CONSUMER CREDIT LAWS IN THE COMMON LAW COUNTRIES

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This study originated in preparations made by the author for delivery in the first half of 1974 of two papers[1] designed to compare the consumer laws in certain countries having common law backgrounds. At that time the story was necessarily incomplete since a number of the jurisdictions under examination were about to enact consumer credit legislation that would substantially change the situation as it existed at the time when the papers were presented. The project developed, therefore, into a continuing study, the outcome of which is this article in its present form.

At the outset of this inquiry, it was the feeling of the writer that the majority of the other common law jurisdictions were lagging behind the United States in the enactment of modern and realistic consumer credit laws. Subsequent investigation has proved the accuracy of that impression, but many of the laggards have made remarkable strides in recent months.[2]

The principles developed in the United States in relation to truth in lending[3] have been justifiably acclaimed and will be adopted in many other jurisdictions. Those monumental products of American legal scholarship, the Uniform Commercial Code and the Uniform Consumer Credit Code,[4] are being avidly studied all over the world, and many aspects of those models, suitably adapted for local conditions, will find their way into the laws of other countries.

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1. Annual Convention, Missouri Consumer Finance Association, St. Louis, Missouri, April 10, 1974; Annual Convention, National Consumer Finance Association, Montreal, Canada, May 21, 1974.

2. *See, e.g.*, Consumer Credit Acts, no. 134, Consumer Transactions Act no. 135, 1972, of South Australia; Consumer Credit Act 1974, c. 39, of the United Kingdom.

3. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146; 12 C.F.R. pt. 226 (1975).

4. Both codes were developed by special committees of the National Conference of Commissioners on Uniform State Laws.

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The American method has been almost universally rejected insofar as it relates to the usury laws and to the close regulation of interest rates and loan sizes which constitute such a remarkable feature of the legislative framework in nearly every state in this country.[5]

This investigation will commence with a brief review of historical background in order to clarify the nature of the common law of England and the manner in which it took seed abroad. Thereafter, consideration will be given to the constitutions and relevant laws of England, Canada, Australia, New Zealand and the United States, four of which belong to what is left of the British Commonwealth, and all of which derive their legal systems from the English common law. This last statement must be qualified to some degree since in Canada, in the Province of Quebec,[6] in Scotland,[7] and in some parts of the United States,[8] the civil law[9] is an influential factor in the jurisprudential system. However, even in these exceptional cases, the common law has necessarily intruded since the jurisdictions in question are all subordinate to central governments that look primarily to common law sources.

At the conclusion of this inquiry into consumer credit laws, a forecast of future trends will be ventured, including with respect to the United States, a prediction that sooner or later, the usury laws will be swept away.[10] It is submitted that their survival in the

5. [O]ther industrial countries have generally rejected the decreed-rate approach and permitted rates on consumer credit transactions to be set by the free market. Recognizing the possibility of occasional unconscionable transactions, they have chosen to test these on a case-by-case basis in their courts.

Report of the National Commission on Consumer Finance, Consumer Credit in the United States, December, 1972, at 95 (Library of Congress Card No. 72-600335) [hereinafter cited as N.C.C.F. Report].

6. *See* J. CASTEL, THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC (1962).

7. *See* W. GLOAG & R. HENDERSON, INTRODUCTION TO THE LAW OF SCOTLAND (6th ed. 1956).

8. *E.g.*, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas. *See* BLACK'S LAW DICTIONARY 350 (4th ed. 1968).

9. Civil Law is defined as:

The system of jurisprudence held and administered in the Roman empire, particularly as set forth in the compilation of Justinian and his successors—comprising the Institutes, Code, Digest, and Novels, and collectively denominated the "*Corpus Juris Civilis,*"—as distinguished from the common law of England and the canon law.

BLACK'S LAW DICTIONARY 312 (4th ed. 1968).

10. For an interesting account of the historical background to the usury laws, see chapter 6 of the N.C.C.F. Report, note 5, *supra*. The Commission's conclusion reads in part:

[O]n balance, rate ceilings are undesirable when markets are reasonably competitive. Imposition of rate ceilings on consumer credit transactions

modern age is an anomaly, and it is their existence, sometimes constitutionally enshrined,[11] that has brought about a plethora of complex laws affecting the credit granting market place.[12]

I. HISTORICAL BACKGROUND

It was the common law of England, developed by Norman judges from ancient customary laws of that country,[13] which was introduced into the various overseas territories that fell under British dominance. It became the practice that, when courts were first established in a colony, they endeavored to apply the law which would have been held to apply by the courts of the United Kingdom.[14] However, as each of the dependent countries gained powers of self-government, it naturally proceeded to develop and vary its law to suit the characteristics of its people and the particular conditions in which they lived. At the same time, changes were constantly taking place in England. This trend was particularly evident in the period of reform during the nineteenth century when far-reaching attempts were made to adapt the law to meet the circumstances brought about by the industrial revolution. As a consequence of these changes, substantial differences in detail have developed between the laws of England and those of the other common law countries. A brief discussion of three particular areas of the law, dower, mechanics' liens and usury will serve to illustrate this point.

A. Dower

The nature of dower and its antiquity may be judged by

> neither assures that most consumers will pay a fair price for the use of credit nor prevents overburdening them with excessive debt. . . .

Id. at 108.

11. *See, e.g.*, CALIF. CONST. art. 20, § 22.

12. One writer states:

> Enactment of legislation relating to credit arrangements has not followed the pattern of expansion of the market. Regulation has been devised on an *ad hoc* basis to take care of problems and abuses or to clarify relationships as the need for such regulation became apparent. . . .

B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 3 (1965) [hereinafter cited as CURRAN].

13. *See* W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 4, 47-53 (6th ed. rev. 1938).

14. Local customary law was also applied to the extent that it was held to be valid in a particular colony. For an interesting study of the interaction between English and local laws in the colonies, see T. ELIAS, BRITISH COLONIAL LAW (1962).

reference to section 1 of The Dower Act[15] of Ontario, Canada, which is still in force and reads as follows:

> A widow, on the death of her husband, may tarry in his chief house for forty days after his death, within which time her dower shall be assigned her, if it has not been assigned her before, and in the meantime she shall have her reasonable maintenance, and for her dower shall be assigned to her the third part of all the lands of her husband whereof he was seized at any time during coverture, except such thereof as he was so seized of in trust for another.

This language is taken from a series of English statutes dating back to the Magna Carta in 1216. In Ontario, as in most other jurisdictions in the common law world, modern legislation protects a widow against the possibility of her being left unprovided for on the death of her husband.[16] Yet in many places, real estate transactions continue to be complicated by the survival of this ancient law, and, in Ontario, if a deed of transfer of land is executed by a married man, without the spouse joining to bar her dower, her right to dower will continue even though the property is subsequently sold and resold.[17]

Dower was abolished in England by the Administration of Estates Act of 1925,[18] which abrogated the earlier rules as to the descent and distribution of real and personal estate of persons dying on or after January 1, 1926. This was part of a legislative packet designed to modernize the law of real property, of which the most important statute was the Law of Property Act of 1925.[19]

B. Mechanics' Liens

In his book *The Elements of Roman Law*[20], R.W. Lee observes that "Roman Law of Mortgage continued to be in the highest degree complicated and unsatisfactory."[21] He explains that one of the causes of this state of affairs was the large number

15. ONT. REV. STAT. c. 135 (1970).

16. *E.g.*, Dependent's Relief Act, *id.*, c. 126.

17. G. DONAHUE, CONVEYANCER'S GUIDE TO REAL ESTATE PRACTICE IN ONTARIO 27-28 (1970).

18. Administration of Estates Act of 1925, 15 & 16 Geo. 5, c. 23.

19. Law of Property Act of 1925, 15 & 16 Geo. 5, c. 5. *See* G. CHESHIRE, THE MODERN LAW OF REAL PROPERTY 793 n. 1 (10th ed. 1967).

20. R. LEE, THE ELEMENTS OF ROMAN LAW (4th ed. 1956) [hereinafter cited as LEE].

21. *Id.* at 178.

of tacit hypothecs[22] that existed, and he cites as an example "the tacit hypothec given to a person who had spent money in repairing another person's house or ship."[23] Herein lies the origin of the mechanics' lien legislation which was first adopted in Maryland in 1791 and continues to be an important feature of the law in nearly all the jurisdictions of the United States and throughout Canada.

The mechanics' lien concept is directly opposed to a basic tenet of the common law, namely, that a person who supplies goods or services has a right of action in contract against the purchaser for the price of the articles sold or services rendered, but, in the absence of agreement, has no security interest or preferential position as compared with other creditors in the event of the buyer's insolvency. The mechanics' lien acts single out a particular trade, the construction industry, and confer upon the suppliers of materials and equipment a charge or lien against the land, building and materials associated with a construction project.

Mechanics' lien laws have been enacted in New Zealand as well as in Queensland and South Australia.[24] However, Queensland repealed its Mechanics' Lien Act in 1964, and no legislation of this type has ever been adopted in the United Kingdom.[25]

C. *Usury*

Whether or not one agrees with Jeremy Bentham's views that the usury laws are founded in religious bigotry,[26] there is no doubt that the historical background of such edicts stretches back into the mists of antiquity. The earliest concept was that money should not be lent at interest at all, and Aristotle argued strongly against interest-taking, basing his objections largely upon the view that money was barren.[27] There are many prohibitions against usury

22. Under Roman and civil law a hypothec is:

> [A]n obligation, right, or security given by contract or by operation of law to a creditor over property of a debtor without transfer of possession or title to the creditor. . . .

WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 1117 (1971).

23. LEE, *supra* note 20, at 178.

24. The Wages Protection and Contractor's Liens Act 1939 no. 27 (New Zealand); The Contractors' and Workmen's Lien Acts 1906-1921 (Queensland), repealed by The Contractors' and Workmen's Lien Act 1964 no. 2; The Workmen's Liens Act 1893-1936 (South Australia).

25. *See* Report of the Law Reform Commission of British Columbia, Debtor Creditor Relationships Part 2, 1972, at 16.

26. *See* note 52, *infra*.

27. For an interesting account of the historical development of the concept

California Western International Law Journal, Vol. 6, No. 2 [1976], Art. 3

in *The Old Testament*, but it was apparently not objectionable to demand interest from a foreigner.[28]

It was the growth of trade that made it necessary to mitigate the rigidity of an outright embargo on the taking of interest, and it was in response to the economic changes of the eleventh and twelfth centuries that the meaning of usury was altered. The lending of money at interest was no longer intrinsically wrongful; it was to the extracting of excessive rates of interest that the epithet "usurious" was henceforward to be applied.[29] Unfortunately, it is and has always been beyond the wit of man to establish on an intelligent basis the point at which interest rates cease to be respectable. This fact has not deterred our rulers from selecting that point in an arbitrary way, and that is exactly what is done when usury laws are enacted.[30]

The usury laws were abolished in England in 1854[31] and in Massachusetts in 1867.[32] They have been abandoned in nearly all the advanced countries of the world.[33] Yet nearly every jurisdiction of the United States continues to cling to these laws, and the penalties for contravention are often extremely onerous. The survival of these laws is particularly difficult to comprehend because, as a result of the passage of small loan and similar laws, the general

of usury, see Johnson, *Interest and Usury*, THE REALITIES OF MAXIMUM CEILINGS ON INTEREST AND FINANCE CHARGES 5 (1969) [hereinafter cited as *Interest and Usury*].

28. "Unto a stranger thou mayest lend upon usury; but unto thy brother thou shalt not lend upon usury. . . ." *Deuteronomy* 23:20.

29. The transition was facilitated by the development of legal fictions to evade the prohibitions against interest. Thus, the Caursines, a class of papal merchants in England in the 13th century, extracted a charge from borrowers upon the fiction that this was not interest but a charge for nonpayment of a gratuitous loan at the date promised. *See* D. ORCHARD & G. MAY, MONEYLENDING IN GREAT BRITAIN at 23-27 (1933).

30. *See* J. BENTHAM, LETTERS IN DEFENCE OF USURY (1790) and note his theorem:

> That no man of ripe years and of sound mind, acting freely and with his eyes open, ought to be hindered, with a view to his advantage, from making such bargain, in the way of obtaining money, as he thinks fit; nor (what is a necessary consequence) anybody hindered from supplying him, upon any terms he thinks proper to accede to.

Interest and Usury, supra note 27, at 15.

31. Usury Laws Repeal Act of 1854, 17 & 18 Vict., c. 90.

32. Maine, Colorado and New Hampshire followed the lead of Massachusetts, but all of these jurisdictions subsequently adopted maximum rates for small loans. *See* I. MICHELMAN, CONSUMER FINANCE: A CASE HISTORY IN AMERICAN BUSINESS (1970).

33. *See* note 5, *supra*.

usury laws play virtually no part in the legislative attempts to control interest rates. They do, however, constitute an impediment to trade and a trap for the wary as well as the unwary.[34]

An interesting study has recently been completed with respect to Minnesota's usury law (which applies only to conventional mortgage loans and loans to individuals and unincorporated businesses and farmers) and its impact on mortgage financing in that state. The conclusions reached by the authors are predictably critical of that law. The authors' views are concisely summarized in the final paragraph of their paper:

> The burden of proof, therefore, seems to be on the supporters of an 8 percent ceiling. This analysis suggests that Minnesota's usury law does not provide the type of interest rate protection which some claim it does. Its effect, rather, is to severely limit the financial options available to borrowers. If a usury law is deemed necessary, these results suggest that the rate ceiling should be significantly above market rates, which was the original intent of the law.[35]

II. THE LEGAL SITUATION IN ENGLAND

It is convenient to use the title "England" although most of the forthcoming discussion relates equally to the other components of the United Kingdom which is comprised of England, Wales, Scotland and Northern Ireland.[36]

Time/sale transactions in England at the consumer level are almost always of the hire-purchase[37] variety rather than by means of conditional sale contracts.[38] Although car ownership remains

34. As a result, the Practicing Law Institute of New York City in 1975 found it appropriate to conduct a program on "Usury Laws and Modern Business Transactions." *See* PRACTICING LAW INSTITUTE, COMMERCIAL LAW AND PRACTICE, COURSE HANDBOOK, SERIES No. 129, A4-2045 (1975).

35. Rolnick, Graham & Dahl, *Minnesota's Usury Law: An Evaluation*, NINTH DISTRICT QUARTERLY, Fed. Res. Bank, Minneapolis, Vol. II, no. 2, April, 1975, at 24.

36. The 1971 census revealed that England's population was 45,870,000 out of a total of 55,350,000 for the United Kingdom as a whole. 6 ENCYCLOPAEDIA BRITANNICA 866 (15th ed. 1974).

37. In a hire-purchase contract, the article to be acquired is sold by the dealer to the finance company which then leases it to the debtor, who has an option to purchase at the end of the lease term, but is not obliged to do so. *See generally* R. GOODE, HIRE-PURCHASE LAW AND PRACTICE (2d ed. 1970).

38. *Id.* at 2. Note, however, that the Hire-Purchase Act of 1964 brought conditional sale agreements within the scope of the Hire-Purchase Acts, upon the rationale that both methods seek to accomplish the same end, that is, a security

on a modest scale compared with the situation in North America, the possession of a private motor vehicle is becoming increasingly commonplace at all levels of British society.[39]

In England in 1974, approximately 100,000 new instalment credit contracts were written each month on all types of motor vehicle sales, of which about 80,000 related to sales of new and used private cars.[40] Thus, there were nearly 1,000,000 such contracts in 1974 connected with private car sales, about one quarter of which involved new cars. Although volume has declined through the energy crisis and inflation, these figures are not inconsistent with the estimates quoted by the Crowther Committee to the effect that twenty-seven percent of new car purchases in 1969 were financed by hire-purchase, four percent by bank loans or second mortgages, and the remaining sixty-nine percent were cash transactions.[41] It has been estimated by the National Consumer Finance Association that 1.4 million new cars were paid for through consumer financing in the United States in 1974.[42] Taking total new car sales for 1974 as approximately six million, the proportion financed in the United States would be about twenty-three percent. The Motor Transaction Survey for 1962 arrived at precisely the same percentage of financed purchases in the United Kingdom.[43]

Hire-purchase is extensively used in England for the purpose of financing the purchase of consumer durables of all kinds, including automobiles. There is, of course, a very considerable volume of private borrowing by individuals although accurate fig-

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interest in the article sold. A conditional sale occurs between the original buyer and seller with the financer entering the picture subsequently as the purchaser of the seller's rights under the contract. *See* Hire-Purchase Act 1964, c. 43, § 27.

39. New car registrations in the United Kingdom during 1974 were expected to amount to 1,270,000. Lacey, *A Review of the Car Market—Winter 1974*, CREDIT, Dec. 1974, at 92 [hereinafter cited as CREDIT]. Actual sales of new cars in the United States in the period September 1 through 20 were 335,365 and 342,274 in 1974 and 1975 respectively. Wall Street Journal, Sept. 25, 1975, at 1, col. 6. Even allowing for the fact that the population of the United States is approximately four times that of the United Kingdom, these figures clearly demonstrate how much more automobile oriented is the United States economy; new car sales in one month (approximately 500,000) are not far short of one-half the total sales in the United Kingdom for an entire year.

40. *See* CREDIT, *supra* note 39, at 109.

41. 2 REPORT OF THE CROWTHER COMMITTEE ON CONSUMER CREDIT 455 (1971) [hereinafter cited as CROWTHER REPORT].

42. NATIONAL CONSUMER FINANCE ASSOCIATION, 1975 FINANCE FACTS YEARBOOK 70 (1975).

43. CROWTHER REPORT, *supra* note 41, at 455.

ures on personal loan business are very hard to find. Sources for borrowing purposes in the United Kingdom are similar to those found in the United States and include banks, mortgage lenders and credit unions. However, most small loans are made by pawnbrokers or moneylenders, or by companies that have obtained exemption from the Money-lenders Act.[44] Although statutory regulation of the pawnbroking trade had existed in England since 1603,[45] no laws whatever, other than the usury laws, were enacted to regulate the business of money lending until the end of the nineteenth century.

The lending of money in England was governed by general usury laws from 1487[46] until all such statutes were repealed in 1854. Since that time there has been no statutory control of rates of interest. However, the Money-lenders Act of 1900[47] addressed itself to three particular problems to which public attention had been drawn, namely, extortionate rates of interest, concealment of contract terms and ruthless enforcement measures. The remedies introduced by the Act were compulsory registration of moneylenders with consequential limitations on their freedom of action, the establishment of certain criminal offenses arising out of money-lending activities, and provisions enabling the court to reopen any contract where the interest was excessive and the terms "harsh and unconscionable."[48] Subsequently, as a result of continuing abuse, further legislation was enacted to provide that a contract of loan with a rate of interest in excess of forty-eight percent per annum would be presumed to be harsh and unconscionable and, on that account, capable of being set aside or rewritten at a rate considered by the court to be reasonable, having regard to all the circumstances of the case. It is to be noted, however, that even where the rate exceeds forty-eight percent, the lender may still bring evidence to show that the rate charged was not unreasonable.[49]

In the hire-purchase field there was no control of interest rates and, indeed, it was not until just before World War II that a statute[50] was passed to regulate this class of business and to provide

44. *See* notes 47, 49, *infra.*

45. *See* CROWTHER REPORT, *supra* note 41, at 35.

46. *See* Act Against Usury and Unlawful Bargains, 3 Hen. 7, c. 5.

47. Money-lenders Act of 1900, 63 & 64 Vict., c. 51.

48. *Id.*, §§ 1-4.

49. Money-lenders Act of 1927, 17 & 18 Geo. 5, c. 21, § 10(1), *amending* 63 & 64 Vict., c. 51, § 1.

50. Hire-Purchase Act of 1938, 1 & 2 Geo. 6, c. 53.

protection to the consumer with respect to certain abuses that had been revealed. The scope of the act was limited so that it only applied to agreements where the hire-purchase price was not more than £50 (motor vehicles or railway rolling stock), £500 (livestock or £100 in all other cases. Certain specified information was to be included in the contract, a copy of which had to be supplied to the buyer. Implied terms as to title and quality and fitness were introduced, and the buyer's liability on termination of the contract was limited while the owner was prohibited from repossessing other than by court action if at least one-third of the purchase price had been paid. In the years since 1938 the limits have been raised from time to time, and the Hire-Purchase Act of 1964 extended the statutory coverage to include all agreements where the hire purchase price was approximately £2,000 or less.[51]

The philosophy of the Money-lenders Acts was based upon certain principles which, though founded in the *laissez faire* era of the mid-nineteenth century, have generally continued to be recognized as valid in the British context. The first and most fundamental of these principles, namely, that there should be no statutory control of interest rates, is derived from the teachings of Jeremy Bentham and John Stuart Mill.[52] There is virtually no demand in England for the reintroduction of usury laws, or indeed, for the imposition of interest rate ceilings or loan size limitations. It is almost universally accepted that such measures are ineffective and merely encourage illicit lending. It is believed, however, that moneylending should be shorn of its aura of secrecy and furtiveness, and it was thought that the registration provisions of the statutes would have this effect.

The other major principle was that the courts should be given wide powers of intervention in order to protect borrowers from extortionate practices. While these measures have had considerable effect, it can hardly be claimed that abuses have been eliminated. It is clear, however, that wrongful conduct is mainly to be found in the area of unregistered lending and it is probably unrealistic to expect that unconscionability can be entirely eliminated in

51. The Hire-Purchase Act 1965, c. 66, was a consolidating measure, and a separate Act for Scotland was also passed in the same year. *See* Hire-Purchase (Scotland) Act 1965, c. 67.

52. Bentham (1748-1832) published his *Letters in Defence of Usury* in 1790. He attributed the usury laws to religious bigotry, as did John Stuart Mill (1806-1873). *See* 7 EVERYMAN'S ENCYCLOPEDIA 112 (4th ed. 1958).

such a private matter as personal borrowing. There is, certainly, illicit lending in England, but there is no temptation for lenders to choose the path of deception in order to secure large returns on their investments, since high rates may freely be charged by legitimate operators, subject only to the court's right of intervention to protect the borrower with respect to extortionate transactions.

The Money-lenders Acts were really devised for the purpose of controlling the activities of individuals and partnerships engaged in the business of advancing relatively small sums of money, and the statutory licensing requirements and restrictions on advertising that are imposed by the Acts are considered somewhat irksome by corporations in the lending field.[53] Accordingly, a way was found whereby finance companies could avoid the restrictions of the Money-lenders Acts. The expression "moneylender" does not include any person *bona fide* carrying on the business of banking and, although there is no statutory definition of what constitutes banking, the Department of Commerce and Industry is empowered to issue certificates of exemption from the provisions of the Money-lenders Acts.[54] This, of course, confers a sort of quasi-banking status upon companies that operate under such certification.

In contrast to the situation in the United States, the lending institutions in England have been relatively free of control and supervision by administrative bodies. Although legislation has recently been enacted[55] with the object of bringing England's consumer credit laws into conformity with modern conditions, any feature involving the application of rate ceilings is conspicuously absent. Instead, a new concept has been introduced, namely, that of the "extortionate credit bargain." This is a development of the doctrine of unconscionability and applies to all credit agreements to individuals, regardless of the amount of credit, or by whom the credit is granted. The court is given wide powers to reopen a credit transaction and to grant justice whenever it finds a contract to be extortionate, having regard to certain criteria, including the interest rate relative to prevailing rates, degree of risk to the creditor and extent of financial pressure to which the debtor was exposed at the time of making the agreement.[56]

53. *See* CROWTHER REPORT, *supra*, note 41, at 62-63, 245-46.
54. Companies Act 1967, c. 81, § 123.
55. *See* Consumer Credit Act 1974, c. 39.
56. *Id.*, § 139.

The new statute, which will not become fully effective until detailed regulations have been promulgated, is designed to achieve the three major objectives recommended in the Crowther Committee Report:[57] the redress of bargaining inequality, the control of trading malpractices and the regulation of remedies for default.[58] Earlier legislation in this field had addressed itself to the status of the creditor and the type of transaction involved,[59] but the new law regulates all forms of credit on a similar basis. The act will be administered by the Director General of Fair Trading,[60] and a license will be required in the case of every person (other than local authorities and bodies empowered by a public general act) who carries on the business of providing credit or hire under regulated agreements. Truth in lending, based on the United States model, is an important aspect of the new law, and most of the existing distinctions between various categories of credit granters will disappear.[61]

III. THE LEGAL SITUATION IN CANADA[62]

The comparative reluctance on the part of individuals to engage in credit transactions, so much a part of the British experience, has long since disappeared in Canada, an attitude which in many ways is essentially North American in outlook. The history of Canada is closely interwoven with that of the United States. Commercial and cultural ties between the two countries have grown closer as peace and harmony have continued to prevail across the international border, while cooperation for purposes of mutual defense has forged an alliance of continental proportions. Both countries have a pioneer background and the spirit of the west pervades large areas of Canada just as it features so prominently in the American experience.

The scale of expansion of consumer credit usage in Canada since the end of World War II has paralleled the experience in the

57. *See* note 41, *supra*.

58. *See* Hyde, *The Consumer Credit Act of 1974*, TRADE AND INDUSTRY, Aug. 8 & 15, 1974.

59. Money-lenders Act of 1927, 17 & 18 Geo. 5, c. 21; Pawnbrokers Act of 1872, 35 & 36 Vict., c. 93 *as amended* 8 & 9 Eliz. 2, c. 24; Hire-Purchase Act 1965, c. 66.

60. *See* Fair Trading Act 1973, c. 41.

61. *See* Consumer Credit Act 1974, c. 39, §§ 55, 62, 63.

62. According to the 1971 census, Canada had a population of approximately 22 million. 3 ENCYCLOPEDIA BRITANNICA 721 (15th ed. 1974).

United States. Moreover, the hire-purchase method of engaging in the sale of consumer durables did not take hold in Canada so that the creditors who engage in this class of business usually resort to the conditional sale contract or the chattel mortgage, as is the case with their counterparts south of the border.

The constitution of Canada has its origin in the British North American Act of 1867,[63] a statute of the Imperial Parliament. Under section 91 of that Act are listed matters that are within the exclusive domain of the federal government and those that are within the competence of provincial parliaments. Contrary to the situation in the United States,[64] residuary powers are granted to the central government which was given a dominant position in the affairs of the federation from the inception of the new dominion. Among the important items which were specifically allocated to the federal government were public debt and property, regulation of trade and commerce, taxation, loans on public credit, postal service, census, defense, navigation, fisheries, banking, bills of exchange, interest, bankruptcy and the issue of paper money.[65]

The provincial governments have no power to legislate with respect to interest rates, and because the federal government has the exclusive right to legislate in the field of negotiable instruments, it was a relatively simple matter to end the controversy in Canada over the holder in due course problem in connection with consumer credit sales, an issue which is still very much alive in the United States.[66] The matter was resolved by an amendment to the Federal Bills of Exchange Act[67] which required that any bill or note taken in connection with a consumer purchase be prominently and legibly marked with the words "Consumer Purchase." The holder of such an instrument takes it subject to any defense or right of set-off that the purchaser would have had in an action on the instrument by the seller. If the document is not marked as required by the statute it will generally be void, but an exception is made in favor of a holder in due course without notice of the character of the instrument.[68]

63. British North America Act of 1867, 30 & 31 Vict., c. 3.

64. *See* U.S. CONST. amend. X.

65. British North America Act of 1867, 30 & 31 Vict., c. 3, § 91.

66. The Federal Trade Commission has recently adopted a trade regulation to deal with the holder in due course problem, which took effect May 14, 1976. 40 Fed. Reg. 53506 (1975).

67. Federal Bills of Exchange Act, CAN. REV. STAT. C.B-5 (1970).

68. *Id.*, § 188-92.

Each Canadian province has its own consumer protection laws (all of recent origin and largely fashioned after the Ontario model), none of which limits the rates of interest that may be charged in loan or time/sale transactions.[69] Most of the provinces have their own conditional sale[70] and chattel mortgage[71] statutes which date back, in most instances, to the latter part of the last century. There are no usury laws as such, and so far as finance companies are concerned, there is only one law which imposes a direct restraint on interest rates, namely, the Federal Small Loans Act[72] which was originally passed in 1939. This Act was based on the American Uniform Small Loan Law and relates only to loan transactions up to $1500. The rates allowed are two percent per month to $300, one percent per month to $1000 and one-half percent per month to $1500. The Federal Interest Act,[73] far from limiting the rates of interest that may be charged by lenders, states at section 2:

> Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatever, any rate of interest or discount that is agreed upon.

It is expected that the present Liberal government will shortly introduce legislation for the modernization of both the Small Loan and the Interest Acts.[74]

The only other limitation on interest rates in the consumer field is achieved in a manner reminiscent of the English Moneylenders Act. Most of the provinces have enacted some form of

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69. *E.g.*, Ontario Consumer Protection Act, ONT. REV. STAT. c. 82 (1970); Manitoba Consumer Protection Act, MAN. REV. STAT. c. C200 (1970).

70. *See, e.g.*, Ontario Conditional Sales Act, ONT. REV. STAT. c. 76 (1970).

71. *See, e.g.*, Ontario Bills of Sale and Chattel Mortgages Act, ONT. REV. STAT. c. 45 (1970). Note that The Personal Property Security Act, ONT. REV. STAT. c. 344 (1970) (first enacted in 1967 and based on article 9 of the U.S. Uniform Commercial Code) came into full force and effect on April 1, 1976. The statutes cited *supra* in notes 70 and 71, and several others dealing with security interests in personal property, are thereby repealed.

72. Federal Small Loans Act, CAN. REV. STAT. c.S-11 (1970).

73. Federal Interest Act, CAN. REV. STAT. c.I-18 (1970).

74. It was announced recently that the Borrowers' and Depositers' Protection Act would shortly be introduced into the Federal Parliament. The proposed statute will repeal both the Small Loan and Interest Acts and the only limitation on rates will be a provision against the charging of interest in excess of seven times the prime rate. See Official Release by Dept. of Consumer and Corporate Affairs of Text of Speech by Minister, Hon. Andre Onellat in Quebec City on Feb. 14, 1976.

Unconscionable Transactions Act[75] which permits courts to set aside or rectify credit transactions that are held to be unconscionable in the light of certain statutory criteria. Section 3 of the Unconscionable Transactions Act of Alberta[76] provides:

> Where, in respect of money lent, the court finds that having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may:
>
> (a) reopen the transaction, take an account between the creditor and the debtor, and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;
>
> (b) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;
>
> (c) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;
>
> (d) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and if the creditor has parted with the security, order him to indemnify the debtor.

A recent decision of the Alberta Supreme Court will clarify the manner in which statutes of this kind provide protection to borrowers and will facilitate comparison between the Canadian and United States methods of furnishing safeguards against predatory practices of loan operators in the consumer credit field. In *Krocker v. Midtown Mortgage & Loans, Ltd.*,[77] it was held that, in a real estate mortgage transaction involving a rate of interest on money lent that was more than double the rate at which the funds could

75. *See, e.g.*, Ontario Unconscionable Transactions Relief Act, ONT. REV. STAT. c.472 (1970).

76. Unconscionable Transactions Act of Alberta, ALTA. REV. STAT. c.377, § 3 (1970).

77. [1975] 52 D.L.R.3d 286 (Alta.).

have been borrowed elsewhere, the excessive interest was itself evidence that the transaction was harsh and unconscionable within the meaning of the Act. The borrower was an unskilled laborer and the loan was fully secured, yet the interest rate charged was 30.5% per annum as compared with a "going" rate of about 14%. The court reduced the interest rate to the latter figure, ordered defendant to indemnify plaintiff after an accounting had been taken between the parties, and penalized defendant in costs.

IV. THE LEGAL SITUATION IN AUSTRALIA[78]

In terms of credit-mindedness, Australians are increasingly recognizing the necessity for, and desirability of, credit granting facilities. Agriculture continues to play a major role in economic affairs, but industrialization is proceeding apace, and attitudes are changing as the transformation of the economy gathers force.

Australia has a federal constitution[79] which adopts a position between the American and Canadian models. The central government has less strength than is the case in Canada. Indeed, the basic philosophy is akin to that of the United States in that the powers of the federal government are derived from the surrender of powers by the constituent states which continue to wield residuary legislative power.

The burgeoning of consumer credit has been a remarkable feature of Australian development since the end of World War II. At the end of 1950, there was one automobile for every six Australians. By 1971, this ratio had become one vehicle to every 2.5 persons. A home-based vehicle manufacturing industry has developed in the postwar years and a ninety-three percent growth in motor vehicle registration occurred in the decade of the 1960's. An interesting indication of the important role played by the consumer credit industry in this rapid expansion is furnished by the estimate of the Australian Finance Conference that fifty-five per-

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78. According to the 1971 census, Australia's population was about 13,000,000. 2 ENCYCLOPEDIA BRITANNICA 404 (15th ed. 1974).

79. According to one writer:

> The legislative, executive and judicial powers of the commonwealth and States of Australia derive from the common law of England, the Constitutions of the several states and the Commonwealth of Australia Constitution Act of 1900 (63 and 64 Vict., c.12).

W. WYNES, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA 1 (4th ed. 1970). *See* 2 ENCYCLOPAEDIA BRITANNICA 409-10 (15th ed. 1974) as to the Australian governmental structure.

cent of all motor vehicles marketed in Australia each year are sold by means of some form of credit transaction.[80]

Similarly, the finance industry has played a vital part in the rapid development throughout the nation of the distribution of consumer durables other than motor vehicles. By the beginning of the 1970's over ninety percent of all homes contained refrigerators and televisions, while washing machines were found in eighty-five percent of such homes. It was estimated that seventy-five percent of all these articles were purchased using some form of consumer credit.[81]

The states have power to fix interest rates for loan and other credit transactions, and they appear to have been influenced to some extent by the American example. The Money-lenders and Hire-Purchase Acts of the United Kingdom were universally adopted, but each jurisdiction introduced its own variants. In those cases where maximum rates were adopted, such rates were fixed, with one or two exceptions,[82] at a level high enough to guard against abuse by creditors and yet permit the actual rates to be worked out by the operation of competitive forces.[83]

Nothing comparable to the Model Small Loan Act, which has been adopted in Canada and most of the jurisdictions of the United States, has been enacted in Australia, but annual interest rate ceilings were imposed in some instances.

In all jurisdictions, the courts are empowered to invoke the

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80. *See* Llewellyn, *Credit Aids Growth of Production for Export*, OVERSEAS TRADING, October 15, 1975 (publication of Australian Department of Trade).

81. *Id.*

82. Until recently the exceptions were: Queensland (20% simple interest applicable to personal loans and hire-purchase), Western Australia (15% simple interest on personal loans; no limit on hire-purchase), and Tasmania (10% simple interest on personal loans with a 2½% procuration fee; no limit on hire-purchase). However, there have been some recent changes. Queensland has removed the ceilings on both hire-purchase and personal loans; Western Australia has increased the limit on personal loans to 20% and provided that future adjustments may be made by regulation; Tasmania has increased its 10% limitation to 15%. Annual Report for 1974-1975 of the Australian Finance Conference, at 15.

83. *See* Report on Fair Consumer Credit Laws (The Molomby Report), 1971-72, para. 5.7.1, which reads:

> At present Victoria sets a ceiling of 48 percent per annum upon the rate of interest chargeable by money lenders and three other States set ceilings. A ceiling on terms charged under hire-purchase agreements exists in two States. In New South Wales there is also an upper limit on charges in respect of credit sale agreements. . . .

[hereinafter cited as Molomby Report].

concept of unconscionability to reopen loan transactions. In most cases no restrictions were placed on interest charges for hire-purchase contracts, but Queensland limited the interest rate to twenty percent per annum while New South Wales applied limits that varied with the class of commodity purchased.[84]

The winds of change have been blowing in Australia, as elsewhere, and the framework in which the business of consumer credit is conducted is being altered to a remarkable degree. Several government sponsored committees have recently delivered reports after conducting intensive research and studying the systems in vogue elsewhere. Without exception, these committees concluded that low ceilings on interest rates not only failed to protect consumers but restricted the availability of credit.[85] In addition, the recommendations generally favored simplification of the law, regulation of transactions according to their substance and function instead of according to their form, separation of consumer and commercial transactions and abolition of the artificial distinction in law between secured lending transactions and those where a commodity purchase is financed by instalment credit.[86]

In 1972, South Australia passed its Consumer Credit[87] and Consumer Transactions[88] Acts, which came into force on November 3, 1973. The Hire-Purchase and Money-lenders Acts were repealed and the use of hire-purchase contracts for credit sale transactions was terminated. Instead, a new form of mortgage of goods was introduced. The previously existing rate limitations in connection with hire-purchase contracts were eliminated. Compulsory disclosure of credit terms along the lines of the United States' Truth in Lending Act was introduced and licensing of all credit providers (instead of only those engaged in moneylending) was required.[89]

There are consumer activists in Australia, but there appears to be far less animosity than that which often surfaces in other places when consumers and credit granters are juxtaposed. The new law

84. *Id.*

85. The Molomby Report suggests that the underworld will be likely to fill the void created by restrictions of this kind. *Id.*, para. 5.7.2.

86. *Id.*, para. 1.1.5.

87. No. 134 (1972), by § 4(1) of which the Money-lenders Acts were repealed.

88. No. 135 (1972), by § 4(1) of which the Hire-Purchase Agreements Acts were repealed.

89. No. 134 (1972) and Regulations [S. Australia Gov't Gaz., Aug. 2 1973].

in South Australia is designed to recognize the interests of creditors as well as those of borrowers, and quotation of section 57(1) of the 1972 Consumer Credit Act may provide a fitting conclusion to this section on the Australian scene:

> A consumer shall not make any statement or representation that is to his knowledge false or misleading in an application or offer to a credit provider in which credit is sought. Penalty: One thousand dollars, or imprisonment for twelve months.

V. THE LEGAL SITUATION IN NEW ZEALAND

New Zealand is a small country[90] with a unitary form of government similar to that of England except that its legislature is unicameral. While the economy remains largely agrarian, an important feature is the country's heavy reliance on hydroelectric power which provides a reasonably priced source of energy for purposes of industrial production and domestic usage. As a result, the high standard of living enjoyed by New Zealanders includes widespread use of electric household appliances, such as refrigerators, washing machines and similar items of the type which may be the subject matter of customary hire-purchase agreements.[91]

In consumer credit, New Zealand has largely adhered to the modern model of the United Kingdom in that there has been an avoidance of direct limitation on interest rates. Legislative activity has been confined to limited intervention in the fields of money-lending and hire-purchase. In both areas, New Zealand has adopted the unconscionability concept, permitting the courts to reopen and to remake contracts where the terms imposed upon the debtor are held to be harsh and unconscionable.[92] In one respect, however, an innovation has been introduced, namely, the "customary" hire-purchase agreement, which is unique to New Zealand and which evolved out of the Chattels Transfer Act.[93]

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90. The population of New Zealand at the time of the 1971 census was approximately 3,000,000. 13 ENCYCLOPAEDIA BRITANNICA 47 (15th ed. 1974).

91. For an account of the economic and constitutional situation in New Zealand, see *id.* at 47-48.

92. *See* Money-lenders Act 1908 no.121; Hire-Purchase Act 1971 no. 147; INSTALMENT CREDIT TRADING IN NEW ZEALAND (Report to the Minister of Industries and Commerce by the Tariff and Development Board) (1968) [hereinafter cited as INSTALMENT CREDIT TRADING].

93. *See* Chattels Transfer Act 1924 no. 49 § 57 (N.Z.) (special provisions as to customary hire-purchase agreements).

Such an agreement may be of the hire-purchase type where the contract is one of bailment combined with an option to purchase at the end of the term, or of the conditional sale variety where title automatically passes to the buyer upon full performance of the contract terms. It is a "customary" type of agreement because it relates only to contracts where the subject matter is a commodity commonly dealt with in consumer transactions between a manufacturer or dealer in the particular commodity and an individual purchaser. Such contracts are immune from registration requirements, the purpose of such immunity being to deal with the problem posed by the bankruptcy of the purchaser or hirer. The commodities which may be the subject of a customary agreement of this kind are those with respect to which a trade custom has developed, and in such cases, there is accorded to the parties relief from registration requirements and clarification that the chattels in question are not available to the creditors of the purchaser or hirer in the event of bankruptcy. Unfortunately, in solving one problem, another has been created: unscrupulous persons in possession of goods under unregistered customary hire-purchase agreements may purport to pass title to third parties who, though they may have purchased innocently for value and in good faith, may find themselves divested of title and possession and left with nothing but a personal right of action against the fraudulent transferor.[94]

While it is expected that New Zealand will shortly proceed to modernize its consumer credit laws, it appears that reliance will continue to be placed upon an approach that is relatively mild and consistent with the principles that have been adhered to in the past. Some indication of the way ahead, so far as New Zealand is concerned, may be gleaned from the following extract from a recent report made by the New Zealand Tariff and Development Board:

> Because of numerous and varying factors which might have to be taken into consideration by a supplier of finance in determining his finance charge, the Board considers it impracticable to lay down any statutory maximum for such charge. . . . In any event, any possibility of excess profit taking, as distinct from a higher cost of service or risk on particular

94. *See* D. DUGDALE, NEW ZEALAND HIRE-PURCHASE LAW 12-15 (2d ed. 1965).

transactions, would seem to be well controlled in this country by the keen competition existing between the companies engaged in instalment credit financing.[95]

VI. THE LEGAL SITUATION IN THE UNITED STATES[96]

The finance industry in the United States is highly regulated, and until recently, control was exercised almost entirely at state level.[97] The federal government made its debut on the consumer credit scene in 1968 with the enactment of the so-called Truth in Lending Act,[98] the object of which is the full disclosure of terms of a credit agreement including, in particular, the annual percentage rate calculated according to a stipulated formula. It was believed by the supporters of the legislation that these declarations, made on a consistent basis, would help borrowers in "shopping around" for the most favorable credit sources, and would promote competition because of the comparability of contract terms.

Research so far suggests that the expectations as to "shopping around" have not been fulfilled to any appreciable degree so far as they relate to those at the lower end of the scale of credit worthiness.[99] It seems, therefore, that a fairly lengthy period of consumer education will be required before the full objectives of the Truth in Lending Act can be achieved. Nonetheless, the intellectual quality and high social purpose of this legislation have appealed to most foreign jurisdictions where consumer credit matters have been under investigation. It seems probable that the United States federal legislation in the credit granting field will frequently serve as the model for modern consumer credit laws in other common law countries.[100]

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95. N.C.C.F. Report, *supra* note 5, at 95 (quoting from INSTALMENT CREDIT TRADING, note 92, *supra*).

96. The total resident population of the United States on May 1, 1970, was estimated at 203,409,000, excluding armed forces abroad. WHITTAKER'S ALMANAC 797 (106th ed. 1974).

97. For an excellent analysis of the consumer credit situation in the United States, see CURRAN, note 12, *supra*.

98. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146; 12 C.F.R. pt. 226 (1975).

99. *See* paper presented by Professor R.W. Johnson at a seminar in Australia in 1972, reported in CONSUMER CREDIT—THE CHALLENGES OF CHANGE 317-38 (1972) (CCH Australia Ltd.).

100. *See, e.g.*, Recommendation of the Molomby Committee in Australia as to interest rate disclosure. Molomby Report, *supra* note 83, para. 4.5.4.

A. Model Small Loans Act

At state level there has been a remarkable proliferation of laws and regulations. With the growth of trade and commerce in the nineteenth century, the courts intervened to facilitate the development of credit in connection with retail sales. The time/price doctrine was adopted from English authorities and it was held that when one price was charged for a commodity for a cash sale and another higher price for the same commodity when payment was to be deferred, the difference was not interest and was not subject to the usury laws.[101] However, individuals who wanted to borrow small sums of money and who were ineligible for credit from banks or mortgage lenders were generally excluded from such borrowing or forced into the hands of illegitimate operators who charged excessive rates of interest and often resorted to strong-arm tactics for collection purposes.

The first substantial breakthrough in solving this problem came about as a result of the research work conducted under the auspices of the Russell Sage Foundation. A Model Small Loans Act was produced which was soon adopted in most United States jurisdictions.[102] The basic purpose of this legislation was to allow small loan lending at realistic rates so that legitimate capital would be drawn into the enterprise. Protection for borrowers would be afforded through licensing provisions and close regulation of licensees. Such legislation provided an escape from the restrictions imposed by the usury laws and has undoubtedly been successful except where states have imposed unduly low rate caps and loan size ceilings.[103]

As American society became more credit oriented, it became necessary to enact small loan laws here, installment statutes there, and motor vehicle credit sale and secondary mortgage laws elsewhere, in order to give formal recognition to the realities of economic life and to secure for the benefit of debtors and creditors alike exemptions from the constrictions imposed by the general usury laws. It soon became apparent that the interests of both creditors and consumers would be served if a measure of uniformi-

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101. *See* CURRAN, note 12, *supra*, at 13, and n. 26.

102. *E.g.*, N.H. REV. STAT. ANN. § 399-A (1955); N.J. REV. STAT. ANN. § 17:10 (1957).

103. For a concise review of the development of American consumer credit law, see Malcolm, *The New Maximum Charges*, THE REALITIES OF MAXIMUM CEILINGS ON INTEREST AND FINANCE CHARGES (1969).

ty in state legislation on consumer credit could be achieved. In response to this need a model bill has been developed to which attention is now directed.

B. Uniform Consumer Credit Code (U3C)

The purpose of the U3C is well described in the introduction to the 1974 version of the Code:

> [It] is a comprehensive statute designed to regulate most aspects of consumer credit, to simplify, clarify and modernize state laws on consumer credit, including those governing maximum credit charges, and to replace existing state consumer credit laws, including, among others, those governing retail instalment sales, small loans, instalment loans, and usury.[104]

The U3C was first adopted by the National Conference of Commissioners on Uniform State Laws in 1968. Various factors, including criticism by consumer advocates and the intervention of the federal government in consumer credit matters, made it desirable to revise and update the Code. As a result of dedicated work by the Conference Committee on the Uniform Consumer Credit Code, a new version was finally approved by the Commissioners in August, 1974. Eleven states[105] have already adopted a version of the U3C and it is hoped that the recent promulgation of an updated version will lend impetus to the movement for state adoption of the U3C. The benefits to be derived from adoption of the Code are aptly summarized in the following extract from the Prefatory Note to the 1974 edition:

> Enactment of the Code would abolish the crazy-quilt, patchwork welter of prior laws on consumer credit and replace them by a single new comprehensive law providing a modern, theoretically and pragmatically consistent structure of legal regulation designed to provide an adequate volume of credit at reasonable cost under conditions fair to both consumers and creditors. Upon its enactment, no longer would credit regulation within a state consist of a number of separate uncoordinated statutes governing the activities of different types of creditors in disparate ways.[106]

104. UNIFORM CONSUMER CREDIT CODE iii (1974).

105. The U3C has been adopted by: Oklahoma and Utah (1969), Colorado, Idaho, Indiana and Wyoming (1971), Wisconsin (1972), Kansas (1973), Iowa and Maine (1974), South Carolina (1975).

106. UNIFORM CONSUMER CREDIT CODE xi (1974).

The revised Code contains many features that are favorable to consumers and restrictive of the rights of creditors so far as collection remedies are concerned. The majority of the consumer-oriented recommendations of the National Commission on Consumer Finance have been incorporated in the U3C. Nonetheless, the Code is a balanced and equitable document which recognizes that the rights of creditors cannot properly be ignored. The Code abolishes usury laws, and while it contains rate limitations, its philosophy is directed towards liberalization of state laws that inhibit and distort consumer lending by imposition of unduly low rate caps and loan size ceilings. That philosophy is also well expressed in the Prefatory Note to the 1974 version of the U3C:

> [The] basic premises of the 1968 Text were that (1) in the business area general usury statutes should be terminated completely and control of the price of credit left solely to the free operation of the market place; (2) although in the consumer credit area the operation of the same free enterprise principles is equally warranted, many consumers do not have equal bargaining power with creditors and traditionally have been protected by governmental controls, including maximum rates, and the U3C should provide recommended maximum rates in a standard form more simple and understandable than a hodgepodge of exceptions to general usury statutes; and (3) any rate structure provided should be of the maximum ceiling variety and not a specification of actual rates to be charged as in the regulation of public utilities.
>
> . . .
>
> This Act makes no change in the specific maximum rates included in the 1968 Text.
>
> . . .
>
> The extensive studies and findings reported in Chapters 6, 7 and 8 of the NCCF Report clearly support the reasonableness of the U3C maximum celings. If anything, the NCCF Report indicates that if the U3C ceilings are open to criticism, the ground should be that they are too low at least for small, short term extensions of credit.[107]

Since the adoption of the new version of the Code in 1974 there has been very little progress towards securing a more general acceptance of the Code in the United States. It is this writer's belief that the U3C, being an instrument of such high intellectual

107. *Id.* at xiv-xv.

quality and at the same time so practical in its approach to current problems, will inevitably prevail and will, in due time, be adopted by all the states in the same manner as the Uniform Commercial Code.

In concluding this brief account of the U3C, it is desirable to note three particular aspects of the Code.

1. *Adjustment of dollar amounts.* In these inflationary times, it is particularly satisfactory that the U3C makes provision for automatic adjustments to take place in response to changes in the Consumer Price Index. One of the objectives is to remove the rate making function from the political arena, and it has already been pointed out that the rates in the Code are intended to be high enough to enable actual rates to be determined by the market. However, there are various dollar limits in the statute, including, for example, a system of "step" rates for consumer loans (36% per annum to $300; 21% per annum to $1,000; 15% per annum above $1,000). Under section 1.106, the amounts of $300 and $1,000 are subject to an automatic change on July 1 of each even-numbered year if the percentage of change of the Consumer Price Index is ten percent or more. Each change is limited to multiples of ten percent, fractions thereof being disregarded. The effect of adjustment in this fashion is to provide the lender with a higher effective rate commensurate with the increased operating costs due to inflation, but these provisions never permit the maximum rate of finance charge to rise above thirty-six percent per annum.[108]

2. *Holder in due course.* The manner in which the purchasers of sales finance contracts have sought to immunize themselves from possible liability by invoking the holder in due course doctrine from the law relating to negotiable instruments when disputes between seller and buyer occur has been a matter of controversy for many years. The method by which the problem has been resolved in Canada has already been described. The U3C offers a solution which, though it may not be entirely satisfactory from the viewpoint of credit granters, does at least deal with the situation and bring the argument to an end, including the related problem arising from financing of purchases of goods by transactions couched in the form of loans. Consumerists have long argued that, in certain circumstances, especially where there is a close and continuing relationship between financer and seller, the

108. *Id.*, § 1.106, Comment 2.

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lender should not be permitted to stand aloof and demand to be paid when the goods turn out to be defective and a dispute occurs between the seller and the buyer.[109] The Code now prohibits the use of negotiable instruments in consumer sales and leases[110] and waiver of defense clauses designed to achieve the same measure of immunity for the financer by contract as he would obtain under the holder in due course concept.[111] In addition, a provision to cover the loan situation in the foregoing sense, as advocated by consumerists, is included,[112] but the liability of the credit granter is limited to situations where he is linked with the seller both on a continuing basis and in connection with the particular transaction.[113] The Code has also addressed itself to the similar problem that arises when credit cards are used for the purchase of consumer goods. In limited circumstances the credit card company is made subject to any claims or defenses the cardholder may have against the seller.[114]

3. *Competition and freedom of entry.* In the 1974 version of the U3C, section 2.302 deals with the licensing aspect in connection with supervised loans, and includes a provision that a separate license shall be obtained for each place of business. An official comment to this section reads in part as follows:

> [A] major objective of this Act is to facilitate entry into the cash loan field so that the resultant rate competition fostered by disclosure will generally force rates below the permitted maximum charges. To this end this section adopts a test of "financial responsibility, character and fitness" rather than the test of "convenience and advantage" often used in prior small loan laws . . . .[115]

The so-called "convenience and advantage" or "C. and A." provisions that appear in many of the small loan laws require state loan law administrators to deny an application for a consumer loan license unless it is shown that the granting of such a license would be for the convenience and advantage of the community to be

109. *See* N.C.C.F. Report, *supra* note 5, ch. 3, at 34-38; *see also id.* at 279 n. 58 for sources listed therein.

110. UNIFORM CONSUMER CREDIT CODE § 3.307 (1974).

111. *Id.*, § 3.404.

112. *Id.*, § 3.405.

113. *Id.*, § 3.403.

114. *See generally id.*, §§ 3.307, 3.404, 3.405.

115. *Id.*, § 2.302, Comment 1.

served by the proposed licensee.[116] The idea behind these provisions was to encourage the growth of the size of loan offices and thus to achieve economies of scale. It was feared that a proliferation of loan offices in a particular area would be unnecessary and inefficient. In practice, however, the tendency has been for the "C. and A." provisions to be used to exclude new entrants to the industry and to be anti-competitive in that existing license holders are given a quasi-monopolistic position so far as loan service availability for the local community is concerned. The National Commission on Consumer Finance concluded that the effect of these provisions was to inhibit competition from new firms, and the Commission commented that its studies revealed no significant economies of scale.[117]

The U3C approach, whereby the administrator would only be concerned with the criteria of financial responsibility, character and fitness, should bring about a much healthier competitive atmosphere.

VII. CONSUMERISM

This is an age of consumerism, particularly in the jurisdictions that have been considered in this article, although the degree of militance on the part of the consumer activists and the depth of antibusiness sentiments may vary from place to place. In the years since World War II, the common law countries that have been examined have experienced a tremendous expansion in the volume of consumer credit. It is hardly surprising that problems have arisen and that there have been instances of abuse and overreaching by credit granters. These difficulties have led to the enactment of additional laws for protection of the consumer, and in all countries there have been detailed studies by official bodies and research organizations. As a result of these studies, legislation has been enacted or proposed to modernize and streamline the legal framework in which present day credit granting is conducted.

It is proper that the law should afford reasonable protection to borrowers and buyers on credit, but there must be a point beyond which the law should not go in cosseting the consumer. Individuals must bear some personal responsibility for guarding their own interests. Recognition is now being given in many instances to the

116. *See, e.g.*, N.J. REV. STAT. ANN. § 17:10-5 (1957).
117. *See* N.C.C.F. Report, *supra* note 5, at 114.

cost/benefit factor in assessing the desirability of proposed legislation. Furthermore, there sometimes arises a genuine question as to the validity of the mandate under which consumer advocates claim to represent the consumer interest. In the United States it seems probable that a Consumer Agency Advocacy Act[118] will be enacted whereby a governmental body will be set up with wide powers of intervention by means of court and administrative proceedings. This new bureaucracy will be able to intercede on behalf of the consumer where it finds that adequate protection is not being afforded, even by the administrative agency appointed to regulate the particular business in question. However, since all individuals are consumers and may often be involved in personal conflicts of interest, such as where a person's employment is derived from a firm that is being attacked by environmentalists, it is difficult to see how the new agency can ever legitimately claim to represent the consumer interest on a nationwide basis.[119]

These comments on consumerism are not intended to discount the positive aspects of the consumer movement nor to deny the need for protective laws and regulations. What must be stressed is the need for a measure of objectivity and an understanding that every benefit has its price.[120] If creditors' remedies on default are drastically curtailed, the consequence must be denial of legitimate credit to those who might otherwise have qualified, or an increase in the cost of such credit. Most probably, both of these consequences will ensue. In each country where these matters come under consideration, decision-making by governments will be affected by political pressures, a degree of abuse, historical background and national attitudes. For that reason, different nations apply different remedies to given situations, and legislative and

118. President Ford has indicated that he will veto any legislation of this nature that is passed by Congress. *See* Press Release by White House Press Secretary, Sept. 4, 1975.

119. It may be noted that voluntary associations of consumers are, in some instances, having difficulties with respect to their proper functions. It has been reported that the Consumers Union in the United States is itself in trouble and that costly activism has imperilled its product testing role. *See* Wall Street Journal, May 9, 1975, at 1, col. 4.

120. In an address before the Conference on Business Tomorrow, Washington, D.C., October 21, 1971, Bruce H. Palmer, President of the Council of Better Business Bureaus said in reference to consumerism:

> It can be a significant implement for change if properly managed. But if consumerism is used as a forum for confrontations with business and with governments it will fail to serve as an instrument for the protection of people.

regulatory methods are adopted in one place, yet rejected elsewhere, even when the problems that are faced are similar both in substance and in extent. One may be thankful that these differences continue to exist in an increasingly uniform world. Yet one should also be on guard against meek acceptance of certain conditions and approaches because that is the way it has always been. There is little to be gained from comparison of varying ideas and practices of different groups and nationalities unless there is recognition that other solutions may sometimes be more efficacious than our own. With such considerations in mind it may now be appropriate to attempt to pierce the veil and offer a forecast of what lies ahead in the realm of consumer credit.

VIII. FUTURE PROSPECTS

As one surveys the present scene in the field of consumer finance and attempts to obtain a glimpse of what lies ahead, one does not have to be very prescient to recognize that, wherever we are in this world picture, consumer protectionism will be a dominating force in the foreseeable future. Moreover, because of experience and expertise available in the United States, American methods will be studied by all who are concerned with bringing consumer laws of the various countries into conformity with the facts of economic life. In many instances, those methods will be adopted, or adapted to suit local conditions. In particular, the principles of truth in lending will be embraced.

In the United States one perceives the development of a power struggle with a threatened takeover by the federal government of consumer protection affairs as they relate to credit granting. Mention has been made of the proposed Consumer Agency Advocacy Act which would bring about the establishment of yet another layer of bureaucracy on a nationwide scale. Senator Proxmire has indicated his intention to introduce in the present session of Congress a National Consumer Credit Act[121] which would include federally mandated maximum interest rates. Both the Federal Trade Commission[122] and the Federal Reserve Board[123] have ac-

121. This proposed legislation is understood to be based on The Model Consumer Credit Act of 1973, published by the National Consumer Law Center, Boston, Massachusetts.

122. The FTC has published proposed Rules on Unfair Credit Practices which would, *inter alia,* outlaw the taking of household effects as security (other than in a purchase money transaction), even though the Personal Property Brok-

quired legislative rule making powers and claim the right to be able to preempt state laws by their regulatory decrees. Even if the states succeed in preserving their present powers, there can be no doubt that the federal government will continue to play an influential part in consumer credit affairs. It is believed by this writer that the federal government will indeed stop short of an entire takeover and that a more widespread adoption of the U3C will come about when states recognize that this may be their best method of warding off federal attack.

In those countries other than the United States, such as Australia and Canada, where a federal system of government exists, a similar power struggle will be joined, and it is believed that the outcome in both countries will be increased intervention at the federal level. In those countries, as well as in England and New Zealand, there will be an increasing level of credit activity, and as the current recession is conquered and inflation brought under control, a tremendous spurt may be expected, particularly in Australia, England and New Zealand, as modern laws are enacted and individuals overcome any remaining inhibitions that may have operated as a braking system upon the credit-granting facility. In the United States, despite the continuance of consumerist attacks, the general acceptance of, and dependence upon, consumer credit as a basic factor in the maintenance of the standard of living will ensure that the finance industry will continue to flourish and expand.

It is not anticipated that there will be litigious attacks on credit granters in the countries outside the United States on anything approaching the scale of the American experience. The consumer class action remains in its infancy elsewhere and the private attorney-general concept[124] has not found favor in other common law countries. Although advocates of the United States system may be

ers Act of California, CAL. FIN. CODE §§ 22009, 22012, 22466, 22471 (West Supp. 1975), requires a licensed lender to secure its loans either by wage assignment or by personal property. *See* 40 Fed. Reg. 16347 (1975); 16 C.F.R. § 444.2 (1976).

123. Regulation B was promulgated by the Federal Reserve Board in October, 1975, pursuant to the Federal Equal Credit Opportunity Act, Pub. L. No. 93-495, which became effective on October 28, 1975. This statute and Regulation B preempt conflicting state laws in several respects. *See* 40 Fed. Reg. 49298 (1975); 40 Fed. Reg. 60055 (1975).

124. *See* Fischer, *Consumer Legal Actions*, CONSUMER CREDIT (1973); PRACTICING LAW INSTITUTE, COMMERCIAL LAW AND PRACTICE, COURSE HANDBOOK, ser. no. 85, A4-1090 (1975).

found among consumerists abroad, including proponents of consumer class actions,[125] it seems improbable that startling change will occur so long as the contingent fee is unavailable, which continues to be the case in most common law jurisdictions outside the United States.[126] Moreover, the rewards to be obtained by plaintiffs in terms of damages for nonobservance of consumer credit laws by credit granters are generally modest outside the United States. This is because punitive and exemplary damages[127] are not awarded except in glaring cases and the trend is away from jury trials in noncriminal matters. It is contended by those who support the abolition of juries in civil trials that judges sitting alone are more likely to be consistent in their awards, and they will seldom err on the side of generosity.[128]

Recent occurrences on the legal front in the United States appear to indicate that consumer class actions may have reached their high water mark[129] although it does not seem probable, at least in the short term, that abolition of contingent fees and civil juries is likely to occur in the United States. It also seems inevitable that usury laws will eventually be abandoned by the states that still adhere to them. There may be special difficulties where such laws are constitutionally enshrined or enacted by the vote of the people, but such problems can and will be surmounted, perhaps through the medium of the Uniform Consumer Credit Code or by exercise of the federal government's overriding power.

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125. *See* Williams, *Consumer Class Actions in Canada—Some Proposals for Reform*, 13 OSGOODE HALL L.J. 1 (1975).

126. *See* F. HEUSTON, SALMOND ON TORTS 601 (14th ed. 1965).

> Thus a solicitor who conducts proceedings on the basis of payment proportioned to the amount recovered is guilty of the criminal offence of champerty, and is liable to a civil action.

Re Trepca Mines, Ltd., [1963] Ch. 199.

127. In the English case of *Rookes v. Barnard*, [1964] A.C. 1129, Lord Devlin reexamined the entire doctrine of exemplary damages and sharply limited the occasions on which it would be proper for such damages to be awarded by the court. *Id.* at 1220-39. For a discussion of the extent to which Lord Devlin's strictures have been accepted in the Commonwealth jurisdictions, see A. OGUS, THE LAW OF DAMAGES 31 (1973).

128. In England the civil jury has all but disappeared from the scene as far as tort actions are concerned. In *Ward v. James*, [1966] 1 Q.B.273 (C.A.), Lord Denning said that recent cases had shown the desirability of three things in connection with claims for damages in tort, *viz*: assessability, uniformity and predictability. He concluded that: "None of these three is achieved when the damages are left at large to the jury." *Id.* at 299-300.

129. BOARD OF GOVERNORS, FED. RES. SYSTEM, 92d Cong., 2d Sess., ANNUAL REPORT TO CONG. ON TRUTH IN LENDING 1972, 13 (1973).

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IX. CONCLUSION

It has been observed that the trend in most common law countries other than the United States has been towards an elimination, not only of general usury laws but also of all legislative and regulatory attempts to control interest levels by the imposition of rate ceilings.[130] This alone would not suffice to prove that states in the United States are wrong in their continued devotion to the decreed-rate approach. It is possible, however, that enough evidence has been adduced to justify a new look at the entire subject on the scientific basis that is now possible as a result of the research studies conducted by the National Commission on Consumer Finance.[131] At the very least, usury laws would appear to be ripe for abandonment since, except in Arkansas,[132] they are overridden by small loan laws and other legislation in the consumer credit field. Enactment of the U3C would conveniently terminate the usury laws while at the same time retaining maximum rates of interest to be set at a level low enough to protect the consumer against unconscionable bargains but high enough to allow the free interplay of market forces.

This writer favors a complete abolition of interest rate caps, but given the historical background and the persistence of usury laws in the United States, it would seem that as a matter of practical politics, the U3C approach would be best. This approach is consumer oriented and incorporates in its latest version the majority of the recommendations made by the National Commission on Consumer Finance. Yet the rights of creditors are not overlooked and considerable emphasis is placed on the need for competition among credit granters. It should be stressed, however, that the U3C was designed as a package and is not intended to be cherry-picked. A comment to that effect was made by the Chairman of the National Commission on Consumer Finance with respect to the Commission's Report.[133] Unfortunately there are legislators and consumer advocates whose preference would be to enact only those items that are favorable to the consumer and, in

130. This trend is not limited to those jurisdictions that have been considered in this article. *See* N.C.C.F. Report, *supra* note 5, at 94-95.

131. *See* note 10, *supra*.

132. *See* CURRAN, *supra* note 12, at 26 n. 94. The Arkansas small loan law, INSTALLMENT LOAN LAW, was held unconstitutional by the state supreme court; Strickler v. State Auto Finance Co., 220 Ark. 565, 249 S.W.2d 307 (1952).

133. Remarks of Ira M. Millstein at a press conference in connection with the publication of the N.C.C.F. Report, December 31, 1972.

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some instances, the legislators have been unable to refrain from tinkering with the rate structure of the U3C. This practice is contrary to the basic philosophy of the Code. As stated in the Prefatory Note to the 1974 version of the U3C: "the proposed specific ceiling rates are socially and economically sound and fit with the other provisions of the U3C and the approach used in drafting it."[134]

It seems probable that most legislators would be relieved to have the rate making function taken out of their hands. So long as they are obliged to debate the merits of one rate or another, they cannot ignore the vote-catching implications of an apparent dedication to the protection of the consumer against excessive credit charges. Moreover, many legislators may well be confused by the conflicting views and contradictory advice bandied about by those who claim to be knowledgeable in this field. An amusing and enlightened comment on that theme by Professor W. D. Warren of Stanford University Law School may serve as an apt conclusion to this article:

> The dilemma facing lawmakers on the rate regulation issue today is similar to that a cartographer would confront were he to attend a meeting of the American Geographic Society only to find that one group in attendance believes the world to be flat (populist consumer groups who believe flat ten to twelve percent across-the-board rate ceilings should be applied); another group sees the world as perfectly round and inexorably governed by the laws of the universe (economists who believe rates should be controlled only by market forces); still another group thinks the world is round in the middle and flat on both ends (U3C position that the market should be permitted to operate within high-rate ceilings); and, finally, yet another group, busily engaged in mapping the world, takes no interest in its shape (the NCLC [National Consumer Law Center, Boston, Mass.] which makes no proposals on rate ceilings). One would be tempted to call out for the coming of a consumer Galileo but for the inevitability of the heresy trial.[135]

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134. UNIFORM CONSUMER CREDIT CODE xiv (1974).

135. Warren, *Consumer Credit Law: Rates, Costs and Benefits*, 27 STAN. L. REV. 951, 967 (1975).

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