PROBLEMS OF THE LAW OF HIRE-PURCHASE

The ailing law of hire-purchase at present displays a frenzied activity which in any other patient would be diagnosed as the death-throes. Scarcely a week goes by without the courts producing yet another leading case; two Private Member's Bills have been killed in Parliament;[1] the Molony Committee has reported ;[2] the Law Society has reported ;[3] and the chaos relentlessly increases. In two areas the activity has been particularly convulsive; damages on termination and the position of the dealer as agent. If we examine the technical problems in these particular areas, it may help to bring out the general conceptual challenge to which the law has failed to respond, thus baulking its own unified and rational development.

DAMAGES ON TERMINATION

Standard hire-purchase forms governing agreements outside statutory control[4] have for a long time contained clauses requiring the hirer to pay such an amount on termination as, in addition to the amounts already paid, will make the payment up to a certain percentage of the total hire-purchase price. The actual percentage has been supervised by the courts; thus, 75% was construed as too much;[5] now, under *Campbell Discount Co. Ltd.* v. *Bridge,*[6] two-third is excessive. Not that the criterion has been merely one of percentage; rather a clause is a penalty-clause and unenforceable if it is not "a genuine attempt to pre-estimate damage".[7] Such an attempt need not be arithmetically precise; in one case concerning a new juke-box,[8] a product which depreciates by 50% over the first few months and then more slowly, a graduated damages clause which attempted to reflect broadly this trend was enforceable. An almost identical clause was held valid with surprisingly little discussion in a later case concerning a Morris prime-mover, a product which is subject

1. Sec 650 H.C. Deb., cols. 1716 *et seq.* and 661 H.C. Deb., cols. 1163 *et seq.*
2. 1962 Cmnd. 1781.
3. Sec "The Times", June 26, 1963.
4. The Hire-Purchase Act, 1938 (1 & 2 Geo. 6 c.53) and the Hire-Purchase Act, 1954 (2 & 3 Eliz. 2 c.51).
5. *Lamdon Trust Ltd.* v. *Hurrell* [1955] 1 W.L.R. 391 *sub. nom. Landom Trust Ltd.* v. *Hurrell* [1955] 1 All E.R. 839.
6. [1962] A.C. 600.
7. *Ibid, per* Lord Devlin at p.633.
8. *Phonographic Equipment (1958) Ltd.* v. *Muslu* [1961] 1 W.L.R. 1379.

to different economic forces than is a juke-box.[9] But, at any rate., percentage is not decisive one way or the other, though a high percentage will naturally be less easy to justify as a genuine pre-estimate of damage than a low one.

After the *Bridge* case, finance companies found themselves saddled with thousands of presumably unenforceable damages clauses. How, then, could they recover more money when the contract ended prematurely? One possibility was by use of the principle, if such it is, of *Associated Distributors Ltd.* v. *Hall,*[10] which states that if the hirer exercises his option to terminate the contract before the end of the hiring, he is deemed to affirm it in all its terms. Accordingly, no inquiry as to whether the damages clause is a penalty is permissible. This grotesque doctrine, penalising goodwill and rewarding recalcitrance, was severely criticised by Lords Denning and Devlin in the *Bridge* case,[11] though to Lords Simonds and Morton it seemed a glowing example of the beauty of English jurisprudence.[12] As Lord Radcliffe could not be prevailed upon to offer an opinion, for on the facts of the case it was held that there was not an exercise by the hirer of his option, the doctrine remains formally tenable; and in fact it has once been applied subsequently.[13] But the doctrine is of limited practical significance and doubtful legal validity, so finance companies looked further for a weapon.

They found it in the ordinary principles of contract law. *Yeoman Credit Ltd.* v. *Waragowski,*[14] where the finance company sought a further remedy because of an inadequate (50%), not an unenforceable, damages clause, lit the way. The hire-purchaser of a car, total hire-purchase price £434 7s., had paid £72 deposit, and had agreed to pay 36 instalments of £10 0s. 9d. plus £1 on exercising his option to purchase. He paid no instalments, and was in possession of the car for six months before the finance company took possession of it. Having done so, the company re-sold the car for £205, a reasonable commercial price. If they had sued for arrears of instalments plus depreciation, they would have recovered 6 x £10 0s. 9d. = £60 4s. 6d. plus £84 9s., this figure being the difference between one-half of the total hire-purchase price and the sums already received (£72 deposit plus £60 4s. 6d. instalments). Adding to this, the £205 received on re-sale, the company would altogether receive £11 13s. 6d. less than it originally expected when entering into the contract. So instead of suing for depreciation, they sued for general damages for breach of contract. The amount was assessed at £96 2s. 6d., being £433 7s. minus the deposit, the six instalments recovered and the re-sale price. Giving judgment for this amount, Davies L.J. said:

9. *Lombank Ltd.* v. *Cook* [1962] 1 W.L.R. 1133. The writer's view has been confirmed in *Lombank Ltd.* v. *Palmer* "The Times", July 30, 1963.

10. [1938] 2 K.B. 83.

11. [1962] A.C. 600 at pp.629-630, 633-634.

12. *Ibid.* at pp.613-614 and 614-615.

13. *Goulston Discount Co. Ltd.* v. *Harman (unreported)* (1962) 106 S.J. 362, [1962] J.B.L. 292.

14. [1961] 1 W.L.R. 1124.

> "I can really see no answer to the broad proposition contended for by the plaintiffs [owners] : 'He agreed over a period of three years to make us payments totalling £433 7s. He chose to pay us nothing apart from the £72. He did not exercise his right to terminate the contract.[15] He broke it. As a result of that, instead of receiving that sum of money, we have, by selling the car, by suing him and getting judgment, received that sum of money less £96 2s. 6d., and that is our damage.' In my judgment that proposition is sound in law, and I can see no way in which it can validly be attacked."[16]

This case was followed by *Overstone Ltd.* v. *Shipway.*[17] On the facts, *Associated Distributors Ltd.* v. *Hall*[18] was inapplicable; accordingly, the finance company, having recovered arrears of instalments in a previous action, sued for general damages on the basis of the *Waragowski* case.[19] It was held that their cause of action was not barred, for the instalments had been recovered in debt whereas general damages were recoverable in assumpsit; accordingly, the damages were to be assessed as in the earlier case except that the charges should be reduced because the company was receiving its capital outlay sooner than bargained for. Davies L.J. restated the main principle:

> "It seems to me that if a hirer under a hire-purchase agreement is guilty of such a breach or non-observance of the terms of the agreement as would satisfy any court, not merely that the hire-purchase company had a right to terminate the contract, but that, in all the circumstances, it would be reasonable to terminate the contract, it cannot thereafter be said on behalf of the hirer: 'You exercised your remedy for my breach of contract by terminating the contract, and having done that you cannot claim damages for my non-performance or breach of contract for such period as it had to run thereafter'." [20]

Thus the bulwark of *Bridge* had been penetrated almost before it was erected.[21] The law still gave more support to an overreaching finance company than to a slippery client at the possible cost of the honourable client.[22]

But at this point,[23] Lord Denning, famous protagonist of the individual dominated by superior economic forces,[24] became Master of the Rolls. From his strategic position as head of the Court of Appeal, he

15. Perhaps he knew about the *Hall* case.

16. *Ibid*. at p.1129.

17. [1962] 1 W.L.R. 117.

18. [1938] 2 K.B. 83.

19. [1961] 1 W.L.R. 1124.

20. [1962] 1 W.L.R. 117 at p.130.

21. *Overstone's* case was decided the day after *Bridge's* case was argued.

22. It is not intended to suggest that more than a few finance companies wish to overreach customers. What is important is that those few had opportunity to do so under this doctrine.

23. April 19, 1962.

24. See, for example, his judgments in *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 1 W.L.R. 936; *White* v. *Warwick (John) & Co. Ltd.* [1953] 1 W.L.R. 1285; *Adler* v. *Dickson* [1955] 1 Q.B. 158 and his dissenting judgments in *Faramus* v. *Film Artists' Association* [1963] 2 W.L.R. 504, and *Boulting* v. *Association of Cinematograph Television and Allied Technicians* [1963] 2 W.L.R. 529.

soon had an opportunity to repair the damage done to the spirit of the *Bridge* case. This occurred in the case of *Financings Ltd.* v. *Baldock.*[25] The defendant had paid a deposit of £100 but no instalments, and, as in the *Overstone* case, the finance company was saddled with an unenforceable penalty clause. But there was an essential factual difference from the earlier cases. Whereas in those, there had been non-payment of six and four instalments respectively, here the defendant was only two months in arrears when the owner exercised his right to terminate. The court construed the earlier cases as based upon repudiation of the whole contract by the hire-purchaser; here, by contrast, there is "simply . . . . . a failure to pay one or two instalments (the failure not going to the root of the contract and only giving a right to terminate by virtue of an express stipulation in the contract)".[26] To put it another way: "What were the breaches by the hirer up to the termination of the hiring? He could only point to the simple failure to pay the two instalments of rent. In these circumstances the only moneys which the plaintiffs can recover are those two instalments which are in arrear and unpaid with the interest thereon".[27]

So the pendulum swung back yet again. The case has been followed by the Court of Appeal in *Brady* v. *St. Margarets Trust Ltd.,*[28] where Davies L.J. accepted[29] that his use of the criterion of 'reasonable termination' in the *Overstone* case was misleading, and acknowledged that the correct test was that of repudiation. Though this line of authority awaits a House of Lords decision, it is probably safe to assume that it will be confirmed.

The practical results of all this are potentially odd. If a hire-purchaser fails to pay two instalments, a finance company well-versed in current law may be advised to ignore the situation for a further two months or so, fortified by the knowledge that during this mutual inactivity the mutual rights and liabilities will be drastically altered. The additional risk of leaving the goods in the customer's possession for a further two months may seem small compared with the potential rewards of waiting.[30] It may, of course, be said that, if the hire-purchaser cannot pay two instalments, he is unlikely to be able to pay four instalments plus general damages. But the additional amount for which judgment is recoverable may make applicable the provisions[31] for bankrupting a

25. [1963] 2 W.L.R. 359.

26. *Ibid.* at p.365.

27. *Ibid.* at p.364.

28. [1963] 2 W.L.R. 1162.

29. *Ibid.* at p.1167.

30. The owner, having title, is theoretically protected against an unauthorised disposition. Normally, the risk in these circumstances will simply be that of usual depreciation.

31. Where final judgment has been obtained and total debts exceed £50 the creditor may serve a bankruptcy notice under the Bankruptcy Act, 1914, s.1(1)g., and if within seven days the debtor cannot show he has a set off, counterclaim, etc., then his failure to pay is an act of bankruptcy. The instalments plus County Court costs may not add up to £50 if there are no other debts; four instalments plus general damages certainly will.

judgment debtor, a form of pressure certainly more unpleasant than any other. Such crippling legal liability seems unsuitably founded on such an arbitrary factor.

Another peculiar result is that a finance company caught by the *Baldock* case would have been better protected if the transaction had been within the Hire Purchase Acts. Under section 4 of the 1938 Act, the finance company can recover upon termination all arrears of instalments plus such amount, if any, needed to make the amount paid up to 50% of the total hire-purchase price. In the *Baldock* case, the finance company received from the hire-purchaser less than 25% of his original obligation.[32] This is an unexpected illustration of the irrational workings of a money-limit in the Acts.[33]

One way that has been suggested[34] of circumventing the effect of *Baldock's* case is that finance companies should insert in their standard forms of contract a clause stating that non-payment of any instalment on the due date is to be treated as repudiation of the whole agreement. With respect, it is doubtful if this would have the intended effect. It is one thing to contract for a right to terminate upon the occurrence of a certain event; it is quite another to attempt to impose a legal characterisation upon that event. The latter seems exclusively within the competence of the courts; the former is a legitimate area for mutual agreement.[35] A few examples may clarify the point. Partnership is a legal, not merely a factual, concept; so the courts do not construe a fact situation as partnership just because the parties describe it as such.[36] What constitutes a lease of land is a legal, as well as a factual, phenomenon; the fact that the parties describe their agreement as a license will not prevent the courts from characterising it as a lease.[37] Again, to take the converse case of the one under discussion, in *Munro* v. *Meyer*[38] the parties specified that "each delivery or shipment shall be treated as a separate contract, and the failure to take or give any delivery or shipment shall not cancel the contract as to future deliveries or shipments". Nevertheless, Wright J. (as he then was) held that "where there is a persistent breach continuing for nearly one-half of the contract quantity" the buyer ought to be able to treat the whole contract as repudiated.[39]

32. As they had resold for the commercially unreasonable price of £140, the owners added to their own troubles.

33. See, for further comments on the money limit, the Molony Report, para. 550-560.

34. See Ivamy, "Damages for Breach of Hire-Purchase Agreement" [1963] J.B.L. 274.

35. Not that 'mutual agreement' describes the relationship between finance company and customer. The terms are stated by the company, and that is that.

36. See generally *Halsbury's Laws of England,* Vol. 28, ss.930-948.

37. *Addiscombe Garden Estates* v. *Crabbe* [1958] 1 Q.B. 513; See generally, Halsbury, Vol. 23, ss.1022-1028.

38. [1930] 2 K.B. 312.

39. *Ibid.* at p.331.

This is consistent with a long line of authority[40] that has, indeed, established that the test of repudiation is how material the breach is, and while the intention of the parties is one relevant factor in assessing this it is not dispositive.[41] The issue remains a legal one, and the parties will not so easily remove it from that sphere.

Thus, straining to balance, the law stands.

THE POSITION OF THE DEALER

As the vast bulk of hire-purchase transactions are now carried out by a sale of the goods from the dealer to the finance company and a hire-purchase contract between the company and the hire-purchaser, a layman may well be confused by the legal relationships involved.[42] As all the factual negotiations have concerned him and the dealer, he may, with some justification, expect to have redress against the dealer if the goods are defective. This expectation is even more understandable if one realises, to take the example of a car, that no representative of the finance company normally sees the hire-purchaser or the car, that the dealer may bargain the price of the vehicle with the hire-purchaser, and may offer him a price for his present car, which he may own already or still be acquiring on hire-purchase. Small wonder then, that he may be a little piqued to find that there is no legal relationship between himself and the dealer upon which to found a cause of action if the goods turn out to be unsatisfactory. His pique will become angry frustration when he further discovers that his rights against the finance company have been drowned without trace in a sweeping exclusion clause.

Two main doctrines, however, modify this situation. The first is that of fundamental breach,[43] under which if the goods so little resemble the goods as which they were sold as not to be those goods at all — e.g. a car without an engine — then "the party in breach is disentitled from relying on the provisions of an exempting clause".[44] The hire-purchaser can, under these circumstances, reject and recover all his money, or go on with the contract while retaining his right to sue for damages.[45] The exact scope of the doctrine is not certain; it seems to overlap with the requirement that goods sold by description should correspond with their description[46] and with the common law requirement that goods should

40. *Frost* v. *Knight* (1872) L.R. 7 Exch. 111; *Mersey* v. *Naylor* (1884) 9 App. Cas. 434; *Smyth (Ross T.) & Co. Ltd.* v. *Bailey Sons & Co.* [1940] 3 All. E.R. 60, 164 L.T. 102; *Heyman* v. *Darwins* [1942] A.C. 356; *Shaffer Ltd.* v. *Findlay* [1953] 1. W.L.R. 106; *White and Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413.

41. *Cf. Corbin On Contracts,* para. 946 *et seq.; Williston On Contracts,* para. 1322-1326; *Chitty On Contracts,* (22nd ed. 1961) para. 1158.

42. This point is stressed in the Report of the Council of the Law Society, note 3, *supra.*

43. See *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 1 W.L.R. 936; *Yeoman Credit Ltd.* v. *Apps* [1962] 2 Q.B. 508.

44. [1956] 1 W.L.R. 936 at p.940.

45. *Charterhouse Credit Co. Ltd.* v. *Tolly* [1963] 2 W.L.R. 1168.

46. See *Munro* v. *Meyer* [1930] 2 K.B. 312.

be fit for their purpose.[47] But in any case the facts which bring the doctrine into relevance are unusual.

The second doctrine which modifies the situation is that expounded by McNair J. in *Andrews* v. *Hopkinson,*[48] following several earlier cases.[49] It is this: When a dealer makes a representation to a potential hire-purchaser in reliance upon which he enters into a contract with a finance company, then that representation constitutes a 'collateral warranty' for whose breach damages are recoverable from the warrantor. The consideration supporting this warranty is the fact that the hire-purchaser goes ahead with his transaction with the finance company, for it is enough that consideration moves from the promisee.[50] So if the dealer says, "It's a good little bus. I would stake my life on it. You will have no trouble with it,"[51] and the drag-link joint is unsafe, then he is liable for damages for breach of that warranty. This has recently been confirmed by the Court of Appeal in *Yeoman Credit Ltd.* v. *Odgers.*[52] Useful as this may be, it gives no protection where the dealer says nothing[53] or simply makes an innocent misrepresentation. As the law stands, the latter gives no right to damages.[54]

These problems are clearly not yet fully worked out, and this is because the position of the dealer has not yet been fully defined. Two recent cases, *Financings Ltd.* v. *Stimson*[55] and *Northgran Finance Ltd.* v. *Ashley*[56], illustrate this.

In the *Stimson* case, a potential hire-purchaser signed a proposal form on March 16th, and not until March 25th was the proposal 'accepted', by signing, by the finance company. On March 18th, the dealer allowed the hire-purchaser to take the car away. Finding it unsatisfactory, he returned it to the dealer on March 20th. Both the dealer and the hire-purchaser were under the impression that a contract had already been made which the hire-purchaser wanted to rescind, and on this basis the hire-purchaser returned the car, agreed to sacrifice his deposit,[57] and asked the dealers to get in touch with the finance company and let him

47. The language of the County Court judge in the *Tolly* case suggests that the two ideas were running slightly together.

48. [1957] 1 Q.B. 229.

49. *Brown* v. *Sheen and Richmond Car Sales* [1950] 1 All E.R. 1102; *Shanklin Pier Ltd.* v. *Detel Products* [1951] 2 K.B. 854.

50. This reasoning is enough to illustrate the artificiality of the doctrine of consideration. In 1935 the Law Revision Committee made proposals that would have drawn the teeth of the doctrine, but they have been ignored: Law Revision Committee, Sixth Interim Report, 1937, Cmd. 5449.

51. The facts of *Andrews* v. *Hopkinson,* note 48 *supra.*

52. [1962] 1 W.L.R. 215.

53. As in *Astley Industrial Trust Ltd.* v. *Grimley* [1963] 1 W.L.R. 584.

54. But see the proposals of the Law Reform Committee, 1962 Cmnd. 1782.

55. [1962] 1 W.L.R. 1184.

56. [1963] 1 Q.B. 476.

57. One wonders why, when the facts were discovered, he did not counterclaim for the return of the deposit as money paid for no consideration.

know the outcome. It was accepted that an attempted rescission could be construed as revocation of an offer, but neither of them communicated with the finance company. The vehicle remained on the premises of the dealer, and on the night of March 24th/25th it was stolen. When it was recovered, it was badly damaged. On the morning of the 25th, the finance company, unaware of all the above facts, signed the proposal form. The problem was this: did the dealer's knowledge of the purported rescission, which was construed as revocation of the offer, bind the finance company? To what extent was the dealer an agent of the finance company?

Before answering this, let us state the problem of the *Ashley* case. A, who already had a Morris car on hire-purchase from L. Co., wished to hire-purchase in its stead a Zephyr car. He agreed with the dealer that the dealer would take the Morris car in part-exchange, the dealer paying off the balance to the L. Co. The dealer would also pay the required deposit of £65 on the second-hire-purchase contract, which was with Northgran. L. Co. agreed to the disposition as long as they received the balance, and A accordingly signed a proposal form for the hire-purchase of the Zephyr car. This offer was accepted by Northgran a few days later. Then the dealers failed to carry through their arrangement with L. Co., and A, still bound by the original agreement, notified Northgran that he could not go ahead with the Zephyr transaction. They sued him. His first argument was that the whole transaction was illegal, since there was no down-payment as required by the appropriate Regulations in force at the time.[58] Alternatively, he argued that the dealer knew that the offer to Northgran was conditional upon satisfactory determination of the agreement with L. Co., that the dealer was agent of Northgran, and that his knowledge was, accordingly, the company's knowledge. Let us compare the attitudes of the Court of Appeal to the connected problems posed by the two cases.

In the *Stimson* case, the court held[59] that the dealer had ostensible authority to receive notice of revocation of an offer, and that the return of the car and the conversation of March 20th constituted such notice. Lord Denning said:

> "[Counsel for the defendant] in his argument, pointed out a number of matters in which it cannot be denied that the dealer is the agent of the finance company. . . . The dealer holds the necessary forms; he hands them over to the hirer to sign; he forwards them to the finance company; he receives the deposit as agent for the finance company; he receives from the finance company information that they are willing to accept the transaction; and he is authorised to pass on that communication to the hirer. He was in this very case the agent on behalf of the finance company to see that the insurance cover was all in proper order. . . . Most important of all, he was the agent of the finance company to hand over the motor-car to the hirer. It seems to me that, if we take, as we should, a realistic view of the position, the dealer is in many respects and for many purposes the agent of the finance company. . . . And on

58. Hire-Purchase and Credit Sale Agreements (Control) Order, 1960, made in pursuance of the powers conferred by Regulation 55 of the Defence (General) Regulations, 1939.

59. Lord Denning M.R. and Donovan L.J., Pearson L.J. dissenting.

> the facts of this case I am clearly of the opinion that the dealer was ostensibly authorised to receive communications on behalf of the finance company."[60]

So the extent and nature of his actual authority set up ostensible[61] authority covering related functions.

In the *Ashley* case, by contrast, it was held that, though the dealer was an agent of the finance company for the purpose of receiving a simple offer, he was not authorised to receive an offer subject to a condition precedent (namely, the satisfactory determination of the first agreement). The arguments of Person L.J. were as follows:[62]

(i) *The agreement between the dealer and A was between those two parties only, and could not affect Northgran.* While analytically correct, is this the kind of vital realism needed in approaching this subject?

(ii) *The defendant signed the standard form of proposal with no mention of a condition precedent.* Once more analytically correct, but it begs the whole question. Given that this sort of transaction occurs frequently, is it not reasonable behaviour by the hire-purchaser to think that he is protected because the dealer knows the full facts? And should not the law protect reasonable behaviour?

(iii) *As the dealers had a supply of standard proposal forms, their authority would seem to be to receive standard, not conditional offers.* Certainly their actual express authority goes only this far; but finance companies must realise that this sort of situation occurs daily, and it is surely arguable that there is ostensible authority or even actual implied authority.

(iv) *There was a clause stating that the dealers were not agents of the finance company "for any purpose whatsoever".*[63] But, as Lord Denning said in the *Stimson* case: ".. . . . . these clauses are often not worth the paper they are written on. Nobody can make an assertion of that kind in an agreement so as to bind the courts, if it is contrary to the facts of the case."[64]

(v) *The finance company signed the form without giving any indication that it was accepting a conditional offer.* If it is deemed to be aware of the condition, then its acceptance of an offer without acceptance of condition means that the parties are not yet *ad idem.* In the ordinary case where no hitch occurs, the binding contract comes into existence, therefore, by conduct.

60. [1962] 1 W.L.R. 1184 at p.1188.

61. Most writers use the term 'apparent', but Lord Denning seems usually to refer to 'ostensible'. See, e.g., *Pearson* v. *Rose and Young* [1951] 1 K.B. 275.

62. [1963] 1 Q.B. 476 at pp.493-498.

63. Such a clause would be void if the agreement fell within the Acts: s.5(e) Hire-Purchase Act, 1938.

64. [1962] 1 W.L.R. 1184 at p.1188.

These comments on the arguments of Pearson L.J. do not destroy their literal, legal and analytical correctness within the premise from which they proceed. But the premise is stifling; a slight change of attitude could have rid the court of it on this occasion. Indeed, Pearson L.J. is himself aware of the anomalies of the traditional approach, as his dissenting judgment in the *Stimson* case had shown:

> "This hire-purchase transaction, as unhappily so often happens . . . . . creates complicated, artificial and obscure legal relationships between the parties . . . . It is very difficult . . . . . to assess exactly how much authority the dealer has to act, on the one side on behalf of the proposed hire-purchaser, and on the other side on behalf of the finance company. . . . . The dealer has himself his own interest in the transaction and he is a party to the three-cornered arrangements. He is going to sell the car to the finance company, whereupon the finance company will let it out on hire to the hire-purchaser. Therefore, it is often very difficult to make sure to what extent the dealer is acting in any one of his three capacities, first, on his own behalf as proposed seller; secondly, sometimes in some respects as agent for the hire-purchaser; and, thirdly, sometimes in some respects as agent for the finance company."[65]

We must make up our minds which function of the dealer is to be legally dominant. The Law Society[66] thinks he should be equated with the finance company from the point of view of representations he makes[67] and, presumably, communications he receives. This will raise problems of the rights between finance companies and their dealers, but these would, surely, not be beyond the wit of the law to solve. The Molony Report did not attempt to go beyond the existing structure of hire-purchase in its recommendations, but it did comment adversely on the fact that dealers receive commissions from finance companies for each agreement arranged.[68] This fact emphasises the reality of treating a dealer as agent of the company for all purposes connected with the hire-purchase transaction.

CONCLUSIONS

These two areas illustrate how convulsive and piecemeal is the development of the law of hire-purchase. The courts are doing their best to make a fair adjudication upon each case as it comes before them, but the law is going to remain confused, it is submitted, as long as it fails to define coherently what *is* the phenomenon we call hire-purchase. There are, of course, elements of several types of contract within the doctrine; in as much as the normal commercial result is to convey title from one party to another, it resembles sale; to the extent that it is a bailment of goods for consideration, it resembles hire; in as much as money is advanced on the security of goods at a high rate of interest,[69] it resembles a money-lending contract. But it is none of these things exclusively; rather a strange amalgam of all three which adds up to a

65. *Ibid.* at p.1191.

66. See notes 3 and 42 *supra.*

67. Thus, in a case such as *Yeoman Credit Ltd.* v. *Odgers* [1962] 1 W.L.R. 215, the plaintiff could sue the dealer or the finance company.

68. 1962 Cmnd. 1781, para. 561-562.

69. *Ibid.,* para. 514, 515.

sui generis contract. Unfortunately, the courts cannot or will not redefine it conceptually, but tend to emphasise one side rather than another side according to the circumstances. Let us take a few examples of this.

In *Financings Ltd.* v. *Baldock,*[70] Diplock L.J. stressed the money-lending aspect:

> "In order to avoid the necessity of complying with the statutory requirements relating to money-lenders . . . . . , finance companies enter into a contract with the hirer whereby they hire to him a chattel for a fixed period at an agreed monthly rental, and confer upon him an option to purchase the chattel at the end of the fixed period . . . . The business nature of the transaction is that of money-lending, and, accordingly, clauses are inserted by the finance company in the contract of hire in an endeavour to ensure that, on breach by the hirer of his obligation to pay an instalment of hire, the finance company shall be entitled not only to terminate the contract of hire, but also to recover from the hirer sums which bear no relation to the damages appropriate to a breach of a genuine contract of hire."[71]

From his starting-point that the finance company is the initiator of an evasive proceeding, the decision of Diplock L.J. is predictable.

Lord Denning, on the other hand, stresses the hire aspect:

> "....I will try to state the matter on principle . . . . When an agreement of hiring is terminated by virtue of a power contained in it and the owner retakes the vehicle, he can recover damages for any breach up to the date of termination but not for any breach thereafter, for the simple reason that there are no breaches thereafter."[72]

He adds:

> "It seems that in the 'repudiation' cases, the damages were calculated on the basis that the hirer had bound himself by a firm contract to pay all the instalments up to the very end — indeed, as if he had made a firm contract to purchase it — and repudiated. No regard seems to be paid to the fact that the hirer had the right to terminate the hiring at any time, and thus bring an end to his obligation to pay any more instalments."[73]

The approach that Lord Denning condemns can be seen in the judgement of Davies L.J. in the *Waragowskl* case:

> "The defendant had agreed to hire this vehicle, and, subject to his right to terminate the agreement lawfully by notice, on which event certain circumstances would ensue, to pay the sums that I have mentioned over a period of three years. Had he carried out that contract, then the total sum of money which the plaintiff would have received would be as I have said £433 7s. . . . . "[74]

Therefore, the argument runs, damages must be £433 7s. less the amount received.

Hiring as the primary aspect of hire-purchase was also rejected in *Independent Automatic Sales Ltd.* v. *Knowles & Foster.*[75] The problem

70. [1963] 2 W.L.R. 359.
71. *I bid.* at p.369.
72. *I bid.* at p.363.
73. *I bid.* at p.366.
74. [1961] 1 W.L.R. 1124 at p.1128.
75. [1962] 1 W.L.R. 974.

was whether hypothecation of the benefit of hire-purchase contracts had to be registered if it were not to be void under s.85 of the Companies Act. Was a hire-purchase agreement a book-debt? Rejecting the argument that its nature is mainly hire, so that if the rentals are paid punctually no debt can arise, Buckley J. said:

> ". . . . . although the agreement is of course determinable, by which means the hirer can limit the extent of his liabilities under it, the payments which may fall to be made by him thereunder are not optional [for there is a 50% minimum payment clause, and] when he signs the agreement, the hirer comes under a firm obligation to pay at least that amount. . . . [There is] a debt *debitum in presenti* though in part *solvendum in futuro*. . . . ."[76]

The decision is constructive from the point of view of company law, but unhelpful to the understanding of hire-purchase. Would there still be a book-debt, one wonders, if the agreements hypothecated all included unenforceable penalty clauses?

Judging from these examples, the somewhat tautologous point that hire-purchase is hire-purchase needs to be made. It is not hire, it is not sale, it is not money-lending, it is not debt; it is an independent concept which happens to have some of the legal characteristics of all these. But if its rules are to be coherent and appropriate, they must be evolved not by analogy from these concepts but from its own essence, its own social and commercial nature. In the United States, the Uniform Commercial Code has attempted, with a notable degree of success, to do this with regard to all situations involving security interests in a chattel. The scheme cuts through old notions of chattel mortgage, conditional sale,[77] title,[78] etc. to a new general concept of secured interests. The rules recognise that the secured party[79] needs his security in the collateral[80] to be generally indefeasible by third parties and execution creditors,[81] that the free and fair course of business must on the other hand, be maintained,[82] that the debtor must not be overreached.[83] It would be inappropriate to go into detail at this point, for the system would not, in any case, be adopted completely in English law. But it offers a guide to the sort of ideas that should be examined if the law of hire-purchase is to be reformed to enable it to meet more effectively and less circuitously the needs of modern society.

R. W. HARDING*

76. *Ibid.* at p.984.

77. The usual methods in the United States of achieving what we achieved by hire-purchase. In the former the title is in the debtor, in the latter it remains with the creditor.

78. U.C.C. Article 9-202.

79. I.e. the creditor.

80. I.e. the goods which are the subject-matter of the transaction.

81. U.C.C. Articles 9-301 — 9-306.

82. U.C.C. Article 9-307(1), 9-307(2).

83. U.C.C. Articles 9-501 — 9-504.

* Ll.B. (London), Ll.M. (Columbia); Lecturer in Law in University College, London University.