

Michigan Law Review

Volume 46 | Issue 2

1947

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Recommended Citation

Kenneth K. Luce, *SALES RATIONALE OF DURABLE PRODUCT DISTRIBUTION*, 46 MICH. L. REV. 187 (1947).

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SALES RATIONALE OF DURABLE PRODUCT
DISTRIBUTION**Kenneth K. Luce* †

THIS paper has been prepared to add the writer's bit to the long term struggle for uniformity in the commercial law, and particularly to point to some of the statutory changes in the law affecting distribution of durable goods which have added confusion where once the common law appears to have been on its way to a system more uniform and in accord with business practice and understanding.

Some of the confusing problems may be suggested by assuming bankruptcy of a dealer in some class of durable goods; for instance, radios, refrigerators, automobiles, pianos or stoves. Prominent in the ensuing race for priority are the manufacturers and finance companies who have financed the dealer's stock and who file preferred claims, or petitions for reclamation, as to the items of stock covered by their security contracts with the dealer. Such contracts present a variety of forms; for instance, conditional sale, chattel mortgage, trust receipt, consignment, and possibly hybrids impossible of classification in any form from a mere reading of the language they contain. Some of these may have been recorded as chattel mortgages, conditional sales, or otherwise. Opposed to such claims by the financiers of the dealer's stock are the claims of other creditors; some unsecured; some who prior to bankruptcy acquired valid liens upon items of the stock by taking and recording chattel mortgages at the time they made their loans, or later through the process of judgment and levy. Finally the trustee may see fit to commence conversion and replevin actions against individuals who have purchased items from the stock in the usual course of the dealer's business.

Such problems of legal priority must be considered with reference to their place in the general legal scheme regulating movement of durable goods from producer to consumer. The jurist deals directly here with current business organization and marketing practice, and obviously it is impossible for him to give intelligent consideration to the problems presented without knowledge of and close atten-

*The writer expresses appreciation to John B. Baker, legal department, Allis Chalmers Manufacturing Company, for valuable comment and criticism furnished during preparation of this article.

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tion to the business background generally, and particularly to the business function performed by each party interested in the goods as they proceed from producer to ultimate consumer.

The manufacturer is primarily interested in obtaining his money as soon as possible after the goods leave his factory, or before if it can be so arranged. He may be willing to concede a discount to the entrepreneur, who will assume the financial burden from that point, and thereby free his working capital. Almost always the product is distributed through middlemen, the dealers and retailers, who deal directly with the ultimate consumer. Usually the dealer does not command the capital necessary to carry his stock of durable goods alone, first, during the period between production and sale to the consumer, and second, during the period between delivery of possession to the consumer and the latter's final installment payment. The dealer must seek the aid of some financier, and the producer finds such aid expedient although his motive may be other than the economic necessity which impels the dealer. Even those manufacturers who have elected to do their own financing have found it economically desirable to set the financing function apart from production through delegation, usually to a subsidiary corporation. It is noteworthy that in the relatively brief twenty-five or thirty years during which this distribution structure has been developing on a large scale, it has been the finance companies, and not the banks, who have assumed the principal burden of investment in the floating dealer stock of durable goods. The reluctance of banks to enter the field suggests the risks involved.

The business situation requires that the dealer or retailer have possession and control of the goods during the financing period. He must place them on his show room floor, and demonstrate and handle them in all the ways demanded by the competition of the market. Meanwhile the finance company or manufacturer bears the principal burden of investment, and the parties contemplate that the financier will be paid when the goods are sold to the consumer, or perhaps not until the consumer pays his last installment. So long as things proceed in normal fashion this is what happens, and it makes little difference to anyone how the law views the process. However, the freedom of action with reference to the goods given through practical necessity to the dealer opens to him a multitude of opportunities for nefarious dealing with third parties. The financier cannot stand constant guard over the dealer and the goods, and must rely upon the law for his principal protection against the consequences of such dealing.

If the dealer betrays him, the financier is confronted with the ap-

pealing case of the innocent third party who, for reasons of varying merit, has paid for what he thought was a primary interest in the goods. Even a judicial practice of sending such cases to the jury will throw an incalculable risk into the business of the financier. It should not be difficult to understand that the extent to which the law will protect the financier against such loss may have some indefinable bearing upon the ultimate shape of our distribution system in durable goods. The motivation for a dealer's nefarious dealing with third parties is almost always financial difficulty, and denial to the financier of fair and adequate legal protection, or confusion in the law as to his rights, can be potent influences toward ultimate concentration of the dealer function in a few large and financially proven hands in each field of durable product distribution. Certainly, the attitude of the law and the degree to which it is settled will have some influence upon the policy of the financier group toward the small dealer. On the other hand the protection given the financier against dealer perfidy surely need not be made absolute in order to provide a flow of capital adequate to support the small dealer class. Surely economic policy will be found to harmonize with legal rules which throw the loss upon the financier as against a third party whose ethical position is impregnable. The financier's rights against a third party must depend as well upon who the third party is. At least this was the line followed by the common law governing the factor relation when it drew its distinction between the factor's creditors and those who purchased innocently from him in the ordinary course of his business.

The relative uniformity indicated in the common law in this field has been supplanted by the considerable and widespread confusion which exists today. It is the feeling of the writer that this confusion exists principally because of the effect upon court decisions of statutory requirements and legal concepts which bear no realistic relation either to the economic situation or to the ethical positions of the parties involved. The lines certainly can and must be drawn more clearly and uniformly than the law draws them today. It is for the judges who decide the cases and the legislators who write the statutes to consider the means to correlate again the economic and ethical considerations involved.

The common law background is dominated by the policy of caveat emptor.¹ A man must not be suffered to lose his property without his authorization or consent, or at least his fault. He must in some degree

¹ See Waite, "Caveat Emptor and the Judicial Process," 25 COL. L. REV. 129 (1925).

have been negligent; for example, allowed himself to be defrauded into a volitional act. The outlines of the law are clear. The purchaser who buys from a thief takes nothing regardless of his subjective innocence.² But the dealer in durable goods holds the possession, not only with the consent of the maker, consignor, or financier, but with the latter's express authorization for sale in the market. Such express authority is often subjected to conditions, but the dealer is at least a bailee for the purpose of sale in the market, and his immediate ancestor in the law is obviously the factor, the consignee for sale on commission.³ This would appear to be so regardless of whether the dealer holds the goods, not strictly as agent on consignment, but under some security arrangement which imposes upon him the risk of loss and awards to him for many purposes the beneficial ownership.⁴ Caveat emptor relaxes its grip to increase a factor's power. The factor has the power, unknown to the thief or the mere possessor, to pass all the owner's property in the consigned goods to an innocent purchaser in the ordinary course of the factor's business.⁵ Sometimes this power has foundation in actual, or express, authority given the factor by the consignor.⁶ Sometimes actual authority fails because it is

² WILLISTON, SALES, § 311 (1909); Uniform Sales Act, § 23, 1 U.L.A. §§ 189-190 (1931); AGENCY RESTATEMENT § 174, p. 417 (1933), where it is stated: "A disclosed or partially disclosed principal who entrusts an agent with a chattel, . . . but who does not authorize him to transfer or otherwise affect the principal's interests therein, is not thereby affected by a transaction between the agent and a third person."

³ 2 MECHEM, AGENCY, 2d ed., § 2497 (1914); *Beardsley v. Schmidt*, 120 Wis. 405, 98 N.W. 235 (1904); *Steffen and Danziger*, "The Rebirth of the Commercial Factor," 36 COL. L. REV. 745 (1936).

⁴ *N.Y. Sec. & Tr. Co. v. Lipman*, 157 N.Y. 551, 52 N.E. 595 (1899); *Commercial Credit Corporation v. Northern Westchester Bank*, 256 N.Y. 482, 177 N.E. 12 (1931); *Capitol Motor Corp. v. Lasker*, 138 Va. 630, 123 S.E. 376 (1924); The Massachusetts court recognizes the dealer under a trust receipt as a factor within the meaning of the Factor's Act. In *Associates Discount Corp. v. C. E. Fay Co.*, 307 Mass. 577 at 581, 30 N.E. (2d) 876 (1940), the court stated: "But it is well settled that such a transaction is valid at common law so far that the title of the party financing the transaction is protected, except as against a vendee in some instances under the so called factor's act, . . . and general principles of agency. . . ." In 307 Mass. 577 at 581, the court further stated: "The so called factor's act, (G. L. [Ter. Ed.] c. 104) in § 1, provides: . . . One who is the so called trustee under a trust receipt, with authority to sell . . . is a 'factor or other agent' within that section."

⁵ WILLISTON, SALES, § 329 (1909); *Romeo v. Martucci*, 72 Conn. 504, 45 A. 1 (1900).

⁶ The factor has implied authority to sell in his own name in the absence of contrary instructions; 2 MECHEM, AGENCY, 2d ed., § 2505 (1914); *Commonwealth Finance Co. v. Schutt*, 97 N.J.L. 225, 116 A. 722 (1922); *Rogers v. Whitney*, 91 Vt. 79, 99 A. 419 (1917).

conditioned upon the factor's notifying the consignor and obtaining consent for each individual sale, or upon the factor's paying the consignor the price prior to each sale. Where such conditions are secret and undisclosed to the market purchaser, apparent authority is the foundation for the factor's power to pass a clear title to the purchaser where actual authority has failed.⁷ But such power stops with the factor's actual or apparent authority to sell, and does not extend to give any priority in the goods to his pledgee or lienor or other creditors generally,⁸ unless he is in one of those few jurisdictions possessing a factor's act.⁹ In such jurisdictions caveat emptor is sacrificed by legislative fiat to caveat dominus, and the consignor or financier loses out through operation of the statute to certain defined creditors of his factor, as well as to purchasers from the factor in the market.¹⁰

Often where a manufacturer or financier has placed possession of goods with another for sale to the consumer, there has been occasion for the courts to decide whether the relation between them was that of principal and agent, or seller and buyer.¹¹ As between manufacturer

⁷ 1 WILLISTON, SALES, 2d ed., § 314, p. 720 (1924); BENJAMIN, SALES, 1st Am. ed., § 19 (1875); *Boice v. Finance and Guaranty Corp.*, 127 Va. 563, 102 S.E. 591 (1920); *Bernhagen v. Marathon Finance Corp.*, 212 Wis. 495, 250 N.W. 410 (1933).

⁸ *Paterson v. Tash*, 2 Strange 1178 (1743); *Daubigny v. Duval*, 5 T.R. 604 (1794); *Commercial Credit Corp. v. Colando*, 125 N.J.L. 285, 15 A. (2d) 762 (1940); 14 A.L.R. 424-427 (1921); 2 MECHEM, AGENCY, 2d ed., § 2509 (1914); WILLISTON, SALES, § 317 (1909); 1 AGENCY RESTATEMENT, § 175 (1933), which reads: "(1) A disclosed or partially disclosed principal who entrusts a special agent with the possession of a chattel, . . . with directions to deal with it in a particular way, as by sale, barter, pledge, or mortgage, is not thereby affected in his interests by a transaction of a kind different from that authorized.

(2) The principal is affected in his interests by a transaction of the same kind as that authorized if it is conducted in the usual course of business by an agent dealing in such chattels with one who reasonably believes that the agent is authorized."

⁹ *Freudenheim v. Gütter*, 201 N.Y. 94, 94 N.E. 640 (1911); 2 MECHEM, AGENCY, 2d ed., § 2511 (1914), where the English statute and those of Maine, Maryland, Massachusetts, Ohio, Pennsylvania, and Rhode Island are cited and discussed, and where it is stated that early statutes in Kentucky and Wisconsin were repealed. Such statutes are in effect also in California, Montana, New York, North and South Dakota, and perhaps in other states.

¹⁰ See 1 AGENCY RESTATEMENT, § 175, comment b (1933), where it is stated: "Statutes have frequently changed the rule stated in this Section as to certain types of agents. Factors Acts providing that the pledge of the goods of consignors by factors is valid under certain conditions, although contrary to the orders of the consignor, are common."

¹¹ See *Weir Plow Company v. Porter*, 82 Mo. 23 (1884), and cases cited in 2 MECHEM, AGENCY, 2d ed., § 2499 (1914).

and dealer the decision as to the nature of their relation may have important consequences, and may turn upon seemingly minute provisions in their contract. For instance, a factor may be liable for the price under the terms of the contract, and still be found not subject as buyer to the risk of loss.¹² The factor has a personal possessory lien for his advances, and the conditional buyer a transferable property interest in the goods measured by what he has paid.¹³ Policy may dictate that the financier may not enlarge upon statutory rights to repossess and foreclose by labelling his contract with a dealer something other than a conditional sale or a chattel mortgage.¹⁴ But in the absence of recording requirements it makes little difference to the third party, creditor of or purchaser from the dealer, whether the manufacturer or financier has retained his property interest in the goods through strict consignment, chattel mortgage, conditional sale, bailment lease or trust receipt. The power of the third party to appropriate the property interest of the manufacturer or financier must depend ultimately upon principles of agency—upon the extent to which the dealer has been the recipient of actual or apparent power to deal with the goods.¹⁵ The conditional

¹² See MECHEM, *ibid.*, where it is stated that this is usually the case where the factor sells upon a *del credere* commission.

¹³ 2 MECHEM, AGENCY, 2d ed., §§ 2559, 2561 (1914); 2 AGENCY RESTATEMENT, § 464 (b), (c) (1933).

¹⁴ Policy may demand that the financier holding a trust receipt comply with statutory procedure governing conditional sales and chattel mortgages upon repossession and foreclosure. See *McLeod Nash Motors, Inc. v. Commercial Credit Trust*, 187 Minn. 452, 246 N.W. 17 (1932). But does consistency make it necessary for the trust receipt to be regarded again as a chattel mortgage where the rights of the financier against third parties are in issue?

¹⁵ Section 23 of the Uniform Sales Act, 1 U.L.A., § 23 (1931), reads in part: "(1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." Cases involving the subject matter of this section, not complicated by recording requirements, indicate that the owner is precluded where the seller is performing the function of factor and the buyer buys in the ordinary course of the seller's business, but not generally otherwise; and this is true regardless of whether the seller holds the goods as conditional vendee, bailee, consignee, or in some other relation to the owner. The owner-financier prevails: *Sherer-Gillett Co. v. Long*, 318 Ill. 432, 149 N.E. 225 (1925) (conditional seller); *William Birns, Inc. v. Fritz*, 199 N.Y.S. 540 (1923) (bailor of furniture); *Ford Motor Co. v. National Bond & Investment Co.*, 294 Ill. App. 585, 14 N.E. (2d) 306 (1938) (conditional seller). The third party-purchaser prevails: *Glass v. Continental Guaranty Corp.*, 81 Fla. 687, 88 S. 876 (1921) (trust receipt); *North American Acceptance Corp. v. Meeks*, 146 Neb. 546, 20 N.W. (2d) 504 (1945) (conditional sale); *Western States Acceptance Corp. v. Bank of Italy*, 104

buyer may with consistency be given the agency powers characteristic of a factor, and these are the basis of a third party's right against the conditional seller. In other words, regardless of the form of the agreement between dealer and manufacturer or financier the rights of a third party to priority may, in the absence of recording complications, be controlled by the common law principles of agency applied in the factor situation.¹⁶

The qualification, "in the absence of recording complications," obviously makes the above statement largely one of what the law might have been. More correctly, what has been stated is the law except where results have been changed through the operation of recording statutes, whether correctly or mistakenly applied, and where results have been changed because the mechanics through which the finance companies have entered the picture have served to obscure the dealer's function as a factor. And reading the decisions will disclose that results have been changed sufficiently often to justify a statement that there is more confusion than law on the subject today.

The impact upon the law of the revolution in marketing which developed in significant proportion in the years immediately following World War I was staggering, and judicial conflict was perhaps an in-

Cal. App. 19, 285 P. 340 (1930) (trust receipt); *American Aggregates Corp. v. Wente*, 100 Ind. App. 59, 190 N.E. 552 (1934); *L. B. Motors, Inc. v. Prichard*, 303 Ill. App. 318, 25 N.E. (2d) 129 (1939) (conditional sale); *Simons v. Northeastern Finance Corp.*, 271 Mass. 285, 171 N.E. 643 (1930) (trust receipt); *Universal Credit Co. v. Reily*, 171 Okla. 286, 42 P. (2d) 516 (1935) (trust receipt); in *Commercial Motors Mortgage Corp. v. Waters*, 280 Pa. 177, 124 A. 327 (1924) (bailment lease), the court stated at 180: "While 'placing the truck on exhibition in a sales room,' where the bailee was engaged in buying and selling, would not, of itself, estop the owner from asserting his title, this fact, coupled with the positive evidence of an intimate relationship from which the fact of agency may be predicated, would be sufficient to protect an innocent purchaser . . ."; and in *Jones v. Commercial Investment Trust*, 64 Utah 151, 228 P. 896 (1924) (trust receipt), the court stated at 64 Utah 170: "It does not seem to be necessary to a proper determination of the case to attempt an exact definition of the relationship existing between the appellant (C.I.T.) and the Naylor-Woodruff Motor Company. It may be assumed that they stood in the relation of conditional vendor and conditional vendee, or cestui que trust and trustee, bailor and bailee for the purpose of sale, principal and agent, or in some possible legal combination of these relationships. . . . No recording statute is involved."

¹⁶ As against third parties the significance of the label placed upon the relation between financier or manufacturer and dealer as consignment, conditional sale or chattel mortgage, rests entirely upon the fact that recording of conditional sales and chattel mortgages is commonly provided for by statute, whereas, with rare exceptions, it is not so provided in the case of consignment. 3 JONES, *CHATTEL MORTGAGES AND CONDITIONAL SALES*, 6th rev. ed., § 964 (1933).

evitable consequence. The traditional consignor-factor arrangement was a two-party one. Now the finance company entered as a third party to perform the function of carrying the financial burden during the distribution period after manufacture. The substitution of the finance company for the manufacturer in the traditional arrangement was deceptive. From the business point of view there would seem little or no reason for any change in the law. The finance company had simply stepped into the shoes of the consignor, and should have received the same treatment from the law as regards its property interest as did the consignor under the common law principles governing the factor relation. But the solution is not so simple because of the complicated mechanics involved in substituting the finance company for the manufacturer.

Sometimes, especially where manufacturer and dealer are located in the same city or area, the business transaction through which the finance company enters the picture takes place after the transfer direct from manufacturer to dealer of possession of the goods. In such event, regardless of the name used by the finance company and dealer to designate their contract, the transaction has the earmarks associated in the legal mind with conditional sales and chattel mortgages. It will look like a loan from finance company to dealer of money used to pay off the manufacturer, and the arrangement between finance company and dealer becomes a chattel mortgage.¹⁷ Or it will assume the appearance of a conditional sale from manufacturer to dealer, assigned by manufacturer to finance company. Of course, as an original proposition no³ juridical heresy is evident in calling the dealer a conditional buyer or chattel mortgagor, and, as a matter of fact, such legal classification places risk of loss on the dealer where it usually belongs and eliminates any necessity for specific contract provision concerning it. The difficulty again is that such classification carries with it certain statutory consequences, particularly with regard to the recording requirements.¹⁸

¹⁷ See *Motor Bankers Corp. v. C.I.T. Corp.*, 258 Mich. 301, 241 N.W. 911 (1932).

¹⁸ *People's Loan & Investment Co. v. Universal Credit Co.*, (C.C.A. 8th, 1935) 75 F. (2d) 545; in *Mershon v. Moors*, 76 Wis. 502, 45 N.W. 95 (1890), priority was awarded to the banker-financer against the creditors of the dealer-importer, a result in accord with conventional factor law. The court labelled the trust receipt a conditional sale, but this did not affect the common law result because there was no applicable requirement that the conditional sale be recorded. See 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES, 6th rev. ed., § 33 (e) (1933), where it stated; "As to the original parties, therefore, the dominant purpose of the courts whenever liti-

One cannot generalize with respect to the effect of chattel mortgage recording acts. Sometimes an unrecorded chattel mortgage is by statute ineffective except as between the parties thereto, and sometimes it is even ineffective against creditors with notice.¹⁹ A conditional sale contract, to quote the Uniform Conditional Sales Act, is void "as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale."²⁰ If, in addition to being a factor, the dealer may be a conditional buyer or chattel mortgagor, then the finance company which has not recorded this security interest will, in the event of dealer insolvency, lose its property interest and priority to an indefinitely broad class of dealer creditors.²¹ Reference is being made here only to the financier who, by the business process of substitution described above, has stepped into the shoes of the manufacturer or consignor in what has been recognized traditionally as a factor situation, where the governing legal principles are those of agency and are clear. Much confusion arises from failure to recognize the situation itself as a factor relationship, as distinguished from simple debtor-creditor secured by mortgage or pledge, and this type of confusion will exist independently of that which arises upon application of recording statutes to a recognized factor situation. Clearly, a further

gation has arisen with respect to contracts of doubtful legal classification, has been to ascertain and give effect to the intention of the parties, as to whom it is generally of little significance whether the transaction be called a trust receipt or a mortgage. When the rights of strangers to the transaction are asserted, however, usually the creditors of, or purchasers from, the receiptor or the mortgagor, problems freighted with greater difficulties arise. The question then is presented as to whether the instrument evidencing the agreement was required to be recorded."

¹⁹ *C.I.T. Corp. v. Wallerman*, 242 Wis. 287, 7 N.W. (2d) 884 (1943). See generally, 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES, 6th rev. ed., §§ 237-247 (1933).

²⁰ 2 U.L.A., § 5 (1922). In *Universal Credit Co. v. Finn*, 212 Wis. 601, 250 N. W. 391 (1933), a lien creditor by attachment was held to prevail against a conditional seller who failed to record within the ten days, even though the creditor had actual knowledge of the contract within the ten days.

²¹ A holder of an unrecorded trust receipt, held a conditional sale, loses priority to dealer's trustee in bankruptcy who stands as a lien creditor without notice from the time of the filing of the petition: *Industrial Finance Corporation v. Cappelmann*, (C. C.A. 4th, 1922) 284 F. 8; see also *C.I.T. Corp. v. Seaney*, 53 Ariz. 72, 85 P. (2d) 713 (1938), noted in 87 Univ. Pa. L. Rev. 742 (1939); 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES, 6th rev. ed., §§ 237-247 (1933).

fact essential to the existence of the factor relation is that the goods in question be held by their possessor for resale and not for use. The defect in the recording acts generally lies in their failure to distinguish between situations on this basis, with the result that the financier in such a factor situation whose contract with his dealer is of a type subject to some recording statute stands to lose against the dealer's creditors unless the contract is recorded. This may be true even in a court which correctly appraises the business situation between financier and dealer as a factor relation. Such a result differs widely from that obtainable through application of common law principles of agency to the factor relationship. The question arises whether such results are justified by anything in the ethical or business situation of the parties. The answer may be sought by inquiring: first, into the historical reasons for imposing such record requirements as to chattel mortgages and conditional sales; and second, into the business situation, of which the dealer is the hub, to see if the record requirements have any place or serve any useful function there.

Chattel mortgage recording acts were enacted to enable a debtor to retain possession of personal property encumbered by mortgage lien, and at the same time to give his creditor a mortgage security good against third parties. The common law aversion to secret liens required some such practical substitute for open transfer of possession of the property mortgaged to the mortgagee.²² The conditional sale differed principally in that the secret lien, against which the recording requirement was directed, originated in a transfer by the lien claimant of the possession of the goods, and not in a loan of money. The debt which the lien was intended to secure represented the price of the goods transferred in the one case, and a loan of money in the other.²³ Whether the secret lien originated with a loan of money to the possessor of the goods, or with a transfer of the possession of the goods, it usually related to goods contemplated by the parties to remain in the permanent possession of the borrower or conditional buyer.²⁴ They were goods

²² I JONES, *id.*, § 176.

²³ *LaSalle Mortgage & Discount Co. v. Horan*, 307 Ill. App. 548, 30 N.E. (2d) 785 (1940); *New Dells Lumber Co. v. Piffner*, 216 Wis. 638, 258 N.W. 375 (1935); I JONES, *CHATTEL MORTGAGES AND CONDITIONAL SALES*, 6th rev. ed., §§ 26-33, where the author states at p. 47: "If there is no previous debt, but one is created at time of sale, and this is made merely as security for the loan, there is a strong indication that the transaction is a mortgage. It is an important element in the transaction that the negotiation commences by a proposition to borrow or lend money."

²⁴ WILLISTON, *SALES*, § 327 (1909): "Conditional Sales have become so common

used by him permanently in his home or business, not goods held by him as a distributor for sale. They were the pianos in living rooms, the threshers and wagons on the farms, and the lathes in machine shops. They were not the automobiles, refrigerators and radios standing on the show room floors of factor-dealers. No doubt the lender of money to the farmer, the home owner, or even the small factory owner should be allowed to rely for the good of business in normal circumstances upon his prospective debtor's alleged unencumbered ownership of his physical personal property. At least the common law aversion to the secret lien necessarily assumes the reasonable nature of such reliance as a matter of business custom and understanding. The statutory requirement, then, that the holder of a mortgage or other lien upon goods permanently possessed for use by the borrower or conditional buyer must record such lien locally or forfeit any priority against later creditors was in harmony with common business understanding.²⁵ It seems just as clear that the dealer, who holds possession of goods for sale and not for use, does not fit too well into this historical and functional pattern. To give his later creditors the benefit of the recording requirements pertaining to chattel mortgages and conditional sales, as against the financier of his stock, is to enforce such requirements in a business situation in many ways not analogous to that which made them necessary. However, historical incompatibility is not itself a reason for eliminating the requirement in the dealer-financier situation. It should be determined further whether recording operates there in a manner unfair to the parties, contrary to business understanding, or injurious to healthy business development. This leads to the second question posed in the preceding paragraph.

To enforce chattel mortgage and conditional sale contracts under recording statutes the finance company is required to record and discharge on the public record once for each item of durable goods passing through the dealer's stock. Particularly in the case of large dealers and rapidly floating stocks, such a requirement may become so burdensome as to cause the finance company to cease compliance as a matter of business policy and to take its chances on dealer insolvency.²⁶ Of course, in

under modern methods of business and are so deceptive both to purchasers from the buyer and to the buyer's creditors, since the buyer not only has possession of the property but ordinarily is entitled to use it and does use it as if it were his own, that recording acts have been passed in many States."

²⁵ VOLD, SALES, § 113 (1931).

²⁶ Hanna, "The Extension of Public Recordation," 31 COL. L. REV. 617 at 635 (1931).

the event of such insolvency the finance company forfeits any priority to the dealer's subsequent creditors, a result often contrary to that reached at common law. Arrival at opposite results depending upon the applicability of recording statutes suggests that one or both of them are contrary to business practice and understanding, and perhaps obstructive to desirable business development. Examination of the business position occupied by the dealer's subsequent creditors is suggested. Inquiry in the business world reveals that banks and others who loan to dealers do not as a rule rely on the dealer's possession of his floating stock as evidence of his unencumbered ownership thereof, nor do they generally consult the public records in considering the advisability of a loan. Instead, the practice seems almost universal to rely solely upon the financial statement of the dealer and upon credit reports from agencies specializing in credit conditions in the industry.²⁷ Nor do these agencies rely to any extent upon what the public records say about current encumbrances on the dealer's floating stock, but rather more upon his past credit and earnings record and his current condition as disclosed by the financial statement. In the face of such business practice, to award priority to the dealer's subsequent creditors as against a financier of his stock who has failed to comply with the burdensome recording requirements is to award such creditors an undeserved windfall, because their priority depends for justification upon a false assumption of reliance upon the public record. As between the parties such result seems unfair. And the writer has yet to discover any considerations of policy conducive to sound business development which should justify such complete reversal of the common law point of view.

It has been noted that the courts have been inclined to an annoyingly unpredictable extent to apply the recording requirements for chattel mortgages and conditional sales to the security arrangement between dealer and financier. One result has been development in domestic commerce of devices for expression of this security arrangement which bear the minimum possible resemblance to a conditional sale or chattel mortgage agreement. Most representative has been the trust receipt, which device was introduced from the foreign import trade

²⁷ See the results of a considerable statistical study reported in Hanna, "The Extension of Public Recordation," 31 *COL. L. REV.* 617 (1931); and inquiries made by the author of administrative employees of credit agencies support the conclusion stated. One stated that checking such public records will be resorted to only after illegal or questionable practices or conditions have been otherwise indicated. See also "Sources of Credit Information," BECKMAN, *CREDITS AND COLLECTIONS IN THEORY AND PRACTICE*, 4th ed., Part II (1939).

where it had long been in use in the tri-partite transactions characteristic there.²⁸ It has been the subject, in a number of states, of legislation which gives recognition to the real nature of the security arrangement between financier and dealer.²⁹ Such legislation imposes a practical and feasible recording requirement, designed to eliminate the burden of recording and discharging for each item of floating stock. It requires the financier for protection of his priority to record only once in a named central office the fact of its extension of a line of dealer credit to a particular dealer.³⁰ But in the majority of states the trust receipt remains open to attack as a conditional sale or chattel mortgage in disguise, and attack has been successful sufficiently often to make legal advice hazardous and uncertain in the absence of a clear precedent in a particular jurisdiction.

The writer will not consider the trust receipt at length. This has been done by others.³¹ Normally the trust receipt is used in what has been called a tri-partite arrangement. The manufacturer ships the goods, usually on order bill of lading, and sends the bill of lading with bill of sale, trust receipt, and draft on the dealer for a small down payment to the finance company or its bank at the dealer's location. The

²⁸ The trust receipt was adopted into domestic commerce from the foreign import trade where this type of security was first developed, and where it was generally regarded as a type of security distinct from the chattel mortgage and the conditional sale. See *Moors v. Kidder*, 106 N.Y. 32, 12 N.E. 818 (1887); *Century Throwing Co. v. Muller*, (C.C.A. 3d, 1912) 197 F. 252; *Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520, 36 S. Ct. 194 (1916). Even where used in the import trade, some courts not overly familiar with business practice in that trade were inclined to label the trust receipt a conditional sale: *Mershon v. Moors*, 76 Wis. 502, 45 N. W. 95 (1890); see Prefatory Note of National Conference of Commissioners on Uniform State Laws (1933), 9 U.L.A. 665 (1942).

²⁹ At the beginning of 1946 the Uniform Trust Receipts Act, approved by the National Conference of Commissioners on Uniform State Laws in 1933, had been enacted in twenty-one states: N. Y. Laws (1934) c. 574; Cal. Stat. Ann. (Deering, 1935) c. 716; Ill. Laws (1935) p. 1315; Ind. Laws (1935) c. 206; Ore. Laws (1935) c. 224; Mass. Laws (1936) c. 264; Conn. Laws (1937) c. 230a; Tenn. Laws (1937) c. 89; N. J. Laws (1938) c. 294; N. H. Laws (1939) c. 196; Md. Laws (1941) c. 268; Nev. Laws (1941) c. 128; Pa. Laws (1941) p. 307; Minn. Laws (1943) c. 433; Wash. Laws (1943) c. 71; Va. Laws (1944) c. 368; Idaho Laws (1945) c. 73; Mont. Laws (1945) c. 147; N. D. Laws (1945) c. 320; S. D. Laws (1945) c. 169; Utah Laws (1945) c. 131.

³⁰ Uniform Trust Receipts Act, § 13; *Universal Credit Co. v. Citizen's State Bank of Petersburg*, (Ind. 1945) 64 N.E. (2d) 28; *Commercial Credit Corp. v. Horan*, 325 Ill. App. 625, 60 N.E. (2d) 763 (1945); *Donn v. Auto Dealer's Investment Co.*, 385 Ill. 211, 52 N.E. (2d) 695 (1944).

³¹ Bacon, "A Trust Receipt Transaction: I," 5 *FORDHAM L. REV.* 17 (1936); Bogert, "The Effect of the Trust Receipts Act," 3 *UNIV. CHI. L. REV.* 26 (1935).

dealer receives a copy of the invoice covering the goods shipped. Upon notification of arrival of the goods, the dealer pays the draft, executes the trust receipt, and receives the bill of lading and, thereupon, possession of the goods from the carrier. The financier pays the manufacturer the difference between the down payment and the purchase price, and since the down payment is usually relatively small, the financier's margin of security is small.³² Some decisions appear to hold that so long as the deal remains tri-partite at least in form, the trust receipt will be recognized as a security device essentially different from a chattel mortgage or conditional sale, and will be awarded priority against subsequent lien creditors of the dealer even though unrecorded.³³ But if the tri-partite form is perverted even slightly with a resulting appearance of direct dealing between manufacturer and dealer, and in many cases where the tri-partite form is strictly followed, the court may brand the trust receipt a mere disguise and ineffective against the dealer's creditors unless recorded.³⁴ Such distinctions seem purely legalistic, and obviously not founded upon any substantial difference in the commercial functions performed by the respective parties. In some situations, for instance where the intervention of a carrier between manufacturer and dealer is not necessary, such distinctions may well force the use of unnecessary red tape in order to preserve legally the tri-partite form. This should be wholly baffling to the business man.

One remedy for the confusion attending the use of the trust receipt is the legislation noted in a preceding paragraph. In the fourteen years

³² For description of the business transaction, see *Chichester v. Commercial Credit Co.*, 37 Cal. App. (2d) 439, 99 P. (2d) 1083 (1940).

³³ *In re James, Inc.*, (C.C.A. 2d, 1929) 30 F. (2d) 555; *In re A. E. Fountain, Inc.*, (C. C. A. 2d, 1922) 282 F. 816; *People's Loan & Investment Co. v. Universal Credit Co.*, (C.C.A. 8th, 1935) 75 F. (2d) 545; *General Motors Acceptance Corp. v. Hupfer*, 113 Neb. 228, 202 N.W. 627 (1925); *Walton v. Commercial Credit Co.*, 68 S. D. 151, 299 N.W. 300 (1941).

³⁴ *C.I.T. Corp. v. Seaney*, 53 Ariz. 72, 85 P. (2d) 713 (1938), noted in 87 UNIV. PA. L. REV. 742 (1939); *General Motors Acceptance Corp. v. Whiteley*, 217 Iowa 998, 252 N. W. 779 (1934); *Vonhof v. General Contract Purchase Corp.*, 115 N. J. Eq. 239, 170 A. 239 (1934); *Smith v. Commercial Credit Corp.*, 113 N. J. Eq. 12, 165 A. 637 (1933); *General Motors Acceptance Corp. v. Berry*, 86 N.H. 280, 167 A. 553 (1933); *General Motors Acceptance Corp. v. Seattle Association of Credit Men*, 190 Wash. 284, 67 P. (2d) 882 (1937); *In re Alday Motor Co.*, (D.C. Tenn. 1930) 50 F. (2d) 228; *Industrial Finance Corp. v. Cappelmann*, (C.C.A. 4th, 1922) 284 F. 8, where the court stated with reference to a transaction clearly tri-partite in form, at p. 11: "The court has held that such an instrument as the trust receipt is in the nature of a conditional sale or bailment . . ."; 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES, 6th rev. ed., § 33e (1933).

since it was approved by the National Conference of Commissioners on Uniform State Laws the Uniform Trust Receipts Act has been enacted in approximately twenty-one states. It is important to note that the act is limited in its scope to the tri-partite type of transaction, where the dealer is financed by a third party other than the manufacturer or producer, and where there is involved an immediate course of transfer of goods to a dealer for the purpose at least of ultimate sale or exchange in the market.⁵⁵ Thus the act does not cover every transaction or situation where a dealer holds possession of goods coupled with the powers of a factor. The simplified recording provided by the act is applicable only where the dealer has received such powers from a financier in a tri-partite transaction. If his powers are delegated direct from the manufacturer, or if for some other reason, perhaps of technical statutory interpretation, the act does not cover the transaction, it will be handled judicially under prior law and made subject to the more burdensome conditional sale, chattel mortgage, and other recording requirements.⁵⁶ Ultimately, is it desirable so to classify dealer-financier relations, leaving the older recording requirements in force in a part of the dealer field apparently for no reason other than adverse possession? This problem may be *de minimus*. Tri-partite transactions do constitute a large part of those consummated in dealer financing and marketing to-

⁵⁵ See definition of "entruster" in § 1, U.T.R.A., and of "Trust Receipt Transaction" in § 2, U.T.R.A.; Bacon, "A Trust Receipt Transaction:II," 5 *FORDHAM L. REV.* 240 (1936). If the manufacturer desires to do his own financing, he cannot qualify as an entruster and gain the benefit of the less burdensome recording provided by the U.T.R.A. He will be a conditional seller: *Ford Motor Co. v. National Bond & Investment Co.*, 294 Ill. App. 585, 14 N.E. (2d) 306 (1938). U.T.R.A., § 1 defines "Entruster" in part as follows: "A person in the business of selling goods . . . for profit, who at the outset of the transaction has, as against the buyer, general property in such goods or instruments, and who sells the same to the buyer on credit, retaining title or other security interest under a purchase money mortgage or conditional sales contract or otherwise, is excluded." The prefatory note of the Commissioners on Uniform State Laws, recommending adoption of the statute, comments upon the above definition as follows: "Sec. 1, 'Entruster', excludes any true seller from the operation of the Act, . . . Thus any true conditional sale is outside this Act." 9 *U.L.A.* 667 (1942).

⁵⁶ In *Associates Discount Corporation v. C.E. Fay Co.*, 307 Mass. 577, 30 N.E. (2d) 876 (1940), a transaction intended to involve a trust receipt, in a state possessing the uniform act, failed to satisfy the requirement that the receipt be in writing. The court brought the dealer within the definition of factor in the state factor's act, and the transaction was properly analyzed under agency principles. In some other state, however, it may have been construed as a chattel mortgage transaction, or a conditional sale, with results unpredictable and probably dependent upon recording requirements. The court stated at 307 Mass. 577 at 581: "The present case, in which there was no writing, falls outside the act . . . It is left to be governed by the pre-existing law."

day, and the considerations stated above to the contrary, the Uniform Trust Receipts Act undoubtedly represents the most potent force toward uniformity presently active. The signs point toward its eventual universal enactment, and it must be assumed that financiers will avail themselves of its guaranty of reasonably secure transactions. The large question mark is found after the query concerning the extent to which lending institutions, and creditors generally, actually do rely upon publicly recorded information in assessing the risk of dealer loans. If the real reliance is placed upon financial statements and credit information gained from sources practically independent of the public records, then any recording requirement at all lacks justification and is an unnecessary nuisance in business dealing to the extent that it constitutes a business burden. Perhaps this statistical problem should be investigated and answered before continued enactment of the recording requirement in the Uniform Trust Receipts Act is urged.

A few words of summary are offered with reference to the creditor problem. In the absence of recording complications the law of financier-dealer-creditor relations could be rather simply stated in terms of principles of agency illustrated in the factor cases. Broadly speaking, creditors of the factor with authority only to sell could claim no priority in the goods to be sold as against the consignor, manufacturer or financier except in those jurisdictions where factor's acts give priority to certain defined creditors. These principles of agency are deeply embedded in the common law, and a court should not assume to alter their effect in the absence of legislation indicating a clear, contrary policy. The factors acts to a limited extent do announce such a contrary policy. Because of their historical background it is not so clear that the chattel mortgage and conditional sale recording acts dictate any such reversal of common law policy as has occurred. In the present state of the cases it must be recognized that the courts can do little to relieve the confusion. It is suggested that where the question is an original one, the court at least should endeavor to avoid the too frequent fallacious assumption that any arrangement between a dealer and his supplier or financier is either a conditional sale or a chattel mortgage.³⁷ Solution by

³⁷ See the Michigan cases, which take this attitude regardless apparently of whether the transaction is bi-partite or tri-partite: *Burroughs Adding Machine Co. v. Wieselberg*, 230 Mich. 15, 203 N.W. 160 (1925); *Nelson v. Vieregiver*, 230 Mich. 38, 203 N. W. 164 (1925); and *Motor Bankers Corp. v. C.I.T. Corp.*, 258 Mich. 301, 241 N.W. 911 (1932), where the court states at 258 Mich. 301 at 305: "Under our holdings a trust receipt, accompanied by the obligation of the receptor to pay an

more legislation suggests difficulties arising from statutory inflexibility and confused interpretation.⁸⁸ Subject to such pitfalls the Uniform Trust Receipts Act provides a corrective in the tri-partite transaction, but not in the types of transaction beyond its scope which remain subject to the old recording requirements. Perhaps the legislative correctives should be of the repealing rather than the cumulative variety. If it is true that public recording in this field is not relied upon, and meets no business demand, then the solution does not lie with enactment of more record requirements, but rather with removal of all such requirements now imposed in this type of transaction.

agreed price for an automobile, possession of which is changed, and which permits suit upon the obligation accompanying the trust receipt or the retaking and resale of the car, with application of proceeds in reduction of obligation to pay and right to hold the receptor for the balance, is security in the nature of a chattel mortgage, and if not filed as such, under our recording laws, . . . , is void, as against subsequent purchasers or mortgagees in good faith.”

⁸⁸ In *Donn v. Auto Dealer's Investment Co.*, 318 Ill. App. 95, 47 N.E. (2d) 568 (1943), noted 22 CHI.-KENT L. REV. 99 (1944), 385 Ill. 211, 52 N.E. (2d) 695 (1944), both plaintiff and defendant had filed declarations of intention to engage in trust receipt financing with a dealer, and had subsequently made advances on the same automobiles. The issue was whether plaintiff, who filed the first declaration of intention, or defendant, who made the first advance, should prevail. E. O. Daw, writing in 22 CHI.-KENT L. REV. 99 (1944) indicated that the decision of the appellate court for plaintiff is in accord with the legislative intent to give the recording of the trust receipt declaration some practical effect as a danger signal to later financiers of the dealer. The Supreme Court of Illinois, however, reversed the appellate court and affirmed the judgment of the circuit court for defendant. According to the supreme court decision the only function of trust receipt recording is to place later creditors on notice and inquiry, and the court said that if plaintiff had inquired, the dealer would have told him the automobiles were covered by trust receipts to defendant. Is this realistic? Experience indicates that the dealer in such a situation is likely to tell a lie. In other words, if all of the contesting trust receipt holders have recorded under the act as to a particular dealer, then they are right back where they were at common law in the absence of any recording requirement. The first lien in point of time will prevail. What has been accomplished by the enactment of the recording requirement? Certainly no clarification of the law in Illinois. Daw states again in 22 CHI.-KENT L. REV. 145 at 146 (1944): “Financiers would be wise, however, to direct their inquiries elsewhere since a false statement by the trustee could hardly jeopardize the existing rights of one who had in fact made an earlier advance.” Under the Uniform Trust Receipts Act, §§ 9, 2 (a) (i) (ii), the “buyer in the ordinary course of trade” is given priority over a trust receipt even if the required filing has been had. But the courts appear to have construed this clause much more broadly than to include merely a consumer buying for his own use from a dealer. Cases construing the clause to include dealers who buy from other dealers for resale and not for use, and finance companies and banks who have financed the ultimate consumer's purchase and hold his paper by assignment from the dealer, surely extend the scope of the clause beyond that intended and deprive the financier of most of the benefit of recording. Would inter-

So far this paper has discussed the position of the financier as against the creditors of the dealer. It is necessary also to consider the position of the person who buys for his use a radio, automobile, or other durable product from a dealer, only to find himself faced with a replevin action or repossession by an unpaid finance company. Once again introduction of recording requirements into the picture appears unnecessary. In all fairness, and for the best interest of business enterprise, the buyers of radios and refrigerators should not be bound before purchase to consult public records at their peril. It seems safe to say that they are not accustomed to do so, nor are they accustomed to demand and rely upon a financial statement as is a lending institution. Probably the average buyer relies upon the dealer's possession as evidence of his ownership of, or his power to sell, the goods. And the common law principles of agency gave to the innocent purchaser in the ordinary course of the dealer's business a clear title to the goods as against the dealer's unpaid financier or consignor.³⁹ The ethical superiority of such purchaser's position compared to that of the dealer's creditors is obvious. Resale by the dealer is the thing contemplated, and the purchaser's claim may find basis in actual authority from financier-principal to dealer-agent.⁴⁰ However, actual authority may be and usually is negated by provisions in the agreement between financier and dealer forbidding sale without the financier's consent, or at least making payment of the amount due on the article to the financier a condition precedent to sale.⁴¹ Such secret limitations upon the dealer's authority to sell are invalid against the purchaser upon familiar principles of appar-

pretation of the phrase, "buyer in the usual course of business," found and discussed in the common law cases, be subject to such uncertainty and confusion? See *Colonial Finance Co. v. De Benigno*, 125 Conn. 626, 7 A. (2d) 841 (1939); *Farmers' National Bank of Amsterdam v. Universal Credit Co.*, 259 App. Div. 955, 20 N.Y.S. (2d) 1004 (1940), leave to appeal denied, 284 N.Y. 818, 29 N.E. (2d) 975 (1940); *General Finance Corp. v. Krause Motor Sales*, 302 Ill. App. 210, 23 N.E. (2d) 781 (1939); cases collected in 29 VA. L. REV. 650 (1943). For other cases construing the U.T.R.A., see: *Universal Credit Co., Inc. v. Citizen's State Bank of Petersburg*, (Ind. 1945) 64 N. E. (2d) 28; *Commercial Credit Corp. v. Horan*, 325 Ill. App. 625, 60 N.E. (2d) 763 (1945); *Premium Commercial Corp. v. Kasprzycki*, 129 Conn. 446, 29 A. (2d) 610 (1942); *People's Finance and Thrift Co. of Visalia v. Bowman*, 58 Cal. App. (2d) 729, 137 P. (2d) 729 (1943).

³⁹ 2 MECHEM, AGENCY, 2d ed., § 2505 (1914); 1 WILLISTON, SALES, 2d ed., § 314 (1924).

⁴⁰ *Commonwealth Finance Co. v. Schutt*, 97 N.J.L. 225, 116 A. 722 (1922); *Rogers v. Whitney*, 91 Vt. 79, 99 A. 419 (1917).

⁴¹ For example, see *Finance and Guaranty Corp. v. Defiance Motor Truck Co.*, 145 Md. 94, 125 A. 585 (1924).

ent authority, and the doctrine of estoppel, as well, sometimes operates to protect the innocent purchaser in the usual course of the dealer's business.⁴² Thus the common law of agency works in harmony with business practice and common understanding to award priority to the innocent purchaser as against the financier, as well as to deny such priority to the dealer's subsequent creditors.

Where the security arrangement between financier and dealer is construed to be a conditional sale or chattel mortgage, and in rare cases a consignment for sale, the effect of the recording requirements pertaining to such devices must again be considered. It is interesting to note that although failure on the part of the financier to record may cause him to lose his common law priority against subsequent creditors of the dealer, such failure will leave his rights against the dealer's purchaser where they were at common law.⁴³ It is when he does record that the financier may obtain against the dealer's purchaser a priority he did not have at common law. The recorded contract has been held to constitute constructive notice, not only of the financier's reserved title, but also of the dealer's limited authority to sell, thereby depriving the innocent purchaser of his common law position against the unpaid financier.⁴⁴

⁴² *Bernhagen v. Marathon Finance Corp.*, 212 Wis. 495, 250 N.W. 410 (1933); *Jones v. Commercial Investment Trust*, 64 Utah 151, 228 P. 896 (1924); *Carter v. Rowley*, 59 Cal. App. 486, 211 P. 267 (1922); *North American Acceptance Corp. v. Meeks*, 146 Neb. 546, 20 N.W. (2d) 504 (1945).

⁴³ *Glass v. Continental Guaranty Corp.*, 81 Fla. 687 at 698, 699, 88 S. 876 (1921), involving replevin by finance company against purchaser, where the court stated: "The receipt was not recorded or otherwise brought to the actual or constructive notice of the purchaser Glass. . . . The party taking the trust receipt is estopped from claiming title as against a *bona fide* purchaser from the dealer without actual or constructive notice of the trust receipt or of the conditions on which the bill of lading was delivered to the consignee dealer."

⁴⁴ *Securities Inv. Corporation v. Indiana Truck Corporation*, 129 Neb. 31, 260 N.W. 691 (1935); *Utica Trust & Deposit Co. v. Decker*, 244 N.Y. 340, 155 N.E. 665 (1927); *Whitehurst v. Garrett*, 196 N.C. 154, 144 S.E. 835 (1928); *Whitehurst v. Nixon*, 196 N.C. 823, 146 S.E. 599 (1929); comment in 43 *MICH. L. REV.* 605 (1944); *Finance and Guaranty Co. v. Defiance Motor Truck Co.*, 145 Md. 94 at 100, 101, 125 A. 585 (1924), where the third party was not a purchaser for use, but a finance company which had possessed the truck claiming as assignee of the dealer's conditional sale contract with a purchaser. The manufacturer, who held a recorded conditional sales contract with the dealer, sued the finance company in replevin and recovered. The language of the court with respect to the effect of record as constructive notice follows: "The appellant, however, while it concedes that the statute is valid, and that it applies to this particular transaction, contends that the appellee is estopped from relying upon it, because, he says, it delivered the truck to the Allegany Motor Company for resale, and thereby conferred upon that company such obvious and apparent *indicia* of unconditional ownership that it was thereby enabled to sell the truck as an

Such result is the product of mechanical enforcement of the recording act, and application of the doctrine of constructive notice, apparently without consideration of the commercial implication of a decision that a man must consult the public records at his peril in purchasing a radio for his home.⁴⁵

The Uniform Conditional Sales Act meets this problem by specific provision, which reads as follows:

“When goods are delivered under a conditional sale contract and the seller expressly or impliedly consents that the buyer may resell them prior to performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them the buyer shall be deemed the owner of the goods, even though the contract or a copy thereof shall be filed according to the provisions of this act.”⁴⁶

However, the bulk of chattel mortgage recording acts, and many

unconditional owner thereof to an innocent purchaser, who relied and was entitled to rely upon the apparent title which the Allegany Motor Company had in the property.

“The weakness of that proposition lies in the fact that it ignores the statute, which charged the appellee with constructive notice of the agreement, whereby the title to the truck was reserved to the appellee. For it is axiomatic that the constructive notice afforded by recording statutes is equivalent to actual notice as to any instrument recorded in compliance with their terms And if the purchaser had notice of the existence of the conditional agreement, he also had notice that the Allegany Motor Company, notwithstanding its possession of the truck, was not the unconditional owner thereof, and it is not apparent in that case how the appellee can be estopped from asserting a title of which he had given public notice in the very manner provided by the law.”

⁴⁵ A notable example of refusal to follow a mechanical approach is *Boice v. Finance and Guaranty Corp.*, 127 Va. 563, 102 S.E. 591 (1920), where a dealer borrowed money on chattel mortgage to finance the purchase of automobiles. The recorded chattel mortgage, held by plaintiff finance company, was held ineffective against the claim of defendant, a purchaser in the ordinary course of the dealer's business. The result was reached without benefit of any provision in the Virginia Chattel Mortgage Act similar to section 9 of the Uniform Conditional Sales Act. The court stated, 127 Va. 563 at 570: “The powers which the dealer is permitted to exercise over the property in such case are inconsistent with a mortgage thereon.” In *Bernhagen v. Marathon Finance Corp.*, 212 Wis. 495, 250 N.W. 410 (1933), the purchaser prevailed against the finance company, holder of a recorded chattel mortgage, on the basis of apparent authority arising from peculiar facts involving a prior course of dealing. See also *Indiana Investment & Securities Co. v. Whisman*, 85 Ind. App. 109, 138 N.E. 512 (1923).

⁴⁶ 2 U.L.A., § 9, p. 15 (1922). The Uniform Trust Receipts Act provides, with respect to buyers “in the ordinary course of trade,” that “no filing shall constitute notice of the entruster's security interest to such a buyer.” 9 U.L.A. 687 (1942); U.T.R.A., §§ 9, 2 (a) (i) (ii).

conditional sale recording acts, do not recognize the problem by any such specific provision, and if the financier can convince the court that his contract with his dealer was a chattel mortgage, and prove its record as such, he can confront the purchaser with the argument of constructive notice of the limits upon the dealer's authority.⁴⁷

Attention is invited to a rather unusual statute in Wisconsin. It provides for recording of contracts of consignment for sale, as distinguished from conditional sale and chattel mortgage contracts, in the same manner and in the same place as is provided for contracts of conditional sale. The statute reads as follows:

"(1) Whenever goods, wares or merchandise are consigned and delivered to any person for the purpose of sale or merchandising, and the title thereto remains conditionally or unconditionally in the consignor the consignment agreement shall be in writing and filed in accordance with the provisions of sections 122.06, 122.11 and 122.14.

(2) If a consignment agreement is not so made and filed, the title to any such goods, wares or merchandise shall be deemed to be in the consignee as to purchasers thereof and creditors of such consignee.

(3) Whenever additional goods, wares or merchandise are subsequently consigned and delivered to a consignee under a consignment agreement then legally on file as above provided it shall be sufficient to bring such additional goods, wares or merchandise within the protection of such original filing that an invoice of such additional goods, wares or merchandise, referring to such original filing by date and number, be filed in the same office."⁴⁸

This statute applies expressly to the factor relation, and provides for a continuous method of recording which seems almost, if not entirely, as burdensome to the financier as successive recording and discharging of standard form conditional sales contracts. Through compliance the financier may preserve his common law priority against the consignee's other creditors. And it is suggested that such a recording requirement is justified only if these other creditors are accustomed actually to rely directly or indirectly on such public records in extending credit to dealers. In the not unlikely event of noncompliance, the

⁴⁷ See *Finance and Guaranty Co. v. Defiance Motor Truck Co.*, 145 Md. 94, 125 A. 585 (1924) (conditional sale recording act); *Whitehurst v. Nixon*, 196 N.C. 823, 146 S.E. 599 (1929) (chattel mortgage recording act).

⁴⁸ Wis. Stat., § 241.26 (1945).

recording requirement may result in questionable preference of other creditors in the event of dealer insolvency.

Where there has been compliance with this Wisconsin statute, a trap may be set for the individual who has purchased for value in the usual course of the dealer's business. In the event of noncompliance the statute prefers "purchasers . . . and creditors of such consignee." The inference appears that compliance awards preference to the consignor against both. There is no provision in the statute resembling section 9 of the Uniform Conditional Sales Act, designed to protect the common law status of the purchaser in the usual course of business, where the recording requirement has been satisfied. Does this mean the purchaser is to be charged with constructive notice and lose his property in the goods to the financier in the case of a recorded consignment for sale in Wisconsin, but not in the case of a recorded conditional sale contract? Perhaps not, but in any event the predictable legal result is uncertain since there are no decisions furnishing any answer to date to the question.

Common law principles of agency applied in the factor situation furnished fairly clear answers to most of these problems. The writer has been unable to discover any reasons arising from business practice or legal policy affecting commercial law for regarding the dealer in durable goods other than as a factor, whether the financial strings tied to his physical stock are held at the other end by a finance company or by his supplier or a manufacturer. Certainly lending institutions, including finance companies, should be satisfied with the protection against claims by dealer-creditors afforded by the common law principles. It is submitted that the protection traditionally given the innocent purchaser in the usual course of the dealer's business is not of sufficient importance in the total risk picture of the investing finance company to cause any substantial shrinkage in the avenues of credit open to the average small dealer. Commercial evolution may in time furnish another answer if common law certainty as to the position of creditors remains permanently supplanted by the present state of confusion, and if increasingly burdensome public record requirements continue to be the price of certainty.

It should be repeated that the cause of much of the confusion has been introduction into the factor-dealer situation of recording requirements which functionally did not fit. They have their place in the cases of the loan secured by mortgage upon the debtor's permanently owned chattels, and the conditional sale of goods for the buyer's use. Perhaps

the courts might have limited the recording acts to those situations in the absence of clear legislative mandates to the contrary, or at least could have prevented their extension into the factor field beyond cases where chattel mortgage or conditional sale forms were used.⁴⁹ It is the frequent judicial attitude that any security arrangement must be either a conditional sale or a chattel mortgage that seems objectionable. Undoubtedly it is academic now to speculate as to what the legislatures intended. In many jurisdictions it is probably too late to expect clarification of the confusion through judicial decision. More legislation may be the only answer. It should be as simple as possible. Should it be determined upon investigation that recording in this field serves no business need and no useful function, then the solution of the Uniform Trust Receipts Act to provide a less bothersome substitute in the large bulk, but not all, of the transactions involved seems unsatisfactory. For many years the section of the New York Personal Property Law

⁴⁹ The Massachusetts court regards the dealer in durable goods as a factor, and applies the Massachusetts Factor's Act to third party rights, generally not permitting the designation of the security arrangement as chattel mortgage, or conditional sale to control the agency rationale. See *Associates Discount Corp. v. C. E. Fay Co.*, 307 Mass. 577, 30 N.E. (2d) 876 (1940); *Simons v. Northeastern Finance Corp.*, 271 Mass. 285, 171 N.E. 643 (1930); *Handy v. C.I.T. Corp.*, 291 Mass. 157 at 159-163, 197 N.E. 64 (1935): "We do not pause to inquire whether in these circumstances a so called trust receipt was appropriate to the transaction, or whether it was a chattel mortgage, invalid except as between the parties because not recorded

"An owner's rights in his chattel are protected to every reasonable extent There are equitable considerations in favor of a *bona fide* purchaser of such property entrusted by the holder of its legal title to the possession of another with authority to sell. The strong public policy in favor of such *bona fide* purchaser has been reflected in legislation. It is provided by the so called factor's act, G. L. (Ter. Ed.) c. 104, § 1:

"The contention of the defendant is that the dealer, Stiles, was not a factor or agent, but merely one in possession of the automobile under the provisions of the so called trust receipt. . . . Because of a natural and inherent disinclination toward such concealed ownership of chattels intended to be exposed for sale, some courts have treated the trust receipt as equivalent to a chattel mortgage and required it to be a matter of public record. . . . That hardly seems a logical position for these reasons:

". . . . The undisclosed principal long has been held bound by contracts made by his general agent within the latter's apparent authority, though outside his actual authority, even when the third person has dealt with the agent as if he were the owner. . . . This principle of the law of agency is properly extended to automobile cases where the sale by the dealer, who is in truth a special agent of an undisclosed principal, is conducted in the usual and ordinary course of business with one who reasonably believes the agent to be the owner. . . . In the instant case the application of G.L. (Ter. Ed.) c. 104, § 1, and these principles of the common law of agency result in the protection of the plaintiffs as purchasers from the dealer, Stiles."

providing for recordation of conditional sales contracts has contained the sentence: "This section shall not apply to conditional sales of goods for resale."⁵⁰ Perhaps something similar, with the definition of "resale" broadened to include exchanges and cases of manufacture and processing or otherwise handling the goods preliminary to resale or exchange, might be added by amendment to all statutes requiring recording of chattel mortgages, conditional sales, and other security devices. Such amendments would seem as important in states which have enacted the Uniform Trust Receipts Act as in those which have not.

⁵⁰ N.Y. Consol. Laws (Cahill, 1930) c. 42, art. 4, § 65. See *Chasnov v. Marlane Holding Co., Inc.*, (N. Y. Muni. Ct. 1930) 137 Misc. 332, 244 N.Y.S. 455.