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PROTECTION INSTALMENT BUYERS DIDN'T GET

WILLIAM F. WILLIER*

"Yours on easy credit terms" has become the hark and cry in an affluent society in which every man feels entitled to be as affluent as the next at whatever the personal cost to himself. In the years following World War II consumer credit was introduced upon a wide scale until, today, there is hardly a consumer good or service not available upon some sort of credit terms.¹ Sellers could not afford to pass up this selling innovation, but neither could they afford to assume the rather bad risk of the personal credit of so many buyers whom they could not possibly know or afford to investigate. The secured credit transaction was the answer, but also the undoing of the unwary buyer at the hands of unscrupulous or profit-hungry sellers. In various ways, security would often disproportionately exceed the amount of the debt; charges for credit, hidden and otherwise, would be excessive; fine print would conceal unreasonable terms. As easy credit became the opiate of the people, more and more pushers made a fix more accessible, though not less expensive. Monthly payments became the monkey on the back of the consumer. The plight of the consumer soon came to the attention of the legislatures of a number of states. Existing legislation did not purport to deal with these problems or, if so, it was piecemeal and easily circumvented. At worst, it provided the creditor with unbridled freedom of contract and the utmost protection in realizing upon his security. Legislators were at once faced with conflicting demands for protection from the credit seller and financing agencies and from credit buyers. The result was the enactment by a number of states of what have come to be known as Retail Instalment Sales Acts.² The acts vary in their scope and approach, but generally follow a similar pattern. They require full disclosure of all contract terms to the buyer, prescribe and proscribe a number of those terms, and limit the security and charges for credit.³ Thus, they tend to be regulatory rather than prohibitive and at first glance they give the appearance of broad protection to the consumer. But a care-

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¹ Of \$33.1 billion in outstanding instalment credit in the United States in 1958, almost \$15 billion consisted of payments for or against automobiles. Ill. Bus. Rev., Nov. 1958, p. 5.

² "As of 1959 Retail Installment Sales Legislation had been enacted in 31 jurisdictions." Corman, Sales and Secured Financing 553 (1960).

³ For an excellent survey of the approaches of different states as of 1958, see Hogan, A Survey of State Retail Installment Sales Legislation, 44 Cornell L.Q. 38 (1958).

ful analysis of their essential provisions reveals that the protection they afford is minimal if not minus, more often formal than real.

This article proposes to consider the effect and effectiveness of certain major provisions of those acts. The exemplary acts of California⁴ and New York⁵ have been chosen for this purpose and, where relevant for comparison, the Uniform Conditional Sales Act, Uniform Negotiable Instruments Law, certain exemplary chattel mortgage and motor vehicle certificate of title acts, and the Uniform Commercial Code are considered.

TRANSACTIONS INCLUDED

Problem of use. Retail Instalment Sales Acts clearly include the secured transaction in which the security interest is in goods and payment of the indebtedness for the purchase price is in instalments.⁶ But the extent of the inclusion is not so clear. The New York act, defining "goods" as "all chattels personal, other than things in action or money . . .",⁷ excepts transactions with goods for "business or commercial use"⁸ but nowhere defines such use. The California act⁹ defines "goods" in the same manner as "consumer goods" are defined in sec. 9-109(1) of the Uniform Commercial Code:¹⁰ "If they are used or bought for use primarily for personal, family or household purposes", but California,¹¹ like New York,¹² employs the same exception with reference to "services." The dilemma presented by this exception and by the differing definition of "goods" in the two acts, so similar in other respects, is not easy to resolve. Secured transactions under Article 9 of the Commercial Code and conditional sales under the Uniform Conditional Sales Act are not excepted according to use and hence these acts are broader in their inclusion than the Retail Instalment Acts.¹³ Chattel mortgage acts seldom define "chattels"

⁴ Cal. Civ. Code, Title 2.

⁵ N.Y. Pers. Prop. Law, Articles 9 and 10.

⁶ "Retail instalment contract" includes a chattel mortgage, conditional sales contract, or a bailment or lease whereby the bailee or lessee can or will become the owner upon fulfillment of terms. N.Y. Pers. Prop. Law § 401(6); Cal. Civ. Code § 1802.6.

⁷ N.Y. Pers. Prop. Law § 401(1): This is the same definition as appears in the Uniform Conditional Sales Act § 1.

⁸ N.Y. Pers. Prop. Law § 401(1). Article 9 of the Personal Property Law deals solely with motor vehicles as defined in § 301(1) with provisions almost identical in effect to those of Article 10. The "business and commercial use" exception is there found in the definition of a "retail instalment sale," § 301(5).

⁹ Cal. Civ. Code § 1801.2.

¹⁰ Uniform Commercial Code, 1958 Official Text (hereinafter cited as UCC).

¹¹ Cal. Civ. Code § 1802.2.

¹² N.Y. Pers. Prop. Law § 401(2).

¹³ Uniform Conditional Sales Act § 9 provides expressly for sales for resale with reference to the rights of a buyer in the ordinary course. Interestingly, Cal. Civ. Code

but have been held to apply to all movable things without reference to use.¹⁴ The California definition of "goods" and the New York Act's emphasis upon "retail" probably correlate to mean only "consumer goods and services," but if so, both imply a very narrow meaning to "consumer" and hence, in many instances, thwart their purpose of protecting the unwary buyer. It is unfortunate to exclude the small entrepreneur such as, to use an extreme example, the energetic college student who buys a power mower under an instalment sales contract with which to earn summer money on the grounds that the mower was bought not for household purposes but for a business use. Purchase of cows by a farmer would likewise be excluded.¹⁵ Yet these buyers are as unwary and as in need of protection as the buyer of the home appliance. Thus, the "consumer goods" definition or "business and commercial use" exception can provide a convenient loophole to the unscrupulous seller requiring prolonged and expensive litigation with doubtful results. A distinction based upon the capacity of the buyer or the nature of the goods¹⁶ would better achieve the intended purpose. Both Acts might well define their application by classifying transactions along the lines of the suggested distinctions, but with differing maximum sums.¹⁷

Unmovable fixtures. Both the California and the New York Acts include "goods which, at the time of the sale or subsequently, are to be so fixed to realty as to become a part thereof whether or not severable therefrom."¹⁸ Thus, goods are included which may be excluded from the protective and remedial provisions of the Uniform Conditional Sales Act.¹⁹ The same, in effect, is true of the Uniform Commercial Code, although both uniform acts apply to secured trans-

§ 1802.4 defines "retail buyer" as one who buys goods "not principally for the purpose of resale." Article 9 of the UCC distinguishes types of goods primarily for purposes of perfection against third parties. See definitions of "consumer goods," "equipment," "farm products," and "inventory," § 9-109, and §§ 9-307, 9-312, and 9-401.

¹⁴ See, e.g., N.Y. Lien Law § 230.

¹⁵ So held in *Welch v. Campbell*, 197 Misc. 165, 94 N.Y.S.2d 860 (Sup. Ct. 1950), aff'd, 278 App. Div. 605, 102 N.Y.S.2d 51 (1950). In this case, the court applied the same exception found in the N.Y. Pers. Prop. Law § 64a, which amended the Uniform Conditional Sales Act and required disclosure of terms to buyers under a "conditional sales contract" similar to the requirements of Article 10.

¹⁶ The UCC makes such a distinction, but for other purposes. See note 13 supra.

¹⁷ The California act excludes an unsecured transaction of fifty dollars or less. Cal. Civ. Code § 1801.3. New York limits indebtedness by "added-on" security to \$3000. N.Y. Pers. Prop. Law § 410(2).

¹⁸ Cal. Civ. Code § 1802.1; N.Y. Pers. Prop. Law § 401(1).

¹⁹ Uniform Conditional Sales Act § 7 provides that the reservation of property in fixtures not severable without material injury is void against those who have not assented or, if severable, against owners and subsequent purchasers in the absence of filing in a manner to perfect a lien upon realty.

actions with certain fixtures whether before or after they become so.²⁰ It is possible, however, that under the broad definition of such goods even "sticks and stones" incorporated into a structure are included while expressly excluded by the other acts.²¹ This can, no doubt, create an interesting skirmish between holders of security in the real property and in the one-time personal property, while the rights of the buyer-debtor dangle precariously somewhere in the "in between."

Perfection of the security interest. While the Retail Instalment Sales Acts expressly include chattel mortgages and leases which are security devices,²² the term "retail instalment contract" by which the chattel paper involved must be designated and the provisions which must be included and excluded, create the problem of how the secured creditor is to perfect his security interest. Traditional rigid construction of filing requirements may render a "retail instalment contract" filed as a chattel mortgage or lease unperfected against third parties.²³ By omission, the Instalment Sales Acts leave this to existing legislation and decisions. Problems of this sort would not arise under the UCC, since formal distinctions between secured transactions are abandoned in favor of a functional distinction.²⁴ This, perhaps, has little direct effect upon the credit buyer, but indirectly he may suffer from over-extension of his indebtedness induced by creditors who have neither constructive nor actual notice of another security interest in the same goods. Signing on the line with the "X" is easier for a buyer than a consideration of the personal economic or legal ramifications involved.

"Add-ons." Retail Instalment Sales Acts attempt to curb another evil, "add-ons",²⁵ while other acts usually do not purport to deal with this problem.²⁶ In brief, the Instalment Sales Acts limit extension of security of prior contracts to new contracts and provide for ratable application of instalment payments to old and new retail instalment sales

²⁰ See UCC §§ 9-104(j) and 9-313(2)-(5); Uniform Conditional Sales Act § 7.

²¹ UCC § 9-313(1).

²² See note 6 supra.

²³ See *People v. Burns*, 161 Mich. 169, 125 N.W. 740 (1910).

²⁴ "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation, § 1-201. ". . . [T]his Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures. . . ." § 9-102(1).

²⁵ Cal. Civ. Code § 1808.1-6; § 1804.3., N.Y. Pers. Prop. Law § 410. "Add-ons" would seem to be prohibited in New York where a motor vehicle is the subject matter of the contract. N.Y. Pers. Prop. Law § 302(17).

²⁶ Cf. N.Y. Pers. Prop. Law § 45.

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with termination of the security interest in the former when fully paid.²⁷ These contracts take on certain characteristics of "after-acquired" property transactions except that the subsequent purchases must involve a retail instalment sale and not property acquired in some other way.²⁸ Hence, a provision such as that in the UCC which restricts after-acquired consumer goods to acquisitions within ten days²⁹ would either have no bearing or create a conflict of provisions. The Code contemplates an initial security agreement which provides for the after-acquired property,³⁰ while an "add-on" contract in the usual sense includes prior, not subsequent, transactions. In this respect, the seemingly similar language in both exemplary acts tends to differ in effect. The California act³¹ allows the initial contract to provide for adding on subsequent purchases, while the New York act refers only to a subsequent contract in which a previous instalment balance is included.³² When both expressly permit adding the security of prior contracts to that of subsequent, the language is almost identical: ". . . [S]uch [California, 'the'] contract . . . may [California, 'also'] provide that the goods purchased under the previous contract or contracts shall be security for the goods purchased under the subsequent contract. . . ."³³ "The contract" in the California act must refer to that of the immediately prior language in the same section, which is an initial contract allowing for "subsequent add-ons", but the "previous contract" reference in the quoted sentence creates an inconsistency.³⁴ The New York act is at least consistent, for its prior language permits "add-ons" only by subsequent contracts.³⁵ Whatever the construction of these provisions, the protection afforded the buyer is doubtful. In the first place, the seller will be inclined to encourage additional purchases under the "add-on" arrangement and his only duty to the buyer is to make the writing available to him.³⁶

²⁷ Supra note 25.

²⁸ Cal. Civ. Code 1808.1; N.Y. Pers. Prop. Law § 410(1).

²⁹ UCC § 9-204(4)(b). Cf. § 9-108.

³⁰ UCC §§ 9-203(1)(b), 204(1) and (3).

³¹ Cal. Civ. Code § 1808.1.

³² N.Y. Pers. Prop. Law § 410(1).

³³ Cal. Civ. Code § 1808.1 (last sentence); N.Y. Pers. Prop. Law § 410(2).

³⁴ Cal. Civ. Code §§ 1808.1 and 1810 tend to overlap in their contemplation of a series of purchases provided for in an initial contract. The definition of "goods" in the California act and the sentence dealing with security for "add-ons," the former taken from the UCC and the latter apparently taken from the New York act, indicate that the act borrows language from other statutes with the unfortunate results of inconsistency and conflict.

³⁵ N.Y. Pers. Prop. Law § 410(1).

³⁶ Cal. Civ. Code § 1808.4; N.Y. Pers. Prop. Law § 410(1)(d).

Only those who have been injured by the enforcement of such a contract would know what the highly legalized language means in practical results. While the security interest under the prior contract terminates when it is fully paid by allocation,³⁷ a situation is more than remotely conceivable where default occurs only shortly prior to termination. The buyer is not allowed to redeem the collateral of only the prior contract. In fact no provision at all is made for redemption. Under existing statutes, the buyer could be forced to pay the entire amount under the "add-on" contract in order to redeem anything.³⁸ Were this not so, the add-on device would serve little more than to coerce the buyer to make his payments. The acts would do well to clarify redemption statutes or prohibit "add-ons" altogether. As they are, they reflect a less than satisfactory compromise of their very purpose.

Priorities. Were the above not enough, the acts create problems for creditors as well. Since, under both acts, it seems the security interest for a subsequent indebtedness could attach³⁹ only by the subsequent contract (though in California the added debt could be anticipated in the prior contract), an intervening lien would take precedence over the interest arising from the second contract, assuming all perfection requirements were met at the time of the transactions.⁴⁰ The termination of "added-on" security when the balance due under the prior contract is fully paid⁴¹ confirms this conclusion. The collateral of the first contract at that point ceases to secure the subsequent indebtedness. It is probable, however, that unless the security is actually added to the subsequent contract, consolidating all prior and present indebtedness, it will be lost to an intervening lienor.⁴² This problem would probably not arise in mere refinancing to extend

³⁷ Cal. Civ. Code §§ 1806.4, 1806.2; N.Y. Pers. Prop. Law §§ 410(2), 412.

³⁸ Uniform Conditional Sales Act § 18. California has added redemption provisions to its Retail Instalment Sales Act but makes no provision for redemption under an "add-on" contract. Cal. Civ. Code § 1812.2.

³⁹ "Attach" is here used in the UCC sense, § 9-204(1), requiring an agreement that it attach, that value is given, and that the debtor has rights in the collateral.

⁴⁰ The same result would be reached under UCC §§ 9-107, 301(1)(c) and (2), 312(4) and (5)(a) and (b).

⁴¹ Cal. Civ. Code § 1808.1; N.Y. Pers. Prop. Law § 410(2). New York adds "or (b) twenty per centum of the time sale price of the goods purchased under the subsequent contract has been paid, whichever event first occurs."

⁴² Cal. Civ. Code § 1806.4 and N.Y. Pers. Prop. Law § 412 provide for cancellation of the contract and release of security when terms are performed. "The contract" referred to in these provisions would be the subsequent consolidated contract and whatever security was included in it. In essence, it would be a contract completely substituting for the former ones. Cf. Uniform Conditional Sales Act § 1, "Conditional sale" and § 16; Cal. Civ. Code § 1812.2; UCC § 9-404.

maturity and alter payments and charges, since this would amend the original contract, which would remain in force.⁴³

Revolving accounts. The California act specifically, and by cross reference to other provisions, allows a "retail instalment account" which contemplates a series of instalment sales under an "account" agreement or, apparently, the conversion of prior indebtedness to an instalment payment plan.⁴⁴ Where this arrangement involves security,⁴⁵ it closely resembles an after-acquired property transaction which may conflict with judicial hostility toward, or other statutory restrictions upon, such clauses.⁴⁶ Otherwise, the security interest would presumably be perfected by virtue of the "account agreement" even though it attached subsequently. Under the usual third-party protections statute, the perfection of the security would relate back to the first agreement and thus the security interest would be prior to an intervening lien.⁴⁷ This is the statutory scheme for "revolving accounts" and similar arrangements whereby an instalment payment automatically extends that much additional credit to the buyer. The theory is that once the buyer is on the merry-go-round, he can never get off. The facility with which the seller makes the credit available and the tempting inducements he offers insure the success of the ride. The California statute merely legalizes the practice. In New York, any instalment contract involving security is, by definition, a "retail instalment contract" regardless of form and, in view of the New York act's position as to "add-ons", and the "entire agreement" requirement,⁴⁸ it would seem that the "instalment account" for after-acquired collateral would not be permitted.⁴⁹

⁴³ Refinancing is allowed by both acts with method and charges restricted. Cal. Civ. Code § 1807; N.Y. Pers. Prop. Law § 409.

⁴⁴ Cal. Civ. Code §§ 1802.7 and 1810.1-.11.

⁴⁵ Allowed by Cal. Civ. Code § 1810.8. Allocation of payments to prior purchases is the same as in an "add-on" transaction. Cal. Civ. Code §§ 1810.8, 1808.2.

⁴⁶ See Callahan v. Auburn Production Credit Ass'n, 240 Ala. 104, 197 So. 347 (1940); UCC § 9-204.

⁴⁷ See N.Y. Lien Law § 230; Uniform Conditional Sales Act §§ 4 and 5; UCC §§ 9-204, 312(6).

⁴⁸ N.Y. Pers. Prop. Law § 402(2).

⁴⁹ A chattel mortgage on inventory requires notice to be given creditors. N.Y. Lien Law § 230a. Lien Law § 230b deals specifically with, among other goods, mortgages on crops to be grown. Certain non-secured credit transactions are treated separately in the New York Retail Instalment Sales Act. Merchandise certificates to be exchanged for goods may be issued, but with limitations upon charges, full disclosure of terms to the buyer, and restriction of those terms. N.Y. Pers. Prop. Law § 402A. "Retail instalment credit agreements" include a merchandise certificate or other arrangement whereby a buyer agrees to pay his "outstanding indebtedness" in instalments. Form, terms, and charges are restricted. N.Y. Pers. Prop. Law §§ 401(8) and 413. A retail instalment obligation is simply an agreement of the buyer to pay for goods or services in instalments. Restrictions are similar. N.Y. Pers. Prop. Law §§ 401(7) and 402(7).

PROVISIONS OF CONTRACT AND THEIR EFFECT

Retail Instalment Sales Acts have as their ostensible purpose curtailing freedom of contract. Form and terms are carefully restricted to protect the innocent buyer from the seller's fine print, especially in the face of the effect of the parol evidence rule upon an integrated contract⁵⁰ or, suiting the seller's purpose, the lack of effect upon the multi-document, non-integrated contract.⁵¹ Some statutes, such as those giving holders in due course cut-off powers,⁵² operated to the detriment of the buyer.

Form in other statutes. The Uniform Commercial Code adopts an extremely liberal policy toward freedom of contract, allowing the parties to agree to choice of law,⁵³ to vary rights and remedies otherwise imposed by law,⁵⁴ and to waive those same rights and remedies.⁵⁵ On the other hand, the UCC adds to its many "unless otherwise agreed" provisions "subject to any statute" in at least one instance,⁵⁶ which allows specific intrusion of the Retail Instalment Sales Act. In spite of the open door of section 9-203(2): "A transaction, although subject to this Article, is also subject to [designated Retail Instalment Acts], and in case of conflict between the provisions of this Article and any such statute, the provisions of such statute control . . .," conflict can well arise as to when there is in fact a conflict.⁵⁷ Other existing statutes, unless amended in keeping with the Instalment Sales Acts, seldom limit the form or terms of the contract involved, and then usually by indirection.⁵⁸ Such limitations do not have as their purpose the protection of the buyer, and they leave open no doors for Retail Instalment Sales Acts, the latter acts providing only an occasional keyhole for the others.

The California and New York acts both provide that the retail instalment contract, both in form and terms, shall be the entire agree-

⁵⁰ See *Valley Refrigeration Co. v. Lange Co.*, 242 Wis. 466, 8 N.W.2d 294 (1943) and UCC § 2-202.

⁵¹ See Restatement, Contracts §§ 239-240 (1932).

⁵² See Uniform Negotiable Instruments Law (hereinafter cited as NIL) §§ 52, 57 and 58; UCC §§ 3-302, 3-305, 3-306.

⁵³ UCC § 1-105(1).

⁵⁴ UCC § 1-102(3).

⁵⁵ UCC §§ 9-206(1), 9-318(1); cf. § 2-316.

⁵⁶ UCC § 9-201.

⁵⁷ See, e.g., UCC § 9-507 and "Remedies and Penalties," *infra*.

⁵⁸ Uniform Conditional Sales Act §§ 1-3 describe the contract in broad terms; chattel mortgage acts makes no reference as to form. N.Y. Lien Law § 230. New York, however, added remedial provisions and a brief form similar to those provided in its conditional sales act, as amended, Lien Law § 239 a-1, and to the form in the Retail Instalment Sales Act § 402. Motor Vehicle Certificate of Title Acts do not prescribe form, see New Jersey Stats. Ann. § 39:10-11 and 15.

ment of the parties,⁵⁹ thus excluding separately executed security agreements⁶⁰ and instruments evidencing the indebtedness.⁶¹ This, in effect, supersedes the application of the parol evidence rule.⁶² Of course, in cases of refinancing or consolidation there may be more than one writing, but each writing, as well as the combination of writings, must comply with the statute.⁶³

Disclosure. The form of retail instalment contracts is prescribed from the label, "RETAIL INSTALMENT CONTRACT,"⁶⁴ to the size of type.⁶⁵ The items to be set forth have as their purpose full disclosure of the subject matter and all amounts for which the buyer is liable, without hidden charges or lumping of charges.⁶⁶ In fact, there may be no blanks in the document whether an item is part of the contract or not.⁶⁷ The buyer is warned at the bottom in bold type, "Do not sign this agreement before you read it or if it contains any blank space."⁶⁸ The buyer is entitled to a copy of the complete agreement and the seller must deliver it in person or by mail.⁶⁹

The disclosure requirements of Retail Instalment Sales Acts do proscribe certain obvious evils, such as blanks to be filled in by the seller after signing, usually with added charges, and the lack of a visible total of obscure smaller amounts to be paid. However, it is doubtful that the anxious buyer will read the agreement carefully, if at all, or even understand it if he does; nor will he be inclined to seek legal advice in advance. Typical of the inconsistency and inadequacy of remedies available to the buyer are those available upon the seller's failure to deliver a copy of the agreement to the buyer.

⁵⁹ Cal. Civ. Code § 1803.2(a); N.Y., Pers. Prop. Law § 402(2).

⁶⁰ N.Y. Pers. Prop. Law § 403(3)(c). See *In re Finkelstein*, 11 Misc. 2d 938, 174 N.Y.S.2d 126 (Sup. Ct. 1958).

⁶¹ N.Y. Pers. Prop. Law § 403(1) (indicates separate instruments may be allowed, but they must be non-negotiable); Cal. Civ. Code § 1803.2(a) (separate instruments expressly prohibited).

⁶² This is implied from the emphatic language invalidating a separate assignment of wages in *In re Finkelstein*, supra note 60. Cf. UCC § 2-202.

⁶³ Cal. Civ. Code §§ 1807.1-.3, 1808.1-.6 (cf. "instalment accounts," §§ 1810.1-.11); N.Y. Pers. Prop. Law §§ 409, 410 (cf. "retail credit obligation," §§ 402(7), 402A).

⁶⁴ Cal. Civ. Code § 1893.2(b); N.Y. Pers. Prop. Law § 402(2)(a).

⁶⁵ Cal. Civ. Code § 1803.2 (agreement must be in eight point type, label in ten point bold type); N.Y. Pers. Prop. Law § 402(1), (2).

⁶⁶ Cal. Civ. Code § 1803.4 (add-ons involve a "memorandum" with the terms of the consolidated contract, to be sent to buyer before first instalment is due, § 1808.3); N.Y. Pers. Prop. Law § 402(2)(b), (4) (However, a subsequent contract of consolidation or add-on need not contain the amount of credit service charge, the time balance, or the time sale price, but the rate of service charge must be stated. These may be included or attached after the buyer signs, but within ten days. § 410(1)(c) and (d).

⁶⁷ Cal. Civ. Code § 1803.2(c); N.Y. Pers. Prop. Law § 402(2)(b).

⁶⁸ Cal. Civ. Code § 1803.7; N.Y. Pers. Prop. Law § 405.

⁶⁹ N.Y. Pers. Prop. Law § 405.

New York allows cancellation and return of payments and trade-ins where the buyer has not received the goods or services,⁷⁰ but apparently leaves him to the penalty provisions if the goods have been received.⁷¹ California, in addition to the penalties, holds the buyer responsible only for the cash sale price until the copy is delivered.⁷²

Assignee's "cut-off" power. Most significant for this analysis are the restrictions upon the terms of the contract other than upon the chargeable items. Negotiable instruments are in effect prohibited,⁷³ the buyer, it would at first seem, thus being allowed to retain and assert his defenses against the seller and his assignees.⁷⁴ However, should a seller, not complying with the statute, employ a negotiable instrument which is negotiated to a holder in due course,⁷⁵ the buyer's remedies would be solely against the seller or perhaps his immediate assignee, for the Instalment Sales Acts do not go so far as to impair the free flow of negotiable instruments by destroying their most important attribute.⁷⁶ The Acts contemplate only one assignment, to a "financing agency,"⁷⁷ which then becomes the "holder" of the contract.⁷⁸ While the contract may contain no blanket waiver of defenses against the assignee,⁷⁹ generally allowed by other statutes,⁸⁰ a qualified waiver is allowed which can render both the negotiable instrument and waiver prohibitions practically nugatory. The contract *may* contain a waiver of defenses against an assignee for value, in good faith, and without notice, who receives no notice of the defenses within ten days of the mailing of the notice of assignment with full details of the contract to the buyer. In New York the notice must warn the buyer that if there is error in the statement, or if he has not received the goods, or "if the seller has not fully performed all his agreements with you," the assignee must be notified within ten days; "Otherwise, you will have no right to assert against the assignee any right of action

⁷⁰ N.Y. Pers. Prop. Law § 414.

⁷¹ See "Remedies and Penalties," *infra*.

⁷² Cal. Civ. Code §§ 1803.7, 1812.7.

⁷³ See note 61 *supra*.

⁷⁴ Cal. Civ. Code § 1804.2; N.Y. Pers. Prop. Law § 403(1).

⁷⁵ See note 52 *supra*. The Acts use the negotiable instrument law term "holder" to mean the seller or an assignee. Cal. Civ. Code § 1802.13; N.Y. Pers. Prop. Law § 401(15).

⁷⁶ See Hawkland, Bills and Notes 3 (1956).

⁷⁷ "Financing agency" is a person engaged in purchasing retail instalment contracts, including a bank, trust company, private banker, or investment company. N.Y. Pers. Prop. Law § 401(18) (pledgee of a number of contracts to secure a loan excluded); Cal. Civ. Code § 1802.16.

⁷⁸ See note 75 *supra*, for definition of "holder."

⁷⁹ Cal. Civ. Code § 1804.1(a); N.Y. Pers. Prop. Law § 403(3)(a).

⁸⁰ Uniform Conditional Sales Act §§ 2 and 26; UCC §§ 9-206(1), 9-318(1). Cf. NIL § 5(3).

or defence arising out of the sale which you might otherwise have against the seller."⁸¹ Since the contracts are usually assigned, by pre-arrangement, to a financing agency almost simultaneously with execution, the buyer has very little time to discover the seller's defaults. This is especially true of defects under an express or implied warranty⁸² which may not appear for some time. An important remedy, rescission, would seem to be lost to the buyer after that time, along with the coercion for adjustment which its threat provided.⁸³ Thus, in effect, when a good faith assignee enters the picture, the buyer's rights are actually lessened since even defenses arising before the assignment and notice, normally available against an assignee, are cut off ten days after notice of the assignment. Seemingly, this would be true of the forfeiture of charges provided as a penalty for non-compliance with the Acts.⁸⁴ It is absurd to expect a buyer to know within ten days whether, for example, the complex computation of a service charge is correct. Further, the acts allow a non-complying error to be corrected by the seller or holder within ten days of a notice given at any time,⁸⁵ but a good faith assignee would not be inclined to surrender his advantage and, if so, it becomes a gamble whether or not the buyer ever discovers and gives notice of an error. Of course, many factors may affect the good faith of the assignee. Shouldn't he be required to check the provisions of the contract against the requirements of the Act? What is his past experience with assignments from the same seller? At what discount did he buy the contract? But the acts do not define good faith. Certainly a test as liberal as that used with regard to a person's status as a holder in due course of negotiable instruments should not be applied.⁸⁶ Unfortunately, the seller and financing agency seem to have complete freedom of contract in their dealings.⁸⁷

Annual statement and acceleration. The buyer is entitled once each year to a statement of account informing him of the dates and amounts of payments and the unpaid balance.⁸⁸ The Uniform Com-

⁸¹ N.Y. Pers. Prop. Law § 403(3)(a) (services to be rendered more than ten days after notice of assignment excepted); Cal. Civ. Code § 1804.2 (fifteen days allowed and form of notice not prescribed).

⁸² Sales warranties are retained in secured transactions for sale of goods by the Uniform Conditional Sales Act § 2 and UCC § 2-102.

⁸³ See Uniform Sales Act § 69(1)(d), (3), (4), (5) and UCC §§ 2-608, 2-711.

⁸⁴ See "Remedies and Penalties," *infra*.

⁸⁵ Cal. Civ. Code § 1812.8; N.Y. Pers. Prop. Law § 414(3).

⁸⁶ See NIL §§ 52, 56; UCC §§ 3-302, 3-304; *Benton v. Sikyta*, 84 Neb. 808, 122 N.W. 61 (1909).

⁸⁷ Cal. Civ. Code § 1809.1 ("on such terms and conditions and for such price as may be mutually agreed upon."); N.Y. Pers. Prop. Law § 411(1).

⁸⁸ Cal. Civ. Code § 1806.2; N.Y. Pers. Prop. Law § 407.

mercial Code makes a similar provision.⁸⁹ The creditor, however, need not provide the statement absent the buyer's unlikely request.

Maturity of the obligation may not be accelerated arbitrarily or without reasonable cause, but this is vague language likely to create litigious questions of fact and controversies not unlike those with reference to the negotiability of instruments.⁹⁰ Mere default is excepted and hence gives some clue as to what constitutes a "reasonable cause." The Commercial Code has liberalized acceleration of the obligation evidenced by a negotiable instrument to the extreme of allowing any acceleration.⁹¹ This may be a sound commercial practice where parties involved are familiar with commercial usage.⁹² One of the reasons negotiable instruments are precluded in retail instalment sales transactions under the Acts is to protect the non-business buyer who is not familiar with commercial practices. A commercially reasonable cause may be unreasonable as to a buyer of a washing machine. Acceleration upon default alone would provide ample protection to the secured seller or financing agency. An allowed delinquency charge is optional and, if provided in the contract, would be cumulative with acceleration upon default.⁹³

Prepayment and finance charges. The buyer may pay the entire sum before maturity and is entitled to a proportional refund of charges and insurance premiums included.⁹⁴ This is true also of refinancing before maturity: the sum refinanced is with refund credit on the amount of the original contract.⁹⁵ The credit is allowed whether or not the buyer is in default or maturity is accelerated.⁹⁶ Again, this sort of restriction seems fair enough on the surface, but it is simply the end result of a statutory pattern giving sanction to charges which, prior to the Acts, were usurious in fact although not always

⁸⁹ UCC § 9-208 (debtor may send his statement of the transaction, including collateral, once each six months for approval or correction within two weeks). Chattel mortgage acts do not provide for account statements. See, e.g., N.Y. Lien Law § 230. Uniform Conditional Sales Act § 18 provides for buyer's demand of a statement only for purposes of redemption.

⁹⁰ Cal. Civ. Code § 1804.1(b); N.Y. Pers. Prop. Law § 403(3)(b). Under the NIL acceleration has been allowed where there is an objective test which does not include the holder's deeming himself insecure. NIL § 4(2), (3); see Hawkland, Bills and Notes 62 (1956).

⁹¹ UCC § 3-109(1)(c).

⁹² See UCC § 3-109, comment 4; but cf. the requirement of good faith, § 1-208.

⁹³ Cal. Civ. Code § 1803.6; N.Y. Pers. Prop. Law § 402(6). See "Remedies and Penalties," *infra*.

⁹⁴ Cal. Civ. Code § 1806.3; N.Y. Pers. Prop. Law § 408.

⁹⁵ Cal. Civ. Code § 1807.2; N.Y. Pers. Prop. Law § 409.

⁹⁶ Cal. Civ. Code § 1806.3; N.Y. Pers. Prop. Law § 408.

considered such by the law.⁹⁷ In the first place, finance charges are based upon percentage rates applied progressively or regressively according to the amount or the age of the chattel involved⁹⁸ as if higher rates for smaller amounts or second-hand chattels are invariably justified. The rates tend to be higher than those which reputable and competitive sellers and financing agencies charged prior to the Acts. The Acts provide an incentive to make the price inducingly competitive while charging the no longer questionable maximum rates. The lower price is thus often illusory.

Upon prepayment, buyers are often shocked to learn that the amount of refund is not a simple interest computation, but is based upon a sum-of-digits fraction.⁹⁹ Further, if the earned service charge upon rebate is less than the minimum charge, the minimum charge may be retained.¹⁰⁰ As a result, extremely high charges upon small purchases are exacted and the thrifty buyer is deterred from saving toward prepayment which, after a relatively early period, would be economically impracticable.¹⁰¹

REMEDIES AND PENALTIES

The penalties provisions tend to supplement the other civil remedies afforded the buyer or seller. Wilful violations of the Retail Instalment Sales Acts constitute misdemeanors and if such occur, the contract is probably unenforceable against the buyer,¹⁰² except where the holder is a good faith assignee.¹⁰³ A prohibited term is void, but

⁹⁷ The legal rate of interest in New York for banks and trust companies is six per centum per annum, N.Y. Banking Law § 108. See *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952).

⁹⁸ California multiplies progressive rates times the number of months from date of execution to the date of the last instalment payment: Up to \$1000, 5/6 of 1 percent; upon the excess over \$1,000, 2/3 of 1 percent, with minimum fees of \$10 if the contract is for eight months or less, or \$12 if for a longer time. Cal. Civ. Code § 1805.1. New York provides for ten per centum per annum up to \$500, and eight per centum upon the excess, with the same minimum fees as California. N.Y. Pers. Prop. Law § 404. Upon automobiles, the rate progresses according to age, from seven percent for new cars to thirteen percent for automobiles more than two years old. N.Y. Pers. Prop. Law § 303.

⁹⁹ Upon a twelve-month contract, the denominator would be 78. Thus, refund upon prepayment at six months would not be $\frac{1}{2}$, but $\frac{21}{78}$.

¹⁰⁰ See note 98 supra. In New York, for example, there would be no rebate upon any one year contract of up to \$120 at any time prepayment was made.

¹⁰¹ In the simple case of the \$1000 contract for one year with nothing but the service charge of \$80 added, prepayment at nine months would allow a rebate fraction of $\frac{6}{78}$ or 1.13 or, in dollars, \$6.15.

¹⁰² N.Y. Pers. Prop. Law § 414(1); Cal. Civ. Code § 1812.6. See *Bratta v. Caruso Car Co.*, 166 Cal. App. 2d 661, 333 P.2d 807 (1958), 1 B.C. Ind. and Comm. L. Rev. 102 (1959).

¹⁰³ See "Assignee's Power of 'Cut-off'," supra.

the remainder of the contract terms are enforceable.¹⁰⁴ It is not clear what effect this has upon the buyer's right to recover charges for violation,¹⁰⁵ but neither the criminal sanction nor this severability provision should preclude the buyer from this remedy. Otherwise, a material and non-material violation test must be read into the Acts with resultant uncertainty.¹⁰⁶ Strict compliance is essential to achieve the intended protection to the buyer.

Thus, if any violation allows the buyer this recovery, then even though the buyer is in default, or maturity is accelerated, or repossession effected, he would be entitled to recover the charges, including delinquency charges, if he could show a violation. A buyer redeeming repossessed goods would have to pay only the unpaid balance less all forfeited charges. However, it appears that "any failure to comply" with the Act, presumably even wilful failures, may be corrected by the seller or holder within ten days of notice.¹⁰⁷ This should not allow the seller or holder who gambled against discovery to correct the error while enforcement is in progress thereby defeating the sanctions of the Act; on the other hand, the clever buyer should not be entitled to withhold notice until then in order to reap his harvest. The correction provision is capable of reducing the Acts to mere formalities.

The holder is entitled to collect a single prescribed delinquency charge when there has been default for "not less than ten days."¹⁰⁸ This is no doubt in addition to his other remedies, such as repossession, although the "not less" clause has the characteristics of a grace period. Under the Uniform Conditional Sales Act the seller may retake possession immediately upon default, in which case he could not collect the delinquency charge,¹⁰⁹ or he may give notice to the buyer of intent to retake twenty to forty days before retaking.¹¹⁰ In the latter case, a notice given immediately upon default would allow the buyer to pay within ten days without the delinquency charge; a notice given after ten days would allow the holder to collect the charge

¹⁰⁴ Cal. Civ. Code § 1804.4; N.Y. Pers. Prop. Law § 403(3).

¹⁰⁵ N.Y. Pers. Prop. Law § 414(2); Cal. Civ. Code § 1812.7 (non-complying party may not recover the service charges from buyer and buyer may recover all that he has paid).

¹⁰⁶ See *General Motors Acceptance Corp. v. Kyle*, 351 P.2d 768 (Cal. 1960).

¹⁰⁷ Cal. Civ. Code § 1812.9; N.Y. Pers. Prop. Law § 414(3); (error in service charge on consolidated or "add-on" contract may not be corrected, Cal. Civ. Code § 1812.9; N.Y. Pers. Prop. Law § 414(4)).

¹⁰⁸ N.Y. Pers. Prop. Law § 402(6); Cal. Civ. Code § 1803.6.

¹⁰⁹ Uniform Conditional Sales Act § 16, but seller must hold repossessed goods for ten days after retaking, § 18.

¹¹⁰ Uniform Conditional Sales Act § 17.

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from a buyer redeeming before the repossession. The notice must contain a statement of the buyer's rights or, if retaking occurs without notice,¹¹¹ a statement of the sum due must be given the buyer upon his demand under penalty of forfeiture, plus damages to the buyer.¹¹² The Code makes no provision for notice of intent to retake, the right accruing immediately upon default.¹¹³ Further, the secured party need not hold the repossessed collateral for any length of time and, in the case of consumer goods, where the buyer has paid at least sixty per cent of the sum due, he must dispose of the collateral within ninety days.¹¹⁴ Redemption is allowed at any time prior to disposition.¹¹⁵ Curiously, the Code penalizes the secured party for failure to comply with Part 5 of Article 9 by imposing a forfeiture of the credit service charge plus an additional sum¹¹⁶ which tends to overlap with the similar penalties of the Retail Instalment Acts.

CONCLUSION

From the above analysis it should be apparent that the two exemplary Retail Instalment Sales Acts were enacted with little correlation to existing legislation. They have imposed new, complex, and often conflicting terminology and requirements upon the secured sales transaction involving an innocent and unwary buyer. In more instances than not, the buyer, who is the object of their shelter, receives less protection than without them. The buyer's need for protection is obvious, but a great deal more thought, research and draftsmanship must go into legislation which will meet his need. Merely drawing the pushers from the street corners and the public view will curtail neither their activities nor the addiction which they impose and sustain. Uniform legislation is called for.

¹¹¹ Id.

¹¹² Uniform Conditional Sales Act § 18. See "Annual Statement and Acceleration," *supra*.

¹¹³ UCC § 9-503.

¹¹⁴ UCC §§ 9-504(1), 9-505(1).

¹¹⁵ UCC § 9-506.

¹¹⁶ UCC § 9-507(1).