STATUTORY CONTROLS AFFECTING THE SALE OF GOODS ON CREDIT.*

A. INTRODUCTION.

In the world of modern commerce many traders are unable or unwilling to follow the advice of Polonius, "Neither a lender nor a borrower be." In some form or other the buyer of goods finds it necessary to obtain them without immediate payment. The methods by which this need may be satisfied are various and they have, of course, been greatly developed in modern times. In all the varieties of method which have been evolved, it is important for the business man to be fully advised as to the statutory restrictions and controls which may be applicable to the particular transaction into which he proposes to enter. Dealing with a case arising out of the National Security (Prices) Regulations and out of a Prices Regulation Order made thereunder, Jordan C.J. remarked, "Pausing only to admire the courage of any trader who still ventures to sell anything without having a lawyer and an actuary constantly at his elbow, I proceed to deal with the submissions which have been made."[1] The like courage may be needed of buyer or seller who enters into a credit transaction without the aid of a lawyer and perhaps of an accountant, and who seeks to steer his course between the legislative rocks upon which he may founder and to follow the sometimes confusing charts provided by the case law.

In this Summer School we are dealing with affairs of importance to the business community and with practical problems which have been created by the development of new legal devices to meet changing business needs. We are dealing with the impact upon business affairs of legislation which has been framed and reframed from time to time, in ways which have seemed desirable to give protection against unfair dealings and to provide some special remedies and safeguards, in situations in which it has been thought that the ordinary principles and remedies of the Common Law were not adequate to do justice. In the result there has been a great deal of interference with freedom of contract. In my view it cannot be denied that some legislative interference with so-called freedom of contract is necessary in such fields as those of hire-purchase agreements and of money-

* A paper read at the Law Summer School held at the University of Western Australia in February 1962.

1 Ex parte Rosenwax, (1943) 43 State R. (N.S.W.) 174, at 177.

lending, for the supposed freedom of parties to make a bargain satisfactory to both may often be quite illusory. I feel, however, that it is not helpful to debate the proposition I have just stated or to argue the question whether or not the interference has gone too far, or to embark upon a general discussion as to whether the measures which have actually been adopted are valid and satisfactory from the standpoints of general jurisprudence or of logic. By this I do not mean that we should not draw attention, whenever the occasion arises, to what appear to be defects in a particular Act, with the ultimate object of its improvement. But what I think I should do, in this paper, is to address you, not in general terms, but in terms of some specific legislative provisions and of actual decisions dealing with concrete problems, and I hope that this may prove to be of some assistance at least to those who, like myself, are practising lawyers.

I understand that others will discuss, in some detail, the topics of title to goods, bills of sale, and hire-purchase agreements. I should like, myself, to make some observations on hire-purchase law, hoping that I do not trespass too much on the field of any other speaker. What I have to say on this subject will relate, for the most part, to some recent decisions in New South Wales, with which my listeners may not all be closely acquainted. Then I propose to deal with some aspects of the legislation on money-lending and with some decisions in that field in which, in New South Wales as well as in Western Australia, changes have lately been made in the law. These changes, in my State at any rate, followed upon some public clamour resulting mainly from two decisions, including one of my own. This decision of mine, if I may say so, seemed commonplace enough from a lawyer's point of view, although it involved some difficult questions. However, the two decisions attracted attention because in each the creditor company was left lamenting in respect of a very large sum of money. They were described by a contributor to the Australian Law Journal as "commercially dramatic decisions" which had "spotlighted the uncertainty, chaos, and in many respects absurdity of the law regulating all money-lending transactions with resultant shock and distress to many commercial gentlemen, their legal advisers, and indeed, to all persons who lend money with any degree of frequency in the State of New South Wales."[2] Many letters appeared in the press. Representations were made to the Government by the Bar Council and by others

2 See Margaret Brewster, *Money-Lenders and Infants Loans Act, 1941-1948 (New South Wales)*, (1961-62) 35 AUST. L.J. 12. This cry of distress was echoed by J. A. Lee, *The Investor and the Money-Lenders Act, 1941, ibid.*, 218.

and the result has been an amending Act, assented to as recently as 7th December 1961, to which some reference will hereinafter be made. It may be said at once that the drastic changes made in the New South Wales Act have diminished to a very great extent the practical importance of it to merchants and others who are buying and selling goods in the course of ordinary commercial transactions. But I consider that it is still worthwhile to include in the discussions of this School, some examination of this legislation.

B. HIRE-PURCHASE LEGISLATION.

(1) *Implied condition of fitness for a purpose.*

Difficulties may arise when a purchaser makes his actual bargain with a dealer, but the transaction thereafter takes the form of a written agreement between the purchaser and a finance company. These have been reduced but not wholly removed by the provisions of the recent legislation enacted in various States.[3] The New South Wales Act became operative as from 1st August 1960 in relation to agreements made after that date. It will perhaps be of interest to look at some cases decided in New South Wales, to see some of the problems created under the earlier law, and the extent to which the new legislation has served to resolve them.

An interesting example of such a case is furnished by the case of *Newlands v. Argyll General Insurance Co. Ltd.*[4] I was faced with the problems which this case created whilst presiding over a jury trial at a circuit town. However, the parties agreed, when the hearing was nearing completion, to dispense with the jury, which gave an opportunity for hearing further argument in Sydney and of reserving my decision. The main facts appear in the report which I have cited, which is that of the Full Court decision, and I need not repeat them. But I should state the important facts, that the would-be purchasers obtained possession of a car from a dealer, to whom they made an initial payment, and that in the course of driving it home one of the wheels came off causing an accident in which Mr. Newlands was injured. There were findings of fact that the wheel was not securely fastened to the axle and, in consequence, the car was not reasonably fit for the purpose of being driven.

In such circumstances one would have supposed that the law ought to provide a remedy to the injured person. The circumstances

[3] See secs. 5 and 6 of the Hire-Purchase Act, 1959 (Western Australia), which are repeated in almost the same words in the New South Wales Act of 1960.
[4] [1959] State R. (N.S.W.) 130.

were such that if this had been straight-out sale, the condition implied under the Sale of Goods Act, 1923 (New South Wales), sec. 19 (1), as to reasonable fitness for a purpose would seem to have been operative against the vendor unless excluded by the contract. But the purchasers signed, at the premises of the dealer, an offer to hire, addressed to the defendant, a Sydney finance company. This contained, amongst other provisions, the following:

> "This offer shall be irrevocable for a period of 21 days. It shall become a binding contract if and when the memorandum of acceptance endorsed hereon shall have been signed by you. The delivery of the Goods or any part thereof to or the pre-payment by me of any moneys prior to such acceptance shall not prejudice the provisions of this clause and shall be deemed merely conditional."
>
> "I agree that nothing herein contained shall be construed or be deemed to be an express warranty or condition as to quality fitness or suitability. I declare I have thoroughly examined the goods and depended entirely upon my judgment in making this offer . . . . All implied conditions or warranties statutory or otherwise are hereby negatived except in the case where the relative statute expressly prohibits any such exclusion and to that intent this instrument embodies all the terms and conditions of the transaction between us relative to the Goods."

The offer was subsequently accepted by the defendant but not until some two or three weeks after the date when the plaintiffs had got the car and had had the accident and, curiously enough, after the defendant had become aware that an accident had occurred. The plaintiffs based their main claim upon an alleged breach by the defendant of the condition implied by sec. 26 (2) of the Act then in force, that is the Hire-purchase Agreements Act, 1941-1957, which provided that where the purchaser expressly or by implication makes known the particular purpose for which the goods are required, there shall be an implied condition that the goods shall be reasonably fit for such purpose.

The point on which this claim failed, according to my opinion and that of the majority of the Full Court, was that no contract with the defendant came into being until the later date of acceptance, and that the contract could not be construed so as to render the defendant liable for damages for injury resulting from an alleged breach, when the injury had occurred prior to the existence of the contract. But I draw attention to the interesting dissenting judgment of Sugerman J.

on this question. According to his view the contract, when it had been made, operated for relevant purposes as if it had been made at the earlier date of the initial payment and of "delivery."

Another count, based upon sec. 26 (1) (d) of our then Act, failed because the car was clearly a second-hand one, and I considered that the requirement was fulfilled that the agreement should contain a statement to that effect. It did not, indeed, state, "This is a second-hand car," but the car was described as "used" and as "1936 model." I rejected an argument that the precise expression "second-hand" must be used in order to bring the exception into operation. The provision here under consideration was, although phrased in somewhat different language, similar in its effect to that contained in sec. 5 (2) (c) of the Western Australian Act of 1959.

Finally, the plaintiffs sought to base a claim upon a contract of bailment alleged to have been made by the defendant through its agent, the dealer, antecedently and collaterally to the hire-purchase agreement. By this it was said the defendant agreed to permit the plaintiff to use the car, as bailees, pending consideration by the defendant of the offer to hire, and it was said further that it was an implied term of this contract of bailment that the car should be fit for the purpose of being used and driven. But all the members of the Full Court, as well as myself, took the view that this count could not succeed.

(2) *Collateral warranties by dealers.*

It is interesting to compare the case just discussed with a more recent case in the New South Wales Full Court. In the *Newlands* case the only action before the Court was against the finance company, the dealer not having been sued. What prospects would the Newlands have had against the dealer? It would seem, in the first place, that if they had been able to prove that the dealer acted negligently in handing over a car with a dangerous defect, they might have recovered against him in an action in tort, on the footing that he had acted negligently when it was foreseeable that the plaintiffs might suffer injury because of the defective condition of the car. In the second place, if they could have proved oral representations by the dealer as to the sound condition of the car or as to its fitness for use, could they have recovered in an action against him for breach of warranty, provided they could have obtained a finding of fact that the said representations were promissory in character? According to the decision in *C. J. Grais & Sons Pty. Ltd. v. F. Jones & Co. Pty. Ltd.*,[5] if a

[5] [1962] N.S.W.R. 22.

statement be made which is intended to be of a promissory character it may be relied upon to found an action for breach of contract against the dealer, on the footing that there is a contract between purchaser and dealer by which, in consideration that the purchaser would enter into a hire-purchase agreement with a third party, the dealer warrants that the machine will fulfil the stated requirements. It is important at this point to bear in mind that the transaction there under consideration was not one to which our 1960 Act applied, having occurred before that Act operated, and our earlier legislation did not have the provisions now contained in sec. 6 of the New South Wales Act and of the Western Australian Act. The main facts were that a salesman employed by the defendant company, which was a machinery merchant and a dealer in machinery, told a prospective buyer that a machine would roll half-inch plate. The buyer had an inspection and conducted some tests and eventually paid £100 to the defendant and gave an order addressed to the defendant for "1 only 9′ plate rolls as inspected." On the same day the buyer signed a hire-purchase agreement with a finance company.

The basis upon which the particulars of claim put the case made it one which was founded upon a warranty forming part of a collateral contract. But in the reasoning in the judgment of Herron J., the analysis seems to be that there was first a contract for the sale of goods between the dealer and the plaintiff, which was partly oral and partly in writing, and of which the promise sued upon formed one of the terms. Upon this contract there was superimposed a hire-purchase agreement with a finance company. In such a case the rights of the buyer and the seller, that is the dealer, *inter se* were not affected by conditions introduced into the hire-purchase agreement, and in particular, were not affected by a clause therein which included the provision that "this instrument embodies the entire terms inducements and representations whatsoever made or given to me by you or any other person."

In the *Grais* case (unlike that of Newlands) the would-be buyer did give a written order addressed to the dealer, but it was known throughout that he would require financial assistance and that terms would be arranged. Notwithstanding that there was an order in writing, the only written agreement seems to have been that between the purchaser and the finance company. As I have said, in the reasons of the majority, the case seems to have been treated not as being an action on a warranty the consideration for which was the entering into another contract with a third party, although this was the way in which the claim was framed, but as an action for breach of one

of the contractual terms of a contract for the sale of goods. It may be suggested, with respect, that it was not really in accordance with the legal effect of what took place between the parties to say that there was an operative contract for the direct sale of the goods. If any agreement of that kind was made, which is doubtful, perhaps it ought to be regarded as having been superseded by the hire-purchase agreement: See *Beaton v. Moore Acceptance Corporation Pty., Ltd.*[6] (a highly important case in this field upon which, however, I shall not dwell now.)

There is authority for saying that there may be an enforceable warranty between A. and B., supported by the consideration that B. should enter into a hire-purchase agreement with C.[7] In the *Grais* case Wallace J., who dissented, expressed doubts as to the reasoning in these English cases, but as they had the approval of the Full Court he was not prepared to differ from them. I would conclude my comment upon the *Grais* case by suggesting, with respect, that upon its facts it is not easy to accept as satisfactory the distinction made by Herron J.[8] between it and *Marks v. Hunt Bros. (Sydney) Pty. Ltd.*[9] Upon this point His Honour said:

> "The contract between the plaintiff and defendant was partly oral and partly in writing, an important factor. It was open to the parties to agree upon a term or condition to be included in the bargain as to the description or quality of the goods. In this respect it is different from *Marks v. Hunt Bros. (Sydney) Pty. Limited,* [1958] S.R. (N.S.W.) 380, where the contract was wholly in writing and warranties were expressly excluded so that reliance upon an antecedent collateral agreement as to description was rejected."

No doubt it was open to the parties to agree upon a term or condition to be included in the bargain as to the description or quality of the goods. But the difficulty rests in holding that they did agree upon the relevant oral term or that there was any bargain between them for the sale and purchase of the goods, when the form into which the bargain was finally put was a hire-purchase agreement expressed to embody therein "the entire terms inducements and representations," which agreement did not contain the term relied upon.

6 (1959) 104 Commonwealth L.R. 107, at 118.

7 See Irwin v. Poole, (1953) 70 Weekly Notes (N.S.W.) 186; Brown v. Sheen and Richmond Car Sales Ltd., [1950] 1 All E.R. 1102; and Shanklin Pier Ltd. v. Detel Products Ltd., [1951] 2 K.B. 854.

8 [1962] N.S.W.R. 22, at 27.

9 [1958] State R. (N.S.W.) 380.

I should add here a reference to the recent case of *Yeoman Credit Ltd. v. Apps*,[10] which denies efficacy to an "exclusion" clause in cases where there has been a fundamental breach of the contractual obligation of the party who seeks to rely on it. It affirms also that in a hiring agreement there is at Common Law an implied condition that a specific chattel hired is reasonably fit for the purpose for which it is hired.[11]

(3) *The Hire-Purchase Act, 1960 (New South Wales).*

Following upon efforts made towards achieving uniformity in the law of the various States, the new Act of 1960 has replaced, from 1st August 1960, in relation to agreements entered into after that date, the earlier legislation, just as in Western Australia the 1959 Act replaced the earlier legislation of that State. These two Acts resemble each other quite closely. A difference is that the New South Wales Act contains a provision, sec. 28, making it an offence for an owner to enter into a hire-purchase agreement without having first obtained a deposit in cash or in goods to a value equal at least to one-tenth of the cash price of the goods or to a minimum amount, as prescribed. This was not a new provision in New South Wales. By Regulations made under the Act, minimum amounts were prescribed in terms which had the effect that for new motor-vehicles the minimum is one-fifth, for second-hand motor-vehicles one-fourth, and for other goods one-tenth of the cash price.

The Act contains, in secs. 5 and 6, provisions which appear also in secs. 5 and 6 of the Western Australian Act and which are highly relevant to the cases which I have just discussed. It contains also, in sec. 36, provisions very similar to those in sec. 28 of the Western Australian Act, making void various provisions which might otherwise be used to deprive the hirer of the protection of the Act. These provisions would not have availed to assist the plaintiffs upon the principal point decided in the *Newlands* case, for they contain no new provision as to the time at which the implied conditions as to merchantable quality and fitness will attach. Nor, in my opinion, would they have assisted the plaintiffs in their contention that, apart from the Act, they had a right of action as against a bailor upon an implied condition that the goods should be fit for the purpose for which they were bailed. For the plaintiffs failed on this question primarily because no contract of bailment was made by the defendant company.

10 [1961] 3 W.L.R. 94.

11 A note on this case appears in (1961) 35 AUST. L.J. 325.

As to the *Grais* case, the new provisions will no doubt make it easy in some cases to attach liability to the dealer for warranties and representations made by him or on his behalf, notwithstanding that the negotiations result in the end in a hire-purchase agreement with a third party. It will no longer be necessary to rely upon the somewhat artificial suggestion of a collateral contract with the difficulties of proof which attach to it. Now that sec. 6 is part of the law, the doubts which I expressed above as to the method of approach adopted by Herron J. would not be felt if the like approach were to be made hereafter to a similar case to which sec. 6 applies. By this I mean that if the matter is looked at from the aspect of a notional contract for the sale of goods made between the prospective hirer and the dealer, notwithstanding that the actual contract made is of a different character and with a different party, then it may be a natural line of enquiry to consider whether the oral statement relied upon was promissory in character, this being a question of fact. If the answer is affirmative, then liability will attach to the dealer notwithstanding that the bargain was partly in writing and notwithstanding that there was writing which purported to exclude all other promises, since this attempted exclusion is void. But it is evident that sec. 6 still leaves many potential problems for lawyers and for the courts. I would draw attention to the valuable comments on this matter by Mr. Justice Else-Mitchell and Professor R. W. Parsons.[12] I pass on to the remarks which I shall make on the subject of money-lending.

C. LEGISLATION REGULATING MONEY-LENDING.

(1) *Scope of the discussion.*

The whole field of this legislation and of the case law relating to it cannot be covered here. In any event, the recent changes in the law, whilst serving to alleviate the "shock and distress and terror" from which business men and investors have been said to suffer, have diminished the practical importance of the subject. But I venture to think that ample scope will remain for the courts and for practising lawyers to exercise their ingenuity in working out the effect of these new provisions. We need not fear, or perhaps I should say we cannot hope, that the ground has now been sifted clean of all seeds of dispute and of litigation. I feel, therefore, that the subject is one about which lawyers may talk without any feeling that their talk has no more than an historical or academic interest, particularly as an important question arises as to whether efforts should be made to get uniformity in the

12 See ELSE-MITCHELL & PARSONS, HIRE-PURCHASE LAW (3rd ed., 1961), 74-75.

State laws on this subject. The plan I am adopting is to refer very briefly to the general purpose and scope of money-lending legislation and then to take up some topics and to discuss them in the frame of reference of the Acts in force in New South Wales and Western Australia before the most recent amendments, and next to refer to some of the new provisions made in both States, and to their effect upon these topics. It is to be understood that what follows is not intended as a comprehensive treatment of the questions to which I shall refer, but merely as a discussion of some aspects of the subject which seemed to be of interest.

(2) *General purpose and scope of the legislation.*

It may be stated in general terms that it has been considered necessary in this field, as in others, to depart from the principle of freedom of contract and from the doctrine of *laissez faire* in order to protect the weak and the needy from the strong and the rapacious in relation to dealings in which the former may be compelled by economic necessity to submit to the demands of the latter. In 1942 Mr. J. D. Holmes gave a brief outline of the ancient English legislation on usury.[13] He made this observation, "The philosophy of Bentham, however, so affected public opinion that it became hostile to the usury laws as economically unsound and they were eventually repealed in 1854" (by 17 & 18 Vic. c. 90). To this it is perhaps of interest to add the following citation from Dicey's *Law and Opinion in England:*[14]

> "Bentham's Defence of Usury supplied every argument which is available against laws which check freedom of trade in money-lending. It was published in 1787; he died in 1832. The usury laws were wholly repealed in 1854, that is sixty seven years after Bentham had demonstrated their futility; but in 1854 the opponents of Benthamism were slowly gaining the ear of the public, and the Money-lenders' Act, 1900, has shown that the almost irrebuttable presumption against the usury laws which was created by the reasoning of Bentham has lost its hold over men who have never taken the pains or shown the ability to confute Bentham's arguments."

Mr. Holmes has pointed out in the article mentioned above that the English Act of 1900 had been preceded by the report of a Royal Commission and by the decision in *Gordon v. Street,*[15] in which, by

13 See Holmes, *The Law of Money-lending,* (1941-42) 15 AUST. L.J. 260-264.
14 (3rd ed., 1920 reprint) 33-34.
15 [1899] 2 Q.B. 641.

the application of common law principles, the rapacious Mr. Isaac Gordon failed to recover a loan which he had made in a fictitious name, doing this intentionally and fraudulently. In the eyes of the Court this was clearly a case of the triumph of good over evil. It was not that all money-lenders were regarded as evil, for A. L. Smith L.J. observed:[16] "Amongst money-lenders, as in other ranks of life, there are many given to fair dealing and others given to the most rapacious tyranny known to mankind;" but Mr. Gordon was clearly of the latter class, for later the Lord Justice sets out the description of him which Mr. Holmes quoted in the above-mentioned article and which I shall repeat in part:

> "I must here state who the plaintiff Isaac Gordon is; and, in order that there may be no inaccuracy, I will cite only from his own letters and his own admissions as to what manner of man he is. He describes himself in writing when pressing the defendant as "the extortionate and usurious money-lender with about a gross of aliases, and that he is the hottest and bitterest of creditors." He admits that he is not a British subject, but was born in Russia, and has been convicted of fraud, and has charged 3000 per cent. interest, but would not say if he had charged 5000 per cent.; that he carried on business under six or eight different aliases at Birmingham, Bristol, Bath, Manchester, Liverpool, Oxford, London, and Leeds. I find in a letter which he wrote to the defendant that he expresses himself thus: "I will make it as hot and as bitter as I possibly can for you, upon which you may stake your life."[17]

The Act of 1900 was passed and, as was afterwards said, it cast its net wide, although not so wide as was the cast of some of the Acts which later followed in this country. In the years which followed there is to be observed, in England, a judicial reaction against giving too wide an operation to the Act, and a somewhat restricted approach was adopted to the question whether a man was carrying on business as a money-lender. It will suffice here to mention one of these cases, that of *Litchfield v. Dreyfus,*[18] in which an art dealer who took bills from purchasers and discounted and renewed the bills from time to time and after his retirement discounted customers' bills for two art businesses in which he had an interest, was held never to have been a money-lender. It is worthwhile to quote two passages from the judgment of Farwell J., who said:

[16] *Ibid.,* at 646.
[17] *Ibid.,* at 648.
[18] [1906] 1 K.B. 584.

"But not every man who lends money at interest carries on the business of money-lending. Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible. I do not of course mean that a money-lender can evade the Act by limiting his clientele to those whom he chooses to designate as "friends" or otherwise: it is a question of fact in each case.[19]

"The Act was intended to apply only to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship. This particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community who are called money-lenders as an offensive term. Money-lending is a perfectly respectable form of business. Nobody says that bankers are rascals because they lend money. It is part of their everyday business. Bill-broking is well known in the City of London, and is a respectable business so long as it is carried on in a respectable manner. But the Legislature in casting its net has cast it very wide; and if a man is carrying on the business of a money-lender he is within the Act, although he may be free from all blame morally. The question in each case is, Does he carry on the business of a money-lender? That depends on the facts of the case."[20]

Because of this tendency of the English decisions to limit the scope of the English Act, provisions were introduced in various Acts of the Australian States, to bring in what have been called the *"ad hoc* money-lenders," that is, those who lend money at a rate exceeding a specified rate. This part of the definition is spoken of by Dixon C.J. as having been "thrust in" by the amending Act of 1913 in Western Australia: See *Mayfair Trading Co. Pty., Ltd. v. Dreyer.*[21] In that case the Chief Justice later quoted[22] from the judgment of Isaacs J. in the *Cloverdell* case[23] a reference to the Victorian Parliament's "finding English decisions limiting the benefits of the Act to 'businesses' of money-lenders" and having then enlarged the Act to bring in even an isolated transaction. The extended definition appeared in the New South Wales Act of 1941, but in a somewhat different form, for it

19 *Ibid.*, at 589.
20 *Ibid.*, at 590.
21 (1959-60) 101 Commonwealth L.R. 428, at 439.
22 *Ibid.*, at 445.
23 (1924) 34 Commonwealth L.R. 122, at 139.

brings in anyone who *from time to time* lends money at a rate exceeding ten per cent.

(3) *Who are money-lenders?*

For the purposes of the Acts under discussion there are two main categories. First, there is the category of those whose business is that of money-lending or who announce or hold themselves out as carrying on that business. Second, there is the category of those who lend money at an "excessive" rate (subject to exceptions to which later reference will be made).[24]

(a) *Carrying on business as a money-lender.*

It seems to be established that the question whether a person or company carries on a business of money-lending is substantially a question of fact, although it is one into the determination of which questions of law will often intrude, particularly having regard to the need, in some cases, to examine the statutory definition of the term "loan" and to examine the scope of the exceptions. I shall not review the cases on this question but a few of them may be mentioned. The case of *Austin Distributors Limited v. A. H. Paterson Car Sales Pty., Limited,*[25] was concerned primarily with the operation of an exception clause in the Victorian Act of 1938. But Williams J.[26] made some observations on the more general question, which he regarded as one depending on "a mixture of law and fact", and he cited with approval part of what I have quoted above from the judgment in *Litchfield v. Dreyfus.*[27] Again, there are some general observations on this question in *Hyde v. Sullivan.*[28] The only other contribution I make to this general question is to refer to the discussion of it by Wolff C.J. in *Industrial Salvage Limited v. Equity Investments Pty. Ltd.*[29]

The last-mentioned case deals also with an interesting evidence point. The question being whether or not at a given date there was a business of money-lending, His Honour rejected a contention that evidence could not be given of transactions subsequent to that date, the contention being that evidence to establish the *indicia* of the business, including its continuity, must be limited to prior events. Another interesting point as to evidence arose in the case of *Tozer Kemsley &*

24 See New South Wales Act 1941-1959, sec. 3; and Western Australian Act 1959, sec. 3.
25 (1941) 65 Commonwealth L.R. 118.
26 *Ibid.*, at 128.
27 [1906] 1 K.B. 584, at 589.
28 [1956] State R. (N.S.W.) 113, at 119.
29 [1960] West. Aust. R. 79, at 81-82.

Millbourn (A/Asia) Pty. Ltd. v. Point.[30] The plaintiff there was a Victorian company which carried on business also in various other States. In determining whether it was at the time of the relevant transactions in New South Wales a money-lender within the New South Wales Act, should the enquiry be confined to its activities in New South Wales or should it extend to its transactions elsewhere? Do the definition provisions include within the ambit of the Act as money-lenders all persons who do the things and engage in the activities to which the definitions refer, wherever they may do them? To this question I gave a negative answer, for reasons which appear at pages 754-757 of the report, and therefore I excluded evidence of transactions beyond the State. The point is one, I think, of considerable difficulty, and I am not aware of any other direct authority upon it.[31] It should perhaps be mentioned here that this decision was given on 30th November 1960 and, as is noted in the State Reports, an appeal to the High Court was dismissed by consent on 9th May 1961. However, as late as 24th November 1961 a notice of motion to our Full Court was filed asking (a) that time for appealing be extended, and (b) that upon various grounds the decision should be reversed. This has not, of course, yet come before the Court.

(b) *Lending money at more than a specified rate.*

So far as the Western Australian Act is concerned, it is established by the *Mayfair* case[32] that it is not necessary, in order to bring a person within this part of the definition, to show a practice or a course of business. The Court approved on this question the judgment of Isaacs J. in *Cloverdell Lumber Co. Pty. Limited v. Abbott.*[33]

This matter still remains one of some difficulty so far as the New South Wales Act is concerned, because its definition has the words "or who from time to time lends money at a rate of interest exceeding ten pounds per centum per annum whether or not he also lends money from time to time at a lesser rate of interest." The question arises as to what degree of system or of continuity is required to satisfy these words. This is a question which has not been satisfactorily resolved. It was decided in *Hyde v. Sullivan*[34] that what was held to be but one single loan at above the specified rate could not satisfy the definition. But it is difficult to say how many must be the transactions of

30 [1961] State R. (N.S.W.) 751.

31 See now Walton v. Regent Insurance Limited, [1962] N.S.W.R. 466.

32 (1958) 101 Commonwealth L.R. 428.

33 (1923-1924) 34 Commonwealth L.R. 122, at 139.

34 [1956] State R. (N.S.W.) 113.

this character or with what frequency or over what period they must have occurred to satisfy the provision. The use of the present tense in this part of the definition causes some difficulty. One must determine whether a person was a money-lender at a particular point of time, that is, at the date of the impeached transaction. But what one must determine is whether, at that particular point of time, it was true to say of him that he "lends money from time to time" at the excessive rate. How then does one apply the notion of periodicity contained in the description to a determination of the situation at a particular point of time? If, for example, X. is proved to have made numerous loans at 15 per cent. over a period of three years but thereafter to have made no such loan for the period of one year immediately preceding the critical date, can such a definition, couched in the present tense, apply to him? In the *Tozer Kemsley* case I found it not necessary to give any precise answer to questions of this kind; I was able to say,[35] "Whatever degree of repetition or frequency the words "from time to time" may require I think they must surely be satisfied by the facts which I have outlined."

(c) *The exceptions in the definition of "money-lender."*

In the New South Wales Act of 1941, the following persons were excluded from the operation of the definition:—(a) pawnbrokers, (b) Friendly Societies and Co-operative Societies registered under the appropriate Acts, (c) any company empowered by a special Act to lend money in accordance with the special Act, (d) persons bona fide carrying on the business of banking or insurance, (e) any person carrying on any business not having for any of its principal objects the lending of money in the course of which and for the purposes of which he lends money at a rate not exceeding ten per cent. per annum, and (f) any person or body of persons exempted by the Governor by proclamation.

It will be seen by a comparison with sec. 3 of the Western Australian Act that the latter contained the same exceptions, with the difference that in the provision corresponding to (e) above the words "for its primary object" are used instead of the words "for any of its principal objects." In both Acts this exception is applicable only when the lending is at a rate not exceeding in the one case ten per cent. and in the other case twelve and a half per cent. The case of *Austin Distributors Ltd. v. A. H. Paterson Car Sales Pty., Limited*[36] dealt with the interpretation of a similar exception in the Victorian Act of

35 [1961] State R. (N.S.W.) 751, at 764.
36 (1941) 65 Commonwealth L.R. 118.

1938. It should be noticed that the definition in that Act extended to what I have called *ad hoc* money-lending, that is, it included a person "who lends money at a rate of interest exceeding eight per cent. per annum." But the exception now under discussion did not include in its terms (as did the New South Wales and Western Australian Acts) any corresponding reference to the rate at which the lending took place. Therefore, upon the view which the Court took, that the car distributor who financed dealings in used cars was, in respect of that financing, within the terms of the exception, the dealer escaped the operation of the Act, although it is clear from the report that in this financing it was receiving much more than eight per cent. By contrast, in the *Tozer Kemsley* case, the transactions which brought the plaintiff within the definition, that is, the lending of money from time to time at a rate exceeding ten per cent., although money-lending was not one of the principal objects of the company, seemed clearly to prevent the exception from having any operation.[37]

The New South Wales Act, by amendment made in 1946, included special provisions regulating the cash order method of trading. As to the question whether these transactions attracted, apart from special provisions, the provisions of money-lending legislation, reference may be made to the authorities discussed in *Money-lenders and the Law*[38] and particularly to the case of *Allchurch v. Popular Cash Order Co. Limited*[39] which gave an affirmative answer to the question.

(4) *The requirement of registration or licensing.*

In the Western Australian Act, sec. 5 (1) provided:

> No person shall carry on the business of a money lender or do anything which constitutes him a money lender for the purpose of section three of this Act unless he is granted registration under this Act and is the holder of a current license issued to him thereunder.

But by sub-sec. (6) of the same section it is provided:

> No contract or agreement or transaction entered into by a money lender with any person or body corporate shall be void or voidable by reason only that the money lender has, whether in connection with such contract or agreement or transaction or not, been at

37 [1961] State R. (N.S.W.) 751, at 766. As to the onus of proof in relation to the exceptions, see now Walton v. Regent Insurance Limited, [1962] N.S.W.R. 466.

38 (1956) 29 AUST. L.J. 641.

39 [1929] South Aust. State R. 212.

any time guilty of a contravention of any of the provisions of this section whether convicted thereof or not.

In New South Wales, sec. 4 contained a provision as follows:

(1) Every money-lender (whether carrying on business alone or as a partner in a firm) shall as hereinafter in this Act provided take out annually a licence in the prescribed form in respect of every address at which he carries on business as a money-lender or has an agency in connection with his money-lending business.

But instead of containing any provision saving validity as in sec. 5 (6) of the Western Australian Act, the Act on the contrary contained in sec. 21 the following:

No money-lender shall be entitled to recover in any court any money lent by him or any interest in respect thereof, or to enforce any contract made or security taken in respect of any loan made by him unless he satisfies the court by the production of his licence or otherwise that at the date of the loan or the making of the contract or the taking of the security (as the case may be) he was the holder of a licence under this Act or was registered as a money-lender under the Money-lenders and Infants Loans Act, 1905.

(5) *The requirements of formalities as to contracts of loans, etc.*

In New South Wales it was provided in sec. 22 that no contract for repayment of money lent by a money-lender or for the payment of interest, and no security given in respect of such contract or loan should be enforceable unless . . . . and then followed requirements for a note or memorandum of the contract which was to be signed personally by the borrower, for the delivery of a copy and a summary of the protecting provisions of the Act, and for what the note must contain. The section included the following provision:

(4) No such note or memorandum or copy thereof shall be deemed insufficient by reason only that in such note, memorandum or copy there is an omission or an incorrect or insufficient description or a misdescription in respect of the particulars required to be contained in such note, memorandum or copy if the court before which the enforceability of any such contract or security comes in question is satisfied that such omission, incorrect or insufficient description or misdescription was accidental or due to inadvertence and was not of such a nature as to be liable to mislead or deceive any person to his prejudice or disadvantage.

By sec. 23 such contracts were made unenforceable unless the signed consent of the spouse of the borrower appeared on the note; but there were some provisoes to this. There were also special provisions as to contracts of guarantee. In Western Australia, sec. 9 had somewhat similar provisions to those of sec. 22 of the New South Wales Act, making contracts unenforceable unless the specified requirements as to a note or memorandum of the contract were fulfilled.

(6) *Effects of non-compliance with the statutory requirements.*

(a) What classes of money-lenders are affected.

According to the views expressed in *Hyde v. Sullivan,*[40] an "*ad hoc* money-lender" is not affected at all by non-compliance with the requirement of being licensed. These views would strictly seem to be obiter dicta, for the Court held that it was not open to the jury to find that the plaintiff was a money-lender at all. Sec. 21 was said to apply only to the other categories in the definition of "money-lender." This view has held the field in New South Wales and was accepted by me in the *Tozer Kemsley* case.[41] But it is at least possible, as Mr. Lee's article[42] suggests, that a different view may be taken if the occasion arises for the High Court to deal with the point. It is not a question of real importance in Western Australia because of the provisions of sec. 5 (6). But, as to the requirements concerning a note or memorandum, these did apply to all money-lenders, including those in the *ad hoc* category. As to the former sec. 9 of the Western Australian Act, the *Mayfair* case[43] settles the point, and I have decided that this is so also as to sec. 22 of the New South Wales Act.[44]

(b) The consequences of non-compliance and the rights and remedies of the borrower.

It is clearly established that the provisions that no contract etc. shall be enforceable are not confined in their effect to a prohibition against enforcement by the lender in curial proceedings, but extend to a prohibition against enforcement by extra-judicial methods authorized or allowed by the securities or by the general law.[45] The case law now affords some interesting illustrations of the working out of this principle. A common case, of course, is where the borrower is using the

40 [1956] State R. (N.S.W.) 113.

41 See [1961] State R. (N.S.W.) 751, at 765.

42 See note 2, *supra.*

43 (1958) 101 Commonwealth L.R. 428.

44 See the Tozer Kemsley case (note 41, *supra*), at 765.

45 See Mayfair Trading Co. Pty. Ltd. v. Dreyer, (1958) 101 Commonwealth L.R. 428, and Kasumu v. Baba-Egbe, [1956] A.C. 539.

Act as a defence against an action to recover the debt as in the *Tozer Kemsley* case, and in such cases no particular problems as to the limits of unenforceability would ordinarily occur. Mention may, however, be made of a practice point which came before me recently on an application by a defendant to set aside a default judgment and to be let in to defend. Such an applicant is required to show "a defence on the merits."[46] Some but not all of the defences sought to be raised were based on the Money-lenders Act and these, I considered, could be held to answer the description of "a defence on the merits."[47]

More interesting are the recent cases in which it was the borrower who was the plaintiff, and who relied, as plaintiff, upon non-compliance with the Act. In *Read v. Hastings Deering Finance & Investment Co. Limited,*[48] the plaintiff brought an action for conversion and trespass to goods. Pleas were put in alleging that the goods were covered by a registered bill of sale, that the plaintiff was in default, and that the defendant, in accordance with the terms of the bill of sale, lawfully took and removed the goods. A number of replications were filed alleging that the defendant was a money-lender and that, in various respects set out, there was a non-compliance with the requirements of sec. 22. On demurrer to the replications it was held that the taking of action in respect of the goods under the powers in the bill of sale was unlawful (on the assumptions of fact raised by the replications) and was no justification for the wrongs alleged by the plaintiff. It was stated also that a security unenforceable because of non-compliance with sec. 22 could not support a plea of leave and licence.

In the *Mayfair* case,[49] the High Court held that the putting in of a receiver and manager amounted to an enforcement of the security and was unlawful, that the plaintiffs were entitled to declarations that they were not liable to pay the balance of the loans and that the securities given were unenforceable, to orders for the delivery up of the documents, to an account, and (on this point differing from the Court below) to an order for payment over of the amount which had been collected by the receiver and paid to the defendant. It held also that the plaintiffs were not obliged as a condition of any of this relief to submit to terms as to their repayment of the loan. The discussion of this last-mentioned point was (until the New South Wales Act was

46 Common Law Procedure Act, 1899-1958 (N.S.W.), sec. 25 (3).
47 Commercial Traders Limited v. Furness, [1962] N.S.W.R. 291.
48 [1961] N.S.W.R. 360.
49 (1958) 101 Commonwealth L.R. 428.

amended) of particular interest to New South Wales lawyers, because of the distinction drawn between the rules operating in the equitable jurisdiction in that State and those applicable where provisions were in force which were based upon the judicature system. These observations caused McLelland J., in the case of *White v. Pacific Acceptance Corporation Limited*,[50] to hold that the plaintiffs were not entitled to an order for the delivery up and cancellation of the memoranda of contract and the securities, except on conditions as to restoration by the plaintiffs in respect of the money which had been lent to them. His Honour's own view was that the effect of the judgment in *Kasumu v. Baba-Egbe*[51] was to destroy the basis upon which the rule that "he who seeks equity must do equity" had been applied to money-lending cases in *Langman v. Handover*[52] and in *Automobile and General Finance Co. Ltd. v. Hoskins Investments Limited*.[53] But he felt that he should follow the views expressed in the *Mayfair* case on this subject.

The case of *White v. Pacific Acceptance Corporation Limited*[54] refers to a number of decisions as to the interpretation and operation of sec. 22 of the New South Wales Act which, however, would not for the most part be relevant in relation to the differently framed sec. 9 of the Western Australian Act and upon which I do not dwell.

In the *Mayfair* case it is stated[55] that the moneys collected and paid over to the defendant and retained by it could have been recovered by the plaintiffs under a common money count. The view was expressed that it would not be a correct answer to this claim to say that the defendant could treat the said moneys as applicable, in the hands of the defendant, to the discharge *pro tanto* of the unenforceable loan. Nevertheless, the suggestion has been made that non-compliance with sec. 9 has not the effect of extinguishing entirely the roles of debtor and creditor, although the point was not decided.[56]

It has recently been held in New South Wales that if there is a written memorandum which completely and accurately sets out the terms of the contract, the fact that departures have been subsequently made from those terms in the course of the performance of the contract, in that the actual advances made did not correspond in amounts

50 [1961] N.S.W.R. 1154.
51 [1956] A.C. 539, at 550.
52 (1929) 43 Commonwealth L.R. 334.
53 (1934) 34 State R. (N.S.W.) 375.
54 See note 50, *supra*.
55 (1958) 101 Commonwealth L.R. 428, at 450.
56 See Gill v. R., [1960] West. Aust. R. 91, at 95.

or dates with those of the instalments specified in the memorandum, does not, in the absence of evidence that they were brought about by agreement, enable a borrower to set up a non-compliance with sec. 22.[57]

(7) *Recent amendments to the legislation.*

(a) The Western Australian Act of 1959.

The most important amendment made by this Act is the re-enactment in a new form of sub-section 1 of section 9. The new provision is as follows:

> Where a money lender agrees to lend money under a contract that includes a provision for the repayment of the money, the payment of interest, or for the giving of security in respect of the money or all or any of those provisions, the money lender shall, before the money or any portion of it is lent, deliver to the borrower
>
> (a) a note or memorandum which complies with sub-section (2) of this section, signed by or on behalf of the money lender and the borrower; and
>
> (b) a true copy of the document of security, if any, securing the amount of the loan.

This new provision says nothing as to non-enforceability (1) of the contract for repayment of the loan or for payment of interest or (2) of a security. It imposes an obligation on the lender to deliver to the borrower a note or memorandum and a true copy of the document of security, if any, but it says nothing as to the consequences of non-compliance. No doubt the intention was that in future the consequences, shown by the *Mayfair* decision to follow, would no longer follow upon non-compliance, and it was contemplated that the results of non-compliance would be (a) that the money-lender would be liable to a penalty under sec. 21, and (b) that upon conviction he would be exposed to the risk of suspension or cancellation of his registration and licence under sec. 19. Whether he complied or not the contract, if for an excessive rate of interest, would be read as providing for the maximum rate, and the re-opening provisions of sec. 4 would not be affected.[58]

It may perhaps be questioned whether the mode adopted for achieving the desired result is a satisfactory one. It may not be fanciful

[57] Austral Court Pty. Ltd. v. Esanda Ltd., [1962] N.S.W.R. 161.

[58] See the new subsec. (1a) of sec. 9.

to suggest that someone will, in the future, raise an argument based upon general principles as to the non-enforceability of illegal contracts, that the money lender who is in breach of sec. 9 (1) cannot recover the sum lent in an action in the courts, and will draw attention to the express saving provision in sec. 5 (6) that no contract is to be void or voidable by reason only that the money lender has contravened that section, and to the absence of any such express provision in relation to a contravention of sec. 9. Of course, there are substantial reasons which could be advanced against such an argument. The circumstance that the previous provision was removed by an amending Act would be significant as a guide to the legislative intention. The provision already mentioned as to "reading down" an excessive rate of interest, which was inserted in the new sub-section (1a), and the reference in paragraph (b) of that sub-section to the re-opening provisions of sec. 4, suggest strongly that there is a valid and binding contract of loan notwithstanding non-compliance with sec. 9; but it is perhaps unfortunate that the matter was not put beyond all argument by the inclusion of a provision similar to that in sec. 5 (6).

(b) The New South Wales Act of 1961.

(i) *Change in definition of "loan."*

From the point of view of our general topic of the credit sale of goods, there is an important exclusion from the definition of "loan" of "any bona fide transaction entered into by a vendor (not being a money-lender licensed under this Act) of goods for the sale of goods by him where time for payment for such goods is postponed." This would remove from the ambit of the Act many commercial transactions which could formerly have fallen within it.

(ii) *Change in definition of "money-lender."*

An addition is made to the exceptions in the definition of "money-lender" which excludes from it persons who make or have made loans to a company for which debentures are issued after application made in a form issued with a prospectus.

(iii) *Exclusion of various transactions from the Act.*

A new section 3A provides that nothing in the Act shall apply or be deemed ever to have applied to (a) the letting of goods on hire under hire-purchase agreements in compliance with the Hire-Purchase Act, 1960; (b) agreements which by the definition clause in the last-mentioned Act are excluded from being hire-purchase agreements, namely, agreements whereby the property in the goods passes at the time of the agreement or at any time before delivery, and agreements under

which the hirer or purchaser of goods is a person engaged in the trade or business of selling goods of that nature or description; (c) a credit sale within the meaning of the Credit-sale Agreements Act, 1957; (d) an agreement referred to in, and excluded from the operation of that Act by, certain paragraphs in the definition of "credit-sale agreement" therein. This new section operates whether or not a party to the agreement is a licensed money-lender.

(iv) *Exclusion of various transactions from many of the provisions of the Act.*

A new section 3B provides that Part III of the Act shall not apply (except for sections 21, 30, and 30A) to any loan of the following classes, nor to contracts and securities in relation thereto: (a) a loan to any company; (b) a loan to any person in excess of £5,000, or such greater amount as is prescribed; (c) a loan pursuant to any agreement to finance the erection of buildings to an amount in excess of £5,000; (d) a loan where the rate of interest (as calculated in accordance with the Schedule) is not greater than the current overdraft rate in the Commonwealth Trading Bank.

(v) *Amendments to section 22.*

There are amendments to section 22 the effect of which is that if there is a security document which contains the required particulars which a note or memorandum has to contain, then it is not necessary to have also a note or memorandum of the contract, and the delivery of a copy of the security document satisfies the requirements as to delivery of a copy of the note or memorandum. Similarly, the requirements of section 23 as to signing by a spouse can be satisfied by reference to the security document.

(vi) *Relief of money-lender in respect of non-compliance—wide powers in court to make "just and equitable orders."*

There is a new section 30A which applies to any loan and any transaction which is substantially one of money-lending by a money-lender whenever made (except those in respect of which proceedings have been commenced before the commencement of the amending Act). This provides that if in any proceedings in any court it is established that the money-lender has, in relation to that loan or transaction, neglected or failed to comply with any of the provisions of the Act, and the court is satisfied that the money-lender acted honestly and ought fairly to be excused, it may in giving judgment impose such conditions and give such directions as it may consider just and equitable. In particular, it may (a) exercise any of the re-opening

powers conferred by sec. 30 of the principal Act, (b) confirm or declare to be valid and enforceable in whole or in part as from the date specified any contract for repayment or any security or guarantee, and may vary, alter or amend any condition or agreement in the contract or in the security or in the guarantee; (c) relieve from or impose upon a borrower or guarantor the obligation to repay the whole or part of the principal, with interest at a rate specified or without interest; (d) postpone the time for repayment or for enforcement; (e) make any further order of an incidental or ancillary kind.

(vii) *Summary of results of these amendments.*

Broadly, the results of all this can be summarised as follows. Many transactions are now removed altogether from the operation of the Act.[59] Many more transactions, particularly loans to companies and loans over £5,000 to anyone, cannot be invalidated for any non-compliance with the Act other than the failure of the money-lender to be licensed.[60] Finally, in cases where the money-lender may still be in jeopardy, whether because of failure to be licensed or because in the limited class of transactions to which such invalidating provisions as secs. 22, 23, and 23A still apply there has been non-compliance, he may, if he can show that he acted honestly and ought fairly to be excused, still be able to have the court consider his contract, his security or guarantee, but subject to the widest powers in the court to remould the contract and to give to him part only of the principal or of the interest and generally to do whatever it thinks is "just and equitable."

It is particularly on this last aspect of the matter that one can foresee the opening up of a long vista of future litigation. The court has been given such extensive powers that it will take some time for the judges to mark out some kind of path along which to tread. It will no doubt be thought desirable to attempt to do this rather than that each judge should roam wherever he pleases. But it can, I think, be said that the Act has now been so limited in its scope and in its effects that it will not often constitute a menace to traders or to those who finance their commercial transactions.

As to the new sec. 30A of the New South Wales Act, my own view is that this is an undesirable way to deal with the question of the enforcement of transactions in which there have been breaches of the provisions of the Act. The powers conferred upon the judge to re-write the contract go further than the "re-opening" provisions

[59] See (i), (ii) and (iii) on pp. 468-469.
[60] See (iv) on p. 469.

of the Act. They include a power to deprive the money-lender of the whole or any part of the principal debt, but no criterion other than the reference to doing what is "just and equitable" is furnished as to the circumstances in which this should be done. As the power is exercisable only when it is found that the money-lender has acted honestly and ought fairly to be excused, it is remarkable that it should be so extensive and so ill-defined. No doubt it is a power which will not often be exercised but the conferring of it in those terms is not easy to justify.

C. A. WALSH.*

* *B.A., LL.B. (Syd.); a justice of the Supreme Court of New South Wales, 1954-.*