USURY IN INSTALMENT SALES*

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If A, having no cash at hand, wishes to buy some furniture, three ways of financing the sale are available. (1) He may borrow from a third person and pay the seller in cash. (2) He may buy on the instalment plan at a credit price determined by adding the interest in a lump sum to the cash price. (3) Or, buying on the instalment plan, he may obligate himself to pay the seller the cash price, at an interest rate expressed as such. If the loan bears excessive interest1 it is uniformly held usurious. If, in the second transaction, usurious interest is lumped in the credit price, it is nevertheless sustained on the ground that the vendor may set one price for cash and another for credit.2 And because the third transaction is in substance like the second, the majority of courts conclude that, regardless of the form which the reservation of excessive interest takes, there can be no usury predicated upon a sale.3

Viewed from the standpoint of A, all three transactions are in essence the same and fulfill the same purpose; they enable him to gain present goods in return for his promise to pay in future goods. What are the logical and legal grounds for distinguishing between interest on a loan and interest on a credit sale, between interest expressly reserved and interest lumped in a credit price? Are these distinctions historically and economically sound? The problem is of more than academic interest because instalment selling has rapidly come to play a major rôle4 in financing consump-

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1The writer employs the term “excessive interest” throughout the article in the sense of exceeding the rate of interest fixed by law for transactions to which the law is applicable.
2Hogg v. Ruffner, 66 U. S. 390 (1861); Gilbert v. Hudgens, 92 Colo. 571, 22 P. (2d) 858 (1933). For additional cases, see 66 C. J. 184; 27 R. C. L. 214.
4CLARK, FINANCING THE CONSUMER (1930) 12: “The expansion of instalment credit from a volume of $600,000,000 to $4,000,000 a year in twenty years shows to what extent indirect credit is being given to the masses of the people.” See 1 SELIGMAN, ECONOMICS OF INSTALMENT SELLING (1927) I et seq.; GOLDMAN, PROSP'RTY AND CONSUMER CREDIT (1930).
tion. Our industrial system depends upon mass production; mass production in turn demands a mass market. As a corollary, "wide sales require wide credit—mass buying demands mass finance." The wisdom of instalment selling may be a matter of controversy, but its continued existence as an important economic factor, even since the "crash," is an indisputable fact. This rapid expansion of instalment selling has left a wide area of credit abuses uncontrolled.

The judicial exclusion of credit sales from the operation of usury laws is one of the phenomena resulting from the bias of courts against usury legislation. That bias is a complex of many factors, chief among which are the judicial tendency to adopt a construction that prevents a forfeiture, the impact on judicial interpretation of the *laissez faire* doctrine that a man may do as he will with his own, the unscientific nature of a uniform statutory interest rate, coupled with a perception of the fact that not all credit transactions stand in need of social control. A statutory maximum rate, as was first pointed out by Turgot, is unscientific; it does not take cognizance of the wide variation in costs and risks of making loans; nor does it recognize the re-

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6 Clark, op. cit. supra note 4, at 2.

4 Lubin, *What Delays Revival* (1931) 67 New Republic 92; Ayres, Instalment Debt and Business Revival (1931) 67 New Republic 288 (A reply to Lubin, with rejoinder). *The Anticipated Dollar* (Jan. 1933) 7 Fortune 68, concurs with Ayres in the statement that the "average installment contract was for one year. Hence the outstanding installment debt has been liquidated several times since the crash."

7 Froman, *Cost of Instalment Buying* (1933) 11 Harv. Bus. Rev. 227, believes that about "15% of all goods bought at retail are purchased on the installment plan. This is exclusive of houses, life insurance, and stocks and bonds, . . ." *The Anticipated Dollar, supra* note 6, lists the total of instalment credit in 7 industries at $1,500,000,000, divided as follows: Automobiles, 62.5 per cent; electric refrigeration, 90 per cent; radio, 75 per cent; furniture, 70 per cent; sewing machines, 90 per cent; vacuum cleaners, 85 per cent; furnaces, 80 per cent. A news item on the financial page of the Chicago Daily News, Dec. 26, 1934, states that instalment buying is on the increase.

8 Nugent and Henderson, *Instalment Selling and the Consumer: A Brief for Regulation* (1934) *Annals* 93, 101-102: "The goods and services customarily sold on installments have been associated with highly competitive markets of the *laissez faire* class. The sale of credit, on the other hand, has long been recognized as a function requiring supervision for the protection of the consumer. But by combining the two services, the sale of credit has escaped any vestige of supervision. . . . The necessitous and un-thinking borrower has been protected in the majority of states by the licensing, bonding, and supervision of persons engaged in making small loans. The rise of instalment selling has opened wide gaps in this regulatory armor and exposed large groups of consumers to abusive practices." See Whitaker, *Finance Company Racket* (1931) 33 Am. Mecury 433; Foster, *To Tell You the Truth* (1933) 152 Atl. Monthly 321; Foster, *Easy Payments, A Fable for Consumers* (1934) 95 Scribner's Magazine 47. In *Rate Aspects of Instalment Legislation, infra*, p. 189. Dr. Foster urges that instalment credit rates be expressed in terms of an interest rate on the unpaid balance.

9 No citations are needed to support the well-known proposition that courts favor a construction which precludes a forfeiture. A few familiar examples will serve to illustrate the tendency. Courts construe an instrument as a chattel mortgage rather than as a conditional sale, in order to preserve a right of redemption; or a devise is interpreted to contain a covenant instead of a conditional limitation, to prevent forfeiture.

10 The extent to which *laissez faire* doctrines influenced 18th and 19th century usury concepts is best illustrated by the words of Bentham: " . . . no man . . . acting freely and with his eyes open, ought to be hindered, with a view to his advantage, from making such a 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." Bentham, *Letters in Defense of Usury* (1816) 9 Works (Bowring's ed. 1839) 1. 8 Holdsworth, *History of English Law* (1925) 100: " . . . this century has seen the state resume a control, which it had abandoned under the influence of the a priori theories of Bentham, and of the pseudo-scientific laws of the school of *laissez faire* economists."
spontiveness of money rates to scarcity and abundance. Moreover, as Bentham noted, a statutory maximum fails of its purpose for it does not actually control the market rate of interest. In response to such argument, England removed all bars to interest-taking in 1853. Only a half-century was needed to show that the necessities borrower could not be left to the untrammeled exactions of the lender; consequently, various statutes seeking to remedy this defect were enacted. The states, while retaining the general statutory maximum, have attempted to grapple with the problem by Small Loans Laws, which recognize the plight of the needy borrower and enable the lender to obtain a return commensurate with the costs and risks of making small loans. Credit sales, however, have been handled by the courts, and, impelled by the factors above enumerated, the courts have adopted a policy that has made usury legislation an insignificant factor in the regulation of the practices attendant upon instalment selling. Even in the minority states which strike down the express reservation of excessive interest on a sale, the statute may be evaded merely by adding the interest to the cash price to form a credit price. As a result, credit sales now enjoy practically complete immunity from regulation, and there have been many instances of glaring credit abuses.

11 Turgot, Memoire sur les Prêts d'Argent, §56; Stephens, Life of Turgot (1895) 70.
12 Bentham, op. cit. supra note 10; Ryan, Usury and Usury Laws (1924) 52-57.
14 8 Holdsworth, loc. cit. supra note 10: "In this country a very short experience of the consequences of allowing lenders and borrowers to make what bargains they please has been sufficient to demonstrate this fact; [i.e. that social control is essential to save those in need of pecuniary assistance from grievous oppression] and this century has seen the state resume a control. . . ." The statement by Lipscomb, C. J. of Alabama, after he had witnessed the consequences of repeal, further illustrates the point. "It was feared that much of our monied capital would leave the country if the restrictions imposed by the Act of 1805 should not be removed. It was again and again asked [re-echoing the Benthamite arguments] why not permit the holder of money to sell or hire it for the best price it will command—nobody ever thought of restraining the planter in the sale of his cotton, or the farmer of his grain—why should not contracts for the loan of money be as free and unrestrained. I was a member of the Legislature when the act of 1818 [removing restrictions on the taking of interest] was passed, and was prepared to give it all the support in my power. . . . Although I cannot now see any objection to it in theory, I readily admit that its effects have been deleterious in the extreme." Henry v. Thompson, Minor 209 (Ala. 1824).
15 English Money Lender's Act, 63 & 64 Vict. c. 51 (1900).
16 For Uniform Small Loans Law and Digest of the State Small Loans Laws, see Ryan, op. cit. supra note 12, at 222-231, and, for discussion of such laws, at 127-157. It is worth noting that competition has reduced the interest rate collected under such laws. Clark, op. cit. supra note 4, at 227: " . . . the profitable conduct of this business . . . in states with a 3 per cent maximum and the reduction to 2½ per cent by the Household Finance Company . . . raise the presumption that 3½ per cent may now be higher than is economically necessary."
17 See Indiana Dept. of Financial Institutions, Report on Indiana Consumer Finance Agencies (1934) App. II, which quotes from the report of an investigation by the Pollak Foundation for Economic Research. There interest charges are found running as high as: 51.8 per cent on mechanical refrigerators; 55.5 per cent on furniture, 93.3 per cent on radios, 106.1 per cent on auto tires (where the dealer quoted a rate of 10 per cent), 68.6 per cent on domestic ranges; 103.7 per cent on men's suits. However, the standard, high grade finance companies' rates on long term contracts are considerably lower. Froman, supra note 7, at 228, as an example of high rates, cites the purchase "of a $20 article . . . from one of our largest mail-order houses" where the interest rate runs to 86.6 per cent. He later comments that "some firms advertise 'No increased charges for time payments'. In most cases such firms are either deceiving their
In view of the movement, which is gaining momentum, to subject instalment selling practices to control, it seems desirable to reexamine the economic and historical bases for making the distinctions which courts have followed in the application of usury statutes, and to consider whether there may not yet be a part to be played by such statutes in the present movement.

**Social and Economic Factors**

Any attempt to appraise the propriety of the distinction between a loan and a sale on credit must take into account the social purpose that has fostered usury legislation. It is frequently said that this purpose is the "prevention of extortion and unjust oppression by unscrupulous persons who are ready to take advantage of the necessities of others." While such dicta may be susceptible of the interpretation that the courts will intervene to declare a loan usurious only when the borrower was driven by desperate necessity, the practice is to the contrary. The courts do not weigh the degrees of necessity which impel a borrower to seek a loan. If excessive interest is reserved, a loan to pay for household necessities and one to pay for a yacht are equally usurious. It is to be noted also that early usury laws did not purport to protect only the seeker after credit who borrowed money in order to keep the wolf from the door; on the contrary they outlawed all transactions where interest was taken.

An apt illustration is furnished by the statute 21 Jac. I, the preamble reading, "Whereas . . . divers subjects of this kingdom, as well the gentry as merchants, farmers and tradesmen, both for their urgent and necessary occasions, for the following their trades, maintenance of their stocks, have borrowed money, wares, etc." It may be said that in construing a modern usury statute, although the court must follow the letter of the statute when its meaning is clear and loans must therefore fall within its purview regardless of the necessities of the borrower, the fact that the greater number of instalment sales, i.e. the lump credit price transactions, are not strictly within the letter of the statute, and are not entered into under pressure of necessity, could be urged as a ground for excluding this type of transaction from its operation. Against this it may be argued that a very considerable number of such sales do present the element of discrepancy of bargaining power and, what is more important, this is not the only reason for subjecting such transactions to control. The greater opportunity for deception in the case of the credit sale may well be a circumstance that will offset the fact that in the total of such transactions economic pressure plays a less important part.

That such opportunity for deception does exist is evident. High pressure sales methods, advertising often deceptive in nature, inveigle that segment of the popula-

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18 State v. Griffith, 83 Conn. 1, 74 Atl. 1068 (1910); McArthur v. Schenck, 31 Wis. 673 (1873).
19 For compact summaries of historical data, see 8 Holdsworth, op. cit. supra note 10, at 100-110; Palgrave, Dictionary of Political Economy (1895) 429-432.
20 21 Jac. I, c. 17 (1623).
tion which can least afford to dissipate its purchasing power, into oppressive credit contracts which absorb a considerable part of that purchasing power in finance charges. Present instalment practices often withhold from the buyer knowledge of credit costs or may mislead him as to such costs. Such devices as the lump sum credit price may draw his attention away from the fact that, to take an extreme case, he is paying as much as 106 per cent for the cost of credit; or the interest may be expressed at a low rate, yet because it is computed on the entire unreduced principal throughout the term, the interest charge may be from 20 to 40 per cent. The obscurity that surrounds actual credit costs further impairs the buyer's bargaining position because, lacking such information, he cannot compare that cost with credit costs at other agencies. An ironical result is that the cost of instalment credit has become so high as to justify, in many instances, the lament of small loans agencies that, were the actual cost of credit not concealed from the buyer, he would prefer to finance his purchases through the medium of the declare loan agencies.

It may be inferred from a number of dicta that the risk of the seller is thought to be greater than that of the lender and that the seller is therefore entitled to excessive interest. If such dicta have reference to the small loans agency, the comparison is unfounded, for the seller in fact occupies a position superior to that of the lender. Like the lender, he has in his possession signed instruments which can frequently be exercised summarily. And by means of the reservation of title under a conditional sale, the seller obtains a "more powerful legal instrument . . . than it

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21 Indiana Dept. of Financial Institutions, op. cit. supra note 17, at 5.
22 Nugent and Henderson, supra note 8, at 99: " . . . unfortunate consequences of this failure to state finance charges openly and intelligibly. First, price competition is ineffective. Increasing competition brings bonuses to dealers but no reduction in the price of credit service to the consumer. Second, the consumer is utterly unable to measure the price he pays for installment credit in terms of the advantages of saving and buying for cash . . . or of finding cheaper credit facilities elsewhere." CLARK, op. cit. supra note 4, at 133: " . . . the actual costs of installment credit to the borrower are concealed in a complicated tangle of . . . stating charges." See comment by Froman, supra note 17.
23 See supra, note 17. Nugent and Henderson, supra note 8, at 99: "The Consumers' Advisory Board . . . recommended the inclusion of a provision in the Finance Company Code requiring the statement of finance charges both as a money charge and as a rate per month on the unpaid balance of the contract.

24 Commercial Credit Co. v. Tarwater, 215 Ala. 123, 110 So. 39 (1926) ("there are elements of risk incident to such transactions."); Ricker v. Fay Securities Co., 294 Pac. 732 (Cal. 1931) ("other considerations than interest are properly involved, such as the risk incident to financing the contract."); In re Bibbey, 9 F. (2d) 944 (1925) ("In calculating the amount . . . the chances of loss and failure to pay . . . taken in consideration. . . "). But see Goldman, op. cit. supra note 4, at 67-68: "Mr. John J. Raskob, the organizer of the General Motors Acceptance Corporation . . . has said that while the General Motors Acceptance Corporation had handled $519,203,000 of consumer obligations during the preceding seven years, the entire total of loss was $1,117,706, or only One-seventh of One Per Cent. . . . The loss experience of General Motors Acceptance Corporation fairly well defines the measure of loss sustained on instalment sales in other industries.

25 Nugent and Henderson, supra note 8, at 100-101.
would have if it held a chattel mortgage," the chattel mortgage, according to the same authority, securing "90 per cent in number of all [small] loans."28 The retaken goods, where the vendor has judiciously selected his risks and required an adequate down payment to cover depreciation costs, may well satisfy the balance due.29 Incidentally, the forfeiture of all down payments, which attends default and recapture, has also affected a detrimental change in the buyer’s position.30 Thus, the "weaker position" of the seller is a fiction which furnishes no excuse for excluding the sale from the ambit of usury laws.

Little support is afforded by underlying economic realities for drawing a fine legal distinction between interest on a loan and interest on an instalment sale.81 From an economic point of view, the credit sale and the loan are alike in nature.82 In each, one party is seeking to gain present goods in return for a promise to pay in future goods. In a loan, money, a token exchangeable for either present or future goods, is given to the borrower.83 In a sale on credit, the goods themselves are given to the vendee. Both transactions result in a contract for the future delivery of money.34 Repayment is thus in the same medium of exchange, money, the interest on which is in each instance capable of being calculated on a fixed basis.

There is a difference, it is true, in that the seller will normally look to the profit in his merchandising transaction for his principal compensation, whereas the lender’s remuneration comes solely through the interest charged. It may be thought, therefore, that the need of the seller to turn over goods will exercise a constant limitation on his desire to exact excessive credit terms. That the desire for a great turnover does not necessarily mean low interest charges is shown by the fact that "one of our largest mail order houses" reserves as much as 86 per cent to finance a five month credit sale.34 Moreover, the separate financing corporations that are quite common in fields where the volume of credit sales is large are actuated by motives scarcely distinguishable from those of a lender. At any rate, the results in practice show that

28 See INDIANA DEPT. OF FINANCIAL INSTITUTIONS, op. cit. supra note 17, 41, 14.
29 SELIGMAN, op. cit. supra note 4, at 205; GOLDMAN, op. cit. supra note 4, at 60.
30 INDIANA DEPT. OF FINANCIAL INSTITUTIONS, op. cit. supra note 17, at 46. The Uniform Conditional Sales Act, sections 18-21, where it has been adopted, has effected a change in this respect. For a discussion of the rights of the seller and buyer on default under the typical automobile instalment sale contract, see Adelson, The Mechanics of the Instalment Credit Sale, infra, p. 218, at p. 233 et seq.
31 Nugent and Henderson, op. cit. supra note 8, at 102: "One seeks in vain for a logical distinction between the installment and the cash loan contract, where persons of small income are concerned. The legal line of distinction is fine and the economic distinction does not exist."
32 FISHER, ELEMENTARY PRINCIPLES OF ECONOMICS (1928) 394: "A loan contract is at bottom a sale . . . a borrower is a seller of a note of which the lender is the buyer. A bondholder is regarded indifferently as a lender and as a buyer of the bond."
33 BÖHM-BAWERK, POSITIVE THEORY OF CAPITAL (4th ed. 1921) 296. Ryan, discussing the time-preference interest theory of Böh-Bawerk, says, "In this theory of interest the loan is considered as an exchange or sale of present valuable things against future valuable things." Op. cit. supra note 12, at 65.
34 SELIGMAN, op. cit. supra note 4, at 3: "Economically, the essence of credit is the temporary usance of wealth. A sale on credit is, from the economic point of view, no sale at all . . . credit becomes virtually a contract for the future delivery of money."
the costs of financing sales are not always responsive to the pressure of turn-over, and that the profits at the financing end rival merchandising profits.\textsuperscript{36}

\section*{Historical Background}

Usury laws ultimately trace back to the Biblical prohibition of all interest taking. The usury thus interdicted was the taking of any interest whatsoever upon any kind of transaction. "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury."\textsuperscript{38} "Thou shalt not give him thy money upon usury, nor lend him thy victuals for increase."\textsuperscript{37} Adopted from the Bible by the Church Fathers, this blanket prohibition became a vital part of the Church teachings during the middle ages.\textsuperscript{38} The spiritual concern with temporal matters was not merely confined to interest-taking. The Church condemned exploitation in any guise and sought to stamp out the avarice which prompted one to take advantage of the necessities of another. Coincident with the development of Church teachings on usury was the growth of the concept of "just price."\textsuperscript{39} "The just price is not an arbitrary demand; as an extortionate dealer may obtain an absurd price when he sees that he can drive a hard bargain. . . . The just price is known by the common estimation of what the thing is worth."\textsuperscript{40} In course of time the concepts of just price and usury became interwoven, and oppressive bargains of any nature came to be branded as usurious.\textsuperscript{41} "Neither to scientific nor to popular opinion did usury carry in the middle ages and in the sixteenth century the specialized sense of excessive interest on a loan of money which the word bears

\textsuperscript{36} The following excerpts are taken from an article which lauds the achievements of the finance companies in weathering the depression, and which may therefore be taken to represent the situation as it then existed. \textit{Sales for Sale} (Jan. 1933) \textit{7 Fortune} 70. "One of the most prosperous corporate expressions of the installment-buying movement is Commercial Investment Trust Corp. of 1 Park Avenue, Manhattan. . . . In 1931, C. I. T. turned over \$374,000,000. . . . On its \$374,000,000 turnover, C. I. T. made a net profit of \$7,554,998; the net being almost precisely 2 per cent of the volume. . . . Nearly every motor-car manufacturer operated in 1932 at a large deficit, yet—although the motor car itself supplied one of the most basic and probably by far the most profitable items in C. I. T.'s operations—the company continues to collect an excellent return (7.05 per cent) on its investment. Few companies listed on the New York Stock Exchange share with C. I. T. the distinction of having raised the common cash dividend since October, 1929, and having maintained the increase." A table on p. 74 discloses the following percentage of net to capital and surplus ("earned surplus has consistently increased and was as of June 30, 1932, nearly \$1,400,000"): 10.67 in 1927, 12.36 in 1928, 8.73 in 1929, 8.41 in 1930, and 8.57 in 1931.

\textsuperscript{37} Deuteronomy, xxiii, 19, 20.

\textsuperscript{38} For citations to compact historical summaries, see note 19, \textit{supra}; Ryan, \textit{op. cit. supra} note 12, at 42.

\textsuperscript{39} Tawney, Religion and the Rise of Capitalism (1926) 32 et seq. "The unpardonable sin is that of the spectator or the middleman, who snatches private gain by the exploitation of public necessities." The "practical expression [of these ideas] was the body of economic casuistry in which the best known elements are the teaching with regard to the just price and the prohibition of usury."

\textsuperscript{40} Cunningham, Growth of English Industry and Commerce (4th ed. 1905) 252. For some interesting light on the genesis of sumptuary legislation, see \textit{id.} at p. 250 et seq.

\textsuperscript{41} I. Ashley, English Economic History and Theory (4th ed. 1906) 160: "The transition was easy from usury, strictly so called, to usurious practices in ordinary trade. Thus all payment of money in return for the giving of credit—all bargains in which goods were sold at a price higher than their real value in consideration of the seller's having to wait some time before he was paid—were deemed usurious." \textit{Id.} at 161. "It is easy to see how the theory of usury, when it had once been developed to this point, would come to be interwoven with the theory of just price, until the one could in many doubtful cases be brought to strengthen the other."
today. . . Any bargain from which one party obviously gained more advantage than the other and pressed his economic opportunity to the hilt was regarded as usurious."42 The practice of selling dearer on time, using the device of an excessive credit price, was condemned by Pope Alexander III as early as 1176.43 Gregory IX later declares in a decretal that "A man is to be accounted a usurer, not only if he charges interest, but if he allows for the element of time in a bargain, by asking a higher price when he sells on credit."44 The papal decretals were a part of the canon law,45 and, as Maitland points out, "in all probability large portions (to say the least) of 'the canon law of Rome' were regarded by the courts Christian in this country as absolutely binding statute law."46 . . . I have looked in vain for any suggestion that an English judge or advocate ever called in question the statutory power of a text that was contained in any of the three papal . . ." decretals.47 Additional evidence as to the attitude of the Church in England is furnished by a manual drawn \textit{circa} 1450 for parish clergymen by John Myrc, a canon of a monastery in the West of England. "The parish priest is here instructed to tell his parishioners not only that usury itself is sinful—to lend 12d. to have 13d. —but also that to sell an article to a man at too high a price is just as bad. A form of excommunication is given and it includes all 'usurers that [in order to win] lend their cattall [cattle] till a certain day for a more price than it might have been sold at the time of the loan. . . .'48 Note that the word "lend" as applied to a chattel in a usury context expressed the modern notion of selling on credit.49 One borrowed grain and other consumptibles that were not meant to be returned in specie; and we shall find the later statutes advertising to the lending upon interest of merchandise and wares as well as money,50 in this sense of extending credit. Such credit transactions gave rise to the "problem of prices and interest. . . . The craftsman must buy raw materials on credit. . . . Even the cottager who buys grain at the local market must constantly ask the seller to

\textsuperscript{42}Tawney, \textit{Introduction} (1925) to Wilson, \textit{Discourse on Usury} (1572) 122. (Hereafter cited as Tawney, \textit{Introduction}.)

\textsuperscript{43}1 Ashley, \textit{op. cit. supra} note 41, at 160. The "direct prohibition of such practices [appeared] first in a Bull directed by Alexander III in 1176 to the Archbishop of Genoa." Quoting the Decretal of Gregory IX, "Though contracts of this kind . . . cannot strictly be called usuries, yet nevertheless the venders incur guilt. Your citizens therefore will do well, for their own salvation, to cease from such contracts." Tawney, \textit{op. cit. supra} note 39, at 48, apparently referring to the same practice in Genoa, translates "It is not clear that such contracts are necessarily usurious; nevertheless, the sellers run into sin, unless there is a probability that the wares will have changed in value by the time payment is made."

\textsuperscript{44}Id. at 47. Note that Tawney throughout the page is referring to various sections of a compendious Decretal. Assuming that the early Genoese transaction was not deemed "strictly usurious" in 1176, the language of the text above justifies the inference that by the time of Gregory IX such transactions were forbidden.

\textsuperscript{45}Bouvier, \textit{Law Dictionary}, "Canon Law." "The Corpus Juris Canonici is drawn from various sources,—the opinions of the ancient fathers of the church . . . the decretal epistles and bulls of the holy see, together with . . . the teachings of the Scriptures."

\textsuperscript{46}Maitland, \textit{Canon Law in the Church of England} (1898) 2.

\textsuperscript{47}Id. at 9.

\textsuperscript{48}2 Ashley, \textit{op. cit. supra} note 41, 461.

\textsuperscript{49}Leviticus, xxv, 35-37, employs the term in a similar sense. "Thou shalt not. . . lend him thy victuals for increase." The men who rendered the King James version of the Bible used the familiar term.

\textsuperscript{50}See 21 Jac. I, c. 17 (1623); 12 Anne, c. 16 (1714).
We shall not meet the phrase "buying on credit" in early law; instead, we shall encounter such phrases as the "lending of wares and merchandise" and the "giving of day" for such loans. This phrase the "giving of day" was the mediaeval counterpart of the modern "extension of credit"; the phrase and its synonym "forbearance" will later be found to play an important rôle in usury laws.

How far the common law was influenced by canonical concepts of usury is a question on which historical research has as yet shed little light; such studies as have been made have not focused on the problem now under consideration. It is not clear whether the sale at an excessive credit price, branded as usurious by the canon law, continued to be so regarded by the common law; there is no direct evidence on this point until 1821 when Beete v. Bidgood first presents the question squarely. Possibly the canonical notion that an excessive credit price was usurious was swept away by the rising tide of commercialism. However, the express reservation of excessive interest on a credit sale stands on a different footing, as the section on statutory materials will seek to prove. Certainly in those commercial nations where the civil law had supplanted canon law, excessive interest reserved on sales continued to be regarded as usurious. We have it on the authority of the Louisiana court that "Interest stipulated on sales . . . is classed . . . with interest accruing on loans. . . . This principle is not an innovation in jurisprudence; it has descended to us from the Roman law. . . . It is recognized by many decisions of the court of France." Although the argument—that the express reservation of interest on a credit sale continued to be governed by usury laws—will be rested largely on the internal evidence of the statutes themselves and on the precedents, there is some reason to think that the canon law as to usury was not without influence on the common law, and that the inclusion in the statutes of language aiming at credit sales may well have resulted from the canonical tradition which had for centuries cast its shadow over English life.

As early as 1178 the jurisdiction of usury cases was divided between Church and State; the king had cognizance of usurers dead, and the Church of usurers living. This reservation of ecclesiastical rights was confirmed by the statute of 15 Edw. III, c. 5, in 1341, again by 13 Eliz. in 1570; and was paid lip service at least by the statute of 21 Jac. I in 1623. It is conceivable that the two jurisdictions may have had widely divergent views as to what constituted usury, and as Maitland says, "the king's justices . . . did not profess to administer the law of the church"; yet in view of the fact that the division of jurisdiction arose from the king's desire to obtain the

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52 7 Barn. & Cress. 453 (1821), 1 Man. & Ry. 143.
54 Ashley, op. cit. supra note 41, at 384.
55 13 Eliz. c. 8, §IX (1570). "Every such offender . . . shall and may also be punished and corrected according to the ecclesiastical laws heretofore made against usury."
56 21 Jac. I, c. 17 §V (1623). "No words in this law contained shall be construed or expounded to allow the practice of usury in point of religion or conscience."
57 Supra note 46, at 73.
forfeited estates of dead usurers rather than because of any doctrinal breach, it is simpler to assume that the canonical concepts of usury, which had permeated English thought for generations, were enforced in both lay and church courts. In this connection, it is significant that the statute of 13 Eliz. declares that “all usury, being forbidden by the law of God is sin and detestable” and that every offender “shall and may also be punished and corrected according to the ecclesiastical laws heretofore made against usury.” Then too, “the great compilations” of the civilians and the canonists were “the sole legal teaching that was to be obtained in the schools where Englishmen went to learn law; and although the common law judges might not be canonists or civilians, ‘the statesmen in many cases were.’ The circumstance that the administrative officials had in England, as elsewhere, usually received some part of their training in canon or civil law . . . must necessarily have affected legislation and also the practice of the courts.”

It is not going further than the facts warrant to say that canon law principles in regard to money lending and credit “set the precedents followed by secular authorities down, at least, to the third quarter of the sixteenth century.”

The first clear definition of usury found in an English statute is contained in 11 Hen. VII, and that definition forbids two transactions: the lending of money, and a sale at an excessive price where the vendor or his factor intend to repurchase the goods at a lower price. From this definition it would seem to follow that when subsequent statutes speak of a “bargain and sale,” they advert only to the foregoing device. However, the statute of 37 Hen. VIII repealed all prior laws on the subject of usury; and after a preamble setting forth that the previous enactments had failed to suppress “usury and other corrupt bargains,” it proceeds to redefine usury in terms that for the first time permit the taking of interest. Section II of the statute sets forth in some detail the sale and repurchase by the vendor or his factor previously forbidden by 11 Hen. VII; while section III purports to enumerate other transactions wherein the taking of more than 10 per cent interest would be usurious. Amongst other things, that section states that “no person by way of any corrupt bargain, loan, exchange, interest of any wares shall take in lucre or gains for the forbearing or giving day of payment of one whole year . . . for his money that shall be due for the same wares” more than 10 per cent. To argue that the words

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58 Ashley, op. cit supra note 41, at 384.
60 The Statutes at Large contain only what amounts to the title of 11 Hen. VII, c. 8 (1494). The statute is set out in full in the appendix to Comyns, Usury (Am. ed. 1834) 98. “. . . for the plain explanation . . . of usury . . . the King . . . enacteth . . . that . . . all persons lending money to and for a time taking for the same loan anything more besides or above the money lent etc. . . ., and that all persons which hereafter sell any goods . . . to any person . . . being in necessity, and the seller himself or by his broker or factor in that behalf again buy the same goods etc. . . . of the same person to whom they were sold . . . within three months after they were sold . . . for a less sum of money than they were sold for . . .” shall be guilty of usury. (The first edition of this work appeared in 1817.)
61 37 Hen. VIII, c. 9 (1545) Section 11: “. . . no person . . . shall . . . sell his merchandise or wares to any person . . . and within three months next after, by himself, factor . . . or by any other person or persons to his use and behoof, buy the same merchandise or wares . . . upon a lower price,
italicised above refer again to the transaction already condemned in clearest terms in section II, is needlessly to rob the phrase “forbearing of money due for the same wares” of meaning, without in any way clarifying the unambiguous second section. And according to a recognized canon of interpretation we are forbidden to assume without a clear reason to the contrary that any part of so important a statute is superfluous. If we nevertheless regard this phrase as surplusage and conclude that, except for the sale and resale forbidden by section II, no reservation of excessive interest on a credit sale was usurious, there would then have been no point in resorting to the elaborate sale and resale so unequivocally banned; for it would have been the safe and obvious procedure for the usurer, when besought to lend, to invest his money in wares of the value of 100 pounds and then to sell them to the borrower either for 200 pounds on credit, or for 100 pounds at 100 per cent. Additional support for the proposition that the usury laws were aiming at the excessive reservation of interest on a credit sale is furnished by the preamble and section II of 21 Jac. I. That statute reads “Whereas . . . divers subjects . . . as well the gentry as merchants, farmers and tradesmen, both for their urgent and necessary occasions, for the following their trades, maintenance of their stocks . . . do borrow divers sums of money, wares, merchandise,” be it enacted that “no person upon any contract shall take directly or indirectly, for loan of any monies, wares and merchandises above 8 pounds for the forbearance of 100 pounds.” The borrowing of wares by merchants and tradesmen to maintain their stocks or for the following of their trades was a borrowing in the sense previously alluded to; it was the progenitor of the modern purchase on credit. The merchant who borrowed wool to make up cloth did not intend to repay in wool but in money. Had he intended to repay in wool, the transaction would have been without the bounds of usury law, for, to constitute usury, repayment must be in money.

The archaism “lending of wares” survives as late as 12 Anne, and is thereafter taken over by the American statutes. Finally, the statutes were implemented by the rule of construction prescribed by 13 Eliz., viz., that the statute of 37 Hen. VIII was to “be most largely and
strongly construed for the repressing of usury, and against all persons that shall offend against the true meaning of the said statute, by any way or device, directly or indirectly.\footnote{Supra note 65, §IX.}

If resort be had to the historical antecedents of the legal terms employed in the usury statutes, those terms will be found to embrace excessive interest on a credit sale. It will be recalled that 37 Hen. VIII declares, \textit{inter alia}, that no person shall take excessive interest upon a loan or the "forbearing or giving day of payment for his money that shall be due for the same wares."\footnote{3 Inst. 150, c. 78.} To elucidate the archaic language we turn to Coke, who defines usury to be a "contract upon a loan of money, or giving days for forbearing of money, debt, or duty, by way of a loan . . . sale of wares, or other doings whatsoever."\footnote{Tousey v. Robinson, Graeme v. Adams, \textit{supra} note 3; Cutler v. Wright, 22 N. Y. 472 (1860); Ayres & Graves v. Ellis, 185 Ark. 818, 449 S. W. (2d) 1056 (1932); Davidson v. Davis, 59 Fla. 476, 52 So. 139 (1910); Commercial Credit Co. v. Tarwater, \textit{supra} note 26; Hogg v. Ruffner, 66 U. S. 115 (1861). \textit{Supra} note 66.}

As thus defined, usury embraces a loan, and the giving of day for the forbearance of money or debt, by way of a loan or sale of wares. In short, usury may be predicated upon a loan, or the forbearance of a debt by way of a sale of wares. American authorities later paraphrased Coke’s definition as the "loan of money or forbearance of a debt."\footnote{Although authorities are not wanting that bring the credit sale within the term "loan." Evans v. Negley, \textit{supra} note 3; Van Schaick v. Edwards, \textit{supra} note 64, Henry v. Thompson, \textit{supra} note 14. Ord, \textit{Usury} (1st ed. 1797) 29. See also note 88, \textit{infra}.}

The phrase "forbearance of a debt" is not encountered in English or American statutes; the latter employ the less ambiguous expression "loan or forbearance of goods, money . . . ."\footnote{\textit{Langdell, Contracts} (2d ed. 1880) §100.}; but as the former definition appears to be generally approved, the writer accepts it as the basis of discussion. Since the extension of credit on a sale does not constitute a loan,\footnote{2 Street, \textit{Foundations of Legal Liability} (1906) 1.} the taking of excessive interest on a credit sale can be regarded as usurious only if the extension of credit constitutes a "forbearance of a debt." It must therefore be established that the buyer’s obligation was a "debt" in the sense in which the term was employed at common law; and that the term "forbearance" applied not only to the time of payment after maturity, but also to the actual extension of credit at the time when the debt was contracted.

Reference to the action of debt, which for centuries was the sole remedy by which the seller could enforce the buyer’s obligation, discloses that the term "debt" embraced both the obligation arising on a sale and that resulting from a loan. The action of debt, at early common law, went for the recovery of a sum of money belonging to the creditor but in the possession of the debtor,\footnote{\textit{Langdell, Contracts} (2d ed. 1880) §100.} the duty to pay being imposed by law and arising independently of the promise.\footnote{2 Street, \textit{Foundations of Legal Liability} (1906) 1.} Debt would also lie to enforce an obligation arising on a deed, and this by the fiction of "present grant," whereby the promise to pay a sum certain in the future was "conceived of as a present..."
grant of the sum; a transfer of title to the obligee which creates a *debitum in praesenti* albeit *solvendum in futuro.*" From this it was but a short step to regard the credit sale (which was not yet conceived of in terms of contract) as an exchange of values; in return for the sale of the goods the vendee made a "present grant" of the money.78

Although the action of assumpsit, which proceeded upon the promise, proved a more convenient remedy than debt, displacing it in course of time almost entirely as respects simple contracts,77 the disuse of the remedy did not wipe out the underlying conception of liability upon which debt is based; nor did the duty to pay which is independent of the promise disappear. The obligation engendered by a simple contract continues to have a dual nature, one aspect of which remains a debt which arises instantly by operation of law upon the receipt of a *quid pro quo.*78 It follows that a *debt* arose on a sale as well as on a loan;79 and nothing to the contrary appearing, it may be assumed that Coke, who first employed the term in defining usury, used it in its age-old sense.

The meaning of *forbearance* varied at common law according to the context in which it was used, having one meaning when employed in a usury context, and a different meaning when used to signify the consideration for a promise. Examples of the latter connotation may be found in Comyns' *Digest,* under the heading "What will be a good consideration," subheading, "Forbearance of a suit."80 So, in *Fish v. Richardson,* "F had a debt owing to him by the testator R on a simple contract; and came to the defendant and told him of it; who said, that if plaintiff would forbear suit against him for a time, he promised to pay him”; and it was held a "good promise."81 In a usury context, "forbearance" was a term used interchangeably with, but having a wider meaning than, the term "loan." Thus Comyns cites the statute 37 Hen. VIII under the title "Usury," to the effect that "no person . . . shall take for forbearance of 100 l. or other things due for wares . . . above 10 l. per cent."82

75 KEGWIN, CASES IN COMMON LAW PLEADING (1924) 35.
76 Ames, History of Assumpsit (1888) 2 HARV. L. REV. 53, 55: "A simple contract debt, as well as a debt by specialty, was originally conceived of, not as a contract, in the modern sense of the term, that is, as a promise, but as a grant. A bargain and sale, and a loan, were exchanges of values." WILLIS, ANGLO-AMERICAN LAW (1926) 130: "At first the English courts held that title could only be transferred by delivery and payment. Then they adopted the reciprocal grant doctrine, whereby they held that title might pass without delivery and payment if credit was given."
77 The complete acceptance of assumpsit as a concurrent remedy can only be said to date from Slade's Case, 4 Co. 92b (1602). 2 STREET, op. cit. supra note 74, at 65.
78 Ibid.
79 Pollock & Maitland, History of English Law (1899) 212: "In its earliest stage the action is thought of as an action whereby a man 'recovers' what belongs to him. It has its root in the money loan. . . . The case of the unpaid vendor is not . . . essentially different from that of the lender; he has parted with property and demands a return."
81 Yelv. 55 (1605). Waters v. Glasop, 1 Ld. Raym. 357 (1704): "Forbearance to arrest a debtor until after a particular day is a good consideration for a promise by a third person to pay the debt."
82 7 Comyns' Digest, op. cit. supra note 80, at 608. 37 Hen. VIII is set out more fully supra note 61. For similar use of "forbearance," see 12 ANNE c. 16 (1704), and 21 Jac. I. c. 17 (1623). 13 Geo. III
Used in this sense, "forbearance" did not mean that one refrained from pursuing a remedy on a legal obligation already matured, but that one extended credit—gave day—for a stipulated period; and for this "forbearance" one was paid interest. This meaning of "forbearance" in a usury context is clearly established by an unbroken line of cases extending over a period of two hundred years, cases in which pleadings and judgments had used the word to mean that one forbore a debt from the very instant of its creation. Typical of the cases is Barnes v. Worlich, wherein the issue was whether there was usury because of the required payment of semi-annual interest before maturity. "Fenner and Yelverton held that it was, for when he lends it for one entire year, he ought to forbear his interest for a year." Popham, Gawdy and Williams held that it was not usury. "... But if he had agreed to take his money for the forbearance instantly when he lent it, that had made the assurance void."

The definition relied upon by the majority of American courts to exclude the sale from the operation of the statute, and for which the ultimate authority cited is Ord, is that a "forbearance" means the "giving of a day for the return of the loan, or more properly signifies the giving of a further day where the time agreed upon is passed." No earlier utterance of this definition, in a usury context, than that by Ord in 1797, has been found by the writer; Ord cites no cases to support the application of his definition to usury, and his argument shows in fact that his remarks were not directed to the exclusion of sales from the operation of the statute. He writes, "it is not unusual to speak of money lent upon bottomry, i.e. advanced upon the voyage of a ship... in which case if the ship is lost the money is never to be repaid. ... But how can a bargain of this kind, with propriety be called a for-

(1797) c. 63, s. 30, prohibits any subject of his majesty in the East Indies from taking above twelve pounds "for the forbearance of 100 pounds for one year." Henry v. Thompson, Minor 209 (Ala. 1824) quotes the act of 1805, "... if more than $6 for the forbearance or giving day of payment of $100 for one year... shall be taken...", and, at 224, cites the Act of 1819, "No person shall upon any contract... take above... $8 for the forbearance of $100 for one year."

Each of the following cases involved usury, and in each the court expressly gives the term "forbearance" the meaning of "giving day" from the moment of contracting the debt. Burton's Case, 5 Co. Rep. 69a (1591); Roberts v. Tremaine, Cro. Jac. 507 (1617); Grysell v. Whichcott, Cro. Car. 283 (1633); Lloyd v. Williams, 2 W. Black. 791 (1772): "The statute of 12 Anne is express that it is usury to take above 5 per cent for the forbearing or giving day of payment, which plainly has respect to a taking of the interest or forbearance before the principal is due." Marsh v. Martindale, 3 Bos. & Pul. 154 (1802): "It was then proposed that M... should advance... 4250 pounds and... discount a bill of 5000 pounds at three years [taking 750 pounds interest for three years].... What is this but forbearance for three years to take the sum of 4250 pounds, for which forbearance he was to receive interest on 5000 pounds." See also Comyn, Usury, op. cit. supra note 60, at 32-36.


Dry Dock Bank v. American Life Ins. Co. 3 N. Y. 344 (1890) cites Ord. Graeme v. Adams, supra note 3, cites no authorities. This confusion by the majority of the two different meanings of "forbearance" furnishes an illustration of the tendency noted by Professor Cook, "Substance" and "Procedure" in the Conflict of Laws (1932), 42 Yale L. J. 333, 337: "The tendency to assume that a word which appears in two or more legal rules, and in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions."
bearance, where the day of payment itself may never come?" Obviously, Ord was criticising the use of the term "forbearance" in reference to bottomry contracts, where, since there was no debt, repayment being contingent on the completion of the voyage, there could not properly speaking be a forbearance. That Ord, in proposing the definition, was not seeking to exclude the credit sale from the protection of the statute, is made emphatically clear by his analysis of the credit sale, which, he reasons, results in a loan and is thus within the statute. Ord's definition, in the sense in which it was adopted by the majority courts, is thus seen to be a departure from a meaning firmly established by judicial precedent. To recur to 37 Hen. VIII, which speaks of the "forbearing of money due for wares," since it is a cardinal tenet of statutory construction that the words employed in a statute are to be given the meaning with which they were used at common law, or which they acquired through judicial interpretation, it follows that a sale on credit, wherein the interest is expressly reserved, is within the statutory language. By parity of reasoning, the common law terms "forbearance of a debt," first employed by Coke, must likewise be taken to embrace such a credit sale. Technically, that phrase is not applicable in the situation where the "debt" is the lump credit price fixed by the seller, on which, ordinarily, no further excessive interest is charged. But inasmuch as the lump credit price, which has been fixed with the intention of exacting excessive interest, is merely a device employed to evade the usury law, it would seem that such transactions should come within the prohibitions of usury legislation.

ENGLISH PRECEDENTS

In the light of the statutory materials and of the historical background of usury legislation, it might be expected that there would be many precedents involving usury in credit sales. There are frequent dicta, but the first case the writer found that passes squarely on the express reservation of interest in a credit sale, is Dewar v. Span in 1789. Dicta to the effect that a "bona fide sale" is not usurious will be found

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87 Ord, op. cit. supra note 72, at 24.
88 Id. at 29, "If on a sale the purchase money is allowed to be retained by the vendee, to be paid at a future time, a debt is by that means created, yet that debt arises from a supposed lending. If the transaction to which it owes its existence is analyzed, it will be found to be compounded of two distinct contracts; first, a sale, which contrary to the real fact supposes the purchase money to be paid; and then a loan by the vendor to the vendee. The debt is founded on the latter contract. If we give this latitude to the meaning of the term, it will prove a true maxim, that there must be a loan to constitute usury."
89 The New York Court, one of the first to enunciate the majority view as to the definition of forbearance, has made a ruling in a mortgage case which is inconsistent with that definition. In Ganz v. Lancaster, 169 N.Y. 357 (1902), a grantee had purchased premises subject to a mortgage. On maturity, the mortgagee, as a condition of extending the mortgage at illegal interest, required the grantee to assume the mortgage. The Court of Appeals held the contract usurious. One who purchases subject to a mortgage is not personally liable; as to him there is no debt until he assumes the mortgage. True, the land to which he claims title is chargeable with the mortgage, but his other assets cannot be pursued. Thus there was no forbearance under the majority definition because there had been no giving of time after the maturing of the grantee's debt.
91 3 Term. Rep. 425 (1789).
scattered through cases involving the purchase of annuities, which turn on the principle that since the grantor of the annuity runs the hazard of never receiving his principal back, the contract is exempt from the operation of the statute. This result harmonizes with the fundamental usury axiom: to constitute usury there must be certainty of repayment. Other cases say that if the sale occurs “in the course of trade” it is not usurious. First met in 1702 in the inexplicable case of Yeoman v. Barstow, this dictum arose as follows. Plaintiff sold to defendant 300 pounds in pieces of hammered silver English money “the coin of the realm and in consideration that plaintiff would pay defendant the aforesaid money, defendant undertook to pay 300 pounds in new milled silver English money together with” excessive interest. The court found that there was a custom in the trade to engage in such transactions, that the contract “arose in course of trade,” and that “there was no loan and without that there can be no usury.” It suffices to cite the remarks of Lord Alvanley when that case was later pressed upon him in Marsh v. Martindale, “I must say that I do not quite understand it, nor should I have concurred in the judgement here given. I think that it might have been inferred that the transaction was a color for taking more than legal interest.”

Two of the earliest cases cited for the proposition that since usury can only be predicated upon a loan of money, an excessive reservation of interest on a credit sale is not usurious, will repay examination. In Floyer v. Edwards defendant bought goods on three months credit during which no interest was to be paid; if the debt was unpaid after three months it was to bear excessive interest. One report contains the dictum that where “one buys and the other sells . . . there is no pretense of any negotiation for a loan . . . nor any evidence of an agreement to forbear paying the principal sum.” The actual ground upon which the decision rests, however, is disclosed by another report of the case, which declares, as had many precedents from 1591 on, that “an actual borrowing of money with a penalty on forbearance is no usury, if the borrower can discharge himself by payment within the time.”

Spurrier v. Mayoss, which contains the dictum of Lord Chancellor Wilson that
"it is a contract for the purchase of houses and not for the forbearance of money" and therefore not usurious, concerns an agreement by A to purchase houses from B for 431 pounds, 200 pounds to be paid at once and the balance with interest at Michaelmas; but if not then paid, A to pay in lieu of interest a clear rent of 42 pounds, from which 5 per cent per annum on the 200 pounds was to be deducted. First, upon failure to pay, A was not bound to pay the 231 pounds outstanding, hence there was no debt which could be forborne. Upon this ground Lord Chancellor Eyre proceeded, saying that "usury is taking more than the law allows upon a loan, or as I read it, for the forbearance of a debt. Therefore, it is first necessary to see whether there is a debt constituted upon which there can be the forbearance... There is no debt here..." Second, "no conveyance having been prepared, the legal estate was still in the vendor, and therefore it was competent to the parties to consider themselves in the light of landlord and tenant" until the balance was paid and the title conveyed.

Apparently Dewar v. Span is the first case to hold that the excessive reservation of interest on a credit sale is usurious. There A contracted with B for the purchase of an estate in the West Indies, and it was agreed that part of the purchase price should remain secured by the bond of B and C; that bond was afterwards cancelled and another executed in England by B and D, reserving the same interest as the former one. Counsel urged that this bond for the balance of the purchase money could not "be called usury within the general statutes of usury for they relate only to loans of money; but here [citing Yeoman v. Barstow] there was no loan at all." Lord Kenyon held the contract usurious, saying "if the present attempt were to succeed it would sap the foundation of the statute of usury."

It is worth noting that Ord, who wrote a treatise on Usury in 1792, takes it for granted that usury may obtain elsewhere than in loans, saying "It must not, however, be hence understood, that usury can exist only in pecuniary transactions: the taking of use for other things, as well as money, comes within the notion of usury." And Comyn, who published his treatise on Usury in 1817, said: "The word 'loan' must not be too strictly construed... it should always be remembered that the statute lays as much stress upon the word 'forbearance' as the word 'loan,' and however some of the older cases may be construed, it now appears clear, that where money is owing upon any kind of contract, and forbearance is given for such

101 Supra note 72, at 2.
102 That appears to be the impression of Radcliff, J., in Van Schaick v. Edwards, 2 Johns. 355, (N. Y. 1803). See also Comyn, op. cit. supra note 60, at 59.
103 Supra note 91.
debt... such a forbearance [Comyn was using that term with reference to the original extension of credit] is as much usury as if the sum of money had been absolutely lent... And it does not matter... whether the transaction is... a sale of goods; so long as the lender gain more than 5 per cent for his forbearance."

Beete v. Bidgood, decided in 1821, the first case to pass squarely upon the question of usury in a situation where interest was added to principal to form a lump credit price, is of special importance because upon it was reared the entire superstructure of American usury law, both as to lump credit prices and as to the express reservation of interest. The case involved the sale of an estate at a cash price of $16,000 pounds, together with the interest on the said sum... added thereto, making in the whole principal and interest 20,800 pounds." "The only difficulty," said the court, "has been occasioned by calling the difference between these two prices interest... in substance this was a contract for the sale of the estate at the price of 20,800 pounds. To constitute usury there must be a loan or forbearance. Here there was no loan or forbearance. This was a contract of sale." No cases were cited; no reference was made to the settled construction of "forbearance" which had been reiterated by Marsh v. Martindale just twenty years before; the case of Dewar v. Span, wherein the express reservation of excessive interest on a sale had been held usurious, was ignored. Why did the court, oblivious to the factors just enumerated, and ignoring the clear intent to take usurious interest, refuse to hold the transaction usurious? One factor must not be overlooked, a transaction of this sort did not call for protection; the purchaser of a huge estate is under no such compulsion to buy as renders him the ready victim of oppression. Again, the judicial antipathy towards usury legislation had received a great stimulus from the Benthamite arguments, which in thirty years were to result in a complete repeal of all usury laws. Laissez faire was carrying all before it; a man has a right to set his own price; ergo, he may sell at one price for cash and at another for credit. Finally, the case appeared to be analogous to the bona fide credit price, which the vendor, when asked to sell on time, fixes without reference to the exaction of interest on a set cash price. But Beete v. Bidgood presents a different situation; the principal was fixed, the excessive interest expressly reserved, and the corrupt intent to take excessive interest was evident from the face of the contract. The distinction between a bona fide credit price and the credit price formed by adding excessive interest to a fixed cash price may be fine, but the law abounds in more subtle distinctions. And, as will subsequently appear, there are reasons of administration upon which such a distinction may be based. Moreover, the distinction between the express reservation of interest on a credit sale and the lumping of such interest in a credit price is scarcely less fine, yet such an express

104 Supra note 60, at 34-36.
105 Id. at 59-61.
106 Supra note 52.
107 Supra note 53.
108 Supra note 13.

Assuming that the early canon law ban on such transactions had exerted no influence on common law, and that a bona fide credit sale was permitted at an excessive price.
reservation of interest is clearly within the usury statutes. An early American court says of a similar lump sum credit transaction, "It is a question of intention . . . the additional sum was intended as interest. . . . The 10 per cent was reserved as interest, for the time the notes had to run, and not as part of the purchase money. The statute provides that no person shall take, directly or indirectly, for any contract . . . for the payment of money, founded on any bargain, sale or loan of wares and merchandise . . ." more than the legal rate. 110

To term the right to excessive interest the right to sell at another price for credit, 111 is merely to attach a more attractive label to the transaction. The right of the vendor to sell at any price he chooses must be distinguished, once he has fixed the price, from his right to exact excessive interest. His right to name the price at which he chooses to sell is not in issue; it is his right to exact excessive interest for permitting the debtor to retain his money that is challenged. Where the court is faced with a bona fide credit price alone, the doctrine of Beete v. Bidgood is perhaps justified on the ground that the administrative difficulties which attend an investigation of the price of goods preclude such an inquiry. No such difficulty attaches to an inquiry into the price of money, i.e., interest charges. The maximum price of money has been fixed by law, whereas the price of goods is a variable which is insusceptible of ready determination. Hence, where the court is confronted with a credit price alone, there are reasons of administration, (such as the fact that, in many cases, no adequate means is at hand for ascertaining the cash price, from which the illegal interest lumped in the credit price may be computed, plus the perplexities surrounding the question of whether there was an intent to take excessive interest, or a bona fide sale) which may render it desirable to invoke the Beete v. Bidgood doctrine. These administrative difficulties vanish, however, once the vendor has himself set a cash price. The price of a new Ford car, for example, is well known; it is almost as easily ascertained as the price of money. After the cash price has been set by the vendor, a loan of money and a credit sale of a chattel are on the same plane. The problem then reduces to the question: how much can the creditor charge for the

110 Torrey v. Grant, 10 Smedes & Mar. 89 (Miss. 1848). Although Mississippi has departed from the rule of that case in Commercial Credit Co. v. Shelton, 139 Miss. 132, 104 So. 75 (1925), the earlier case was not alluded to in briefs of counsel or in the opinion. Thompson v. Nesbit, 2 Rich. 73 (S. C. 1845), and Fisher v. Hoover, 3 Tex. Civ. App. 81, 21 S. W. 930 (1895), have also held a lump credit price, which concealed excessive interest, usurious. The writer of a Comment (1929) 39 Yale L. J. 1025, after a study of federal income tax cases wherein exemption was urged for interest paid on a current indebtedness, arrives at the conclusion that whether the interest was expressed as such, or lumped in a credit price, it was interest in both cases entitled to exemption. See note 126, infra.

111 It should be remembered that the right of the early Englishman to do as he willed with his own was limited. See Adler, Labor, Capital, and Business At Common Law (1916) 29 Harv. L. Rev. 243: "Business at common law consists in the undertaking and conduct of a community or public service for profit, and hence it is the duty of every one who takes upon himself 'a public employment,' that is, a business, 'to serve the publick as far as the employment extends.' The duty arises from the undertaking. . . . To carry on a business is to exercise a privilege. The right of a person to do with his own as he chooses need not be disputed. But the business man deals with what is not his own. He emerges from his privacy, involves the fortunes of the community with his own, and by so doing assumes an obligation to the public."
USURY IN INSTALMENT SALES

retention of his money by the debtor? Although the difference between the cash price and the credit price cannot be regarded solely as "interest,"112 since it may include other costs (in automobile sales, for example, the cost of insurance), it remains true that the device enables the seller to conceal excessive interest. The other costs are not itemized; the buyer is compelled to buy insurance whether he will or no; thus the cost of instalment credit is enhanced.113 The attempted rationalization in Hogg v. Ruffner,114 viz., that "a vendor may prefer $100 to double the sum in expectancy" is not only equally applicable to a loan, but it ignores the vital function of usury laws in regulating the extension of credit. When the intent to take excessive interest is clear and when the court need not assume the troublesome administrative burden of inquiring into the price of goods (i.e. where the cash price has been fixed by the seller), the contract should be held to fall within the usury statute, regardless of the form in which the transaction is cast.

AMERICAN PRECEDENTS

Although the majority view today is that no reservation of excessive interest on a credit sale is usurious,115 the early American courts were generally of the opinion that the express reservation of such interest on a credit sale was illegal. The New York court, however, had by 1850 arrived at the contrary conclusion, and because that court exercised so great an influence on later decisions, it will be worth while to examine several of the New York decisions in some detail. (It should be noted in considering the New York cases that usury there entitled a forfeiture of the entire principal.) In 1801 the New York court divided evenly on the question in Van Schaick v. Edwards.116 All of the judges concurred in deciding the case on a conflict of laws question; two of the judges, who dissented on the matter of usury, contented themselves with saying that "the notes were part of the price of land." Radcliff, J., however, said: "I have no doubt that the statute applies to existing debts as well as to immediate loans of money, and equally so whether such debts have arisen from the sale of lands, or from any other source. The statute itself speaks only of loans; but the forbearance or giving time of payment for a debt, is in substance a loan. . . . In the case of Dewar v. Span the forbearance of a debt arising from the sale of a real estate in consideration of interest at 6 per cent was held usurious." Kent, J., said that "Usury is taking more than the law allows for the forbearance of a debt; and whenever a debt is created, and there is an agreement to pay more than legal interest for forbearance of payment of it, such agreement is usurious."

Dry Dock Bank v. American Insurance Co.117 is the first New York case relied on for the doctrine that there can be no usury on a bona fide sale. That case concerned the sale of 48,000 pounds in certificates for which complainants were to pay

112 In re Bibbey, 9 F. (2d) 944 (1925).
113 Indiana Dept. of Financial Institutions, op. cit. supra note 17, App. II, last page.
114 Supra note 2.
115 Supra note 3.
116 Supra note 102.
117 3 N. Y. 344 (1850).
50,000 pounds, and as the sale was merely a disguise for a loan it was held usurious. Relying on Ord, the court defined “forbearance” to be “the giving of a further day, when the time originally limited for the return of the loan has passed.” It has been previously noted that forbearance has a wider meaning which Ord did not intend to limit for the purpose of excluding credit sales from the statute. The court, contradicting its own definition of forbearance, continued: “Upon the sale of property on time, the purchase money becomes a debt which is forborne for the period limited by the credit”; confining this definition of forbearance, however, to the case of a sale used to disguise a usurious loan. No explanation was offered for so limiting the definition, and no cases were cited. Incidentally, the cases cited for the proposition that “where the contract is one of sale ... there can be no usury whatever the price may be, or the mode in which it may be reserved,” offer it little or no support, for Beebe v. Bidgood is confined by its facts to a lump sum credit price, and Van Schaick v. Edwards was pronounced by a divided court; the persuasive, indeed the only, reasoning in that decision being to the contrary. Finally, in 1860, Cutler v. Wright, which turns on a conflict of laws point, the interest not being excessive in Florida, where the note was payable, relies on the earlier New York cases for the statement that “to constitute usury there must be either a present loan, or a forbearance in respect to some debt previously existing.”

Against this line of New York cases there were arrayed by 1860 a considerable number of precedents holding that credit sales wherein excessive interest was expressly reserved were within the statute. In 1824, Henry v. Thompson, construing the Alabama Act of 1805, which in almost every particular reads like the English statutes, said, “... the old law restrained the taking of interest on any contract whatsoever at a greater rate than 6 per cent. The words used include not only the loan of money, but every article that could possibly be made the subject of a contract. ... The words 'forbearing or giving day of payment' ... can be applied as well to an absolute sale as to a loan.” Pennsylvania followed in Evans v. Negley, decided in 1825, and, by 1860, six other jurisdictions, including the United States Supreme Court, had joined the array. It is characteristic of the use of precedents in this field that the Supreme Court decision in Hogg v. Ruffner, which is constantly
cited for the dictum that, on a credit sale, even the express reservation of excessive interest is not usurious, actually supports the converse view. There the Supreme Court said “The original contract by which a debt is created may be for the purchase and sale of land, and it will nevertheless be contrary to the statute for the vendor to demand or receive more than the legal interest for the forbearance of such debt, as in the case of Crawford v. Johnson, where separate notes were taken for 2 per cent interest in addition to the legal interest, on the sum due for the purchase of land.”

To examine the later majority cases in detail would be both tedious and repetitious. They rely on Beete v. Bidgood, which is confined by its facts to a lump sum credit price transaction, and on Hogg v. Ruffner, which expressly disavows the majority view. Two of the arguments advanced by the majority courts deserve mention. Some courts say that the excessive interest is as much a part of the consideration for the sale as is the principal; consequently it is not paid for the loan of money or forbearance of a debt. Little merit is to be found in this argument, inasmuch as the excessive interest is equally a part of the consideration for a loan. Or it is argued that because the reservation of interest in the form of a lump credit price is not usurious, the express reservation of interest which is in substance the same is likewise valid. Though there may be some justification for courts that, on grounds of policy and because the lump sum credit transaction does not come strictly within the terms “forbearance of a debt,” refuse to apply the usury statute, the extension of that doctrine to a situation that is clearly within the terms of the statute is unwarranted.

The contention that the transactions are the same in substance, when advanced in federal income tax cases in support of a claimed exemption for interest paid on an indebtedness, was rejected by the federal courts. Conceding the transactions to

not bound; the debt was contingent and there could be no forbearance of a debt. Struthers v. Drexel, 122 U. S. 487 (1887), contains a dictum that “unless there was a loan there was no usury.” That case involved a sale of stock, with an option to the purchaser to resell within a year to the vendor at an advance of 7 per cent. There was of course no loan, and since no debt was created there could be no forbearance; consequently there was no ground for invoking the usury statute.

Tousey v. Robinson, Reger v. O’Neal, both supra note 3.

Compton v. Compton, 5 La. Ann. 615 (1850). Nor can a divergence in treatment rest on the retention of title in a loan as contrasted with the passing of title in a sale, because, though the action of debt went for recovery in specie of the money loaned, 2 Pollock & Maitland, op. cit. supra note 79, at 204, it was not contemplated that the particular money was to be returned. The loan of money must not be confused with the true loan of a chattel, in which the very chattel borrowed was to be returned. Booth v. Terrell, 16 Ga. 20 (1854).

Graeme v. Adams, Tousey v. Robinson, both supra note 3.

Suits were brought under acts similar to 44 Stat. 26 (1926), 26 U. S. C. A. §2023 (b). Among the deductions from gross income which an individual or corporation is allowed to make in computing net income for the purpose of federal income tax is “all interest paid or accrued within the taxable year on indebtedness.” Where a taxpayer purchases an article contracting to pay therefor in installment he may deduct the interest he pays on the indebtedness if the interest is clearly expressed as such in the contract. But, where the interest is lumped in a credit price, “interest not being provided for in the contract of sale, no part of the deferred payments will be considered as interest.” Daniels Bros. Co. v. Comm’r, 7 B. T. A. 1086 (1927), aff’d, 28 F. (2d) 761 (C. C. A. 5th, 1928). See Comment (1929) 39 Yale L. J. 1025. The
be the same in substance, the common law abounds in instances of transactions similar in substance but differing in form, and expressed in dissimilar legal terms, and consequently differing entirely in legal effect. If the courts occasionally disregard differences in form to give effect to substance, as, for example, where a deed absolute on its face is construed to be a mortgage, it is because of equitable considerations which are not here present; equity, in fact, protects the borrower against an oppressive bargain.

CONCLUSION

Usury laws originally sought to protect credit seekers against exploitation. Although the circumstances which give rise to exploitation in instalment sales may differ from those found in small loans, the necessity for protection is none the less urgent, as is made evident by the reports of legislative investigating committees recommending stringent regulation of instalment credit. A distinction drawn between interest on credit sales and interest on loans will be found to rest on a slender historical and legal base. Perhaps some justification for a discrimination may be found in the administrative difficulties which accompany an inquiry into chattel prices. Where this problem is non-existent, the reason for the discrimination disappears. Hence, to return to the situations set forth at the beginning of this article, in transaction 2 where the credit price alone is known and an inquiry into the original cash price would be burdensome, the courts properly decline to enter into such an investigation. But, where the cash price is known and it is obvious that excessive interest is reserved for the extension of credit, the transaction should be held usurious, though in the guise of a lump credit price. Where the excessive interest is clearly reserved on a credit sale, as in transaction 3, the minority doctrine (that the express reservation of excessive interest on a sale is usurious) is logically inescapable.

There is no more reason for the courts to disregard the statutory maximum in the

intimation of the cases is that the courts will not enter into the difficult inquiry as to what was the original price on which interest was computed. The discrimination is pragmatic, not logical.

127 For example, a chattel mortgage is an absolute sale with a reservation of a lien to secure the purchase money; a conditional sale is a mere agreement to sell upon a condition to be performed. Harkness v. Russell, 118 U.S. 663 (1886). There is no right of redemption on a conditional sale, Pfeiffer v. Norman, 22 N.D. 168, 133 N.W. 97 (1911); on a chattel mortgage the vendee may redeem. In re B. & M. Motors, 277 Fed. 808 (1922). Another instance is the distinction between estates on special limitation and those on condition. A devise to X, as long as he remains in the manor, creates an estate on special limitation, and if the event happens no reentry is required; the estate automatically revests in the grantor. First Universalist Society v. Boland, 155 Mass. 171, 29 N.E. 524 (1892). A devise to X, on condition that he remain in the manor, creates an estate on condition; and the grantor must reenter to revest the estate. Petition of Copps etc. Church, 120 Ohio St. 309, 166 N.E. 218 (1929).


129 Barrett v. Hartley, L.R. 2 Eq. 789, 795 (1886); James v. Kerr, L.R. 40 Ch. D. 449 (1889).

130 INDIANA DEPT. OF FINANCIAL INSTITUTIONS, op. cit. supra note 17. The Wisconsin Legislative Interim Committee has been engaged in investigating consumer credits for more than a year, and is shortly to make its recommendations. The Clerk of the Wisconsin Senate, Mr. L. E. Packard, informed the writer that the Committee had uncovered many abuses.
USURY IN INSTALMENT SALES

case of a credit sale than in the field of small loans. Though the courts realized that
the cost of making small loans exceeded the statutory maximum, they left the
problem of establishing a more adequate rate to the legislature. No better ground
for judicial legislation exists in the case of a credit sale. In fact, the solution worked
out by the majority of courts in seeking to facilitate credit sales has, in many cases,
been as pernicious, from the viewpoint of one needing credit, as was the once com-
plete repeal in England of all restrictions on loans. The problem of credit sales must
be solved as was the problem of small loans—by the legislature; but what form
the legislative solution should take the writer does not attempt to specify. No con-
tradiction is involved in urging legislative intervention and at the same time invoking
the aid of the courts because: (1) it is in the interest of legal symmetry and of avoid-
ing legal obscurantism that the courts should make no distinction between interest on
sales and that on loans; (2) more important is the fact that this pressure exerted by
the courts through the medium of existing usury laws will hasten legislation.\footnote{31}

It may result in temporary inconvenience; the commercial interests involved are
large;\footnote{32} but the powerful, well-organized, merchant group can obtain remedial
legislation in short order. When that legislation is drafted, enough aroused con-
sumer opinion exists to compel the interpolation of some necessary consumer safe-
guards.

In many states the courts are still in a position to lend their aid to the instalment
debtor. In the minority states, at least those transactions in which the interest is
expressed as such can be controlled by the courts. In a considerable number of states
no cases involving usurious interest on a sale have been passed upon. While the
weight of authority may be persuasive in such states, each state is free to construe its
own usury statute in the light both of present social needs and of the common law
signification of the terms employed in the statute. There are also a number of states
where the question is regarded as closed, but where a vigorous attempt to bring
credit sales within the operation of the statute might perhaps not be unproductive.
In Illinois, for example, the question has yet to be passed upon by the court of last

\footnote{31} It will not be the first time that the courts have thus hastened the pace of legislation. Professor
Edwin F. Albertsworuth of the Northwestern University School of Law has made a careful study of the use
of this device by the courts, and he has been kind enough to give the writer access to materials to be
published in the May, 1935, issue of the \textit{Georgetown Law Journal}, under the title “Advisory Opinions
by Judicial Dicta.” He is of the opinion that the Supreme Court, through its refusal to sustain State
Compensation Laws in the field of maritime injuries and deaths, compelled Congress to enact a Federal
Compensation Law to remedy these evils. He is also of the opinion that the Supreme Court is construing
the Federal Employer’s Liability Act in such fashion as to force a Federal Compensation Act in rail
calls.

\footnote{32} The avoidance of usurious credit contracts will in many states entail no more than the forfeiture
of the interest. See Tables in \textit{Ryan, Usury and Usury Laws} (1925) for penalties on forfeiture. In states
where the effect may be more serious, the writer submits that evil results may be avoided by giving only
prospective operation to the decisions, \textit{i.e.} by making the decision applicable only to contracts made there-
after. See \textit{Kocourek \& Koven, Renovation of the Common Law Through Stare Decisis}, 29 ILL. L. REV.,
April, 1935; Address by Mr. Justice Cardozo (1932) 55 N. Y. STATE BAR ASSN. REP. 263, 293; \textit{Sunburst
Oil \& Refining Co. v. Great Northern Ry. Co.}, 91 Mont. 216, 7 P. (2d) 927 (1931).
resort; an intermediate court has relied upon older Illinois cases which lend no support to the proposition that there can be no usury predicated upon a sale.\textsuperscript{188}

At no time has the writer lost sight of the fact that the attitude of present-day courts to the problem of instalment sales has been guided by expediency, by the realization that the statutory maximum inadequately provided for the cost of extending consumer credit. On the other hand, this policy has left the consumer group, to whom such credit is vitally important, utterly defenseless. Only after a balancing of interests can a policy be formulated. The writer believes that the vast, inarticulate body of consumers stands more in need of protection than the readily mobilized, vocal, merchant group. The plight of the former will not inspire immediate legislation, whereas the merchant group, if compelled by judicial application of existing usury laws to act, is in a position to exert pressure on legislative assemblies and to obtain almost immediate relief.

\textsuperscript{188} Primley v. Shirk, 60 Ill. App. 312 (1895), is cited for the dictum that “on a sale . . . there can be no usury charged simply because the price is fixed at one sum if paid at one time, and at another sum if paid at another.” There the vendor of land had agreed to hold $15,000 at the disposal of the vendee who was to acquire therewith title to a designated alley. That sum was added to the credit price, to be credited thereon if not advanced. It was never demanded by the vendee, who at the time of suit disputed the interest charged on the $15,000. The Supreme Court, affirming in 163 Ill. 389, 45 N. E. 247 (1896), disregarded the ground chosen by the Appellate Court and held that since the vendor had kept the $15,000 at the disposal of the vendee throughout the life of the contract, thereby being deprived of the use of his money, the vendor was entitled to interest on that sum.

In Clemens v. Crane, 234 Ill. 215, 84 N. E. 884 (1908), cited for the proposition that to constitute usury: “1. there must be a loan or a forbearance; 2. the loan must be of money,” the claimant had advanced money to decedent to invest in his business, under a partnership agreement which guaranteed to claimant a minimum of 15 percent on her investment. The court took great pains to establish the intent to invest in a partnership, and held that the “transaction could not be converted into a usurious loan.”

Manufacturers Finance Trust v. Stone, 251 Ill. App. 414 (1929), passes on a case where interest was lumped in a credit price. The court cites the Appellate decision in Primley v. Shirk, supra, for the proposition that “appellee was a bona fide purchaser of property, not a borrower of money,” and cites Clemens v. Crane to the effect that to “constitute usury . . . there must be a loan or forbearance . . . of money.” The Clemens case says “there must be a loan or forbearance; the loan must be of money”; and in neither of the cases cited was the court called upon to distinguish between a credit sale and a loan.

It is worth noting that the Stone case is confined by the facts to a lump sum credit price. Furthermore, the court said, “A similar state of facts . . . was considered . . . in . . . General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 262 S. W. 425 (1924) and held not to violate the Usury Statute of Missouri, which is similar to our own statute.” The Weinrich case says “Of course, the fact that a note is given for the purchase price of an article will not prevent the note from being usurious if the note calls for more interest than the law allows.”