THE OVERWORKED CONTRACT: DOCUMENTATION IN CONSUMER CREDIT TRANSACTIONS

by

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In 1972 the Parliament of South Australia, as others have since done, made considerable changes in the law relating to instalment credit contracts entered into by consumers. Hire-purchase was effectively abolished. Property in the goods concerned was at once to pass to consumers and security over those goods thereafter took the form of consumer mortgages given by consumers. The protection given to defaulting consumers under the old Hire Purchase Act against re-possession, and in respect of other matters, was, however, maintained, and, indeed, enhanced. Credit contracts were required to contain more information than formerly, and information about the rate of interest and certain charges was to be provided in a uniform way. The intention of Parliament in enacting the latter measures was clearly that consumers were, by being more fully informed about the nature and the terms of their transactions, to be better able to know the extent to which they were committing themselves.

Important as these enactments were, there remain fields in which further legislative action might be thought justifiable, notably the law relating to chattel securities, and the simplification of documents used in credit transactions. Those two matters are, indeed, connected, for part of the cause of the complexity of consumer mortgages – which are Bills of Sale falling within the Bills of Sale Act 1886-1972 – lies in the complexity of the law of securities which their drafters have to take into account. Nothing substantial has so far been done by Parliament about reforming the law of chattel securities. Parliament, however, the year after the before-mentioned reforms were enacted and, no doubt, having had the opportunity to consider the documents thereafter brought into use, amended the Consumer Transactions Act 1972, to include a provision empowering the Governor to make regulations "for the purpose of promoting simplicity and uniformity of expression in consumer contracts, credit contracts and consumer mortgages".[1] As yet, however, no regulations have been made and, except in the case of revolving charge accounts, which are governed by conditions laid down by the Credit Tribunal (the body which grants authorizations to maintain such

1 Consumer Transactions Act 1972-1982 (SA) s 50(2)(da).

accounts), the documents now used in credit transactions in South Australia, all of which the writer has had the opportunity of examining, remain open to criticism on several grounds. Notable among these are their length, and their unintelligibility to the consumer, as judged by every test of intelligibility of which the writer is aware.

It is the principal object of this paper to see if, and how, "simplicity and uniformity of expression" might be achieved. However, it is hoped that it may be possible also to explore other problems which have been experienced with respect to credit transactions. Some of these result from the malpractices of the sellers of goods, notably of second-hand motor-vehicles. Credit providers and consumers alike have suffered from such practices. Another is the almost intractable problem of getting to the consumer's notice the information which it is provided that he must have, at a time which is early enough to allow his decisions to be influenced by it. At present, for example, most consumers are unlikely to become aware of the rate of interest they will be required to pay until they are on the point of signing the credit contract, an act which invariably follows the conclusion of their agreement to buy goods. Their desire to obtain credit to buy those goods, to the purchase of which they have become emotionally committed, may override the caution about the terms of credit which they might otherwise have felt. A further problem is the lack of any single document which fully informs the consumer, either before or after he has contracted, of his obligations, rights or remedies. There seem to be two causes for this. First, the contract/mortgage, which is, of course, where the consumer will primarily look, may incorporate obligations only by reference. It is common, for example, for consumer mortgages to contain a term that the consumer agrees that the covenants and powers contained in section 11 of the Bills of Sale Act are to be implied in favour of the mortgagee. But the consumer is not told in the contract/mortgage what those obligations are, though they are of great importance. One of them, indeed, is a prohibition against selling the mortgaged goods, a prohibition which might well be thought worthy of an express mention in the mortgage document. And it may be doubted if the Bills of Sale Act is to be found on every consumer's bookshelves, so the deficiency will not readily be remedied. Secondly, the contract/mortgage does not inform the consumer of considerable limitations placed by Statute on the exercise of the rights which credit providers appear to have obtained under the terms of the contract/mortgage. The consumer is given a limited amount of information about such matters in a statutory notice which the credit provider is obliged by Statute to send to him, though only after the contract has been concluded. Again, if enforcement of the security is sought by the credit provider the notices required by Statute to be sent to the consumer will then give him information. But until default the information readily available to him will be far from complete, and it will usually be given in terms which are too difficult for him to understand. This is a far from unimportant matter. Many credit contracts have a lifetime of several years, and it may perhaps be just as important for a consumer to have by him during the lifetime of the agreement a full and easily understandable statement of his continuing obligations, both negative and positive, as it is for him fully to know, before he signs the contract, what his legal position will thereafter be.

Certain techniques have been used by Parliament in the past with the intention of shortening documents. An example of one such technique is

the statutory implication of a covenant in a mortgage of land, in favour of the mortgagee, that the mortgagor will repair buildings, and permit a certain liberty of access to the mortgagee.[2] Another is to be found in the Bills of Sale Act 1886-1972. Here there is no statutorily implied obligation on the grantor to insure the goods given as security, but it is provided that when the words "the grantor will insure" appear expressly they are to carry with them certain prescribed consequences.[3] There are at least two possible criticisms of such techniques. The first is the lack of a single source for the borrower's obligations, as noted above. In the case of the obligation to repair the mortgagor wishing to know what obligations are upon him in this respect must look to two separate sources, ie to the Real Property Act 1886-1975, and to the mortgage deed, which may in fact contain an *express* covenant to repair, which may have to be harmonised with the implied covenant. In the case of a Bill of Sale, the obligation to insure is not implied, but may be stated quite shortly in the Bill of Sale itself. However, the grantor of a Bill of Sale would have to consult the Bills of Sale Act to find out exactly what that obligation requires of him, and to ascertain a number of other important matters. There is, in both cases, no single document to which he could readily refer, containing a full statement of the borrower's legal position in respect of these matters. The second criticism is that even if the borrower has both sources of obligation at hand he is likely to find it difficult to understand the technical language of the Statute. The use of such language is no doubt necessary to ensure that obligations are precisely stated, but only lawyers are likely to be able to understand it. Parliament envisaged, in the 1973 amendment above referred to, that simplicity and uniformity of expression might be achieved by the making of regulations prescribing the terminology and expressions that might be used in consumer documents and providing that such terminology and expressions should bear stipulated interpretations.[4] This would, however, mean that the consumer would again be obliged to look both to his own documents and to the statutory regulations to ascertain his position. And the proviso that the prescribed interpretations were to prevail only in the absence of a contrary intention means that the drafters of documents could set them aside at will.

If the problems adverted to can be overcome by the use of different procedures or techniques, so much the better. However, the principal aim of this paper is to consider how the documents used in consumer transactions, and particularly credit transactions, might be made short enough and simple enough for their contents to be read and understood before the consumer commits himself to abide by their terms, and short, simple and comprehensive enough to inform him of his obligations under the contract, and of other matters affecting his legal position, after he has done so. The problem of the unintelligible contract is no new one. Hakluyt reports an instance in 1405: "Forasmuch as divers articles propounded ... were so obscure, that in respect of their obscurity, there

2 Real Property Act 1945-1982 (SA) s 130.
3 Bills of Sale Act 1886-1972 (SA) s 12.
4 Cf Consumer Credit Act 1981 (NSW) s 127. It is interesting to note that s 149(2)(b) of the Act makes the intelligibility of the language in which a contract or mortgage is expressed one of the matters which the Credit Tribunal may take into account in determining whether a transaction may be re-opened on the ground that it was unjust. Cf the different approach in the Credit Act 1981 (Vic) s 150(4).

could no resolute answer be made unto them ..." [5] The solution then adopted was to refer such contracts to the Chancellor, with a forecast, perhaps more easily made of the judgment of an ecclesiastic than a lawyer, that "complete justice shall be administered on both parts". Hakluyt does not mention the cause of the 15th century obscurity. However, it is possible to essay an investigation into the causes of the problems of length and difficulty in present day consumer transactions. As could be expected, the problems arise mainly in transactions in which security is given. Unsecured contracts are often not as intelligible as they might be, but the problem of attaining simplicity in an unsecured contract of loan is a straightforward enough one, because relatively few complications need to be catered for in the contract, and because many of the contents of the obligations of the consumer, if not the language in which they are to be expressed, are prescribed by Statute. Unsecured sales by instalments may present more difficulty, mainly because some sellers (as do some lessors) complicate their contracts by going to extreme lengths to try to avoid liability in respect of the quality of the goods sold, but it seems that the purely credit-granting aspect of these contracts need cause few difficulties. The secured contract is a different matter, imposing a greater number of continuing obligations, both positive and negative, upon the mortgagor, and requiring provision for many contingencies. It would, of course, be a simple task to simplify mortgage documents by statutorily depriving mortgagees of the benefit of more of the terms which they have inserted in them for the protection of their security, but it would be unfair and unwise to do so. Many of the provisions which make mortgage documents so lengthy are indeed there because of the draftsman's desire to protect the mortgagee's security. Yet without the material and psychological weapon afforded by holding an *effective* security the losses of credit providers would certainly be greater, and the indications are that credit would in all probability be harder to obtain, And, as a matter of legislative policy, simplicity and brevity ought not to be sought at the expense of fair treatment, for both parties. Again, one must recognise that drafting, like politics, is the art of the possible. One cannot hope to make documents simple enough for everyone instantly to understand: one's ambition must be limited to making them as simple as possible. Complicated needs necessarily produce complicated rules, and one must be wary of the kind of crude over-simplification which makes no provision for practical problems which are likely to arise. Was it not once said that it was easy to put the Rule in Shelley's Case into a nutshell, but quite another thing to keep it there?

The documents commonly used by credit providers are almost invariably drafted by specialist lawyers. A lawyer has the duty of obeying his client's lawful instructions, subject to conforming with the ethical standards of his profession. He must exercise skill, care and diligence in performing the task which he has undertaken and will naturally use the technical legal language to which he is accustomed, and which enables him to express himself accurately. Unless he is expressly instructed otherwise, a lawyer must, in drafting documents, use his skill solely in the furtherance of his client's interests. He will feel bound to seek to

5 Hakluyt, *The Principal Navigations Voyages Traffiques and Discoveries of the English Nation* (1903-1905) vol 2, A briefe relation of William Esturmy and John Kington, concerning their Ambassages into Prussia and the Hans-townes.

secure for his client every advantage which the law allows. He has in the past gratefully accepted the opportunity expressly to exclude implied terms which legislatures, torn between their affection for the notion of freedom of contract and the desire to obtain protection for consumers, used invariably to give him. When legislatures, aware of his success in that respect, react by depriving him of his ability so to exclude terms he may, less justifiably, attempt to avoid possible liabilities in other ways, for example, by inserting clauses which will seek to incorporate admissions of facts into contracts aimed at destroying any factual basis for an implication of liability. These "admissions" will, the draftsman hopes, bind the consumer when the document is signed, even if he has not read them. It is remarkable how accurately in such cases the draftsman seems to be able to foresee that all consumers are going fully to examine the goods before purchase, while it is re-assuring to learn that it is possible to predict that all consumers will display such expertise and independence of mind that none of them will ever wish to rely on the skill and judgment of the seller when choosing goods!

One might at this point digress somewhat to express doubt about the wisdom of applying to consumer "contracts of adhesion" two rules, which are no doubt necessary in the case of commercial contracts more likely to have been made by persons in equal bargaining positions. Both are concerned with the ascertaining of the intention of a party to a contract. The first has a relatively small independent part to play in a field where printed forms of contract are in use. This is the rule that the intention of a party is to be determined objectively, so that it is not his real intention but the expression of his intention, as reasonably understood by the other party, which is to be looked to. The second rule, however, is of central importance. It was expressed thus by Scrutton LJ in *L'Estrange* v *Graucob*:[6]

> "In cases in which the contract is contained in . . . [an] unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."

This doctrine applies to all terms of the contract and not merely to clauses by which it seems that the consumer has made damaging admissions of fact. Clauses of that type, however, illustrate particularly well how mischievously this doctrine can operate. The drafter of a document can obviously have not the faintest notion whether or not in particular cases in which the document is to be used a consumer will examine the goods. But he includes such terms in his document, confident in his expectation that most consumers will sign, unread, the agglomeration of printing put before them. Now, as long as the liberty of draftsmen to include in the printed forms which they draw up almost whatever they wish remains unimpaired they will continue so to serve what they consider to be the best interests of their principals. It may be, therefore, that the only ways to prevent such abuses are statutorily to

6 (1934) 2 KB 394, 403.

reverse or alter the rule in *L'Estrange* v *Graucob,* and to insist that the consumer's actual intention be looked to, a course which would almost certainly provoke much difficult litigation, or to remove the draftsman's almost unrestricted liberty to include in his documents almost whatsoever he thinks fit.

But to revert to the question of why documents are so long! The draftsman may have attempted to guard against every contingency, however unlikely: to foresee what ordinary mortals do not foresee is, after all, part of his particular skill. Every document therefore embodies terms which will in most cases never be invoked. And yet it cannot be said that provision ought not in some way to be made for even the rare occurrence. Again, security may be taken over as many different kinds of goods as are available for purchase. But the cost of having separate documents drafted and printed is high enough to make credit providers wish to use as few documents as possible. The draftsman may therefore be required to draft a multi-purpose document. If so, he will be obliged to include in it terms which, though perhaps apt in, say, the case of the mortgage of a motor-car (theoretically at least, a mobile chattel, and, when mobile, invariably exposed during almost every occasion of its use to the risk of damage), will have little relevance in the case of the mortgage of a suite of furniture. Such terms will, therefore, unnecessarily lengthen and complicate the latter. As an example, a motor-car will usually have to be insured under a separate policy, whereas furniture may fall within the ambit of an existing householder's policy.

Some terms owe their presence in documents to the fact that the general law does not, although it could easily do so, itself provide for certain eventualities. For example, it is increasingly the case that instalments are paid by cheque drawn by the consumer, or by banker's orders issued on his instructions. The general law leaves it to the individual contract to determine whether payment may be so made, as it does other questions arising from the use of these, or other, negotiable instruments. Naturally, therefore, the draftsman includes an express term which will, typically, permit payment to be made by cheque etc, but provides that such payment is conditional upon the cheque being duly honoured. It may also provide that the negotiation of the cheque by the credit provider is not to be deemed payment. As, it is believed, such cheques are in practice always collected by the credit provider's bank, and never negotiated, the latter provision appears also to fall within the category of remote contingencies earlier mentioned. Several lines of highly technical words have to be added to a contract to achieve these entirely reasonable results. This seems to be a clear case of the law leaving to the agreement of the parties something which could well be covered by legislation. If the law did provide for such questions of payment the contract could be shorter, and the shorter the contract the more quickly it can be read through.

In some respects the general law fails to give reasonable protection to the credit provider's interests. Clearly, if the general law does not give his client adequate protection if certain events occur, the draftsman is obliged to obtain such protection for him by inserting appropriate terms in the mortgage. Such terms may invoke complicated legal doctrines, and employ language unfamiliar to the consumer, for example, a term by which the mortgagor confers upon the mortgagee an irrevocable power of attorney to institute legal proceedings for the protection of the security,

or to recover insurance money. If the general law were itself to provide reasonable protection for mortgagees with respect to the disposition of insurance moneys, etc, the mortgage could clearly be much shortened. And the measures necessary for the protection of credit provider's security would not depend for their validity on the pretence that the consumer has agreed to them, when the consumer has rarely the ability, and often not the wish, to understand even the essentials of the legal effect of the mass of printed words in the document which is placed before him for signature. It was of a bank mortgage deed which attempted, if unsuccessfully, to give to the bank "every advantage which the law allows" that Fox J, in *Richards* v *Commercial Bank of Australia,*[7] said: "It surely is a sad commentary on the operation of our legal system that a borrower should be expected to execute a document which only a person of extraordinary application and persistence would read, which, if read, is virtually incomprehensible and which, in any event, has a legal effect not disclosed by the language." Unfortunately, expensive litigation may be necessary before any deficiencies in such documents are exposed, and persons unable to afford such litigation may be forced to meet "obligations" of doubtful legal validity. However, a well-drafted document will have no such deficiencies, and will suffer merely from incomprehensibility. Now, it may be incomprehensible not only to consumers, but also to the employees of credit providers who have the task of seeing to the completion of the document. It seems, indeed, to be much in the interests of credit providers, too, that their documents should be easy to understand. However skilfully drafted a document may be, it will contain blanks which must be filled in *appropriately,* and there are many instances where they have not been. The consequences of the credit provider's error in this field may be very severe on him. Again, it is much more likely that an employee will innocently misrepresent the terms of a contract to a consumer if he himself does not fully understand them. And one might also, with public relations in mind, doubt (though this was something which Fox J in *Richards* v *Commercial Bank of Australia*[8] thought it was not his task then to comment on) if it is to the ultimate benefit of credit providers to be seen to be taking "every advantage which the law allows".

And, paradoxically, although every term in a lengthy document may be in favour of the credit provider, it is in practice very rarely that he takes advantage of any of them, other than of the covenant to make periodic payments. Under modern conditions a large finance company is likely to have little contact with its borrowers except when they are late in making payments. For example, it is not uncommon for consumers misguidedly to believe that it is lawful for them to sell the mortgaged goods if they keep on paying the instalments, a belief perhaps induced by the fact that there may be no express prohibition in the mortgage document against their doing so. If a consumer does dispose of the goods, and does keep up his payments to the credit provider the latter is unlikely to learn, while they are still coming in, of the loss of its security. If so serious a breach can go undetected what of less important matters? And it may be that even if it suspects, or is actually aware, that certain covenants have been broken, the credit provider will turn a blind eye, if the basic obligation of payment is being honoured. In one document in frequent

7 (1971) 18 FLR 95, 99f.
8 Ibid.

use there is a covenant to the effect that before a workman does any work on the mortgaged goods the mortgagor is obliged to inform him that there is a provision in the mortgage that the mortgagor has no right to create any lien over the goods. The draftsman obviously, and quite properly, felt under a duty to protect the priority of his client's security. Yet one wonders how often a consumer has honoured that promise when taking his car to be serviced – something which is, after all, necessary for the well-being of the secured property – or if the rights arising from the breach of covenant, which is, of course, an irremediable one, have ever been enforced by any of the credit providers who use the document containing the term. Perhaps the most that can be said for the practical usefulness of such a clause is that a credit provider, fearing a more important breach of obligation by a consumer, might use it to give him an excuse for putting an end to a contract, which he thought it desirable at once to terminate, without being able to establish any other breach.

If, then, it seems to be the case that the length and complexity of printed forms is in great part caused by the use of the concept of "Contract" to gain advantages for the credit provider using the form, which he might not have obtained if the transaction had resulted from genuine bargaining between equal parties, the failure of the general law itself to provide such rules as are necessary for the protection of the reasonable interest of credit providers also plays its part. The law, of course, already provides a good deal of protection to consumers *against* credit providers who seek unduly to better their legal position. Parliaments have acted by requiring full information to be given to consumers.[9] They have invalidated particular provisions.[10] They have made the validity of certain rights depend on the provisions creating them having been given unusual prominence in contracts.[11] They have acted by restricting the exercise of rights, and by giving consumers the right to remedy breaches.[12] They have acted to reduce the damages consumers would have had to pay on breach.[13] They have acted to prevent secured goods being sold immediately, or at an undervalue.[14] And so on! Yet, almost always, Parliaments have, as it were, "confessed and avoided", by according notional primacy to the terms of the contract, and by then taking away the effect of those terms. Nevertheless, although they have chosen such a *modus operandi,* Parliaments have for decades, in the field of moneylending, by their intervention in reality made contracts for the parties in many respects. Credit providers have, in fact, lost their ability fully to regulate their legal position by contract, and their power to act in the way the law of contract would ordinarily allow when a breach of contract has occurred. Indeed, one might with some justification argue that the agreement of the parties has comparatively little to do with the ultimate legal position of the parties in most secured contracts, for two reasons. First, the consumer's agreement to the terms of the contract is only rarely a genuine and informed agreement, and is found to exist only because he has signed, unread, a document which he could not have understood if he had read it. Secondly, although the consumer has committed himself

9 Eg Consumer Credit Act 1972-1982 (SA) s 40(1)(b).
10 Eg Consumer Transactions Act 1972-1982 (SA) s 24(2).
11 Eg Consumer Credit Act 1972-1982 (SA) s 44.
12 Eg Consumer Transactions Act 1972-1982 (SA) ss 27(1), 29(4).
13 Eg Consumer Transactions Act 1972-1982 (SA) s 26.
14 Eg Consumer Transactions Act 1972-1982 (SA) s 29(1).

by signing the contract, the credit provider is by Statute not permitted to enforce the "agreed" terms according to their tenor.

At the close of a celebrated passage in his "Ancient Law" Sir Henry Maine observes that "we may say that the movement of progressive societies has hitherto been a movement from Status to Contract".[15] Maine was pointing out, as his earlier observations show, that, in 1861, instead of a person's obligations, as in past times, being determined by law according to his status within a *familia* (a concept which included slaves as well as relatives), his obligations generally arose from "the free agreement of individuals". For example, the status of the slave had been replaced by the contractual relationship between master and servant. It is not necessary here to speculate just how "free" the agreement of, say a factory worker was in 1861, but there is no doubt that he had, at least, the freedom to choose, without physical punishment, between working and starving, which a slave did not have. But it seems to be the case that more was later made of Maine's observation than he appears to have intended – perhaps because it was felt that Maine regarded the pre-eminence of Contract as being the sine qua non of "Progress", a notion dear to the later Victorians. Many persons elevated the notion of freedom of contract into a philosophical ideal. Some did so on the premise that the agreement of both parties was a genuine, subjective, agreement, and not merely an objective or apparent agreement. Others were less discriminating, and were prepared to hold that persons ought to be bound by agreement when there was no true agreement, but only the appearance of one, or where there was a document which had been signed. It is, however, fair to say that many of the judges who held such "agreements" binding were principally concerned with the desirability of upholding, wherever possible, the validity of the commercial transactions of firms, rather than with the contracts of those who are now classified as "consumers". In the nineteenth century the contracts of such persons very rarely occupied the attention of superior courts. Yet, unless Parliaments decreed otherwise, the rules of the law of Contract elaborated by courts dealing principally with the often international transactions of business men were applied also to the contracts of adhesion made between the unsophisticated consumer and the moneylender.

An important but sometimes overlooked word in the extract from Maine quoted above is the word "hitherto", but there is now no way of knowing whether he included it because of caution or because of his recognition of the possibility that the trend which he had noted might be reversed when contracts of adhesion replaced the individually negotiated contracts which he undoubtedly had in mind. Certainly, Jessel MR, as zealous a proponent as could be found of the doctrine that persons should have "the utmost liberty of contracting" and that their contracts should "be held sacred", and "enforced by Courts of justice", was a few years later prepared to concede that freedom of contract might in some cases be interfered with, although it was a "paramount public policy" that it should not be done "lightly".[16] Now, the writer believes as firmly as any one that it is desirable that free persons should be free to regulate their own affairs by their "agreements freely entered into". Yet it

15 Maine, *Ancient Law* (11th edn 1887) 170.
16 *Printing and Numerical Registering Co* v *Sampson* (1875) LR 19 Eq 9 462, 465.

may be that in order to restore true freedom of contract it will prove necessary to remove from the realm of Contract many matters which are now governed by it (perhaps only because there is at present no other way of providing for them), in order better to allow consumers to exercise an informed and sensible judgment on the more central matters which the writer feels ought certainly to remain within the ambit of the concept of Agreement.

There will, no doubt, always be those who will use credit unwisely, just as there will be those who will unwisely grant it to them. But one would hope to see matters improved by the enactment of measures which might help consumers to make a sensible use of credit in the organisation of their personal affairs, so that they do not take on heavier financial liabilities than they may be able to cope with, and so that they may become less likely to infringe obligations not necessarily involving the expenditure of money, which might bring about unwanted early termination of their credit contracts. The number of matters of which it seems to the writer *essential* that a prospective borrower be aware before he commits himself is quite limited. Many of them are already required by law to be particularised in the credit contract, eg the amount borrowed, the number and amount of instalments, when, where and to whom instalments are to be paid, the rate of interest, and the total amount of interest.[17] Under the present law, however, many matters of less central importance must also be stated in the contract, for the relevant Statute requires that *all* the terms and conditions on which the credit is provided must be set out in the contract.[18] Disputes about the extent of the obligation imposed by similar enactments in other jurisdictions have given rise to litigation,[19] and it seems that the problems have not as yet been fully resolved by the decided cases. But whatever the extent of that obligation may be, it seems clear that many terms of secondary or contingent significance have by law at present to be incorporated in the form of contract, with, *pro tanto,* the tendency to distract the consumer from matters of more central importance to him. As pointed out above, such secondary or contingent terms will usually have been drawn with a view to securing advantages for the credit provider, yet these, and, more importantly, the central and primary obligations, will in most cases be undertaken by the signature of an unread document.

When considering whether it is possible to improve what many will feel to be an undesirable state of affairs one must not overlook the fact that in the lifetime of a secured credit transaction many eventualities may arise which have to be provided for in some way. It seems to the writer that even if the obligations necessary to ensure adequate protection for the parties were to be reduced to a minimum number, and set out as concisely as language would permit, any document containing all of them would still be too long to be capable of having its contents assimilated by the consumer before he committed himself to the contract. It seems, therefore, that the only way to produce shorter contracts is for certain matters to be excised from the contract and provided for, as efficiency

17 Consumer Credit Act 1972-1982 (SA) ss 40(1), 41(1).
18 Consumer Credit Act 1972-1982 s 40(1)(b).
19 See cases referred to in Pannam, *Law of Money Lenders in Australia and New Zealand* (1965) 162-167.

requires that they must be, otherwise and elsewhere. Even if a *locus poenitentiae* in the shape of a general "cooling-off" period were to be provided for in all credit transactions – a remedy which would probably cause great practical problems when the purchase of goods was the reason for the obtaining of credit – the problem of the lack of comprehensibility of the contract would remain. The consumer would have more time to read the contract before being irrevocably bound by it, but might very well be neither wiser nor better informed if he did so.

In 1925 the Parliament of the United Kingdom adopted a technique which, it seems to the writer, might, with suitable adaptations, be capable of removing some of the difficulties which exist in the field presently under consideration. The "curtain" principle of the Settled Land Act 1925 (UK) was intended to facilitate dealings with settled property by confining the attention of prospective purchasers to matters which it was essential for them to know. Other matters, notably those dealing with the destination of purchase money received by trustees, were to be dealt with behind a "curtain", behind which the purchaser had no need to, and could not, pass. There were, of course, three parties in such transactions, namely purchasers, trustees, and beneficiaries, whereas in the present situation there are only two. Again, the disposition of purchase moneys is, or is made, an object of no concern to the purchaser, so that the two sets of obligations may be clearly and finally divided off by the curtain, whereas, in the case of credit contracts there can be no such division, all the obligations involved being between the credit provider and the consumer. And the distinction, if it be a valid one, between, on the one hand, primary or central obligations, which have to be met whatever does or does not happen and, on the other, secondary or contingent obligations, which may, or may not, have to be met, is inexact, and in the result may well prove to be impermanent, in that the consumer will, if events so turn out, be as much concerned with and bound by the latter as by the former.

Nevertheless, although the clear distinction which exists under the Settled Land Act 1925 (UK) between vesting deed and trust instrument cannot be maintained in the field of credit transactions, the object in the present case is not to prevent equities from hindering transactions but the different one of simplifying transactions, and it is submitted that improvements in this area would result if the documentation of secured credit transactions were divided into two. What the writer envisages is a short first document setting out in simple terms the primary obligations of the consumer (which will, in the main, be those involving financial liabilities), and a second longer, and necessarily more detailed, document. The latter document would contain an elaboration of such of the primary terms as might require it, but, more importantly, would set out the secondary or contingent obligations of the consumer, plus a number of other matters. The first document would owe its binding force entirely to the agreement of the parties. It ought to be short enough, and its meaning clear enough, to offer a better prospect of that agreement being a genuine and informed agreement. The second document would depend on agreement for its binding force only in so far as the elaboration of the terms expressly agreed to in the first document can be said to result from agreement. All other legal incidents of the transaction would directly result from, and owe their binding force to, legislation. The document would, therefore, not itself create obligations, but would merely set out the legal regime of the transaction, including the powers

and obligations of the parties, as determined by Statute. It is not to be hoped for that the obligation-creating statute could be enacted otherwise than in the kind of language commonly used in Statutes, and it would therefore be desirable, in the regulations which would implement the Statute, to "translate" the statutory language into language which would be more readily understood by consumers. Some loss of precision might result from doing so and it would therefore also be necessary to provide cheap and speedy means for resolving any difficulties which might result. This second document, as well as informing consumers in simple terms of their legal rights and duties, would also fulfil the function of giving information and advice to consumers which is at present to some extent performed by the statutory notices provided to them at various times. Consumers would, of course, be supplied with a copy of both the first and second documents. Together, or, if it was so desired, in the second document alone, if it was so designed as to permit the incorporation of the contents of the first document, they would have as nearly complete a statement of their legal position as the use of simple language will permit. Undoubtedly problems would from time to time arise which would not be capable of resolution by the parties on the basis of the material contained in the documents. If such cases were to occur then there would be nothing for it but that the consumer concerned would have to obtain expert advice, either from a lawyer or from an officer of a Department of Consumer Affairs. The matter would thereafter be handled at the technical, "statutory", level, and might ultimately perhaps have to be disposed of by litigation. But it is thought that such cases would be few: indeed, it is a main object of the proposed scheme to reduce their number.

Experience has in fact shown that it is generally only in respect of the obligations which would be created by the contractual first document that significant problems have arisen with the performance by consumers of their part of the transaction. It may be, of course, that credit providers often remain in ignorance of breaches of obligations of a less fundamental nature than those of payment, insuring and repairing, and that they would take action on such breaches if they knew of them. But the only breach of the three obligations mentioned which will certainly come to their notice is the first. And, fortunately, it seems to be the case that it is only in a very low percentage of such cases that breaches are not eventually put right. In a recent survey covering several hundred thousand transactions, although almost 10% of consumers were overdue seven to ten days with particualr payments, fewer than 2% were two instalments in arrears. Termination of the contract and enforcement of security resulted in under 1% of cases, and, it is believed, the reason in nearly all such cases was breach of the obligation to repay. This finding seems to be consistent with the separation of that obligation, along with some few others, from the main body of the provisions now found in documents, which are, it would appear, in most cases a dead letter.

The effect of these proposals would be to bring about what could no doubt be called a partial regress from contract to status. Once the parties had reached agreement in the terms of the first document their relationships (except in certain exceptional cases for which provision would no doubt have to be made) would be governed solely by provisions of law which the parties would not be free to vary by agreement. Yet it may well be that it is only by reducing the work which has hitherto had to be done by the contract that true freedom of

contract can be restored in the areas in which it really matters. If the obligations created by Statute, and simply and informally expressed in their second document, are such as to give adequate protection to the interests of the credit provider and to provide sensibly for incidental matters, such as methods of payment, then the credit provider is unlikely to suffer unduly or at all from the loss of his freedom unilaterally to draft the documents on which he does business. Indeed, he might gain, for if the documents were independently drawn he could not be held responsible for any defects in the prescribed documents. The consumer also would be unable to vary the contents of the second document, but he would, in practice, be no more powerless to alter terms than he now is, and he would have the consolation that those terms would be terms which the legislature considered fair and reasonable. Naturally, full consultation with interested parties would be a sine qua non in the formulation of legislation and of the suggested documentation. Organizations now exist which are capable of adequately representing the interests of credit providers and consumers. It might well prove to be the case that substantial agreement on the contents of documents could be reached, so that one would have, in effect, a genuine block agreement, or agreements, albeit by collective bargaining, in place of the present mass of individual contracts, which in truth owe little to genuine agreement.

What terms, then, would be included in a contract so shortened by excision, in addition to the provisions dealing with the cost of credit and the obligation to repay? This might well differ according to the purpose of the contract, but in the case of a loan taken for the purpose of buying a motor vehicle over which the lender desired to take security, there might be a term binding the consumer to give security, and terms obliging the consumer not to dispose of the vehicle, and to keep the vehicle insured and in good repair. Even though these terms would, strictly, fall within the statutory regime of the security it seems desirable that the consumer should realise before he contracts that he will be liable to make payments which are additional to his instalments during the currency of the transaction. There should also be a provision in the form of contract that the consumer is obliged accurately to furnish information sought by the credit provider about his creditworthiness. It is in the writer's view important that however much the freedom of the credit provider to draft its own contracts may require to be restricted, there should be no restriction of its rights to obtain the information which it considers necessary to allow it to make a reasoned assessment of the risk of lending. And there is, of course, no suggestion that interest rates, the amount of down payments, the duration of the transaction, etc, should be decided otherwise than they are at the moment. The credit provider would set its own terms, and the consumer would decide if they were acceptable to him. In passing, however, one might express the wish that all credit providers should be required to state their interest rates in the same way, and that the ability of banks and others to express interest as a flat rate should be removed. It is a serious weakness of the existing disclosure requirements which the present proposal, by according them a greater relative prominence, is intended to strengthen, that interest rates are required to be accurately stated only by certain kinds of credit providers. This is inevitably a cause of confusion and uncertainty to consumers, although, oddly, this particular ill-effect may be somewhat limited by another, though lesser, evil, namely the freedom allowed to

those credit providers who *are* required to state the rate of interest as the nominal annual rate of interest in their actual contracts, to quote their interest rates as flat rates in pre-contractual statements. All such discrepancies, it is submitted, ought to be done away with. Uniformity in the expression of interest rates is a matter which appears to require legislative attention if consumers are to be able to make an informed choice of credit provider.

There are certain problems which appear to be encountered chiefly in respect of grants of credit for the purchase of second-hand motor-vehicles. One practice is likely to be hurtful principally to the reputation of credit providers, while others are to the detriment of consumers. The practice affecting credit providers is that of "jacking-up": the seller artificially elevates (with the real or apparent acquiescence of the consumer) the "price" said in the contract to have been paid by him for vehicles traded-in on the purchase of a replacement vehicle. This is accompanied by a corresponding increase in the price of the latter vehicle, which is thus made artificially high, so that if the vehicle is seized and sold by the credit provider the price then realised must fall dramatically short of the contract price, leaving an apparently very large sum owing on the consumer's personal covenant. Other practices involve misrepresentation by the seller to the consumer. This not infrequently takes the form of mis-stating the cost of insuring the vehicle, so that the consumer later finds himself faced with a demand for a renewal premium which is higher than he had been led to expect. Sometimes the policy is in fact initially taken out by the seller for a shorter period than the consumer is led to expect, so that he finds that a further premium must be paid after a few months rather than after a year. Sometimes, on the other hand, the vehicle is insured by the seller, perhaps at the request of the credit provider, for the whole term of the credit contract. If the cost of, say, four years premium is, as often, added to the sum borrowed, it significantly increases the credit charges. Even if it is not, it is unlikely that any refund of premium will be forthcoming in the case of an earlier termination of the credit contract. Again, the rate of interest charged by the credit provider may be understated by the seller (not always deliberately). The consumer may, because of the difficulty of proof, or because the contract which he has signed is at variance with what he was earlier told, find it difficult to obtain redress for the harm which he suffers from such practices. If questions of insurance, value etc were to be suitably adverted to in the first document, or in an appendix to it by, for example, the inclusion of declarations to be signed by the seller, the above-mentioned malpractices might cease to flourish.

The first document should, it is submitted, be compulsorily treated as a written offer by the consumer, capable, of course, of acceptance or rejection by the credit provider.[20] Practice at present no doubt varies, but it seems that where the purchase of goods is concerned the seller, who will often have links with a particular credit provider, ascertains from the consumer the information he knows will be required by the credit provider. He may perhaps himself already have authority to conclude the credit contract, absolutely or conditionally, or he may use the telephone to discuss the matter with the credit provider and either be given authority to conclude the credit contract or be told that it is

20 Cf Consumer Credit Act 1981 (NSW) ss 30-32.

probable that the credit provider will agree to make credit available. In some cases he may merely submit to the credit provider a form of contract signed by the consumer, the credit contract not being formed until the document is signed by the credit provider. Whatever the situation, the consumer who has sought credit will rarely know at what moment his offer to borrow has been accepted, and, therefore, whether he has thereby lost his right to withdraw his offer. This is something he might well wish to do if he becomes aware that he might obtain credit on better terms elsewhere, or if he realises that he would be better off withdrawing his savings instead of borrowing. The seller may also find himself in difficulty if he parts with possession of the goods in the expectation that the credit provider will pay him for them, and then finds that the money is not forthcoming. If he has also parted with the property in the goods his position may be even worse.

There would be advantages, therefore, if the form of application for credit signed by the consumer were explicitly to take the form of a request for a loan, ie an offer to borrow, in the terms on which the consumer believes, from what he has been told, that the credit provider is willing to lend. The application being an offer, the consumer would have the right to withdraw it up to the time of acceptance (or, if it is thought more appropriate, the time of posting the acceptance by the credit provider, or of receipt by the consumer of the acceptance). The length of time between offer and acceptance would be determined primarily by the way in which the credit provider managed its affairs. No doubt provision might be made for the offer to lapse if not accepted within a specified, or a reasonable, time. More important, perhaps, is the fact that the document would have set out definitely the terms on which the consumer had been led to expect that credit would be provided. If the document containing the consumer's offer did not accurately set out the terms on which the credit provider was prepared to contract the latter would, one assumes, refuse the offer, though it would, of course, be open to it to inform the consumer of the terms on which it *was* prepared to contract. Such a procedure would, it is thought, lessen the possibility of the consumer being bound by a seller's misrepresentations etc, for the credit provider would have the opportunity of checking the terms put forward as those on which the consumer expects to be able to borrow. If no discrepancy existed the credit provider would either accept the offer and conclude the contract, or, if he was not prepared to lend to the particular consumer, reject it. In the latter case the consumer would have to look elsewhere for finance if he wished to proceed with the purchase. If the offer is accepted, then a copy of the consumer's offer, with the credit provider's acceptance of it, suitably added to it at its foot, would be returned to the consumer, and would constitute the written contract.

Lastly, one would envisage that the first document would be headed by a short notice to the consumer explaining in outline the procedures to be followed, his rights pending completion of the contract, and certain immediately relevant financial consequences of the fact that he will be required to give security as a condition of being granted credit.

It is obvious that a document as sparse in its terms as that proposed could do no more than spell out a small part of the legal regime necessary to govern a secured transaction. The legislature would be required to provide the other necessary rules by enactment. Statute, of

course, already governs many aspects of secured transactions, though as a rule as an adjunct to, or qualifier of, particular contractual provisions. The change of method which would be required in the present case is a change to the direct comprehensive legislative settlement of all material matters not dealt with, or not sufficiently dealth with, in the contractual first document. The rules so enacted would then, it is envisaged, be rendered into simpler language in the second document, with which consumers would be provided. There would be little point in attempting here to itemise the matters requiring to be so regulated: they would be those which, after discussion with interested parties, are thought necessary by Parliament adequately and fairly to govern the transaction. The substantive law embodied in this document would, no doubt, cover the ground now covered partly by the documents currently used in such transactions, partly by the statutory provisions which at present modify their effect, and partly by the notices now required by Statute to be given to consumers at various times. However, it should also perform the important function of advising consumers about such matters as how to go about a contemplated course of action involving the secured property without committing a breach of the terms of the security, for example, what to do if they desire to sell the secured property. And it would also inform them how, if at all, a breach actually committed might be remedied.

Legislative action of the kind proposed would not in all respects be a novelty. For example, when Parliament abolished the use of hire-purchase in consumer transactions by section 24 of the Consumer Transactions Act 1972, it provided that the rights of the credit provider should be secured instead by a "prescribed consumer mortgage". The contents of that mortgage are laid down by regulation, and, though not particularly favourable to the credit provider, are not alterable by him. At a much earlier date the Bills of Sale Act 1886, which had provided a somewhat rudimentary legal regime for bills of sale by enacting that certain covenants and powers should be implied, also provided that a particular form of words set out in a schedule to the Act (amended in 1924) could be employed to create a Bill of Sale. But the use of the form was not made obligatory and the covenants could be expressly negatived or modified by agreement. The grantees of bills of sale have, therefore, while taking advantage of the implied covenants also extensively improved their legal position by the insertion of express terms. Legislation of the type now proposed would repeal and replace the Bills of Sale Act, a much maligned measure, and if, as is hoped, it sufficiently provided for the reasonable requirements of the parties there would be no reason for allowing credit providers more than a carefully controlled liberty to depart from the terms laid down.

Parliament, in seeking simplicity and uniformity in consumer contracts clearly intended to make existing pre-contract disclosure requirements more effective by making what has to be disclosed more intelligible. By seeking those qualities in the documents creating security, it seems also to intend that consumers who are undertaking or have undertaken contractual obligations should be able readily to ascertain what is required of them during the period for which the security taken pursuant to that contract exists. Parliament seems to be more concerned with the *ascertainability* of the contents of documents for it had already provided, in the case of contracts, very specifically what those contents should be. But hitherto, although the draftsman has been compelled specifically to

refer to a number of matters when drafting his documents, he has been left with a very free hand in so far as his choice of the language in which to embody those prescribed requirements is concerned. The same is true, of course, of provisions of his own, and not Parliament's, devising.

The present suggestion is that, subject to the important exceptions above mentioned, all the incidents of a secured relationship between credit provider and consumer should be regulated by law, and its documentation divided. But it seems to the writer that it is also necessary, if Parliament's intention is to be achieved, that not only the substantive contents of documents but the words used in those documents must be prescribed. It goes without saying that there will not be uniformity of language unless all documents emanate from a single source. And not only uniformity, but also simplicity, is what Parliament seeks to achieve.

It is essential that consultation by the Legislature with representatives of credit providers and of consumers should take place on the subject of what the rules governing transactions ought to be. This, possibly by consensus but perhaps by decree, would lead to the determination of those rules. The rules could then be drafted and enacted. At that stage, experts in the art of communication would be required to assist in the process of transmitting the technical statutory language into the more easily understandable language actually to be used in the documents. These would then be prescribed for use, by regulation.

The use of such documents would have to be obligatory, and not optional. The question might therefore arise of their suitability for use in cases where the circumstances of the parties happen to be unusual. Departure from the prescribed forms unless it amounted to a waiver of its rights by the credit provider ought, if past experience teaches anything, to be permissible only in cases where it is genuinely required because of unusual circumstances, and care taken to maintain the balance and fairness of the transaction. A number of devices exist which might be employed to prevent abuse of what would in some cases be a necessary flexibility. Which device would be the best choice would depend in large part on the number of unusual transactions requiring to be dealt with, and on the need to avoid delay in or disruption of transactions.

Experience indicates that cases requiring special treatment might in fact be very few, and many of those would probably be capable of being provided for by statutory provisions similar to those already in operation. It is significant that for about ten years the same security document has been used by some seven-eighths of the major credit providers in South Australia, for whom it was specifically drawn up, and by many smaller ones. The writer has been given to understand that it has been very rarely found necessary to depart from the printed form. It would seem from reading it that the document, which was clearly very expertly drafted, was drawn up with the interests of the credit provider primarily in mind. Its users are probably confident that it will resolve all foreseeable situations in their favour and have, for this reason, not sought to vary it. On the other hand, it is a complex document which few persons other than specialist lawyers would be able to understand. Now, bank guarantees, too, are highly complex documents — drawn, it has been said, with the aim of keeping a tight hand on the guarantor and a loose one on the bank — and the authors of books on banking

often stress the inadvisability of bank managers making changes to them without first seeking expert legal advice. It would be surprising if the employees of credit providers are not similarly warned not to venture on making variations without head office approval. But whatever the reason, cases requiring ad hoc modification of the printed form of security have been few, and there is no reason to suppose that they would be any more numerous if a carefully drawn and comprehensive statutory form were to be prescribed for use. It might be that there would be cases where the circumstances of the borrower were such as to make it expedient for him to wish to make unequal periodic payments: problems of disclosure of interest rates might then arise. However, existing legislation contains measures which seem to have proved adequate to deal with such cases, without any need for the intervention of any external body, and there is no reason to suppose that they would not continue to be effective. But if necessary, the existing tribunal could be given power to resolve any problems, on application from either party.

The writer's belief is that statutory prescription of the contents and the language of documents is necessary if such documents are to be uniform and simple in their terms. There are, of course, two ways only in which the obligations necessary for the carrying through of transactions can be created, that is, by Statute and by Contract. Contract was originally the sole source of rights and obligations, but the ability of the parties to regulate their relationship entirely by agreement has been so much interfered with by Statute that it is no longer possible to say that the legal position of the parties is so determined. It is, of course, a common place observation that the so-called "agreement" of the consumer is in most respects not a genuine agreement, for he knows little of the terms of the documents which he is required to sign.

However, Contract continues to occupy the primary role, albeit one extensively curtailed by Statute, in creating the legal regime of transactions. As a result, contracts are overloaded. They must remedy *lacunae* in the general law which could easily be removed by the enactment of suitable rules. They must provide protection for the necessary interests of credit providers. By contract the draftsman naturally seeks to maximise the advantages of his client. Less excusably he attempts to evade or minimise liabilities which Parliament has clearly intended should be the credit provider's. Such attempts add greatly to the complexity of documents, yet Parliaments, by using the device of the excludable implied contractual term – in itself a legal fiction – virtually invited draftsmen to make them. Parliaments usually no longer permit the exclusion of such "implied terms", and have in other respects paid diminishing obeisance to the notion of the Sanctity of Contract by displaying their readiness directly to interfere with the terms of contracts and the consequences of their breach. So extensive has this interference been that it might well be that apart from the disappearance from documents of provisions which it has not been possible to justify as reasonably necessary for the protection of the holders of securities – a result which might not be universally mourned – the actual substantive content of transactions would not be much altered if Parliaments chose to control such transactions by themselves laying down specific rules instead of by modifying or otherwise interfering with terms initially devised by credit providers. The object of Parliament would no doubt be to provide comprehensively and efficiently for the regulation of transactions in a way which gave effect to the reasonable requirements of

each, and if the achieving of that object did involve some change it could hardly be argued that the change was not justifiable.

When the incidents of a relationship are laid down by law and cannot be altered by the will of the parties to it then Status has taken the place of Contract. This is so even if entry into that relationship resulted from the free exercise of will by the parties. The intrusion of Status into this field is unlikely to be easily accepted by some. Yet, Status is already what in effect obtains, though there is a number of Statuses, the actual incidents of which depend on the terms of whichever document has been accepted as binding by the consumer, who has probably never read and almost certainly not understood it, and who has as little chance of varying its contents by the "free agreement of individuals" as if it were a statement of the rules of a status imposed by law. It might well be preferable to have a single Status, the incidents of which are fair for both parties, than a number of Statuses, deriving from contracts of adhesion, which favour only one. However, the important matter, in the writer's opinion, is that a reorganisation such as that proposed above could bring new life to the concept of freedom of contract in respect to those primary and vital matters which would remain to be determined by agreement. The terms of the security given pursuant to a credit contract are, of course, important, but the vital matters to the consumer in any credit contract are the amount of credit to be sought, the cost of that credit, in terms of both interest rate and actual outgoings, and the times at which he must repay. These, and the gist of any other matters of sufficient importance can be expressed shortly and simply, if isolated from more peripheral matters. Consumers, confident that they are to be fairly treated in respect of such matters, would, it is hoped, then be sufficiently well informed to reach a balanced decision on the matters which vitally affect them.