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Are Instalment Plans Usurious

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ARE INSTALMENT PLANS USURIOUS?

THE INSTALMENT CREDIT INDUSTRY

The extension of instalment credit to the consumer has grown to such an extent that it totals twice the amount of all other forms of consumer credit outstanding.[1] Instalment credit is offered through two mediums: the direct loan to the consumer of cash or its equivalent; and the instalment "sale," by which the consumer receives credit, repayable by instalments, at the time of purchase of the commodity sought—ostensibly indirectly from the financing agency through the dealer.

Direct loans are generally made by banks or small loan companies, both of which are regulated as to the permissible charges, not only as to noninstalment loans[2] and "small loans,"[3] but as to instalment loans as well. In Minnesota, the statute[4] permits banks or trust companies, but not others, to charge six per cent per year upon any loan up to fifteen hundred dollars which is repayable in instalments, computed upon the entire amount until

1. 38 Fed. Res. Bull. 198 (1952). Although total consumer credit, including instalment credit, by 1951 had increased to 285 per cent of that in 1939, instalment credit alone increased to over 305 per cent.

2. *E.g.,* Minn. Stat. § 334.01 (1949), which states that "no person shall directly or indirectly take or receive . . . any greater sum . . . for the loan or forbearance of money . . . than $8.00 on $100 for one year . . ." The provisions as to maximum rate of interest vary among the states, but it is usually not lower than 6 per cent nor higher than 10 per cent. Some states seem to have changed their maximum rates with the changes in social attitudes, usually becoming more liberal. See 6 Williston, Contracts § 1683 (rev. ed. 1938). Minnesota, following the lead of New York and other commercial states, enacted in 1947 a statute which deprived corporations of the defense of usury. Minn. Stat. § 334.021 (1949). Such statutes have been held constitutional. See 6 Williston, Contracts § 1683, n. 3; Legis., 33 Minn. L. Rev. 27, 37 (1948).

3. Minnesota provides that a licensee under the small loan act may charge up to 3 per cent per month of the unpaid balance of a loan not exceeding three hundred dollars. Minn. Stat. § 56.13 (1949). In actual practice, small loan companies in Minneapolis and St. Paul have been advertising and charging rates amounting effectively to between 1½ and 2½ per cent per month. In 1949 New York, evidently surveying the actual charges and taking cognizance of the decreasing value of the dollar, permitted licensees to loan up to five hundred dollars but set the interest rate at 2½ per cent per month on amounts not over one hundred dollars, 2 per cent up to three hundred dollars, and ½ per cent on any amount remaining over three hundred but less than five hundred dollars. N. Y. Banking Law § 352.

The small loan acts, liberal in allowable interest rates by comparison with general usury statutes, have served effectively to drive out the "loan sharks" lending small amounts of money to needy borrowers at rates often as high as 133 per cent. See, *e.g.,* Bennett and Heffner, The Campaign Against Auto Loan Usurers in New York State (1940).

4. Minn. Stat. § 48.153 (1949).

the stated due date of the loan; the allowable minimum charge is three dollars. This statute raises the allowable effective rate of interest for instalment loans from the eight per cent allowed generally[5] to slightly less than twelve per cent for a twelve-month loan and yet higher for loans of longer terms. This increase in the effective charge arises because the borrower repaying principal and interest by instalments retains on the average only one-half of the principal amount borrowed, but he pays the same flat rate as if he had retained the full amount until maturity of the loan.[6] The expenses of investigation, monthly notification or furnishing a monthly coupon book, and extra bookkeeping costs, as well as the expense of collection when payment is late or in default,[7] increase the cost of making the loan to the extent that, at the popular rate for commercial loans of effectively six per cent, only the large volume banks could break even or make little more than a slight profit.[8] Special instalment loan statutes at higher interest rates are therefore economically justifiable.

The tremendous growth of instalment credit and its virtual strangle-hold upon an economy dependent upon mass production to maintain its climbing standards[9] have been factors which, aided by the inability to profit on direct instalment loans under general usury laws, gave early rise to the indirect instalment credit and its phenomenal counterpart, the sales finance company.[10] There can be no doubt that without the sales finance company, dealers, particularly in the automobile industry, would be hard pressed to maintain their present high incidence of sales on an instalment payment plan. In 1950 banks held as purchasers of the instalment

5. See note 2 *supra.*

6. See General Motors Corp. v. FTC, 114 F. 2d 33, 35 (2d Cir. 1940), *cert. denied,* 312 U. S. 682 (1941) (affirming order that General Motors Acceptance Corporation cease and desist from advertising its "6% Time Payment Plan" since it tended to mislead a substantial part of the buying public).

7. Minn. Stat. § 48.155 (1949) provides for this expense by allowing additional charges of 5 per cent of the amount overdue with a maximum of fifty cents on one instalment, or interest on the overdue payment at 6 per cent per annum, if greater.

8. See Baird, *Commercial Bank Activity in Consumer Instalment Financing,* 33 Fed. Res. Bull. 264, 265 (1947). But even with the higher rate allowable under the instalment loan statute, banks small and large generally charge only 5 per cent, which effectively amounts to slightly less than 10 per cent. See *Report of the Joint Legislative Committee on Installment Financing,* State of New York Legislative Document No. 63, 16 (1949).

9. See Isaacs, *Instalment Selling: The Relation between Its Development in Modern Business and the Law,* 2 Law & Contemp. Prob. 141 (1935).

10. For the historical development of the sales finance company, see Seidman, Finance Companies and Factors 10 (1949).

paper less than one-third of the outstanding automobile sale credit.[11] Their lack of popularity with dealers in comparison with finance companies stems largely from the fact that banks are inherently more cautious as to credit risks while some finance companies will finance anyone who can make the down payment.

Furthermore, particularly with the finance companies, dealer participation in the finance charge has become a lucrative source of profit.[12] A recent survey in New York[13] revealed that some portion of the finance charge is almost always paid to the dealer, and the amount depends largely upon competition between financing agencies to purchase the instalment paper from the dealers. The agencies themselves reported that dealers receive up to seven per cent of the amount financed or up to thirty per cent of the finance charge. Investigators reported, however, that actually dealers participate much more in the finance charge, some instances being up to eighty-five per cent! An attorney for one of the largest sales finance companies has scoffed at studies made of the "occasional" abuses of a small minority in the financing field,[14] while at the same time finance companies have admitted they paid rebates unwillingly and denounced the bonus as "commercial bribery."[15] The bonus sets higher rates to the consumer and has no possible relation to the cost of financing. The "reserve" plan of setting aside a percentage of the finance charge to compensate dealers for losses on automobiles repurchased after repossession by the finance company also results in an unfair rate to the consumer because the reserves established are generally higher than the

11. 38 Fed. Res. Bull. 198-199 (1952).

12. Originally, indorsement of the purchaser's note and contract to the sales finance company was with recourse to the dealer in event of default by the purchaser, but when competition arose in the financing industry some companies introduced a non-recourse plan—which delighted dealers. To combat this plan, the three finance companies with the major share of the business, General Motors Acceptance Corporation (G.M.A.C.), Commercial Investment Trust, Inc. (C.I.T.), and Commercial Credit Company (C.C.C.), adopted the "repurchase" plan. By this plan dealers were only obligated to repurchase cars repossessed by the finance company, and a reserve was set up from a percentage of the finance charge to reimburse the dealer for any losses incurred by repurchase. The smaller independent companies came back with bonuses to the auto dealers, and when sales profits were low dealers would "pack" the finance charge to the unsuspecting purchaser in order to increase the size of the bonus. See Cavers, *The Consumer's Stake in the Finance Company Code Controversy*, 2 Law & Contemp. Prob. 200, 202-204 (1935).

13. *Report of the Joint Legislative Committee on Installment Financing, op. cit. supra* note 8, at 19.

14. Ecker, *Commentary on "Usury in Instalment Sales,"* 2 Law & Contemp. Prob. 173, 188 (1935).

15. Cavers, *supra* note 12, at 207.

concededly small number of losses realized and in actuality they amount to a flat rebate.[16]

There can be no doubt that the expenses of the sales finance company, like those of the direct instalment lender, are sufficiently higher, even among the most efficient companies, to justify charging more than is generally allowable under usury statutes. But in actual operations, the unregulated finance charges exacted for instalment sale credit are subject to such great abuse that the unsuspecting public is being milked of valuable purchasing power. The rationale invariably advanced by the indirect financing agencies is that their expenses caused by default are so great as to justify higher charges.[17] It is conceded that some sales finance companies will accept credit risks not acceptable for direct bank loans, but with down payments of one-third of the cash price and provisions for not over-long periods to pay off the balance,[18] as well as requirements for collision insurance acceptable to the finance company (at the purchaser's expense), it is hard to conceive of a situation wherein the company could incur any losses except in exceptional cases—which direct lenders have also. When the direct instalment lender is allowed, as in Minnesota, a higher rate than for commercial loans, a rate no higher or lower is similarly justified for the sales finance company.

The Instalment Finance Charge Under General Usury Laws

While the courts have acknowledged that the instalment purchaser may be the victim of an unscrupulous seller,[19] they are

16. *Ibid.*
17. See, *e.g.*, Ecker, *supra* note 14, at 177.
18. The percentage down payment which was required for automobiles under Regulation W was ⅓ of the cash price, with only eighteen months in which to pay. 37 Fed. Res. Bull. 958 (1951). This applied only to automobiles of a year-model later than 1942, 38 *id.* 29 (1952), but in practice terms made on prewar models have generally been more stringent than those required for newer models.
19. In Commercial Credit Co. v. Shelton, 139 Miss. 132, 139, 104 So. 75, 76 (1925), after counsel argued that those who cannot afford to pay cash are taken advantage of, the court said: "We . . . would add thereto that there seems to have been a large increase in the population of the country since . . . the sage proclaimed that 'a sucker is born every minute.'" But see General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 78, 262 S. W. 425, 428 (1924). The argument that the purchaser does not have to buy if he does not like the price and is therefore not like the needy borrower for whom the usury statutes were enacted is fallacious. The only reason the consumer buys on time is that he does not have the cash but needs the commodity, and he is generally ignorant of the actual effective charge. Furthermore, usury statutes are applied irrespective of the borrower's necessities. See Berger, *Usury in Instalment Sales,* 2 Law & Contemp. Prob. 148, 151 (1935).

almost hopelessly split in determining in what situations the instalment charge comes under the usury statute. A usurious transaction has three essential elements: (1) a loan or forbearance or money; (2) an agreement to return money absolutely; (3) an agreement to pay in excess of the lawful interest rate.[20] While the element of intent is generally required, chiefly to characterize transactions not in the form of loans,[21] direct intent to evade the law is not necessary in Minnesota but intent to obtain interest which is in fact excessive is sufficient.[22] The element of an agreement to return money absolutely is purely academic;[23] the major problem facing the courts has been the definition of "forbearance," since the determination of whether excessive "interest" has been agreed to[24] depends upon whether there has been a loan or forbearance from which "interest" might arise.

To the consumer a direct loan transaction results in the same purchase as the indirect instalment credit,[25] but the former is closely regulated by usury statutes and scrutinized by the courts, while the latter may be completely unregulated. A majority of the courts favor the rule that a credit sale of property is not a forbearance of money unless the sale is a mere sham or device to evade the usury law.[26] Thus, whether the sale is a mere device to cover usury[27] is a question for the trier of fact,[28] and in actual practice

20. See Seebold v. Eustermann, 216 Minn. 566, 573, 13 N. W. 2d 739, 743 (1944); 6 Williston, Contracts § 1684; Note, 21 Minn. L. Rev. 585, 586-587 (1937).

21. See 6 Williston, Contracts § 1698.

22. Fred G. Clark Co. v. E. C. Warner Co., 188 Minn. 277, 247 N. W. 225 (1933); *see* Dege v. Produce Exchange Bank, 212 Minn. 44, 47, 2 N. W. 2d 423, 425 (1942); Nelson v. Satre, 111 Minn. 60, 61, 126 N. W. 399 (1910). But no mere clerical error in computing interest, made without intent to avoid the statute, shall constitute usury. Minn. Stat. § 334.03 (1949).

23. In one case, however, a lender attempted to avoid the usury statute by agreeing to assume the hazards of loss of the automobile; the attempt was unsuccessful as a device to evade the statute since the risk assumed bore no reasonable relation to the finance charge. Stuback v. Sussman, 8 N. Y. S. 2d 141 (Sup. Ct. 1938), *aff'd*, 256 App. Div. 903, 10 N. Y. S. 2d 240 (1st Dep't 1939).

24. By his agreement, however, the borrower is not *particeps criminis* with the lender irrespective of his knowledge or intent. *See, e.g.*, Seebold v. Eustermann, 216 Minn. 566, 581, 13 N. W. 2d 739, 747 (1944).

25. See Berger, *supra* note 19, at 148.

26. *See, e.g.*, Blackmore Ins. Co. v. Johnson, 32 F. 2d 433, 435 (9th Cir.), *cert. denied*, 280 U. S. 586 (1929) (not usurious); Seebold v. Eustermann, 216 Minn. 566, 573, 13 N. W. 2d 739, 744 (1944) (usurious); Dunn v. Midland Loan Finance Corp., 206 Minn. 550, 554, 289 N. W. 411, 413 (1939) (not usurious); see 6 Williston, Contracts § 1687(4) and cases cited.

27. One device, used with varying success to cover usury, is the sale of property to the borrower by the lender at an exorbitant price. Proof of a discrepancy between the value and the price is evidence of a usurious device but is not conclusive. *See* Barry v. Paranto, 97 Minn. 265, 268, 106 N. W.

appellate courts rarely disturb the finding on the question.[29] As pointed out in *Dege v. Produce Exchange Bank*,[30] the degree of proof of usury, whether asserted defensively or in seeking affirmative relief, is the same as that in the ordinary civil case: proof by a fair preponderance of the evidence. But while the court in the *Dege* case stated that there should be no hesitancy to pronounce a contract usurious whenever the evidence is reasonably satisfactory to show usury, nevertheless the same court two years later, in *Seebold v. Eustermann*,[31] indicated by dictum that usury laws are to be strictly and not liberally applied.

While the Minnesota Supreme Court has never held as a matter of law that a sale involving a cash price plus a finance charge equalling a credit price is usurious, that situation has been carefully distinguished from that where the deal is closed at a credit price, no cash price being involved. In *Midland Loan Finance Co. v. Lorentz*[32] the court distinguished *Dunn v. Midland Loan Finance Corp.*[33] by pointing out that in the *Dunn* case the trial court found no usury because there was no agreement binding the dealer to sell at a cash price[34] while in this case the dealer had agreed to a binding cash price, resulting therefore in usury. Other courts have similarly indicated the usuriousness of the time selling price arrived at by adding charges to the unpaid balance of a cash price agreed upon.[35] Some courts have even taken a further step and have held

911, 912 (1906); Saxe v. Womack, 64 Minn. 162, 164, 66 N. W. 269 (1896). If the property has a readily ascertainable market price and is sold in excess thereof, *see* Trauernicht v. Kingston, 156 Minn. 442, 443, 195 N. W. 278 (1923), and the lender knows the borrower never particularly desired the property itself, *see* Kommer v. Harrington, 83 Minn. 114, 117, 85 N. W. 939, 940 (1901), it is more than likely that the court will find that the sale transaction was a mere sham and the excess in price in effect additional compensation for lending money.

28. Bass v. Patterson, 68 Miss. 310, 8 So. 849 (1891); United Tire & Inv. Co. v. Trone, 189 Okla. 120, 113 P. 2d 977 (1941) (jury found that although handled by an auto dealer, a note and chattel mortgage were in fact given for a loan from a finance company); Nazarian v. Lincoln Finance Corp., 78 A. 2d 7 (R.I. 1951) (trial court found that the dealer was only a conduit for a loan); *see* Seebold v. Eustermann, 216 Minn. 566, 573, 13 N. W. 2d 739, 743 (1944).

29. See, *e.g.*, Brown v. Crandall, 218 S. C. 124, 61 S. E. 2d 761 (1950); Reger v. O'Neal, 33 W. Va. 159, 10 S. E. 375 (1889).

30. 212 Minn. 44, 2 N. W. 2d 423 (1942).

31. 216 Minn. 566, 571, 13 N. W. 2d 739, 742 (1944).

32. 209 Minn. 278, 286, 296 N. W. 911, 915 (1941).

33. 206 Minn. 550, 289 N. W. 411 (1939).

34. The court in the *Dunn* case itself stated that "a binding sale price, payable in whole or part by deferred payments . . . creates a debt for the unpaid purchase price, or part thereof, and the granting of time to pay is a forbearance to collect such existing debt, which it is conceded everywhere is subject to the usury law." *Id.* at 555, 289 N. W. at 414.

35. *See* E. Tris Napier Co. v. Trawick, 164 Ga. 781, 782, 139 S. E.

as a matter of law that where a finance charge is added to the unpaid or "deferred" balance of the cash price to arrive at a time price the substance of the transaction is a loan or forbearance of money or of a debt;[36] if the additional charge is not for compensation for extra services to the purchaser[37] but for profit, that amount is interest.[38]

Perhaps in unexpressed fear of upsetting thousands of deferred payment contracts now outstanding[39] and destroying completely the trade custom of the time sales plan used in automobile sales[40]

552, 553 (1927); Associates Inv. Co. v. Sosa, 241 S. W. 2d 703, 706 (Tex. Civ. App. 1951); G. F. C. Corp. v. Williams, 231 S. E. 2d 565, 567 (Tex. Civ. App. 1950); Associates Inv. Co. v. Baker, 221 S. W. 2d 363, 364 (Tex. Civ. App. 1949) (but no evidence of definite time price); Associates Inv. Co. v. Lyon, 209 S. W. 2d 218, 219 (Tex. Civ. App. 1948). A typical conditional sales contract is illustrated in Associates Inv. Co. v. Sosa, *supra* at 704:

"(A) Total Bona Fide Cash Price of Motor Vehicle $2250.00 plus $25.00 T&T $2275.00
Down Payment { Trade-in .... $........ ; Cash .... $ 975.00
(B) Total Down Payment .... $ 975.00
(C) Unpaid Cash Balance (Deferred Balance) $1300.00
(D) Total finance charge and insurance premium for which credit is extended 437.60
Type of Insurance $50.00 DD and Comp.—
24 months

(No insurance included unless described above)
The Time Balance (sum of C & D) .... $1737.60"

36. Bernhardt v. Atlantic Finance Corp., 311 Mass. 183, 40 N. E. 2d 713 (1942); Ferguson v. Grand Rapids Land Contract Co., 242 Mich. 314, 218 N. W. 685 (1928); Benton v. Sun Industries, 277 App. Div. 46, 97 N. Y. S. 2d 736 (1st Dep't 1950); Morgan Motor & Finance Co. v. Oliver, 101 Utah 492, 124 P. 2d 778 (1942).

37. Such compensation is generally allowed, but a strict degree of proof of reasonableness is required when it is challenged as usurious. *See* Continental Nat. Bank v. Fleming, 170 Mich. 624, 644, 134 N. W. 656, 663 (1912). The fees cannot include general overhead, but may be for such services as credit investigation which also inures to the lender's benefit. Williams v. Personal Finance Co., 172 Tenn. 69, 109 S. W. 2d 1166 (1937); *cf.* Hobart v. Michaud, 167 Minn. 1, 208 N. W. 191, *rev'd on other grounds*, 167 Minn. 1, 4, 209 N. W. 39 (1926).

38. Ferguson v. Grand Rapids Land Contract Co., 242 Mich. 314, 218 N. W. 685 (1928).

39. See Nelson v. Scaritt Motors, 48 So. 2d 168, 169 (Fla. 1950).

40. See Seebold v. Eustermann, 216 Minn. 566, 581, 13 N. W. 2d 739, 747 (1944). Minnesota is one of the comparatively few states which provide that if usury is found "All bonds, bills, notes . . . and all other contracts . . . whereupon or whereby there shall be reserved, secured, or taken any greater sum or value for the loan or forbearance . . . shall be void. . . ." Minn. Stat. § 334.03 (1949). In the *Seebold* case, *supra*, a purchaser brought replevin against a dealer to recover a truck which had been repossessed by self-help upon default; the conditional sales contract was usurious. The majority opinion stated that the statute declared executory contracts unenforceable, and although the result was harsh there could be no quarrel with legislative policy. Restoration on the part of the person seek-

many courts have paid only lip-service to the theory that the substance and not the form of the transaction is controlling[41] and that whether usury exists is a question of fact.[42] Courts have adopted the reasoning of *General Motors Acceptance Corp. v. Weinrich*[43] and have strongly indicated that even where prior to the sales transaction the lender furnished the dealer with forms and rates and investigated credit that fact has little or no effect on whether a sale is bona fide.[44] One procedure favored when the price is increased for credit is to make the test one of good faith.[45] As resolved by another court this test became one of whether the difference in price was unfair or extortionate in view of the hazards of the security.[46] Worse yet, one trial court discussed the rule that a sale on credit must not be a "cloak for a usurious loan" and then without hearing any evidence held that no loan or forbearance could be involved if the parties had agreed to a credit price.[47] The point completely overlooked by these courts is that the question is whether the sale is actually a credit sale and not a mere device to cover a loan or forbearance, which can be determined only by considering all surrounding circumstances.[48]

Not all courts, however, have indicated that they will look beyond the form to the substance of the transaction in applying the rule that a sale cannot be a device to evade the usury laws. The definition of "forbearance" has been strictly limited to synony-

ing relief was unnecessary. But the court then reasoned that the conditional sales contract being void, the purchaser had no right to possession of the truck, and then reasoned: "The statute . . . is . . . a shield to protect the weak . . ., but not a sword or rapier for offensive attack . . . Plaintiff cannot take his claimed 'pound of flesh' without spilling blood." As a result of this case, one suing to cancel an usurious contract would be wise to apply for a temporary injunction *pendente lite* to prevent repossession of the goods, coupled with an offer to pay the remaining instalments into court as they come due. Otherwise, under the *Seebold* majority opinion, one could be deprived of his right under the forfeiture statute by repossession of the goods.

41. See note 26 *supra*.
42. See note 28 *supra*.
43. 218 Mo. App. 68, 262 S. W. 425 (1924).
44. *Cf.* Attorney General v. Contract Purchasing Corp., 327 Mich. 636, 42 N. W. 2d 768 (1950); *see* Henry v. P. & E. Finance Co., 197 Okla. 676, 677, 174 P. 2d 373, 375 (1946).
45. *See* Commercial Credit Co. v. Tarwater, 215 Ala. 123, 125, 110 So. 39, 40 (1926); Blake Bros. v. Askew & Brummett, 112 Ark. 514, 520, 166 S. W. 965, 967 (1914); see 10 Minn. L. Rev. 550 (1926).
46. Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429 (1933).
47. Levine v. Nolan Motors, 169 Misc. 1025, 8 N. Y. S. 2d 311 (Sup. Ct. 1938).
48. *See, e.g.*, Dege v. Produce Exchange Bank, 212 Minn. 44, 46, 2 N. W. 2d 423, 424 (1942).

mity with "loan" or even completely ignored as a factor.[49] Consequently, courts merely held that deferred payments were not a forbearance[50] or gave no explanation at all except that one could sell his property for any price.[51]

Since a recurring factor influencing the courts to find usury is the separate statement of the finance charge in the contract,[52] an attempt to avoid such a finding may be made by stating only the time price in the contract. Any evidence, however, whether extrinsic or intrinsic may be used to prove that a finance charge was agreed upon and therefore that the contract is really a usurious device.[53]

Furthermore, agreeing in advance of the sale to assign the contract to the finance company denotes in reality a single transaction for a loan.[54] By this test automobile payment plans now existing would fall automatically within the usury statutes, for it is common knowledge that the actual control and management of the credit and finance of automobile dealers is in the sales finance companies.[55]

If the finance charge or credit differential is not payment for the use or detention of the balance for which credit is extended,

49. See Smith v. Kaufman, 145 Ark. 548, 224 S. W. 978 (1920); General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 262 S. W. 425 (1924).

50. Thomas v. Knickerbocker Operating Co., 108 N. Y. S. 2d 234 (Sup. Ct. 1951); *see* Rattan v. Commercial Credit Co., 131 S. W. 2d 399 (Tex. Civ. App. 1939).

51. General Motors Acceptance Corp. v. Taylor, 294 S. W. 386 (Ark. 1927); Commercial Credit Co. v. Shelton, 139 Miss. 132, 104 So. 75 (1925); American Loan Plan v. Frazell, 135 Neb. 718, 283 N.W. 836 (1939). See the interesting case of Graham v. Lynch, 206 Ga. 301, 57 S. E. 2d 86 (1950) in which the instalment seller argued that he was a lender under the instalment loan statute, which allowed a higher rate than the general usury statute. The court, in affirming the finding below, said that the instalment loan statute applied only to the lending of money and not a purchase of property, but that the general usury statute applied here since the deferred payments resulted in a greater rate of "interest" than allowed by law.

52. See Bernhardt v. Atlantic Finance Corp., 311 Mass. 183, 40 N. E. 2d 713 (1942); Morgan Motor & Finance Co. v. Oliver, 101 Utah 492, 124 P. 2d 778 (1942). When the price is agreed upon irrespective of credit and thereafter charges are added this constitutes forbearance of an amount due at once. Morgan Motor & Finance Co. v. Oliver, *supra*. *But see* Harper v. Futrell, 204 Ark. 822, 824, 164 S. W. 2d 995, 996 (1942); Standard Motors Finance Co. v. Mitchell Auto Co., 173 Ark. 875, 879, 293 S. W. 1026, 1027 (1927).

53. *See* Dege v. Produce Exchange Bank, 212 Minn. 44, 46, 2 N. W. 2d 423, 424 (1942).

54. See Benton v. Sun Industries, 277 App. Div. 46, 97 N. Y. S. 2d 736 (1st Dep't 1950).

55. See Buffalo Industrial Bank v. De Marzio, 162 Misc. 742, 744, 296 N. Y. Supp. 783, 785 (Buff. City Ct. 1937). But see Ecker, *supra* note 14, at 179.

it is difficult to determine just what it is intended to compensate;[56] no one has denied that there is profit to the sales finance company. It is true that a sale on credit incurs risk, but there is risk in most loans, and yet they are regulated by the law whether secured or not.[57] If the finance companies have a justifiable complaint that under the usury laws there can be no profit, the remedy is to seek legislation—not to evade the law by any and every device possible.

Existing Instalment Sales Acts

Since consumers have not been consistently protected against exorbitant finance charges, especially in the financing of automobile sales,[58] and because the bona fide cost of instalment credit exceeds the rates generally allowed under usury statutes,[59] in recent years a number of states have enacted some form of regulation aimed particularly at automobile instalment sales.

Of the states providing regulation only California has no licensing provision.[60] Other states at least require that sales finance companies be licensed,[61] with some states also licensing dealers[62] and, in Wisconsin, manufacturers and distributors of automobiles.[63] The licensing provision would seem to be a strong weapon in the hands of the state agencies, as evidenced by its use in New York in reducing the number of small loan usurers.[64] In a few states, however, when the cash sale price exceeds a specified amount, the instalment sales act is inoperative.[65]

56. See Frankfurt Finance Corp. v. Cox, 142 S. W. 2d 553, 554 (Tex. Civ. App. 1940).

57. See Universal Credit Co. v. Lowell, 166 Misc. 15, 22, 2 N. Y. S. 2d 743, 750 (Roch. City Ct. 1938). The court also said: "May the vendor make legal the unconscionable charge . . . for deferring payment of . . . the cash purchase price . . . by smoothly sugar-coating it with phraseology?"

58. See Pa. Stat. Ann. tit. 69, § 602 (Supp. 1950).

59. See Seidman, Finance Companies and Factors 98 (1949).

60. Cal. Civ. Code §§ 2981, 2982 (1949).

61. *E.g.*, Ind. Ann. Stat. § 58-911 (Burns 1951); Me. Rev. Stat. c. 56, § 264 (1944); Mich. Stat. Ann. § 23.628(3) (Supp. 1951); N. J. Stat. Ann. § 17:16B—2 (1950).

62. Pa. Stat. Ann. tit. 69, § 604 (Supp. 1950).

63. Wis. Stat. § 218.01(2) (1949).

64. See Bennett and Heffner, The Campaign Against Auto Loan Usurers in New York State (1940).

65. Conn. Rev. Gen. Stat. §§ 5963(a), 6698(a) (Supp. 1951) ($3000 limit); Ind. Ann. Stat. § 58-901 (Burns 1951) ($2500); Md. Ann. Code Gen. Laws art. 83, § 139 (Cum. Supp. 1947); ($2000); N. J. Stat. Ann. § 17:16B-1 (1950) ($3000). In Connecticut the statutory provisions for instalment sales also apply to instalment loans. Conn. Rev. Gen. Stat. § 6698 (c) (1949). The practice of lifting regulation of charges when the principal amount becomes fairly large seems to be favored in the states with more liberal usuary statutes. For example, in New York a loan over the

One requirement of every statute is that the terms of the sale must be specified and a copy thereof furnished to the buyer. The Michigan statute,[66] which is typical, requires the contract to be completed before signing and the following items to be recited separately: cash price; down payment; balance due; cost of insurance and description thereof; other fees paid for the buyer's benefit; balance financed; finance charge; time balance; and the number, amount and due dates of instalments. It is required in addition that the buyer sign an acknowledgement that he received a copy of the contract.[67] The chief reason for such provisions is the widespread practice of signing and accepting contracts in blank,[68] which would thus be curtailed.

Although all the states provide expressly for such disclosures, they split on whether to regulate the finance charges by statute.[69] When fixed by statute the rates are usually set by the age of the automobile, varying as to new cars, cars up to two years old, and older cars; the respective rates in those states are six, nine and twelve per cent, computed on the whole amount and thus effectively doubled.[70] California does not make the distinction among classes but sets a flat rate of one per cent per month with an allowable minimum of twenty-five dollars.[71] An act proposed in New York would adopt the method of varying rates according to classification, evidently because they result more consistently in a fair profit for the dealers and financing agencies.[72] Similarly, four states have express limitations upon refinancing charges, either limiting them to an effective rate of about twelve per cent per year[73] or providing

amount of five thousand dollars repayable on demand and made upon collateral security to a bank is not subject to the usury statutes and the interest rate may be set by agreement. N. Y. Banking Law § 108(3).

66. Mich. Stat. Ann. § 23.628 (Supp. 1951).

67. *E.g.*, Mich. Stat. Ann. § 23.628(12e) (Supp. 1951), which also requires that the acknowledgment be printed immediately below the space provided for the buyer's signature to the contract and be independently signed.

68. See *Report of the Joint Legislative Committee on Installment Financing*, State of New York Legislative Document No. 63, 21 (1949).

69. Regulation: Cal. Civ. Code § 2982(c) (1949); Mich. Stat. Ann. § 23.628(18) (Supp. 1951); Pa. Stat. Ann. tit. 69, § 619 (Supp. 1950). No statutory regulation: Conn. Rev. Gen. Stat. §§ 6698 *et seq.* (1949); Ind. Ann. Stat. §§ 58-901 *et seq.* (Burns 1951); Md. Ann. Code Gen. Laws art. 83, §§ 116 *et seq.* (Cum. Supp. 1947); N. J. Stat. Ann. § 17:16B (1950); Wis. Stat. § 218.01 (1949).

70. Mich. Stat. Ann. § 23.628(18) (Supp. 1951); Pa. Stat. Ann. tit. 69, § 619 (Supp. 1950).

71. Cal. Civ. Code § 2982(c) (1949).

72. See *Report of the Joint Legislative Committee on Installment Financing*, *op. cit. supra* note 68, at 43.

73. Conn. Rev. Gen. Stat. § 6702 (1949) (12 per cent); N. J. Stat. Ann. § 17:16B-8 (1950) ($5.00 plus 10 per cent).

a scale by classification which approximates the original charges allowable.[74] By either method, possible devices to evade the statutes are eliminated.

In those states which have no express statutory rate limits[75] finance charges are usually controlled by requiring expressly by statute or under general powers given to a state agency that the finance companies licensed file rate charts with a state agency,[76] which are accepted for filing unless the agency considers the rates unconscionable.[77] The Indiana Department of Financial Institutions has gone even further under its broad powers[78] and prescribed a complex formula for computation of maximum charges rated by the class of the vehicle.[79]

Most of the regulatory acts also provide that a refund of the finance charge shall be made for prepayment of the amount financed;[80] some acts make no specific provision, but a schedule of refund rates may be required under the broad powers of the state agency.[81] Some form of regulation of refunds for prepayment is needed, for sales finance companies in many instances have no fixed policy covering rates for refunds given, if any.[82]

It seems that none of the regulatory acts have effectively eliminated dealer participation in the finance charge. Indiana has fixed dealer participation at a percentage of the amount financed, ranging from two to five per cent depending upon the class of the vehicle.[83] Michigan by statute has limited dealer participation to a percentage of the amount financed but ostensibly only if the dealer has furnished credit information or the instruments to carry out the transaction.[84] In actual operation it is fairly obvious that the limitation of dealer participation will be ineffectual to stop those not actually providing service from also obtaining the bonus, and, perhaps because of legislative expediency, New York legislators have decided that dealer

74. Mich. Stat. Ann. § 23.628(19) (Supp. 1951); Pa. Stat. Ann. tit. 69, § 620 (Supp. 1950).

75. See note 69, *supra.*

76. *E.g.,* N. J. Stat. Ann. § 17:16B-2(c) (1950) (by statute); Wis. Stat. § 218.01(5) (1949) (general powers).

77. See *Report of the Joint Legislative Committee on Installment Financing, op. cit. supra* note 68, at 29, 34.

78. Ind. Ann. Stat. § 58-906 (Burns 1951).

79. 1 Indiana Rules and Regulations 1053-1055 (1947).

80. *E.g.,* Md. Ann. Code Gen. Laws art. 83, § 125 (Cum. Supp. 1947); Pa. Stat. Ann. tit. 69, § 622 (Supp. 1950).

81. *E.g.,* 1 Indiana Rules and Regulations 1057-1058 (1947).

82. See *Report of the Joint Legislative Committee on Installment Financing, op. cit. supra* note 68, at 17.

83. 1 Indiana Rules and Regulations 1056 (1947).

84. Mich. Stat. Ann. § 23.628(31)(c) (Supp. 1951).

participation in finance charges should not be outlawed because dealers should be compensated for their actual contribution in the way of service.[85] Actually, sales finance companies do all the credit service, including furnishing forms, and the rates set up under these acts supposedly have recognized such expenses as a cost of financing.

One form of legislation which should never be used to regulate the charges on instalment sales is that now employed in Utah. The statute provides that:

> "No contract for the purchase of any goods, . . . or loan or forbearance of money, shall contain any . . . service charge . . . which when taken together with the interest charged on said contract . . . exceeds ten per cent per annum . . . except . . . for a service charge, which . . . shall not exceed four per cent per annum of the unpaid balance . . ."[86]

As far as this statute applies to instalment sales it might as well not exist, for it speaks in terms of interest, and the Utah Supreme Court has held that it does not prohibit a dealer from selling goods on time at a higher price than he might have sold for cash but only prohibits a transaction in which a price is agreed upon and a time charge is added thereafter.[87]

To control the sales finance industry, licensing seems a necessity. Essential provisions of any act are the disclosure provisions, control of finance charges, refunds for prepayment, and dealer participation. Whether rates should be specifically set out in the statute or controlled by state agencies is a difficult question. While there is some desirability in allowing fluctuations in finance charges to be adjusted in view of the changing circumstances and to maintain the flow of consumer goods on instalment plans, expediency should not be allowed to outweigh the public interest in definite upper limits on finance charges, which, if excessive, tend to limit the consumer purchasing power.[88] It is apparent that many, though perhaps not all, of the finance companies are out to get what the market will bear. The present controls, other than the existing instalment sales acts, are far too inconsistent to adequately restrict harmful practices.

85. See *Report of the Joint Legislative Committee on Installment Financing, op. cit. supra* note 68, at 43.

86. Utah Code Ann. § 44-0-2 (1943).

87. Mathis v. Holland Furnace Co., 109 Utah 449, 166 P. 2d 518 (1946); *see* Morgan Motor & Finance Co. v. Oliver, 101 Utah 492, 502, 124 P. 2d 778, 782 (1942). See also Sayler v. Brady, 63 N. D. 471, 248 N. W. 673 (1933).

88. In either case, stringent penalties should be set out for violations of the disclosure and rate provisions even if not wilful, unless the result of mere clerical error.