machinery in various situations.

The major economic downturns in 1837 and 1839 spawned the second wave of northeastern chattel mortgage acts.¹²⁵ Vermont passed an act in 1838 and Maine followed in 1839.¹²⁶

The Vermont statute resembled the Connecticut statute. It affected only chattel mortgages on factory machinery:

When any machinery used in any factory, shop or mill, shall be sold or mortgaged, the purchaser or mortgagee may cause the bill of sale or mortgage deed conveying such machinery, to be recorded in the town clerk's office of the town in which such factory, shop or mill shall be situated.¹²⁷

The Vermont statute, similar to the Connecticut statute, merely validated filed nonpossessory secured transactions. "Such record shall have the same effect as if the purchaser or mortgagee had taken possession of such machinery, at the time of making the record."¹²⁸ Vermont's prior court opinions generally had voided the nonpossessory secured transaction, except between the parties.¹²⁹

123. CONN. STAT. tit. 56, ch. 1, § 9 (1821).

124. *Id.*

125. For the economic downturns, see PETER TEMIN, *THE JACKSONIAN ECONOMY* 15-22 (1969) (attributing the disaster to British deflation rather than Jackson's deflation efforts with the Specie Circular of 1836). An economic depression into the mid-1840s accompanied this downturn. *See id.*, at 156-62 (challenging the depression description, re-labeling it a deflation from 1839 to 1843).

126. Act of Mar. 14, 1839, ch. 390, 1839 Me. Laws 557 (concerning the mortgage of personal property); *see also* Act of Nov. 5, 1838, ch. 27, 1838 Vt. Acts & Resolves 17 (relating to the sale of machinery). In 1856, Vermont added railroad franchises and rolling stock, and in 1878, all other personalty. *See* Act of Nov. 26, 1878, no. 51, 1878 Vt. Acts & Resolves 57; Act of Nov. 18, 1856, ch. 29, 1856 Vt. Acts & Resolves 29.

127. Act of Nov. 5, 1838, ch. 27, 1838 Vt. Acts & Resolves 17.

128. *Id.*

129. For Vermont pre-chattel mortgage act decisions, *see* Flint, *Northern Struggle*, *supra* note 28, at 9-50.

The Maine statute tracked the Massachusetts statute but added an exception for collateral worth less than \$30.¹³⁰ Prior court opinions in Maine generally enforced the nonpossessory secured transaction.¹³¹

The remaining northeastern states, Pennsylvania and New Jersey, waited to pass their statutes until 1853 and 1864, respectively.¹³²

B. *The Legislative Histories*

The legislative material relative to these statutes consists of gubernatorial messages, bills, hearings, committee reports, legislative debates, legislative journals, and statutory titles and preambles.¹³³ For the northeastern states during the Jacksonian Era, this material suffers two drawbacks. First, legislatures frequently did not preserve records of many of these proceedings.¹³⁴ Lawyers only need this material when interpreting ambiguous statutory language.¹³⁵ State legislative journals in the Jacksonian Era do not mention bill wording, floor debates, proposed amendments, or committee proceedings. They merely provided perfunctory bill titles

130. Maine's act followed Massachusetts' act except inserting "where the debt thereby secured amounts to more than the sum of thirty dollars" after "hereafter made," and replacing "city or town" with "town, city, or plantation" in section I, making a new section II for the section I proviso on bottomry and respondentia bonds with slightly different language, and renumbering section II as section III with slightly different language. Act of Mar. 14, 1839, ch. 390, 1839 Me. Laws 557.

131. For Maine pre-chattel mortgage act decisions, see Flint, *Northern Struggle*, *supra* note 28, at 9-50.

132. Pennsylvania, in the nineteenth century, never had a comprehensive chattel mortgage act, allowing only for machinery relative to a factory or mining lease. *See* Act of Apr. 27, 1855, no. 387, 1855 Pa. Laws 368 (legislating for leases of collieries, mining land, and manufactories with fixtures and machinery); Act of Apr. 5, 1853, no. 198, 1853 Pa. Laws 295 (legislating for coal mining leases along with machinery relating thereto). In the 1870s, the Pennsylvania legislature extended it to certain mineral resources. *See* Act of May 18, 1876, no. 151, 1876 Pa. Laws 181 (authorizing chattel mortgages in the commonwealth upon lumber, iron and coal oil in bulk, and upon iron tanks, tank cars, iron ore, mined and prepared for use, manufactured slate and canal boats [for loans over \$500]). This act expired after five years, but the legislature eventually reenacted it for iron ore. *See* Act of Apr. 28, 1887, no. 32, 1887 Pa. Laws 73; *see also* Act of May 20, 1891, no. 78, 1891 Pa. Laws 102 (extending the act to boilers, engines, oil, gas, and artesian well supplies, all petroleum or coal oil, all roofing, asphaltum blocks, and cement). Pennsylvania also had earlier chattel mortgage statutes for mortgages on leases. *See supra* note 69 and accompanying text. Due to the sparse statutory protection and the prohibition under the Pennsylvania common law, creditors did not use chattel mortgages much in Pennsylvania. *See* JOSEPH ELLIOTT COBBEY, *A PRACTICAL TREATISE ON THE LAW OF CHATTEL MORTGAGES AS ADMINISTERED BY THE COURTS OF THE UNITED STATES: COMPLETE AND EXHAUSTIVE* 724 (St. Paul, Minn., West Pub. Co. 1893); Flint, *Northern Struggle*, *supra* note 28, at 47-48 (Pennsylvania common law rule).

Similar to other northeastern states, Pennsylvania courts ruled the chattel mortgage ineffective until filed. *See* *Appeal of Sturtevant*, 34 Pa. 149, 150 (1859) (holding that under the 1855 chattel mortgage act for factory leases, a late filing voids the chattel mortgage for intervening executions). For New Jersey, *see* Act of Mar. 24, 1864, ch. 312, 1864 N.J. Laws 493.

133. *See* 2A NORMAN SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* 277-346 (Sands 4th ed. 1984) (advocating use of legislative history to interpret a statute).

134. For example, the major record of the proceedings of the U.S. Constitutional Convention became an unofficial notebook made by James Madison. *See* WINTON U. SOLBERG, *THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE UNITED STATES* 67 (1958).

135. *See* SINGER, *supra* note 133, at 278.

and conclusions that a member made an unspecified amendment or the committee reported, without providing any details. Second, when records do exist, they are difficult to access. Some legislatures during the Jacksonian Era did not print these records and make them available to practicing lawyers.

For the Jacksonian Era, the legislative materials consisted predominately of legislative journals, some handwritten records, and statutory titles. Some journals contain so little information as to restrict historians' choice of states for investigation.¹³⁶ Of the northeastern states, microfilm copies of the handwritten and printed legislative journals exist covering the years of interest for New Hampshire, Connecticut, Rhode Island, Maine, and New Jersey.¹³⁷ New York and Pennsylvania printed their legislative journals. A newspaper reporter's legislative journal for Massachusetts appears in the microfilmed copies of the *Boston Daily Advertiser and Patriot*, a National Republican newspaper; for New Hampshire, in the microfilmed copies of the *New Hampshire Patriot and State Gazette (Concord)*, the newspaper of Isaac Hill's Concord Regency; and for New York, in the microfilmed copies of the *Albany Argus*, the newspaper of Martin Van Buren's Albany Regency.¹³⁸ This work, therefore, did not examine legislative records for only Pennsylvania and Vermont.

In Massachusetts, the first northeastern state to pass a chattel mortgage act, the bill arose in the House on January 14, 1832, when Representative Ives moved to instruct the Judiciary Committee to consider and report on causing recordation of all mortgages of personalty with town clerks.¹³⁹ Ives resided in Westfield, the township adjacent to both Holyoke and Chicopee, all in Hampden County, where the Boston Associates established major textile manufacturing facilities in the 1820s.¹⁴⁰ Three days later, Francis Brinley moved to instruct the same committee to inquire into providing for better protection of goods of merchants entrusted to factors and agents.¹⁴¹ Brinley lived in Boston and favored transportation and debtor causes.¹⁴² These proposals, one from a manufacturing area and the other from a major seaport, suggest manufacturer and commercial merchant dissatisfaction with the rebuttable rule then in use in Massachusetts.

136. See Herbert Ershkowitz & William G. Shade, *Consensus or Conflict?: Political Behavior in the State Legislatures during the Jacksonian Era*, 58 J. AM. HIST. 591, 592 n.6 (1971).

137. See WILLIAM SUMNER JENKINS, *A GUIDE TO THE MICROFILM COLLECTION OF THE EARLY STATE RECORDS* (Lillian A Hamrick ed., 1950 & Supp. 1951).

138. See DONALD B. COLE, *JACKSONIAN DEMOCRACY IN NEW HAMPSHIRE, 1800-1851*, at 4 (1970) (discussing the Concord Regency); LEE BENSON, *THE CONCEPT OF JACKSONIAN DEMOCRACY: NEW YORK AS A TEST CASE 44* (1961) (discussing the Albany Regency).

139. See *BOSTON DAILY ADVERTISER & PATRIOT*, Jan. 16, 1832, at 2, col 1.

140. See ROBERT F. DALZELL, *ENTERPRISING ELITE: THE BOSTON ASSOCIATES AND THE WORLD THEY MADE*, at vii-viii (1987).

141. See *BOSTON DAILY ADVERTISER & PATRIOT*, Jan. 18, 1832, at 2, col. 1.

142. Francis Brinley (1800-1889) of Boston, Suffolk County, a lawyer and author, took interest in railway and other internal improvements and advocated abolition of debtors' prison. See APPLETON'S *CYCLOPAEDIA OF AMERICAN BIOGRAPHY* 377 (James Grant Wilson, ed., N.Y., Appleton & Co. 1887) [hereinafter APPLETON'S]. Brinley served on the Engrossed Bill Committee. See *BOSTON DAILY ADVERTISER & PATRIOT*, Jan. 10, 1832, at 2, col 5.

On February 18, 1832, Representative Holmes of the Judiciary Committee reported negatively on both topics and placed both for legislative consideration at the following meeting.¹⁴³ The House referred the matter of recordation to a committee on the subject of mortgages of personal property.¹⁴⁴ On March 6, Ives reported from this committee on a bill entitled "An Act to prevent Fraud in the transfer of Personal Property."¹⁴⁵ The title alone fails to indicate whether the fraud consisted of the debtor's multiple lending or debtor's suborned perjury under the rebuttable rule. Referral of the bill to the Judiciary Committee, however, suggests the presence of the same suborned perjury problem that later annoyed Great Britain.¹⁴⁶ But a statute prohibiting either fraud suggests that the pre-chattel mortgage act rule upheld some questionable transactions challenged by third parties, contradicting Gilmore's scenario. On March 16, the House passed the bill to prevent fraud in the transfer of personal property for engrossment.¹⁴⁷ On the morning of March 22, the House passed this bill for enactment.¹⁴⁸ The Senate briefly considered the bill to prevent fraud in the transfer of personal property, passing it for engrossment on March 21, 1832, and passing it on the afternoon of March 22.¹⁴⁹

In New Hampshire, the second northeastern state to pass a chattel mortgage act, the bill originated in the House on June 11, 1832, when Representative George W. Nesmith gave notice of an intention to introduce a bill entitled "An Act to prevent fraud in the transfer of personal property by mortgage."¹⁵⁰ Again this title fails to denote which fraud type: secret liens or suborned perjury. Nesmith introduced the

143. See BOSTON DAILY ADVERTISER & PATRIOT, at Feb. 20, 1832, at 2, col 1. Representative Holmes resided in Rochester, Plymouth County. He served only on the Judiciary Committee. See BOSTON DAILY ADVERTISER & PATRIOT, Jan. 10, 1832, at 2, col 5.

144. See BOSTON DAILY ADVERTISER & PATRIOT, Mar. 7, 1832, at 2, col. 1.

145. Compare *id.* with 1832 Mass Acts. 460.

146. The jury aspect of the rebuttable rule's application to nonpossessory secured transactions led Parliament to pass the English Bill of Sale Act of 1854 to prevent perjuries. Perjury might establish a sham nonpossessory secured transaction or defeat a legitimate one. See Act of July 10, 1854, 17 & 18 Vict., ch. 36 (Eng.) reprinted in 36 THE STATUTES OF THE UNITED KINGDOM OF GREAT BRITAIN & IRELAND, 17 & 18 VICT. 140-43 (London, Her Majesty's Printers 1854); *Cookson v. Swire*, 9 App. Cas. 653, 664-65 (1884) (Eng.); E.L.G. TYLER & N.E. PALMER, CROSSLEY VAINES' PERSONAL PROPERTY 450 (5th ed. 1973); JOHN HERBERT WILLIAMS & WILLIAM MORSE CROWDY, GOODEY'S MODERN LAW OF PERSONAL PROPERTY 100-01 (5th ed. 1912).

147. See BOSTON DAILY ADVERTISER & PATRIOT, Mar. 17, 1832, at 2, col. 4.

148. See BOSTON DAILY ADVERTISER & PATRIOT, Mar. 23, 1832, at 2, col 1.

149. See BOSTON DAILY ADVERTISER & PATRIOT, Mar. 22, 1832, at 2, col. 1; BOSTON DAILY ADVERTISER & PATRIOT, Mar. 23, 1832, at 2, col. 1.

150. N.H. House J., June Sess. 4, 30 (1832). George W. Nesmith, Democrat of Franklin, Merrimack County, served on the Committee for the second reading of bills and was related to John Nesmith (1793-1869), a Lowell, Massachusetts, cotton textile manufacturer from Windham, Rockingham County, New Hampshire, and later Republican Lieutenant Governor of Massachusetts. See N.H. PATRIOT & ST. GAZETTE, Mar. 19, 1832, at 2, col. 5 (labeling Democrat as Republican); N.H. PATRIOT & ST. GAZETTE., June 11, 1832, at 2, col 3; 9 JAMES T. WHITE & CO., THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 194 (1924) (discussing John Nesmith).

Giving notice of intent publicized the bill so proponents and opponents could organize. See e.g., JOHN W. CADMAN, JR., THE CORPORATION IN NEW JERSEY, BUSINESS AND POLITICS 1791-1875, at 7 (1949).

bill on June 13 when the House read it twice and referred it to the Judiciary Committee.¹⁵¹ Referral to this committee again suggests the suborned perjury problem concerned the legislators. On June 19, Representative Charles B. Goodrich of the committee reported the bill out with no amendments.¹⁵² The House read the bill a third time on June 20, passed it, and sent it to the Senate for concurrence.¹⁵³

The New Hampshire Senate received the request for concurrence on June 20, read the bill twice, and referred the bill to the Judiciary Committee.¹⁵⁴ On June 21, Senator Phineas Handerson of Cheshire County reported the bill out of committee without amendment and the Senate read it a third time and passed it.¹⁵⁵

In Connecticut, the last state to pass a chattel mortgage act in 1832, the chattel mortgage bill initially appeared in the Assembly. Since both the Connecticut Assembly and Senate treated several bills labeled a "Bill for an Act in addition to an Act entitled, 'An Act for the regulation of Civil Actions,'" identifying the correct bill is difficult until its passage by the Senate.¹⁵⁶ It was probably the "Bill for an Act in addition to an Act for the regulation of Civil Actions," referred to a Select Committee consisting of Representatives Loren Waldo, Lemuel Whitman, and John Holbrook.¹⁵⁷ The Select Committee reported the bill without amendment and the Assembly passed it on May 22.¹⁵⁸

The Connecticut Senate received the bill from the Assembly and referred it to a Select Committee consisting of Senators Charles Hawley, Charles Johnson McCurdy, and Tracy Peck.¹⁵⁹ The Select Committee reported the bill without amendment.¹⁶⁰ The Senate passed it on May 25 as the "Bill de Civil Action and mortgages of Machinery."¹⁶¹

Of those first wave states that delayed, the chattel mortgage bill in New York

151. See N.H. House J., *supra* note 150, at 45.

152. See *id.* at 4, 76. Charles B. Goodrich, a National Republican, resided in Portsmouth, Rockingham County. See N.H. PATRIOT & ST. GAZETTE, Mar. 19, 1832, at 2, col. 5.

153. See N.H. House J., *supra* note 150, at 88; N.H. PATRIOT & ST. GAZETTE, June 25, 1832, at 2, col. 3.

154. See N.H. Senate J., June Sess. 4, 9-50 (1832).

155. See *id.*, at 52, 54; N.H. PATRIOT & ST. GAZETTE, Mar. 26, 1832, at 2, col. 5 (discussing towns voting for Handerson in Cheshire County). Phineas Handerson ran as a National Republican (Federalist) against the Democrat in 1832. See N.H. PATRIOT & ST. GAZETTE, Mar. 19, 1832, at 2, col. 5 (labeling National Republican as Federalist).

156. See *infra* note 161 and accompanying text (providing the name of the bill).

157. Conn. Assembly J., May Sess. 15, 16 (1832). Loren Pinckney Waldo (1802-1881) of Tolland, Tolland County, a lawyer, later served as Democrat member of the U.S. Congress from 1849 to 1851. See A.N. MARQUIS CO., *supra* note 61, at 555. Lemuel Whitman (1780-1841) of Farmington, Hartford County, a lawyer, served as Democrat-Republican member of the U.S. Congress from 1823 to 1825. See *id.* at 557. John Holbrook resided in Windham, Windham County.

158. See Conn. Assembly J., *supra* note 157, at 34.

159. See Conn. Senate J., May Sess. 49 (1832). Charles Johnson McCurdy (1797-1891) of Lyme, New London County, a lawyer and National Republican, served later as Whig Lieutenant Governor in 1846 and ambassador to Austria in 1851. See 4 JAMES T. WHITE & CO., *supra* note 150, at 376 (1897). Tracy Peck resided in Bristol, Hartford County. See 12 *id.* at 214 (1912).

160. See Conn. Senate J., *supra* note 159, at 54.

161. See *id.* at 56.

emerged in the Assembly. On January 3, 1833, Representative William Baker, Jr., gave notice to the Assembly of an intention to introduce a bill requiring recordation of mortgages in certain cases.¹⁶² Baker served on only one committee, the Committee on Incorporation and Alteration of the Charters of Banking and Insurance Companies.¹⁶³ Baker delayed until January 23 before introducing his bill requiring the filing of bills of sale and mortgages of personal property in the town clerk's and other offices.¹⁶⁴ This description suggests the New York bill went considerably further than a chattel mortgage act in that it would require filings for all transfers including sales, not just nonpossessory secured transactions. This would make passage difficult. The next mention of the bill occurred on April 2 when the Assembly read the bill a third time and passed it.¹⁶⁵

The next day, the New York Senate received it, read it twice, and appropriately referred it.¹⁶⁶ On April, the committee of the whole, chaired by Senator Myndert Van Schaick of New York City, passed the bill requiring filing of bills of sale and mortgages of personal property in town clerk's and other offices.¹⁶⁷ The Senate read the bill a third time and tabled it the next day.¹⁶⁸ The tabling suggests that some Senators envisioned a problem. Van Schaick revealed the problem with the bill on April 23 when he moved that the Senate recommit the bill to a committee of the whole with a view to amend it to exempt New York City from its operations.¹⁶⁹ This amendment suggests the city's wholesalers and jobbers saw costs in numerous filings. The motion carried 12-10.¹⁷⁰ The second committee of the whole, chaired by Senator Henry Allen Foster, met on April 24.¹⁷¹ Van

162. See ALBANY ARGUS, Jan. 4, 1833, at 2, col. 1. William Baker, Jr., of Otsego County, a Democrat, served later as Speaker of the Assembly in 1834 and a Canal Commissioner from 1835 to 1840. See JOHN JENKINS, HISTORY OF THE POLITICAL PARTIES IN THE STATE OF NEW YORK 394, 405, 433 (Albany, N.Y., Alden & Markham 1846).

163. See ALBANY ARGUS, Jan. 5, 1833, at 2, col. 5.

164. See ALBANY ARGUS, Jan. 24, 1833, at 2, col. 6.

165. See ALBANY ARGUS, Apr. 3, 1833, at 2, col. 4.

166. See ALBANY ARGUS, Apr. 4, 1833, at 2, col. 5.

167. See ALBANY ARGUS, Apr. 20, 1833, at 2, col. 4. Myndert Van Schaick, a Democrat, resided in New York City. See JENKINS, *supra* note 162, at 379, 387.

168. See ALBANY ARGUS, Apr. 22, 1833, at 2, col. 1.

169. See ALBANY ARGUS, Apr. 24, 1833, at 2, col. 4.

170. Senators John F. Hubbard, Peter Gansevoort, and Alpheus Sherman supported the motion and Senators Levi Beardsley, John Birdsall, and Albert Haller Tracy opposed the motion. John F. Hubbard was a Democrat. See JENKINS, *supra* note 162, at 387. Peter Gansevoort (1788-1876) of Albany, Albany County, was a lawyer, Clintonian, Democrat, and son-in-law of Democrat-Republican U.S. Senator Nathan Sanford. See 1 JAMES T. WHITE & CO., *supra* note 150, at 382 (1898, 1891); JENKINS, *supra* note 162, at 387. Levi Beardsley (1785-1857) of Hoosic, Rensselaer County, a lawyer, later served as a justice of the New York Court of Errors. See 1 APPLETON'S, *supra* note 142, at 207. John Birdsall, an Antimason, resided in Chautauqua County. See JENKINS, *supra* note 162, at 373. Albert Haller Tracy (1793-1859) of Buffalo, Erie County, a lawyer, a Clintonian, and an Antimason, served as Democrat-Republican member of the U.S. Congress from 1819 to 1825. See A.N. MARQUIS CO., *supra* note 61, at 536; JENKINS, *supra* note 162, at 380.

171. See ALBANY ARGUS, Apr. 25, 1833, at 2, col. 4. Henry Allen Foster (1800-1889), a lawyer, and resident of Rome, Oneida County, a major center of New York's textile mills, served as Democrat member of the U.S. Congress from 1837 to 1839 and the U.S. Senate from 1844 to 1845. See A.N.

Schaick moved to amend the first section to exempt New York City, with Senators Van Schaick, Sherman, Beardsley, and Tracy debating it. Van Schaick then varied his amendment to confine its operations to mortgages on personal property, which passed. Tracy further amended the bill to modify the remaining sections to conform, which passed. The revised bill, now limited to a chattel mortgage act, was debated for an hour on April 25 and subsequently passed 24-4.¹⁷² On April 27, the Assembly concurred with the Senate amendments for the bill requiring filing of mortgages of personal property in the town clerk's and other offices.¹⁷³

In Rhode Island, the last state of the first wave to adopt a chattel mortgage act, the chattel mortgage bill emanated from the House. On January 15, 1834, Representative Benjamin Hazard, part owner of a cotton textile mill in North Providence, introduced a bill to prevent fraud in the transfer of personal estate, and the House read it the first time.¹⁷⁴ Again, this bill failed to denote which fraud type it was intended to prevent. On January 31, 1834, the House passed the "Act to prevent fraud in the transfer of personal property."¹⁷⁵ The bill appeared in the Rhode Island Senate only once on that same day, when the Senate concurred in a bill labeled "Transfer of Personals to be recorded."¹⁷⁶

In Maine, the last state in the second wave to adopt a chattel mortgage act, Representative Oliver B. Dorrance presented the bill for "an act concerning the mortgage of personal property" on March 5, 1839.¹⁷⁷ The House referred it to the Judiciary Committee and sent it to the Senate for concurrence.¹⁷⁸ On March 6, the

MARQUIS CO., *supra* note 61, at 188; DIXON RYAN FOX, *THE DECLINE OF ARISTOCRACY IN THE POLITICS OF NEW YORK* 318-20 (1919) (discussing the Oneida textile industry).

172. The Senate ordered the bill, now limited to a chattel mortgage act, to a third reading. On April 25, the Senate read the bill a third time. After an hour debate with Senators Gansevoort, Van Schaick, and Foster in opposition and Senators Beardsley, William I. Dodge, and Tracy in favor, the bill passed twenty to four, with Senators William Deitz, Foster, Gansevoort, and Van Schaick voting against it. *See* ALBANY ARGUS, Apr. 26, 1833, at 2, col. 5.

William Dietz (1778-1848) of Schoharie County, a farmer, served as a Democrat member of the U.S. Congress from 1825 to 1827. *See* A.N. MARQUIS CO., *supra* note 61, at 149. Deitz lived as a large farmer. Both Gansevoort and Van Schaick had connections with city banks. Gansevoort served as a director of the State Bank of Albany, a Republican bank established in 1803, and Van Schaick, as a trustee of the Bank for Savings in New York City, founded in 1819. *See* 1 JAMES T. WHITE & CO., *supra* note 150, at 382 (1898, 1891); CHARLES KNOWLES, *HISTORY OF THE BANK FOR SAVINGS IN THE CITY OF NEW YORK 1819-1929*, at 184 (1929) (describing the history from 1831 to 1834).

173. *See* ALBANY ARGUS, Apr. 29, 1833, p. 2, col. 4.

174. *See* R.I. House J., Jan. Sess. 742 (1834). Benjamin Hazard (1770-1841), a lawyer, resided in Newport, Newport County. *See* 8 JAMES T. WHITE, *supra* note 150, at 17 (1900); PETER I. COLEMAN, *THE TRANSFORMATION OF RHODE ISLAND 1790-1860*, at 83 (1969) [hereinafter COLEMAN, TRANSFORMATION]. A long-time arch-conservative leader of the Assembly, former Federalist at the Hartford Convention and later Whig, he opposed Thomas Dorr's efforts to expand the Rhode Island electorate and abolish imprisonment for debt in the 1830s. *See* MARVIN E. GETTLEMAN, *THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM: 1833-1849*, at 17 n.44, 26-28 (1973); PATRICK T. CONLEY, *DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT: 1776-1841*, at 245 (1977).

175. R.I. House J., *supra* note 174, at 786.

176. R.I. Senate J., Jan. Sess. 11 (1834).

177. *See* Me. House J., 1st. Sess. 338 (1839).

178. *See id.*

Maine Senate received it from the House and referred it to the Judiciary Committee, which concurred.¹⁷⁹ The Senate amended and passed the bill and sent it down to the House for concurrence the following day.¹⁸⁰ The House passed the amended bill on March 9.¹⁸¹

The New Jersey Assembly and Council considered no bills relating to chattel mortgages during 1832 and 1833.¹⁸²

This legislative history suggests that three states, Massachusetts, New Hampshire,¹⁸³ and Rhode Island,¹⁸⁴ had concern for suborned perjury under the rebuttable rule. Only these three states claimed a desire to prevent fraud in entitling their statutes. Two of these three states, plus Maine, demanded that their Judiciary Committee consider the bill. Two other states, New York and Maine, expressed some concern for the costs of filing. New York attempted to exempt its premier mercantile city. Maine added an exemption for small transactions. One state, New York, revealed a connection with banking interests, and a member of a banking committee proposed the New York bill. Two states, Massachusetts and Rhode Island, revealed a connection with cotton textile interests. In those states, a representative from an area with textile mills and an owner of a textile mill proposed the respective bills.

C. Post-Chattel Mortgage Act Opinions

After passage of the respective state's chattel mortgage act, the courts occasionally referred to the reasons for its passage. These pronouncements starkly divided the states into two camps: the Eastern New England states, which supported chattel mortgages, and New York, which was hostile to them.

In Massachusetts in 1834, Chief Justice Lemuel Shaw made no reference to fraud, but indicated that the legislature intended to replace the common law rule, which he claimed was the *per se* fraud rule, and provide a mechanism for the nonpossessory secured transaction to stand both against the debtor and third parties:

It seems to have been the intent of this statute to enable the owners of personal property to make a valid transfer, by way of mortgage or con-

179. See Me. Senate J., 1st Sess. 345 (1839).

180. See *id.* at 355.

181. See Me. House J., *supra* note 177, at 369.

182. See Votes & Proceedings of the General Assembly of the State of N.J., 58th Sess. Oct. 22, 1833 - Feb. 28, 1834 (1834); J. & Proceedings of the Legis. Council of the State of N.J., 57th Sess. Oct. 23, 1832 - Feb. 28, 1833 (1833); Votes & Proceedings of the General Assembly of the State of N.J., 57th Sess. Oct. 23, 1832 - Feb. 28, 1833 (1833); J. & Proceedings of the Legis. Council of the State of N.J., 56th Session Oct. 25, 1831 - Mar. 16, 1832 (1832); Votes & Proceedings General Assembly of the State of N.J., 56th Sess. Oct. 25, 1831 - Mar. 16, 1832 (1832).

183. Massachusetts and New Hampshire were the two states with the integrated Waltham-Lowell textile mills of the Boston Associates. See DALZELL, *supra* note 140, at vii, 71 (discussing the locations in Lowell, Western Massachusetts, Northeastern Connecticut, Southeastern New Hampshire, and Saco, Maine).

184. Rhode Island had the integrated Slater-Brown textile mills. See COLEMAN, TRANSFORMATION, *supra* note 174, at 77-92.

ditional sale, to stand as a security, and of course available against third persons, as well as against the mortgagers and their heirs, and yet to enable such mortgagers to have the possession and use of the goods until condition broken.¹⁸⁵

In New Hampshire in 1840, Justice Andrew Salter Woods similarly indicated that the legislature meant to replace the common law rule and uphold the nonpossessory secured transaction. Justice Woods noted that

[b]y the provisions of that statute, the common law relating to mortgages of personal property is so far altered, as to render it indispensably requisite, to give effect to a mortgage, either that the possession of the mortgaged property *should be taken and retained* by the mortgagee, or that the *mortgage should be recorded*.¹⁸⁶

New Hampshire lawyers, however, indicated a fraud problem with the common law rule, without specifying suborned perjury or secret liens:

Previous to June 22, 1832, property might be held by mortgage, without possession, or record, when it was done honestly and without fraudulent intention of the parties; but so many cases of fraud were practiced, that the legislature passed an act, that no mortgage thereafter should be valid [unless the collateral was delivered or the mortgage filed].¹⁸⁷

In Rhode Island, Justice Richard W. Greene in 1851 indicated that the legislature desired to protect good faith buyers, stating:

[P]urchasers were often defrauded, and, though dealing with the ostensible owner, could never be sure of acquiring a valid title. To remedy this, the General Assembly passed a law in 1834, providing that mortgages of personal property should be registered in the town where the mortgagor resided.¹⁸⁸

New York justices, however, did not agree with the justices from the three Eastern New England states, indicating a different aim for their chattel mortgage act. In New York, Justice Greene C. Bronson, in 1837, claimed the legislature intended the chattel mortgage act to provide an additional ground upon which to invalidate a nonpossessory secured transaction:

This [act] does not repeal the Statute Concerning Fraudulent Conveyances. It only adds another to the grounds on which a mortgage of personal chattels shall be void. If the plaintiffs had omitted to file their

185. *Bullock v. Williams*, 33 Mass. (16 Pick.) 33, 34-35 (1834) (erroneously describing the prior common law rule as requiring delivery whether absolute or conditional, the *per se* fraud rule).

186. *Hoit v. Remick*, 11 N.H. 285, 288 (1840).

187. *Smith v. Moore*, 11 N.H. 55, 58 (1840) (illustrating argument of Ainsworth for defendant deputy sheriff).

188. *Jenckes v. Goffe*, 1 R.I. 511, 513 (1851) (deciding sale in ordinary course terminates the security interest).

mortgage it would for that cause have been "absolutely void." If it was before void on another ground, filing it could not make it valid.¹⁸⁹

Justice Bronson later blamed actions by debtors desirous of protecting their property from legitimate executions for the act's passage:

When creditors began to press . . . [debtors] executed mortgages and bills of sale of their . . . personal effects, to friendly creditors who would consent to stand between the property and the expected execution. In the meantime nobody was paid. Creditors who resorted to legal process were not paid, because an assignment stood in their way. The assignee was not paid because he did not take the property [and the debtor disposed of the collateral].¹⁹⁰

In 1838 and 1839, New York specifically rejected efforts to authorize chattel mortgages without change of possession.¹⁹¹ These efforts occurred at the same time when Vermont and Maine enacted their first chattel mortgage act.

These judicial statements from New Hampshire, Rhode Island, and New York indicate the pre-chattel mortgage act common law rule validated chattel mortgages, refuting Gilmore's interpretation. Moreover, they indicate that the problem with the pre-chattel mortgage act rule consisted of fraud. Judicial statements from Eastern New England, in particular, Rhode Island, depicted the problem as the uncertainty of acquiring title, the perjury problem at the courthouse. In contrast, judicial statements from New York decried the problem as preferences, the secret lien problem.

189. *Wood v. Lowry*, 17 Wend. 492, 495-96 (N.Y. Sup. Ct. 1837) (concerning inventory as collateral); *accord Dutcher v. Swartwood*, 15 Hun. 31 (N.Y. Sup. Ct. 1878) (concerning inventory as collateral); *Smith v. Acker*, 23 Wend. 653 (N.Y. 1840) (concerning inventory as collateral, according to Senators Edwards, Hopkins, and Verplanck opinions). *But see Lee v. Huntoon*, 1 Hoff. Ch. 447, 460 (N.Y. Ch. 1840) (holding that, for firmly attached iron foundry machinery, filing deemed a substitute for delivery); LEONARD JONES, *supra* note 10, at 274 & n.5 (noting the New York Court's failure to interpret filing under the statute as a substitute for delivery and condemning such an interpretation).

Greene C. Bronson (1789-1863), a Democrat from Utica, Oneida County, served as Justice of the Supreme Court from 1836 to 1845, as Chief Justice from 1845 to 1847, and as Justice of the reorganized Court of Appeals from 1847 to 1850, and as Chief Justice from 1850 to 1851. As a member of the conservative, anti-Van Buren, anti-Barnburner faction, he served as its gubernatorial candidate in 1855. *See* 1 APPLETON'S, *supra* note 142, at 384. He also served as attorney general in 1829, bringing insolvency actions against country banks that refused to honor their banknotes. *See Bank of Columbia v. Attorney General*, 3 Wend. 588 (N.Y. 1829).

190. *Butler v. Van Wyck*, 1 Hill 438, 458 (N.Y. Sup. Ct. 1841) (Bronson, J., dissenting) (concerning chattel mortgage of tavern furnishings).

191. *See id.* at 460-61 (Bronson, J.) (describing legislative failures in 1838 and 1839 to authorize chattel mortgages without a change of possession). For legislative history of these acts, see *infra* notes 386-91 and accompanying text.

D. Alternatives to the Rebuttable Rule

During the latter stages of the pre-chattel mortgage act era, the literature revealed dissatisfaction with the old rule. In those states following the rebuttable rule, secured parties needed to find some alternative transaction to prevent third party interference. Lawyers proposed two alternatives. One solution favored the third party and would abolish the nonpossessory secured transaction. The other favored the secured party and used real estate law.

1. The Effort to Abolish the Nonpossessory Secured Transaction

Pennsylvania, recognizing the *per se* fraud rule, did not have the problem. It also did not use chattel mortgages as security devices. Instead, the old statutory recognizance, protected from chattel mortgages by the *per se* fraud rule, became the popular security device.¹⁹²

So, in the early 1830s, some legal circles attacked the rebuttable rule. In *Ash v. Savage*,¹⁹³ Chief Justice William Richardson of New Hampshire claimed the better rule would require mortgagee possession. But because he recognized the rebuttable rule as the common law in Maine, New Hampshire, Massachusetts, New York, and in the Federal First Circuit, he felt compelled to administer the law as he found it. Any changes, he noted, must come from the legislature.¹⁹⁴

The *United States Law Intelligencer and Review*, published in Providence, Rhode Island from 1829 through 1831, with Joseph Angell as editor, contained a section reviewing legislative acts. That review for 1829 noted a New York insolvency statute that put all endorsers and other confidential creditors entitled to a preference on the same footing with other creditors, sharing ratably. This law enacted a *per se* fraud rule for the nonpossessory secured transaction in insolvency. Angell commented, "Such a law, or one similar, should exist in every state."¹⁹⁵

The abolition advocates included three of the greatest legal minds of the first half of the nineteenth century: James Kent, Joseph Story, and Lemuel Shaw.¹⁹⁶

192. See Richard Henry Klein, *The Entry of Judgment by Confession on Promissory Notes*, 32 DICK. L. REV. 191 (1928) (describing only the Pennsylvania practice for a general article).

193. 5 N.H. 545 (1831).

194. See *id.* at 547-48.

195. *A Review of Legislative Acts, of the Present Year, in Amendment of American Jurisprudence*, 1 U.S. LAW INTELLIGENCER & REV. 366, 371 (Joseph Angell ed., Philadelphia, Pa., P.H. Nichlin & T. Johnson 1829). For the New York insolvency law, see N.Y. REV. STAT. tit. 1, art. 3, § 24 (1829). See also *infra* notes 316-25 and accompanying text.

196. See KERMIT HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 113 (1989) (discussing Shaw, a central figure in adjusting the law to the changing economy); *id.* at 154 (discussing Kent and Story as the two most influential law writers in the nineteenth century). James Kent (1763-1847) served as New York Justice from 1798 to 1804, Chief Justice from 1804 to 1814, and Chancellor from 1814 to 1823. See A.N. MARQUIS CO., *supra* note 61, at 292. For additional information about Kent, see *infra* notes 297-99 and accompanying text. Joseph Story (1779-1845) served as U.S. Associate Justice from 1811 to 1845. See A.N. MARQUIS CO., *supra* note 61, at 510-11. Lemuel Shaw (1781-1861) served as Massachusetts Chief Justice from 1830 to 1860. See *id.* at 478-511.

Gilmore's interpretation may have had roots in some of their negative pronouncements.

James Kent, with a New York City clientele, predominately dealt with commercial causes of action, especially marine insurance. As a judge he became famous for incorporating Lord Mansfield's English commercial rules into the American common law.¹⁹⁷ Kent felt that the rationale of the English bankruptcy opinions, based on general principles, should apply in every case.¹⁹⁸ He lauded his own adoption of the heightened rebuttable rule for sales transactions as Chief Justice in 1812, lamented his successors for overruling the decision by 1821, and praised Vermont's adherence to the rule in light of neighboring states abandoning the rule.¹⁹⁹

Joseph Story, with a Salem, Massachusetts, practice, dealt primarily with debt collection, and as in-house counsel to the Crowninshields, oriental shippers, practiced banking and commerce law. As a judge he became the United States Supreme Court's expert on maritime and commercial law.²⁰⁰ As a lawyer representing clients, Story advocated the *per se* fraud rule in 1811.²⁰¹ Even in 1832, writing about pledges, Story described the general rule for chattel mortgages as requiring creditor possession, listing only two Massachusetts cases enforcing debtor possession as rare exceptions to the rule.²⁰² Joseph Story used his influence as a state legislator to obtain bank charters for his co-partisans and became president of Merchant's Bank in Salem.²⁰³

Lemuel Shaw practiced commercial law in Boston, keeping his clients out of much litigation.²⁰⁴ Although not a great advocate, he shaped his legal arguments on natural justice.²⁰⁵ Both as a lawyer representing clients and as a judge, he advocated the absolute-conditional rule in 1824 and 1833, long after its demise in Massachusetts.²⁰⁶ He also described the pre-chattel mortgage act rule as the *per se* fraud rule.²⁰⁷

197. See JOHN THEODORE HORTON, *JAMES KENT: A STUDY IN CONSERVATISM, 1763-1847*, at 103-04, 156-61 (1939).

198. See 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 517 (Boston, Mass., Little, Brown & Co., 13th ed. 1884).

199. See *id.* at 526 (discussing Vermont); *id.* at 529 (discussing New York).

200. See R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 50-51, 82 (1985).

201. See *Putnam v. Dutch*, 8 Mass. (8 Tyng) 287, 289 (1811).

202. See JOSEPH STORY, *COMMENTARIES ON THE LAW OF BAILMENTS WITH ILLUSTRATIONS FROM THE CIVIL LAW AND THE FOREIGN LAW* 198 (Cambridge, Mass., Hilliard and Brown 1832). For the cases, see *Ward v. Sumner*, 22 Mass. (5 Pick.) 59, 59 (1827) (delivery of one on behalf of whole), and *Homes v. Crane*, 19 Mass. (2 Pick.) 607, 608 (1824) (delivery by laying on of hands).

203. See GERALD T. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 142-43 (1970).

204. See FREDERIC HATHAWAY CHASE, *LEMUEL SHAW: CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1830-1860*, at 12, 49, 119 (1918).

205. See *id.* at 122.

206. See *supra* note 80.

207. See *supra* note 185.

2. The Effort to Preserve the Nonpossessory Secured Transaction

The American Jurist and Law Magazine, published in Boston from 1828 to 1843, contained a January 1832 article on whether debtor possession concerned a question for the jury (the rebuttable rule) or the judge (the *per se* fraud rule or the absolute-conditional rule).²⁰⁸ The author believed this issue would remain important in the future. Nevertheless, he presented his version of the major decisions on the matter. After concluding that Massachusetts would routinely enforce a mortgage leaving the debtor in possession, the author noted that lawyers based their attacks against the transaction on *Twyne's Case*.²⁰⁹ For the author, this case did not support either the *per se* fraud rule, since the case listed, the debtor's possession as only one of many evidences of possible fraud, nor the absolute-conditional rule as it made no such distinction.

A second group of lawyers focused on the standpoint of Lee and Thompson. If they structured their transaction as a nonpossessory secured transaction, they would face possible interference from a general creditor with a judgment lien. They might have to litigate under the rebuttable rule to uphold their transaction. The same problem would face them in most of the northeastern states, in particular those using the rebuttable rule. To avoid the rebuttable rule, Lee and Thompson needed to devise another way to accomplish the nonpossessory secured transaction.

American real estate law did not have the problem of the rebuttable rule. It had adopted recording statutes in the early 1600s.²¹⁰ Court rulings under these statutes

208. *See Possession by the Vendor or Mortgagor of Chattels — Whether the Question of Fraud is One of Law or Fact — Delivery of Goods Sold*, AM. JURIS & L., Jan. 1832, at 19 (vol. 7). This review also contained digests for decisions in Maine, New York, and Maryland, but not Connecticut and Vermont for the critical decisions concerning fixtures and the nonpossessory secured transaction. It also reported the Massachusetts chattel mortgage act without comment. *See id.* at 191.

209. 76 Eng. Rep. 809 (1601).

210. The earliest American realty recording statutes in the northeast appeared in New Plymouth in 1636, Rhode Island in 1638, Connecticut in 1639, and Massachusetts Bay in 1640. *See* Act of Oct. 10, 1639, 1639 Conn. Pub. Acts, *reprinted in* 1 PUBLIC RECORDS, *supra* note 6, at 37 (“[A]ll bargaines or morgages of land whatsoever shall be accounted of noe value vntill they be recorded.”); Act of Oct. 7, 1640, 1640 Mass. Acts 290, *reprinted in* 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY 306-07 (Nathaniel Bradstreet Shurtleff, ed., Boston, Mass., William White 1853) (“[N]oe morgage . . . [or] sale . . . shallbee of force against any other person except the graunter . . . unlesse the same bee recorded”); 1636 New Plym. Laws, *reprinted in* 1 RECORDS OF THE COLONY OF NEW PLYMOUTH 12 (Nathaniel Bradstreet Shurtleff, ed., Boston, Mass., William White 1855) (“[A]ll sales, mortgages . . . of howses & landes . . . to be . . . committed to publick Record.”); Act of Mar. 13, 1638, 1638 R.I. Laws, *reprinted in* 1 RECORDS OF THE COLONY OF RHODE ISLAND 54 (John Russell Bartlett, ed., Providence, R.I., A.C. Greene & Bros. 1856) (“[A]llottment recorded in [Portsmouth town] Book shall be . . . sufficient evidence . . . for . . . right[] to possess.”).

The Connecticut legislatures modeled its statute after the 1571 Fraudulent Conveyance Statute, voiding those not recorded. *See* Fraudulent Conveyance Statute of 1571, 13 Eliz. I, ch. 5 (Eng.), *reprinted in* 4 STATUTES OF THE REALM, *supra* note 13, at 537-38; George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L. REV. 281, 285 (1941). The New Plymouth, Rhode Island, and Massachusetts Bay legislatures based their statutes on priority with unrecorded deeds being valid. *See* Haskins, *supra*, at 284, 288. Although some colonies experimented with recording only selected information, all eventually settled on recording the entire document. *See* ROBERT NATELSON,

gave priority based on the time of recording. This meant judgment lien creditors would not interfere with the transaction. The statutory rule took the place of the rebuttable rule, and it worked like the old absolute-conditional rule. The sheriff could tell before trial who would win.

This realty law might apply to personalty through fixture law. Fixture law dealt with treating some personalty as realty because it related intimately to that realty. Fixture law generally required that the parties physically attach the item of personalty to the real estate before a court would treat it as realty. As a result, several secured creditors in the northeastern states adopted this technique, especially for textile machinery.²¹¹

Unfortunately, fixture law had yet to become well settled.²¹² The requirements for the firmness of the attachment of the personalty to the realty depended on the relationship between the parties: one the claimant to personalty, the other the claimant to realty. At the beginning of the nineteenth century, the English common law that guided the American states had only specified the requirements for three relationships: (1) executor and heir, (2) executor and life tenant, and (3) tenant and landlord.²¹³ The first relationship possessed the weakest degree of firmness of

MODERN LAW OF DEEDS TO REAL PROPERTY 490 (1992).

The other northeastern colonies similarly provided with New York and New Jersey in 1664, Pennsylvania in 1682, and New Hampshire in 1701. Of these four statutes, only New Jersey had a permissive statute. See Act of June 14, 1701, ch. 8, 1701 N.H. Laws, reprinted in 1 LAWS OF NEW HAMPSHIRE, *supra* note 64, at 681; The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea or New Jersey (1664), reprinted in 5 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2535-536 (1909) (discussing priority); 1664 N.Y. Laws ch. n.s., reprinted in 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 31 (Albany, N.Y., J.B. Lyon 1894) (recognizing void unless recorded); *id.* at 62; 1682 Pa. Laws, reprinted in 1 PENNSYLVANIA ARCHIVES, FOURTH SERIES 40 (George Reed ed., 1900) (containing section 20 voiding those not recorded). See generally MARSHALL HARRIS, ORIGIN OF THE LAND TENURE SYSTEM IN THE UNITED STATES 331-37 (1953).

211. Secured parties used this scheme to avoid the rebuttable rule elsewhere. See *Toby v. Reed*, 9 Conn. 216, 223-25 (1832) (adopting real estate mortgage for farm produce); *Swift v. Thompson*, 9 Conn. 63, 67-68 (1831) (adopting real estate deed for textile machinery); *Gale v. Ward*, 14 Mass. (14 Tyng) 352, 356 (1817) (utilizing real estate mortgage for textile machinery); *Sturgis v. Warren*, 11 Vt. 433, 433-37 (1839) (utilizing real estate mortgage for textile machinery); *Tobias v. Francis*, 3 Vt. 425, 431 (1830) (utilizing real estate mortgage for textile machinery).

212. For an explanation of fixture law during the first half of the nineteenth century, compare JOSEPH FERARD, THE LAW OF FIXTURES vii-xi, 13 (New York, Gould & Banks, 1st Am. ed. 1830) (describing three relationships: between heir and executor; between executor and remainderman; and between landlord and tenant) with 1 JOHN WILLIAM SMITH, A SELECTION OF LEADING CASES, ON VARIOUS BRANCHES OF THE LAW 210-19 (Philadelphia, Pa., T. & J.W. Johnson, 5th Am. ed. 1855) (describing six relationships: the above three, and, vendor and vendee, mortgagor and mortgagee, and bankruptcy trustee and others).

For the state of flux, see *Taffe v. Warnick*, 3 Blackf. 111, 112-13 (Ind. 1832) (reasoning that for debtor-creditor relationship it is a question of much doubt); and FERARD, *supra*, at 196 (placing *Winn v. Ingilby*, 106 Eng. Rep. 1319, 1319 (K.B. 1822) (rejecting landlord-tenant test for pots, ovens, and ranges attached to the building for the debtor-creditor relationship), in a section labeled conflicting decisions).

213. See *Elwes v. Maw*, 102 Eng. Rep. 510, 515 (K.B. 1802). For American adoption of English

attachment; the last, the strongest. The English common law added one additional relationship during the first half of the nineteenth century: that of seller and buyer. Since a mortgage took the form of a sale, this group also included mortgagors and mortgagees and hence debtors and creditors. In 1834, the English common law eventually determined that for this new relationship the weakest attachment requirements applied.²¹⁴

Before this English common law became settled, however, several northeastern commercial states had already confronted the issue. Several applied the strong test of landlord-tenant law to mortgages, namely New York in 1810, Massachusetts in 1817, Vermont in 1830, and Connecticut in 1831.²¹⁵ In these states parties had to attach the fixture-chattels so firmly to the realty that they could not sever the connection without breaking or otherwise harming the realty. Therefore, in these states, the fixture substitute for the nonpossessory secured transaction could not operate.

In contrast, several other states applied the weak test of heir-executor law to mortgages, namely Pennsylvania in 1828 and Maine in 1829.²¹⁶ In these states, if the parties connected the item to the realty and operation of the factory or business

common law, see *supra* note 83.

214. For the English common law position for the debtor-creditor relationship, see *Longstaff v. Meagoe*, 111 Eng. Rep. 65 (K.B. 1834) (rejecting landlord-tenant test for counters, presses, grates, coppers, work boards, cupboards, glazed doors, and moveable partitions of a tailor's shop attached to the building for the mortgagor-mortgagee situation); and *Winn v. Ingilby*, 106 Eng. Rep. 1319, 1319 (K.B. 1822).

215. For the states applying the landlord-tenant standard, see *Swift v. Thompson*, 9 Conn. 63, 67-68 (1831) (reasoning textile machinery standing, cleated, and nailed to floor deemed personalty for debtor's general creditor suing mortgagee); *Union Bank v. Emerson*, 15 Mass. (15 Tyng) 159, 159-60 (1818) (holding kettle in fulling-mill used for dyeing cloth set in brick so creditor could not remove it without injury constituted fixture for mortgagee suing mortgagor's buyer); *Gale v. Ward*, 14 Mass. (14 Tyng) 352, 356 (1817) (holding carding machines standing and later nailed to floor judged personalty for judgment lienholder suing sheriff); *Raymond v. White*, 7 Cow. 319, 321-22 (N.Y. Sup. Ct. 1827) (holding tanner's vats and leaches attached by board tacked with nails considered personalty for mortgagee's buyer suing judgment lienholder); *Cresson v. Stout*, 17 Johns. 116, 121 (N.Y. Sup. Ct. 1819) (holding carding machines cleated to floor amounted to personalty for mortgagee suing judgment lienholder); *Heermance v. Vernoy*, 6 Johns. 5, 7-8 (N.Y. Sup. Ct. 1810) (reasoning tanner's grinding stone attached by bolted iron bands taken for personalty for vendee suing vendor); *Sturgis v. Warren*, 11 Vt. 433, 436-37 (1839) (holding woolen machinery attached by cleats, screws, and nails held personalty for secured party's assignee suing deputy sheriff); and *Tobias v. Francis*, 3 Vt. 423, 431 (1830) (holding carding machine connected by band for propulsion deemed personalty for secured party suing execution official).

216. For the states applying the heir-executor standard, see *Farar v. Stackpole*, 6 Me. 154, 158 (1829) (holding saw mill chains, dogs, and bars attached by hook to draft chain fastened to shaft by spike constituted fixtures for vendee's assignee suing vendor); *Morgan v. Arthurs*, 3 Watts 140, 141 (Pa. 1834) (holding engine in steam saw-mill considered fixture for mechanics lienholder of general contractor suing owner); and *Gray v. Holdship*, 17 Serg. & Rawle 413 (Pa. 1828) (holding copper kettle in brewery taken for fixture for owner suing mechanics lienholder of prior owner). See also *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N.H. 205, 233-34 (1841) (holding steam boilers set in brick, printing presses secured by braces nailed to building judged fixtures of a printing business, but not steam engine and machinery standing, for mortgagor suing mortgagee).

required the item, the item became a fixture. Massachusetts joined these states in 1818.²¹⁷ So in these states the fixture substitute became viable.

By virtue of the fixture substitute, Lee and Thompson in 1830 could expect their transaction to operate effectively in Pennsylvania, Maine, and Massachusetts and fail in New York and Vermont. However, they resided in Connecticut where the courts had yet to settle the issue. Unfortunately for them, Connecticut in 1831 decided to join New York and Vermont, and so the transaction failed.

This harmful legal result could spread to New York, Massachusetts, and Vermont. Each had earlier suffered a *Swift v. Thompson* type of opinion in 1810, 1817, and 1830, respectively.²¹⁸ Massachusetts had retreated from the firm attachment test of fixture law in 1818.²¹⁹ But for Massachusetts, and undecided New Hampshire, New Jersey, and Rhode Island, the threat of the firm attachment test of *Swift v. Thompson* remained. The chattel mortgage acts would remove that threat.

IV. The Adoption of the Filing Requirement

Luckily, the Lee-Thompson transaction, an equipment situation, indicated the solution to the problem. Treating the nonpossessory secured transaction the same as realty would alleviate the interference problem and make the transaction enforceable. This would entail filing the security document at the townhouse or courthouse where the debtor resided. To pass such legislation would require some degree of political clout.

Other recent research has indicated the group favoring the status quo were the traders, the wholesalers and jobbers.²²⁰ Loan documentation for this group involved by far the least care. They risked losing their nonpossessory secured transaction without the rebuttable rule. Those favoring the proposed legislation were the manufacturers along with the institutional lenders. They prepared loan documentation carefully. They risked losing their nonpossessory secured transaction to perjury under the rebuttable rule. The group opposing the proposed legislation were the retailers. They had poor documentation for their nonpossessory secured

217. New York and Massachusetts subsequently adopted the weakest attachment rule, the same as for executors and heirs. See *Union Bank v. Emerson*, 15 Mass. (15 Tyng) 159, 159-60 (1818) (recognizing cloth dyeing kettle as fixture); *Powell v. Monson & Brimfield Mfg. Co.*, 19 F. Cas. 1228 (C.C.D. Mass. 1824) (No. 11,357) (holding mill-wheel attached and necessary to operate mill deemed fixture for mortgagor's heir suing mortgagee's assignee); see also *Farrar v. Chauffetet*, 5 Deni. 527, 529-32 (N.Y. Sup. Ct. 1848) (holding machinery cleated, bolted, and screwed to unattached boards judged personalty for purchaser of realty suing purchaser of personalty); *Walker v. Sherman*, 20 Wend. 636, 657 (N.Y. Sup. Ct. 1839) (holding machinery not attached considered personalty for partition for tenants in common).

218. See *Gale v. Ward*, 14 Mass. (14 Tyng) 352, 356 (1817) (considering wool carding machinery a fixture); *Heermance v. Vernoy*, 6 Johns. 5, 7-8 (N.Y. Sup. Ct. 1810) (deciding millstone in tanning mill a fixture); *Tobias v. Francis*, 3 Vt. 423, 431 (1830); see also *Wetherby v. Foster*, 5 Vt. 136, 142 (1832) (deciding between judgment lien versus judgment lien).

219. See *Union Bank*, 15 Mass. (15 Tyng) at 159 (finding a cloth dyeing kettle a fixture); *Powell*, 19 F. Cas. at 1228 (finding a water wheel and mill-gearing fixtures).

220. See generally Flint, *Northern Struggle*, *supra* note 28, at 51-53.

transaction, and the absence of the buyer-in-the-ordinary-course doctrine impacted them.

A. *The Eastern New England States*

The opinions involving manufacturing lenders predominantly dealt with cotton textile mills and woolen mills. Manufacturing statistics for the northeastern states in the 1830s ranked the five major cotton manufacturing states as Massachusetts, Rhode Island, New York, Connecticut, and New Hampshire.²²¹ These same five states also ranked as five of the seven top woolen manufacturing states, with only Pennsylvania and Vermont edging ahead of Rhode Island and New Hampshire.²²² Pennsylvanian manufacturing amounted to little consequence for the chattel mortgage acts. Not only did Pennsylvania not use the rebuttable rule, but Pennsylvania textile factory owners and operators primarily involved immigrants who did not have access to commercial merchant capital and accordingly financed their much smaller factories through suppliers of raw materials and their own capital.²²³

Banking statistics provided the same leading five states. Bank commissioner data ranked the same five states as five of the top six leading northeastern states on the basis of banking capital, with Pennsylvania ahead of Rhode Island, Connecticut, and New Hampshire.²²⁴ Again Pennsylvania lacked significance for the chattel

221. In 1810, the northeastern states ranked by number of arkwright machinery as Massachusetts (27), Rhode Island (12), Connecticut (10), New York (8), Pennsylvania (4), New Hampshire (4), New Jersey (2), Maine (1), and Vermont (0). *See* 1 VICTOR CLARK, *HISTORY OF MANUFACTURES IN THE UNITED STATES, VOLUME I 1607-1860*, at 536-37 (1949) (consolidating information from Albert Gallatin's manufacturing report of 1810 as Secretary of Treasury and other sources). Reports based on the number of spindles in 1820 ranked these states as Rhode Island (70,000), Massachusetts (52,000), New York (over 50,000), Connecticut (30,000), and New Hampshire (15,000). *See id.* at 544. By 1832, the rankings ordered them as Massachusetts (340,000), Rhode Island (240,000), New York (157,000), Connecticut (140,000), New Hampshire (rivaling Connecticut), and Pennsylvania (ranked with Connecticut and New Hampshire). *See id.* In 1839, the United States manufacturing census ranked them as Massachusetts (335,000 to 1,450,000), Connecticut (150,000 to 730,000), Rhode Island (140,000 to 475,000), New York (65,000 to 390,000), New Hampshire (60,000 to 260,000), Pennsylvania (45,000 to 220,000), New Jersey (30,000 to 150,000), Maine (25,000 to 105,000), and Vermont (0 to 25,000). *See id.* at 552-53.

222. In 1810 they ranked on the basis of the following number of mills: Massachusetts (9), Connecticut (6), Pennsylvania (4), New Hampshire (2), New York (2), Vermont (2), Maine (1), and New Jersey (0). *See id.* at 562-63. Similar reports based on the number of mills in 1820 ranked these states as Massachusetts (120), New York (83), Connecticut (80), Rhode Island (39), New Hampshire, and Pennsylvania (only household manufacture). *See id.* at 566-67. In 1830, the rankings were Massachusetts, New York, Connecticut, Pennsylvania, and Vermont. *See id.* at 567. In 1845, the rankings were Massachusetts (479), New York (471), Connecticut (302), Pennsylvania (135), Vermont (113), Rhode Island (81), New Hampshire (73), Maine (32), and New Jersey (19). *See id.* at 572-73 (disseminating from Graham's statistics).

223. *See* PHILIP SCRANTON, *PROPRIETARY CAPITALISM: THE TEXTILE MANUFACTURERS OF PHILADELPHIA, 1800-1885*, at 12-71 (1983); ANTHONY F.C. WALLACE, *ROCKDALE: THE GROWTH OF AN AMERICAN VILLAGE IN THE EARLY INDUSTRIAL REVOLUTION* 119-23 (1972).

224. The rankings were New York (\$41.5 million), Massachusetts (\$38.8 million), Pennsylvania (\$26.1 million), Rhode Island (\$8.5 million), Connecticut (\$7.4 million), New Hampshire (\$3.2 million),

mortgage acts since it used the *per se* fraud rule. Therefore, the states most impacted by the rebuttable rule — the states most likely to require a changed rule — consisted of Massachusetts, Rhode Island, Connecticut, New York, and New Hampshire. These five states also became the first northeastern states to pass a chattel mortgage statute.

1. Massachusetts

Encountering the problem does not necessarily result in legislation. In addition, those groups with the problem need political power. The major group with the problem was the manufacturers selling cotton and woolen textile machinery on credit — a purchaser money lender seeking secured status. Other lenders, such as institutional lenders, could avoid the problem by not lending to purchasers of textile machinery or textile factories. But those selling the factories, or supplying them with machinery, could not avoid the problem as easily. Sellers such as these had political clout in three of these states, namely Massachusetts, Connecticut, and New Hampshire.

Textile machinery came from five centers: Philadelphia; Paterson, New Jersey; Providence, Rhode Island; and Worcester and Lowell, Massachusetts.²²⁵ Manufacturers established machine shops at these locations to take advantage of male labor while their familial partners worked in the textile mills located nearby.²²⁶ Shops were originally designed to supply local mills through construction at the mill.²²⁷ But in 1817, the Boston Associates, the international merchant capitalists behind Francis Lowell and Nathan Appleton, changed matters.²²⁸ It had established the Waltham factory system involving an integrated plant. All manufacturing processes

Maine (\$2.8 million), Vermont (\$1.3 million), and New Jersey (\$0.5 million). See FENSTERMAKER, *supra* note 79, at 186-236. On a per capita basis the five ranked more in line with their manufacturing prowess: Rhode Island (\$87.5), Massachusetts (\$63.6), Connecticut (\$24.9), New York (\$17.1), Pennsylvania (\$15.1), New Hampshire (\$11.9), Maine (\$7.1), Vermont (\$4.7), and New Jersey (\$1.3). For 1830 census data, see THE WORLD ALMANAC AND BOOK OF FACTS 380-81 (1997). On the basis of the number of banks, the northeastern states ranked as Massachusetts (83), New York (63), Rhode Island (49), Pennsylvania (37), New Hampshire (22), Maine (18), Vermont (11), and New Jersey (4). See FENSTERMAKER, *supra* note 79, at 186-236.

225. See GIBB, *supra* note 51, at 45-46. The major machine manufacturers prior to 1834 were the Lowell Machine Shop in Lowell, Massachusetts (founded in 1815), George Draper & Sons in Hopedale, Worcester County, Massachusetts (1816), James Brown Machine Shop in Pawtucket, Providence County, Rhode Island (1824), Providence Machine Company in Providence, Rhode Island (1827), Fales and Jenks Machine Company in Pawtucket, Rhode Island (1830), and the Whitin Machine Works in Whitinsville, Worcester County, Massachusetts (1833). See THOMAS R. NAVIN, THE WHITIN MACHINE WORKS SINCE 1831, at 485-86 (1950).

226. See 1 CLARK, *supra* note 221, at 466.

227. See *id.* at 519.

228. The Boston Associates included the Lawrences, Lymans, Cabots, Perkinses, Dwights, Brookses, and others. See DALZELL, *supra* note 140, at vii. The Boston Associates owned the Lowell Machine Shop set up as a subsidiary of their Merrimack Manufacturing Company in 1824 following the success of their Boston Manufacturing Company's sales of textile machinery to competitors beginning in 1817 from its Waltham, Massachusetts, machine shop and also the Saco Water Power Company with machine shops at Biddeford, Maine, established in 1836. See GIBB, *supra* note 51, at 40, 64, 112.

for converting raw cotton to cloth came under one roof. Specialized workers were paid in cash, output was standardized, cost accounting and systematic buying and selling was implemented, and all functions were performed by a single corporate organization.²²⁹ In 1817, the Boston Associates began selling textile machinery to their competitors and licensing their patents to New Hampshire machinery manufacturers.²³⁰ In 1820, it purchased the machine-shop patents and designed the works at Lowell to make textile machinery for outside parties.²³¹ It made the works an independent business in 1825. Its shops involved a vastly larger scale than those of others in Worcester and Philadelphia.²³²

Moreover, the Boston Associates had banking and political connections. It operated a number of different companies, with different members in different enterprises, including many banks.²³³ In 1831, its leader, Nathan Appleton, described its method of getting private use of bank funds for manufacturing endeavors. The Boston Associates bought up bank shares and gained proxies to control the board due to the apathy of most shareholders.²³⁴ It founded the New England Bank in 1813 for the purpose of acquiring country banknotes and quickly redeeming them for specie at the respective country bank.²³⁵ This procedure prevented country banknote depreciation due to evasion or delay in redemption. When selling goods, it received the same country banknotes as manufacturers. Other members of the group commenced the Suffolk Bank's adoption of a joint venture of Boston banks to perform the same function in the 1820s, the Suffolk system.²³⁶

Not only did the Boston Associates have influence with bankers, but it also had political clout. It lobbied Congress in 1816 for the initial tariffs protective of manufacturing, most notably its own manufacturing.²³⁷ Members of the Boston Associates later held positions in the National Republican Party, the Whig Party, and became strong backers of Senator Daniel Webster.²³⁸ In addition, Nathan Appleton himself served in the state legislature at various times from 1816 to 1827 and in the United States Congress from 1831 to 1833 and in 1842, as a Federalist, National Republican, and Whig.²³⁹ Appleton led the political forces of the protectionist manufacturers to victory over the free-trade commercial merchants in

229. See 1 CLARK, *supra* note 221, at 450.

230. See GIBB, *supra* note 51, at 40-43.

231. See 1 CLARK, *supra* note 221, at 519.

232. See *id.* at 519-20.

233. See DALZELL, *supra* note 140, at viii (noting investments in railways, banks, and insurance companies, providing ancillary services to textile manufacturing); *id.* at 79-80 (stating by 1848 it had 20% of the nation's cotton spindles, 40% of Boston's banking capital, 41% of its marine insurance, 77% of its fire insurance, and five railroads).

234. See FRITZ REDLICH, *THE MOLDING OF AMERICAN BANKING: MEN AND IDEAS PART I 1781-1840*, at 62 (1947); see also DALZELL, *supra* note 140, at 96.

235. See *id.* at 69.

236. See *id.* at 71-72; see also DALZELL, *supra* note 140, at 96.

237. See DALZELL, *supra* note 140, at 36, 42, 194; GIBB, *supra* note 51, at 61; CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815-1846*, at 75 (1991).

238. See DALZELL, *supra* note 140, at 3, 165, 180.

239. See A.N. MARQUIS CO., *supra* note 61, at 26.

1831.²⁴⁰ This allowed interested parties to influence legislation protective of their interests.

Their main goal involved reducing risks. They did not invest in the speculations bringing the greatest returns, but settled for lesser returns with continuing stability.²⁴¹ For its machinery customers, the Boston Associates had to extend credit directly because banks did not lend to manufacturers.²⁴² They did so only when well secured.²⁴³ Although the price per machine involved a few hundred dollars, each factory required numerous machines.²⁴⁴

The secondary literature provides no direct reference to the Boston Associates using chattel mortgages on machinery. That literature does, however, indicate that the Boston Associates did not use the conditional bill of sale and the deed of trust until its machine shops in Saco, Maine, began to use these devices for railroad locomotives in 1839, neither of which the textile industry used at the time.²⁴⁵ The only other security device for personalty in use at the time involved the chattel mortgage. A major competing textile machinery manufacturer, Whitin Machine Works, sold only for "cash."²⁴⁶ This system required payment within fifteen days for cash shortages, within thirty days for declining sales, and half-cash and half-note

240. See ARTHUR B. DARLING, *POLITICAL CHANGES IN MASSACHUSETTS 1824-1848: A STUDY OF LIBERAL MOVEMENTS IN POLITICS* 12 (1925).

241. See *id.* at 8-10, 54-55, 59.

242. An interest rate study — with no discussion of security devices — of textile mill borrowings after the Jacksonian Era revealed borrowings consisted of short-term loans from commercial banks at 6.6%, above the usury rate of 6%, long-term loans from savings banks, trust companies, and insurance companies at 5.8%, and both types of loans from private individuals and business suppliers. See generally Lance E. Davis, *The New England Textile Mills and Capital Markets: A Study of Industrial Borrowing 1840-1860*, 20 J. OF ECON. HIST. 1-10, 17 (1960).

Banks lent to manufacturers only on strong collateral, refusing to make the unsecured signature loans they did for merchants. See Livesay, *supra* note 47, at 63, 65, 67. A Paterson, New Jersey, mill secured the first bank loan to a textile mill, that from the Bank of New York in the first decade of the nineteenth century, with U.S. government bonds. See Joseph J. Klein, *Development of Mercantile Instruments of Credit in the U.S.*, 12 J. OF ACCT. 422, 437 (1911). The Boston Associates' Suffolk Bank, required by its 1818 charter to lend 10% of its capital to manufacturers and farmers, did so only on realty mortgages. See *id.* at 439. Similarly, realty also secured savings bank loans to textile mills, both that of the factory and the mill owners. See Livesay, *supra* note 47, at 65 (describing the 1820s loan of Worcester Savings Bank to Washburn and Goddard, a wire and nail firm). Generally, however, antebellum city banks lent to nonmerchants only through accommodation endorsements of two people, while country banks required additional endorsers. See Klein, *supra*, at 435. Banks refused to discount notes bearing solely manufacturer endorsements or on manufacturer receivables. See Livesay, *supra* note 47, at 78. Insurance companies and trust companies were even less inclined to lend to manufacturers. See *id.* at 66.

The manufacturers' customers paid on the agricultural cycle, near harvest time. See *id.* at 76. To survive, manufacturers required merchant endorsers or supplier credit. See *id.* at 77.

243. See GIBB, *supra* note 51, at 46 (extending credit to machinery customers); *id.* at 227 (noting machinery credit sales well secured).

244. For prices, see GIBB, *supra* note 51, at 47 (charting prices of looms at \$125 up to double speeders at \$2,000 in 1817 to 1823). For factory amounts, see NAVIN, *supra* note 225, at 98 (explaining that some mills ordered \$100,000 to \$150,000, which could represent 25% of a machine shop's annual sales in 1870).

245. See *id.* at 96-97.

246. See NAVIN, *supra* note 225, at 98.

payments if the debt was spread over six to twelve months.²⁴⁷ Because Whitin used the term "cash" to distinguish it from a long-term mortgage with machinery as collateral, the industry must have used the chattel mortgage. Thus, the method of filing under realty law became much more preferable to the Boston Associates than gambling under the rebuttable rule with respect to a nonpossessory secured transaction on textile machinery.

The Boston Associates located its major textile mills and prime customers for machinery in Chicopee, Holyoke and Lowell, Massachusetts, as well as in Manchester, New Hampshire. These two states thereby became the first to adopt a chattel mortgage act. These states also possessed essentially a one-party political system, which meant that its politicians were more easily influenced.

Massachusetts' one-party system was controlled principally by manufacturing interests.²⁴⁸ During the Federalist Era from 1784 to 1824, the Essex Junto of shipmasters and commercial merchants controlled the state.²⁴⁹ This changed when Jefferson's embargo forced the Boston commercial merchants, the Perkinses, Cushings, and Lowells, to divert their merchant and shipping money into manufacturing.²⁵⁰ By 1824, the shipowners joined Appleton and Abbott Lawrence in banking to oppose the Republican country banks chartered from 1810 to 1812 under the Republican Governor Elbridge Gerry.²⁵¹ It was not until later, however, that the shipowners joined the Lawrences in manufacturing.²⁵² Their political allies became the whalers of the Old Colony (Plymouth), who also turned to textile manufacturing, and the country squires of Worcester and Western Massachusetts.²⁵³ Wage earners in Boston and the Old Colony, dependent on the commercial merchants and whalers, and western farmers, followers of the Congregational clergy, voted with them.²⁵⁴ The opposition consisted of Essex fishermen and farmers in the Old Colony.²⁵⁵ After the fall of the Federalist Party in 1824, most Federalists and the Anti-Warren Bridge Republicans joined John Quincy Adams and the National Republicans.²⁵⁶ The Jacksonian Party consisted of some Federalists who could not forgive Adams for supporting Jefferson's embargo, free bridge advocates led by David Henshaw, and rural farmers under Marcus Morton.²⁵⁷ Before 1840 they could not wield political power. The Antimasons sapped their strength in the Old Colony and the Workingmen's Party diverted their votes in the West.²⁵⁸ The

247. *See id.*

248. *See* DARLING, *supra* note 240, at 2 (describing Massachusetts in the Jacksonian Era as controlled by enlightened conservatives, the Boston aristocrats, and the country squires behind Daniel Webster).

249. *See id.* at 4.

250. *See id.* at 7-8, 13.

251. *See id.*

252. *See id.*

253. *See id.* at 17-18.

254. *See id.* at 33.

255. *See id.* at 35.

256. *See id.* at 52.

257. *See id.* at 78.

258. *See id.* at 91, 100.

combination produced the passage of the first northeastern chattel mortgage statute on March 22, 1832.

2. *New Hampshire*

The Concord Regency, allied with the major manufacturing interests, controlled New Hampshire, another essentially one-party northeastern state.²⁵⁹ Other parties controlled New Hampshire before the Concord Regency united Republican farmers with Portsmouth commercial merchants in 1816.²⁶⁰ The Federalist Party controlled New Hampshire until 1800, and this period was followed by a two-party system created by disputes over bank charters between interior Republicans surrounded by Congressional Federalists in the Connecticut Valley and coastal Federalist commercial merchants.²⁶¹ The Concord Regency became the *nouveau-riche* when banking expanded in New Hampshire along with manufacturing.²⁶² Hill and the Concord Regency invested in the factories and banks.²⁶³ The Boston Associates became the largest and most politically influential of these manufacturing establishments. Hill's political opponents slurred his tariff support by alleging he increased his wealth "by his vicinage to the large manufacturing establishments."²⁶⁴ The consequence involved the passage of the third northeastern chattel mortgage act on June 22, 1832. Two of the first three northeastern states to pass chattel mortgage acts possessed unchallenged political systems controlled by the manufacturing interests and the philosophy of the Boston Associates.

3. *Rhode Island*

Judges in both Massachusetts and New Hampshire had used the rebuttable rule in the pre-chattel mortgage act era. But the stance of Rhode Island judges on chattel mortgages in that era remained obscured. No Rhode Island judge wrote an opinion until the 1840s, subsequent to the state's passage of a chattel mortgage act.²⁶⁵ Moreover, the Rhode Island Supreme Court did not have final say on a legal matter; the legislature could reverse the judgment.²⁶⁶ Nevertheless, Rhode Island probably used the absolute-conditional rule. The landed aristocracy used this most primitive rule and controlled Rhode Island politics until the 1840s.²⁶⁷ The commercial merchants developed the rebuttable rule in response to the Statute of Frauds for the sale of goods. Although Rhode Island never adopted that statutory provision in the

259. See COLE, *supra* note 138, at 11 (noting the alliance dominated from the War of 1812 to the 1840s); PAUL GOODMAN, *TOWARDS A CHRISTIAN REPUBLIC: ANTIMASONRY AND THE GREAT TRANSITION IN NEW ENGLAND, 1826-1836*, at 109 (1988) (noting the transformation of new Hampshire into a one-party style).

260. See COLE, *supra* note 138, at 17-20.

261. See *id.*

262. See *id.* at 104, 123.

263. See *id.* at 105, 132.

264. Hezekiah Niles, *NILES' WEEKLY REGISTER*, Mar. 31, 1832, at 80 (vol 42).

265. See COLEMAN, *TRANSFORMATION*, *supra* note 174, at 252.

266. See *id.*

267. See CONLEY, *supra* note 174, at xiv.

pre-chattel mortgage act era, it remained a possibility since all contiguous states had adopted it.²⁶⁸

In contrast to the political systems of New Hampshire and Massachusetts, the most industrialized state of the era, Rhode Island, did not have a one-party political system.²⁶⁹ Similar to Massachusetts, commercial merchants, such as Moses Brown in Providence; Samuel Slater and James DeWolf in Bristol; and Benjamin Hazard in Newport, had transferred their capital into manufacturing and established the Slater factory system centered in Providence.²⁷⁰ Like the Waltham system of the Boston Associates, the Slater factory system established itself as a major industry.²⁷¹

As did the Boston Associates in the northeast, the Providence textile manufacturers controlled manufacturing in eastern Connecticut and southern Massachusetts through the ancillary services of factoring, banking, insurance, and transportation.²⁷² The Brown family obtained the first Rhode Island bank charter in 1791, and with their mercantile allies, they controlled affiliated banking and insurance underwriting houses.²⁷³ Through their company-owned mill villages, with company stores and company tenements, these manufacturers controlled local politics through pressure on their employees.²⁷⁴ Allied banking firms similarly controlled the votes of those that borrowed from them.²⁷⁵

Although the manufacturers dominated the Rhode Island economy, they did not yet dominate the Rhode Island legislature to the extent needed to obtain the filing statute enabling sale of their textile machinery on credit without interference from a potential rebuttable rule. Colonial Rhode Island politics had spawned a two-party system between the commercial merchants and farmers of the south and west and the commercial merchants and farmers of Providence.²⁷⁶ The city's antiquated 1667 charter, with its landholding suffrage requirement and voting by fixed townships, preserved that dichotomy between a manufacturing northeast and a rural south and west.²⁷⁷ The agrarians, dominated by the Jacksonians, and fearing commercial merchants and manufacturers would direct the votes of their sailors and workers, endeavored to preserve their electoral superiority by refusing to extend suffrage to holders of personalty, such as bank stock and textile equipment.²⁷⁸ The National Republicans and later the Whigs favored the suffrage movement, except the old mercantile elite led by Benjamin Hazard.²⁷⁹ But both parties had manufacturing

268. See *supra* notes 63-65 and accompanying text.

269. See generally GOODMAN, *supra* note 259, at 193-213.

270. See COLEMAN, TRANSFORMATION, *supra* note 174, at viii, 65, 83, 91; *id.* at 77 (noting that Samuel Slater was Moses Brown's partner).

271. See *id.* at 100; I CLARK, *supra* note 221, at 466.

272. See COLEMAN, TRANSFORMATION, *supra* note 174, at 132.

273. See *id.* at 188.

274. See *id.* at 231.

275. See *id.* at 261.

276. See CONLEY, *supra* note 174, at 50.

277. See *id.* at 160.

278. See *id.* at 208, 229, 243.

279. See *id.* at 233, 245.

interests. The Allens and Spragues were manufacturers from Cranston who sided with the Democrats, while the Hazards sided with the Whigs.²⁸⁰

The election of the lower house occurred twice each year with senators and statewide offices elected once a year further complicating political control in Rhode Island.²⁸¹ Moreover, a third party, the Antimasons, predominantly northern farmers who resented textile mills damming their streams and driving up the wages of their hired help, wielded the balance of power from 1829 to 1837.²⁸²

Antimason political strength in New England in the early 1830s established a dominant party in Vermont. The Antimasons were the second strongest party in Massachusetts.²⁸³ They penetrated where the industrial society generated apprehension that the new industrial order subverted republican government and evangelical Christianity.²⁸⁴ Antimasons detested the new class structure based on wealth and property spawned by industrialization and capitalistic agriculture.²⁸⁵ They desired the old order of deference to their betters, rare tenancy, and subsistence farming,²⁸⁶ and opposed monopoly and privilege.²⁸⁷ The legislative grant of special privileges became a significant issue in Rhode Island that the new manufacturing elite felt compelled to skirt. Manufacturers in Rhode Island continued to use the mercantile partnership form of business, rather than the corporate form popular in Massachusetts. Because of this issue, the Antimasons refused to press the Rhode Island legislature for incorporation until after 1847.²⁸⁸

The Antimasons also favored the American system of Henry Clay, and so they sided with the National Republicans in 1830, but withdrew in 1832 after failing to defeat Masonic appointments.²⁸⁹ In November 1831, a report by Benjamin Hazard's committee on the investigation of the Masons triggered the split between the Antimasons and National Republicans.²⁹⁰ Although a non-Mason, Hazard insulted the Antimasons by claiming that they only sought office.²⁹¹

Consequently, in the year of interest, 1832, Rhode Island had three independent parties. The result was an elective gridlock that failed to produce a governor in five 1832 elections and controversially produced a minority U.S. Senator when the National Republicans continued the 1831 legislature in office.²⁹² So when the manufacturers needed to file legislation, both major parties, the National

280. See COLEMAN, TRANSFORMATION, *supra* note 174, at 244; CONLEY, *supra* note 174, at 245.

281. See *id.* at 24, 182.

282. See generally GOODMAN, *supra* note 259, at 195, 200, 213.

283. See *id.* at 4.

284. See *id.* at 37, 102.

285. See *id.* at 38.

286. See *id.*

287. See *id.* at 36.

288. See COLEMAN, TRANSFORMATION, *supra* note 174, at 113-14.

289. See CONLEY, *supra* note 174, at 246.

290. See WILLIAM PRESTON VAUGHN, THE ANTIMASONIC PARTY IN THE UNITED STATES, 1826-1842, at 137 (1982).

291. See *id.* at 139.

292. See Philip A. Grant, *Party Chaos Embroils Rhode Island*, in 26 RHODE ISLAND HISTORY 113, 114-15 (1967).

Republican-Whigs and Democrats, desired to attract Antimason support. This entailed postponing any request for special privileges for manufacturers, difficult to achieve in a landed aristocracy even without Antimasonry. Although the Whigs were dominant in the Providence manufacturing industry and controlled the legislature in 1832, they proposed no chattel mortgage act.²⁹³

The competition for Antimason support ended in the spring of 1833 when the Antimasons entered into a coalition with the Democrats who controlled the legislature until 1835 and the governor's office until 1837.²⁹⁴ It was not until the coalition's second legislative session that Whig Benjamin Hazard, with ownership interests in textile mills, could feel strong enough support to shepherd through the legislature a chattel mortgage act similar in language and impact to that of Massachusetts in January 1834, the fifth northeastern chattel mortgage act.²⁹⁵ The manufacturers did have some support within the Antimason party. Their leaders included manufacturers, such as William Sprague of Cranston, their Speaker of the House and later a Whig, and Oziel Wilkinson of Pawtucket, the textile machinery manufacturer.²⁹⁶

B. The Northern Mid-Atlantic States

The situation in the Mid-Atlantic states differed significantly from the situation in the Eastern New England states. The Mid-Atlantic states lacked political dominance by manufacturers. Instead, traders and retailers vied for control. The traders favored the rebuttable rule, while the retailers favored the *per se* fraud rule. The battle between these groups, the port city trader and the back country retailer, began in 1812 when James Kent, then Chief Justice of New York's Supreme Court, announced the heightened rebuttable rule applicable to an absolute sale.²⁹⁷ His later legal treatise on American law advocated extension of the rule to the nonpossessory secured transaction, however, his successors on the New York Supreme Court rejected the argument.²⁹⁸ Kent, although he represented marine insurers in his later practice in New York City and became an expert in commercial law, came from and conducted his early law practice in Poughkeepsie, about sixty miles upriver from New York City, and became a member of the landed aristocracy.²⁹⁹

Before New York resumed this battle, the proponents of the *per se* fraud rule won in two neighboring states. In 1819, John Bannister Gibson, Associate Justice

293. See *id.* at 114 (noting that the Whig state in 1832 and a Whig legislature elected their candidate as Senator in January 1833); R.I. House J., June Sess. 676 (1833) (unfinished business from Jan. 1833 has no chattel mortgage bill).

294. See Grant, *supra* note 292, at 114; GOODMAN, *supra* note 259, at 198.

295. See *supra* notes 174-76 and accompanying text.

296. See GOODMAN, *supra* note 259, at 199, 208, 211; A.N. MARQUIS CO., *supra* note 61, at 499 (listing William Sprague's credentials).

297. See *Sturtevant v. Ballard*, 9 Johns. 337, 338 (N.Y. Sup. Ct. 1812).

298. See *Bissell v. Hopkins*, 3 Cow. 166, 186 (N.Y. Sup. Ct. 1824) (suggesting that Kent intended to state the rebuttable rule previously adopted an 1808); KENT, *supra* note 198, at 525 (noting the heightened rebuttable rule), *id.* at 527-28 (lamenting New York's later rejection of the rule in 1824 and praising its re-institution in 1829).

299. See FOX, *supra* note 171, at 134; HORTON, *supra* note 197, at 52-53.

and later long-time Chief Justice of the Pennsylvania Supreme Court, announced the *per se* fraud rule in Pennsylvania in an opinion involving the nonpossessory secured transaction on a retailer-manufacturer's inventory, and Pennsylvania courts followed this rule thereafter.³⁰⁰ Gibson and his concurring justice, Thomas Duncan, started their law practices in Carlisle, about ninety miles west of Philadelphia.³⁰¹ In 1824, Stephen Titus Hosmer, Chief Justice of the Connecticut Supreme Court of Errors, announced the heightened rebuttable rule in Connecticut in an opinion involving the nonpossessory secured transaction on a retailer-manufacturer's equipment, and Connecticut courts followed this rule thereafter.³⁰²

The battle resumed in New York in 1827 when the revisers of the New York statutes proposed the *per se* fraud rule for all sales transactions. At this time, the major political force opposing Van Buren's Albany Regency became the Antimasons.³⁰³ Despite their rural image, the New York Antimason strength lay in the wealthier townships of western New York with attorneys and businessmen providing their candidates.³⁰⁴ By 1827, Thurlow Weed had transformed the Antimasons into a movement to root out the privileged class.³⁰⁵ They believed in an egalitarian, leveling philosophy.³⁰⁶ This attitude influenced the draftsman of the revised statutes that contained the *per se* fraud rule for both absolute and conditional sales of personalty with seller retention of the collateral. John Canfield Spencer, a lawyer from Canandaigua, New York, had Antimasonic leanings.³⁰⁷ He served as the special prosecutor in the 1829 trials involving the murder of William Morgan by misguided Masons trying to prevent Morgan's publication of Masonic secrets.³⁰⁸ His father, Ambrose Spencer, former Chief Justice of the New York Supreme Court

300. See *Clow v. Woods*, 5 Serg. & Rawle 275 (Pa. 1819); accord *Welsh v. Bekey*, 1 Pen. & W. 57 (Pa. 1829).

301. See BERNARD SCHWARTZ, MAIN CURRENT IN AMERICAN LEGAL THOUGHT 207 (1993); 16 JAMES T. WHITE & CO., *supra* note 150, at 298 (1918) (listing Duncan's credentials).

John Bannister Gibson (1780-1853) of Carlisle, Cumberland County, served as Associate Justice (1816-1827 & 1851-1853) and Chief Justice (1827-1851). See A.N. MARQUIS CO., *supra* note 61, at 203.

Thomas Duncan (1760-1827) of Carlisle, Cumberland County, was appointed to the Supreme Bench by Governor Snyder and served as Justice (1817-1827). See 16 JAMES T. WHITE & CO., *supra* note 150, at 298-99 (1918).

302. See *Patten v. Smith*, 5 Conn. 196 (1824); accord *Swift v. Thompson*, 9 Conn. 63 (1831).

303. See BENSON, *supra* note 138, at 33 (noting the opposition beginning after February of 1829); VAUGHN, *supra* note 290, at 28.

304. See VAUGHN, *supra* note 290, at 24-25; BENSON, *supra* note 124, at 25 (noting support from rural residents of western New York).

305. See VAUGHN, *supra* note 290, at 27.

306. See BENSON, *supra* note 138, at 47 (safety fund in 1829 for state banks); *id.* at 48 (state bank charters in 1831); VAUGHN, *supra* note 290, at 49 (Second Bank recharter resolution in 1831 favoring state banks).

307. See WILLIAM ALLEN BUTLER, THE REVISION OF THE STATUTES OF THE STATE OF NEW YORK AND THE REVISERS: AN ADDRESS DELIVERED BEFORE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JAN. 22, 1889, at 40 (New York, N.Y., Banks & Bros. 1889); A.N. MARQUIS CO., *supra* note 61, at 498.

308. See VAUGHN, *supra* note 290, at 5-7; A.N. MARQUIS CO., *supra* note 61, at 498.

and member of the court that had made New York a rebuttable rule state, served as an Antimason presidential elector in 1832.³⁰⁹

John Canfield Spencer crafted two provisions for the Revised Code of 1829, considered by the legislature in the fall of 1827, attempting to institute the *per se* fraud rule. The first provision denied insolvency discharge to a debtor who had granted a preference to a favored creditor, including a nonpossessory chattel mortgage, immediately before insolvency.³¹⁰ Joseph Angell, a treatise writer from Rhode Island, urged other states to adopt this anti-preference provision.³¹¹ In the second provision, Spencer restated the fraudulent conveyance rule, not as the rebuttable rule, but as the *per se* fraud rule.³¹² As a state senator, Spencer participated in the debates to preserve his drafting.

But the small businessman view of Spencer did not govern in New York. However, the political machine of the Albany Regency did govern, and they used special privilege to reward and punish their political underlings, especially through bank charters.³¹³ Banks should have favored chattel mortgages as protective of the estates of those who endorsed bank borrowers' promissory notes to the banks, typically bank shareholders. But the Albany Regency also opposed many issues of interest to manufacturers. They turned against tariffs when lower Hudson River Democrats came out against them.³¹⁴ They repealed the textile mill exemption from property taxes in 1824 after determining factories did not support their

309. See VAUGHN, *supra* note 290, at 43.

310. See ALBANY ARGUS, Nov. 10, 1827, at 2, col. 4.

311. See *supra* note 195 and accompanying text.

312. The legislature passed this change to the fraudulent conveyance statute proposed by the revisers when it adopted the Revised Statutes. See *Hall v. Tuttle*, 8 Wend. 375, 378-80 (N.Y. Sup. Ct. 1832). The revisers, in a portion drafted by John Canfield Spencer (Benjamin Franklin Butler of the Albany Regency served as the other draftsman as John Duer had resigned earlier), had recommended the *per se* fraud rule; however, the legislatures added the good faith exception determined by a jury. See *Stoddard v. Butler*, 20 Wend. 507, 547-53 (N.Y. 1838) (remarks of Sen. Verplanck); BUTLER, *supra* note 307, at 40.

John Canfield Spencer (1788-1855) of Canandaigua, Ontario County, a lawyer and son of Ambrose Spencer, a Republican and later Antimason and Whig, served as a member the U.S. House from 1817 to 1819, prosecutor of those who abducted William Morgan in 1839, Secretary of War from 1841 to 1843, and Secretary of the Treasury from 1843 to 1844. See A.N. MARQUIS CO., *supra* note 61, at 498. Ambrose Spencer was one of the New York justices who adopted the rebuttable rule in New York. See Flint, *Northern Struggle*, *supra* note 28, at 42-43.

Benjamin Franklin Butler (1795-1858) of Columbia County, a lawyer, served as Secretary of War from 1836 to 1837. See A.N. MARQUIS CO., *supra* note 61, at 88. Butler and Spencer represented clients on opposite sides of the issue in 1832, with Spencer arguing invalidity under the absolute-conditional rule. Butler, in 1853, represented English secured creditors in a famous bank failure against those seeking to defeat the claims. See BUTLER, *supra* note 307, at 93.

John Duer (1782-1858) of Orange County, a lawyer and writer of treatises on marine insurance law, served as Chief Justice of New York from 1857 to 1858. See A.N. MARQUIS CO., *supra* note 61, at 158.

313. See BENSON, *supra* note 138, at 39 (managed a system of state monopolies); *id.* at 42-43, 133 (controlled legislation from 1821 to 1837); RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION 84-92* (1982).

314. See FOX, *supra* note 171, at 331.

party.³¹⁵ So when the legislature considered the proposals in late 1827, passage of the *per se* fraud rule remained doubtful.

The legislature sent all portions of the revision to a joint committee. On November 6, 1827, the joint committee reported on Chapter V dealing with insolvencies to the Assembly with various amendments.³¹⁶ The Assembly debated the provision barring debtor discharge for granting a preference, engrossing it on November 8.³¹⁷

The Senate received the bill on November 8, 1827, and began debate on the anti-preference provision on November 9.³¹⁸ Senators Charles Stebbins, John L. Viele, Thomas G. Waterman, Truman Hart, and Charles Dayan opposed the provision on the ground that a debtor ought to have the right to prefer a friend who extended credit through an endorsement.³¹⁹ Senators Spencer, Ambrose L. Jordan, Victory Birdseye, William Nelson, James McCall, William M. Oliver, and Charles H. Carroll supported the provision due to the loud calls of the mercantile part of the community for this remedy.³²⁰ Those favoring the bill responded to the endorsement argument by pointing out that the friend who lent his name to the insolvent for the purpose of assisting him to commence his business also created the problem by allowing the debtor to increase his debts by show of this wealth, and was thus deserving of the penalty.³²¹ This debate indicates a battle between those desirous of purchasing from inventory free of a security interest, and those using secured endorsers. Senator Spencer moved to limit the anti-preference provision to

315. *See id.* at 324.

316. *See* ALBANY ARGUS, Nov. 7, 1827, at 2, col. 4.

317. *See* ALBANY ARGUS, Nov. 8, 1827, at 2, col. 4; ALBANY ARGUS, Nov. 9, 1827, at 2, col. 4.

318. *See* ALBANY ARGUS, Nov. 9, 1827, at 2, col. 4; ALBANY ARGUS, Nov. 10, 1827, at 2, col. 4.

319. *See* ALBANY ARGUS, Nov. 10, 1827, at 2, col. 4.

John Ludovickus Vizele (1788-1832) of Washington County, a lawyer and a Clintonian, served as a judge of the Court of Errors in 1821. *See* 6 APPLETON'S, *supra* note 142, at 291.

Thomas Glasby Waterman (1788-1862) of Binghamton, Broome County, son of an iron maker and a lawyer, wrote a treatise on the powers of justices of the peace in 1828. *See id.* at 387.

Charles Dayan (1792-1877) of Lowville, Lewis County, a lawyer, served as a Democrat member of the U.S. House of Representatives from 1831 to 1833. *See* A.N. MARQUIS CO., *supra* note 61, at 140.

320. *See* ALBANY ARGUS, Nov. 10, 1827, at 2, col. 4.

Ambrose Latting Jordan (1789-1865), a lawyer, resided in Hudson, Columbia County. *See* 11 JAMES T. WHITE & CO., *supra* note 150, at 171 (1912).

Victory Birdseye (1782-1853) of Pompey Hill, Onondaga County, a lawyer, served as a Democrat-Republican member of the U.S. House from 1815 to 1817, and later a Whig member of the U.S. House from 1841 to 1843. *See* A.N. MARQUIS CO., *supra* note 61, at 57.

William Nelson (1784-1869) of Peekskill, Westchester County, a lawyer, served as judge of the Court for the Correction of Errors from 1824 to 1827, and later a Whig member of the U.S. House of Representatives from 1847 to 1851. *See id.* at 386.

William Morrison Oliver (1792-1863) of Penn Yan, Yates County, a lawyer, served later as Lieutenant Governor in 1830, a Democrat member of the U.S. House of Representatives from 1841 to 1843, and president of Yates County Bank. *See id.* at 376.

Charles Hobart Carroll (1794-1865) of Groveland, Livingston County, studied law but became a farmer and land agent. He later served as a Clay Whig member of the U.S. House of Representatives from 1843 to 1847. *See id.* at 96.

321. *See* ALBANY ARGUS, Nov. 10, 1827, at 2, col. 4.

transactions entered into after the effective date. With this amendment, the provision passed eleven to six.³²² On November 12, Senator Waterman proposed an amendment to exempt accommodation endorsers and sureties from the anti-preference provision.³²³ After vigorous debate, the first motion lost.³²⁴ Finally, on November 14, the Senate passed the motion.³²⁵

On November 17, 1827, the Assembly agreed to certain amendments to Chapter V proposed by the revisers and adopted by the Senate, thereby concluding the legislative approval of the anti-preference provision. As a result, the farmers standing against the retailers and jobbers lost.

Both houses referred Chapter VII, the fraudulent conveyance provision, to the joint committee on November 15, 1827.³²⁶ Spencer made the Senate motion and the Senate appointed Senators Birdseye, Viele, and Latham A. Burrows to the joint committee.³²⁷

For the Assembly, Representative Moseley reported the bill out of the joint committee on November 17, 1827, recommending sundry amendments.³²⁸ The Assembly referred the bill to a committee of the whole, chaired by Francis Granger.³²⁹ The revisers had submitted two proposals: (1) the 1787 act verbatim and (2) the *per se* fraud rule, which the reviser Spencer felt would restore the original 1571 provision with such changes demanded by the New York conditions. Moseley moved to consider the substitute first, which passed.³³⁰ Representative Eldredge moved that the Assembly reject the substitute on the grounds that litigation had already interpreted each provision of the old rule and introduction of a new rule would only spawn additional litigation to clarify its provisions.³³¹ Moseley responded that the joint committee's numerous amendments would correct this deficiency. After debate by Representatives Eldredge, Moseley, Bucklin, Fish, Parke, Tracy, A.C. Paige, Starkweather, Daniel Wardwell, and Sherman, the motion failed.³³²

322. *See id.*

323. Senator Hart supported, and Senators Birdseye, Spencer, and McCall opposed this provision. *See* ALBANY ARGUS, Nov. 13, 1827, at 2, col. 4.

324. Senators Dayan, Hart, John McCarty, Richard McMichael, Stebbins, Waterman, and Benjamin Woodward voted for the motion, and Senators Birdseye, Stukely Elsworth, David Gardiner, Wells Lake, McCall, Duncan McMartin, Jr., Oliver, Joshua Smith, and Spencer voted against it. *See id.*

325. *See* ALBANY ARGUS, Nov. 15, 1827, at 2, col. 5.

326. *See* ALBANY ARGUS, Nov. 16, 1827, at 2, col. 4.

327. *See id.*

328. *See* ALBANY ARGUS, Nov. 20, 1827, at 2, col. 3.

329. *See id.* Francis Granger (1792-1868) of Canandaigua, Ontario County, a Yale lawyer and Antimason, served later as a Whig member of the U.S. House of Representatives from 1835 to 1837 and 1839 to 1841 and Whig candidate for Vice President in 1836. *See* A.N. MARQUIS CO., *supra* note 61, at 214.

330. *See* ALBANY ARGUS, Nov. 20, 1827, at 2, col. 3.

331. *See id.*

332. *See id.* Daniel Wardwell (1791-1878) of Mannsville, Jefferson County, a lawyer, served later as a Republican member of the U.S. House of Representatives from 1831-1837. *See* A.N. MARQUIS CO., *supra* note 61, at 562.

On November 19, Representative Town reported Chapter VII out of the committee on engrossed bills for a third reading.³³³ Representative Campbell moved to strike three provisions voiding every sale of chattels unless accompanied with actual and continued change of possession.³³⁴ Eldredge renewed his prior day's argument, Representative Dayton argued for the rebuttable rule, Representative Hamilton opposed to introducing fraud without intent and forcing fathers to protect their son's profligacy by removing every means of sustenance, and Representative Livingston, angered by imposing new laws when the revisers' direction merely called for codification, supported the motion.³³⁵ Moseley, arguing the Act's reduced language, and Sherman, arguing the absence of an alternative to stop fraud, opposed the motion.³³⁶ Granger moved to recommit the *per se* fraud rule to the committee of the whole because the provision would interfere with ordinary business transactions. For example, a new farmer pledging his growing crop to a neighbor for necessities until he was ready to market his first crop and merchants from the principal towns who bought up grain and flour in the fall, would be left with the vendors until the spring when they could move them by canal.³³⁷ After recommitment to the committee of the whole, Representative Sill moved to strike out the sections relating to the transfer of personal property, arguing in favor of the rebuttable rule, as did Dayton.³³⁸ Representative Bucklin opposed the motion since the cases contradicted each other and the absence of any other method to prevent frauds by means of chattel mortgages.³³⁹ Representative Parke favored the motion since the result would apply to both the endorser who enabled a debtor to obtain credit and the wholesaler who left his goods with a country retailer.³⁴⁰ General George McClure, a merchant, favored the motion since the parties frequently could not effect immediate delivery.³⁴¹ After further discussion between Representatives Tracy and Johnson, the Assembly struck one of the three offending provisions by a vote of 37-26.³⁴² Johnson then moved, for the purpose of testing the sense of the Assembly, to reject the whole substitute provision, which carried 32-31.³⁴³ The Assembly referred the bill back to the joint committee. The day's debates reflected a split in the trader group, with grain jobbers and consignment wholesalers deserting the remaining jobbers.³⁴⁴

333. See ALBANY ARGUS, Nov. 20, 1827, at 2, col. 3.

334. See *id.*

335. See *id.*

336. See *id.*

337. See *id.*

338. See *id.*

339. See *id.*

340. See *id.*

341. See *id.* George McClure (1770-1851) of Bath, Steuben County, a merchant, commanded the forces that burned the capital of Upper Canada during the War of 1812. See A.N. MARQUIS CO., *supra* note 61, at 344.

342. See ALBANY ARGUS, Nov. 20, 1827, at 2, col. 3.

343. See *id.*

344. See *id.*

The next day, November 20, 1827, Dayton moved to reconsider the prior day's rejection of the substitute measure contending opposition centered only on the *per se* fraud rule and the Assembly should consider the rest of the fraudulent conveyance provisions.³⁴⁵ Eldredge and Hamilton opposed the motion, while Moseley favored it. It passed almost unanimously.³⁴⁶ With the Assembly in a committee of the whole with Granger as chair, Dayton offered an amendment striking two of the offending sections and allowing a good faith showing to overcome the *per se* fraud rule in the third section.³⁴⁷ This motion succeeded and the remainder of the bill passed the committee of the whole with minor amendments.³⁴⁸ The committee reported to the Assembly which in turn passed it.³⁴⁹

On November 22, 1827, the Senate took up Chapter VII, but discussed only the Statute of Frauds portion, making various amendments.³⁵⁰ On November 23, the Senate passed it.³⁵¹

On November 26, 1827, the Assembly in a committee of the whole considered the amendments made by the Senate to the bill and adopted all of them except the amendment relating to the effect of sales by auctioneers.³⁵² Thus, the Assembly adopted the report of the committee of the whole.³⁵³ On November 27, the Senate adhered to their amendment to Chapter VII concerning the effect of sales by auctioneers.³⁵⁴ On November 28, the Assembly receded from their vote on nonconcurrency and adopted the amendment.³⁵⁵ Chapter VII with its new version of the rebuttable rule thereby became law on January 1, 1829.³⁵⁶ This meant that the wholesalers and grain jobbers allied with the farmers defeated the retailers and remaining jobbers.

The following year, the New York Supreme Court imposed the heightened rebuttable rule for the first time on a nonpossessory secured transaction. In an opinion by Justice John Savage involving a grocer's inventory, the court's new standard arose before the effective date of the new statutory rebuttable rule.³⁵⁷ Savage had practiced

345. See ALBANY ARGUS, Nov. 21, 1827, at 2, col. 4.

346. See *id.*

347. See *id.*

348. See *id.*

349. See *id.*

350. See ALBANY ARGUS, Nov. 23, 1827, at 2, col. 4.

351. See ALBANY ARGUS, Nov. 24, 1827, at 2, col. 4.

352. See ALBANY ARGUS, Nov. 27, 1827, at 2, col. 4.

353. See *id.*

354. See ALBANY ARGUS, Nov. 28, 1827, at 2, col. 4.

355. See ALBANY ARGUS, Nov. 29, 1827, at 2, col. 4.

356. See ALBANY ARGUS, Dec. 6, 1827, at 2, col. 3. This statute, published as part of the revised statutes, became effective in 1829. See BUTLER, *supra* note 307, at 46. For court pronouncements on the reason for the statute's passage, see *Stoddard v. Butler*, 20 Wend. 507, 547-53 (N.Y. 1838) (noting Senator Verplanck intended to end litigation by setting forth a black letter rule). *Accord* *Smith v. Acker*, 23 Wend. 653, 666-81 (N.Y. 1840) (noting same); see also *Doane v. Eddy*, 16 Wend. 523, 525-29 (N.Y. Sup. Ct. 1837) (Bronson, J.) (noting that the 1829 Act eliminates the difference between absolute sales and conditional sales). *But see* *Hall v. Tuttle*, 8 Wend. 375, 379-80 (N.Y. 1832) (Savage, C.J.) (noting that the 1829 Act restates the common law in effect since the Statute of Fraudulent Conveyances in 1571).

357. See *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. Sup. Ct. 1829); *accord* *McLachlan v. Wright*,

law in Salem, Washington County, forty miles north of Albany.³⁵⁸ Because of the new statutory rule, this opinion should have had limited precedential impact.

After New York's limited adoption of the heightened rebuttable rule but before the first wave of chattel mortgage statutes appeared in the northeastern states, one other state adjacent to New York, the rural state of Vermont, adopted the heightened rebuttable rule. Vermont lacked an essential group, the commercial merchants, to propound the rebuttable rule. In an 1830 *per curiam* decision, the Vermont Supreme Court adopted the heightened rebuttable rule.³⁵⁹ The justices then serving all came from small towns: Samuel Prentiss of Montpelier; Titus Hutchinson of Woodstock; Charles Kilbourne Williams of Rutland; Stephen Royce of Sheldon; and Ephraim Paddock of St. Johnsbury.³⁶⁰

When the need for manufacturers to require filing of chattel mortgages arose in 1831, several northeastern states already had rules hostile to the chattel mortgage, namely, Pennsylvania with the *per se* fraud rule and Connecticut, New York, and Vermont with the heightened rebuttable rule. To overcome these hostile rules would require considerable political clout. The effort succeeded only in Connecticut and Vermont.

1. Connecticut

Immediately prior to 1833, manufacturing and financial institutions controlled Connecticut as a one-party state.³⁶¹ But the commercial merchants, few in number, never controlled Connecticut's politics as they did in both early Massachusetts and New York.³⁶² Instead, the financial institutions controlled state politics with their directors serving as judges, congressmen, and local politicians.³⁶³ In Connecticut, the merchant class predominantly consisted of the retailers and their middleman suppliers, and the wholesalers and jobbers, who purchased from the few shippers.

Prior to the 1818 disestablishment of the Congregational State Church, the Federalists (Congregationalists) comprised one party, and thereafter the Republicans (Dissenters) or National Republicans.³⁶⁴ Both parties favored conservative, status quo policies.³⁶⁵ But cotton and woolen manufacturing interests, flourishing in the East, managed to oust the Republican Governor in 1827 for another, who favored protective

3 Wend. 348 (N.Y. Sup. Ct. 1829) (discussing brewer's inventory).

358. See A.N. MARQUIS CO., *supra* note 61, at 456.

359. See *Tobias v. Francis*, 3 Vt. 423, 431 (1830).

360. See U.S. WORKS PROGRESS ADMINISTRATION, VERMONT: A GUIDE TO THE GREEN MOUNTAIN STATE 140 (1937).

361. See JARVIS MEANS MORSE, A NEGLECTED PERIOD OF CONNECTICUT'S HISTORY 1818-1850, at 85, 122 (1933).

362. See *id.* at 12. Manufacturers did not gain ascendancy over the patrician families (lawyers and local politicians) in New Haven, Connecticut, until 1842. See ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 11-13 (1961).

363. See MORSE, *supra* note 361, at 18, 282.

364. See *id.* at 30.

365. See *id.* at 34 (discussing reactionary Republicans); *id.* at 46, 283; *id.* at 112 (discussing National Republicans for status quo).

tariffs.³⁶⁶ The sharing of control between the financial institutions and the manufacturers continued until the Antimasons deprived the National Republicans of votes in 1833, resulting in a two-party state.³⁶⁷

The financial institutions lent to both manufacturers, through accommodation paper, and retailers. The institutions could force a compromise, allowing the manufacturers to grant valid nonpossessory security interests in order to purchase factory machinery from the Boston Associates and those in Providence, without interfering with purchases from inventory by the retailers under the heightened rebuttable rule. As a result, a chattel mortgage act applicable only to factory machinery resulted, and the second northeastern chattel mortgage act passed on May 29, 1832.

2. New York

In 1832, when the New York manufacturers desired a chattel mortgage act, they lacked the necessary political clout. Although the Antimasons constituted a minority in the legislature, the manufacturers could expect to defeat the philosophy of the upstate small-business owners who were attempting to expand the electoral base of the Antimasons.³⁶⁸ Not until the collapse of both the Antimasons and National Republicans in the fall 1832 elections could a chattel mortgage proposal have a chance of succeeding.³⁶⁹ The Albany Regency safely dominated the 1833 legislature with 104 of the 128 Assembly seats.³⁷⁰ But the Albany Regency represented a variety of capitalists.³⁷¹ Many of the banks they created, especially those with renewed charters, rewarded their back country supporters, those that lent to the small businessmen-retailers in the back country.³⁷² This Albany Regency support worried about losing their retail inventory during hard times to a jobber's secured endorser, a jobber friend or relative.³⁷³ All preferences, whether created by an absolute sale or a chattel mortgage, concerned them.

Moreover, New York manufacturers did not have the resources possessed by their counterparts in Massachusetts and Rhode Island. New York manufacturers did not evolve from politically connected, commercial merchants shifting money from international trade to domestic manufacturers.³⁷⁴ Instead, they derived from small, thinly capitalized entrepreneurs with few political connections to the commercial

366. *See id.* at 81, 94, 98.

367. *See id.* at 118.

368. *See* VAUGHN, *supra* note 290, at 41. The Antimasons numbered 30 of 131 in the 1831 Assembly and seven of 32 in the 1831 Senate; eight of 128 in the 1833 Assembly.

369. *See id.* at 46.

370. *See id.* at 47.

371. *See* DOUGLAS T. MILLER, *JACKSONIAN ARISTOCRACY: CLASS AND DEMOCRACY IN NEW YORK 1830-1860*, at 124 (1967) (noting that wealthy New Yorkers had money in more than one enterprise). For example, fur merchant John Jacob Astor dealt with real estate and textile mills. *See id.* at 111, 124.

372. *See* BENSON, *supra* note 138, at 47.

373. *See, e.g.*, *Bailey v. Burton*, 8 Wend. 339 (N.Y. 1831) (noting fraudulent mortgage to brother on collateral valued at three times debt); *see also* *Doane v. Eddy*, 16 Wend. 523 (N.Y. Sup. Ct. 1837) (discussing fraudulent mortgage to brother); *Look v. Comstock*, 15 Wend. 244 (N.Y. Sup. Ct. 1836) (same).

374. *See* DALZELL, *supra* note 140, at 59.

merchants.³⁷⁵ In fact, these commercial merchants politically opposed the manufacturers. These commercial merchants initially opposed the tariff in 1824 since they feared it subsidized manufacturers by withdrawing funds from commerce.³⁷⁶ They even sought legislation to restrict incorporation of manufacturing companies.³⁷⁷ Moreover, New York manufacturers possessed little representation. They located most of their cotton mills in Oneida and Rensselaer Counties about Albany.³⁷⁸ They built much smaller factories since they did not integrate operations along the model of the Boston Associates.³⁷⁹

Therefore, when retailers, through the Albany Regency, proposed a filing statute for all sales in 1833, including consignments, Senators from the back country, such as Albert Haller Tracy of Buffalo and Levi Beardsley of Hoosic supported it as an additional ground to strike down the chattel mortgage.³⁸⁰ Senators from the manufacturing centers, such as Myndert Van Schaick of New York City, Peter Gansevoort of Albany, and Henry Foster of Rome, Oneida County, opposed it.³⁸¹ These three areas contained most of New York's manufacturing centers. Oneida County had the cotton textiles, Albany and Troy had iron manufacturers, and New York City had clothing, textiles, and shoes.³⁸² Shippers and jobbers from New York City vigorously opposed the numerous filings. Retailers, on the other hand, could gain wholesaler support by limiting the act to only chattel mortgages, thereby leaving wholesaler consignments intact. The result produced the passage of the northeastern states' fourth chattel mortgage act on April 29, 1833, not as a validating act but as an additional ground to thwart chattel mortgages. The retailers and wholesalers had overcome the shippers, jobbers, and manufacturers.

In 1837, Justice Greene C. Bronson of Utica, an anti-Van Buren Democrat, laid any doubt about the effect of the New York chattel mortgage act to rest by reimposing the heightened rebuttable rule.³⁸³ Bronson, under the statutory rebuttable rule, had earlier refused to comply with the statutory requirement for jury trial and followed the lead of Justice Savage. He used the heightened rebuttable rule for a nonpossessory secured transaction arising after passage of the statutory rebuttable rule.³⁸⁴

375. See 1 CLARK, *supra* note 221, at 551 (stating that the upper Hudson River cotton mills were more moderate in size than those of Boston Associates, and were operated by individual proprietors or small stock companies); FOX, *supra* note 171, at 123 (noting New York merchants invested in land and thus allied with the landed aristocracy); *id.* at 329 (noting some upriver-landed aristocracy of merchants had invested in mills); ALVIN KASS, *POLITICS IN NEW YORK STATE 1800-1830*, at 103 (1965) (noting Clintonians including DeWitt Clinton, John Taylor, and Stephen Van Rensselaer, the large landowner, had invested in cotton mills at Whitestown, Oneida County).

376. See FOX, *supra* note 171, at 327.

377. See *id.* at 329; KASS, *supra* note 375, at 103 (discussing Federalist leader and mayor of New York City proposed incorporation restriction for manufacturers in 1824).

378. See 1 CLARK, *supra* note 221, at 552.

379. See *id.* at 549.

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

381. See *supra* note 173 and accompanying text.

382. See MILLER, *supra* note 371, at 116-18.

383. See *Wood v. Lowry*, 17 Wend. 492 (N.Y. Sup. Ct. 1837).

384. See *Randal v. Cook*, 17 Wend. 53 (N.Y. Sup. Ct. 1837); *Doane v. Eddy*, 16 Wend. 523 (N.Y.

Attempts by manufacturers and those favoring endorsements, such as farmers, to legislate the Massachusetts filing rule, came during the next economic downturn following the Panic of 1837 in the Assembly in 1838 and 1839.³⁸⁵ On January 11, 1838, Victory Birdseye moved to direct the judiciary committee to inquire into what alterations, if any, that the law relative to chattel mortgages required.³⁸⁶ The repeal would have removed the futile filings of New York City's shippers and jobbers under the state Supreme Court's decision. Representative James R. Lawrence contended that the New York Supreme Court's construction of the act virtually repealed it. Because he felt the people did not desire repeal, Lawrence introduced amendments to the chattel mortgage act to cure the defects. That afternoon, he gave notice for such amendments.³⁸⁷ Lawrence did not introduce his amendments until the following year, giving notice on January 12, 1839, and introducing the bill on January 14, 1839.³⁸⁸ Lengthy debates on the bill by the committee of the whole began on March 5 and continued both on March 6 and March 8.³⁸⁹ The committee of the whole passed the bill, but a few Representatives requested the same amendments proposed in the earlier debates, including a motion by Representative Smith to strike out the entire bill and repeal the chattel mortgage act. This motion lost by a vote of 50-51.³⁹⁰ Subsequently, a motion by Representative Hogeboom to reject the bill by striking out the enacting clause passed 56-54.³⁹¹ The retailers and wholesalers once again overcame the shippers, jobbers, manufacturers, and farmers.

These trends against chattel mortgages did not occur in eastern New England due to the political power of the Boston Associates. Unlike other manufacturers, they began so heavily capitalized that they had little need for loans other than as working capital.³⁹² Instead, they entered into distribution partnerships and lent to their suppliers.³⁹³ Because they owned the goods they sold, they sought to allow nonpossessionary security interests to secure their loans.

Sup. Ct. 1837); *Look v. Comstock*, 15 Wend. 244 (N.Y. Sup. Ct. 1836).

385. See *Butler v. Van Wyck*, 1 Hill 438 (N.Y. Sup. Ct. 1841) (Bronson, J., dissenting).

386. On January 26, Representative Denniston introduced, after notice, his bill relative to chattel mortgages. On January 30, Representative David Bayard Ogden of the judiciary committee, reported on the bill to repeal the chattel mortgage act with Representative James R. Lawrence dissenting. See ALBANY ARGUS, Jan. 12, 1838, at 2, col. 5. For Birdseye's biography, see *supra* note 320. David Bayard Ogden (1775-1849), Federalist and Whig lawyer, resided in New York City. See A.N. MARQUIS CO., *supra* note 61, at 385. James R. Lawrence resided in Onondaga County. See ALBANY ARGUS, Feb. 27, 1839, at 3, col. 3.

387. See ALBANY ARGUS, Jan. 12, 1838, at 2, col. 5.

388. See ALBANY ARGUS, Jan. 14, 1839, at 2, col. 6; ALBANY ARGUS, Jan. 15, 1839, at 2, col. 2.

389. See ALBANY ARGUS, Mar. 6, 1839, at 2, col. 7; ALBANY ARGUS, Mar. 7, 1839, at 3, col. 1; ALBANY ARGUS, Mar. 9, 1839, at 2, col. 6.

390. See ALBANY ARGUS, Mar. 9, 1839, at 2, col. 6.

391. See *id.*

392. See DALZELL, *supra* note 140, at 27, 48, 52.

393. See *id.* at 50.

C. The Second Wave States

The northeastern states participating in the second wave of chattel mortgage statutes that passed after the Panic of 1837, included two of the three least industrialized northeastern states, Vermont and Maine. Both, however, were adjacent to the states producing the textile machinery that spawned the chattel mortgage acts, and both states had little textile manufacturing. But they differed in their pre-chattel mortgage act rule. Vermont used the same heightened rebuttable rule as did Connecticut, while Maine used the same rebuttable rule as did Massachusetts.

1. Vermont

Most of the settlers in Vermont came from Connecticut.³⁹⁴ The Vermont legislature originally specified the law of Connecticut as the original law of Vermont.³⁹⁵ Vermont therefore tended to follow legal nuances emanating from Connecticut.

Vermont faced a situation similar to that of Connecticut in that there were numerous proponents of the several possible rules. Vermont lacked commercial merchants since it had no ports. Vermont's manufacturing class, comprised principally of woolen textile factories, was weaker than Connecticut's manufacturing class.³⁹⁶ From the viewpoint of the retailers there was no serious opposition.

When the issue arose in 1832, the Antimasons controlled Vermont. Vermont had been divided into two sections with the east trading with southern New England and the west trading with New York.³⁹⁷ Antimasonry predominated in the west.³⁹⁸ A rural aristocracy of the more fortunate ruled rural New England, including Vermont.³⁹⁹ Antimasonry's emphasis on equality conflicted with this rural aristocracy.⁴⁰⁰ Organized in Vermont in 1828, the Antimasons won a Vermont congressional seat in 1829 and took the governorship and legislative majority in 1831.⁴⁰¹ They ruled both until their collapse in Vermont in 1835 and subsequent merger with the Whigs in 1836.⁴⁰² Consequently, Vermont adopted no chattel mortgage act in the early 1830s. Instead, its heightened rebuttable rule continued to operate as the *per se* fraud rule favored by the retailers.

The Vermont opinions did not help in determining the reason for adopting a chattel mortgage act in 1838. Of nine opinions, only five identify the secured party, three identify sellers, and one identifies stand-ins for banks.⁴⁰³ Only one identifies the

394. See DAVID LUDLAM, *SOCIAL FERMENT IN VERMONT 1791-1850*, at 5 (1939).

395. See LUDLAM, *supra* note 394, at 6; MICHIE LAW PUBLISHERS, *VERMONT STATUTES ANNOTATED 1* (1995) (introductory material stating that the last 1778 Vermont Statute reputed to declare the laws "as they stand in the Connecticut law book . . . to be the law of the land").

396. See I CLARK, *supra* note 221, at 567; LUDLAM, *supra* note 394, at 125.

397. See GOODMAN, *supra* note 259, at 126; LUDLAM, *supra* note 394, at 10.

398. See GOODMAN, *supra* note 259, at 123; LUDLAM, *supra* note 394, at 15, 104.

399. See LUDLAM, *supra* note 394, at 97.

400. See *id.* at 98; GOODMAN, *supra* note 259, at 124.

401. See LUDLAM, *supra* note 394, at 118-21.

402. See *id.* at 131; GOODMAN, *supra* note 259, at 139.

403. For sellers, see *Woodward v. Gates*, 9 Vt. 358 (1837) (horse seller); *Tobias v. Francis*, 3 Vt.

general creditor, a surety.⁴⁰⁴ Seven opinions revealed the main activities in Jacksonian Vermont. Of those, three opinions dealt with farming, two dealt with woolen textile manufacture, one dealt with sheep herding, and another dealt with the manufacture of maple sugar.⁴⁰⁵

After 1832, the dominant activity in Vermont became commercial production of sheep to supply meat.⁴⁰⁶ During the 1830s, Vermont's sheep raising was centered in Addison, Rutland, and Windsor Counties.⁴⁰⁷ Vermonters drove the sheep to market at Brighton, Suffolk County, Massachusetts, fattening them along the march.⁴⁰⁸ Textile factories in southern Vermont would in turn use the wool. The factory owners obtained their machinery from the nearest plant of the Boston Associates in mid-Massachusetts.

After the Panic of 1837, when credit became stringent, to purchase the equipment from the Boston Associates, which had grown accustomed to the Massachusetts' chattel mortgage act, would demand a similar filing statute as a condition of the purchase.⁴⁰⁹ Since this became the main trade with a region with a filing statute (residents also purchased goods from Connecticut and New York), the legislature modeled their chattel mortgage act after the Connecticut statute, validating chattel mortgages only for factory equipment. The northeast's sixth chattel mortgage statute passed on November 5, 1838.

2. Maine

Maine did not participate in the first wave of chattel mortgage acts because it did not possess the industrial community found in the southern New England states.⁴¹⁰ Cotton textiles did not exploit the water power available at Saco, Maine, until just before 1830.⁴¹¹ The industrial community in Maine did not receive any Antimasonry

425 (1830) (seller of woolen factory); and *Fletcher v. Howard*, 2 Vt. 115 (1826) (seller of farm implements). For bank stand-ins, see *Spaulding v. Austin*, 2 Vt. 555 (1829) (surety on a note). For others, see *Atwater v. Mover*, 10 Vt. 75 (1838) (constable).

404. See *Fletcher v. Howard*, 2 Vt. 115 (1826). Of the nine opinions, four involved battles between the secured party and the judgement lien, four between the secured party and the debtor, and one involving the secured party and prior interests.

405. For farming, see *Atwater v. Willard*, 10 Vt. 75 (1838); *Woodward v. Gates*, 9 Vt. 358 (1837); and *Fletcher v. Howard*, 2 Vt. 115 (1826). For woolen textile manufacture, see *Sturgis v. Warren*, 11 Vt. 432 (1839); *Tobias v. Francis*, 3 Vt. 423 (1830). For sheep herding, see *Spaulding v. Austin*, 2 Vt. 555 (1829). For maple sugar manufacture, see *Durkee v. Leland*, 4 Vt. 612 (1832).

406. See GOODMAN, *supra* note 259, at 126.

407. See EDWARD NORRIS WENTWORTH, *AMERICA'S SHEEP TRAILS* 71 (1948) (comparing sheep trails to New York at 112 and New Hampshire at 65, with total population exceeded only in New York, Ohio, and Pennsylvania).

408. See *id.*

409. See *id.* at 71-72 (discussing the credit conditions in Vermont after the Panic of 1837 were not as stringent as in the competing West).

410. See GOODMAN, *supra* note 259, at 115. For economic statistical comparisons, see *supra* notes 221, 222, 224 and accompanying text.

411. See 1 CLARK, *supra* note 221, at 551.

reaction.⁴¹² Consequently, Maine lacked both a proponent for filing chattel mortgages and a proponent for the *per se* fraud rule.

The Maine opinions also did not provide the reason for adopting a chattel mortgage act in 1839. Of twenty-three opinions, only eleven identified the secured party, while six opinions mentioned the sellers, and four mentioned stand-ins for banks.⁴¹³ Only four identify the general creditor; two opinions mention buyers, and two mention suppliers.⁴¹⁴ The nineteen opinions of this period dealing with debtors revealed the following clusters of laborer-debtors in Jacksonian Maine: seven pertained to farming, four pertained to shipping, four pertained to retailing, three pertained to textile manufacturing, and one pertained logging.⁴¹⁵

The Boston Associates had textile mills at Saco, Maine, and manufacturing increased greatly in the 1830s.⁴¹⁶ However, manufacturing did not dominate Maine as it did elsewhere in New England. Moreover, Maine possessed a two-party political system dominated for a generation after 1830 by the Democrats that represented the views of farmers and free trade commercial merchants.⁴¹⁷

Banking statistics and reports, however, suggested the problem. These statistics suggest that the number of banks, their capital, their circulation, and their loans peaked between 1836 and 1837 and then declined to the mid-1840s.⁴¹⁸ The Maine banks and their banking commissioners despised the Suffolk System of the Boston banks.⁴¹⁹

412. *See id.*

413. For sellers, see *Ripley v. Dolbier*, 18 Me. 382 (1841) (horse seller); *Smith v. Putney*, 18 Me. 87 (1841) (selling printing partner); *Pritchard v. Low*, 15 Me. 48 (1838) (oxen seller); *Lane v. Borland*, 14 Me. 77 (1836) (horse seller); *Tibbets v. Towle*, 12 Me. 341 (1835) (oxen seller); and *Gleason v. Drew*, 9 Me. 79 (1832) (boat seller). For bank stand-in, see *Brinley v. Spring*, 7 Me. 241 (1831) (trustee for banks); *Reed v. Jewett*, 5 Me. 96 (1827) (refinancier); *Bartels v. Harris*, 4 Me. 146 (1826) (endorser); and *Haskell v. Greeley*, 3 Me. 425 (1825) (bank endorser). For others, see *Ulmer v. Hills*, 8 Me. 326 (1832) (sheriff).

414. For buyers, see *Lane v. Borland*, 14 Me. 77 (1836) (horse buyer); and *Lunt v. Whitaker*, 10 Me. 310 (1833) (horse buyer). For suppliers, see *Winslow v. Tarbox*, 18 Me. 132 (1841) (ship repairman); and *Colson v. Bonzey*, 6 Me. 475 (1830) (ship supplier). For others, see *Reed v. Jewett*, 5 Me. 96 (1827) (debtor's brother). The 23 opinions involve battles between the secured party and judgment liens, 13 opinions; good faith buyers, five opinions; suppliers, two opinions; and the debtor, three opinions.

415. For farming, see *Ripley v. Dolbier*, 18 Me. 382 (1841) (horse buyer); *Pickard v. Low*, 15 Me. 48 (1838) (oxen buyer); *Tibbets v. Towle*, 12 Me. 341 (1835) (oxen buyer); *Smith v. Tilton*, 10 Me. 350 (1833) (oxen buyer); *Lunt v. Whitaker*, 10 Me. 310 (1833) (horse buyer); *Sawyer v. Shaw*, 9 Me. 47 (1832) (chaise owner); and *Ulmer v. Hills*, 8 Me. 264 (1832) (horse owner). For shipping, see *Goodenow v. Dunn*, 21 Me. 86 (1842) (ship builder); *Winslow v. Tarbox*, 18 Me. 132 (1841) (brig owner); *Gleason v. Drew*, 9 Me. 79 (1832) (boat owner); and *Colson v. Bonzey*, 6 Me. 474 (1830) (vessel owner). For retailing, see *Abbott v. Goodwin*, 20 Me. 409 (1841) (store stock); *Smith v. Putney*, 18 Me. 87 (1841) (newspaper firm); *Lane v. Borland*, 14 Me. 77 (1836) (horse firm); and *Bartels v. Harris*, 4 Me. 146 (1826) (retailer). For textile manufacturing, see *Brinley v. Spring*, 7 Me. 241 (1831); *Reed v. Jewett*, 5 Me. 96 (1827); and *Haskell v. Greeley*, 3 Me. 425 (1825). For logging, see *Cutter v. Copeland*, 18 Me. 127 (1841).

416. *See DALZELL*, *supra* note 140, at 71; 1 CLARK, *supra* note 221, at 551.

417. *See GOODMAN*, *supra* note 259, at 115.

418. *See* Everett Stackpole, *State Banking in Maine*, 7 SOUND CURRENCY, May 1990, at 57, 86.

419. *See id.* at 71-77.

Maine banknotes gravitated to Boston where Maine's trade was centered.⁴²⁰ The Suffolk Bank of Boston required Maine banks to keep interest free deposits for redemption of these banknotes, else the Suffolk Bank would deliver them to Maine for specie redemption. This meant that Maine banks had difficulty keeping their bills in circulation, which was necessary for them to make a profit.

Maine borrowers received Maine banknotes as loan proceeds and spent them on goods and services emanating from Boston. When the contraction began following the Panic of 1837, these Maine borrowers, whether retailers buying stock or manufacturers buying equipment and raw materials from Boston, needed additional credit from their Boston suppliers. These Boston suppliers, accustomed to lending under Massachusetts' chattel mortgage act, required filing to protect their chattel mortgage (the nonpossessory security interest in the goods sold to a Maine debtor on credit). Boston suppliers often would refuse to lend until Maine also passed a chattel mortgage act. Lending elsewhere had safety and more security. These circumstances yielded the northeastern states' seventh chattel mortgage act, which passed on March 14, 1839, with no opposition.

D. The Third Wave States

The remaining two northeastern states participating in the third wave of chattel mortgage statutes were Pennsylvania and New Jersey. During the Jacksonian Era neither one adopted a chattel mortgage act. They differed considerably in their economic situation. Pennsylvania constituted a major commercial state and the nation's banking center, while New Jersey ranked as the least industrialized. As a result, they differed in their pre-chattel mortgage act rule. Pennsylvania used the *per se* fraud rule and New Jersey used the rebuttable rule.⁴²¹

1. Pennsylvania

Pennsylvania failed to pass a chattel mortgage statute for a variety of reasons. Most notably, Pennsylvania had never adopted any version of the rebuttable rule. Of the northeastern states, only Pennsylvania adopted the *per se* fraud rule. Gibson delivered this change to the Pennsylvania common law in 1819 because manufacturers desired to avoid litigation fostered by the rebuttable rule's requirement to present evidence of good faith to overcome the presumption of fraud stemming from debtor possession of the collateral.⁴²²

Although not recognizing the chattel mortgage, Pennsylvania had viable alternatives to the chattel mortgage. Pennsylvania also avoided the other spur to the filing statutes. Pennsylvania did not follow the other major northeastern states, New York and Massachusetts, with respect to declaring loosely attached factory equipment as

420. See *id.* at 74.

421. For New Jersey post-1840 opinions, see *Smithurst v. Edmunds*, 14 N.J. Eq. 408, 419 (1862) (finding secured interests defeat judgment liens under the rebuttable rule); *Miller v. Pancoast*, 29 N.J.L. 250, 255 (1861) (same); *Runyan v. Groshen*, 12 N.J. Eq. 86, 93 (1858) (finding secured interests defeat good faith purchasers under the rebuttable rule); and *Doughton v. Gray*, 10 N.J. Eq. 323, 330 (1855) (finding secured interests defeat assignees for benefit of creditors under rebuttable rule).

422. See *Clow v. Woods*, 5 Serg. & Rawle 275 (Pa. 1819).

personalty. Instead, in 1828 Pennsylvania declared that brewery equipment lying on the brewery premises constituted fixtures, a part of the real estate.⁴²³ Consequently, the mechanism used in Connecticut's *Swift v. Thompson*⁴²⁴ opinion, a real estate mortgage on factory equipment, would work successfully in Pennsylvania. In fact, the first chattel mortgage statutes passed in Pennsylvania in the 1850s covered these transactions, allowing a nonpossessory secured interest in the lease of a factory along with the fixtures and equipment.⁴²⁵

Pennsylvania used another technique to achieve chattel mortgages on corporate property with debtor-corporate possession. The legislature authorized them in corporate charters.⁴²⁶ Corporations also used this authority to issue corporate bonds secured by deeds of trust in the form of a nonpossessory secured transaction.⁴²⁷ Justice Gibson specifically recognized chattel mortgages in deed of trust form under these provisions as enforceable in the Pennsylvania courts.⁴²⁸

Pennsylvania courts also recognized another nonpossessory security device used for sales — the bailment lease. In 1831, Justice Gibson had changed Pennsylvania common law to permit enforcement of a lease serving as a security interest.⁴²⁹ Thus, when the need for a filing requirement arose in the northeastern states, the need did not arise in Pennsylvania.

423. See *Gray v. Holdship*, 17 Serg. & Rawle 413, 416 (Pa. 1832) (finding mechanics lien on real estate covers unattached brew kettle); see also *Pyle v. Pennock*, 2 Watts & Serg. 390, 392 (Pa. 1841) (holding deed on rolling mill includes rolls and iron plates covering floor when challenged by assignment to benefit creditors of personalty); *Voorhis v. Freeman*, 2 Watts & Serg. 116, 120 (Pa. 1841) (finding real estate mortgage on lot includes unfastened iron rolling machinery when challenged by judgement lien on personalty); *Ovies v. Ogelsby*, 7 Watts 106, 107 (Pa. 1838) (finding real estate deed on tannery includes steam engine challenged by judgment lien); *Morgan v. Arthurs*, 3 Watts 140, 140 (Pa. 1834) (finding mechanics lien on saw-mill real estate applies to unattached steam engine).

424. 9 Conn. 63 (1831).

425. See Act of Apr. 27, 1855, no. 387, 1855 Pa. Laws 368 (concerning leases of collieries, mining land, and manufactories with fixtures and machinery); Act of Apr. 5, 1853, no. 198, 1853 Pa. Laws 295 (dealing with coal leases with machinery).

426. See, e.g., Act of Apr. 4, 1833, no. 76, § 2, 1832 Pa. Laws 144, 146 (concerning charter of Philadelphia and Reading Railroad Company: to mortgage personalty); Act of Feb. 17, 1831, no. 44, § 2, 1830 Pa. Laws 53, 55 (concerning charter of Philadelphia, Germantown, and Norristown Railroad Company: to mortgage personalty); Act of Apr. 7, 1830, no. 194, § 2, 1829 Pa. Laws 392, 393 (concerning charter of Beaver Meadow Railroad and Coal Company: to hold personalty in fee simple or lesser estate); 1811 Pa. Laws 226 (charter of Union Canal Company: to mortgage all property including personalty).

427. See, e.g., *Insurance Co. v. Union Canal Co.*, Brightly N.P. 49 (Pa. 1843) (refusing to enforce an agreement to mortgage in deed of trust form canal tolls and personalty since it was not a mortgage within the charter provision); *Ridgeway v. Stewart*, 4 Watts & Serg. 383, 393 (Pa. 1842) (enforcing a deed of trust by the Philadelphia, Germantown, and Norristown Railroad Company on a locomotive when challenged by a judgment lien); RALPH A. MCCLELLAND AND FREDERICK S. FISHER, JR., *THE LAW OF CORPORATE MORTGAGE: BOND ISSUES 2* (1937) (discussing Philadelphia and Reading Railroad Company in 1839); *id.* at 3 (discussing Beaver Meadow Railroad and Coal Company in 1839).

428. See, e.g., *Insurance Co. v. Union Canal Co.*, Brightly N.P. 49 (Pa. 1843) (refusing to enforce an agreement to mortgage in deed of trust form canal tolls and personalty since it was not a mortgage within the charter provision).

429. See *Myers v. Harvey*, 2 Pen. & W. 478, 481 (Pa. 1831).

Another major factor in the failure of Pennsylvania to adopt a filing requirement came from some of the same conditions working against the filing requirement in New York. Pennsylvania lacked a real proponent in favor of the filing requirement. The powerful commercial merchants in Pennsylvania, unlike those in Massachusetts, did not divert their moneys to manufacturing during the calamities of the Embargo of 1807 and the War of 1812. Instead, Pennsylvania merchants diverted them into minerals, and later railroads.⁴³⁰ And when Pennsylvania finally adopted the filing requirement, it aided primarily the industries of mining and railroads.⁴³¹

Pennsylvania manufacturers, unlike those in New England, did not heavily capitalize and integrate. They consisted mostly of self-made British immigrants financed thinly from their own funds, which frequently led to insolvency.⁴³² They operated their businesses under a sole proprietorship or family partnership with owner management, not the corporation with absentee owners.⁴³³ The Pennsylvania manufacturers fell into two groups, the rural mill-owners and the Philadelphian mill-owners.⁴³⁴ The rural mill-owners resembled the Massachusetts mill-owners with their location near power sources, construction of housing for workers (row houses, not dormitories), defense of high tariffs, and a stewardship culture.⁴³⁵ They differed from the Massachusetts mill-owners by leasing their factories, rather than owning them, and only in the 1830s did they integrate their mills.⁴³⁶ In contrast, the Philadelphian mill-owners owned their mills, but operated only small mills and never integrated even into the twentieth century.⁴³⁷ Consequently, when the need for a filing requirement by manufacturers arose in Pennsylvania, they, as foreigners, lacked both political and economic clout.

Sectionalism was another condition which governed Pennsylvania and operated mostly to defeat Philadelphia's commercial merchants.⁴³⁸ Ethnic backgrounds and party factionalism aggravated the sectionalism. The failure of those eastern commercial merchants to support needed transportation and education at public expense, embittered the western Scots-Irish, who gained political supremacy in 1817 in the state legislature and judiciary.⁴³⁹ Even during Jackson's administration, the Jacksonian party was split with factionalism, primarily between the Amalgamators, former Federalists, led by James Buchanan; and the Family Party, lead by Samuel

430. See SCRANTON, *supra* note 223, at 132-33.

431. See Act of May 18, 1876, no. 151, 1876 Pa. Laws 181 (regarding lumber, iron ore and oil in bulk, and upon iron tanks, tank cars, iron ore, mined and prepared for use, manufactured slate, and canal boats); Act of Apr. 5, 1853, no. 198, 1853 Pa. Laws 295 (dealing with coal leases).

432. See SCRANTON, *supra* note 223, at 37, 48, 160, 177, 270.

433. See *id.* at 3, 10.

434. See CHARLES MCKOOL SNYDER, *THE JACKSONIAN HERITAGE: PENNSYLVANIA POLITICS 1833-1848*, at 9 (1958)

435. See *id.* at 40.

436. See *id.* at 37; WALLACE, *supra* note 223, at 119-20.

437. See SCRANTON, *supra* note 347, at 42, 83, 177.

438. See LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860*, at 11 (1948).

439. See PHILIP SHRIVER KLEIN, *PENNSYLVANIA POLITICS 1817-1832: A GAME WITHOUT RULES* 7, 26, 29 (1940).

Ingham, a paper manufacturer, George Dallas, a financier, and Richard Bache.⁴⁴⁰ Henry Baldwin, the Amalgamator's candidate for the U.S. Supreme Court in 1829, defeated John Bannister Gibson, the Family Party's candidate and the same Scots-Irish Justice who introduced the *per se* fraud rule into Pennsylvania.⁴⁴¹ Consequently, passage of a bill favoring one group would require substantial lobbying for passage, not a likely event for a filing requirement that was not needed.

Antimasonry, a third condition, waxed extremely strong in Pennsylvania. Its strength lay with the poor, western farmers and the thrifty Germans of the southeast.⁴⁴² Led by Thaddeus Stevens and his egalitarian philosophy, the Antimasons in Pennsylvania polled forty percent in 1829 and by 1832 almost elected a governor and succeeded in electing thirty-four of its members to the state House, nine to the state Senate, and eight to the United States House of Representatives.⁴⁴³ But unlike Antimasonry in the other northeastern states, Stevens managed to keep the Antimasons as a force in coalition with the smaller Whigs until 1844, when Stevens, miffed by the failure to gain patronage under a Whig president, Harrison, turned against major Whig candidates.⁴⁴⁴ Stevens obtained an inquisition to investigate the Masons in return for Antimason votes for the recharter in Pennsylvania of the Second Bank of the United States, the subject of an expensive lobbying campaign from Nicholas Biddle.⁴⁴⁵ During the critical period when other northeastern states adopted a filing requirement for chattel mortgages, such legislation in Pennsylvania would require a substantial lobbying effort to overcome Antimason egalitarian principles. These conditions resulted in no chattel mortgage statute in Pennsylvania until long after the Jacksonian Era, in 1853, and then only on a very limited basis.

2. New Jersey

New Jersey also failed to pass a chattel mortgage statute for a variety of reasons. Principally, the landed aristocracy still controlled an agricultural state during the Jacksonian Era. New Jersey operated under a constitution designed for that landed aristocracy until 1844.⁴⁴⁶ It specified a weak governor with no party following and a powerful legislature that concerned itself most of the time with granting special privileges through charter grants, state contracts, divorces, and other special bills.⁴⁴⁷ Despite universal suffrage since 1807, legislators came solely from the founding families, the economically prominent, and the lawyers.⁴⁴⁸ These landed aristocratic legislators would not change the chattel mortgage rule, the rebuttable rule mandated by the 1799 passage of New Jersey Statute of Frauds for the sale of goods.

440. *See id.* at 126-29, 202, 214, 262.

441. *See id.* at 298.

442. *See* VAUGHN, *supra* note 290, at 89.

443. *See id.* at 92-94.

444. *See id.* at 98, 100.

445. *See id.* at 107-08.

446. *See* HERBERT ERSKOWITZ, *THE ORIGINS OF THE WHIG AND DEMOCRATIC PARTIES: NEW JERSEY POLITICS 1830-1837*, at 2 (1982).

447. *See id.* at 2-3, 179.

448. *See id.* at 5.

Another factor involved New Jersey's sectionalism. New Jersey manufacturing existed primarily in Essex County.⁴⁴⁹ The traditional sectionalism operated between East Jersey — influenced by New York City through heavy capitalistic investment in Newark, Elizabethtown, and Patterson industries — and West Jersey.⁴⁵⁰ West Jersey was influenced by Philadelphia.⁴⁵¹ Most East Jersey industries conducted most of their business through New York City banks.⁴⁵² And the New Jersey legislature granted charters to induce New York firms to move to New Jersey, even reserving stock for the State of New York.⁴⁵³ Since Patterson produced textile machinery, the Boston Associates lacked influence. West Jersey engaged almost exclusively in farming and fishing.⁴⁵⁴ Each section opposed the other section's internal improvements, so much so that the legislature passed no constructive legislation in the 1820s.⁴⁵⁵ Consequently, although Essex County manufacturers might have desired a filing requirement for chattel mortgages in 1832, they clearly did not have sufficient political clout to carry such a bill, lacking both manufacturing legislators and dominance even in their section of the state.

New Jersey manufacturers did not need a filing requirement. When they needed to mortgage equipment, provided they organized their manufacturing business as a corporation, they got a charter provision from the legislature.⁴⁵⁶ One such corporation, the Morris Canal and Banking Company, in 1829 and 1830 obtained the right to hypothecate by way of mortgage its charter rights and privileges, provided the company recorded the transfer in the New Jersey Secretary of State's office.⁴⁵⁷ Other corporations did not have to file.⁴⁵⁸ New Jersey lacked a strong proponent in favor of a chattel mortgage act.

449. *See id.* at 119; CADMAN, *supra* note 150, at 19.

450. *See* ERSKOWITZ, *supra* note 446, at 9.

451. *See id.*

452. *See id.*

453. *See* CADMAN, *supra* note 150, at 37, 250.

454. *See* ERSKOWITZ, *supra* note 446, at 9.

455. *See id.* at 18.

456. *See* CADMAN, *supra* note 150, at 268; ERSKOWITZ, *supra* note 446, at 177-78 (discussing sharp increase in corporate charters after 1825). The first initial such charter occurred in 1815 for a steamboat company. *Compare* Act of Feb. 11, 1815, 1815 N.J. Laws 91-92 (concerning incorporation of Pennsylvania and New Jersey Steam Boat Company charter: "to purchase . . . lands . . . goods and chattels . . . and the same . . . to mortgage, pledge") with Act of Feb. 15, 1814, 1814 N.J. Laws 104 (incorporating New Brunswick Steam Boat Ferry Company). By 1832, a charter grant to convey included the right to mortgage, *see* Leggett v. N.J. Manufg. & Banking Co., 1 N.J. Eq. 541 (1832), and after 1863, a charter grant to borrow included the right to mortgage, *see* Stratton v. Allen, 16 N.J. Eq. 229 (1863).

457. *See* Act of Jan. 28, 1830, 1830 N.J. Laws 17; Act of Feb. 23, 1829, 1829 N.J. Laws 86-87.

458. *See, e.g.,* Act of Jan. 18, 1844, 1844 N.J. Laws 2, 3-18 (concerning amendment to charter of Paterson and Hudson River Rail Road: to hypothecate by way of mortgage or trust all charter rights, franchises, and privileges); Act of Feb. 22, 1838, 1838 N.J. Laws 125, 127 (concerning amendment to charter of Morris and Essex Railroad Company: to hypothecate by mortgage or trust of all property, franchises, and charter rights).

A third factor dealt with finances. New Jersey's credit resources came from Philadelphia and New York City, not internally.⁴⁵⁹ Pennsylvania, and effectively New York, opted for the *per se* fraud rule to prevent jobbers from granting security interests to their family members and close friends to protect against execution of judgment liens held by retailer-purchasers in rural Pennsylvania and New York.⁴⁶⁰ But in New Jersey, Pennsylvanian and New Yorker jobbers comprised the close-friend endorsers, while New Jersey retailers were left with the unsecured judgment liens. To protect this out-of-state credit required the rebuttable rule since New Yorkers and Philadelphians did not approve of the filing requirement. New Jersey thus lacked a strong proponent for the *per se* fraud rule. New Yorkers and Pennsylvanians lobbied the New Jersey legislature, offering bribes for charters so that they could obtain a protective filing if needed.⁴⁶¹ These factors created no chattel mortgage statute in New Jersey until long after the Jacksonian Era, in 1864.

V. Conclusion

The northeastern states passed chattel mortgage statutes in the 1830s. The prior legal rule (the rebuttable rule), which was in place for at least several decades prior to 1830, spawned litigation to enforce a nonpossessory secured transaction challenged by a judgment lien. The rebuttable rule presumed that debtor possession of the collateral constituted fraud. Therefore, the sheriff, when levying the execution writ, would not suspend the levy merely for some alleged chattel mortgage, often contained in supplemental documentation or made orally. But the rebuttable rule also allowed the secured party to present rebuttable evidence to a jury that he made the transaction in good faith.

This litigation, through legal fees and lost cases, drove up the cost of those selling textile machinery on credit. They generally possessed good documentation for their nonpossessory security interest. At first they tried to avoid the impact of the rebuttable rule by entering a real estate transaction, a mortgage of both the land and factory, including everything in the factory, namely the machinery. The real estate transaction avoided the rebuttable rule problems since owners recorded titles to real estate in the courthouse subject to established rules providing priority to a prior recorded realty interest over a subsequent judgment lien. But by 1832, fixture law in several New England states and New York had become hostile to this approach, finding the machinery not part of the real estate and hence not covered by the real estate filing. The solution obviously involved reestablishing the filing system, this time for personalty, or at least machinery.

The risk-averse owners of large, well-capitalized corporations operating textile mills desired this change. They were former commercial merchants who, to avoid unnecessary risks during the Embargo of 1807 and the War of 1812, had shifted much of their trading capital into manufacturing. They operated integrated five-story

459. See CADMAN, *supra* note 150, at xi.

460. See Flint, *Northern Struggle*, *supra* note 28, at 57-61.

461. See CADMAN, *supra* note 150, at 10.

factories with their workforce living in nearby company towns in the Eastern New England states. They also owned other corporations that manufactured textile machinery for anyone desirous of operating a mill. Small operators would require credit sales to purchase such machinery. The risk-averse sellers would consider such credit only if secured by the machinery sold. This mandated the filing requirement. The proposed chattel mortgage acts would not need filing deadlines or priority rules since the documentation transferred title to the secured party. The filing requirement voided that transfer until filing occurred. And since only one person could have title, priority became superfluous. Either the first secured party had title, or he did not.

Those states economically, and hence politically, dominated by these risk-averse owners, passed chattel mortgage statutes quickly. The interests of the Boston Associates in Massachusetts and New Hampshire, with their machinery foundries in Massachusetts, obtained passage of two chattel mortgage statutes in Massachusetts and New Hampshire in 1832 and later in Maine, when their Maine operations became significant, in 1839. The Slater group, delayed by attempts to form coalitions with the egalitarian Antimasons, offended by the special privileges conferred by chattel mortgages, passed another chattel mortgage statute in Rhode Island in 1834. Courts in these states soon ruled that a proper filing obviated any inquiry into potential fraud, thus cutting off much of the costly litigation.

The commercial merchants who had not diverted their capital to manufacturing, but to inland distribution opposed these changes. The commercial merchants earlier operated by acquiring title to the goods they traded, both imports and exports, receiving unsecured credit from abroad and giving unsecured credit to consumers. Consequently for this group, the rebuttable rule favored the local friend as a secured party and hindered the distant, unsecured supplier. But as trading volume increased in the Jacksonian Era, capital requirements of this procedure became too great. So importers turned to consignments, with title remaining in the supplier and drastically reducing their need for credit. These consignment wholesalers later applied the same principle to distributing domestically manufactured goods. The exception became the Boston Associates, whose exclusive distributor took title. But these importers no longer sold to the consumer. Instead they sold to jobbers who sold to retailers. These latter two groups did take title to the goods they sold, and hence sometimes needed credit. That credit ultimately came from the consignment wholesaler. So in the Jacksonian Era, the local friend as a secured party-endorser became the few powerful, rich port-city creditors, while the unsecured judgment lien comprised the much more numerous retailer-purchasers.

Those states dominated by these small businessmen and retailer-purchasers rejected the filing requirement as legitimizing the chattel mortgage. These retailers dominated in New York and Pennsylvania where the manufacturers remained small and constituted a smaller portion of the economy. The consequence resulted in the adoption of the *per se* fraud by the judiciary in Pennsylvania in 1819 and the adoption of a chattel mortgage statute in New York in 1833, not as a protective act, but as another ground on which to declare the nonpossessory secured transaction fraudulent.

Three states lacked dominance by either group. Before 1831, both Connecticut and Vermont indicated leanings toward the retailer-purchasers. Their judiciaries adopted

the heightened rebuttable rule. No longer would a jury determine the existence of fraud in the presence of debtor possession of the collateral. Instead, the judges would. They always held that a nonpossessory secured transaction alone did not rebut fraud. But Eastern Connecticut had significant ties to the manufacturer groups in Rhode Island. So these conditions in 1832 produced a chattel mortgage statute solely for manufacturing equipment, retaining the heightened rebuttable rule for all other situations. During the 1830s, Vermont developed a woolen industry centered on capitalistic production of sheep, becoming suppliers to woolen textile mills. Although Vermonters drove most of their sheep to Boston, Vermont had enough woolen textile mills that in 1838 they adopted the Connecticut solution to the problem. Vermont adopted a chattel mortgage act solely for manufacturing equipment, retaining the heightened rebuttable rule for all other situations. The remaining state, New Jersey, lacked sufficient manufacturing or retailing to abandon its rebuttable rule until 1864.

The significance of this episode lies in what it reveals about history, historiography, and jurisprudence. Previously, the tale of the adoption of the chattel mortgage acts claimed that courts found chattel mortgages fraudulent from their introduction around 1600 until the passage of the chattel mortgage statutes in the 1820s, caused by the increase in value of personalty wrought by the Industrial Revolution. But this study has shown that in the northeastern states, courts accepted chattel mortgages as legitimate transactions prior to the passage of the chattel mortgage statutes, which occurred in the 1830s, not the 1820s. Consequently, the chattel mortgage statutes did not legalize the transaction. They functioned to avoid potential litigation in routine transactions deemed necessary by textile machinery sellers.

Moreover, the increase in the value of personalty generally did not spur their passage. Instead, the 1831 failure of attempts to avoid litigation through realty mortgages spawned the chattel mortgage statutes. But a group that preferred the *per se* fraud rule dominated in Pennsylvania and New York. So the chattel mortgage acts did not result from the Industrial Revolution, but from an interaction of two changes that occurred in the northeastern states. First, large, well-capitalized textile corporations whose owners sought to avoid risk when selling their side product of textile machinery developed. They wanted unquestioned enforcement of the chattel mortgage. And this group did not develop in each northeastern state, but only in Eastern New England. The other change involved the development of a multistep product distribution system, the credit-granting portion of which did not hold title to the distributed goods and the credit-receiving portion of which held title. This latter group also did not develop equally in each northeastern state, but concentrated in, and dominated, Pennsylvania and New York. These two developments explain the differences between Massachusetts, New Hampshire, and Rhode Island on the one side and Pennsylvania and New York on the other. Previously, traditional history did not even recognize the difference, much less explain it, other than to claim that after the passage of the supposedly legalizing chattel mortgage statutes the courts remained hostile to them.⁴⁶²

462. See BAIRD & JACKSON, *supra* note 36, at 35.