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A SURVEY OF STATE RETAIL INSTALMENT SALES LEGISLATION

William E. Hogan†

"... people who are persuaded by persons whom they do not know to enter into contracts that they do not understand to purchase goods that they do not want with money that they have not got."


I. INTRODUCTION

After a spurt of activity commencing in the thirties, comprehensive legislation protecting the buyer under an instalment sale has received steadily increasing attention in recent years.¹ In 1957 and 1958 such statutes were enacted in eleven jurisdictions which previously had no sales finance laws;² extensive restraints now exist in twenty-eight states.³ It is, therefore, not surprising that there is considerable divergence both as to the coverage, requirements, and enforcement of the existing state legislation. The proposed Uniform Commercial Code suggests still

† See Contributors' Section, Masthead, p. 74, for biographical data.

¹ Indiana passed what appears to be the first such act in 1935. Four states followed that lead prior to 1940: Wisconsin (1935), Massachusetts (1937), Maine (1939), and Michigan (1939). Mors, "State Regulation of Retail Instalment Financing—Progress and Problems," 23 J. Bus. U. Chi. 199 (1950).


other forms of control of such instalment sales, particularly by the codification of the law of chattel security.\textsuperscript{4} Although the Code does not often direct itself to consumer protection, it furnishes a sound and intelligent basis for retail instalment legislation specifically directed to that end.\textsuperscript{5}

While these patterns of legal regulation have been emerging, the retail instalment sales industry has experienced a gargantuan increase in its volume of business. Instalment paper outstanding in 1925 has been variously estimated at two to two and a half billion dollars.\textsuperscript{6} Federal Reserve Board statistics reveal that from the end of 1949 to the middle of 1957, automobile and other consumer goods paper outstanding grew from some eight billion to more than twenty-three billion dollars.\textsuperscript{7} If we reach back to 1939, we find that the increase has been sevenfold, from slightly more than three billion to more than twenty-three billion dollars. Motor vehicle paper grew from slightly less than one and one-half billion in 1939 to more than fifteen billion in 1957.\textsuperscript{8}

The growth has not been merely quantitative. Qualitatively the sales finance industry has experienced profound and rather far reaching changes. As a result of the huge post-World War I growth in motor vehicle sales, there has been developed a specialized group of companies, designed originally at least to act in coordination with the "big three" of the motor vehicle industry: General Motors Acceptance Corporation (G.M.A.C.), formed as a subsidiary of the General Motors Company; Commercial Investment Trust Corporation (C.I.T.), associated with the Ford Motor Company; and Commercial Credit Company (C.C.C.), cooperating with Chrysler Corporation.\textsuperscript{9} These firms

\textsuperscript{4} Article 9, Secured Transactions, codifies and compiles for the first time an integrated set of rules governing transactions secured by an interest in personal property. Part five, Default, is particularly helpful in formulating a reasoned amount of control over realization of the security interest.

\textsuperscript{5} Article 9 establishes distinctions in this area based upon the kind of transaction rather than upon the type of legal form involved. One of the categories so isolated is a purchase-money security interest in consumer goods, U.C.C. 9-107 and 9-109 (1957 ed.). The distinction is primarily of importance in connection with filing and proceedings on default under § 9-302 and part five of the article.

\textsuperscript{6} Seligman, The Economics of Instalment Selling 18 (1927).

\textsuperscript{7} Fed. Reserve Bull. 1074 (Sept. 1957).

\textsuperscript{8} Ibid.

\textsuperscript{9} G.M.A.C. was incorporated in 1919, and its consolidated volume of retail financing business has grown from approximately 73.6 million dollars in 1922 to 3.7 billion dollars in 1956. Its total 1956 volume was 9.1 billion dollars. C.I.T., founded in 1924, does retail, wholesale, and commercial factoring and had a 1956 total net purchase of 4.8 billion dollars. C.C.C., created in 1912, had a 1956 gross income of 161 million. Moody's Bank and Financial Manual 1957, pp. 841, 845, 1132. The largely unsuccessful efforts to disassociate these sales finance and manufacturing companies is traced in Birnbaum, "The Auto-Finance Consent Decree: A New Technique in Enforcing the Sherman Act," 24 Wash. U.L.Q. 325 (1939); Haberman and Birnbaum, "The Auto-Finance Consent Decree, an Epilogue," 1950 Wash. U.L.Q. 46. In 1952 a consent decree entered against General Motors was aimed at coercive practices forcing dealers to discriminate in favor
have developed their astounding annual volumes primarily through automotive financing.\textsuperscript{10}

But these are not the only competitors seeking to obtain a share of the sales finance market; hundreds of small companies have entered the scramble for the profits available from the public’s growing acceptance of instalment buying as a normal part of life.\textsuperscript{11} Among those who have recognized the profit potential of sales financing are members of the banking community who have instituted vigorous programs designed to solicit such business.\textsuperscript{12} General references in this article to “sales financing companies” or “sales financing agencies” include all of these institutions which have developed as part of the expansion of instalment sales financing.

As the volume of instalment sales has increased, many people have grown more and more uneasy over the possibility that the buyers involved in these sales are being duped by an avaricious segment of the sales finance industry. There are also those who have regarded the growth of instalment selling as offering an open invitation to dishonest debtors. Although it may be virtually impossible to approach this or any other problem without some preconceptions as to the social values involved, it would be well to identify and isolate some of them prior to discussing the substantive provisions of statutes regulating instalment buying.

Debtor-oriented people view the problem with thoughts of the eager or careless buyer and the harassment, overreaching, and misrepresentation that mark some parts of the sales finance industry. This group thinks of regulation as a necessary adjustment of the inequality of bargaining power between the lending and borrowing class.\textsuperscript{13} To this the creditor groups respond with recollections of dishonest debtors who mis-

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\textsuperscript{10} The expansion of instalment selling from its limited nineteenth century use in high grade furniture houses can be traced from the introduction of the device into automobile merchandising after the first World War, from which it spread to other lines during the early twenties. Seligman, supra note 6, at 14-54; 12 Encyc. Brittanica 427 (1935). It has been estimated that of the total credit extended in 1937 by 424 sales finance companies these three firms handled over three-fourths of the auto loans through dealers and one-half of the total instalment credit granted by retail dealers. Plummer & Young, Sales Finance Companies and Their Credit Practices 43, 264 (1940).

\textsuperscript{11} In 1926 there were estimates ranging from 800 to 1700 independent companies. Plummer, W. C., “Social and Economic Consequences of Buying on the Instalment Plan,” 129 Annals 1, 19 (Supp. 1927).

\textsuperscript{12} Plummer & Young, supra note 10, at 20-21; Cox, The Economics of Instalment Buying 345 (1948); Phelps, Instalment Sales Financing 22 (1953).

represent their credit status, resist collections, or use their promise as a passport to bankruptcy.\textsuperscript{14} Still another attitude reflects fear that controls over instalment financing may inordinately interfere with a device which, together with advertising, has filled millions of American homes with an unprecedented number of cars, washing machines, vacuum cleaners, and other modern necessaries of life.\textsuperscript{15} Finally, some professionals in the general lending field regard regulatory schemes as tools for eliminating unfair competitive practices of a segment of the industry.\textsuperscript{16}

A sketch of the usual transaction may furnish some idea of the complexity of the problem and some of the possible factual distinctions.\textsuperscript{17} The buyer has three potential choices when he decides to purchase. He may (1) pay cash, (2) borrow the money from a lending institution, or (3) purchase under a deferred payment arrangement with the seller. Although the last two may be but different means of accomplishing the same end, the third alternative is our main concern. In purchasing on the basis of a deferred payment the buyer makes an essentially tripartite arrangement. The buyer, dealer, and financing agency each come into relationships with one another. The deal itself has three aspects:

(1) The sales transaction,

(2) The promise to pay, usually negotiable in form, and

(3) The creation of an in rem security interest in favor of the seller.

The security interest is usually in the form of a conditional sale or a chattel mortgage, depending primarily upon the statutory scheme within a given state. It is aimed primarily at giving the seller a power to realize payment of the obligation by seizure of the goods in the event of the buyer's default, insolvency, or bankruptcy, although it also provides some protection against the risk of the buyer's dishonesty. A further purpose of the security interest is to induce the buyer to pay out of fear of losing the property.

After having made his agreement with the buyer, the dealer, often as

\textsuperscript{14} Phelps, Financing the Instalment Purchase 88 (1954).


\textsuperscript{17} For descriptions of the mechanics of sales financing, see: Cox, The Economics of Instalment Buying (1948); Plummer & Young, Sales Finance Companies and Their Credit Pratctises (1940); and Retail Instalment Selling, Research Report No. 6, Maryland Legislative Council, Research Division (1940). A short treatment appears in Adelson, "The Mechanics of the Instalment Credit Sale," 2 Law & Contemp. Prob. 218 (1935).
a result of a previous arrangement, then transfers the contract to the financing institution and receives a discounted payment in return. The buyer is then indebted to the financing institution.

Turning from this brief synopsis of a perhaps overgeneralized transaction and its legal and social setting, we may set forth the scheme of the balance of this analysis. After a short review of the impact of other law, we will examine the safeguards provided at the time of the sale, during the credit extension, and upon default. We will then turn to the consequences of violating the consumer protection requirements. Following this, we will examine the question of the coverage of the acts. The latter topic is the final consideration, since it seems preferable to deal with the scope of the statutes after surveying the abuses and some of the remedies provided. We can then more carefully consider whether these controls should be limited to motor vehicle sales, to consumer goods transactions generally, or be extended to all instalment sales. New York, for example, has two separate acts: one governing motor vehicle sales, and the other consumer goods generally.18

II. LEGAL FRAMEWORK WITHIN WHICH THE CONTROLS OPERATE

The utilization of the instalment sales device brings all sorts of law into play. The law of sales governs the seller-buyer relationship.19 The law of negotiable instruments deals with the rights and obligations of all the parties to the note.20 Their position after the transfer of the note may be affected by the law of assignments. Finally the law of chattel security operates upon the in rem rights of the dealer and his successor in interest, the financing institution. It is here that the lack of uniformity from state to state and within a given state is most apparent.

Chattel mortgages have been described as wholly creatures of statute.21 All but one of the forty-eight states enacted chattel mortgage statutes prior to the growth of the instalment sales industry. For the most part these statutes were aimed at providing a recording system for the protection of third parties dealing with the mortgagor who remained in posses-

sion of the goods. The borrower's protection, through judicial recog-
nition of an equity of redemption and control of the "fairness" of the 
resale price, was built into the theory of the chattel mortgage.

The conditional sale evolved under a different legal theory than the 
chattel mortgage but accomplished the same business purpose. Apart 
from statutory controls the conditional vendor had a choice of two in-
consistent remedies upon the buyer's default and was called upon to 
elect (1) to proceed against the goods and recapture them from the 
buyer; or (2) to recover the purchase price. This doctrine of conditional 
sales law aided the buyers and balanced the advantage given to sellers 
who were permitted to retake the goods without liability to repay any 
of the prior instalments. The Uniform Conditional Sales Act was 
drafted upon the premise that chattel mortgages and conditional sales 
should be treated alike by the law, since they have identical objects and 
effects; but that act retained each in a separate category. It is noteworthy 
that this uniform law was approved by the Commissioners in 1918 before 
the enormous expansion in consumer instalment selling subsequent to 
World War I. For this reason its provisions are often geared to the 
business rather than the consumer transaction. It has been enacted in 
only twelve jurisdictions, but other states have acted to alter the reme-
dies of the vendor. The Uniform Commercial Code carries the basic 
premise of the Uniform Conditional Sales Act one step further when it 
totally abandons the conceptual distinction between chattel mortgages 
and conditional sales.

Thus, retail instalment sales acts enter this rather complex arena of 
interaction among various artificial divisions of the law. The compart-
ments are not airtight and are frequently poorly integrated. Obviously, 
the regulation of the area must be accomplished on the basis of thought-
ful adjustment of the law of sales, negotiable instruments, and chattel 
security, in light of the real needs of the buyer under the instalment sale. 
Hasty tinkering may bring lasting damage to predictability of result; 
worse, it may defeat the purpose of consumer protection.

22 South Carolina's act of 1698 was apparently the first chattel mortgage statute and 
was followed by many southern states in the eighteenth century and the northern states 
in the nineteenth century. Durfee, Cases on Security 490-91 (1951). Louisiana held out 
26 One writer concludes that this is the reason for the provision authorizing the seller 
to cut off the buyer's power of redemption by notice of intention to reposess. Donald-
son, "An Analysis of Retail Installment Sales Legislation," 19 Rocky Mt. L. Rev. 135, 
158 (1947); see note 118 infra.
27 2 Unif. Laws Ann 6 (1956 Supp.)
28 Comment, U.C.C. 9-101 (1952 ed.).
III. PROTECTION AFFORDED AT THE TIME OF THE SALE

A. Disclosure. Since the consumer, at least in theory, can choose to use cash, an ordinary loan, or an instalment sales plan, much of the thrust of the instalment sales legislation has been to make this a relatively free and informed choice. The competitive race for the buyer's credit business has led to the adoption of many devices which screen the actual cost of buying on time. To prevent this abuse, all regulatory statutes are based, at least in part, on a philosophy of disclosure. 29

Typical in this respect are the provisions of the New York act dealing with motor vehicle sales. They assure that the buyer actually receives the required information and that he has a source of reference for determining his rights during the life of the contract by requiring that the contract be in writing and signed by both parties. 30 In this manner the seller as well as the buyer is chargeable with knowledge of the contract's contents, particularly in the event of noncompliance with the other mandatory terms of the act. Strangely, the New York motor vehicle act requires that both parties sign the contract, while the separate act covering other goods is silent on that point. 31 Coupled with the demand for a signed writing is the further necessity for the delivery of an executed copy of the contract to the buyer. 32 Although a period of grace

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30 N.Y. § 302. A writing is also required in Cal. § 2982a; Colo. § 13-16-6(1); Conn. § 6699(a) 1, § 6699(f); Fla. § 520.07(a)(1); Idaho § 64-806; Ill. § 224; Ind. § 58-902; Iowa § 322.3; Kan. § 7a; Ky. § 190.100; Me. § 254 I A; Md. § 116a; Mass. G.L. c. 255, §§ 1, 12; Mich. § 492.112(a); Minn. § 6a(1); Miss. § 26(a)(1); Neb. § 60-617; Nev. § 97.020(1); N.J. § 6a(1); N.Y. § 402; N.D. § 2(1); Ohio § 1317.02; Ore. § 2; Pa. § 613a; S.D. § 3(1); Utah § 15-1 to -2a(B); Va. § 46-532; Wis. § 6a. (For full citation see notes 2 and 3 supra.) See also U.C.C. 9-203 (1957 ed.).

31 Compare N.Y. Pers. Prop. Law § 302 with § 402. Both parties must sign under: Cal. § 2982a; Fla. § 520.07(a)(1); Idaho § 64-806; Ill. § 224; Iowa § 322.3; Kan. § 7a; Me. § 254 I A; Md. § 116a; Mich. § 492.112(a); Minn. § 6a(1); Miss. § 26(a)(1); Neb. § 60-617; Nev. § 97.020(1); N.D. § 2(1); Ohio § 1317.02; Ore. § 2; Pa. § 613a; Utah § 15-1-2a(B); Wis. §§ 6a, 6c. The buyer alone must sign under: Colo. § 13-16-6(1)(a); Conn. § 6699(a) 1, § 6699(f); Ind. § 58-902; Ky. § 190.100; N.J. § 6a(1); N.Y. § 402; S.D. § 3(1); Va. § 46-532. Compare with these provisions U.C.C. 9-203 (1957 ed.). (For full citation see notes 2 and 3 supra.)

32 Cal. § 2982a; Colo. § 13-16-6(1)(a); Conn. §§ 6699(a) 1, 6699(f); Fla. § 520.07(a)(3); Idaho § 64-806; Ill. § 226; Ind. § 58-902; Iowa added § 1; Kan. § 7d; Ky. § 190.100; Me. § 254 I C; Md. § 116b; Mich. § 492.112c; Minn. § 6a(1); Miss. § 26-(a)(3); Neb. § 60-617; Nev. § 97.020(1); N.J. § 6a(1); N.Y. § 302(3) and § 405;
is generally allowed the seller to enable him to carry out this obligation, in some of the acts the penalty for a violation is rather severe. Until the goods sold are delivered, the buyer is given a power to cancel the contract and the right to recover both his payment in cash and any goods "traded in" to the seller. If the article traded has been sold, it seems wise to provide specifically for the recovery of its value. It is of questionable soundness to limit the buyer's power to rescind the contract to cases where he has not received delivery of the goods. Normally, restitutionary remedies are available so long as the plaintiff offers to restore the goods received. If the notion is bottomed upon the similar exception to the operation of the Statute of Frauds in sales cases, there seems to be little analogy in policy considerations, and the seller is not here excused upon a partial delivery. Maryland rejects this limitation on the buyer's power to rescind and dictates not only that the buyer be given a copy of the contract, but also that he be given a receipt for any down payment prior to that time. There may well be areas where this copy requirement is unreasonably burdensome or pointless. Illinois seems to have isolated such a case when it exempted contractual documents sent by the buyer under terms set forth in a mail-order catalog or announcement. The concept of disclosure and an apprehension that blanks in the instrument invite overreaching and fraud by the seller result in their prohibition. Balancing the business necessities against this considera-
tion, several statutes permit blanks for the later insertion of serial numbers more specifically identifying the goods. Some also permit the insertion of the date of the first payment.

Since the financing agency may take an assignment of the contract without knowledge of the seller's failure to comply with either the mandate of a delivery of a copy of the contract or the prohibition against blanks, a policy issue arises as to whether the assignee should be protected. Protection seems to depend upon the presence of a sufficiently conspicuous acknowledgment clause. As noted, in some statutes such an acknowledgment by the buyer creates a conclusive presumption of compliance. This operates to insulate both the seller and the assignee with or without notice. To permit the seller to shield himself in this fashion by what will become a standard "boiler-plate" contract provision is to condone violation of the copy requirement and the prohibition upon blanks. The more limited protection of the assignee without knowledge can be justified by considering that such a result enhances the flow of the paper and is most practically consistent with the mass production nature of the business. Those same considerations furnish a pragmatic basis for protecting even an assignee with knowledge, since this is the only means whereby the issue of knowledge is eliminated from litigation.

An additional device of disclosure informs the buyer of his legal status under the regulatory act. Maryland, for example, demands that the contract contain in twelve point bold type, or larger, a notice of the buyer's rights:

**Notice to Buyer**

1. You are entitled to a copy of this agreement at the time you sign it.
2. Under the state law regulating instalment sales, you have certain rights, among others:
   (1) to pay off the full amount due in advance and obtain a partial rebate of the finance charge.
   (2) to redeem the property repossessed for a default.
   (3) to require under certain conditions a resale of the property if repossessed.

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40 Conn. § 6699(a) 1; Fla. § 520.07(f); Ill. § 229; Kan. § 7(1); Me. § 254 VI; Miss. § 26(g); N.Y. §§ 302(8), 402(4); N.D. § 2(8); Ore. § 8; Pa. § 615; Wis. § 6(c). (For full citation see notes 2 and 3 supra.)

41 Fla. § 520.07(f); Ill. § 229; Kan. § 7(1); Me. § 254 VI; Miss. § 26(g); N.D. § 2(8); Ore. § 8. (For full citation see notes 2 and 3 supra.)

42 Protects seller and assignee: Fla. § 520.07(f); Ind. § 58-902; Me. § 254 VI; Miss. § 26(g). Protects all assignees: Colo. § 13-16-6(5); Conn. § 6699(g); Iowa added § 1; Ky. § 190.100(6); Minn. § 6e; N.J. § 6e; Ohio § 1317.02 (prima facie proof); S.D. § 3(9). Protects assignee without knowledge: Ill. § 229; Kan. § 7(1); Md. § 136; N.Y. §§ 302(8), 405; N.D. § 2(8); Ore. § 4. (For full citation see notes 2 and 3 supra.) Where the statute is silent, such an acknowledgment has been held to be substantial evidence of compliance. Millick v. Peer, 130 Cal. App. 2d 894, 279 P.2d 212 (1955).

43 Md. § 117c. Similar notices are required by Conn. § 6699(c) (motor vehicles only); Fla. § 520.07(a)(2); Ill. § 224; Iowa § 58-902; Kan. § 7b; Ky. § 190.100(2); Me.
As against an unscrupulous seller these rather indefinite disclosures seem to be of little value, since he can fill their content with misleading or fraudulent representations as to the particular requirement. Their maximum value seems to be that the buyer is informed of the fact of state regulation. More explicit provisions would serve only to defeat the purpose of disclosure because the buyer could conceivably be overwhelmed by the detail of the contracts. This may even now be one of the causes of failing to read the contract or of signing it when it contains blanks.

B. Control of Excessive Finance Charges. Rate fixing and disclosure, alone or in combination, have been employed in combating the major problem in instalment sales financing, the unreasonable or exorbitant finance charge. General usury laws are largely impotent in dealing with the problem because of the distinction drawn between a "sale on credit" and a "loan." Thus if a buyer borrows the money in an independent loan transaction, the rate of interest will be controlled by any general usury law or the applicable small loan law within the jurisdiction. On the other hand, if he selects the instalment sale method, the sale is usually held to be without the scope of those laws. The finance or credit charges are labeled as a part of the sale price and not interest upon a loan. Seldom is the distinction drawn for anything other than this conceptual reason. As in the case of small loans, the risk and cost

§ 254 I.B2; Mich. §§ 492.112(d), 492.113(b)(9); Miss. § 26(a)(2); N.Y. §§ 302(2), 402(2); N.D. § 2(2)(c); Ore. § 3; Pa. §§ 613D, 614. (For full citation see notes 2 and 3 supra.)


46 Compare Berger, "Usury in Instalment Sales," 2 Law & Contemp. Prob. 148 (1935) attacking the distinction with Ecker, "Commentary on 'Usury in Instalment Sales'," 2 Law & Contemp. Prob. 173 (1935) defending it. Corbin's rationalization of the rule seems to ignore the profit motives of the seller and the finance company:

In some cases the result may be as harmful to one who buys a car beyond his means as would have been the borrowing of money at a usurious rate. But is a poor man to be prevented from having a car merely because he is prevented from borrowing money? Besides, the financing system distributes the risk so that those who can not
of instalment selling may be greater than in the ordinary loan of money. This can be taken into consideration in any statutory rate-making plan. The fluidity of such risks and costs might be guarded against through a rate-making authority. Absent such controls in the usury laws or the instalment sales laws, the seller and the finance company are limited solely by competitive considerations.

Where explicit rate-making has not been adopted, disclosure is the rule in the apparent hope that if the buyer could be protected against deception, competitive forces would operate to keep the rate down. Of the more recent statutes the Illinois provisions are typical. The contract must list:

1. the cash sale price of the goods;
2. the amount of the buyer's down payment in money and goods with a brief description of the goods;
3. the difference between these two;
4. the amount, if any, charged for insurance and other benefits, specifying the coverages and benefits;
5. the amount of official fees;
6. the principal balance which is the sum of items (3), (4) and (5);
7. the finance charge, stated either in a per cent of the monthly unpaid balances or as a dollar amount;
8. the time balance, the sum of items (6) and (7), expressed in number and amount of instalments and the due date or period thereof;
9. the total time sale price.

A somewhat unusual provision in the Illinois act is the permission granted to the seller in automobile sales to lump insurance charges with the finance charge in the contract upon the condition that within twenty days he sends the buyer a memorandum noting the separate charges.

pay have the use of the car at the expense, in part, of those who can.

6 Corbin, Contracts § 1500 (1951).
47 One state is experimenting with a rate making board in the small loan field. In 1956 the Massachusetts legislature created an administrative board to investigate the necessary facts and to establish from time to time a maximum rate of charge for small loans up to $1500. Mass. Ann. Laws c. 140, § 100 (1957); Gahan, "Massachusetts Creates Small Loan Rate Fixing Board," 10 Pers. Fin. L.Q. Rep. 117 (1956). While loans by trust companies, savings banks, cooperative banks, savings and loan associations, credit unions, national banking associations, and federal savings and loan associations are not subject to the other regulatory controls governing small loans, their rate of charge is within the control of the board. Mass. Ann. Laws c. 140, § 114A (1957). Rate hearings were held in the fall of 1957. Note, 12 Pers. Fin. L.Q. Rep. 30 (1957). Cf. Indiana, infra note 54.
48 In 1955 the median finance charge for new cars was $11.00 per hundred, and the range was from less than $7.00 per hundred to more than $15.00 per hundred. Consumer Instalment Credit, Part IV, Federal Reserve Board, p. 73 (1957) (hereinafter cited 1957 F.R.B. Study).
49 Ill. § 225. See also: Cal. § 2982a; Colo. § 13-16-6(2); Conn. §§ 6699(b), 6699(f); Fla. § 520.07(a)(4); Idaho § 64-806; Ind. § 58-904; Iowa §322.3(6)(c); Kan. § 7(f); Ky. § 190.100(2); Me. §§ 254 II, 254 I B 2; Md. § 117; Mass. § 12; Mich. § 492.113; Minn. § 6b; Miss. § 26(h); Neb. § 60-617; Nev. § 97.020(2); N.J. § 6b; N.Y. §§ 302(4)-(5), 402(5); N.D. § 3(4)-(5); Ohio § 1317.04; Ore. § 5; S.D. § 3(5); Pa. § 614B; Utah § 15-1 to -2a; Va. § 46-532; Wis. § 6b. (For full citation see notes 2 and 3 supra.)
50 Ill. § 225. Substantially the same permission exists in Ind. § 58-904; Me. § 254 II D;
Easing the requirement in this fashion clearly permits depriving the buyer of necessary information in determining at the time of the sale whether to secure his insurance through the dealer or elsewhere.

Earnest claims have been made that the finance charge should be expressed in both the dollar amount and as a rate of interest per annum, or rate of interest per month on the declining balance. These formulations of the finance charges are urged because they will enable the buyer to judge better the cost of competing means of financing the purchase: for example, most small loan laws require the expression of rate per month on the declining balance. These claims have received little response from legislatures, probably because of a fear of cluttering up the contract and the adoption by competing agencies of the dollar amount method in their solicitations.

In those instances where flat statutory rate fixing is employed, the utility of disclosure requirements is not diminished, since a complete itemization of the time price readily reveals compliance or noncompliance with the rate regulation. Most of the more recent statutes adopt the rate-fixing technique. It is particularly the trend where the statute is limited to motor vehicle sales. Maine's statute sets a maximum rate dependent upon the age of the vehicle:

Notwithstanding the provisions of any other law, the finance charge shall not exceed the following rates:

Group 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made, $7.00 per $100 per year.

Group 2. Any new motor vehicle not in class 1, and any used motor vehicle designated by the manufacturer by a year model of the same or not more than three years prior to the year in which the sale is made, $11.00 per $100 per year.

N.J. § 6b; and Ohio § 1317.04. (For full citation see notes 2 and 3 supra.) See also, the statement that this sort of provision makes the state statute an inadequate substitute for Federal Trade Commission control. Ayres' Statement, supra note 29, at 38.


62 Barrett, supra note 44.

63 Maximum finance charges expressed in percentage rates do exist in Cal. § 2982c (1% of unpaid balance times the number of months or $25.00); Iowa added § 3(a); Nev. § 97.040; Pa. § 619; and S.D. § 4. (For full citation see notes 2 and 3 supra.) There is current ferment in the small loan area about a middle ground between the interest on unpaid balances approach and the add-on approach; i.e., "precomputation." This retains the statement of charges in terms per month but permits as an alternate method the application of each payment to the combined total of principal and scheduled charges. See "A Symposium on Precomputation," 12 Pers. Fin. L.Q. 4-16 (1957).

64 1958 Acts: Kan. § 8a; Miss. § 27; 1957 Acts: Fla. § 520.08; Iowa added § 3; Minn. § 7a; N.D. § 3(1); Ore. § 19; S.D. § 4. Prior Acts: Cal. § 2982c; Conn. § 6699(1); Ind. § 58-906; Ky. § 190.110(1); Me. § 255 I; Md. § 119A; Mich. § 492.118; Nev. § 97.040; N.Y. §§ 303, 404, 413(3); Ohio § 1317.06; Pa. § 619; Utah § 15-1 to -2a; Wis. § 6b. (For full citation see notes 2 and 3 supra.)
Group 3. Any used motor vehicle not in Class 2, $13.00 per $100 per year.\(^6\)

In any event the seller is there entitled to a minimum total finance charge of twenty-five dollars.\(^6\) Considerable care must be taken where the act is not limited to motor vehicles. The New York legislation indicates that it may be necessary to establish varying rates dependent upon the kind of goods involved. It permits, in some cases, a much higher rate in its general act than in the motor vehicle act.\(^6\)

Unavoidably connected to specific rate regulation is the problem of dealer participation. Because of the competitive race for the consumer's business, some financing agencies offer the dealer a share of the finance charge as an inducement to his persuading the buyer to use that firm's plan. This occurs in a variety of fashions. Some methods depend upon the transfer to the finance agency being upon a recourse or repurchase basis. In theory, at least, by crediting the dealer with part of the finance charge, a reserve is set up from which claims against the dealer may be paid. If no such claims are paid, the dealer has the benefit of the fund.\(^6\) Another method is the outright payment of part of the finance charge or of the "pack," that is, the amount charged by the dealer in excess of that called for in the financing agency's rate chart.

All four of the states which have attempted to strike at these practices have done so in connection with rate-fixing regulation.\(^6\) One abandoned the field when it found that the limitation was unconstitutional "price-fixing" legislation.\(^6\) The area is one which seems to call for control, particularly where the original finance rates are regulated. Otherwise,

\(^{65}\) Maine § 255 I. Rates are also set in California, Connecticut (rate regulation limited to motor vehicles), Florida, Iowa, Kansas, Kentucky, Maryland (rate regulation limited to motor vehicles), Michigan, Mississippi, Nebraska, Nevada, North Dakota, Oregon, Pennsylvania, South Dakota and Wisconsin.


\(^{67}\) Compare N.Y. Pers. Prop. Law § 303 with §§ 404 and 413(3).

\(^{68}\) The delay in payment induced the court in Johnson v. Comm'r, 233 F.2d 952 (4th Cir. 1956), to hold that such amounts were not taxable income to a dealer on an accrual basis when credited to the dealer's account. The Tax Court has refused to follow the decision. Brodsky, 27 T.C. 216 (1956).

\(^{69}\) Indiana §§ 58-906, 910, 926; Mich. § 492.131(c); Ohio § 1317.08; Wis. § 3. (For full citation see notes 2 and 3 supra.)

\(^{70}\) Dept. of Financial Institutions v. Holt, 231 Ind. 293, 108 N.E.2d 629 (1952), held that statutory provisions allowing administrative restrictions on dealer participation was an unconstitutional interference with the dealer's freedom of contract. Contra, Teegardin v. Foley, 166 Ohio St. 449, 143 N.E.2d 824 (1957). Legislative response permitted such control of participation as part of a scheme to eliminate monopolies. Ind. Ann. Stat. §§ 58-935-45 (Supp. 1957). This too received unkind treatment by the Supreme Court of Indiana, which set aside a cease and desist order relating to dealer participation under the act, since there was no proof of monopoly nor proof of agreement tending to create a monopoly. Department of Financial Institutions v. Universal C.I.T. Credit Corp., — Ind. —, 146 N.E.2d 93 (1957). See also Hardy, "Another View on the Origin of Dealer Participation in Automobile Finance Charges," 30 Ind. L.J. 311 (1955); Pecar, "Dealer Participation in Automobile Finance Charges: A Reply," 30 Ind. L.J. 319 (1955); Note, 28 Ind. L.J. 641 (1953).
the maximum rates will have a tendency to become the minimum also. Furthermore, formulation of future rate charges will be based upon costs of the dealer's participation, and the buyer will thus bear an expense which has but slight relation to the risks attendant upon the extension of credit. The fact that the dealer may assume a contingent liability for the buyer's default can be adequately considered in setting the limits on participation.61 Incentives offered the dealer shade off into other forms, including the low cost of financing of the dealer's own inventory. This is done because the financing agency expects to obtain a large share of the dealer's consumer contracts.62 Such collateral inducements seem to be beyond the practical scope of regulatory control, and the buyer himself probably benefits from the dealer's own low cost financing.

Control of refinancing charges, rebates on prepayment, and insurance premiums and practices, are all questions intimately allied to rate fixing. Of these only insurance will be considered here; the remainder are treated under the discussion of protections afforded during the credit extension, in section IV.

C. Insurance. One of the risks attendant upon this kind of financing is the damage or destruction of the goods. The appropriate safeguard is insurance to protect the secured party against such perils. Numerous problems directly concerning the buyer arise here. One relates to coverage. As the ownership of the property is divided so are the risks to the goods. Both parties are concerned with coverage against fire, theft, collision, and the like. In the automobile transaction in particular, the buyer is independently concerned with liability insurance covering both personal injury and property damage. This has led some legislatures to enact requirements of specific disclosure of the presence or absence of such coverage in automobile sales.63 Another problem which arises is that one of the methods used to hide an excessive finance charge is to include an inordinate charge for insurance on the goods.64 In other cases the credit charge is lumped together with the insurance premium,

61 None of the states controlling participation prohibit it. For example, Ohio sets a maximum of 2% of the principal balance. Ohio Rev. Code Ann. § 1317.08.
63 Colo, § 13-16-6(2)(d); Fla. § 520.07(a)(2); Ill. Ann. Stat. c. 95 ½, § 58p; Kan. § 7(c); Ky. § 190.100(3); Me. § 254 I B.1; Mich. § 492.113, as amended by Acts 1957, S.B. No. 1026, 1 CCH Cond. Sale Chat. Mortg. Rep. 787; Md. § 117b; Miss. § 26(a)(2); N.D. § 2(2)b (not limited to motor vehicles); Ore. § 3; S.D. § 3(6); Va. § 46-532; Wis. § 6m. (For full citation see notes 2 and 3 supra.)
64 Car insurance premiums were included in slightly less than one half of the new car contracts in 1955, and credit life premiums were incorporated into one third of such contracts in 1954 and two fifths of such contracts in 1955. 1957 F.R.B. Study, p. 76, supra note 48.
obscuring the cost of each and permitting manipulation and misrepresentation in the oral negotiations. The requirements of separate itemization of insurance premiums and specification of coverage in the contract go far to ameliorate these conditions. Some statutes attack the problem of excessive charges for insurance by providing that the premiums may not exceed the rates filed with the state insurance administrator for similar coverage, or those specified in a standard insurance manual.

Furthermore, there is almost universal concern in the retail installment sales legislation with coercive practices in the sale of insurance by the seller. To the extent that this is a problem in light of present day competition among sellers, the statutory formulations of relief are rather ineffective, since they permit the seller to reject an insurer obtained by the buyer. Such a safeguard of the seller's control of the insurer seems quite proper, since the seller has an interest in the insurance; but limitation on this power of approval could well be made part of the statute.

Besides the destruction of the goods a second risk in the installment transaction is the loss of the buyer's earning power through death or disability. Credit life, health, and accident insurance policies are employed against this peril on an ever increasing basis. On the theory that "no man's debts should live after him," this method of insurance was instituted some forty years ago. The benefit to the debtor's family

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65 Itemization of insurance premiums: Cal. § 2982a; Colo. § 13-16-6(2); Conn. § 6699(b); Fla. § 520.07(4); Ill. § 225; Ind. § 58-904; Iowa § 322.3(6)(c); Kan. 7(f)(4),(5),(6); Ky. § 190.100(2), (3); Me. § 254 II D; Md. § 117(6); Mass. § 12; Mich. § 492.113; Minn. § 6b(4); Miss. § 26(b)(4); Neb. § 60-617; N.J. § 6b; N.Y. §§ 302(4), 402(3); N.D. § 2(5); Ohio § 1317.04; Ore. § 614 B 4; S.D. § 3(5); Utah § 15-1 to 2a; Va. § 46-536; Wls. § 6b. Specification of Coverage: Colo. § 13-16-6(2); Conn. § 6699(b); Ind. § 58-902; Iowa § 322.3(6)(c); Kan. § 7(f)(4),(5),(6); Ky. § 190.100(2)(d); Me. § 254 II D; Md. § 117(6); Minn. § 6b(4); Miss. § 26(b)(4); Neb. § 60-617; N.J. § 6b; N.Y. §§ 302(6), 402(3); N.D. § 2(5); Ohio § 1317.02; Ore. § 5; Pa. § 614 B 4. (For full citation see notes 2 and 3 supra.) But see text, supra note 50.

66 Rate filing: Fla. § 520.07(c); Ill. § 227; Iowa § 322.3(6)(d); Kan. § 7(g); Ky. § 190.100(4); Me. § 254 III; Md. § 119; Miss. § 26(c); N.Y. §§ 302(6), 402(5); N.D. § 2(6); Ore. § 6(1); (special provisions governing credit life, health, and accident insurance § 6(2)); S.D. § 3(6). Manual: Ind. § 58-905; Ohio § 1317.05 (buyer permitted to deduct three times the amount of any excessive charge). Two states set the maximum charge in terms of the market price for similar coverage. Mich. § 492.116; Pa. § 617. (For full citation see notes 2 and 3 supra.)

67 Nebraska provides that the disapproval of the insurer selected by the buyer (1) must be reasonable under all the circumstances; (2) cannot be arbitrary or unreasonably discriminatory; and (3) does not tend to unreasonably restrain trade or to create a monopoly. Neb. L. 1957, L.B. No. 458, 1 CCH Cond. Chat. Mortg. Rep. 9359. Others attack the problem by regulation as well, e.g., Connecticut, Regulations of the Insurance Commissioner § 292-2-9, 1 CCH Cond. Sale Chat. Mortg. Rep. § 917 (Conn. Statutes). (For full citation see notes 2 and 3 supra.)
implied in this slogan is no doubt real, but it should not cloud the fact that this type of insurance also reduces the creditor's risk.\(^6\)

The abuses here are not unlike those related to insurance on the property itself. They have been summed up by Florida's Insurance Commissioner as (1) excessive insurance (for example, requiring a five hundred dollar policy on a fifty dollar deal); (2) pyramiding coverage (failing to cancel old insurance and requiring new insurance when the debt is refinanced); (3) overcharging; (4) coercion; and (5) nonpayment of claims.\(^7\)

Overcharging in this field is perhaps typified by the cases in which the buyer is charged the single policy rate, and the seller or financing agency carries group credit life, health, and accident insurance. One estimate of the overcharge in such cases indicates that the buyer pays twice the cost of the insurance.\(^7\) Oregon specifically attacks this practice by limiting the amount of the insurance premiums for credit life, health, and accident insurance to the actual cost to the financing agency or dealer.\(^2\)

The tied-in insurance company appears to be a case of indirect overcharging. Although the buyer pays the usual rate in such cases, the financing agency ultimately reaps the profit from the insurance.\(^7\) There is little likelihood of enactment of regulatory legislation governing the tied-in companies only.\(^4\) Furthermore, since this form of insurance is employed in all kinds of loan transactions, its entire regulation might better be left to general insurance law. Florida enacted such legislation in 1956, and the National Association of Insurance Commissioners has suggested a model act.\(^7\)

D. "Balloon Notes" and "Add On Contracts." Some abuses cannot

\(^6\) Morris, "History of Credit Life Insurance," 1957 Ins. L.J. 329, emphasizes the debtor benefits. In 1956 families of debtors are reported to have received $77 million in payment of claims under group credit life insurance policies. Downey, "Insurance in Installment Credit Transactions," 1958 Ins. L.J. 256, 263.

\(^7\) Statement of J. Edwin Larsen, also Chairman of the Subcommittee of the National Association of Insurance Commissioners on Credit Life, Health & Accident Insurance, 1957 Ins. L.J. 327.

\(^7\) "Thus on a comparable basis, the rate for ordinary consumer credit life insurance is about twice that of group coverage." Kedzie, "Present Characteristics & Trends, Credit Life Insurance," 1957 Ins. L.J. 334, 338.

\(^2\) Note 66 supra.

\(^7\) From 1950-1956, Motor Insurance Corp., owned by G.M.A.C. had average yearly earnings of nearly three million dollars. Moody's Bank & Financial Manual 841 (1957). The Wisconsin court held that the amount of G.M.A.C. dealer participation included retained insurance premiums from transactions with Motor Insurance Corp. so that the total could not exceed two per cent limit. General Motors A. Corp. v. Commissioner of Banks, 258 Wis. 56, 45 N.W.2d 83 (1950), rehearing denied, 258 Wis. 64a, 46 N.W.2d 328 (1951).

\(^4\) None of the present legislation directly deals with the problem. In 1957 new legislation in Massachusetts appears to have been defeated because of debate on an amendment covering the problem of tied-in insurance companies. The original bill is contained in Mass. House Document No. 2825 (1957).

be eliminated by disclosure alone. They relate to the terms of the contract itself and are tools for overreaching by the seller. One of these is the “balloon note”. By this device the contract or note calls for relatively small regular payments and a final large payment. Variations on the theme are endless and may be in the time allocations of the instalments as well as in the amount. The danger perceived by legislators is that such terms leave the buyer in an extremely hazardous position at the time of the last payment. He is at the mercy of the finance company, which may decide to foreclose its security interest or extend the terms of payment.

Legislative treatment of these provisions has not been at all uniform. Limitation rather than prohibition is more appropriate because this kind of repayment plan appears to have a legitimate function in those cases where the buyer’s income is seasonal. Maryland’s provisions are the most ambitious, and such clauses are there prohibited unless the buyer is given an absolute right to have the schedule of payments revised to conform to average amounts and intervals. New York relies totally upon a requirement of conspicuous disclosure of the term. Many of the statutes are simply silent on the question.

A similar use of the eager or ignorant buyer’s willingness to sign forms gives birth to the “add on” provision. Here the seller attempts to enhance his in rem security position by providing either (1) that future instalment purchases will also secure the first contract, or (2) that the subject matter of the present sale also secures past sales obligations. Thus, though the buyer may have made payments sufficient to pay for the goods purchased under one contract, he discovers that default in another contract may result in the holder seizing both items.

Considerable doubt is cast on both kinds of clauses when a conditional sales device is used to finance the sale. Even where a chattel mortgage is employed, the attempt to include after-acquired property

76 An estimated seven per cent of the new automobile contracts in 1955 contained balloon payment terms; one eighth of these were to buyers associated with the automobile industry. 1957 F.R.B. Study, pp. 52-3, supra note 48.


81 Compare Bucyrus-Erie Co. v. Casey, 61 F.2d 473 (3d Cir. 1932), with Webster Hall Corp. v. Continental Bank, 66 F.2d 338 (3d Cir. 1933). See also Dunn v. Archer, 150 Tenn. 440, 265 S.W. 678 (1924).
may fall at the suit of creditors. But neither of these considerations help the consumer, since we are still confronted with their in terrorem effect and their use in cases where the buyer fails to resist. On the other hand, some valid basis for their use may be present when the seller needs the added security to adequately protect himself as in the case of rapidly deteriorating goods. If authorized, care must be taken that the "add on" provision is not used to avoid the disclosure requirements of the act. This is particularly true of the provision which picks up after-acquired property. Maryland provides that in this event the disclosure obligation must be met at the time of the second purchase, and payments made thereafter are statutorily allocated to each purchase. When either price is paid, that property becomes the buyer's.

IV. PROTECTION AFFORDED DURING THE CREDIT EXTENSION

Close on the heels of the execution of the instalment contract by the buyer, the seller assigns the paper to the financing institution. Some of the rights of the buyer now hinge on general contract law. There is the traditional question of whether or not the buyer will be protected as against the finance company if, without notice of the assignment, he pays the seller. In those circumstances case law usually safeguards the buyer, and some of the statutes codify that result.

A. Acceleration Provisions. One risk the buyer takes in some transactions is the acceleration of the obligation. Where this is based on default in payment, little objection can be made to the seller's refusal to wait for each payment to fall in default. But many times the acceleration does not hinge upon default or any other ascertainable fact but upon whether or not the seller deems himself to be insecure. This licenses considerable discretion in the finance company.

Courts have reacted to this kind of provision in at least three ways: (1) the creditor is the sole judge of the facts, and so long as he acts in

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82 Cohen & Gerber, "The After-Acquired Property Clause," 87 U. Pa. L. Rev. 635 (1939). The Commercial Code gives vitality to such clauses generally, but limits their effect in consumer goods transactions to goods acquired within ten days after the advance. U.C.C. 9-204 (1957 ed.).
83 "Add ons" are dealt with in: Conn. § 6699(a)(2); Ill. § 237; Ky. § 190.100(1)(b); Md. § 124; Mass. § 13B (household furniture only); N.J. § 6(a)(2); N.Y. § 302(17); and N.D. § 2(17). (For full citation see notes 2 and 3 supra.)
85 4 Corbin, Contracts § 890 (1951); 2 Williston, Contracts § 433 (1936); Colo. § 13-16-6(1)(e); Conn. § 6699(a)(5); Fla. § 520.08(d); Ill. § 231; Kan. § 8(d); Ky. § 190.100(1)(e); Me. 255 TV; Md. § 123; Mich. § 492.115; Minn. § 6a(4); Miss. § 27(d); N.J. § 6a(5); N.Y. §§ 302(11), 406; N.D. § 2(11); Ore. § 11; Pa. § 616; S.D. § 3(3); Wis. § 6e. Of these, Colo. § 13-16-6(4); Conn. § 6699(e); Fla. § 520.08(d); Kan. § 8(d); Ky. § 190.100(5); Me. § 255 IV; Minn. § 6d; N.J. § 6d; Miss. § 27(d); N.D. § 2(10); N.Y. §§ 302(10), 411; S.D. § 3(8); Ore. § 10, provide protection to the finance company as assignee of the contract against some of the risks of the assignor's insolvency or bankruptcy. (For full citation see notes 2 and 3 supra.)
good faith there is no requirement that he must have reasonable grounds for deeming himself insecure;\footnote{E.g., Thorp v. Fleming, 78 Kan. 237, 96 Pac. 470 (1908); Johnson v. Thayer, 53 Ohio App. 25, 4 N.E.2d 172 (1936); Cline v. Libby, 46 Wis. 123, 49 N.W. 832 (1879).} (2) the acceleration can only occur where the creditor had good reason to think and did in good faith think himself insecure;\footnote{E.g., Bullock v. Young, 118 A.2d 917 (D.C. Mun. Ct. App. 1955); Parks v. Phillips, 71 Nev. 313, 289 P.2d 1053 (1955); Woodruff v. Stahl, 126 Wash. 184, 217 Pac. 1013 (1923).} and (3) the creditor must act in good faith and upon facts which actually render the debt insecure.\footnote{Flinn v. Fredrickson, 89 Neb. 563, 131 N.W. 934 (1911); Humphner v. D. M. Osborne & Co., 2 S.D. 310, 50 N.W. 88 (1891).} Some suggestion has been made of a fourth solution, permitting even arbitrary acceleration where the creditor does not actually consider himself to be insecure.\footnote{2} The Uniform Commercial Code adopts the first view and provides that such an acceleration provision means that the accelerating party shall have the power to do so only if he in good faith believes that the prospect of payment or performance is impaired.\footnote{U.C.C. 1-208 (1957 ed.).} The party objecting to the acceleration must sustain the burden of establishing lack of good faith, which is elsewhere defined as “honesty in fact.”\footnote{Ibid.} This, however, is not directed particularly at consumer sales but at commercial transactions in general, and a more stringent provision in the area under discussion would certainly be compatible with the Code.\footnote{Although the rule dealing with such an acceleration is contained in article 1, General Provisions, which also sets out a presumption against implied repeal (§ 1-104), the frequent saving clauses in article 2, Sales, and article 9, Secured Transactions, clearly indicate that a different rule in regulatory legislation would be controlling. U.C.C. 2-102, nn. 9-102, 9-203(2) (1957 ed.).} The instalment sales statutes frequently prohibit the operation of such clauses, particularly where the acceleration is arbitrary or without reasonable cause.\footnote{Ill. § 233; Md. § 118d; Mich. § 492.114(b); N.Y. §§ 302(13), 403(3); N.D. § 2(13); Ore. § 13; Pa. § 615 (approved where car is being illegally used). (For full citation see notes 2 and 3 supra.) Of these, only Maryland, Michigan and Pennsylvania contain outright prohibition.} An astute seller, intent on overreaching, might succeed by taking a series of demand notes from an unwary buyer; but this advantage would seldom be worth the added administrative cost and burden.\footnote{Comment U.C.C. 1-208 (1952 ed.).}

When acceleration is permitted, one of its side effects is to create a problem as to the apportionment of the finance charge. Since the finance charge is lumped together with the cash price and other fees, and this total is then divided into the instalments, there is no real contractual
allocation of the charge to any time interval. In the parallel situation where the obligation is voluntarily paid before maturity, the buyer may be denied a reduction in the finance charge for the interval between payment and the stated maturity date.

B. Prepayment Rights. Only an exaggerated emphasis upon the notion that the seller is entitled to his original bargain can lead to a denial of some proportionate rebate to the buyer under the circumstance of voluntary prepayment. The statutory solutions are aimed mainly at voluntary prepayment, but New York recently amended its laws to provide for credit for full payment made prior to the maturity of the final instalment even where acceleration occurs because of the buyer's default. Some utilize the so-called "rule of 78" or the "sum of the digits" method. Others use a general allocation based on the sum of payments made. In either test some weight has been given to the contention that upon the advance payment the finance company is also entitled to an "acquisition cost."

The "rule of 78" or the "sum of the digits" method allocates the finance charge upon the notion that the financing agency earns the greater part of the charge in the early period of the credit extension. This seems to be true, since the amount of the principal is steadily reduced as payments are made. The nomenclature comes from the fact that the sum of the digits one through twelve (the number of months in the year) totals seventy-eight. This total number is used as the denominator of the fraction applied to the finance charge to determine the rebate. The numerator of that fraction is obtained by adding the sum of the digits assigned to the months anticipated. In making this assignment, the first month of the credit extension is given the number twelve, the second eleven, and so forth, because of the notion that most of the charge is earned in the early months. To particularize this formula, let us assume that we have a twelve-month contract with instalments set at $90 a month; the finance charge at $80. If paid in full after the sixth month, the "rule of 78" would use twenty-one (the sum of 6, 5, 4, 3, 2, 1) as the numerator of the fraction, and the formula would be as follows:

96 Indiana § 58-906, Rebate set by the Department of Financial Institutions, General Order No. 1, April 25, 1949; 2 CCH Cond. Sale Chat. Mortg. Rep. § 914.01 (Indiana); Md. § 125; Mass. § 12 B. (For full citation see notes 2 and 3 supra.)
97 Cal. § 2928c; Colo. §§ 13-16-7; Conn. § 6701(a); Fla. § 520.09; Ill. § 242; Iowa 322.3(6)(3); Kan. § 9 (proportion of sum of monthly balances beginning one month after prepayment and the sum of all monthly balances); Ky. § 190.120; Me. § 256; Minn. § 8; Miss. § 28; Nev. § 97.050; N.J. § 7; N.Y. §§ 305, 408; N.D. § 5; Ore. § 24; Pa. § 622; S.D. § 5; Utah § 15-1 to -2a (70% of amount). (For full citation see notes 2 and 3 supra.)
98 See note 100 infra.
The alternate formula merely ascertains the rebate by applying to the finance charge a fraction made up of the sum of the payments anticipated over the sum of all the payments under the contract. Thus, in our hypothetical case, the rebate would be calculated as follows:

\[
\frac{540}{1080} \times 80 = \$40
\]

You will note that this does not take into account the factor of early risk as does the "rule of 78." For that reason it seems less realistic. That factor may, however, be considered through the means of an acquisition cost or a minimum finance charge. The New York motor vehicle act specifically permits a seller to deduct and retain fifteen dollars of the credit service charge prior to the application of the fraction. This acquisition cost would result in the refund in our hypothetical case being altered to $32.50. If the acquisition cost is calculated so that it compensates the financing agency for more than mere administrative charges, then it is a means of avoiding the objection raised to the sum of the balances formula.

C. Receipts, Statements of Account, Evidence of Cancellation.

Other general protections afforded the buyer during the credit extension include the right to a receipt for a "cash" payment. With the huge increase of personal checking accounts, some problems of interpretation of "cash" may be expected. In addition, the buyer upon written demand is entitled to a statement of indebtedness and a statement of can-

99 The confusion attendant upon an ambiguous definition of the month of payment is examined in Note, 2 Stan. L. Rev. 362, 364 (1930).

100 The holder is entitled to an acquisition cost or minimum finance charge in: California ($25.00); Colorado ($15.00); Connecticut ($15.00); Florida ($25.00); Illinois ($10.00); Iowa ($25.00); Kentucky ($25.00); Maine ($25.00); Minnesota ($15.00); Mississippi ($10.00); Nevada ($25.00); New Jersey ($10.00); New York ($10.00-$15.00); North Dakota ($15.00); Oregon ($15.00); Pennsylvania ($10.00); South Dakota ($15.00); Utah ($5.00 and $15.00 for motor vehicles). Usually there is no requirement of a refund where the amount due is less than one dollar.

101 The formula would then be:

\[
\frac{540}{1080} \times (80-15) = \$32.50
\]

102 Cash payments only: Colo. § 13-16-6(1)(e); Conn. § 6699(a)(6); Fla. § 520.07(g); Ill. § 232; Kan. § 7(m); Ky. § 190.100(1)(f); Me. § 254 (VII); Minn. § 6a(5); Miss. § 26(h); N.J. § 6a(6); N.Y. §§ 302(12), 407; N.D. § 2(12); S.D. § 3(4). All payments: Md. § 123; Mich. § 492.129; Ore. § 12; Pa. § 629. (For full citation see notes 2 and 3 supra.)

103 The difficulty is anticipated by reason of those cases holding a check to be conditional payment of the debt, e.g., Wasilaukas v. Brookline Savings Bank, 239 Mass. 215, 156 N.E. 34 (1927) (invoking the construction of by-law as to "money paid out"); Pohl v. Johnson, 179 Minn. 398, 229 N.W. 555 (1930).
cancellation sufficient to release the security. The requirement of a demand for the statement of cancellation may be unwise unless the buyer is informed of the right to obtain the release. Furthermore, where a recording of the original security interest has been made, it seems wise to add a duty upon the financing agency to record the release and thus insulate the buyer from impairment of his credit status because of the earlier recording of the security device. The financing agency's burden would not be intolerable in those cases where it elected to record the documents, since it already would be dealing with the recording office on a regular basis.

V. PROTECTION UPON DEFAULT

The duality of the practical functioning of the instalment contract is nowhere more apparent than in the provisions governing default. It is not merely a little piece of legislation to be construed in litigation. It is perhaps more important as a weapon in what frequently becomes a war of nerves. Threats are almost always less expensive to the creditor than litigation. One textbook for retail credit employees suggests that in dealing with obstinate debtors, one advantage of utilizing credit collection agencies and attorneys is that "fear is inspired on the part of most debtors who do not know what the collection agency or attorney may, or can, do to them." This tool is obviously enhanced if the collector can point to a particularly harsh provision of the contract when he actually makes a threat. The enforceability of such clauses then is immaterial for these purposes.

A. Delinquency and Penalty Provisions. Delinquency and penalty provisions often fall in this in terrorem category. Here the debtor is, by reason of a contract stipulation, required to pay additional sums when he

104 Statement of Indebtedness: Colo. § 13-16-6(1)(e); Conn. § 6699(a)(6); Fla. § 502.079; Ill. § 232; Kan. § 7(m); Ky. § 190.100(1)(f); Me. § 254 VII; Md. § 130; Mich. § 492.128; Minn. § 6a(5); Miss. § 26(h); N.J. § 6a(6); N.Y. §§ 302(12), 407; N.D. § 2(12); Ore. § 12; Pa. § 628; S.D. § 3(4). Statement of Cancellation: Conn. § 6699(h) (contracts over $100); Ill. § 241; Kan. § 7(m); Md. § 127; Mich. § 492.130; N.Y. §§ 304, 412; N.D. § 4; Ore. § 23; Pa. § 630. (For full citation see notes 2 and 3 supra.)

105 Of the statutes cited in note 104 supra, Connecticut, Illinois, North Dakota and Pennsylvania place a mandatory obligation upon the finance company to mail a sufficient release of the debt to the buyer.

106 During the Massachusetts legislative deliberations upon the Uniform Commercial Code in the fall of 1957, the writer and others met with a group of town, city, and state officials responsible for recording in Massachusetts, and these officials emphasized that their experience demonstrated the need for the mandatory recording of statements of cancellation.

107 Phelps, Retail Credit Fundamentals 337 (1957).

108 In Lepore v. Atlantic Corporation, — Mass. —, 148 N.E.2d 279 (1958), the court ignored this consideration in upholding the validity of a conditional sales contract which contained the statutory clause on expenses in repossession and resale and another inconsistent provision authorizing 15% of the unpaid debt as attorney's fees on the basis that the statutory clause started out with a proviso "Anything herein contained to the contrary notwithstanding ...." Cf. note 139 infra.
fails to make a payment on time. This added charge not only induces the debtor to pay on time, but it also compensates the financing institution for any extra cost incurred by reason of the special treatment required under the particular contract.

On the other hand, this area is ripe for rate abuses, since a disproportionate penalty inflicted shortly after nonpayment can be a source of extra income to the financing firm. Hence there may be a reverse twist to the penalty. It may encourage the debtor to pay, but it may also discourage efforts at prompt collection by the holder of the contract. In this circumstance we are close to the finance company making a new “loan” at what may be an exorbitant rate, that is, the delinquency charge. This runs counter to the basis of the regulatory legislation, the usury laws, and much of the small loan legislation restricting regular lenders. Two tools, alone or in combination, are employed as remedies. One is the prohibition of delinquency charges during a short five or ten day grace period. The other is the control of the amount of any delinquency charge. Usually the provisions set a maximum of five per cent of the amount in default or five dollars, whichever is the lesser amount.

B. Refinancing. If the delinquency continues, the financing firm is faced ultimately with refinancing the obligation or employing its legal weapons against the debtor. If the refinancing technique comes into play, other police power controls may operate on the transaction. The general usury laws of some jurisdictions have been held to apply, since this extension has much the same effect as a cash loan. If the amount involved is within the statutory limits, the various small loan or consumer finance laws may control. Generally they permit a higher in-

110 Late charges were held usurious in Duvio v. Thomas, 95 So. 2d 687 (La. App. 1957).
111 Colo. § 13-16-6(1)(c); Conn. § 6699(a)(4); Fla. § 520.07e; Ill. § 228; Kan. § 7(k); Ky. § 190.100(1)(d); Me. § 254; Md. § 132; Mass. § 13D; Minn. § 6a(3); Miss. § 26(e); N.J. § 6a(4); N.Y. §§ 302(7), 402(6); N.D. § 2(7); Ohio § 1317.06; Ore. § 7; S.D. § 2(7). (For full citation see notes 2 and 3 supra.)
112 Colo. § 13-16-6(1)(c); Conn. § 6699(a)(4); Fla. § 520.07e; Ill. § 228; Ind. § 58-906 (set by Department); Kan. § 7(k) (5% or $2.50); Ky. § 190.100(1)(d); Me. § 254 (5% each instalment or 6% per annum on the total unpaid balance); Md. § 132; Mich. § 492.120 (2% a month; not authorized on accelerated paper); Minn. § 6a(5); Miss. § 26(e); N.J. § 6a(4); N.Y. §§ 302(7), 402(6); N.D. § 2(7); Ohio § 1317.06 (5 cents on the dollar); Ore. § 7; Pa. § 621 (2% a month); S.D. § 2(7). (For full citation see notes 2 and 3 supra.) All of these except Indiana, Kansas, Michigan, Ohio, and Pennsylvania also authorize the collection of limited attorneys' fees as long as the contract is referred to an attorney who is not a salaried employee of the holder.
113 By the middle of 1956, approximately eight per cent of the 1954 and four per cent of the 1955 new car instalment buyers had refinanced their purchases. 1957 F.R.B. Study, p. 82, supra note 48.
114 Associates Discount Corp. v. Ruddock, 224 Miss. 533, 81 So. 2d 249 (1955); London v. Toney, 263 N.Y. 439, 189 N.E. 485 (1934), 91 A.L.R. 1100 (1934).
115 Such a result seems to have been reached in State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 715, 77 N.W.2d 215, 233 (1956).
terest rate than the usury laws but only to licensed regulated lenders.\textsuperscript{116} Here too the problem of allocating the unearned portion of the finance and insurance charges must be considered by any thoughtful draftsman. All but one of the retail instalment sales acts establishing control of the refinancing rates also set the original rate.\textsuperscript{117}

C. Repossession and Resale. Failing collection or refinancing, the financial institution then considers the more drastic method of collection—realization upon the security. This is ordinarily accomplished by repossession and resale of the property involved.\textsuperscript{118} A myriad of laws apply to this part of the activity. Since few states actually control security realization in the instalment sales legislation itself, the emphasis here will be placed upon the provisions of the Uniform Conditional Sales Act and the Uniform Commercial Code.\textsuperscript{119}

Where protection is afforded the consumer, it is formulated on the premises of (1) safeguarding the act of repossession in order to prevent any breach of the peace; (2) permitting the buyer to pay the debt and thus redeem the property taken by the seller; (3) as far as practicable, assuring that the resale is so effectively conducted as to avoid unnecessary loss to the buyer and thus reduce or eliminate any deficiency judgment; and (4) requiring the seller to account to the buyer for any profit made on the resale over and above the amount of the debt and expenses.

Repossession limitations in the instalment sales acts have followed the provisions of the Uniform Conditional Sales Act, demanding re-


\textsuperscript{117} Conn. § 6702; Fla. § 520.10; Iowa added § 4; Kan. § 10; Ky. § 190.130; Me. § 257; Mich. § 492.119; Minn. § 9; Miss. § 29; N.J. § 8; N.Y. §§ 306, 409; N.D. § 6; Ore. § 25; Pa. § 620; S.D. § 6. (For full citation see notes 2 and 3 supra.) Of these only New Jersey fails to set a maximum original rate, see supra note 54.

\textsuperscript{118} One estimate indicates that from one to two per cent of the new cars sold on the instalment plan in 1954-1955 had been repossessed by the middle of 1956. 1957 F.R.B. Study, p. 81, supra note 48. An interesting study of four hundred and three personal bankruptcy cases in Kansas City and St. Louis, Missouri, shows that defaults may be due to poor planning by the lender as well as the borrower. "Consumer finance companies had unpaid debts in 70 per cent of the cases (St. Louis) compared with 69 per cent for the bankruptcy group in Kansas City and 79 per cent for the wage earner plan group. Sales finance companies were involved in 46 per cent of the cases (St. Louis), well above the 36 per cent and 24 per cent for the bankruptcy group and wage earner plan group in Kansas City. Banks were owed money in 31 per cent of the cases (St. Louis), below the 36 per cent for the bankruptcy group in Kansas City, but well above the 10 per cent for the wage earner plan group." Dauten, C., Overloading the Borrower and Bankruptcy—Cause and Effect, Proceedings of the Fourth Annual Consumer Credit Conference 1957, Washington University School of Business, St. Louis, p. 16, 23.

\textsuperscript{119} Retail instalment sales acts detailing control over security realization include those in Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, and Pennsylvania. (For full citation see notes 2 and 3 supra.) The failure of the American legislatures to provide safeguards upon repossession has been well said to be its great point of weakness. Donovan, "Retail Instalment Sales—The Australian Experience," 33 N.Y.U.L. Rev. 666, 690 (1958).
taking by legal process only where a breach of the peace would otherwise occur. This adds little to the buyer's protection. If abuses are prevalent in connection with repossessions, the English Hire-Purchase Act offers an excellent tool aimed at what is picturesquely described as the "snatch back." Under sections 11 and 12 of the Act, if one third of the price has been paid, the owner (who holds a comparable position to that of the secured party under American law) may enforce the contract only by legal action. The court has the power to make orders protecting the goods from damage or depreciation pending the hearing. Although such judicial control of repossession would prevent many of the abuses and much of the tort litigation in this area, none of the American statutes go this far.

A few of the statutes require preliminary notice to the buyer of the intention to retake in order that the buyer can arrange for payment or prepare for the loss of the goods. It has been suggested that such a notice is desirable to avoid the summary seizure of the baby's crib or the family washer, despite its admitted utility to the buyer intent upon absconding or concealing the goods. Wedded to complete judicial control, this notice provision would be unexceptionable; but alone it offers considerable basis for the worries of those lenders who cannot deny abuses in their industry but who have vivid and unhappy memories of recalcitrant, fraudulent, and generally dishonest buyers. This is particularly true when one recollects that the usual practice of collection involves many notices of the default on the indebtedness prior to seizure of the goods. Furthermore, the statutory period of time allowed the buyer to redeem the goods after repossession should be long enough to enable him to arrange to pay the debt, so that in any event he would be deprived of the goods for only a relatively short time.

As to redemption rights of the buyer, the parallel to the Uniform Conditional Sales Act is again significant. It is here that the principal defect relating to consumer protection in the Uniform Act is apparent, since the holder of a conditional sales contract is able to cut off the buyer's power to redeem by a notice prior to retaking. The theory seems

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120 Unif. Cond. Sales Act. § 16. See also Conn. § 6700(a); Fla. § 520.11; Mass. § 13 E; Md. § 128; Mich. § 492.123(a); N.D. § 2(15); Ore. § 15; Pa. § 623; U.C.C. 9-503 (1957 ed.).
124 Donaldson, supra note 109, at 157.
125 Phelps, op. cit. supra note 107, at 317.
126 Unif. Cond. Sales Act §§ 17, 18. Similar power is vested in the mortgagee in Conn.
to be that the buyer's interest is thus protected, since he can pay the amount due during the period between the notice and the actual retaking. This may be true of the informed commercial merchant-buyer, but the existence of the retail instalment sales legislation is bottomed upon disclosure to a group of buyers who are not informed of their rights. Moreover, if the buyer pays even after retaking, the seller cannot legitimately complain, because payment of the debt is the whole reason for the security interest. The notice of redemption in the Uniform Conditional Sales Act was borrowed from the rights of the mortgagee under a chattel mortgage, so that where that device is employed, the buyer's power to redeem is more secure. It is especially noteworthy here that the Uniform Commercial Code abolishes the distinctions between chattel mortgages and conditional sales and also rejects the Uniform Conditional Sales Act's limitation upon the buyer's right of redemption.

If the buyer refuses to or cannot ransom the goods through redemption, his principal hazard then becomes the deficiency judgment. Of the various avenues open to protecting him from an exorbitant deficiency judgment, the forced resale is the one generally chosen. This too has a Uniform Conditional Sales Act antecedent. First, in certain circumstances the seller is forced to make a resale where the buyer has paid fifty per cent or more of the price or, if less has been paid, where the buyer makes a written demand for a resale. Secondly, the buyer is discharged from liability for any deficiency if no resale is made. The Uniform Commercial Code has parallel provisions in both instances. Under section 9-505(1) if sixty per cent of the price has been paid in a purchase-money consumer-goods transaction, the buyer is protected by requiring a sale. The Code requires this resale unless the buyer renounces or modifies his right to such a sale after default. This is unlike the provisions of the Maryland Retail Instalment Sales Act which


Contracual attempts to authorize private foreclosure of chattel mortgages were successful, but judicial control of the fairness of the resale price persisted. Gilmore and Axelrod, "Chattel Security," 57 Yale L.J. 517, 533 (1948).


Unif. Cond. Sales Act §§ 19, 20; Conn. § 6700(d)-(e); Fla. § 520.11(a); Ill. § 247 (not compulsory); Md. § 130; Mass. § 13F (only where fifty per cent paid); Mich. § 492.127 (not compulsory); Pa. § 626 (not compulsory). Ill. § 249 and Mich. § 492.127 attempt to protect a buyer who has paid in 80% of a time balance of $2,000 or less by requiring a seller who repossessed without legal process to elect between losing the deficiency or returning the vehicle and suing for the balance due. (For full citation see notes 2 and 3 supra.)

Unif. Cond. Sales Act § 23; Conn. § 6700(b); Fla. § 520.11(c); Ill. § 247; Md. § 131. (For full citation see notes 2 and 3 supra.)

U.C.C. 9-505(1) (1957 ed.).
require the resale only upon the buyer's demand.\textsuperscript{133} The Code provisions seem preferable, for they retain a desirable flexibility while protecting the buyer from losing his right to a resale through ignorance of the necessity for a demand. Under section 9-505(2) even where less than sixty per cent of the price has been paid, the seller can only retain the goods without a resale where he does so in full satisfaction of the buyer's obligation after giving the buyer notice and an opportunity during a thirty-day period to demand a resale.\textsuperscript{134}

The remaining issue concerns the kind of resale to be required: should it be public or private. As to the forced sale the Uniform Conditional Sales Act requires a public resale.\textsuperscript{135} The Code permits a private resale as long as it is commercially reasonable in every aspect including method, manner, time, place, and terms.\textsuperscript{136} Furthermore, unless the goods are perishable or are the kind sold on a recognized market, the Code demands that the debtor be notified of the time of sale.\textsuperscript{137} The Code does prohibit the secured party from buying at a public sale but recognizes his right to buy at a private sale.\textsuperscript{138}

Finally, there is the question of the seller's duty to pay to the buyer the portion of the proceeds of the sale which exceed the amount of the debt and the expenses of repossession and resale. Incidental to that issue there is a problem of defining the legitimate expenses involved.\textsuperscript{139}


\textsuperscript{134} The requirement of an objection to a proposed retention of repossessed goods in satisfaction of the debt is consistent with the argument for no demand in the case of a compulsory resale. By lodging the choice in the buyer, he is given the power of exercising judgment as to the most profitable approach: resale with liability for a deficiency or no resale with no such liability. U.C.C. 9-505 (1957 ed.).

\textsuperscript{135} Unif. Cond. Sales Act, § 19. Public or private: Conn. § 6700(d); Fla. § 520.11(a); Ill. § 247; Pa. § 626. Public: Mass. § 13F; Mich. § 492.126; Md. § 130. (For full citation see notes 2 and 3 supra.)

\textsuperscript{136} U.C.C. 9-504(3). See also U.C.C. 9-507(2).

\textsuperscript{137} U.C.C. 9-504(3).


If there is no duty to account to the buyer after resale, the seller retains any profits made on the transaction. Apparently, most resales result in the realization of little or no funds in excess of the amount owed and the expenses of the retaking and resale. But again if such excess does result, the seller gets all that he bargained for if he is permitted to keep only the amount of the debt and the expenses of realizing on the security. The buyer should receive any excess, particularly in light of the fact that he remains liable for any deficiency.

VI. SAFEGUARDS IN LITIGATION

One would expect lawsuits to follow realization upon the security only when the amount of the deficiency is significant, or perhaps when an example is to be made of a particularly recalcitrant buyer. However, there was early recognition that the expense of litigation is quickly reduced in a nonadversary proceeding. By means of confessions of judgment or power of attorney provisions in the contract, the holder is empowered to obtain a judgment against the debtor without much cost or difficulty. Since the debtor gets neither notice nor opportunity to be heard in such a situation, these harsh practices received severe legislative treatment. Where existing law does not treat of the problem, several retail instalment sales acts do.

Consideration must be given to the procedural aspect of the financing agency's position in litigation. Traditionally the holder of a negotiable instrument has procedural advantages in both pleading and proving his cause of action. Little attention has been directed toward these advantages in the regulatory legislation. This oversight has occurred primarily through provisions in some acts directed toward protecting the buyer in litigation with the finance company. Holders in due course have rather sacrosanct protection, particularly as to freedom from the so-called personal defenses, such as fraud in the inducement, breach of warranty, and failure of consideration. Guarded by this status, the finance companies have usually avoided the assertion of such defenses

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140 Cox, The Economics of Instalment Buying 280-82 (1948).
141 U.C.C. 9-504(2).
142 Colo. § 13-16-6(c); Conn. § 6699(a)(3); Ill. § 234; Ky. § 190.100(1)(c); Me. § 254 VII; Md. § 118b; Minn. § 6a(2); N.J. § 6a(3); N.Y. §§ 302(14), 403(3); N.D. § 2 (14); Ore. § 14. (For full citation see notes 2 and 3 supra.) Wage assignments in the contract are often similarly prohibited, e.g., cited sections of Illinois, Kentucky, North Dakota and Oregon acts.
143 The advantage rests on presumptions of delivery and consideration and upon the holder's prima facie position as a holder in due course. Negotiable Instruments Law §§ 16, 24, 59. See U.C.C. 3-307, 3-408 (1957 ed.).
144 See statutes collected note 148 infra.
145 Negotiable Instruments Law § 57, U.C.C. 3-305 (1957 ed.). This traditional freedom from defenses has been traced in English law as far back as the fifteenth century. Holden, History of Negotiable Instruments in English Law 63 (1955).
by the buyer when sued on the note.\textsuperscript{146} Thus the buyer has had to bear the cost of litigating with the seller and the risk of the seller's insolvency. This followed even though the financing company had power to pursue the seller whom it, as well as the buyer, had selected. In fact, the determination by the finance company to deal with the seller, involves a much more sophisticated and informed judgment than the similar decision by the consumer. By identifying the dealer with the finance company, a few courts have shifted these risks.\textsuperscript{147} The surprisingly scant legislative response prohibits or limits the use of a negotiable instrument in the retail instalment sale.\textsuperscript{148} This presents little practical difficulty where the note and secured interest are jointly transferred. Perhaps because the separate negotiation of such instruments may be rare, care has not been taken to safeguard such a transferee.\textsuperscript{149}

The problem of the buyer's defenses against his vendor does not end with the consideration of the negotiable instruments law because financing companies have been able to insulate themselves through terms waiving defenses against assignees of the contract.\textsuperscript{150} Legislative action

\textsuperscript{146} E.g., Cotton v. John Deere Plow Co., 246 Ala. 36, 18 So. 2d 727 (1944); Commercial Credit Co. v. M. McDonough Co., 238 Mass. 73, 130 N.E. 179 (1921); B.A.C. Corp. v. Cirucci, 131 N.J.L. 93, 35 A.2d 36 (1944).

\textsuperscript{147} Close relationship of seller and finance company: Commercial Credit Co. v. Childs, 199 Ark. 1073, 117 S.W.2d 260 (1940) (finance company supplied forms with a printed assignment, and the instruments were assigned immediately); Commercial Credit Corp. v. Orange County Machine Works, 34 Cal.2d 766, 214 P.2d 819 (1950) (facts similar to Commercial Credit Co. v. Childs, supra, and evidence of telephone participation by finance company); Mutual Finance Co. v. Martin, 63 So. 2d 449 (Fla. 1953) (finance company used forms, and that company's office designated as place of payment); compare, Implement Credit Corp. v. Elsinger, 268 Wis. 143, 66 N.W.2d 657 (1954). Seller said to be agent of finance company: Palmer v. Associates Discount Corp., 124 F.2d 225 (D.C. Cir. 1941); Associates Discount Corp. v. Goetzinger, 245 Iowa 326, 62 N.W.2d 191 (1954).

\textsuperscript{148} In Maryland (§ 134) the note must refer to the instalment contract and is subjected to defenses of the buyer. Other states forbid utilization of any negotiable instrument which will cut off the buyer's defenses in the hands of a third party: N.Y. §§ 302(9), 403; N.D. § 2(8); Ore. § 9(1); Pa. § 615. On the other hand, Michigan (§ 492.114(f)) specifically safeguards the insulated position of the holder in due course. (For full citation see notes 2 and 3 supra.)

\textsuperscript{149} One court protected the buyer rather than the innocent financing agency, even where the note was separated from and did not refer to the contract as required by the regulatory act. Griffin v. Baltimore Federal Savings & Loan Assoc., 204 Md. 154, 102 A.2d 804 (1954) (confession of judgment provision in note).

\textsuperscript{150} A provision that the contract when assigned “shall be free from any defense, counterclaim, or cross complaint” was held to preclude the defense of failure of consideration even if the plaintiff was not a holder in due course in Commercial Credit Corp. v. Biagi, 11 Ill. App. 2d 80, 136 N.E.2d 580 (1956). On the other hand a similar provision was denied effect in Quality Finance Co. v. Hurley, — Mass. —, 148 N.E.2d 385 (1958). For a suggestion that the commercial importance of freedom of defenses has been exaggerated see Gilmore and Axelrod, “Chattel Security,” 57 Yale L.J. 517, 541 (1948). Under the English Hire-Purchase system contracts, the buyer's contract is not with the retailer but
ranges from complete prohibition of such contract clauses to the limited protection afforded in the New York legislation.\textsuperscript{151} The latter protects the assignee under the contract terms only where the assignee takes the transfer in good faith and for value, and has no notice of the claim within ten days after mailing a notice of the transfer to the buyer.\textsuperscript{153} Claims of defective performance are thus available to the buyer for the limited period, but the statute also protects the assignee from fictitious defenses fabricated when the buyer discovers he is unable to pay the debt. Where there are latent defects in the goods, the risk of suing the seller is thrown upon the buyer, but considerations of the relative innocence of both parties and the desirability of a free flow of this kind of paper make the provision seem meritorious.

One objection to protecting the buyer in these cases is that it places him in a better position than a cash buyer of the goods, since the fact of payment would force the cash buyer to sue the seller and thus take the risk of the seller's absconding or insolvency.\textsuperscript{163} This is true, but it does not seem to answer the problem of balancing the interest of the financing agency and the buyer where the buyer has not paid the seller but has bought on credit. In fact, the buyer could reply that his position regarding defenses is more comparable to a buyer whose seller extends credit without the intervention of a finance agency. In that case the buyer's defenses are obviously available in litigation with the seller.

When the financing agency is introduced into the transaction, the entire question really involves an allocation of the risks of the seller's moral and financial integrity to the buyer or the finance company. The intensity of feeling upon this issue can be traced through the history of the problem in the Uniform Commercial Code. The original drafts contained strong provisions favoring the buyer, but these were gradually tempered in the heat of controversy so that the present provisions leave the question almost entirely to state law.\textsuperscript{164} Here again the Code carefully leaves adequate ground for regulatory statutes.\textsuperscript{165}

\begin{footnotesize}
with the finance company, and consequently there are many obstacles to the buyer's attempt to fix the seller with express or implied warranty obligations. Donovan, "Retail Instalment Sales—The Australian Experience," 33 N.Y.U.L. Rev. 666, 675-80, 683-84 (1958).

\textsuperscript{151} Prohibition: Mich. § 492.114(f); Miss. § 26(f); Pa. § 615. Limitation: N.Y. §§ 302(9), 403(3)(a); N.D. § 2(5). (For full citation see notes 2 and 3 supra.)

\textsuperscript{152} N.Y. Pers. Prop. Law §§ 302(9), 403(3)(a). The form and content of the notice is prescribed by the statute which calls for a specific disclosure of the effect of the notice.


\textsuperscript{154} The development was from a complete preservation of the consumer's defenses to a middle ground "fearfully and wonderfully made" insulating the finance company in suits on the note but opening defenses if the finance company sought to repossess, attach, or levy upon the goods sold. Sutherland, "Article 3—Logic, Experience and Negotiable Paper," 1952 Wis. L. Rev. 230, 235-40. After the New York Law Revision Commission
\end{footnotesize}
Sanctions upon noncompliance can be categorized into three groupings: (1) criminal penalties, (2) civil remedies afforded the buyer, and (3) revocation of required licenses. Of these the criminal sanction is most widely found on the statute books. Usually a willful violation of the statute constitutes a misdemeanor punishable by fine and occasionally by imprisonment. An interesting feature of the New York legislation covering goods other than motor vehicles, is the recognition of a power to correct the violation and thus avoid the criminal penalty. Except where there is a willful violation in connection with consolidations and "add ons," the violator may correct the condition within ten days after notice of the violation. This avenue of escape from compliance with the statute at the time of the sale may save the hard case in which there has been noncompliance with the more formalistic requirements of the act. Thus if the seller gave the buyer an unsigned copy of the contract, the policy of the act would be fulfilled if his signature was added to the contract upon demand. Other cases, however, could involve the disclosure provisions of the acts; for example, the willful failure of the seller to itemize the elements of the time price. Disclosing the finance charge and insurance costs after the contract is made obviously prevents the buyer from making any effective comparison of the cost of obtaining the money through another competitive agency. Since in the New York legislation the same saving provision operates to defeat the various civil remedies, this is a major "loophole" in the buyer's protection.

Civil relief varies considerably, and the violation may result in loss of the security interest or of the debt, in whole or in part. The buyer
may be permitted to recover the entire finance charge for all or some violations.\textsuperscript{161} In some cases he is permitted to recover all the payments previously made.\textsuperscript{162} Under the Uniform Commercial Code, noncompliance with the security realization provisions may entitle the debtor to recover the finance charge and ten per cent of the principal balance.\textsuperscript{163}

Prior to the enactment of the Code in Massachusetts, a conditional seller could lose his security interest for failure to insert mandatory contract provisions.\textsuperscript{164} Idaho merely makes a noncomplying contract non-recordable.\textsuperscript{165} Of these the Code seems to provide the most effective means of eliminating violations. One might voluntarily assume the risk of losing his profits in the finance charge, but the added loss of part of the principal amount increases the risk and seems to be a more effective deterrent. To permit the buyer to recover all of the payments and perhaps retain the goods seems unduly harsh.\textsuperscript{166} The Massachusetts approach usually benefits the buyer only indirectly by avoiding the seller’s security interest. Most often the beneficiary of the sanction is a third party who is contesting with the finance company concerning the in rem rights to the goods.\textsuperscript{167} The recordability sanction in the Iowa statute may be desirable since it, in effect, polices the contract terms in each transaction. But here recording may be deliberately avoided by the seller or finance company.

The problem of imposing the penalty whether it be civil or criminal, upon the financing agency when the seller is the one guilty of violating

\textsuperscript{161} Colo. § 13-16-9; Conn. § 6703; Fla. § 520.12 (contract formalities and finance charge limitation); Ill. §§ 240, 243 (or 10% of cash price if no finance charge is specified); Ind. § 38-903 (contract enforceable only to extent of the principal balance); Kan. § 414(b); Ky. § 100.990; Me. § 258; Md. § 136; Mich. § 492.131d; Miss. § 32(b); N.T. § 8; N.Y. §§ 307(2), 414(2); N.D. § 7; Ore. § 27(2); Pa. § 631; S.D. § 13; Utah § 15-1 to -2a(5); Va. § 46-532; Wis. § 6d. (For full citations see notes 2 and 3 supra.) Some of the acts phrase this in terms of a bar to the recovery of the finance charge by the violator, rather than in terms of giving the buyer a cause of action.

\textsuperscript{162} Explicit provisions are made for this result in Cal. § 2982e; Nev. § 97.060; Minn. § 10 (wilful violation); and Utah § 15-1 to -2a (conditioned on return of property sold). (For full citation see notes 2 and 3 supra.)

\textsuperscript{163} U.C.C. 9-507(1) (1957 ed.).

\textsuperscript{164} Mass. Ann. Laws c. 255, § 13 A will be repealed by Mass. Acts 1957, c. 765, § 2, effective October 1, 1958. The application of the proceeds of the sale will then be governed by U.C.C. 9-504(1) (1957 ed.), and the penalty will be that provided by U.C.C. 9-507, loss of the finance charge and 10% of the principal balance.

\textsuperscript{165} Idaho Code Ann. § 64-807 (Supp. 1957).

\textsuperscript{166} Mass. Ann. Laws c. 255, § 13 A will be repealed by Mass. Acts 1957, c. 765, § 2, effective October 1, 1958. The application of the proceeds of the sale will then be governed by U.C.C. 9-504(1) (1957 ed.), and the penalty will be that provided by U.C.C. 9-507, loss of the finance charge and 10% of the principal balance.

\textsuperscript{167} The buyer was a party in but two of the eight cases collected supra note 139. Lepore v. Atlantic Corp. — Mass. —, 148 N.E.2d 279 (1958); Nickerson v. Zeoli, 332 Mass. 738, 127 N.E.2d 779 (1955).
the regulatory requirements is usually resolved in favor of the holder. This is accomplished by an authorization for an acknowledgment clause in the contract or a provision that the penalty is not to be imposed upon an innocent financing agency.\footnote{168}

If the test of the penalty's worth is its effect as a deterrent, licensing, the last of the controls, is the most desirable. Many of the more recent statutes create a scheme of licensing of sales finance companies, and violation of the regulatory legislation is a basis of revocation of the license.\footnote{169} Inquiry and investigative powers should of course be an adjunct of the licensing power.\footnote{170} A few of the statutes create licensing controls over the seller as well as the finance company.\footnote{171} Such controls of the seller operate upon the person dealing with the buyer and for this reason enhance the chance of compliance with the regulatory features of the statutes. On the other hand, it seems hardly probable that legislatures could be expected to require the licensing of sellers of all the classes of goods or services sold on an installment basis. Where present legislation requires licensing of the dealer, it is aimed only at the seller of motor vehicles.\footnote{172} Such a singling out of one group of consumer sales raises the problem of the coverage of the various statutes. This subject has been reserved until last because it can best be treated after a survey of the abuses perceived and the remedies provided by the various legislatures.

\footnote{168} The acknowledgment operates to protect the assignee against the seller's violation of the requirement of the delivery of a copy of the contract and the prohibition on blanks, note 42 supra. The innocent assignee is saved from the criminal penalty because of a requirement of "willfulness," see statutes note 156 supra. In the statutes explicitly authorizing civil recovery of all payments made, the holder is only responsible for his own violation. Where the statute provides for the recovery of the finance charge, there is usually a similar provision or a requirement that the assignee is liable only if he had knowledge of or ratified the violation. But see, Illinois, Indiana, Maryland, Michigan, and Pennsylvania, supra note 161. In Mississippi the protection is extended only to purchases in good faith for value "by any bank, trust company, private bank, industrial bank or investment company authorized to do business in this state..." Miss. Laws 1958, H.B. No. 39, § 32(c); 1 CCH Cond. Sale Chat. Mortg. Rep. 8477, § 32(c).

\footnote{169} Colo. § 13-6-2-3; Fla. § 520.03; Ind. § 58-915; Iowa § 322.3(2) (dealers only); Kan. § 3; Me. § 250; Mich. § 492.103; Minn. § 3; Miss. § 15; N.J. § 2; N.Y. Banking Law § 11B; Pa. § 604; S.D. § 7; Wis. § 2. (For full citations see notes 2 and 3 supra.) Several of these include within the definition of sales finance company a dealer who himself finances the purchase of his buyer, e.g., Florida and Minnesota.

\footnote{170} Colo. § 13-16-5; Fla. § 520.05-06; Ind. § 58-926; Iowa added § 8; Kan. §§ 5, 6; Me. § 253; Mich. § 492.110; Minn. § 5; Miss. §§ 23, 24, 25; N.J. §§ 4, 5; N.Y. Banking Law § 11B; Pa. § 611; S.D. § 12; Wis. § 2. (For full citations see notes 2 and 3 supra.) A report of buyers' complaints in Wisconsin for the period January 1, 1936 to November 10, 1939 buttresses the need for dealer control. Of the 1043 complaints received, 59% were settled without monetary adjustment; 38% resulted in money adjustments in favor of the buyers averaging $61.00; and 30% were not settled satisfactorily. Of the cases involving money adjustment, three-fourths were attributed to dealer "ethics" and but one-fourth to finance company practices. Plummer & Young, Sales Finance Companies and Their Credit Practices 242 (1940).

\footnote{171} Iowa § 322.3(2); Ky. Rev. Stat. § 190.010-080 (Supp. 1957); Me. § 250 I; Mich. § 492.103; Pa. § 604 (also licenses, collectors and reposessors); Wis. § 2. (For full citations see notes 2 and 3 supra.)

\footnote{172} Iowa § 322.2(9); Ky. § 190.09(2); Me. § 249; Mich. § 492.102(1); Pa. § 603; Wis. § 1(e). (For full citations see notes 2 and 3 supra.)
The defined scope of the acts varies considerably; the limits are expressed in terms of the type or value of the goods, the kinds of buyers involved, and the presence or absence of a security device in the sale. Motor vehicle sales are the principal target, and many of the statutes extend controls to this area alone. This appears to be caused by the huge volume and the frequency of abuses in the automobile transaction.

The concentration of legislative effort upon the peculiar problems of a particular group of sellers and financing agencies probably accounts for the fact that most of the statutory regulation of the finance charges is found in statutes limited to motor vehicle sales. The difficulty of fairly formulating a maximum finance charge schedule to cover a variety of goods has been noted previously. Some of the abuses, such as the use of "add on" provisions, have infrequent application in the motor vehicle area. Other practices have little application beyond this motor vehicle area; for example, the disclosure of liability insurance coverage. Finally, the most effective enforcement device, licensing, is much more manageable when confined to a single industry. So limited licensing of the dealers becomes practical even where such sellers do not act as their own sales financing agency. All of the statutes which so control the dealer are limited to motor vehicle sales.

Statutory criteria establishing the classification of "motor vehicles" differ. Wisconsin simply includes any vehicle required to be registered. New York's classification is in terms of propulsion by other than muscular power. Kentucky excludes certain construction equipment, agricultural implements, and vehicles sold for business and com-

173 Cal. § 2981; Colo. § 13-16-1(2); Fla. § 520.02; Iowa § 322.2(8); Ky. § 190.090(2); Me. § 249; Mich. § 492.102(1); Minn. § 1b(1); Miss. § 6; Nev. § 97.010; N.Y. § 301(1) (separate act covers other goods); N.D. § 1(3); Ore. § 1(9); Pa. § 603; S.D. § 1(b); Wis. § 1(e). (For full citations see notes 2 and 3 supra.)


175 Of the twenty-one states regulating rates, note 54 supra, fourteen are limited to motor vehicle transactions: California, Florida, Iowa, Kentucky, Maine, Michigan, Mississippi, Nevada, North Dakota, Oregon, Pennsylvania, South Dakota and Wisconsin. Two of the remaining states, Connecticut and Maryland, have broader coverage but limit their rate regulation to motor vehicles. New York, of course, has separate acts regulating motor vehicles and other goods, note 18 supra.


177 Note 172 supra.


179 N.Y. Pers. Prop. Law § 301(1).
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mmercial use. The non-application of the controls to purely business transactions is found in other statutes either in the definition of motor vehicles or in an exclusionary provision and appears to be based upon consideration of the kind of buyers who need protection. It is easy to become concerned about the unwary and eager consumer who deals directly with the professional seller and indirectly with the skilled financing agency. The intensity of concern diminishes when the adversaries are two professionals: the commercial buyer and seller or financing firm. Furthermore, extending the prohibitions of the regulatory acts to sales between businessmen may impede normal commercial practices, for example, the employment of "balloon notes."

Thus the buyer of a fleet of automobiles is to be distinguished in the protecting statute from the buyer of the family car. This kind of approach also accounts for the dollar limitations in many of the acts. These vary from $2,000 to $7,500. Where this is the only tool employed to exclude wholly business transactions, the amount should be large enough to bring controls to the high dollar automobile purchasers. Safeguards should extend to the consumer purchaser of the limousine as well as to the buyer of the low price car. The Uniform Commercial Code meets the drafting problem of distinguishing buyers needing protection from those who do not. Section 9-109 defines consumer goods as those "used or bought for use primarily for personal, family or household purposes." Instalment sales legislation can easily be built upon this kind of definition, and as precedents arise under the Code they can be used in marking out the meaning of the regulatory acts.

Only the New York, Ohio and Kansas acts govern unsecured transactions. New York has special provisions governing formalities, disclosure, and rate regulation of what are called "retail instalment credit agreements" in various categories of unsecured sales. Ohio and Kansas

180 Ky. Rev. Stat. § 190.090(3) and (4) (Supp. 1957).
183 Fla. § 520.02(a) ($7500); Ind. § 58-901(a) ($5000); Ky. § 190.090(4) ($5000); Md. § 139a ($2000); Miss. § 2 ($7500); N.J. § 1a ($3000); Ohio § 1317.06(A)(2) (Act applies only where finance charge exceeds $15.00 under regulated rate); Utah § 15-1-2(a)(B)(7) ($7500). (For full citations see notes 2 and 3 supra.)
184 N.Y. Pers. Prop. Law § 413. These are agreements to pay in instalments any indebtedness that may be incurred from time to time to a retail seller for goods, services, or merchandise certificates. N.Y. Pers. Prop. Law § 401(S). Also regulated are the
merely include such contracts within the coverage of the provision governing secured sales.\textsuperscript{185} The remainder of the statutes limit their scope to secured transactions only. Some label their provisions in terms of conditional sales contracts exclusively.\textsuperscript{186} Judicial penetration into the policy of the acts, especially in the presence of a broad statutory definition of conditional sale, should lead to the inclusion of other devices such as the chattel mortgage.\textsuperscript{187} Otherwise, we obtain the strange result that the social protections afforded the consumer can be avoided by the seller merely by the use of a different legal form in the transaction.

IX. CONCLUSION

Two polar evils can result from the adoption of retail instalment sales legislation. One is the oppression of the business of instalment selling. There is little evidence that this has been the case where controls have been in effect for many years. The other evil is that the practical effect of the legislation will be thwarted by the unscrupulous, whom we must recognize as gifted in the art of law evasion.

Both of these undesirable results will flow from statutes which unduly specify the required contract provisions. The same can be said of acts with broad terms of coverage, unaccompanied by careful concern with the special legitimate problems of the various merchandising groups. The inflexibility of statutory contract terms and undifferentiated coverage provisions will strangle the ethical and tempt the criminal.

On the other hand, if each legislature focuses upon the actual abuses within its jurisdiction in the marketing of given items to particular buyers, workable controls can be fashioned. Lodging licensing, investigative, and rate making power in an administrative agency enhances both enforcement and flexibility. Viewing retail instalment sales legislation as a problem for individual treatment by each of the states in light of the unique conditions in each state, uniform legislation should be presently avoided. Similarly, a desire for statutory symmetry with the small loan controls should not force the sales finance business into the mold of the small loan industry. Additional experience may someday furnish a basis for uniformity among the states, but that day has not yet arrived.

\textsuperscript{185} Ohio Rev. Code Ann. § 1317.01 (Page 1953).
\textsuperscript{186} Cal. § 2981; Idaho § 64-805; Mass. § 13F; Nev. § 97.010(3); Utah § 15-1 to -2a. (For full citation see notes 2 and 3 supra.)
\textsuperscript{187} Carter v. Seaboard Finance Co., 33 Cal.2d 564, 203 P.2d 758 (1949) (chattel mortgage held within regulatory act governing "conditional sales"); see also Waterbor v. Livingood, 179 Pa. Super. 610, 117 A.2d 790 (1955) ("UJ Drive It" contract providing for lease for indefinite term and for forced sale to lessee with application of rental payments in the event of breach of the lease was held to be outside regulatory act).