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# Retail Credit Sales and Usury

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## COMMENTS

### RETAIL CREDIT SALES AND USURY

Consumer credit has expanded immensely in recent years<sup>1</sup> to reach strata of the population previously excluded. As a result, it has embraced thousands of consumers who are much less sophisticated about debt than bankers and merchants, and has left a dramatic increase in personal bankruptcies in its wake.<sup>2</sup> Concurrently, there have been legislative and judicial efforts to control consumer finance enterprises for the protection of consumers. Legislative control is represented by retail installment sales acts,<sup>3</sup> applicable to all goods,<sup>4</sup> or to motor vehicle sales only,<sup>5</sup> which fix maximum finance charges and otherwise regulate consumer financing. Judicial control, represented by application of usury statutes to retail credit sales, is examined in the first part of this Comment. The remainder of the Comment surveys pertinent Louisiana law.

#### USURY AND SALES: THE COMMON LAW

##### *The General Rule*

If a consumer desires a new car but lacks sufficient cash to pay the purchase price, he may acquire the car in either of two ways. He may borrow the necessary cash to complete the purchase price, or he may purchase through a credit transaction. In the latter alternative, he probably would enter a conditional sale contract and give a promissory note for the unpaid balance

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1. In 1945 outstanding consumer credit totaled over five billion dollars; in 1956 over forty-two billion dollars; in November 1963 over sixty-seven billion dollars, of which over fifty billion dollars represented installment obligations. FED. RESERVE BULL. 88 (Jan. 1964). The growth of consumer credit and its significance is thoroughly explored in another publication of the Board of Governors of the Federal Reserve System, CONSUMER INSTALLMENT CREDIT pt. I (1957).

2. About 90% of all bankruptcies are filed by persons working for wages or salaries. See generally, Snedecor, *Consumer Credit and Bankruptcy*, 35 REF. J. 37 (1961).

3. More than 30 states have enacted such laws. For studies of this legislation see Hogan, *A Survey of State Retail Installment Sales Legislation*, 44 CORNELL L.Q. 38 (1958); Note, 58 COLUM. L. REV. 854 (1958).

4. For example, N.Y. PERS. PROP. LAW §§ 401-418.

5. For example, COLO. REV. STAT. ANN. §§ 13-16-1 to 10 (1953). Louisiana has such a statute. See LA. R.S. 6:951-976 (1950). This statute is discussed in text accompanying note 132 *infra*.

of the sale price.<sup>6</sup> To the cash sale price, or to the unpaid balance after the vendee makes a cash down payment, the vendor will add a finance charge, usually calculated from rate charts furnished by a finance company, to obtain the credit sale price, or the balance to be financed. The vendor then generally assigns the contract and negotiates the note to a finance company at such discount that he will receive the difference between the cash down payment of the vendee and the cash sale price. As a result vendor receives the sale price immediately and vendee becomes debtor of the finance company.<sup>7</sup> Whether he borrows cash or buys on credit, the consumer obtains the car and remains with a debt. This debt will be larger than either the part of the purchase price obtained by loan or the unpaid balance of the price in the credit sale since it will be inflated by interest or finance charges. Obviously the two types of transactions perform the same economic function with respect to the consumer and his debt. In legal effect, however, there is an important difference. The first transaction is characterized as a loan, and the pertinent usury statute is applicable.<sup>8</sup> The second is characterized as a sale to which usury statutes generally are held not to apply.<sup>9</sup>

Common law doctrine begins with the premise that usury can occur only in connection with either a loan or a forbearance of debt.<sup>10</sup> A loan, in this context, is an agreement by which one

6. In Louisiana the transaction probably would be a credit sale in which the vendee gives a promissory note secured by a chattel mortgage. This practice is used since Louisiana refuses to admit that a conditional sale of a movable, as a conditional sale is understood at common law, is possible. See *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1908).

7. For a more detailed description of credit sale financing, see Adelson, *The Mechanics of the Instalment Credit Sale*, 2 LAW & CONTEMP. PROB. 218 (1935).

8. See *United Tire & Inv. Co. v. Trone*, 189 Okla. 120, 113 P.2d 977 (1941).

9. See VOLD, *LAW OF SALES* § 62 (1959); WHITNEY, *LAW OF MODERN COMMERCIAL PRACTICE* § 616 (1958). If the vendee gives a promissory note for the unpaid balance, and the note is to bear an unlawful rate of interest after maturity, the local usury statute may be applicable. Since the debt is due on maturity of the note, the interest charge is for forbearance of debt, which is within the ambit of usury statutes. See note 10 *supra*.

10. See *Struthers v. Drexel*, 122 U.S. 487 (1887); *Oil City Motor Co. v. C.I.T. Corp.*, 76 F.2d 589 (10th Cir. 1935); *Ballard v. First Nat'l Bank of Birmingham*, 261 Ala. 594, 75 So.2d 484 (1954); *Blaisdell v. Steinfeld*, 15 Ariz. 155, 137 Pac. 555 (1914); *Verbeck v. Clymer*, 202 Cal. 557, 261 Pac. 1017 (1927); *Philadelphia Real Estate Trust Co. v. Wilmington & N.C. Electric Ry.*, 77 Atl. 756 (Del. 1910); *Bell v. Idaho Finance Co.*, 73 Idaho 560, 255 P.2d 715 (1953); *Clements v. Crane*, 234 Ill. 215, 84 N.E. 884 (1908); *Hamilton v. Kentucky Title Savings Bank & Trust Co.*, 159 Ky. 680, 167 S.W. 898 (1914); *Hopkins v. Flower*, 256 Mass. 367, 152 N.E. 635 (1926); *Dunn v. Midland Loan Finance Corp.*, 206 Minn. 550, 289 N.W. 411 (1939); *Robb v. Metropolitan Life Ins. Co.*, 351 Mo. 1037, 174 S.W.2d 832 (1943); *London v. Toney*, 263 N.Y. 439, 189 N.E. 485 (1934); *Ector v. Osborne*, 179 N.C. 667, 103 S.E. 388 (1920);

party transfers a sum of money to another who agrees to repay that sum absolutely.<sup>11</sup> Ordinarily the borrower will agree to repay an additional sum (interest) for the use of the money borrowed. Only this last sum is limited by usury statutes.<sup>12</sup> Forbearance of debt is best illustrated by an extension of time for payment of a matured obligation.<sup>13</sup> Usury statutes apply only to the consideration given for this forbearance.<sup>14</sup> Thus usury statutes operate on two kinds of agreements, and in each the statutes touch only the charge assessed and not the basic agreement.

A credit sale is considered conceptually different from either a loan or forbearance of debt, and therefore usury statutes are not applied to it.<sup>15</sup> The vendor, it is said, may justly have one price at which he will sell for cash and a higher price at which he will sell on credit.<sup>16</sup> The increase in price represents the

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Hafer v. Spaeth, 22 Wash. 2d 378, 156 P.2d 408 (1945); Case v. Fish, 58 Wis. 56, 15 N.W. 808 (1883).

11. See *In re Grand Union Co.*, 219 Fed. 353 (2d Cir. 1914); *Milana v. Credit Discount Co.*, 27 Cal. 2d 355, 163 P.2d 869 (1945); *Brem v. Cook*, 147 Tex. 374, 216 S.W.2d 179 (1949).

12. Usury is commonly defined as contracting for or receiving something in excess of the amount allowed by law for the loan of money or forbearance of debt. See 91 C.J.S. *Usury* § 1 (1955). The elements of usury are said to be four: an unlawful intent, a loan or forbearance of money, an agreement that the loan shall be repaid; the exaction of interest in excess of that permitted by law. See 91 C.J.S. *Usury* § 13 (1955).

13. See *Heilos v. State Land Co.*, 113 N.J. Eq. 239, 166 Atl. 330 (1933); *Moseley v. Brown*, 76 Va. 419 (1882); *Hafer v. Spaeth*, 22 Wash. 2d 378, 156 P.2d 408 (1945).

14. See note 13 *supra*.

15. See *General Motors Acceptance Corp. v. Mid-West Chevrolet Co.*, 66 F.2d 1 (10th Cir. 1933); *Commercial Credit Co. v. Tarwater*, 215 Ala. 123, 110 So. 39 (1926); *Verbeck v. Clymer*, 220 Cal. 557, 261 Pac. 1017 (1927); *Cady L. Daniels, Inc. v. Fenton*, 97 Colo. 409, 50 P.2d 62 (1935); *Zazzaro v. Colonial Acceptance Corp.*, 117 Conn. 251, 167 Atl. 734 (1933); *Davidson v. Davis*, 59 Fla. 476, 52 So. 139 (1910); *Richardson v. C.I.T. Corp.*, 60 Ga. App. 780, 5 S.E.2d 250 (1939); *Bell v. Idaho Finance Co.*, 73 Idaho 560, 255 P.2d 715 (1953); *Wernick v. National Bond & Inv. Co.*, 276 Ill. App. 84 (1934); *Robrock v. Ditzler*, 113 Ind. App. 332, 47 N.E.2d 163 (1943); *Atlas Securities Co. v. Copeland*, 124 Kan. 393, 260 Pac. 659 (1927); *Munson v. White*, 309 Ky. 295, 217 S.W.2d 641 (1949); *Hartwick Lumber Co. v. Perlman*, 245 Mich. 3, 222 N.W. 147 (1928); *Dunn v. Midland Loan Finance Corp.*, 206 Minn. 550, 289 N.W. 411 (1939); *Commercial Credit Co. v. Shelton*, 139 Miss. 132, 104 So. 75 (1925); *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 262 S.W. 425 (1924); *Grand Island Finance Co. v. Fowler*, 124 Neb. 514, 247 N.W. 429 (1933); *Taylor v. Hintze*, 57 N.J.L. 239, 30 Atl. 551 (1894); *Weaver Hardware Co. v. Solomovitz*, 235 N.Y. 321, 139 N.E. 353 (1923); *Saylor v. Brady*, 63 N.D. 471, 248 N.W. 673 (1933); *Mayer v. American Finance Corp.*, 172 Okla. 419, 45 P.2d 497 (1935); *Coast Finance Corp. v. Ira F. Powers Furniture Co.*, 105 Ore. 339, 209 Pac. 614 (1922); *Equitable Credit & Discount Co. v. Geier*, 342 Pa. 445, 21 A.2d 53 (1941); *Cohen v. Williams*, 164 S.C. 499, 162 S.E. 758 (1932); *Graham v. Universal Credit Co.*, 63 S.W.2d 727 (Tex. Civ. App. 1933); *Hafer v. Spaeth*, 22 Wash. 2d 378, 156 P.2d 408 (1945); *Conway v. Skidmore*, 48 Wyo. 73, 41 P.2d 1049 (1935).

16. *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 262

vendor's compensation for the increased risk he incurs in the credit sale; it is not interest on a loan of money to the vendee.<sup>17</sup> The difference between the cash price and the credit price — commonly called the "time price differential" — is not a charge for forbearance of debt because the parties have agreed that the entire credit price is not due at the time their bargain is made. Since the time price differential is considered neither a loan nor a forbearance of debt, usury statutes do not limit it: the parties may make their own bargain as to it.

With equal plausibility, the time price differential might have been considered a loan (if not of money, then of money's equivalent)<sup>18</sup> or a forbearance of debt. Several reasons may be suggested why common law courts did not do so. Usury statutes frequently have a penal aspect and require substantial forfeitures upon violation.<sup>19</sup> Therefore, they are commonly construed strictly.<sup>20</sup> Further, the common law assumes that vendors and vendees have equal bargaining power:<sup>21</sup> "a purchaser is not like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller."<sup>22</sup> On this assumption neither needs protection against the other, and there is no need to limit their freedom to make their own bargain. In some cases, the court may have been convinced that the complaining party simply was not the sort of person that usury statutes were intended to protect.<sup>23</sup>

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S.W. 425 (1924). *Accord*, Commercial Credit Co. v. Tarwater, 215 Ala. 123, 110 So. 39 (1926); Atlas Securities Co. v. Copeland, 124 Kan. 393, 260 Pac. 659 (1927); Commercial Credit Co. v. Shelton, 139 Miss. 132, 104 So. 75 (1925).

17. See note 16 *infra*.

18. A loan of money's equivalent has been held within the ambit of usury statutes. See Archer v. Putnam, 20 Miss. 286 (1849); State Bank v. Ayers, 7 N.J.L. 130 (1824).

19. See, e.g., CAL. GEN. LAWS ANN. act 3757, § 3 (1919) allowing the borrower to collect three times the amount of interest paid as damages. In Nebraska, the usury statutes are interpreted to require upon violation forfeiture of principal and interest. See McNish v. General Credit Corp., 164 Neb. 526, 83 N.W.2d 1 (1957).

20. See, e.g., Minnesota Mut. Life Ins. Co. v. Schlanger, 284 Mich. 207, 278 N.W. 821 (1938); Fry v. Layton, 191 Miss. 17, 2 So.2d 561 (1941); Crisman v. Corbin, 169 Ore. 332, 128 P.2d 959 (1942); Frick Co. v. Tuten, 204 S.C. 226, 29 S.E.2d 260 (1944).

21. See VOLD, LAW OF SALES § 62 (1959).

22. General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 78, 262 S.W. 425, 428 (1924).

23. *Ibid.* The facts of the case show that Weinrich owned an equity of some \$36,000 in two farms. It is understandable that the court might feel that Weinrich in no way resembled the "needy borrower" for whom the usury law offered protection.

Finally, a general hostility to usury statutes by bench, bar, and business probably influenced the ultimate decision.<sup>24</sup>

It became well settled as a general rule that usury statutes do not apply to credit sales.<sup>25</sup> In the last two decades, however, significant signs of change have appeared, mostly in cases concerning automobile sale transactions. These are now to be considered.

### *Deviations from the General Rule*

As an exception to the general rule, it is agreed usury statutes apply to a loan disguised as a sale.<sup>26</sup> Thus if the lender takes title to the borrower's land for security purposes and reconveys it on repayment of the loan, the fact that the transaction takes the form of a sale-repurchase will not prevent judicial application of the usury statute.<sup>27</sup> Purported sales of mortgages,<sup>28</sup> purported sales with an option to repurchase,<sup>29</sup> and purported sales of accounts with the vendor guaranteeing payment<sup>30</sup> have all been found to be disguised loans in particular cases. In such cases the sale is a simulation and the true transaction is a loan, to which usury statutes apply. The result is clearly the same if a purported credit sale of a motor vehicle is a disguised loan, but in these transactions it is difficult to determine what fact situations will lead a court to rule that a particular transaction is in fact a disguised loan.

If the vendee alleges that the automobile sale was entirely for cash, that he borrowed a sum from finance company to complete the sale, that he executed a conditional sale contract or chattel mortgage and promissory note solely at finance company's insistence, but finance company claims the note is for the unpaid balance of a credit sale, there is an issue for the trier of fact to resolve.<sup>31</sup> If the trier of fact resolves the issue

24. See Berger, *Usury in Instalment Sales*, 2 LAW & CONTEMP. PROB. 148 (1935).

25. See cases cited in note 15 *supra*.

26. See *Milo Theater Corp. v. National Theater Supply*, 71 Idaho 435, 233 P.2d 425 (1951); *Dorothy v. Commonwealth Commercial Co.*, 278 Ill. 629, 116 N.E. 143 (1917); *Bass v. Patterson*, 68 Miss. 310, 8 So. 849 (1891); *Osborne v. Fuller*, 92 S.C. 338, 75 S.E. 557 (1912). *Cf. Adams v. Schwartz*, 356 S.W.2d 597 (Tenn. App. 1961); *Consumers Discount Corp. v. State*, 352 S.W.2d 466 (Tex. Civ. App. 1962).

27. See *Britz v. Kinsvater*, 87 Ariz. 385, 351 P.2d 986 (1960); *Wilcox v. Moore*, 354 Mich. 499, 93 N.W.2d 288 (1958).

28. See *Dante v. Givens*, 156 So.2d 13 (Fla. App. 1963).

29. See *Cowles v. Zlaket*, 167 Cal. App. 2d 20, 334 P.2d 55 (1959).

30. See *Milana v. Credit Discount Co.*, 27 Cal. 2d 335, 163 P.2d 869 (1945).

31. See *White v. Disher*, 232 N.C. 260, 59 S.E.2d 798 (1950); *United Tire*

in favor of the vendee, the local usury statute applies to the transaction as it is a disguised loan, and a reviewing court is unlikely to disturb the findings below.<sup>32</sup> Parol evidence is admissible, as it usually is if usury is in issue, to establish the character of the transaction.<sup>33</sup> The essential evidence to make out a case for the vendee seems to be testimony that connects finance company to vendee prior to, or during, the transaction between vendor and vendee.<sup>34</sup>

*Jackson v. Commercial Credit Corp.*<sup>35</sup> presents a variation of this fact situation. Vendee alleged that he obtained a loan from finance company — paid by finance company to vendor to complete a cash sale — and that the transaction was arranged by an agent of both finance company and vendor. The common agent may have been the salesman who sold the car. It was held to be an error to dismiss the petition on demurrer — it was for the jury to determine whether there was a disguised loan to which the usury statute would apply. This was not an ordinary time price agreement, the court explained, but allegedly an agreement between vendor, vendee, and finance company that the latter “would supply the money to cover the difference between the cash price and down payment plus a charge for the loan.”<sup>36</sup> Realistically, the finance company does the same thing when it purchases at a discount from the vendor the vendee’s note and the conditional sale contract: the considera-

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& Investment Co. v. Trone, 189 Okla. 120, 113 P.2d 977 (1941); *Nazarian v. Lincoln Finance Corp.*, 77 R.I. 497, 78 A.2d 7 (1951).

32. See note 31 *supra*.

33. Parol admissible to establish usury: *Schuck v. Murdoek Acceptance Corp.*, 220 Ark. 56, 247 S.W.2d 1 (1952); *Milana v. Credit Discount Co.*, 27 Cal. 2d 335, 163 P.2d 869 (1945); *Jackson v. Commercial Credit Corp.*, 90 Ga. App. 352, 83 S.E.2d 76 (1954); *Seebold v. Eustermann*, 216 Minn. 566, 13 N.W.2d 739 (1944); *Yeager v. Ainsworth*, 202 Miss. 747, 32 So.2d 548 (1947); *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957); *White v. Disher*, 232 N.C. 260, 59 S.E. 798 (1950); *Simpson v. Penn Discount Corp.*, 335 Pa. 172, 5 A.2d 796 (1939); *Associates Investment Co. v. Thomas*, 210 S.W.2d 413 (Tex. Civ. App. 1948); *Clausing v. Virginia Lee Homes*, 384 P.2d 644 (Wash. 1963).

34. See *White v. Disher*, 232 N.C. 260, 59 S.E.2d 798 (1950); *United Tire & Investment Co. v. Trone*, 189 Okla. 120, 113 P.2d 977 (1941). *But cf.* *Henry v. P. & E. Finance Co.*, 197 Okla. 676, 174 P.2d 373 (1946). *Compare* *Nazarian v. Lincoln Finance Co.*, 77 R.I. 497, 78 A.2d 7 (1951) *with* *Luchesi v. Capitol Loan & Finance Co.*, 83 R.I. 151, 113 A.2d 725 (1955). Where vendee (*Nazarian*) dealt directly with finance company, reviewing court refused to disturb trial court’s finding that the transaction was a loan disguised as a sale; but where vendee (*Luchesi*) did not deal directly with finance company, reviewing court refused to disturb trial court’s finding that the transaction was a *bona fide* sale.

35. 90 Ga. App. 352, 83 S.E.2d 76 (1954). *Cf.* *Graham v. Lynch*, 206 Ga. 301, 57 S.E.2d 86 (1950).

36. *Jackson v. Commercial Credit Corp.*, 90 Ga. App. 352, 356, 83 S.E.2d 76, 79 (1954).

tion for the note and contract represents the difference between the cash sale price and down payment; the discount represents the charge the vendee must pay to recompense the finance company for supplying the balance of the cash price to the vendor. The finance charge which vendor adds to his cash sale price in a credit transaction is usually computed from charts supplied by finance company to assure that vendor will receive exactly the difference between the cash sale price and down payment when finance company discounts the paper.<sup>37</sup> What, then, distinguishes *Jackson* in legal effect from the ordinary time price agreement? Perhaps it is the participation of finance company, through the common agent, in the transaction between vendor and vendee. Or perhaps it is the intention of the parties.

In either event, the decision makes it possible to find that the purported credit sale is a disguised loan within the ambit of the usury statute. If the result depends on the participation of finance company, through an agent, in the transaction between vendor and vendee, such participation may frequently be found. The relationship between finance company and motor vehicle vendor may frequently be so intimate that the vendor can be deemed an agent of the finance company. If finance company supplies the contract forms which vendor and vendee use, sets the finance charge which vendor must assess, and customarily discounts vendor's paper, little more needs to be added to conceive the vendor as an agent of finance company. In the context of negotiable instruments law, there is considerable authority for the proposition that a finance company may be too intimately associated with vendor to become a holder in due course after discounting his paper.<sup>38</sup> Such cases offer some support for a finding that the vendor in an automobile sale is an agent of

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37. See note 7 *supra*. The arrangement between vendor and finance company may be even more intimate if the finance company rebates part of the finance charge to vendor as an inducement for the vendor to sell his paper to finance company and not to its competitors. See BLACK, BUY NOW, PAY LATER 193-196 (1963). The arrangement may also be complicated by finance company's undertaking to provide financial assistance ("flooring") to vendor in his dealings with the automobile manufacturer.

38. "In a number of cases the courts appear to have used the legal microscope to find evidence of bad faith purchase of notes by finance companies from dealers, obtained by the dealer in installment selling transactions. The evidence of bad faith purchase seems to have been found from the close association of the dealer and his discounting finance company." BRITTON, BILLS AND NOTES § 112 (1961). See *Commercial Credit Co. v. Childs*, 199 Ark. 1073, 137 S.W.2d 260 (1940); *Commercial Credit Co. v. Orange County Machine Works*, 34 Cal.2d 766, 214 P.2d 819 (1950); *Mutual Finance Co. v. Martin*, 63 So.2d 649 (Fla. 1953); *Davis v. Commercial Credit Corp.*, 87 Ohio App. 311, 94 N.E.2d 710 (1950). See generally Annot., 44 A.L.R.2d 1 (1955).



the finance company, and therefore, that the finance company participates in the transaction between vendor and vendee. If the character of the transaction depends upon the intention of the parties, then what result if vendee contemplated a loan but vendor and finance company contemplated a credit sale? Presumably it would be for the jury to decide what was the intention of the parties. A jury of consumers might be inclined to agree with the vendee.

The federal usury statute<sup>39</sup> has been applied to a transaction which appears to differ little from an ordinary motor vehicle credit sale in which a national bank acted as the finance company.<sup>40</sup> The court characterized the transaction as a cash sale plus a loan for the following reasons: a cash price, but never a credit price, was quoted to vendee during negotiation with vendor; vendee was told the "interest" would be 5% but 9.75% was actually charged; the purported credit price was calculated by adding finance charge to the cash sale price; there was an understanding from the beginning between vendor and the bank on the purchase price intended to go to vendor and the finance charge intended to go to the bank.<sup>41</sup> There is a suggestion that the usury statute applies to any credit sale the financing of which is prearranged by vendor and finance company.<sup>42</sup> In light of ordinary business practices, the court's

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39. 13 Stat. 108 (1864), 12 U.S.C. § 85 (1958). The statute is applicable to national banks, and it limits also the discount rate on commercial paper.

40. *Daniel v. First National Bank of Birmingham*, 227 F.2d 353 (5th Cir. 1955); *rehearing denied*, 228 F.2d 803 (5th Cir. 1956); adhered to on second appeal, 239 F.2d 801 (5th Cir. 1956); *cf.* *Beatty v. Franklin Investment Co.*, 319 F.2d 712 (D.C. Cir. 1963); *United States v. Commercial Credit Corp.*, 242 F.2d 57 (5th Cir. 1957).

41. "Accordingly we repeat some of the indicia which influence us to hold that these sales were at a cash price combined with a loan or extension of credit as distinguished from a *bona fide* time price: (1) a standard product, a motor vehicle, having a known and definite market price advertised and quoted only as a cash price and not separately as a cash price and time price; (2) the only price mentioned, except in the final papers, being a cash price and no time price being actually agreed on; (3) the erroneous quoting to the purchaser of interest at 5% within the legal rate; (4) the so-called time price being calculated on the cash price by adding thereto insurance, recording fees and interest or discount; (5) the clear separation from the beginning of the purchase price intended to go to the seller of the vehicle from the interest or discount intended to go to the Bank." *Daniel v. First National Bank of Birmingham*, 228 F.2d 803, 805 (5th Cir. 1956). Query: are not these indicia present in most automobile sales transactions?

42. "The evidence leave us in no doubt that there was never any bona fide 'time price' in any one of the three contracts, but that the real transaction was a sale at a cash price accompanied by a loan or extension of credit to which the Bank was privy throughout. Any other result of the plain transactions here involved would leave that vast number of persons who purchase equipment and vehicles on credit, the financing of which is pre-arranged between the dealer or finance company, outside the pale of protection of the state and national laws

suggestion embraces a large number of credit sales and would be a substantial deviation from the general rule.

Texas courts have displayed a strong tendency to find a purported credit sale of an automobile to be a disguised loan to which the usury statute applies. In the first such case, three facts were taken as indicia of a disguised loan: the finance company actively participated in the transaction between vendor and vendee; finance company prepared and supplied vendor with contract forms and with rate tables for computation of finance charges; vendor quoted only the cash price to the vendee.<sup>43</sup> In subsequent cases, the transaction was found to be a disguised loan although finance company did not actively participate in the transaction between vendor and vendee.<sup>44</sup> *Associates Investment Co. v. Sosa*<sup>45</sup> is illustrative. The conditional sale contract recited a cash price and a time balance. Parol evidence showed that vendee was quoted only one price and was not given a choice between a cash price and a credit price. On this basis the court held the transaction a disguised usurious loan.<sup>46</sup> Further the court held that the finance company had notice of the usury (and hence was not a holder in due course of the note) because the conditional sale contract was executed on its printed contract form.<sup>47</sup>

If the facts of a case show that finance company actively participated in the transactions between vendor and vendee, there may be a sound basis for holding that the transaction is

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against usury." *Daniel v. First National Bank of Birmingham*, 227 F.2d 353, 357 (5th Cir. 1955).

43. *Associates Investment Co. v. Thomas*, 210 S.W.2d 413 (Tex. Civ. App. 1948). "In the case before us the written conditional sales contract provides that the car was being sold at a time selling price. . . . However, there is testimony sufficient to show that the only price quoted to appellee was the cash price. . . ; that the seller told appellee that he would arrange for the financing of the deferred balance; that the matter was taken up with appellant before the sale was made, that the latter checked appellee's credit and talked to her, and examined her car, and agreed to finance the sale before it was made; and that appellant prepared the note and contract, and participated in the closing of the sale." *Id.* at 415. *Cf. Associates Investment Co. v. Baker*, 221 S.W.2d 363 (Tex. Civ. App. 1949).

44. See *Tyson v. Associates Investment Co.*, 331 S.W.2d 768 (Tex. Civ. App. 1959); *Associates Investment Co. v. Sosa*, 241 S.W.2d 703 (Tex. Civ. App. 1951); *Associates Investment Co. v. Hill*, 221 S.W.2d 365 (Tex. Civ. App. 1949).

45. 241 S.W.2d 703 (Tex. Civ. App. 1951).

46. "But if the selling price merely designates the means of computing the amount the seller was to receive and buyer to pay, and, as a part of such transaction, an arrangement is made for financing a deferred balance in addition thereto which is in excess of 10%, same is usury, irrespective of whether the transaction was made at cash price or credit price." *Id.* at 706.

47. *Id.* at 704-05. The decision was legislatively overruled. See *Lamb v. Ed Maher, Inc.*, 368 S.W.2d 255 (Tex. Civ. App. 1963).

a disguised loan. The parties may have agreed that finance company should loan a portion of the sale price to vendor (paying it to vendor and to vendee) to complete a cash sale, although it is believed the agreement of the parties ordinarily is otherwise. Finding a transaction to be a disguised loan because the vendee was quoted only one sale price instead of being given a choice between a cash price and a credit price seems dubious logic. In cases such as *Sosa* it appears that the court is in fact applying usury statutes to credit sales as a means of judicial control of consumer finance enterprises.

That usury statutes apply to any transaction which is a scheme or device to evade usury statutes is a second well-known exception, closely related to and hardly distinguishable from the exception of disguised loans, to the general rule that usury statutes do not apply to credit sales. Thus one who made numerous small loans at maximum legal interest but required each borrower to purchase for \$30 a 90¢ bottle of vitamins was promptly convicted for violating the Small Loans Act.<sup>48</sup> The lender who charged small interest but required borrowers to take out life, health, and accident insurance — on which policies lender made an 85% commission — was convicted of usury with equal dispatch.<sup>49</sup> Such applications of the principle are not provocative as the basic transaction between the parties is transparently a loan.

A conditional sale contract could be employed to evade the usury statute in a transaction which the parties intended to be a loan. Such a case would probably give no court much difficulty. The use of a conditional sale of a motor vehicle for this purpose, however, seems unlikely. Perhaps *Seebold v. Eustermann*<sup>50</sup> is such a case. The court seems to have concluded that this was a cash sale, vendor lending vendee sufficient cash to satisfy the purchase price, and then simulating a credit sale to secure greater interest on the loan than the law allowed.<sup>51</sup>

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48. *People v. Coleman*, 337 Mich. 247, 59 N.W.2d 276 (1953).

49. *Tribble v. State*, 89 Ga. App. 593, 80 S.E.2d 711 (1954). *Accord*, *Cochran v. State*, 270 Ala. 440, 119 So.2d 339 (1960); *Strickler v. State Auto Finance Co.*, 220 Ark. 565, 249 S.W.2d 307 (1952); *Peebles v. State*, 87 Ga. App. 649, 75 S.E.2d 35 (1953); *Carter v. Life Ins. Co. of Virginia*, 122 N.C. 338, 30 S.E. 341 (1898); *cf. Griffin v. Kelly*, 92 So.2d 515 (Fla. 1957); *Family Loan Co. of Nashville v. Hickerson*, 168 Tenn. 36, 73 S.W.2d 694 (1934); *Thrift Finance Co. v. State*, 351 S.W.2d 653 (Tex. Civ. App. 1961).

50. 216 Minn. 566, 13 N.W.2d 739 (1944).

51. "It is the general rule everywhere conceded, that when the sale is in fact at an agreed cash price, and the form of a sale on credit is resorted to for the purpose of evading the statute against usury, the transaction will be declared

*Seebold* remains an isolated case,<sup>52</sup> later Minnesota cases re-affirming the general rule.<sup>53</sup>

Nebraska courts, which previously followed the general rule,<sup>54</sup> recently have been most willing to find a credit sale of a motor vehicle to be a scheme and device to evade the usury statute.<sup>55</sup> In the first of such cases, finance company actively participated in the transaction between vendor and vendee, and vendor testified that the time price differential included "interest."<sup>56</sup> The court held the transaction to be a scheme and device to evade the usury statute and sustained vendee's defense of usury.<sup>57</sup> *McNish v. General Credit Corp.*<sup>58</sup> established the rule that a credit sale would be considered a scheme and device to evade the usury statute unless the "buyer actually was informed of and had an opportunity to choose between a time sale price and a cash sale price."<sup>59</sup> Regardless of the recitations in the conditional sale contract, parol is admissible to show that

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usurious." *Id.* at 575, 13 N.W.2d at 744. *Cf.* *Hillman's v. Em'n'al's*, 345 Mich. 644, 77 N.W.2d 96 (1956), which suggests the possibility of usury if the parties in fact agreed on a cash sale. *But see* *Black v. Contract Purchase Corp.*, 327 Mich. 636, 42 N.W.2d 768 (1950), in which the court rebuffed the Attorney General's attempt to regulate finance companies under Michigan's Small Loan Act. The court was favorably impressed by the Attorney General's argument as to social policy, but decided to leave the decision to the legislature. *Hillman's* may reflect a change of opinion by the court.

52. The court was perhaps assisted to its conclusion by vendor's testimony in which he referred to the added charge on the deferred balance as "interest." See *Seebold v. Eustermann*, 216 Minn. 566, 575, 13 N.W.2d 739, 744 (1944).

53. See *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 93 N.W.2d 690 (1958).

54. See *Grand Island Finance Co. v. Fowler*, 124 Neb. 514, 247 N.W. 429 (1933).

55. See *Wood v. Commonwealth Trailer Sales*, 172 Neb. 494, 110 N.W.2d 87 (1961); *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 91 N.W.2d 19 (1958); *Nelson v. General Credit Corp.*, 166 Neb. 770, 90 N.W.2d 799 (1958); *McNish v. Grand Island Finance Co.*, 164 Neb. 543, 83 N.W.2d 13 (1957); *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956); *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956).

56. See *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956).

57. "It is of course true, as has been pointed out by the decisions of this court, that an automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in price may exceed lawful interest for a loan . . . It is also true that a time sale made in good faith at a price in excess of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into by a purchaser and a dealer, may not be regarded as being tainted with usury. . . . These rules however do not apply where it is proved that the transaction was not made in good faith but that it was a scheme and a device pursued to evade operation against it by the usury statutes." *Id.* at 18-19, 75 N.W.2d at 127.

58. 164 Neb. 526, 83 N.W.2d 1 (1957).

59. *Id.* at 537, 83 N.W.2d at 9.

the vendee was never quoted two prices.<sup>60</sup> The vendee's defense of usury is available against finance company on the theory that the vendor is its agent.<sup>61</sup>

Again it appears that the court is applying the usury statute to transactions which are in fact credit sales. Surely there is a bona fide sale if the parties intend a transfer of property for money, as in *McNish*. It is submitted that the court entertained no doubt that such was the intention of the parties, and that the decision represents a retreat from the general rule that usury statutes do not apply to credit sales.

Subsequent developments in Nebraska support this conclusion. In 1959 the legislature enacted an installment sales act which allowed vendors to add greater time price differentials to cash prices in credit transactions than the court allowed by application of the usury statute.<sup>62</sup> In *Elder v. Doerr*<sup>63</sup> the statute was declared unconstitutional as a local or special law regulating the interest on money.<sup>64</sup> After a summary of Ne-

60. See *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957).

61. *Ibid.*

62. NEB. REV. STAT. § 45-305 (Cum. Supp. 1959): "(1) Notwithstanding the provisions of any other law, the time price differential shall not exceed the following schedule:

"(a) As to motor vehicles:

"CLASS 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made — eight dollars per one hundred dollars per year.

"CLASS 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 two years prior to the year in which the sale is made — ten dollars per one hundred dollars per year.

"CLASS 3. Any used motor vehicle not in Class 2 and designated by the manufacturer by a year model not more than four years prior to the year in which the sale is made — thirteen dollars per one hundred dollars per year.

"CLASS 4. Any used motor vehicle not in Class 2 or Class 3 and designated by the manufacturer by a year model more than four years prior to the year in which the sale is made — fifteen dollars per one hundred dollars per year.

"(b) As to goods other than motor vehicles: (i) On so much of the basic time price as does not exceed three hundred dollars, twelve dollars per one hundred dollars per year; (ii) if the basic time price exceeds three hundred dollars, but is one thousand dollars or less, ten dollars per one hundred dollars per year on that portion over three hundred dollars; and (iii) if the basic time price exceeds one thousand dollars, eight dollars per one hundred dollars per year on that portion over one thousand dollars."

This statute has been attributed to the requests of the consumer finance industry. See *Wall Street Journal* Oct. 23, 1963, p. 1, col. 4.

63. 175 Neb. 483, 122 N.W.2d 528 (1963).

64. NEB. CONST. art. III, § 18 (1875): "The Legislature shall not pass local or special laws in any of the following cases, that is to say . . . Regulating the interest on money." The statute was held a local or special law because vendors of motor vehicles were treated differently than vendors of other personal property, and because four different classes of vehicles with four different allowable time price differentials were created. The court held that such classification was "unreasonable, arbitrary, and capricious," and that the act did not "operate uniform-

braska doctrine on usury and credit sales,<sup>65</sup> the court, without attempting to determine whether the installment contract in question was bona fide or a cloak for usury, shifted to a study of the installment sales act itself. This shift was rationalized as follows: the parties stipulated that the contract was made in conformity with the act; therefore, if the act provides for usurious *interest*, the contract must be tainted with usury.<sup>66</sup> Due to the peculiar wording of the statute,<sup>67</sup> the court concluded that the charge designated as time "price differential was for the forbearance of money and is, in fact, an interest charge"<sup>68</sup> which is at a usurious rate. Therefore the transaction made in conformity with the unconstitutional statute was held void because of usury.<sup>69</sup> Since the vendor had complied with the *McNish*

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ly on the persons and property sought to be regulated." *Elder v. Doerr*, 122 N.W.2d 528, 537 (Neb. 1963). There may also be an idea akin to substantive due process of law in the decision: "But this court has adhered to the principle that the Legislature under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly." *Id.* at 532. An amended version of the statute was declared unconstitutional in *Stanton v. Mattson*, 175 Neb. 767, 123 N.W.2d 844 (1963). The amended statute had deleted the offensive classifications, but was declared unconstitutional as a special law regulating interest because it applied only to retailers, "while all others, including manufacturers, distributors and all others having occasion to sell on an installment contract, are not entitled to benefit by its provisions." 123 N.W.2d at 847.

65. "The general rule is that a sale of property for a price fixed by the seller and accepted by the purchaser, if made in good faith, does not involve any question of usury. It is only when it is shown that such a transaction is a scheme or artifice, to avoid the usury laws, that the courts will look through form and determine the real nature of the transaction.

"Since the true nature of such financial transaction can only be determined by the evidence in each particular case, uncertainty has arisen in a field where certainty is desired. This court has consistently held that an installment time sale which is in fact a loan is void if it is made in violation of the Nebraska Installment Loan Act. It is question of fact as to whether or not a particular transaction is a time sale made in good faith or the financing of the unpaid balance of a cash purchase price. . . . A transaction is not a valid time sale made in good faith unless the seller informs the buyer, at the time of the sale, of the cash and time sales prices and gives the buyer an opportunity to choose the one he will accept." *Elder v. Doerr*, 122 N.W.2d 528, 533 (Neb. 1963).

66. 122 N.W.2d at 533. The fallacy of this reasoning is pointed out in the dissenting opinion: "The Installment Sales Act was intended to regulate valid time sales. The act is not applicable to transactions which in fact are loans made in violation of the Installment Loan Act. Consequently, if the retail installment contract involved in this case was not a valid time sale, then the Installment Sales Act is not involved and its constitutionality cannot be an issue in the case. If the retail installment contract is in fact a time sale made in good faith, then it is valid. . . . In that event, the constitutionality of the Installment Sales Act cannot be an issue because the contract is valid without regard to the statute." *Id.* at 537.

67. "Eight dollars per one hundred dollars per year," etc. See NEB. REV. STAT. § 45-305 (Cum. Supp. 1959).

68. *Elder v. Doerr*, 122 N.W.2d 528, 535 (Neb. 1963).

69. "The parties having stipulated that the time differential, which is in fact interest, exceeds that amount, the installment sales contract is in fact a loan and in violation of the Nebraska Installment Loan Act." *Id.* at 537.

rule in this case — vendor had expressly given vendee a choice between a cash price and a time price<sup>70</sup> — the case seems to stand for the proposition that any transaction made in conformity with the Nebraska installment sales act is not a bona fide credit sale but a scheme and device to evade the usury statute.

In a subsequent case, the court found usury, although the conditional sale contract listed a cash price and a time sale price.<sup>71</sup> The time price differential was said to be interest.<sup>72</sup> *Lloyd v. Gutgsell*<sup>73</sup> announced that if the vendee is unable to pay the quoted cash price, then application of a *schedule of rates* to the cash price in order to determine the credit price makes the difference between the two prices *interest*, and therefore limited by the usury statute.<sup>74</sup> This seems to be an open repudiation of the general rule that usury statutes do not apply to credit sales.

One other jurisdiction has abandoned the general rule. The general rule was well established in Arkansas<sup>75</sup> until 1952 in spite of a self-operative constitutional provision on usury<sup>76</sup>

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70. *Id.* at 528.

71. *General Motors Acceptance Corp. v. Mackrill*, 175 Neb. 631, 122 N.W.2d 742 (1963).

72. 122 N.W.2d at 746: "The transaction on its face shows a cash sale price of \$1,895, an allowance for the trade-in, and two additional charges for insurance. The total of \$1,349.47 is shown to be the basic time price. The only apparent conclusion is that the amount of \$1,349.47 is financed. There is then an item designated as the time price differential of \$231.22. Regardless of the term used; this item is a charge for the loan of money or for forbearance of debt. Disguise it by any name or title we will, it is and remains interest."

73. 175 Neb. 775, 124 N.W.2d 198 (1963).

74. "There seems to be an impression that if a cash price is quoted and the buyer is unable to pay cash, it is then possible to apply a certain schedule of rates of charges to the cash price in order to determine the time sale price, the difference being denominated a time price differential. It is possible to do so if the resulting charge does not exceed 9 percent simple interest. If it does, we have a usurious transaction. Where a time sale price is determined by applying a certain schedule of rates or charges to the cash price, the resulting product is interest. This is merely a sale for a cash price, with the difference between the money the buyer has and what he needs being financed. When we look through the form, can we come to any other conclusion but the one that the difference between the price and what the buyer finally pays is the cost of carrying the balance of the cash price? To put it another way, the charge is for the forbearance to collect the full cash price, or for the use of money." 124 N.W.2d at 203-04.

75. See *Garst v. General Contract Purchase Corp.*, 211 Ark. 526, 201 S.W.2d 757 (1947); *Harper v. Futrell*, 204 Ark. 822, 164 S.W.2d 995 (1942); *General Contract Purchase Corp. v. Holland*, 196 Ark. 675, 119 S.W.2d 535 (1938); *Cheairs v. McDermott Motor Co.*, 175 Ark. 1126, 2 S.W.2d 1111 (1928); *Standard Motors Finance Co. v. Mitchell Auto Co.*, 173 Ark. 875, 293 S.W. 1026 (1927); *Smith v. Kaufman*, 145 Ark. 548, 224 S.W. 978 (1920).

76. ARK. CONST. art. XIX, § 13 (1874): "All contracts for a greater rate of

which could have been construed to apply to credit sales. In *Hare v. General Contract Purchase Corp.*<sup>77</sup> the court in effect prospectively overruled the earlier cases,<sup>78</sup> and warned that in the future the constitutional provision might be applied to certain credit sales. After explaining the reason for the reversal of policy,<sup>79</sup> the court listed three propositions as applicable to future cases: (1) In a bona fide transaction, vendor could increase his cash price to compensate for the increased risk of a credit sale.<sup>80</sup> (2) If finance company discounts vendor's paper so that it receives more than 10% return on its investment, and if vendor increased his cash price to allow this result under reasonable assurance that finance company would discount the paper, the entire transaction is impeachable for usury.<sup>81</sup> (3) If finance company supplies vendor with forms and rate charts,

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interest than 10 percent per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same by law. . . ."

77. 220 Ark. 601, 249 S.W.2d 973 (1952).

78. "But the time has come when we must re-examine these holdings, so we now give the public a caveat that the effect of transactions, such as in the case at bar, may impinge the constitutional mandate against usury, and transactions entered into after this appeal becomes final may be subjected to the taint of usury with the aforementioned decisions affording no protection." *Id.* at 607, 249 S.W.2d at 977. The court listed the cases cited in note 73 *supra*.

79. "Our cases disclose that finance companies have seized upon the 'credit price rule' as a means of obtaining more than 10% return upon what is in form a sale, but is in substance, a loan. It is obvious that if a prospective purchaser of a car, radio, refrigerator, etc., should borrow \$1000 directly from a finance company, then buy the article with the money and execute a one year note to the finance company for \$1,200, such transaction would be usurious. But the finance companies are accomplishing the same result by having dealers in cars, radios, refrigerators, etc., handle the sale in the first instance, and under the guise of a credit price, add an excessive charge which inures to the finance company, because the dealer is reasonably confident in advance of the sale that he can transfer the paper to the finance company for his own cash price. Nor is the increase purely for credit risk, because the car, radio, refrigerator, etc. is usually insured against normal hazards.

"The result is that, by the simple expedient of providing forms and a rating book to the seller, and buying the conditional sale contract and note from him, the finance companies are receiving a usurious rate of interest. . . . Buying at a credit price, as distinguished from a cash price, has largely disappeared in fact, but it is being used as a cloak for usury in many cases by such words as 'time price differential,' or some other such language." *Id.* at 608-09, 249 S.W.2d at 977-78.

80. "We leave unimpaired the doctrine that a seller may, in a *bona fide* transaction, increase the price to compensate for the risk that is involved in a credit sale. But there may be a question of fact as to whether the so-called credit price was *bona fide* as such, or only a cloak for usury." *Id.* at 609, 249 S.W.2d at 978.

81. "If the seller, whether he has quoted two prices to the purchaser or not, subsequently transfers title documents to an individual or company which is engaged in the business of purchasing such documents, at a price which permits the transferee to obtain more than 10% on its investment, then a question of fact arises as to whether the seller increased his cash price with the reasonable assurance that he could so discount the paper to such individual or finance company. If that reasonable assurance existed, then the transaction is in substance a loan, and may be attacked for usury." *Id.* at 609, 249 S.W.2d at 978.



this is good evidence that vendor had reasonable assurance that finance company would discount his paper.<sup>82</sup>

Although *Hare* purports to leave intact the doctrine that vendor may increase his sale price to compensate for the increased risk of a credit sale despite the usury law, practically *Hare* abandons the general rule and applies the usury law to motor vehicle sales. The thesis of *Hare* is that the usury law applies to limit finance company's return on investment whenever vendor fixes his credit sale price under reasonable assurance that finance company will discount his paper.<sup>83</sup> Given the realities of automobile financing, vendor will frequently have the reasonable assurance contemplated by the decision.<sup>84</sup> Since usury is a real defense in Arkansas, vendee can urge the defense against finance company even if it is a holder in due course of his note.<sup>85</sup>

Subsequently, the usury law was applied not only to three-party transactions,<sup>86</sup> but also to transactions involving vendor and vendee alone.<sup>87</sup> *Sloan v. Sears Roebuck & Co.*<sup>88</sup> decisively rejected the contention that participation of a finance company was necessary to taint a credit sale with usury. The difference between cash price and credit price, according to the court, amounts to a forbearance of debt, and is, therefore, interest.<sup>89</sup>

82. "When the finance companies or purchasers of title paper supply dealers with a set of forms and schedule for credit price increases, such will tend to show that the dealer had reasonable assurance that such finance company or purchaser of the paper would take the paper at such discount." *Id.* at 609, 249 S.W.2d at 978.

83. See *Universal C.I.T. Credit Corp. v. Avery*, 225 Ark. 190, 280 S.W.2d 229 (1955); *Universal C.I.T. Credit Corp. v. Stanley*, 225 Ark. 96, 279 S.W.2d 556 (1955); *General Contract Purchase Corp. v. Duke*, 223 Ark. 938, 270 S.W.2d 918 (1954). The cases immediately after *Hare* involved transactions which were completed prior to that decision. The court applied pre-*Hare* law to these. See *Universal C.I.T. Credit Corp. v. Hale*, 225 Ark. 78, 279 S.W.2d 281 (1955); *Universal C.I.T. Credit Corp. v. Crossley*, 222 Ark. 278, 258 S.W.2d 562 (1953); *Kensinger Acceptance Corp. v. Tippet*, 222 Ark. 199, 258 S.W.2d 561 (1953); *Perry v. Duncan*, 222 Ark. 160, 258 S.W.2d 560 (1953); *Aunspaugh v. Murdock Acceptance Corp.*, 222 Ark. 141, 258 S.W.2d 559 (1953); *Murdock Acceptance Corp. v. Higgins*, 222 Ark. 140, 258 S.W.2d 558 (1953); *Criseo v. Murdock Acceptance Corp.*, 222 Ark. 127, 258 S.W.2d 551 (1953).

84. See the cases cited in the preceding note. *But cf.* *Universal C.I.T. Credit Corp. v. Hudgens*, 234 Ark. 668, 356 S.W.2d 658 (1962).

85. See *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952).

86. See cases cited in note 83 *supra*.

87. See *Heidelberg Southern Sales Co. v. Tudor*, 229 Ark. 500, 316 S.W.2d 716 (1958); *Kyser v. T. M. Bragg & Sons*, 228 Ark. 578, 309 S.W.2d 198 (1958); *Sloan v. Sears Roebuck & Co.*, 228 Ark. 464, 308 S.W.2d 802 (1958); *Holland v. C. T. Doan Buick Co.*, 228 Ark. 340, 307 S.W.2d 538 (1957); *Jones v. Jones*, 227 Ark. 836, 301 S.W.2d 737 (1957).

88. 228 Ark. 464, 308 S.W.2d 802 (1958).

89. See *Sloan v. Sears Roebuck & Co.*, 228 Ark. 464, 308 S.W.2d 802 (1958).

Thus, in two-party transactions, the usury law limits the amount by which vendor may increase his credit price over cash price. Given this proposition, Arkansas has completely repudiated the general rule that usury laws do not apply to credit sales.<sup>90</sup>

That usury statutes do not apply to credit sales is still the majority position at common law.<sup>91</sup> Since 1950, however, there has developed a respectable body of case law which limits or repudiates the majority position. Arkansas and Nebraska seem to have reached the logical terminus of the decisions previously considered which found a credit sale to be a disguised loan or a scheme to avoid the usury law. Those decisions appear frequently to apply usury statutes, without admitting it, to transactions which in reality are credit sales. The remaining question is whether these deviations from the general rule can be supported.

### *Policy Considerations*

The decisions applying usury statutes to credit sales seem to be based on the belief that judicial regulation of consumer finance enterprises is desirable.<sup>92</sup> The arguments in favor of

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90. *But cf.* Universal C.I.T. Corp. v. Hudgens, 234 Ark. 668, 356 S.W.2d 659 (1962), in which the court uses language of pre-*Hare* decisions. Adoption of the Uniform Commercial Code by Arkansas, however, has been said not to affect the usury law. See Cooper v. Cherokee Village Development Co., 364 S.W.2d 158 (Ark. 1963).

91. See cases cited note 15 *supra*. Recent cases in accord: Langille v. Central Penn Nat'l Bank of Philadelphia, 156 A.2d 410 (Del. 1959); Beatty v. Franklin Investment Co., 179 A.2d 913 (D.C. Mun. App. 1962); Certified Motors v. Nolan Loan Co., 122 A.2d 227 (D.C. Mun. App. 1956); Brooks v. Auto Wholesalers, 101 A.2d 255 (D.C. Mun. App. 1953); Lincoln Loan Service of Takoma Park v. Motor Credit Co., 83 A.2d 230 (D.C. Mun. App. 1951); Nelson v. Scarritt Motors, 48 So. 2d 168 (Fla. 1950); Bell v. Idaho Finance Co., 73 Idaho 560, 255 P.2d 715 (1953); Munson v. White, 309 Ky. 295, 217 S.W.2d 641 (1949); Van Asperen v. Darling Olds, Inc., 254 Minn. 62, 93 N.W.2d 690 (1958); Bryant v. Securities Investment Co., 233 Miss. 740, 102 So. 701 (1958); Wyatt v. Commercial Credit Corp., 341 S.W.2d 348 (Mo. App. 1960); Thomas v. Knickerbocker Operating Co., 108 N.Y.S.2d 234 (1951); Carolina Industrial Bank v. Merrimon, 260 N.C. 335, 132 S.E.2d 692 (1963); Cobb v. Baxter, 292 P.2d 389 (Okla. 1956); Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950); Hallstrom v. Buhler, 14 Utah 2d 111, 378 P.2d 355 (1963); *cf.* Blue River Sawmills v. Gates, 225 Ore. 439, 358 P.2d 239 (1960); Maestro Music, Inc. v. Rudolph Wurlitzer Co., 88 Ariz. 222, 354 P.2d 266 (1960). The cited cases from the District of Columbia should be reconsidered in view of Beatty v. Franklin Investment Co., 319 F.2d 712 (D.C. Cir. 1963), *reversing* Beatty v. Franklin Investment Co., 179 A.2d 913 (D.C. Mun. App. 1962).

92. *Cf.*: "Any other result of the plain transactions here involved would leave that vast number of persons who purchase equipment and vehicles on credit, the financing of which is pre-arranged between the dealer or finance company, outside the place of protection of the state and national laws against usury." Daniel v. First National Bank of Birmingham, 227 F.2d 353, 357 (5th Cir. 1955). "Buying at a credit price, as distinguished from a cash price, has largely dis-

some kind of regulation of this area have often been presented.<sup>93</sup> There is little logic in affording protection to the consumer who borrows cash to facilitate a purchase while refusing the same protection to the consumer who purchases on credit. There is even less logic in the distinction when the price the consumer must pay for credit is in reality fixed in advance by a finance company and the vendor. The equality of bargaining power between vendor and vendee assumed by the common law is hardly realistic in motor vehicle sales as automobiles are frequently considered necessities and most vendees must purchase on credit or not at all. The serious abuses present in consumer financing are well known:<sup>94</sup> exorbitant finance charges, failure

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appeared in fact, but it is being used as a cloak for usury in many cases by such words as 'time price differential' or some other such language." *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 609, 249 S.W.2d 973, 977 (1952).

93. See Berger, *Usury in Instalment Sales*, 2 LAW & CONTEMP. PROB. 148 (1935); Hogan, *A Survey of State Retail Instalment Sales Legislation*, 44 CORN. L.Q. 38 (1958); Nugent & Henderson, *Installment Selling and the Consumer*, 173 ANNALS 93 (1934); Notes, 71 HARV. L. REV. 1143 (1958); 18 U. PITT. L. REV. 744 (1952), 60 YALE L.J. 1218 (1951). See also *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952).

94. "Many sharp practices had developed in unregulated installment selling, such as failure to make adequate disclosure of all the terms of the bargain, and exorbitant credit charges. The inferior financial status of most installment buyers, and the fact that they are often ignorant of their legal rights, have made the position of the retail dealer and finance company dominant throughout the transaction. The carrying charge, or differential between the cash price of an article and its price on the installment plan, generally ranges between 11 and 40 per cent on the credit actually obtained. Moreover, it has been the practice to compute the carrying charge on the original unpaid balance for the full installment period rather than on the decreasing amounts as payments are made. Furthermore the use of widely varying and frequently incomprehensible formula to set forth the charge hinders the buyer in canvassing competing sources of consumer credit for the most advantageous terms." WHITNEY, *LAW OF MODERN COMMERCIAL PRACTICES* § 655 (1958). See generally BLACK, *BUY NOW, PAY LATER* (1963); Berger, *Usury in Instalment Sales*, 2 LAW & CONTEMP. PROB. 148 (1935). For a practical catalogue of abuses consider the following paraphrase of the Attorney General's petition in *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956): "Defendant corporation is a wholly owned subsidiary of Associates Investment Company, an Indiana corporation. . . . Defendants, without having procured a license to operate an installment loan business in this state, have conducted such business with the intent of evading the usury laws of the state; and have engaged in a device and subterfuge by means of which they have exacted excessive, unlawful, exorbitant, unconscionable, and usurious charges for the making of installment loans to purchasers of automobiles. For the purpose of carrying out such device and subterfuge, defendant corporation purports to be engaged solely in the business of purchasing, at a discount, from automobile dealers, notes and mortgages covering the sale of automobiles, but in fact none of such contracts represent bona fide sale transactions but constitute direct loans by defendant corporation to the purchasers of such automobiles.

"Defendants solicit automobile dealers to finance their purported time sale transactions, and as an inducement and consideration therefor offer and agree to rebate to such dealers a percentage of the charges made to the purchasers, and chattel mortgage and note forms are furnished such dealers by defendants. In the sale of automobiles, purchasers are not quoted agreed time sales prices but only

to disclose the true cost of credit,<sup>95</sup> add-on contracts, balloon

the cash price is mentioned, . . . and such purchasers are then required to sign a note and mortgage in blank.

"Thereafter, such blank instruments are delivered to defendant Kemnitz or some other agent of defendant corporation . . . and such blank instruments are taken to the office of defendant corporation where the interest and other charges are inserted in such contracts. The interest included in the contracts is clearly in excess of 9 per cent per annum, and in addition thereto charges are added for property damage insurance on the automobile, and in most cases also for health and accident or credit life insurance, or both, although no application is made for such insurance by the borrower and such charges are made without their knowledge or consent. The property damage insurance is placed with Emmco Insurance Company, an Indiana corporation, which is another wholly owned subsidiary of Associates Investment Company. The charges made for such insurance are excessive and unreasonable amounts and constitute additional charges for the use of money advanced to the borrower by defendants.

"Because there is no contract between the buyer and seller as to any credit price, defendants control the entire financial transaction, and defendant corporation is in fact the principal in such financial transaction. However, in order to make the transaction appear to be a bona fide time sale agreement between buyer and seller, and to further carry out said device and subterfuge, the note and mortgage are made payable to the dealer who in turn purports to endorse same to defendant corporation without recourse.

"Also, in order to secure additional excessive, unlawful, and usurious charges, the majority of such loans are made for a period of 1 year, with the first 11 monthly payments being in equal amounts, the twelfth payment consisting of a large or balloon payment. In most cases, the borrower is unable to make such balloon payment when due, and defendants then make a new loan and require the borrower to sign a new note and mortgage. . . . Included in such note and mortgage is the amount of the balloon payment together with interest in an excessive and usurious amount . . . and in addition thereto, as a condition to the making of the loan, charges are made for property damage insurance on the automobile together with additional charges for health and accident, or credit life insurance, or both. . . . The new contract usually provides for equal monthly installments, with the final payment being a balloon payment.

"Due to the unlawful, exorbitant, and confiscatory charges made upon these loans, the amount applied to the principal balance each year is small, and the loan contract is rewritten numerous times before the borrower is able to make final payment. This method of operation by defendants is contrary to the declared public policy of the State of Nebraska. . . .

"These loans are made to persons of moderate means, including a large number of service men whose circumstances make it necessary for them to secure credit in order to own an automobile for business purposes, to furnish transportation to and from work, and for family use. Due to the unlawful, exorbitant, and confiscatory charges made on such loans, the interest of the borrower in the automobile given as security is reduced to such an extent that it becomes impossible for such borrowers to secure loans from other sources; and 'that if a borrower fails to meet the payments demanded by the defendants on such void and unlawful loans the defendants threaten to and do replevin the automobile of such borrower' who is not in a position to defend against the collection method used by defendants to enforce payment of the unlawful, void, and unconscionable loans." *Id.* at 689-92, 77 N.W.2d at 221-22. In states following the majority rule defendant's mode of business probably is legal.

95. Installment purchasers are practically never quoted the credit charge in terms of simple annual interest. Instead they are told that it is, say 6%, usually meaning 6% of the original unpaid balance multiplied by the number of years for payment. See BLACK, BUY NOW, PAY LATER 75-98 (1963). Such finance charges may be converted into simple annual interest (approximately) by the following formula:

$$r = \frac{2pC}{A(n+1)}$$

notes, and the like. Regulation of some kind to cure such abuses has enjoyed increasing support.<sup>96</sup>

The arguments for regulation, if accepted, do not compel the conclusion that the regulation should be judicial application of the local usury statute to credit sales. Rather, the indicated conclusion seems to be that a comprehensive retail installment sales act is desirable. By applying usury statutes to credit sales, courts can control primarily only one of the abuses in consumer financing — exorbitant finance charges — unless the court is to undertake, by expansion of the usury concept, policing of the entire consumer financing enterprise. The latter task seems more appropriate for an administrative agency than for a court. Moreover, there is at least doubt whether consumer financing can be profitably conducted under the limits which would be imposed by existing usury statutes.<sup>97</sup> On the other hand, in the absence of a retail installment sales act,<sup>98</sup> judicial application of usury statutes to credit sales has two merits: (1) unconscionable bargains may be conveniently denied enforcement; (2) some control, albeit crude, of the worst abuses of consumer financing is made possible where otherwise none at all is available. A possible side effect might be to stimulate adoption of

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r = annual interest rate.

p = number of payment periods in 1 year exclusive of down payment.

C = interest or finance charge in dollars.

A = amount borrowed.

n = number of equal installment payments in whole contract period exclusive of down payment. *Id.* at 229.

96. The enactment of retail installment sales acts by more than 30 states is one measure of the support.

97. Compare Becker, *Usury in Instalment Sales*, 2 LAW & CONTEMP. PROB. 138 (1935) with Ecker, *Commentary on "Usury in Instalment Sales," id.* at 173. The percentage of loss in consumer sale transactions has been reported to be less than one half of one percent, which is obviously relevant to the controversy. WINCHESTER, CONSUMER INSTALLMENT LOAN LOSSES AND VALUATION RESERVES 14 (1955). Presumably, consumer financing has not disappeared in Arkansas in spite of the applicability of the local usury law. In Nebraska, an estimated billion dollars worth of goods were purchased by contracts complying with the Installment Sales Act declared unconstitutional in *Elder v. Doerr*. A significant decrease in credit sales was reported shortly thereafter. Wall Street Journal, Oct. 23, 1963, p. 1, col. 4. Another facet of the problem stems from the various forfeitures which frequently result from violation of the usury statute. Nebraska is an extreme example. In the context of a purported credit sale which is found to violate the usury statute, the vendee retains the goods, his note is void and uncollectible, and he may recover any payments made thereof. See *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957).

98. With the possible exception of *Nazarian v. Lincoln Finance Co.*, 77 R.I. 497, 78 A.2d 7 (1951) no case was found in an important commercial state which indicated that the court would consistently apply the usual statute to credit sales. Significantly, all important commercial states have retail installment sales acts of some form.

a retail installment sales act. These advantages are real and perhaps will appear convincing to more courts in the future.

### USURY AND CREDIT SALES: LOUISIANA

At an early date Louisiana courts decided that usury statutes apply to loans but not to sales.<sup>99</sup> This doctrine has been reaffirmed in twentieth century cases arising out of credit sales of automobiles.<sup>100</sup> The automobile cases rely on the early Louisiana decision and a leading common law case<sup>101</sup> as authority. Thus Louisiana appears to follow the general rule that usury statutes do not apply to credit sales.

It is submitted that the provisions of the Civil Code do not compel the conclusion that our usury statutes are inapplicable to credit sales. The basic usury statute<sup>102</sup> is significantly different from the typical usury statute in common law jurisdictions. First, article 2924 as modified by R.S. 9:3501 is scarcely a penal statute since the only sanction for usurious interest is loss of all interest.<sup>103</sup> Second, interest in Louisiana law has a somewhat different meaning than in the common law. Moreover, specific code provisions on interest and sales<sup>104</sup> apparently

99. *Mills v. Crocker*, 9 La. Ann. 334 (1854).

100. See *General Motors Acceptance Corp. v. Swain*, 176 So. 636 (La. App. 1st Cir. 1937); *Robbins v. Page & Sons*, 120 So. 683 (La. App. 2d Cir. 1929); cf. *Borel v. Living*, 28 So.2d 392 (La. App. 1st Cir. 1946).

101. *Commercial Credit Co. v. Tarwater*, 215 Ala. 123, 110 So. 39 (1926).

102. LA. CIVIL CODE art. 2924 (1870): "Interest is either legal or conventional. Legal interest is fixed at the following rates, to wit:

"At five per cent on all sums which are the object of a judicial demand. Whence this is called judicial interest;

"And on sums discounted at banks at the rate established by their charters.

"The amount of conventional interest cannot exceed eight per cent. The same must be fixed in writing; testimonial proof of it is not admitted in any case.

"Except in the cases herein provided, if any persons shall pay on any contract a higher rate of interest than the above, as discount or otherwise, the same may be sued for and recovered within two years from the time of payment. . . ."

103. LA. R.S. 9:3501 (1950): "Any contract for the payment of interest in excess of that authorized by law shall result in the forfeiture of the entire interest so contracted." This provision combined with article 2924 seem to be the only penalty for usury in Louisiana. Compare the provisions in other jurisdictions mentioned in note 19 *supra*.

104. LA. CIVIL CODE art. 2553 (1870): "The buyer owes interest on the price of the sale, until the payment of the capital, in the three following cases:

"1. If it has been so agreed at the time of the sale.

"2. If the thing sold produces fruit, or any other income.

"3. From the date of the sale when the price is then due."

*Id.* art. 2552: "When the seller has granted to the buyer a term for the payment, the interest begins to run from the end of that term."

*Id.* art. 2781: "A contract of sale, in which it is stipulated that the price shall be paid at a future time, but that it bears interest from the day of the sale, is not a contract of rent."

were not considered in cases which announce that usury statutes do not apply to credit sales.

In the civil law, interest is a form of moratory damages: it is the damages recoverable for delay in performance of an obligation to pay money.<sup>105</sup> Unless the parties stipulate to the contrary, all debts bear legal interest.<sup>106</sup> The same code article fixes the rate of legal interest and the maximum rate of conventional interest.<sup>107</sup> Since all debts bear legal interest unless the parties stipulate otherwise, in which event the debt bears conventional interest, the limit on conventional interest is applicable to any transaction which creates a debt and not to loans only. If the parties stipulate what rate of interest a debt shall bear, they are bound by the provisions of article 2924 regardless of the transaction which created the debt.

Louisiana courts have recognized this in a series of cases on bond for deed contracts, contracts which are fundamentally conditional sales. A common stipulation in such contracts gave the vendor the right to take possession of the property upon default by the vendee and to forfeit all payments made theretofore by the vendee. Our courts have declared the forfeiture provision null: since the vendee's obligation was to pay money, interest not in excess of the rate permitted by article 2924 was the only damages the vendor could collect.<sup>108</sup>

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105. *Id.* art. 1935: "The damage due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more."

*Id.* art. 1936: "Interest is of two kinds, conventional and legal; the rate of both is fixed by law in the chapter on loans on interest."

*Id.* art. 1937: "In contracts stipulating a conventional interest, it is due without demand from the time stipulated for its commencement until the principal is paid."

*Id.* art. 1938: "All debts shall bear interest at the rate of five per centum per annum, from the time they become due unless otherwise stipulated."

106. *Id.* art. 1938.

107. *Id.* art. 2924.

108. *Ekman v. Vallery*, 185 La. 488, 169 So. 521 (1936); *Heeb v. Codifer & Bonnabel*, 162 La. 139, 110 So. 178 (1926); *cf. Scott v. Apgar*, 238 La. 29, 113 So. 2d 457 (1959); *Louisiana Delta Farms Co. v. Davis*, 202 La. 445, 12 So. 2d 213 (1943); *Farthing v. Neely*, 129 So. 2d 224 (La. App. 3d Cir. 1961), *cert. denied*; *Canepa v. Jackson*, 18 So. 2d 64 (La. App. Or. Cir. 1944); *Southwest Improvement Co. v. Whittington*, 193 So. 483 (La. App. 1st Cir. 1940); *Rainey v. McCrocklin*, 185 So. 705 (La. App. Or. Cir. 1939); *Cointment v. Segrest*, 184 So. 360 (La. App. 1st Cir. 1938); *Chauvin v. Theriot*, 180 So. 847 (La. App. 1st Cir. 1938); *Victor v. Lewis*, 157 So. 293 (La. App. Or. Cir. 1934); *Subdivision Realty Co. v. Woulfe*, 135 So. 71 (La. App. Or. Cir. 1931); *Schluter v. Gentilly Terrace Co.*, 8 La. App. 422 (La. App. Or. Cir. 1928). The later cases frequently deny the forfeiture on the theory that it represents punitive damages, that it is without consideration, or simply because it is inequitable.

Since the bond for deed cases show that article 2924 applies to transactions other than a loan,<sup>109</sup> may not that article also apply to a credit sale? The Code teaches that the vendee owes interest on the price in a sale if the parties so agree, if the thing sold produces fruit, or from the date of the sale when the price is then due.<sup>110</sup> The third case recited seems to refer to a cash sale and is simply an application of article 1938<sup>111</sup> to a sale: since the price is then due, legal interest on the debt accrues.<sup>112</sup> The second case also refers to legal interest; in a number of early cases, the court held that *legal* interest is due for the price of property, usually land, producing fruit.<sup>113</sup> What then is meant in the first case — interest is due if the parties so agree at the time of the sale? Presumably if the vendee gives a promissory note bearing interest from date to cover the sale price, the parties have agreed that the vendor is entitled to interest on the price. The rate of interest could not exceed that permitted by article 2924. Is the character of the transaction altered if the vendor offers to sell for \$500 cash or for \$600 on credit to be paid in monthly installments and the vendee elects to buy on credit? In substance the two transactions seem identical: the parties have agreed that the vendor is ultimately entitled to an additional sum beyond the cash sale price in lieu of immediate payment thereof. In short, the parties seem to have agreed that the vendor shall have damages for the vendee's delay in performing an obligation to pay money. If so, any such agreement is an agreement for interest and the rate of interest cannot exceed that permitted by article 2924.<sup>114</sup>

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The better theory is that of *Eckman v. Vallery*, that there is an unlawful rate of interest. See Comment, 33 TUL. L. REV. 180, 195 (1958).

109. The bond for deed contract in substance is a conditional sale. Technically, it is a contract to sell and not a sale.

110. LA. CIVIL CODE art. 2553 (1870): "The buyer owes interest on the price of the sale, until the payment of the capital in the three following cases:

"1. If it has been so agreed at the time of the sale.

"2. If the thing sold produces fruits, or any other income.

"3. From the date of the sale when the price is then due."

111. *Id.* art. 1938: "All debts shall bear interest at the rate of five per centum per annum from the time they become due, unless otherwise stipulated."

112. *Cf. id.* art. 2554: "When the seller has granted the buyer a term for the payment, the interest begins to run from the end of that term." This is another application of article 1938: the debt is not due until the end of the term; therefore legal interest accrues only from that date. See *Hughes v. Mattes*, 104 La. 231, 28 So. 1009 (1900).

113. See *Balph v. Hoggart*, 2 La. Ann. 462 (1847); *Minor v. Alexander*, 6 Rob. 166 (La. 1843); *Gay v. Kendig*, 2 Rob. 472 (La. 1842); *Barker v. Banks*, 15 La. 453 (1840); *Caldwell v. His Creditors*, 9 La. 265 (1836); *Franklin v. Verbois*, 6 La. 727 (1834).

114. See *Griffin v. His Creditors*, 6 Rob. 216 (La. 1843) (credit sale); *Patterson v. Bonner*, 14 La. 214 (1839) (sale with right of redemption); *Dendinger*



Since the difference between the cash sale price and the credit sale price represents an additional sum which the vendor ultimately receives in lieu of immediate payment of the cash sale price, it is submitted that the additional sum is interest whether the parties call it interest, finance charge, time price differential, or something else. The "service charge" paid on a revolving charge account would seem even more clearly to be interest.<sup>115</sup> Against these conclusions, a vendor might protest that the finance charge does not represent damages; rather it is compensation for the increased risk incurred in a credit sale and for the increased overhead resulting from the additional bookkeeping.<sup>116</sup> There are two answers to this argument. The short answer is that for delay in performance of an obligation to pay money, a creditor may recover interest and nothing more "whatever loss he may have suffered."<sup>117</sup> The other answer is that a vendor hardly stands, with respect to risk and overhead, in a different position than a lender of money, and it has never been doubted that the latter's charge is interest.<sup>118</sup> On principle, it seems that in a credit sale the parties agree that the vendor is entitled to interest on the cash price. If so, the usury statute applies; the rate of interest cannot exceed that permitted by law.

Should it be held that the Louisiana usury statutes apply to credit sales, the defense of usury would not be available to the vendee in every case. By the terms of article 2924, if the interest is capitalized and included as part of the principal in a promissory note, any holder may collect the face amount of the note provided it bears no more than 8% per annum interest after maturity.<sup>119</sup> Even the payee can collect the face amount

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v. Emuy & Eichhorn, 124 So. 604 (La. App. Orl. Cir. 1929) (sale). In each case the court found unlawful interest in a sale transaction.

115. Revolving charge accounts operate on the following pattern. Vendee is given a maximum (e.g., \$500) to which he may purchase on credit. Monthly payments are made on the account. Usually vendee is given six months to pay. If vendee purchases up to the maximum during the first month, then after his first payment on account his indebtedness is below the maximum and he may make further credit purchases during the following month until the maximum is again reached. The service charge is commonly 1½% per month or 18% per annum simple interest. See *Consumer Labelling Bill (Hearings on S. 2755) Before a Subcommittee of the Senate Committee on Banking and Currency, 86th Cong., 2d Sess., 123 (1960)*.

116. See Ecker, *Commentary on "Usury in Instalment Sales," 2 LAW & CONTEMP. PROB. 173 (1935)*.

117. See LA. CIVIL CODE art. 1935 (1870), quoted note 105 *supra*.

118. See Berger, *Usury in Instalment Sales, 2 LAW & CONTEMP. PROB. 148 (1935)*.

119. "The owner or discounter of any note or bond or other written evidence of debt for the payment of money, payable to order of bearer or by assignment,

of the note regardless of the amount of interest capitalized.<sup>120</sup> *Time Finance Co. v. Louis*<sup>121</sup> is an extreme example. Vendee had an unpaid balance of \$2691.45 on a car. He borrowed this sum from finance company who required that he sign a promissory note for \$4200.00 payable in 24 months — \$75.00 per month for the first 23 months and \$1975.00 for the last month. In other words, after 23 months, vendee would have reduced by only \$717.45 the amount which he actually received while paying over \$1000 capitalized interest. Being unable to meet the final balloon installment (\$1800 was still due after vendee's best effort) vendee "refinanced," *i.e.*, he issued a new promissory note for \$2952.00 payable in three years. The capitalized interest in this note amounts to more than 40% per annum. Neither note was considered usurious, and finance company recovered on the second note.<sup>122</sup> The case graphically illustrates that if vendee gives a promissory note there is no legal limit on the amount of finance charge (interest) which may be included in the face amount of the note. Promissory notes are commonly given in motor vehicle purchases but not in purchases on a revolving charge account.

If it is held that usury statutes apply to credit sales, the Small Loans Act<sup>123</sup> may determine in some cases whether the vendee can urge usury as a defense. Under this act the permissible rate of interest depends on whether the creditor is a

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shall have the right to claim and recover the full amount of such note, bond or other written evidence of debt and all interest not beyond eight per cent per annum interest that may accrue thereon, notwithstanding that the rate of interest or discount at which the same may be or may have been discounted has been beyond the rate of eight per cent per annum interest of discount but this provision shall not apply to the banking institutions of this State in operation under existing laws.

"The owner of any promissory note, bond or other written evidence of debt for the payment of money to order or bearer or transferrable by assignment shall have the right to collect the whole amount of such promissory note, bond, or other written evidence of debt for the payment of money, notwithstanding such promissory note, bond or other written evidence of debt for the payment of money may include a greater rate of interest or discount than eight per cent per annum; provided such obligation shall not bear more than eight per cent per annum after maturity until paid." LA. CIVIL CODE art. 2924 (1870).

120. See *Vosbein v. Leopold*, 230 La. 21, 87 So.2d 715 (1956); *cf.* *General Securities Co. v. Jumonville*, 216 La. 681, 44 So.2d 702 (1950); *Williams v. Alphonse Mortgage Co.*, 144 So.2d 600 (La. App. 4th Cir. 1962); *Jefferson Securities Co. v. Benoit*, 92 So.2d 487 (La. App. 1st Cir. 1957). See also *Mayfield v. Nunn*, 239 La. 1021, 121 So.2d 65 (1960); *Note*, 35 TUL. L. REV. 276 (1960).

121. 152 So.2d 248 (La. App. 4th Cir. 1963), *cert. denied*.

122. *Time Finance Co. v. Louis*, 152 So.2d 248 (La. App. 4th Cir. 1963), *cert. denied*, 244 La. 898, 154 So.2d 768 (1963).

123. LA. R.S. 6:571-593 (1950).

licensee,<sup>124</sup> and even if the creditor is a licensee, the permissible interest cannot be increased by capitalizing it in a note.<sup>125</sup> Although the act could be construed to govern every transaction in which interest is claimed on a sum of \$300 or less,<sup>126</sup> it probably should not be so read. From its language<sup>127</sup> and its purpose<sup>128</sup> the Small Loans Act appears to embody the common law concept of interest, which presupposes a loan or forbearance of debt, and it has been expressly held that the act does not apply to a credit sale.<sup>129</sup> That decision seems proper unless the court is to adopt one of the theories recently evolved elsewhere that credit sales are within the ambit of usury statutes embodying the common law concept of interest.<sup>130</sup> Article 2924 seems, on the other hand, to encompass credit sales.<sup>131</sup> If so, the Small Loans Act should have no application to a vendee's plea of usury in a credit sale even if the sum involved is less than \$300.

The recent Motor Vehicle Sales Finance Act<sup>132</sup> is another statute which may determine whether a vendee's defense of usury will prevail. This act provides for the licensing<sup>133</sup> and regulation<sup>134</sup> of finance companies that purchase motor vehicle installment sale contracts. Further it prescribes the form of the contract between vendor and vendee<sup>135</sup> and fixes maximum finance charges.<sup>136</sup> The finance charge limitations are stated

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124. See *id.* 6:583 for allowable interest a licensee may charge. Interest by non-licensees cannot exceed 8% per annum. *Id.* 6:589.

125. See *Home Finance Co. v. Padgett*, 54 So.2d 813 (La. App. 2d Cir. 1951).

126. See LA. R.S. 6:572 (1950): "No person shall engage in the business of making loans of money, credit, goods, or things in action in the amount or to the value of three hundred dollars or less, and charge, contract for, or receive a greater rate of interest than eight percent per year, except as authorized by this Chapter, and without first obtaining a license from the commissioner. . . ."

*Id.* 6:589: "A. Except as authorized by this Chapter, no person shall directly or indirectly charge, contract for, or receive any interest, discount, or consideration greater than eight percent per year upon the loan, use, or sale of credit, of the amount or value of three hundred dollars or less. . . ."

127. See note 126 *supra*.

128. The object of the act is to regulate the *business* of making *loans* of \$300 or less at greater interest than 8% per annum. See *Davis Loan Co. v. Blanchard*, 129 So. 413 (La. App. Or. Cir. 1930).

129. *General Motors Acceptance Corp. v. Swain*, 176 So. 636 (La. App. 1st Cir. 1937).

130. See text accompanying note 26 *supra*.

131. See text accompanying note 109 *supra*.

132. LA. R.S. 6:951-964 (Supp. 1964). This act appears to have become effective January 1, 1963. See also the cognate statute, *Direct Vehicle Loan Company Act*, *id.* 6:970-976.

133. *Id.* 6:952.

134. *Id.* 6:953-955.

135. *Id.* 6:956. The section contains fairly significant disclosure provisions.

136. *Id.* 6:957: "A. Notwithstanding the provisions of any other existing law, a retail installment transaction may include a finance charge not in excess of the following rates:

in terms of *simple interest* per month on the declining balance and range from 15% per annum to over 27% per annum. It is to be observed that the act classifies motor vehicles into the same four categories employed by the act declared unconstitutional in Nebraska.<sup>137</sup> Since the Louisiana Constitution contains the same prohibition of special laws fixing the rate of interest<sup>138</sup> as the Nebraska Constitution, the Motor Vehicle Sales Finance Act may be subject to serious constitutional objection.<sup>139</sup> If the act is constitutional,<sup>140</sup> a vendee presumably would be able to recover the interest paid if the interest charged were in excess of that permitted by the act. The act does not so provide; it does provide that "Any seller or holder" who *wilfully* violates the provisions relative to finance charges or contract form "shall be barred from recovery of any finance charge, delinquency or collection charge on the contract."<sup>141</sup> In such cases the vendee should be allowed to recover any payment of finance charge he has made because he has paid a debt not owed.<sup>142</sup>

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"Class 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made, an amount equivalent to one and one-fourth per cent (1¼%) per month simple interest on the declining balance.

"Class 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 two years prior to the year in which the sale is made, an amount equivalent to one and three-fourths per cent (1¾%) per month simple interest on the declining balance.

"Class 3. Any used motor vehicle not in Class 2 and designated by the manufacturer by a year model not more than four years prior to the year in which the sale is made, an amount equivalent to two and one-fourth per cent (2¼%) per month simple interest on the declining balance.

"Class 4. Any used motor vehicle not in Class 2 or Class 3 and designated by the manufacturer by a year model more than four years prior to the year in which the sale is made, an amount equivalent to two and one-fourth per cent (2¼%) per month simple interest on the declining balance, plus a flat charge of one dollar per month for the number of months from the date of the contract to the maturity date of the last installment thereunder, but in no event in excess of twelve dollars."

137. Compare the statute quoted in note 136 *supra* with that quoted in note 62 *supra*.

138. LA. CONST. art. IV, § 4: "The Legislature shall not pass any local or special law on the following specified subjects: . . . Fixing the rate of interest. . . ." The Small Loans Act was upheld as not in violation of this section. *State v. Hill*, 168 La. 761, 123 So. 317 (1929).

139. In *Elder v. Doerr*, 175 Neb. 483, 122 N.W.2d 528 (1963) the court had to construe Nebraska's Installment Sales Act as fixing the rate of interest on money. The Louisiana act by its very terms does so, thus inviting constitutional objection.

140. Whether the act is a local or special law is beyond the scope of this Comment.

141. LA. R.S. 6:960 (1950). Criminal penalties for persons who "wilfully and intentionally violate" any provision of the act are provided in *id.* 6:959.

142. See LA. CIVIL CODE art. 2133 (1870): "Every payment presupposes a debt; what has been paid without having been due, is subject to be reclaimed. That cannot be reclaimed that has been voluntarily given in discharge of a

Further, to give full effect to the act, it should be interpreted to supersede Civil Code article 2924 as to any promissory note given in connection with a motor vehicle credit sale. So interpreted the act would protect the vendee against capitalized interest in excess of the legal maximum and would seem to make usury a real defense available against a holder in due course.<sup>143</sup>

The question of usury in retail credit sales in Louisiana may be summarized as follows. Louisiana has adopted the general rule that usury statutes do not apply to credit sales. However, it is believed that "finance charge," the difference between cash sale price and credit sale price, is interest within the contemplation of the Civil Code. If so, article 2924 limits conventional interest to 8% per annum and this provision should apply to credit sales. Vendee should be entitled to sue and recover the interest paid if it was usurious.<sup>144</sup> If the interest has been capitalized in a promissory note, there is no usury regardless of the amount of interest capitalized. Practically, this may mean vendee is protected only if he has not given a promissory note for the unpaid balance. The Motor Vehicle Sales Finance Act may be interpreted to supersede article 2924 as to notes issued in motor vehicle purchases. This act may allow munificent interest rates, but in general it seems to offer greater protection to consumers than the illusory protection of article 2924.

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## EXPROPRIATION—COMPENSABLE ITEMS IN LOUISIANA

### INTRODUCTION

The expansion of state-sponsored public improvement programs has increased the frequency with which the property rights of individuals must yield to public interest.<sup>1</sup> An impinge-

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natural obligation."

143. There is a conflict of authority whether usury is a real defense. Compare *In re Gerber's Estate*, 337 Pa. 108, 9 A.2d 438 (1939) (no) with *Employees Loan Co. v. Templeton*, 109 S.W.2d 774 (Tex. Civ. App. 1938) (yes). Apparently Louisiana has not passed on the question.

144. See LA. R.S. 9:3501 (1950).

1. State-sponsored public improvements are an inevitable result of an increasing population and a concentration of population in urban areas. An example is