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EDITORS' NOTE

Part III, the concluding part, of Dr. Tay's article "Law in Communist China", which was to have been published in this issue of the *Sydney Law Review*, will not be available for publication until late 1973. We hope to be able to publish it in our next issue.

REPOSSESSION UNDER THE AUSTRALIAN "UNIFORM" HIRE-PURCHASE LEGISLATION

*C. TURNER**

Although a Committee set up to investigate the law relating to consumer credit in Australia has recently expressed substantial approval of the repossession provisions in the Australian "uniform" Hire-Purchase Acts,[1] it is the writer's contention that many of the provisions as they stand at present give rise to problems of interpretation and uncertainty, some of which have already arisen before the courts and others will almost certainly require further judicial interpretation. The writer also questions whether some of the provisions in fact achieve in practice what was intended of them, whilst others have led to cumbersome proceedings which appear to be in need of reform. The purpose of this paper is accordingly, to critically analyse the repossession provisions of the Australian "uniform" hire-purchase legislation and in particular, to examine:

(a) the formalities to be undertaken by the owner before repossessing goods and the uncertain nature of the civil remedies available to the hirer in the event of the owner not complying with the statutory formalities;

(b) the cumbrous and unsatisfactory nature of the proceedings under

* LL.B. (B'ham); Ph.D. (A.N.U.); Lecturer in Law, Faculty of Law, S.G.S., Australian National University.

[1] *Report to the Standing Committee of State and Commonwealth Attorneys-General on The Law relating to Consumer Credit and Moneylending*, The Law School, University of Adelaide, 1969, chapter XIX, 55-56.

s. 47 of the New South Wales Hire-Purchase Act, 1960-1970 where the hirer unlawfully detains goods in the event of a breach of the hire-purchase agreement;[2]

(c) the sanctions for entry on to premises by the owner for the recovery of goods let under a hire-purchase agreement;

(d) the statutory formalities to be complied with by the owner after the goods have been repossessed; and,

(e) the problems arising in relation to the assessment of damages between the owner and hirer on the owner repossessing goods under a hire-purchase agreement.

(a) *Formalities before Repossession by the Owner and Sanctions for Non-compliance*

Australian standard-form contracts of hire-purchase almost invariably provide that in the event, *inter alia*, of a hirer making default in any payment under the agreement, the owner, "shall become entitled to immediate possession of the goods and may without notice (save as required by the Act) retake possession thereof . . ." The reference to notice required by the Act is a reference to the notice required to be served on the hirer in the form set out in the Third Schedule to each of the Australian Hire-Purchase Acts.[3] After setting out a description of the goods, such notice must state that in the event of non-payment of arrears within a specified period the owner intends to retake possession. In all the States, except New South Wales, the hirer must be given a minimum period of seven days after service of the notice in which to pay the arrears before the owner may retake possession, the minimum period in New South Wales being twenty-one days.[4] Special provisions have been enacted in all the States where the hirer is also a farmer.[5]

Failure to serve such notice before repossession[6] will render the owner

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[2] For the corresponding provisions in the other Australian States and Territories, see *post* n. 34.

[3] N.S.W., Hire-Purchase Act, 1960-1970, s. 13(1); Vic., Hire-Purchase Act, 1959-1970, s. 13(1); Qld., Hire-purchase Act of 1959, s. 13(1); S.A., Hire-Purchase Agreements Act, 1960-1966, s. 13(1); W.A., Hire-Purchase Act, 1959, s. 13(1); Tas., Hire-Purchase Act, 1959-1971, s. 17(1); A.C.T., Hire-purchase Ordinance, 1961-1969, s. 18(1); N.T., Hire Purchase Ordinance, 1961, s. 17(1); Territ. Papua-N.G., Hire-purchase Ordinance, 1966, s. 21(1). Further footnote references to the Australian "uniform" Hire-Purchase Acts and Ordinances will be cited only by the State or Territory followed by the section reference.

[4] See similarly, Territ. Papua-N.G., s. 21(1) and Third Schedule. The Australian Finance Conference has recommended to the New South Wales State Government that the provisions of s. 13(1) of the New South Wales Hire-Purchase Act, 1960-1970 be brought into line with the other State Acts in this respect, since they contend that the minimum period of twenty-one days after service of notice of intention before the goods can be repossessed gives the hirer too long a period to dispose of the goods in breach of the hire-purchase agreement.

[5] In the case of agricultural implements or a motor truck let under a hire-purchase agreement to a "farmer", the minimum period to be stipulated in the notice of intention to repossess is thirty days after service of the notice, within which time the farmer may apply to a court of Petty Sessions for an order restraining the owner from taking possession of the goods. On such application, the Court, if satisfied that within twelve months from the date of application the farmer will have a reasonable prospect of paying the instalments due on that date, may make an order restraining repossession of the goods for a period not exceeding twelve months on such terms and conditions as the Court thinks fit. See N.S.W., s. 33; Q'ld., s. 30; S.A., s. 25; W.A., s. 25; Tas., s. 34; A.C.T., s. 30; N.T., s. 37; Territ. Papua-N.G., s. 40. Under the corresponding provision in s. 25 of the Victorian Act, the "farmer" may apply for similar relief within twenty-one days *after* the goods have been repossessed.

[6] In *Bennet* v. *Esanda* (1967), not yet reported, the Tasmanian Full Supreme Court held that the corresponding provision in the Tasmanian Hire-Purchase Act, 1959, s. 17, requires the owner to serve separate notice on each of several hirers even though one of them may be authorised by the others to accept notice on their behalf.

guilty of an offence against the governing Hire-Purchase Act as a result of which he will be liable to a penalty not exceeding four hundred dollars;[7] such notice need not be served in circumstances where:

> . . . There are reasonable grounds for believing that the goods comprised in the hire-purchase agreement will be removed or concealed by the hirer contrary to the provisions of the agreement, but the onus of proving the existence of those grounds lies upon the owner.[8]

However, since no civil law consequences are provided by the Australian Hire-Purchase Acts for failure to serve a notice of intention to repossess, and since no provision is made in the Acts for the incorporation of the statutory restriction on repossession in the hire-purchase agreement, R. Else-Mitchell and R. W. Parsons[9] have said that in the event of failure to serve notice:

> It would seem to follow that the repossession is not wrongful so as to expose the owner to actions by the hirer in trespass and conversion or so as to preclude him pursuing any remedies given by the hire-purchase agreement attendant upon repossession (*cf. Hemmings* v. *Stoke Poges Golf Club*[10]).

The bailor of goods however, is liable in trespass or conversion to the bailee where he repossesses goods before the period for which the goods were hired has expired.[11] Since the hirer under a hire-purchase agreement would appear to have a right to retain possession of the goods until the expiry of the period set out in the notice,[12] the action of the owner in repossessing before the service of such notice would appear to be a wrongful retaking of the goods in that it deprives the hirer of his right to retain the goods until the expiry of the stipulated number of days which should be included in such notice. Accordingly, it is submitted that repossession without

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[7] N.S.W., s. 50; Vic., s. 39; Q'ld., s. 46(1); W.A., s. 39; Tas., s. 49; A.C.T., s. 44; N.T., s. 51; Territ. Papua-N.G., s. 55. See similarly, S.A., s. 39, which also provides an alternative sanction for non-compliance of a term of imprisonment not exceeding three months.

[8] N.S.W., s. 13(2); Vic., s. 13(2); Q'ld., s. 13(2); S.A., s. 13(2); W.A., s. 13(2); Tas., s. 17(2); A.C.T., s. 18(2); N.T., s. 17(2); Territ. Papua-N.G., s. 21(2).

[9] *Hire-Purchase Law*, 4 ed., 1968 at 113.

[10] (1920) 1 K.B. 720 (C.A.). It is respectfully submitted however, that that case has no relevance to the question in that in any event, the owner of the cottage which the plaintiff occupants had refused to leave had the right to immediate possession of the premises, whereas the owner of goods let under a hire-purchase agreement has no such right until the expiry of the period to be stipulated in the Third Schedule notice.

[11] *Roberts* v. *Wyatt* (1810) 2 Taunt. 268 (127 E.R. 1080); *Lee* v. *Atkinson and Brooks* (1699) Yelv. 172 (80 E.R. 114). See also, *Howe* v. *Teefy* (1927) 27 S.R. (N.S.W.) 301 (F.C.). The bailor will also be liable in detinue, *City Motors (1933) Pty. Ltd.* v. *Southern Aerial Super Service Pty. Ltd.* (1961) 106 C.L.R. 477. The measure of damages for wrongful repossession by the bailor is the bailee's interest in the goods. *Brierly* v. *Kendall* (1852) 17 Q.B. 937 (117 E.R. 1540); *Chinery* v. *Viall* (1860) 5 H. & N. 288 (157 E.R. 1192); *Turner* v. *Hardcastle* (1862) 11 C.B.N.S. 683 at 709 *per* Erle, C. J.; *Johnson* v. *Stear* (1863) 15 C.B.N.S. 330 (143 E.R. 812). See also *City Motors (1933) Pty. Ltd.* v. *Southern Aerial Super Service Pty. Ltd.* (1961) 106 C.L.R. 477 at 491 *per* Windeyer, J.; *Healing (Sales) Pty. Ltd.* v. *Inglis Electrix Pty. Ltd.* (1969) A.L.R. 533 (H.C.); K. C. T. Sutton, "Damages for Conversion of Goods Sold," (1969) 43 *A.L.J.* 95.

[12] Thus, the N.S.W. Hire-Purchase Act, 1960-1970, s. 13 (1) provides: "Subject to this section, an owner shall not exercise any power of taking possession of goods comprised in a hire-purchase agreement arising out of any breach of the agreement relating to the payment of instalments until he has served on the hirer a notice, in writing, in the form of the Third Schedule and the period fixed by the notice (being not less than twenty-one days after the service of the notice) has expired." For the corresponding provisions under the other Australian State Hire-Purchase Acts see *supra* n. 3.

service of notice of intention to repossess as set out in the various Hire-Purchase Acts amounts to a wrongful repossession depriving the hirer of the use of the goods, and that consequently, an action may be brought by the hirer against the owner in trespass and conversion.

The Queensland Full Supreme Court[13] appears to have reached a similar conclusion in *Garven* v. *Ronald Motors Pty. Ltd.*[14] under the corresponding provision in the Queensland Hire-purchase Agreement Act of 1933[15] which, like the present section, did not directly impose any civil law consequences for failure to comply with the statutory provisions as to notice. The Court held that the measure of damages for conversion in such a case was the difference between the value of the goods at the time of wrongful repossession less the balance of instalments still owing under the hire- purchase agreement. Accordingly, the Court held that since the balance of instalments under the agreement exceeded the value of goods at the time of their wrongful repossession, the hirer under the hire-purchase agreement had suffered no loss as a result of the conversion, although nominal damages were awarded against the owner in trespass for the wrongful seizure.[16]

It is possible, however, that a different view may be taken on this point in New South Wales as a result of the decision in *Nock & Kirby Finance Co. Pty. Ltd.* v. *Stanley Thompson Investments Pty. Ltd.*[17] In that case, a hirer entered into a hire-purchase agreement with the plaintiff finance company for, *inter alia,* a prefabricated home to be erected on certain land of which he was the registered proprietor. The building was duly erected on the hirer's land and the hirer later mortgaged the land to the defendants. The hirer defaulted in his obligations both under the hire-purchase agreement and the mortgage: the defendants subsequently exercised their power of sale under the mortgage and sold the land with all the improvements erected thereon to one Ockert, and the plaintiff finance company sued the defendants in the District Court for conversion. On judgment being entered for the plaintiff in the District Court, the defendants appealed to the New South Wales Court of Appeal.

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[13] R. J. Douglas, J., Hart and Graham, A.JJ.

[14] (1938) Q.W.N. 38.

[15] S. 4(1); repealed by the Q'ld. Hire-purchase Act of 1959, s. 1(6) and Fifth Schedule.

[16] See also, *Henry Berry & Co. Pty. Ltd.* v. *Rushton* (1937) Q.S.R. 109, where the Queensland Full Supreme Court held that since the plaintiff owner of the goods let under a hire-purchase agreement to a storekeeper had not served on the storekeeper a notice of intention to exercise his right to repossess the goods under the agreement required by the Mortgagors Relief Act of 1931, s. 4, as extended to hire-purchase agreements by the Financial Emergency Relief Extension Act of 1932, he was not entitled to immediate possession of the goods and therefore could not maintain an action in trespass or detinue against the defendant who had taken the goods pursuant to a bill of sale executed by the storekeeper. See also *Lawrence* v. *Keenan* (1935) 53 C.L.R. 153. The decision in *Garven* v. *Ronald Motors Pty. Ltd.* (*supra*) perhaps indicates that the question of whether or not the hirer is able to maintain an action in conversion against the owner where the latter fails to serve the required statutory notice is primarily of academic interest rather than practical importance. Thus, in most cases of repossession by the owner, the value of the goods repossessed is less than the unpaid balance owing under the hire-purchase agreement and thus, as in *Garven's Case,* the hirer would generally be unable to show that he had suffered any loss resulting from the conversion by the owner but the latter, it would seem, can still counterclaim for the balance owing under the hire-purchase agreement. Contrast the decision of the U.K. Court of Appeal in *Abingdon Finance Ltd.* v. *Champion, The Guardian,* Nov. 6, 1961, *post* n. 32.

[17] (1969) 89 W.N. (Pt. 2) (N.S.W.) 284.

Much of the argument in the Court of Appeal concerned the application of s. 35 of the New South Wales Hire-Purchase Act, 1960-1970[18] to the particular facts of the case but one of the arguments advanced by the defendants was that the plaintiff could not succeed in its action for conversion because it had no right to the possession of the goods in that it had not given notice terminating the agreement pursuant to s. 13(1)[19] of that Act. However, the Court of Appeal[20] rejected that contention on the ground that s. 13:

> . . . presupposes a power to take possession of the goods and for the purposes of the Act places a limit upon the exercise of the power. It does not in our view affect rights on conversion. Under the agreement there was a right on breach to determine the hiring and retake possession and this in our view is sufficient to found a right to sue for conversion provided the conditions of the clause or any of them have happened. There is then an immediate right to possession: *North General Wagon & Finance Co. Ltd.* v. *Graham*;[21] *Reliance Car Facilities Ltd.* v. *Roding Motors*.[22] [23]

Provided that the proposition advanced in that passage, namely that on breach of the hire-purchase agreement by the hirer the owner is entitled to immediate possession of the goods,[24] is confined to situations *other than* the owner repossessing the goods from the hirer without service of the Third Schedule notice on the hirer defaulting in the payment of instalments under the hire-purchase agreement, it would seem to derive support from the authorities cited.

However, insofar as the proposition advanced by the Court may be taken to apply to all situations where the hirer is in breach of the hire-purchase agreement, including the situation where the hirer defaults by non-payment of instalments under the agreement and the owner repossesses the goods from the hirer without service of the notice of intention to repossess which may, on the Court's reasoning, nonetheless entitle the owner to immediate possession of the goods, it would seem to follow that in contrast to the decision of the Queensland Full Supreme Court in *Garven* v. *Ronald Motors Pty. Ltd.*[25] the hirer could not maintain an action in trespass or conversion against the owner for failure to serve the statutory Third Schedule notice.

Further, if the decision of the New South Wales Court of Appeal on this point, that the owner is entitled to immediate possession of the goods on breach of the hire-purchase agreement, is taken as applying even where the

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[18] That section provides: "(1) Goods comprised in a hire-purchase agreement that, at the time of the making of the agreement, were not fixtures to land shall not, in respect of the period during which the agreement remains in force, be treated as fixtures to land. (2) Notwithstanding anything contained in sub-section one of this section, the owner is not entitled to re-possess goods that have been affixed to a dwelling-house or residence if, after the goods have become so affixed, any person other than the hirer has bona fide acquired for valuable consideration an interest in the land without notice of the rights of the owner of the goods."

[19] For the terms of s. 13 see *supra* n. 12. For the corresponding provisions under the other "uniform" Australian Hire-Purchase Acts see *supra* n. 3.

[20] Wallace, P., Jacobs and Holmes, JJ.A.

[21] (1950) 2 K.B. 7.

[22] (1952) 2 Q.B. 844.

[23] (1969) 89 W.N. (Pt. 2) (N.S.W.) 284 at 290.

[24] In the absence, of course, of any contrary intention in the hire-purchase agreement.

[25] (1938) Q.W.N. 38.

goods are repossessed by the owner for the hirer's default in payment of instalments without service of the Third Schedule notice, it would seem contrary to the view expressed by Asquith, L.J. in *North General Wagon & Finance Co. Ltd.* v. *Graham*.[26] In that case the hire-purchase agreement for a motor vehicle between the hirer and the plaintiff finance company provided, *inter alia*, that the hirer would not do anything which would tend to affect prejudicially the ownership or financial position of the owners in relation to the vehicle, and that he would not sell, loan, or part with its possession. Clause 7(i) of the agreement further provided: "If the hirer shall fail to pay any sum due hereunder or to observe or perform any stipulation on his part herein contained, the owners may terminate the hiring. . . ." In breach of the agreement the hirer placed the car with the defendant auctioneer who sold it to the highest bidder. Subsequently, the plaintiff owners brought an action for conversion against the auctioneer.

The Court of Appeal[27] held that the plaintiffs were entitled to maintain an action in conversion against the defendant, the bailment, on the facts of the case, being determinable at the will of the bailor the moment after the breach had occurred. However, in the course of his judgment, Asquith, L.J. said that the question to be determined was whether, having regard to the terms of the hire-purchase agreement and particularly clause 7(i) of that agreement, the effect of the hirer's breach was not merely to give the plaintiffs a right to terminate the hiring, but also to entitle them to say that at the time of the defendant's sale they had a right to immediate possession of the goods so as to be able to maintain an action in conversion against the defendant. He said that the possibility was that the hiring could be terminated on breach by simply taking possession but added:

> Supposing that that is the proper construction of cl. 7(i), then clearly a person who has a right to retake possession must necessarily have had a right to immediate possession in the events which have happened. To avoid that conclusion, therefore, it is necessary to establish that some other act, additional to or other than retaking possession, was necessary for the purpose of terminating the hiring. The easiest one to imagine is some form of notice; and the question, to my mind, really reduces itself to this: on the true construction of this contract, was any notice needed to terminate the agreement?[28]

The implication following from that passage is that if some notice had been required, and s. 13(1)[29] of the New South Wales Hire-Purchase Act, 1960-1970 requires notice to be given before the owner repossesses goods for any breach of the hire-purchase agreement relating to the payment of instalments, the owners would not have been entitled to immediate possession of the goods until such notice had been served.

In practice, as pointed out earlier, the hire-purchase agreement normally provides that in default of payment of any instalment, the owner is entitled to immediate possession and may repossess without notice save as required by the Act.[30] However, it is submitted that the owner is not entitled to

[26] (1950) 2 K.B. 7.
[27] Cohen, Asquith and Singleton, L.JJ.
[28] (1950) 2 K.B. 7 at 13.
[29] See *supra* n. 19.
[30] See *supra* at 2.

immediate possession but is only entitled to possession after the expiry of the minimum number of days stipulated in the notice to be served on the hirer in accordance with the appropriate Hire-Purchase Act. Where a term is incorporated in the agreement that the owner may repossess the goods without notice save as required by the Act, the failure to serve such notice would appear to be a breach of the hire-purchase agreement itself, and amount to a wrongful repossession under the express terms of the contract.[31] The measure of damages for conversion in such a case would *prima facie* be the difference between the value of the goods at the date of the wrongful repossession, less the owner's interest in the goods, that is the unpaid balance of instalments under the hire purchase agreement.[32]

(b) *Proceedings for the Unlawful Detention of Goods*

In practice, the hirer is generally given ample warning and opportunity to make arrangements for the payment of arrears of hire. Finance companies usually send out a number of stereotyped notices bringing the hirer's attention to the amount of arrears even before serving notice of intention to repossess, each successive notice becoming more demanding in tone in its request for settlement. However, in the event of non-compliance with such requests, a notice of intention to repossess will be served on the hirer, and should the owner be unable to physically retake possession of the goods,[33] he may apply for an order that the goods are being unlawfully detained by the hirer, proceedings for such order in New South Wales being made under s. 47 of the Hire-Purchase Act, 1960-1970 which provides:

> (1) Upon complaint made by an owner who is entitled to take possession of any goods comprised in a hire-purchase agreement or by any person acting on behalf of an owner that the hirer or any person acting on behalf of the hirer has refused or failed to deliver up possession of the goods on the service of a notice of demand made by the owner or by an agent of the owner authorised in that behalf, any justice of the peace may summon the person complained of to appear before a court of petty sessions and if it appears to the court hearing the case that the goods are being detained without just cause, the court may order the goods to be delivered up to the

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[31] *North General Wagon & Finance Co. Ltd.* v. *Graham* (1950) 2 K.B. 7 at 13 *per* Asquith, L.J. As to the taking of goods without service of notice in the form stipulated by the contract, see *Brierly* v. *Kendall* (1852) 17 Q.B. 937 (117 E.R. 1540). See also, *Reliance Car Facilities Ltd.* v. *Roding Motors* (1952) 2 Q.B. 844 (C.A.).

[32] *Garven* v. *Ronald Motors Pty. Ltd.* (1938) Q.W.N. 38. *See also, Mizza* v. *H. V. McKay-Massey Harris Pty. Ltd.* (1935) 37 W.A.L.R. 87; *Roberts* v. *Roberts* (1957) Tas. S.R. 84 (F.C.); *Belsize Motor Supply Co.* v. *Cox* (1914) 1 K.B. 244 at 252 *per* Channell, J.; *Whiteley Ltd.* v. *Hilt* (1918) 2 K.B. 808 at 821 *per* Warrington, L.J.; *City Motors (1933) Pty. Ltd.* v. *Southern Aerial Super Service Pty. Ltd.* (1961) 106 C.L.R. 477 at 491 *per* Windeyer, J. See also *Healing (Sales) Pty. Ltd.* v. *Inglis Electrix Pty. Ltd.* (1969) A.L.R. 533 (H.C.); "Damages for Conversion of Goods Sold," K.C.T. Sutton (1969) 43 *A.L.J.* 95. The failure to serve a notice of intention to repossess would also appear to constitute breach of a statutory duty, see *Roberts* v. *Roberts* (1957) Tas. S.R. 84 (F.C.); *Bowmakers Ltd.* v. *Tabor* (1941) 2 K.B. 1 (C.A.). Compare, *Abingdon Finance Ltd.* v. *Champion, The Guardian*, Nov. 6, 1961, where on the owner retaking possession in breach of the hire-purchase agreement, the Court of Appeal gave judgment in favour of the hirer on a counter-claim for the return of his deposit and instalments already paid and dismissed the owner's claim for the arrears of instalments and for a fixed sum payable under a depreciation clause in the agreement: see A. G. Guest, *The Law of Hire-Purchase*, 1966, 220, para. 512.

[33] As to the common law and statutory rights and limitations of an owner repossessing goods from the premises of a hirer, see *post* at 14 *et seq.*

owner at or before a time, and at a place, to be specified in the order.

(2) Any person who neglects or refuses to comply with any order made under this section is guilty of an offence against this Act.[34]

Before proceeding under that section, the owner will serve a notice of demand on the hirer[35] that unless the goods are delivered up at a place stipulated in the notice, legal process will be issued against the hirer for the recovery of the goods; if such demand fails to evoke any response from the hirer, a detention summons will be issued against him.[36]

It is unusual for a hirer to make an appearance at the time and date stipulated in the detention summons, since if he intends to come to some arrangement as to payment of arrears with the finance company, he will normally do so before the case comes on for hearing, and the proceedings against him will be adjourned, or in the case of payment withdrawn. In the event of his making an appearance, arrangements will generally be made with the credit officer representing the finance company as to the terms on which future payments will be made.

However, as pointed out earlier, the hirer does not usually make an appearance on the date stipulated in the summons and in the absence of prior agreement between the hirer and finance company, and after evidence of the unlawful detention given by the credit officer,[37] the stipendiary magistrate will usually make an order for the return of the goods to the finance company within a specified period and for the payment of court costs.[38]

Subsequently, the hirer will receive a letter from the finance company informing him of the decision of the Court and the details of the order made.[39]

[34] For the corresponding provisions in the other "uniform" Acts, see Vic., s. 36; Q'ld., s. 41; S.A., s. 36; W.A., s. 36; Tas., s. 45; A.C.T., s. 41; N.T., s. 48; Territ. Papua-N.G., s. 51.

[35] As to the necessity of serving such demand after the lapse of time fixed by the notice of intention to repossess, see R. Else-Mitchell and R. W. Parsons, *Hire-Purchase Law*, 4 ed., 1968, at 228-229. In *Ex parte Kennaway; Re Featherstone* (1970) 92 W.N. (N.S.W.) 290, the New South Wales Court of Appeal held that the jurisdiction of a court of petty sessions to hear a complaint and make an order under s. 47(1) does not depend upon actual compliance by the complainant with the preliminary requirements of s. 13(1) (notice of intention to repossess) and s. 47(1) (notice of demand) of the Act, but upon the magistrate's opinion or determination that the required facts do exist. Accordingly, the only way of testing whether a magistrate has fallen into error in such a determination is by appeal in the appropriate form and within the appropriate time; and the prerogative writs of prohibition and certiorari are not available for adjudging the validity of a magistrate's order by reason of the complainant's failure to comply with the preliminary statutory requirements.

[36] I.e., a credit officer of the finance company will make out a complaint, and a summons will be issued by a Justice of the Peace under the form laid down by the N.S.W. Justices Act, 1902-1971, s. 62.

[37] On the non-appearance of the hirer after his name has been called three times, the credit officer gives evidence and produces a copy of the summons served on the hirer with an affidavit of service, the notice of intention to repossess with an affidavit of mailing, his authority to prosecute on behalf of the finance company, the notice of demand and the affidavit of service and the hire-purchase agreement, declaring that the goods the property of the finance company are being held by the hirer without just cause, and that no action has been taken in any other Court for the recovery of an amount due under the hire-purchase agreement.

[38] The hirer is given fourteen days to return the goods and pay the court costs of five dollars, the order further providing that in default of payment of such costs, the defendant should be imprisoned with hard labour for twenty-four hours pursuant to the N.S.W. Justices Acts, 1902-1971, s. 82.

[39] The N.S.W. Justices Act, 1902-1971, s. 85(1) provides: "If the Justice or Justices convict or make an order against the defendant a minute or memorandum of the conviction or order shall be made at the same time. No fee shall be paid for any such minute or memorandum."

Non-compliance with the order of the magistrate is an offence against the New South Wales Hire-Purchase Act, 1960-1970,[40] which offence renders the hirer liable to a penalty not exceeding four hundred dollars.[41] Consequently, in the event of the hirer failing to comply with the order by delivering the goods to the address stipulated in the order, or failing to satisfy the arrears owing under the hire-purchase agreement, the company's credit officer will lay an information[42] against the hirer[43] and a summons will generally be issued by a Justice of the Peace directing the hirer to appear in court at a particular time and date to answer the information.[44]

Again, the hirer does not usually appear in court at the date of hearing of the information, and the credit officer proceeds to give evidence against the hirer, producing a copy of the summons served on the defendant with an affidavit of service by the police officer, his authority to prosecute, a copy of the court's order forwarded by registered mail to the defendant, and a copy of the company's letter and the original court order, declaring that the order for the return of the goods had not been complied with, and that the order had not been registered as a judgment in any Small Debts Court.

After hearing the evidence, the stipendiary magistrate will generally fine[45] the hirer and order that a moiety of the fine be paid to the informant,[46] and make provision for the payment of court costs, the order stipulating that in default of payment the hirer should be imprisoned with hard labour for a term depending on the amount of fine and costs.[47]

As R. Else-Mitchell and R. W. Parsons have pointed out:

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[40] S. 47 (2) *supra* n. 34.

[41] See *supra* n. 7.

[42] S. 36(3) of the Victorian Hire-Purchase Act, 1959-1970 provides: "No information for an offence against this section shall be laid until seven clear days after a certified extract of the court register relating to the complaint has been personally served on the hirer."

[43] Thus, the N.S.W. Hire-Purchase Act, 1960-1970 stipulates that proceedings for offences against the Act are to be disposed of summarily in a court of petty sessions held before a stipendiary magistrate sitting alone; the N.S.W. Justices Act, 1902-1971, s. 52 provides that an "information may be laid before a Justice in any case where any person has committed or is suspected to have committed an offence or act in New South Wales for which he is liable upon summary conviction before a Justice or Justices to be punished by fine, imprisonment, or otherwise", whilst under s. 10, a stipendiary magistrate may do alone, any act which may be done by any Justice or Justices.

[44] N.S.W. Justices Act, 1902-1971, s. 60.

[45] Although the amount of the fine ordered to be paid varies, the amount generally found to be imposed on the defendant on examination of the summons records at Sydney Central Court of Petty Sessions between the three weeks ending on 9th December, 1966 was ten dollars.

[46] Such order is made under the authority of s. 5(3) of the Fines and Penalties Act, 1901-1954 (N.S.W.) which provides: "Where the Act imposing or authorising the imposition of a fine penalty or forfeiture makes no direction as to the application thereof the court before which such fine penalty or forfeiture is recovered may where the informer or other person prosecuting or suing for the same is not a member of the police force direct that such portion of the fine penalty or forfeiture as the Court thinks fit (but not exceeding a moiety thereof) shall be paid to the informer or other person prosecuting or suing for the same."

[47] Under the N.S.W. Justices Act, 1902-1971, s. 82(2) the order for imprisonment in default of payment of the fine and costs is mandatory; the term of imprisonment in default of payment is calculated on the basis of one day for each five dollars of the amount ordered to be paid, but in no case is to exceed twelve months. Neither the fine nor costs can be levied by distress except where the conviction or order is made against a corporate body (s. 82(1)) in which case the order operates as an order for the payment of money under the N.S.W. Small Debts Recovery Act, 1912 as amended (s. 82(2A)). The order made against the defendant may allow time for the payment of the fine and costs, and direct payments to be made by instalments (s. 83).

> . . . although an order of the type which is contemplated by s. 47(1) may become exhaused when the hirer fails to deliver up the goods within the time and at the place stated in the order, it would be open to the owner under s. 47 to serve a series of demands and obtain a series of orders each of which, when not complied with, would give rise to an offence under s. 47(2). The draftsman may have intended that this procedure would avoid the penal or quasi-criminal proceedings of the Courts being used for the recovery of civil debts but, despite the rather cumbersome nature of the procedure, it seems certain that s. 47 will be availed of as a means of enforcing payment of overdue instalments.[48]

An examination of the summons records in the Sydney Central Court of Petty Sessions leaves little doubt that the procedure under s. 47 of the New South Wales Hire-Purchase Act, 1960-1970, is used extensively by some finance companies and retail traders financing their own hire-purchase transactions as a method of bringing pressure to bear on the hirer for the payment of arrears due under the hire-purchase agreement, especially by those companies financing the acquisition of household furniture and effects such as television sets, refrigerators, washing machines, radios and lawn-mowers, that is, goods which often have relatively little second-hand value in relation to the original hire-purchase price.[49]

As a result of the form of drafting of the New South Wales Hire-Purchase Act, 1960, it was held by Isaacs, J.[50] in *Mutual Acceptance Co. Ltd.* v. *Gestro*[51] that a hirer fined for non-compliance with an order for the delivery up of goods pursuant to s. 47[52] of that Act could be ordered to pay compensation to the informant under s. 554(3) of the New South Wales Crimes Act, 1900-1970, which section provides that where a person is convicted of any offence by a court of summary jurisdiction:

> . . . the Court may, on such conviction or at any time thereafter upon notice given to the offender direct that a sum not exceeding three hundred dollars be paid to the person aggrieved, by way of compensation for injury or loss sustained by reason of the commission of such offence.[53]

In *Gestro's Case*, the magistrate had found that the defendant hirer had failed to comply with a previous order to deliver up a transistor radio under a hire-purchase agreement at the informant's premises. Accordingly, he found him guilty of an offence under s. 47(2) of the New South Wales Hire-Purchase Act, 1960, fined him thirty pounds, and ordered the payment of court costs,

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[48] *Hire-Purchase Law*, 4 ed., 1968, at 230.

[49] Thus, an examination of the summons records at Sydney Central Court of Petty Sessions for the period between 21 October, 1966 and 9 December, 1966 disclosed that some 363 applications were made under s. 47 of the Hire-Purchase Act, 1960-1970 (N.S.W.). Approximately 30% of such applications were adjourned and some 10% withdrawn, indicating that the proceedings taken under that section were sufficient in many cases to induce the hirer either to come to some agreement with the companies concerned as to the future payment of arrears, or in fact to pay the arrears to avoid possible future action against them. Almost invariably the summonses examined during this period related to arrears owing under hire-purchase agreements for household furniture and effects, none of them relating to hire-purchase agreements for motor vehicles.

[50] In Chambers.

[51] (1965) 83 W.N. (Pt. 1) (N.S.W.) 21.

[52] *Supra* n. 34.

[53] That section further provides that any sum directed to be paid by the offender is to be paid to the clerk of the court, who in turn is to pay it to the aggrieved party; such order is enforceable under the N.S.W. Justices Act, 1902-1971, s. 82.

or in default imprisonment for sixty-three days[54] but refused to award compensation to the informant. However, by case stated, heard before Isaacs, J.[55] the magistrate enquired whether he had erred in law in refusing to award compensation to the informant.

Counsel for the Crown contended that on examination of the whole of the relevant New South Wales hire-purchase legislation from 1941-1960, a clear and positive legislative intention could be extracted, which established that the Hire-Purchase Act, 1960 was the sole legislative code in respect of offences against the Act to the exclusion of any penal Act, including the Crimes Act, 1900 and especially s. 554(3) of that Act.[56] However, as Isaacs, J. pointed out in *Gestro's Case*,[57] the question as to the application of s. 554(3) of the Crimes Act, 1900 as amended, could not arise under the earlier hire-purchase legislation since whatever proceedings were taken for the recovery of possession of goods or payment of money in lieu, such proceedings were not taken in respect of "an offence under the Act" as under the present legislation. He said that the earlier legislation afforded no assistance in determining the question before him since, the 1960 Act ". . .stands alone on its own feet and the relevant provisions are clear and unambiguous in their terms".[58] Accordingly, he accepted the appellant company's contention that by virtue of s. 47(2) of the New South Wales Hire-Purchase Act, 1960,[59] non-compliance with an order made under s. 47(1) for the delivery of the goods to the owner, rendered the hirer guilty of an offence against the Act, and therefore liable to a penalty not exceeding four hundred dollars.[60] Since proceedings for offences against the Act are to be disposed of summarily before a court of petty sessions,[61] the provisions of s. 554(3) of the Crimes Act, 1900[62] as amended, which applies to convictions for "any offence" in courts of summary jurisdiction are attracted, and consequently, the magistrate had erred in law in holding that where a defendant is convicted of an offence under s. 47(2) of the Hire-Purchase Act, 1960, a court of summary jurisdiction has no power to make an order for compensation pursuant to s. 554(3) of the Crimes Act, 1900 as amended.

Isaacs, J. rejected the contention that as a matter of either express intendment or necessary implication, where a person is convicted before a court exercising summary jurisdiction for an offence against the Hire-Purchase Act, 1960, s. 554(3) of the Crimes Act, 1900 as amended could have no application, since:

> Far from there being any intendment of the legislature I do not think that the situation was ever considered by it. The disparity between the maximum amount of £150 which may be ordered under s. 554(3) and

[54] Under s. 82(2) Justices Act, 1902, as amended, new provisions regarding the calculation of the term of imprisonment in default of compliance with the court order were made by the Justices (Amendment) Act, 1971, s. 3; *supra* n. 47.

[55] In Chambers.

[56] For the operation of the earlier provisions prior to the N.S.W. Hire-Purchase Act, 1960, see R. Else-Mitchell, *Hire-Purchase Law*, 2 ed., 1955, at 73-77; R. Else-Mitchell and R. W. Parsons, *Hire-Purchase Law*, 4 ed., 1968, at 227-228.

[57] (1965) 83 W.N. (Pt. 1) (N.S.W.) 21 at 26.

[58] *Ibid.*

[59] *Supra* n. 34.

[60] N.S.W. Hire-Purchase Act, 1960-1970, s. 50.

[61] *Id.* s. 51.

[62] *Supra* n. 53.

> the value of the goods which might be involved and the extent of the loss sustained by reason of the commission of the offence, which might range from very small amounts to many thousands or even hundreds of thousands of pounds, is perhaps sufficient to indicate that the legislature never expressly or by intention directed its mind to s.554(3) of the Crimes Act when enacting s. 47(1) and (2) and s. 50(2) of the 1960 Hire-Purchase Act. It could never have thought that compensation up to £150 was in any way adequate or proper for the commission of the offence which resulted in the loss to the hirer, e.g. of a motor car sold under hire-purchase for more than £2,000 where £2,000 was still owing on it. The melancholy fact is that s. 554(3) is still apt to describe an offence against the Hire-Purchase Act, 1960, the result being fortuitous and not intentional.[63]

Earlier, Isaacs, J. had pointed out that s. 47 of the New South Wales Hire-Purchase Act, 1960 evinces a change in policy, since no longer can an order for the payment of money in lieu of the return of the goods be made, and no longer has non-compliance with such an order the effect of ultimately landing a person in prison for non-payment as under the previous legislation. Section 47, he said, simply provides for complaint to a Justice who could summon the hirer to appear before the court, which on deciding that the goods were being detained without just cause, could order the goods to be delivered up to the owner at or before a time and at a place to be specified in the order. He said, "This is the only order that an owner can now obtain from the court of petty sessions and the court is no longer a debt collecting court in the sense it was previously."[64] The result, he concluded, was that the only sanction imposed by the 1960 Act to induce or produce a return of the goods was the fine imposed by s. 50(2) for the offence created by s. 47(2).

However, it is respectfully submitted that this is an over-simplification of the objects of the proceedings taken under s. 47, which often are taken not so much with the object of regaining actual physical possession of the goods from the hirer, but as a means of bringing pressure to bear on him to pay the arrears outstanding under the hire-purchase agreement. It is true that the court can no longer order the payment of money in the event of the hirer's neglect or refusal to deliver up the goods as ordered by the magistrate, backed by the sanction of imprisonment. But in practice, a moiety of the fine imposed is ordered to be paid to the informant. This procedure, which ultimately carries with it the sanction of imprisonment, must surely amount to the use, in effect, of the jurisdiction of the court of petty sessions for the recovery of arrears under a hire-purchase agreement. Further, by virtue of the judgment of Isaacs, J. in *Gestro's Case*, compensation may be ordered to the informant under s. 554(3) of the New South Wales Crimes Act, 1900-1970; this enables the use of a court of petty sessions as a debt collecting court, particularly where the arrears or balance owing under the hire-purchase agreement is not greater than three hundred dollars, when this procedure provides a useful alternative where the goods being financed consist of household furniture and effects; the order for payment is backed by the sanction of imprisonment.

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[63] (1965) 83 W.N. (Pt. 1) (N.S.W.) 21 at 26.
[64] *Id.* at 25.

However, as Isaacs, J. pointed out in *Gestro's Case,* the simple finding that s. 554(3) of the Crimes Act, 1900 was applicable to the offence created by s. 47(2) of the New South Wales Hire-Purchase Act, 1960 was insufficient to determine the whole question, since one of the grounds on which the magistrate had refused to make an order for compensation was that the company had not suffered, ". . . injury or loss sustained by reason of the commission of such offence" within the meaning of that expression in s. 554(3) of the Crimes Act, 1900 as amended.[65] Thus, the loss suffered for which compensation may be ordered, must be by reason of the commission of the offence of failing to deliver up the goods pursuant to an order made under s. 47(1). In *Gestro's Case,* however, Isaacs, J. said that the deprivation of an owner of possession of his goods when he is legally entitled to possession must as a matter of law involve some loss or injury. However, the appellant company had not given any evidence of monetary loss except that it had submitted that it had lost the value of the goods, the moneys invested therein, and the opportunity of recouping its losses caused by the failure of the defendant to deliver up the goods. Isaacs, J. said that no doubt it contended that with the passage of time the value of the goods would continue to depreciate, and that some loss by way of depreciation was being suffered by reason of its failure to get the goods under the order. He said:

> It was of course open to the magistrate to weigh the matters and to decide not to make any order under s. 554(3) either because he was not satisfied as a matter of evidence that any loss had been sustained by the commission of the offence, or even if so satisfied yet by exercising his discretion judicially of course and not capriciously against the making of any order.[66]

However, since it was evident that the magistrate had determined the matter purely as a question of law,[67] Isaacs, J. upheld the appeal and remitted the case back to the magistrate to be dealt with accordingly.

It was apparent to the writer on examination of the proceedings taken under s. 47 of the New South Wales Hire-Purchase Act, 1960-1970 in the Sydney Central Court of Petty Sessions, that some magistrates dislike the use of the court of petty sessions as a means of enforcing the payment of civil debts, that is, the arrears owing under a hire-purchase agreement. Where such cases are heard before magistrates taking this view the informant will often fail to secure an order under s. 554(3) of the Crimes Act, 1900-1970 on the ground that he cannot show the precise loss suffered in monetary terms through the hirer's failure to deliver up the goods in accordance with

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[65] *Supra* n. 53.

[66] (1965) 83 W.N. (Pt. 1) (N.S.W.) 21 at 27.

[67] The magistrate had taken the view that where goods were being repossessed, the machinery for determining the liability of the hirer with regard to his monetary obligations was completely catered for by the provisions of the Hire-Purchase Act itself. Accordingly, he said that the essence of the offence committed was no more than a sanction which may be invoked for non-compliance with the court's order but had no relation to the rights of the parties which were dealt with by the other provisions of the Act: "This being so one cannot say that the vendor of goods has been aggrieved in any monetary manner by the commission of this offence so as to entitle him to compensation for loss sustained by it." *Ibid.* Isaacs, J. however, rejected that view since, he said, the provisions laid down by the Act dealing with the situations where the owner desires to repossess and does repossess, have no relation whatever to a situation where he obtains an order under s. 47(1) and is deliberately defied by the hirer who accordingly commits the offence under s. 47(2).

the order, nor establish proof that the goods were worth the unpaid balance claimed as compensation.

It will be apparent from the decision of Isaacs, J. in *Mutual Acceptance Co. Ltd.* v. *Gestro*[68] that compensation under s. 554(3) of the Crimes Act, 1900-1970 may be awarded on the first conviction and fine of the hirer under s. 47(2) of the New South Wales Hire-Purchase Act, 1960-1970 for non-compliance with an order by a stipendiary magistrate for the return of the goods under s. 47(1).[69] In practice however, it would appear that even those magistrates accepting the proceedings under s. 47 as a matter of form, do not generally order compensation to be paid to the informant until the defendant has been convicted on a third occasion, by which time it will usually be evident from the protracted nature of the proceedings that the hirer does not intend to discharge his obligations under the hire-purchase agreement.[70]

However, even the excessively cumbersome procedure under s. 47 of the New South Wales Hire-Purchase Act, 1960-1970 does not necessarily result in the actual return of the goods to the owner, and in any event, it is evident that many hirers only return the goods to the owner after a considerable part of the protracted procedure under that section has been undertaken by an owner. Accordingly, the question arises as to the ability of an owner to recover the actual possession of the goods otherwise than by action, e.g. in detinue or conversion in a superior Court followed by a writ of delivery.

(c) *Recovery of the Goods by the Owner*

The only Australian Hire-Purchase Act expressly making provision for the actual recovery of goods under a hire-purchase agreement is the South Australian Hire-Purchase Agreements Act, 1960-1966. Section 36(1) of that Act provides that on application being made to a court[71] by an owner entitled to the possession of goods under a hire-purchase agreement, where the court is satisfied that the hirer has refused or failed to deliver up possession of the goods on the service of a notice of demand made by the owner and it appears that the goods are being detained without just cause, the court may order the goods to be delivered up to the owner at or before a time and at a place stipulated in the order. In addition, however, that section further provides that:

> (2) Any person who neglects or refuses to comply with any order made under this section shall be guilty of an offence against this Act, and the court making the said order may issue a warrant to the bailiff of the court who, by such warrant, shall be empowered to enforce the said order.
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> (3) All constables and other peace officers shall aid in the execution of every such warrant.

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[68] (1965) 83 W.N. (Pt. 1) (N.S.W.) 21.

[69] *Supra* n. 34.

[70] Of the 363 applications made under s. 47 of the N.S.W. Hire-Purchase Act, 1960 at the Sydney Central Court of Petty Sessions as recorded in the Summons Records of the Court during the period 21 October, 1966 to 9 December, 1966, 5 orders for compensation were made, each order for compensation being made at the time of the defendant's third conviction for the offence committed under s. 47(2) for failing to comply with an order made under s. 47(1). A typical order for compensation would provide: "Fined $10. Court Costs $2, in default 6 days imprisonment with hard labour. Moiety of fine to informant. To pay compensation in the sum of $282 to the Clerk of Petty Sessions, Central Court of Petty Sessions Sydney for payment to (Name and address of informant). In default 141 days imprisonment with hard labour. Allowed to pay by instalment $6 per week. First payment (date stipulated)."

[71] S. 2(1) of the Act provides that a "court" means a local court of full jurisdiction.

Prior to the "uniform" Australian hire-purchase legislation in 1959-60, it was usual for the hire-purchase agreement to give the owner an express licence to enter premises for the recovery of goods on the hirer being in default of the terms of the hire-purchase agreement,[72] and the earlier South Australian[73] and Queensland[74] hire-purchase legislation expressly empowered an owner to enter upon the land of any person where the chattels comprised in the agreement were, or where the owner or his agent reasonably suspected that they were. However, all the Australian Hire-Purchase Acts now provide that any provision in any agreement or other document is void whereby:

> . . . the owner under a hire-purchase agreement or any person acting on his behalf is authorised to enter upon any premises for the purpose of taking possession of goods comprised in the hire-purchase agreement or is relieved from liability for any such entry.[75]

Although such provision prevents an owner from entering premises under an express licence, the Acts do not otherwise appear to affect any rights which an owner may have at common law for the recaption of chattels. Thus, the provision does not affect the owner's right to retake possession of, for example, a motor vehicle which is on the highway or other public place. The upsurge in such repossessions has led to statutory provision in New South Wales and Victoria requiring a "commercial agent" who repossesses a motor vehicle, the subject of a hire-purchase agreement or bill of sale, to report the matter to the police[76] to save their time in looking for allegedly stolen vehicles which later turn out to have been repossessed by the owner under a hire-purchase agreement.[77]

It was established at common law that a person entitled to the lawful possession of goods could, if necessary, forcibly retake them from one who had wrongfully taken possession of them, for example, by trespass,[78] provided that no more force was used to recover them than was necessary in the

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[72] See e.g. *Belsize Motor Supply Co.* v. *Cox* (1914) 1 K.B. 244 at 246. A. Dean, *Hire-Purchase Law in Australia*, 2 ed., 1938, at 92.

[73] S.A. Hire-purchase Agreements Act, 1931, s. 4(1)(a).

[74] Q'ld. Hire Purchase Agreement Act of 1933, s. 4(1) (a).

[75] N.S.W., s. 36(1)(g); Q'ld., s. 33(1)(g); S.A., s. 28(1)(g); W.A., s. 28(1)(g); Tas., s. 37(1)(g); A.C.T., s. 33(1)(g); N.T., s. 40(1)(g); Territ. Papua-N.G., s. 43(1)(h). All these Acts provide that in the event of a clause in the hire-purchase agreement being void as a result of the section, the owner is guilty of an offence against the Act and accordingly, liable to the monetary penalty laid down in the Acts. However, the corresponding provision in s. 28(g) of the Victorian Hire-Purchase Act, 1959-1960 does not provide for any additional penalty.

[76] N.S.W. Commercial and Private Inquiry Agents Act, 1963, s. 22; Vic. Private Agents Act, 1966, s. 37. Section 4(b) and s. 3(a) of those Acts respectively, define a "commercial agent" as including, *inter alia*, a person: "ascertaining the whereabouts of or repossessing any goods or chattels which are the subject of a hire-purchase agreement or a bill of sale". The Acts provide for the licensing of such agents. The New South Wales provision requires notice of such repossession and particulars of the vehicle to be delivered or sent to the officer in charge of police at any police station within twenty-four hours. The corresponding Victorian provision requires that on repossession such information must be given (a) "forthwith" to an officer of police at a police station near the place where the vehicle was repossessed, and (b) within twenty-four hours of repossession such information be delivered or sent in duplicate to the police station nearest the commercial agent's registered address.

[77] *N.S.W. Parl. Debs*, 1962 vol. 41 (Assembly) at 41; *Vic. Parl. Debs*, 1966 (Assembly) at 786-787.

[78] *Blades* v. *Higgs* (1861) 10 C.B. (N.S.) 713; 11 H.L.C. 621. In *Whatford* v. *Carty* (Oct. 28, 1960) [1960] C.L.Y. 3258 the Divisional Court (Lord Parker, C.J., Ashworth, and Elwes, JJ.) held that a person who sought by force to recover his bow and arrows from persons who, without right, had taken them from him, was not guilty of an assault even though he had not requested the return of his property before resorting to violence.

circumstances.[79] However, greater uncertainty exists as to whether at common law goods may be forcibly retaken where the person wrongfully detaining them acquired possession of them lawfully, as in the case of a bailee detaining goods when the bailment has been terminated. Thus, although in *Salmond on Torts*,[80] it is said that the "remedy of forcible recaption is not limited to cases of the wrongful taking of chattels but stands to all cases of the wrongful possession of them", Clerk and Lindsell[81] have submitted that:

> . . . if a person has a chattel bailed to him and unlawfully refuses to give it up on the termination of the bailment, the owner must bring his action and cannot use force to recover his property, since the original possession was lawful. . . .

Salmond based his proposition on the decision of the Court of Common Pleas in *Blades* v. *Higgs*[82] where the plaintiff, after purchasing rabbits from a poacher, was forcibly dispossessed of them by the defendants who were servants of the owner of the land from where the rabbits had been taken. However, the plaintiff's action for the assault by the defendants failed, and Erle, C.J. delivering the judgment of the Court said:

> . . . if the defendants were the owners of the chattels, and entitled to the possession of them, and the plaintiff wrongfully detained them from them after request, the defendants in law would have the possession, and the plaintiff's wrongful detention against the request of the defendants would be the same violation of the right of property as the taking of the chattels out of the actual possession of the owner.[83]

Although the decision in *Blades* v. *Higgs*[84] has been accepted as good law by the New Zealand Supreme Court[85] for the proposition that force may be used for the recaption of chattels even where the original possession was lawful, as well as where the original possession of the person detaining the goods was wrongful, the Appellate Division of the New Brunswick Supreme Court in *Devoe* v. *Long*[86] rejected *Blades* v. *Higgs*[87] on this point as going beyond what was necessary for the decision in that case since the original possession of the poacher was wrongful. However, the New South Wales Full Supreme Court, like the New Zealand Supreme Court, earlier accepted *Blades* v. *Higgs*[88] as authority for the proposition that goods, even although initially in the lawful possession of the plaintiff, may be retaken from him by the use of force where necessary. Thus, in *Zimmler* v. *Manning*,[89] Stephen, C.J. on referring to *Blades* v. *Higgs* said:

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[79] *R.* v. *Milton* (1827) 1 M. & M. 107 at 107-108 *per* Lord Tenterden, C.J.
[80] 14 ed. 1965, at 790.
[81] *On Torts*, 12 ed., 1961, at 242, para. 456.
[82] (1861) 10 C.B. (N.S.) 713; 11 H.L.C. 621. Although the case later reached the House of Lords, the only point at issue before their Lordships was the question whether the property in game killed by a trespasser rested in the trespasser or in the owner of the land on which it was killed.
[83] (1861) 10 C.B. (N.S.) 713 at 720. Pollock however, was of the opinion that the reasons given for that proposition seem wrong, and the decision itself contrary to the common law as understood in the thirteenth century. *Pollock on Torts*, 15 ed. 293, n. 81. See also, C. A. Branston, "Forcible Recaption of Chattels", (1912) 28 *L.Q.R.* 262, at 266-267.
[84] (1861) 10 C.B. (N.S.) 713; 11 H.L.C. 621.
[85] *De Lambert* v. *Ongley* [1924] N.Z.L.R. 430 (Sim, J.).
[86] (1951) 1 D.L.R. 203 (Richards, C.J., Harrison, and Hughes, J.J.).
[87] (1861) 10 C.B. (N.S.) 713.
[88] *Ibid.*
[89] (1863) 2 S.C.R. 235.

> . . . the owner of a chattel in the manual possession of another may, after demand and refusal, take it from the latter by force. For, in such cases, as explained in the judgment of Erle, C.J., the legal possession of the chattel demanded is in its rightful owner, who, therefore, in effect, uses the force in defence of that possession.[90]

Insofar as the Australian States of Queensland, Western Australia, and Tasmania are concerned, the Criminal Codes of these States provide that it is lawful for a person entitled to the possession of movable property to retake the goods and to use such force as may be necessary to overcome the resistance of the person in possession not claiming right to it, provided that the person taking possession does not inflict bodily harm.[91]

However, it is very unlikely that the courts would construe those provisions as implying a licence in favour of the person entitled to the possession of goods to forcibly enter land for the purpose of recaption. The position at common law on the question whether entry on premises without the consent of the occupier for the recovery of goods being detained by one whose possession at its inception was lawful[92] is a defence to an action in trespass, is similarly shrouded in uncertainty. Thus, in *Blades* v. *Higgs*,[93] Erle, C.J. said that the owner of land entitled to possession may use force to remove a wrongdoer even though a breach of the peace may be committed, and said that the principles relating to the right of property in land applied in principle to the right of property in a chattel, whilst in *Anthony* v. *Haney*,[94] Tindal, C.J. appears to suggest that a refusal by an occupier of land to deliver up goods or answer the demand for their return by an owner entitled to their possession, might enable the latter to enter and take his property, subject to any damage which he might commit.[95] However, in a note to *Webb* v. *Beaven*,[96] Littleton, J. is reported as having said:

> . . . if a man takes my goods and brings them upon his own land, I can enter into his land and take my goods, for the entry is lawful; for they came upon his land by his own wrong. But it is otherwise if I bail goods to a man,—I cannot enter his house and take the goods; for they did not come there by wrong, but by the act of us both. . . .

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[90] *Id.* at 240. See also *Abbott* v. *N.S.W. Monte de Piete Company* (1904) 4 S.R. (N.S.W.) 336 (F.C.) at 339.

[91] See, Q'ld. Criminal Code, 1899, s. 276; W.A. Criminal Code, 1913, s. 253. The Tasmanian Criminal Code, 1924, s. 45 provides that it is lawful for reasonable force to be used in such circumstances: ". . . provided that such force is not intended and is not likely to cause death or grievous bodily harm."

[92] Where the goods are wrongfully taken by the plaintiff onto his own land the defendant is entitled to enter the land to recover them: *Patrick* v. *Colerick* (1838) 3 M. & W. 483; *Zimmler* v. *Manning* (1863) 2 S.C.R. 235 at 241 *per* Stephen, C.J.; *Cox* v. *Bath* (1893) 14 L.R. (N.S.W.) 263. Again, where goods have been wrongfully taken and placed on another's land with his consent, the person entitled to possession may enter that land for the purposes of recaption: *Huet* v. *Lawrence* [1948] Q.S.R. 168 (F.C.); *Cunningham* v. *Yeomans* (1868) 7 S.C.R. (N.S.W.) 149 (F.C.). However, the fact that goods have been placed by a third party on an occupier's land does not entitle the owner of the goods to enter that land without the occupier's consent, but he must show the circumstances under which they were placed there: *Anthony* v. *Haney* (1832) 8 Bing. 186; *Zimmler* v. *Manning* (1863) 2 S.C.R. (N.S.W.) 235.

[93] (1861) 10 C.B. (N.S.) 713 at 720-721.

[94] (1832) 8 Bing. 186.

[95] *Id.* at 192-193. Pollock has doubted the validity of that proposition: *Pollock on Torts*, 15 ed., 1951, 293 n. 85. In that case, Tindal, C. J., was concerned with the rights of an owner of goods to enter the land of an innocent occupier on whc lands the goods were placed, rather than the detention of goods by a bailee or own land after the termination of the bailment.

[96] (1844) 6 M. & G. 1055 (134 E.R. 1220).

In the Canadian case of *Devoe* v. *Long*,[97] it was said that the reasons given in *Blades* v. *Higgs*[98] went far beyond what was necessary for the decision in that case, and it was held that if A's possession of B's chattel is lawful at its inception, B is not entitled to trespass on A's land to retake it unless A's right to possession has been terminated by a request by B for his goods, in which case B may enter on A's land to retake provided the entry is made peaceably and without committing a breach of the peace, for example, by breaking open the door to A's house, but in no case can entry be justified which is accompanied by a breach of the peace.

However, what little Australian authority there is on this question would tend to suggest that even where the possession of the goods by the plaintiff was initially lawful, if subsequently he wrongfully detains the goods adversely to the person entitled to possession of them, the latter may enter the plaintiff's premises and use force if necessary to gain possession. Thus, in *Zimmler* v. *Manning*,[99] Stephen, C.J., after pointing out that in certain circumstances the law implies a licence by the owner of land to enter on it for the purpose of taking goods, said:

> And it might probably have been successfully contended, therefore, that such a licence would be implied as against Gunst, the occupier of the house at the time of his mortgage of the goods, the subject of this action.[100]

In that case, one Gunst had executed a bill of sale in favour of the defendant over certain goods as security for a debt, and the plaintiff subsequently purchased the goods from Gunst and entered into possession of the premises previously occupied by the latter. The defendant's agents entered the premises and took possession of the goods, and it was held that the defendant's plea of justification to the plaintiff's claim in trespass was bad, since no licence could be implied to enter the plaintiff's premises to seize the goods,[101] although such would probably have been implied in the mortgage of the goods between Gunst and the defendant. However, since the action in trespass was brought by the plaintiff against the defendant, the remarks as to what the position might have been had Gunst brought such an action against the defendant were necessarily *obiter*.

In a later decision of the Full Supreme Court of New South Wales in *Abbott* v. *New South Wales Monte de Piete Company*,[102] the plaintiff had given the defendant a bill of sale over certain goods as security for a loan, and on the plaintiff being in default in repayment of the loan, the defendant entered the plaintiff's property and seized the goods. In an action, *inter alia*, by the plaintiff in trespass, the Chief Justice[103] said:

> Under the circumstances it appears to me that the defendants were justified in entering and seizing their goods, notwithstanding that they may

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[97] *Supra* n. 86.
[98] (1861) 10 C.B. (N.S.) 713; 11 H.L.C. 621.
[99] (1863) 2 S.C.R. (N.S.W.) 235 (F.C.).
[100] *Id.* at 241. See also *Zimmler* v. *Manning* (1864) 3 S.C.R. (N.S.W.) 319 (F.C.) at 332 *per* Stephen, C. J.
[101] Similarly, in *Varszegi* v. *Henry Place & Co. Pty. Ltd.* (1967) 1 C.C.R. (Vic.) 81, Hewitt, J. held that the defendant owners were liable in trespass when one of their agents entered the plantiff's premises and seized the motor from a refrigerator which had been sold to the plaintiff by a hirer in breach of his hire-purchase agreement at the time of the sale of the premises to the plaintiff.
[102] (1904) 4 S.R. (N.S.W.) 336 (F.C.).
[103] With whom Owen, and Pring, JJ. concurred.

> have used "force and violence and a strong hand". The case of *Blades* v. *Higgs* (10 C.B. N.S. 713) seems to me to set this matter completely at rest. There it was held that the owner of goods which are wrongfully in the possession of another may justify an assault or a breach of the peace in order to repossess himself of them; and Erle, C.J., says, "If the owner (of a chattel) was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it."[104]

However, insofar as that passage indicates that at common law a person entitled to the possession of goods may forcibly enter premises for the purposes of taking possession, it is *obiter* in that under the bill of sale, the defendant was given an express licence to enter premises in the event of default in repayment of the loan by the plaintiff.

In the apparent absence of *binding* authority, it is respectfully submitted that the Australian courts would probably hold that in the absence of permission of an occupier of premises who is unlawfully detaining goods after the expiry of a bailment, the owner of the goods would not be entitled to enter the premises to recover them; hence such entry would be unlawful and entitle the bailee to an action in trespass.[105] In the absence of such authority, and since the prevailing view among text-writers is that such an entry is unlawful,[106] and since the hire-purchase legislation of all the Australian States renders void any attempt on the part of the owner to gain a written licence from the hirer to enter premises in the case of default under the hire-purchase agreement, it is unlikely that an Australian court would hold that a licence for such entry is implied at common law although that proposition is by no means certain.

Although there would appear to have been instances of forcible entry on to premises for the purpose of repossessing goods,[107] there is at present no reported case of a hirer having brought an action in trespass against an owner entering premises without his consent and seizing the goods, the subject of a hire-purchase agreement.[108] Perhaps this is not surprising in view of the fact that it is unlikely that in such an action, the hirer would recover more than the damage actually occasioned as a result of the forcible entry, unless the court was to take the view that in the circumstance of a particular

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[104] (1904) 4 S.R. (N.S.W.) 336 at 339.

[105] R. Else-Mitchell and R. W. Parsons in *Hire-Purchase Law*, 4 ed., 1968, at 197 have said that the right at common law of an owner to take possession of his goods depends on the fact that the owner is entitled to the property in, or at least the possession of the goods when the bailment is determined, but that since the hire-purchase legislation gives the hirer an interest in the goods, it seems doubtful whether the common law right to retake possession is still exercisable, and accordingly, the entry on land to retake such goods would constitute a trespass. However, whilst agreeing that such an entry would probably constitute a trespass, it is respectfully submitted that this result is not by reason of any statutory recognition of an equity which the hirer might have in the goods, since the owner is entitled to the possession of the goods under the terms of the hire-purchase agreement on the hirer's breach of that agreement and the expiry of the period set out in the notice of intention to repossess required by the Third Schedule to each of the Australian Hire-Purchase Acts.

[106] Clerk and Lindsell *On Torts*, 12 ed., 1961, at 242 para. 456, and at 607 para. 1158; Salmond *On Torts*, 14 ed., 1965, 791 n. 13; J. G. Fleming, *The Law of Torts*, 3 ed., 1965, at 96.

[107] See *C'wlth. Parl. Debs*, 1965 (Representatives) at 2664 and 2666.

[108] The subject of the repossession of goods was discussed at a conference of law ministers in Perth, in July, 1966.

case the trespass justified an award of exemplary damages.[109] Perhaps the absence of such authority is also attributable to the fact that the type of hirer likely to find himself having goods forcibly repossessed, despite the notices generally sent out by the company before the notice of intention to repossess demanded by all the Australian Hire-Purchase Acts, is unlikely to expend the energy and possible cost in seeking legal advice in such circumstances.

Accordingly, it is unlikely that the possibility of a civil action being taken against it would seriously deter a company seeking to recover its security in the goods let under the hire-purchase agreement from unlawfully entering premises to seize that security, since it may well be considered worthwhile to pay the cost of replacing a broken padlock on a garage in exchange for having the car in its possession even if the initial entry does constitute a trespass at common law.

The effective sanctions against such unlawful entry must therefore be sought elsewhere, and with the probable exception of Victoria, and the possible exception of New South Wales, they would appear at present to be severely limited. Thus, although the possibility of criminal proceedings being taken under the Statute of Forcible Entry, 1381[110] may have operated as a deterrent against such entry in some cases, the Full Supreme Court of New South Wales in *R.* v. *Waugh*[111] held, following the Canadian decision in *R.* v. *Pike*,[112] that the Statute[113] applied only where the forcible entry was made with

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[109] See *Schumann* v. *Abbott and Davis* (1961) S.A.S.R. 149, where exemplary damages were awarded against inquiry agents for unlawfully entering premises for the purpose of searching for evidence of a wife's adultery for divorce proceedings. In *Murray* v. *M'Neill* (1885) 1 W.N. (N.S.W.) 136, a jury awarded, inter alia, £400 for the trespass of the defendants in seizing furniture from the plaintiff's premises, the plaintiff being a bona fide purchaser of the furniture from a mortgagor who had earlier executed a bill of sale over the furniture to the defendants as security for a loan. However, on the defendants moving for a rule nisi, the Full Supreme Court considered the damages excessive and held that the rule must be granted unless the plaintiff would consent to reduce the £400 to £200 in which event the rule would be refused. As to the award of exemplary damages in a case of trespass to and conversion of goods, see *Dymocks Book Arcade Ltd.* v. *McCarthy* (1966) 2 N.S.W.R. 411 (N.S.W. Supreme Court, C.A.). Cf. *Healing (Sales) Pty. Ltd.* v. *Inglis Electrix Pty. Ltd.* (1969) A.L.R. 533 (H.C.).

[110] 5 Rich. II, Stat. 1 c. 7. The provisions of the Statutes of Forcible Entry are at present in force in all the Australian jurisdictions in some form. See Vic. Crimes Act, 1958, s. 207; S.A., Criminal Law Consolidation Act, 1935, s. 243; Q'ld. Criminal Code, 1899, s. 70; W.A. Criminal Code, 1913, s. 69; Tas. Criminal Code, 1924, s. 79(1). As to what constitutes forcible entry, see Halsbury's *Laws of England*, 3 ed., vol. 10, at 590 *et seq.*

[111] (1935) 52 W.N. (N.S.W.) 20 (Crt. of Crim. App.). See also, *Waters Motors Pty. Ltd.* v. *Cratchley* (1964) 80 W.N. (N.S.W.) 1165 at 1176 *per* Else-Mitchell, J.

[112] (1898) 2 Can. Crim. Cas. 314. The point at issue before the Court in that case was the meaning of "forcible entry" in the Manitoba Criminal Code, 1892, s. 89. In view of the earlier authorities relating to the offence of forcible entry prior to the Code, and other provisions of the section itself, the Court held that the meaning of "entry" in s. 89 was an entry on land for the purpose of seizing possession of it, and not an entry made for the purpose of recovering goods which may be on the land.

[113] 5 Rich. II, Stat. 1. c. 7 has been repealed by the New South Wales Imperial Acts Application Act, 1969-1970 and s. 18 substituted in its place; the latter section provides: "No person shall make any entry into any land except where such entry is given by law and, in such case, with no more force than is reasonably necessary." Under s. 20 contravention of s. 18 renders the offender liable to imprisonment for up to one year or a fine not exceeding one thousand dollars or both. *Quaere* whether the New South Wales courts would still follow the Canadian decision in *R.* v. *Pike* (supra) and hold that s. 18 of the Imperial Acts Application Act, 1969-1970 applies only where the entry is made with the intention of seizing possession of the land itself and not in respect of an entry made to repossess chattels on the land. In any event, no offence is committed under s. 18 ". . . where such entry is given by law . . .", and as pointed out earlier, it is by no means certain whether there is a right at common law to enter land, forcibly if necessary, to recover goods at the expiration of a contract of bailment.

the intention of seizing possession of the land itself, and not in respect of an entry made to repossess chattels on the land even though the entry was made contrary to the will of the occupant and in such a manner as to be likely to cause a breach of the peace.[114]

A further possibility as to the existence of criminal sanctions against the forceful entry on premises for the repossession of goods in New South Wales is the Inclosed Lands Protection Act, 1901-1970. That Act provides, *inter alia*:

> Any person who, without lawful excuse, enters into the inclosed lands of any other person, without the consent of the owner or occupier thereof, or the person in charge of the same, shall be liable to a penalty not exceeding fifty dollars, and the proof of such lawful excuse shall be upon the defendant in any such case.[115]

The inherent limitations of the Act are evident from that provision, since the unlawful entry must be on "inclosed lands" as defined by the Act,[116] whilst in the *Appeal of Trevor Thompson*[117] it was held by the Chairman of Quarter Sessions[118] that the Act was not intended and does not in fact cover an unlawful entry into a dwelling-house or other structure on land which is otherwise inclosed.[119] Thus, in that case, the appellant Thompson, although apparently entitled to enter the rear of the plaintiff's premises to collect money from a gas-meter, on the occasion in question went to the front door; he was refused permission by the plaintiff to go through the front entrance, the plaintiff's wife being in a negligée in the lounge room. Consequently, on permission being refused and the front door being shut, the appellant thrust his shoulder to the door and entered through a broken panel.

The Chairman of Quarter Sessions however, although stating that the appellant's trespass was of a most reprehensible kind, and that the appellant "seemed very pleased with himself in doing it,"[120] held that no offence had been committed under the Act, the whole intention of which was to cover the case of unlawful entry on to land but not upon any structure on the land itself.[121] It will be apparent that the provisions of the Act could not accordingly be invoked against, for example, a flat-dweller or other person whose land does not constitute "inclosed lands" as defined by the Act.

Although the Act is primarily concerned with the entry on inclosed lands

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[114] Compare the contrary view expressed by R. M. Goode *Hire-Purchase Law and Practice*, 1962, at 151 and 399; A. G. Guest, *The Law of Hire-Purchase*, 1966 at 222.

[115] S. 4(1).

[116] S. 3 provides: "In this Act—'inclosed lands' means any lands, either public or private, inclosed or surrounded with any fence, wall or other erection, or partly by a fence, wall or other erection, and partly by a canal or by some natural feature such as a river or cliff by which the boundaries thereof may be known or recognised".

[117] (1948) 67 W.N. (N.S.W.) 183.

[118] Studdert, Ch. Q.S.

[119] The decision in that case was followed by Holden, Ch. Q.S. in the *Appeal of Alfred Burton* (24 July, 1950). See also, *Press* v. *Tuckwell* (1968) 69 S.R. (N.S.W.) 17 (C.A.).

[120] (1948) 67 W.N. (N.S.W.) at 183.

[121] Compare *Hart* v. *McMahon* (1920) Q.W.N. 31, where the Queensland Full Supreme Court held that the defendant, on entering a dance hall without a ticket and therefore "without lawful excuse", had committed an offence under s. 1 of the Inclosed Lands Act of 1854 (18 Vic. No. 27), the precursor of the N.S.W. Inclosed Lands Protection Act, 1901-1970, s. 4(1) *supra* n. 115. The defendant's solicitor had admitted that the land on which the alleged trespass occurred was the plaintiff's property and constituted "inclosed lands" as defined by that Act.

in rural areas,[122] there would seem little doubt that it also covers "inclosed lands" in urban areas.[123] However, as Lord Parker, C.J., sitting in the Divisional Court of Queen's Bench[124] has said in reference to the general public's right of entry on private property in the area between the gate and the front door: "there, as it seems to me, the occupier of any dwelling-house gives implied licence to any member of the public coming on his lawful business to come through the gate, up the steps, and knock on the door of the house."[125]

Accordingly, since a person on lawful business has an implied licence to enter land for the purpose of knocking on the front door, and presumably knocking on the front door to ask the occupier for the return of goods after the termination of a bailment could hardly be considered other than lawful business, a person asking for such return has up to that point a "lawful excuse" for having entered the plaintiff's inclosed land. The essential question, however, as regards the application of that Act to the forcible entry of premises to repossess goods, is whether on the lawful business of the repossession agent being completed, for example, by asking for the return of goods, his subsequent entry of the dwelling-house without the consent of the owner would constitute an unlawful entry to the inclosed land under the New South Wales Inclosed Lands Protection Act, 1901-1970.

Following the decision in the *Appeal of Thompson*,[126] the forcible entry into the dwelling-house for the purposes of repossession does not in itself constitute the offence under the Act and accordingly, the question to be determined is whether that trespass renders his initial entry on the land unlawful, apart from circumstances where the plaintiff can show that on his initial entry into the inclosed land, the defendant intended, if necessary, to forcibly enter the plaintiff's premises for the purpose of repossession, in which event his initial entry would be "without lawful excuse".[127] The same question arises where the occupier orders the defendant from his land and consequently revokes the latter's implied licence but the defendant refuses to leave. Although the defendant may be liable to a civil action in trespass for damages in such circumstances,[128] the Act would appear to be aimed only at the initial unlawful entry; it does not deal with the situation where the defendant's entry is

[122] Thus, s. 4 makes provision for a drover in charge of stock being driven upon a road lawfully inclosed in the lands of any person from which the stock has strayed, and under s. 5, a penalty is provided for those wilfully or negligently leaving open any gate or slip-panel on the inclosed lands of another, whilst s. 7 enables an owner or person in charge of "inclosed land" to destroy any goat trespassing on the land in certain circumstances.

[123] See the *Appeal of Trevor Thompson* (1948) 67 W.N. (N.S.W.) at 183 *per* Studdert, Ch. Q.S. See also, *Press v. Tuckwell* (1968) 69 S.R. (N.S.W.) 17 at 19 *per Walsh*, J.A.

[124] *Robson* v. *Hallet* (1967) 2 All E.R. 407 (Lord Parker, C.J., Diplock, L.J., and Ashworth, J.).

[125] *Id.* at 412; see also, at 414 *per* Diplock, L.J. Such is the position where the garden gate is not locked, *per* Diplock, L.J. at 414.

[126] (1948) 67 W.N. (N.S.W.) 183. See also, *Press* v. *Tuckwell* (1968) 69 S.R. (N.S.W.) 17 (C.A.).

[127] Assuming here, of course, that there is no right at common law to forcibly enter premises, if necessary, for the purpose of recovering goods at the expiration of a bailment, a point discussed earlier in this paper.

[128] See *supra*, n. 127.

with "lawful excuse" at its inception, but his presence on the land subsequently becomes unlawful.[129]

However, in *Ex parte Blick*,[130] the New South Wales Full Supreme Court[131] held that the Act did apply in such circumstances. In that case, the prosecutor, a wine-grower, was also a road trustee, and had advertised for tenders for the construction of a certain road. The tenders were to be sent to Wilkinson's cellars. The appellant sent in a tender and went to the cellars, where he was told that his tender had not been accepted. He refused to leave and in consequence of such refusal, Wilkinson instituted proceedings against him under the Inclosed Lands Protection Act. The Full Supreme Court dismissed the appellant's appeal against conviction by the magistrate for breach of that Act, since although his initial entry on to the prosecutor's land was lawful, on being told that his tender had not been accepted he had no right to stay: "Every moment he was there after being so told was equivalent to an entry without leave, otherwise by drunkenness and misconduct much annoyance might be caused."[132]

Accordingly, as a result of that decision, it would seem that in New South Wales at least, the provisions of that Act may be invoked in the limited class of cases to which it applies, on premises being entered without the owner's consent for the purpose of repossessing goods under a hire-purchase agreement,[133] provided that the courts take the view that there is no right at common law to forcibly enter premises, if necessary, to recover chattels at the expiration of a bailment, a proposition which is by no means certain.[134]

The importance of the New South Wales Inclosed Lands Act, 1901-1970 as providing criminal sanctions against unlawful entry has now probably been considerably lessened by the Summary Offences Act, 1970, s. 50(1) of which provides:

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[129] See, N.S.W. Inclosed Lands Protection Act, 1901-1970, s. 4(1); *supra* n. 115. On commenting upon the effect of the corresponding provision in s. 1 of the Inclosed Lands Act of 1854 (18 Vic. No. 27), Macnaughten, J. in *Cochrane* v. *Weller* (1926) Q.S.R. 263 (F.C.) at 265, said: "It will be observed that the offence is not trespassing upon, but *entering into* enclosed lands". Similarly, in *Feros* v. *Potiris* (1927) Q.S.R. 139 (F.C.) at 141, Macrossan, S. P. J. said: "The alleged offence of trespassing and continuing to trespass is not one known to The Enclosed Lands Act of 1854, which makes it an offence to enter upon enclosed lands without lawful excuse or prescribed consent."

[130] (1886) 7 N.S.W.L.R. 204 (F.C.).

[131] Sir J. Martin, C.J., Windeyer, and Sir G. Innes, JJ.

[132] (1886) 7 N.S.W.L.R. 204 (F.C.) at 205 *per* Sir J. Martin, C.J.

[133] The corresponding operative Act in Queensland is the Inclosed Lands Act of 1854. *Quaere* however, whether the Queensland courts would take the view that a person who initially entered land with "lawful excuse" but whose presence on that land subsequently constitutes a trespass would be guilty of an offence against the Act. See *Cochrane* v. *Weller* and *Feros* v. *Potiris*, *supra*, n. 129. The maximum penalty under that Act has remained at $10 (s. 1). The same doubt may also be expressed in relation to the corresponding provision in s. 2 of the Tasmanian Trespass to Lands Act, 1862, where again the penalty is $10. However, by s. 3 of the Trespass to Lands Act, 1916, a person convicted of that offence in respect of an entry to any dwelling is liable to a penalty of $200 or six months imprisonment. The question arises whether that provision is applicable to an unlawful entry to recover goods, since s. 4(1) provides that on conviction for such entry, the court: ". . . may issue a warrant addressed to all police officers commanding them to enter into the premises and give possession thereof to the complainant," and accordingly, the entry contemplated would appear to be an entry to take possession of the land itself. The South Australian Trespassing on Land Act, 1951, makes it clear that it applies only to a person unlawfully entering land used for agricultural purposes, since the Act applies only to the unlawful entering of an "enclosed field" as defined in s. 4(1) of the Act.

[134] See *supra* at 17-19.

> A person who enters or remains in or upon any part of a building or structure, or any land occupied or used in connection therewith, and has no reasonable cause for so doing is guilty of an offence
> Penalty: Two hundred dollars or imprisonment for three months.

Although knocking on a door and asking for the return of goods after the hirer's breach of a hire-purchase agreement would presumably be regarded as a "reasonable cause" for having entered the hirer's premises,[134a] should the hirer order the repossession agent from his premises a forcible entry then made for the purpose of effecting a recovery of the goods may well be regarded as not having been made with "reasonable cause" thereby rendering those concerned liable to the prescribed penalty.[134b]

A further criminal sanction against unlawful entry in New South Wales is where the damage resulting from that entry comes within the provisions relating to malicious injuries to property in the Crimes Act, 1900-1970.[135] However, even where, for example, repossession agents forcibly batter down a door in order to gain access to premises[136] they would probably be liable only to the cost of replacing the door and an additional fine of ten dollars.[137] In the event of the agents finding the key to the premises and entering in the absence of the owner,[138] or forcibly entering on the occupier opening the door,[139] they would not come within those provisions of the Act.[140] There could be some dispute as to whether such activities come within the Summary Offences Act, 1970, ss. 50(1) and (2) as constituting an entry or remaining on premises without "reasonable cause". A factor in such determination may well be the point referred to earlier, namely, whether there is a right at common law to forcibly enter premises if necessary for the purpose of recovering goods at the expiration of a bailment.

Prior to the passing of the Summary Offences Act, 1970, the precise scope of which has yet to be determined, the only criminal sanction against the unlawful entry on to premises in New South Wales, at least where malicious damage to property was not concerned, would seem to have been that provided under the Inclosed Lands Protection Act, 1901-1970, and only then when the land constitutes "inclosed lands" as defined by that Act. This would also appear to reflect the position in the other Australian States[141] with the exception of South Australia and Victoria.

[134a] See the discussion *supra* at 22.

[134b] Such action may also fall within the ambit of s. 50(2) of the Summary Offences Act, 1970 (N.S.W.), whereby: "A person who remains in or upon any part of a building or structure or any land occupied or used in connection therewith, which part or land is not a public place, and has no reasonable cause for so doing shall, if he there— (a) does any act; or (b) uses any language, which, if done or used by him in a public place, would be an offence under this or any other Act or any regulation, rule, ordinance or by-law made under any other Act, be deemed to have committed that offence and may be convicted and punished accordingly."

[135] Ss. 530-543.

[136] For an example of such an entry see *C'wlth Parl. Debs*, 1965 (Representatives) at 2666 (Mr. Daly).

[137] S. 541. On a repeated conviction the offender is liable to pay the cost of the damage caused and in addition a fine of forty dollars (s. 542).

[138] See *C'wlth Parl. Debs*, 1965 (Representatives) at 2664 (Dr. Mackay).

[139] See *Sunday Telegraph* Nov. 21, 1965.

[140] The sanctions against malicious damage to property vary considerably from State to State. Compare, Vic. Summary Offences Act, 1966-1970, s. 9(1) and the Crimes Act, 1958, s. 248; Q'ld. Criminal Code, 1899, s. 469, 480; S.A. Police Offences Act, 1953-1967, s. 43 and the Criminal Law Consolidation Act, 1935-1969, s. 126, 127; W.A. Police Act, 1892-1970, s. 80 and the Criminal Code, 1913, s. 453, 465; Tas. Police Offences Act, 1935-1971, s. 37 and the Criminal Code, 1924, s. 273.

[141] But as to the difficulties of interpretation of those Acts in relation to the unlawful entry of repossession agents, see *supra* n. 133.

In South Australia, "any person who is in or on any premises or part of any premises for an unlawful purpose or without lawful excuse", is guilty of an offence and is liable on conviction to a penalty of one hundred dollars or six months imprisonment.[142]

Stringent penalties are provided in Victoria for wilfully trespassing on property after the trespasser has been warned to leave by the owner or person on behalf of the owner, and also for wilful damage to property.[143] However, repossession agents managing to enter premises in the absence of the owner and without causing wilful damage would not come within the ambit of that section, since "The Legislature has provided that trespass *per se* shall not be a punishable offence, unless and until the trespasser has been ordered to leave and has refused to do so".[144]

Probably the most effective sanction in Victoria against unlawful entry on premises by repossession agents is that provided by the Private Agents Act, 1966. The term "private agent" in that Act includes a "commercial agent",[145] defined by the Act as meaning, *inter alia*:

> . . . any person (whether or not he carries on any other business) who, whether as principal or agent exercises or carries on or advertises or notifies or states that he exercises or carries on or that he is willing to exercise or carry on or in any way holds himself out to the public as ready to undertake any of the functions of—
>
> (a) ascertaining the whereabouts of or repossessing any goods or chattels which are the subject of a hire purchase agreement or bill of sale;[146]

The Act provides for the licensing of such agents,[147] and further provides that where a "private agent" carrying out his functions as such enters any premises without lawful authority, he commits an offence against the Act;[148] a conviction for such offence constitutes a cause for not granting or revoking a licence.[149] The effectiveness of those provisions would, however, seem dependent on the Victorian courts holding that there is no right at common law to forcibly enter premises, if necessary, for the purpose of recovering goods at the expiry of a bailment, a point considered earlier in this paper.[150]

The New South Wales Commercial Agents and Private Inquiry Agents Act, 1963 also makes provision for the licensing of such agents, including

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[142] Police Offences Act, 1953-1967, s. 17(1).

[143] Thus, s. 9(1) Summary Offences Act, 1966 (Vic.) provides that any person who: "(c) wilfully injures or damages any property (whether private or public) the injury being done under the value of $500: or (d) wilfully trespasses in any place and neglects or refuses to leave that place after being warned to do so by the owner—shall be guilty of an offence. Penalty: $500 or imprisonment for six months." The provisions do not apply to any case where the person offending acted under a fair and reasonable supposition that he had a right to do the act complained of (s. 9(4)). By the Summary Offences (Trespassers) Act, 1970, s. 9(1)(d) of the 1966 Act was amended to include occupier as a person entitled to warn trespassers to leave.

[144] *Marsden* v. *O'Callaghan* (1938) V.L.R. 87 at 88 *per* Mann, C.J.

[145] S. 5.

[146] S. 3.

[147] S. 6. That section also stipulates that a person who exercises the functions of or holds himself out to be a "private agent" when not holding a licence is liable to a penalty of $500 or six months imprisonment or both, and in addition, is liable to a further penalty of $10 a day where he is guilty of such offence after previous conviction.

[148] S. 27. Under s. 46 the penalty for such offence is a fine of $250 or imprisonment for three months or both.

[149] S. 12(2)(g) and s. 13(1)(vi).

[150] *Supra* at 17-19.

repossession agents recovering possession of goods under a hire-purchase agreement or bill of sale,[151] but makes no express provision governing the unlawful entry on to premises by such agents.[152]

Accordingly, with the probable exception of Victoria and South Australia, and possibly New South Wales, it is submitted that the protection afforded against the more unscrupulous repossession agent in Australia would appear both uncertain, and in most States inadequate, whilst the possibility of a civil action in trespass being brought against him for the unlawful entry is apparently an insufficient deterrent in such cases.

It seems a little surprising, however, that there is no reported case of an action being brought by a hirer for exemplary damages against a repossession agent trespassing[153] on premises for the purpose of seizing goods on hire-purchase, since the tactics employed in some instances would appear to leave little room to doubt that they amount to a "contumelious disregard of the plaintiff's rights".[154]

Perhaps, as pointed out earlier, one of the main factors vitiating against the institution of such proceedings is the type of hirer likely to be involved in such a case. Again, evidence that the formalities under the Hire-Purchase Acts had been followed as regards the service of intention to repossess the goods, and possibly that a court order had been obtained for their return by the hirer, who accordingly would have had ample time in which to come to some arrangement with the company, or at least to allow them to peaceably repossess the goods, would be factors militating against such an award and accordingly, render the chance of success not worth the possible cost of initiating such proceedings.

(d) *Formalities after Repossession by the Owner*

On repossessing goods,[155] the owner must within twenty-one days[156] serve on the hirer and every guarantor a notice in writing setting out the amount necessary to reinstate or finalise the hire-purchase agreement in the form laid down in the Fourth Schedule to each of the Australian Hire-Purchase Acts.[157] The notice must also include, *inter alia*, the owner's estimate of the value of

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[151] S. 4(6).

[152] However, such tactics may well result in an agent being considered by the court as not a fit and proper person to hold a licence under s. 10(10).

[153] Assuming that the Australian courts would take the view that there is no right at common law to forcibly enter premises, if necessary, to recover chattels at the expiration of a bailment as to which see *supra* at 17-19.

[154] Mayne and McGregor *On Damages*, 12 ed. (1961) at 196. Allegations of such conduct in Australia appear from time to time in the Australian press; see, e.g. *Sunday Telegraph*, Nov. 21, 1965. See also, *C'wlth Parl. Debs.*, 1965 (Representatives) at 2664 and 2666.

[155] Under the N.S.W. Hire-Purchase Act, 1960-1970 s. 13(4), the hirer must be given a document acknowledging receipt of the repossessed goods, or in the event of the hirer not being present at the time of such repossession, must immediately be sent such a document. The other State Acts do not have a corresponding provision.

[156] The statutory period under the Q'ld. Hire-purchase Act, 1959, s. 13(3) is thirty days. See to similar effect, Territ. Papua-N.G., s. 21(3).

[157] N.S.W., s. 13(3); Vic., s. 13(3); S.A., s. 13(3); W.A., s. 13(3); Tas., s. 17(3); A.C.T., s. 18(3); N.T., s. 17(3); Territ. Papua-N.G., s. 21(3). In *Burke* v. *Custom Credit Corporation Ltd.* (1970) 65 Q.J.P.R. 5, Nicholson, D.C.J. held that where a Fourth Schedule notice had been posted by certified mail addressed to the hirer's last known place of abode but was returned to the sender as unclaimed by the postal department, evidence of the posting did not establish due service of the notice on the hirer under the Hire-purchase Act of 1959 (Q'ld.).

the goods repossessed.[158] The consequence for failure to serve such notice is that the rights of the owner under the agreement "cease and determine" unless the hirer exercises his statutory rights to recover possession of the goods, in which event, the rights and liabilities of the parties under the agreement remain the same as they would have been had the notice been duly served.[159]

The hirer has twenty-one days from the service of the Fourth Schedule notice in which to finalise the agreement by payment of the balance due under the agreement and the owner's incidental costs of repossession less, in accordance with the statutory provisions for the early completion of the agreement, the statutory rebates for terms and insurance charges and, with the exception of New South Wales, the statutory rebates for maintenance charges.[160] Further, the hirer has twenty-one days from the service of such notice in which to give the owner written notice requiring him to either (a) re-deliver the goods to the hirer or to his order, or (b) to sell the goods to any person introduced by the hirer who is prepared to buy the goods for cash at a price not less than the estimated value of the goods set out in the Fourth Schedule notice.[161]

However, the owner need not re-deliver the goods to the hirer unless the latter, within fourteen days of giving such notice, pays the arrears owing under the hire-purchase agreement up to the date of tender, pays the owner's incidental costs of repossession and re-delivery, and remedies any breach of the agreement or tenders the amount necessary to remedy such breach to the owner.[162] Where the owner re-delivers the goods to the hirer without the latter having rectified a breach or breaches, the owner cannot repossess because of such failure without first having given written notice to the hirer at the time of re-delivery specifying and requiring the breach to be remedied, and the hirer has failed to comply with such notice within fourteen days, or after the expiry of any later period stipulated in the notice.[163]

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[158] In *Equipment Investments Pty. Ltd.* v. *M. J. Dowthaite & Co. Pty. Ltd.* (1969) 16 F.L.R. 23, Gibbs, J. held that the inclusion of an amount for interest on arrears and an amount for insurance in the part of the Fourth Schedule notice relating to the owner's estimate of the amount required to finalise the agreement resulted in the notice not being in the form required by the Hire-Purchase Act, 1960, s. 13(3) (N.S.W.). Further, the owner's estimate of the hirer's liability to the owner given in the notice served in that case was stipulated to be "inclusive selling expenses": the question whether this resulted in the Fourth Schedule notice not being in the form required by s. 13(3) was left undecided, although Gibbs, J. inclined to the view that such inclusion did not affect the validity of the notice.

[159] N.S.W., s. 13(5); Vic., s. 13(4); Q'ld., s. 13(4); S.A., s. 13(4); W.A., s. 13(4); Tas., s. 17(4); A.C.T., s. 18(4); N.T., s. 17(4); Territ. Papua-N.G., s. 21(4). The failure to serve such notice would nonetheless constitute an offence under the Acts and thereby render the owner liable to a penalty not exceeding four hundred dollars.

[160] N.S.W., s. 11; Vic., s. 11; Q'ld., s. 11; S.A., s. 11; W.A., s. 11; Tas., s. 15; A.C.T., s. 16; N.T., s. 15; Territ. Papua-N.G., s. 19.

[161] N.S.W., s. 15(1)(a); Vic., s. 15(1)(a); Q'ld., s. 15(1)(a); S.A., s. 15(1)(a); W.A., s. 15(1)(a); Tas., s. 19(1)(a); A.C.T., s. 20(1)(a); N.T., s. 19(1)(a); Territ. Papua-N.G., s. 23(1)(a).

[162] In *Kemp* v. *United Dominions Corporation (Australia) Ltd.* (1970) Qd. R. 323, Wanstall, J. construed the Hire-purchase Act of 1959 (Q'ld.) as imposing on the owner an obligation to specify remediable breaches of a hire-purchase agreement by the hirer in the Fourth Schedule notice. He held that failure to specify any remediable breach in such notice does not invalidate the notice, but merely prevents the owner from relying on failure to remedy that breach as justifying his withholding the goods after arrears of instalments have been tendered. Further, the owner need not specify irremediable breaches (for example, false statements regarding ownership of a trade-in vehicle) in a Fourth Schedule notice and in such case the hirer has no right under the Act to redeem the goods upon mere payment of the arrears of hire.

[163] N.S.W., s. 16; Vic., s. 16; Q'ld., s. 16; S.A., s. 16; W.A., s. 16; Tas., s. 20; A.C.T., s. 21; N.T., s. 20; Territ. Papua-N.G., s. 24. For the wider rights these provisions confer on the owner as regards waiver of breach than existed under the earlier law, see R. Else-Mitchell and R. W. Parsons *op. cit.* at 127.

The owner must not sell or otherwise part with possession of the goods without the hirer's consent in writing[164] before the expiry of twenty-one days from his service of the Fourth Schedule notice or, where such is the later period, before the expiry of fourteen days from the hirer requiring the owner to re-deliver the goods to him or to his order but fails to comply with the provisions for re-instating the agreement.[165] Non-compliance would constitute an offence against the Act and render the owner liable to a penalty not exceeding four hundred dollars.[166]

Since the hirer has a statutory right to finalise or re-instate the agreement, should the owner sell the goods to a third party before the expiration of the statutory period during which he is required to retain possession of the repossesed goods, he will be in breach of the statutory implied condition as to title since he will not have "a right to sell the goods at the time when the property is to pass".[167] Further, since the Acts provide that where the hirer tenders the amount necessary to re-instate the agreement within fourteen days of giving notice of such intention to the owner, the owner "shall forthwith return the goods to the hirer",[168] it is submitted that such tender would entitle the hirer to immediate possession of the goods and thus enable him to found an action in conversion against the owner where the latter had already sold the goods to a third party before the expiry of the statutory period during which he is required to retain possession of the goods.[169] These provisions prevent the kind of "snatch-back" apparent in *Cramer* v. *Giles*,[170] where on the hirer defaulting in the last two payments under a hire-purchase agreement for a piano, the company repossessed the piano and refused to return it on the hirer's subsequent tender of arrears.

(e) *The Measure of Damages on Repossession*

However, assuming that the hirer exercises none of those statutory rights where the goods have been repossessed, the measure of damages for breach of the hire-purchase agreement is, under the Australian Hire-Purchase Acts, based on a "true measure of damages" principle. That is to say, on repossession, the owner is not entitled to recover more[171] than the total amount

[164] Under the N.S.W. Hire-Purchase Act, 1960-1970, s. 14, such consent must be witnessed by some person other than the owner, or the solicitor for, or agent, or employee of the owner. The corresponding provisions of the other State Acts do not demand such a pre-requisite.

[165] N.S.W., s. 14; Vic., s. 14; Q'ld., s. 14; S.A., s. 14; W.A., s. 14; Tas., s. 18; A.C.T., s. 19; N.T., s. 18; Territ. Papua-N.G., s. 22.

[166] N.S.W., s. 50; Vic., s. 39; Q'ld., s. 46(1); W.A., s. 39; Tas., s. 49; A.C.T., s. 44; N.T., s. 51; Territ. Papua-N.G., s. 55. The corresponding provision in the South Australian Act, s. 39, provides an alternative sanction of up to three months imprisonment.

[167] N.S.W., s. 5 (1)(b); Vic., s. 5 (1)(b); Qld., s. 5 (1)(b); S.A., s. 5 (1)(b); W.A., s. 5 (1)(b); Tas., s. 9(1)(b); A.C.T., s. 10 (1)(b); N.T., s. 9 (1)(b); Territ. Papua-N.G., s. 13 (1)(b).

[168] N.S.W., s. 16; Vic., s. 16; Q'ld., s. 16; S.A., s. 16; W.A., s. 16; Tas., s. 20; A.C.T., s. 21; N.T., s. 20; Territ. Papua-N.G., s. 24.

[169] *Cf.* R. Else-Mitchell and R. W. Parsons, *op. cit. supra* n. 35, at 115-116.

[170] (1883) Cab. & El. 151. For an account of earlier malpractices in this respect, see A. Vallance, *Hire-Purchase*, 1939, at 60 *et seq.*

[171] Although the Australian Hire-Purchase Acts determine the maximum amount recoverable in the event of the hirer's default, with the exception of South Australia, they do not confer a statutory right on the owner to recover that sum, which right should accordingly be provided for in the hire-purchase agreement—see R. Else-Mitchell and R. W. Parsons, *op. cit. supra* n. 35, at 122-123.

payable under the hire-purchase agreement less the value of the goods,[172] the amount already paid by way of initial deposit, trade-in and instalments, statutory rebates for terms charges and insurance, and, with the exception of New South Wales, maintenance charges.[173]

Where the hirer believes himself entitled to an amount payable to him on the owner repossessing the goods, he must within twenty-one days of the owner serving a Fourth Schedule notice give the owner notice in writing of his claim including his assessment of the value of the goods at the time of the owner's repossession. Such notice must be signed by the hirer, or his solicitor or agent, and proceedings commenced for the recovery of such amount not earlier than seven days and, except where the goods have been sold to a person introduced by the hirer, not later than three months after the hirer has given the owner notice of his claim.[174]

The effect of these provisions is to prevent companies, at least directly, from recovering a possible "windfall" from repossessing goods, that is, recovering goods as a result of default in payment and then instituting proceedings against the hirer under a minimum payment clause in the agreement, despite the fact that the value of the goods repossessed is sufficient, or at least partially sufficient, to compensate the owner for the hirer's breach of contract.[175] Fortunately, as a result of these and earlier provisions in the hire-purchase legislation, the Australian courts have been able to avoid in the main[176] the vagaries of their English counterparts in determining whether a minimum payment clause in a particular hire-purchase agreement constitutes a penalty, and is therefore unenforceable at law, or a genuine pre-estimate of the loss likely to be caused on the hirer's breach of contract and consequently, recoverable as liquidated damages.[177]

The outcome of the English decisions on minimum payment clauses is

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[172] The value of any goods at the time of repossession is: "(i) the best price that could reasonably be obtained by the owner at that time; or (ii) if the hirer has introduced a person who has purchased the goods for cash, the amount paid by that person," less the owner's incidental costs of repossession, storage and sale. On the sale of repossessed goods, the onus lies on the owner of proving that the price obtained was the best price reasonably obtainable at the time of repossession. See, N.S.W., s. 15; Vic., s. 15; Q'ld., s. 15; S.A., s. 15; W.A., s. 15; Tas., s. 19; A.C.T., s. 20; N.T., s. 19; Territ. Papua-N.G., s. 23.

[173] *Ibid.*

[174] *Ibid.*

[175] See e.g. *Lamdon Trust Ltd.* v. *Hurrell* (1955) 1 W.L.R. 391; *Lombank, Ltd.* v. *Excell* (1963) 3 All E.R. 486 (C.A.).

[176] But see *Universal Guarantee Pty. Ltd.* v. *Carlile* (1957) V.R. 68 and *G. & B. Transport Pty. Ltd. (In Liq.)* v. *Commercial & General Acceptance Ltd.* (1969) 15 F.L.R. 10. See also *Universal Guarantee Ltd.* v. *Jarvis* (1937) (unreported except in Dean, *Hire-Purchase Law in Australia*, 2 ed., 1938, at 310), and the unreported decisions discussed by G. Sawer, "The Minimum Hiring Clause in Hire Purchase Agreements", (1936) 10 *A.L.J.* 167; R. L. Gilbert, "The Minimum Hire Provision in Hire-Purchase Agreements", (1938) 12 *A.L.J.* 139, 198.

[177] Compare, *Elsey & Co. Ltd.* v. *Hyde* (1926) D.C. unrep., Jones & Proudfoot, *Notes on Hire-Purchase Law*, 2 ed., 1937, 107; *Chester and Cole* v. *Wright* (1930) D.C. unrep. Jones & Proudfoot *op. cit.* 124; *Re Apex Supply Co. Ltd.* (1942) Ch. 108; *Cooden Engineering Co. Ltd.* v. *Stanford* (1953) 1 Q.B. 86 (C.A.); *Landom Trust, Ltd.* v. *Hurrell* (1955) 1 All E.R. 839; *Yeoman Credit Ltd.* v. *Waragowski* (1961) 3 All E.R. 145 (C.A.); *Bridge* v. *Campbell Discount Co. Ltd.* (1962) A.C. 600; *Financings Ltd.* v. *Baldock* (1963) 2 Q.B. 104 (C.A.); *Phonographic Equipment (1958) Ltd.* v. *Muslu* (1961) 3 All E.R. 626 (C.A.); *Lombank Ltd.* v. *Archbold* (1962) C.L.Y. 1409; *Lombank, Ltd.* v. *Cook* (1962) 3 All E.R. 491; *Lombank Ltd.* v. *Kennedy and Whitelaw* (1961) N.I. 192 (C.A.); *Lombank Ltd.* v. *Excell* (1963) 3 All E.R. 486 (C.A.); *Anglo-Auto Finance Co. Ltd.* v. *James* (1963) 3 All E.R. 566 (C.A.); *United Dominions Trust (Commercial) Ltd.* v. *Ennis* (1967) 2 All E.R. 345 (C.A.). See J. S. Ziegel, "The Minimum Payment Clause Muddle," (1964) *C.L.J.* 108.

that although a hirer sometimes "escapes an onerous liability because the Court holds it to be penal",[178] in at least one case, such a clause was held to be penal although based on a "true measure of damages" principle.[179] Furthermore, it might be of considerably greater economic advantage to the hirer to wait for the owner to repossess the goods, rather than admit his inability to pay and voluntarily terminate the agreement at an earlier stage.[180]

The latter proposition it would seem also reflects the present position under the Australian "uniform" hire-purchase legislation where the hirer exercises his statutory right to determine the hire-purchase agreement by voluntarily returning the goods to the owner.[181] In such circumstances the Acts provide that the owner is entitled to recover from the hirer:

(a) the amount (if any) required to be paid in those circumstances under the agreement; or

(b) the amount (if any) that the owner would have been entitled to recover if he had taken possession of the goods at the date of termination of the hiring,

whichever is the less.[182]

However, in contrast to the situation where the owner has repossessed the goods, the Acts do not confer any statutory right on the hirer to recover the value of any "equity" he might have in the goods voluntarily returned to the owner and accordingly, in *G. & B. Transport Pty. Ltd. (In Liq.)* v. *Commercial & General Acceptance Ltd.*[183] Sweeney, J. held that even where the amount already paid by the hirer under the hire-purchase agreement and the value of the goods voluntarily returned by the hirer exceeded the balance originally payable under the hire-purchase agreement, the owner is not obliged to sell the goods and account to the hirer for any sum exceeding the balance payable under the agreement. The result, of course, is that in such circumstances the hirer who waits for the owner to repossess the goods for breach of the hire-purchase agreement is in a much better position than the hirer who, finding himself in financial difficulty, communicates this fact to the hire-purchase company and voluntarily returns the goods to the company.

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[178] *Final Report of the Committee on Consumer Protection*, July, 1962, Cmnd. 1781, 181 para. 548.

[179] *Anglo-Auto Finance Co. Ltd.* v. *James* (1963) 3 All E.R. 566 (C.A.). Compare *Universal Guarantee Pty. Ltd.* v. *Carlile* (1957) V.R. 68.

[180] See *Associated Distributors Ltd.* v. *Hall* (1938) 2 K.B. 83 (C.A.); *Campbell Discount Co. Ltd.* v. *Bridge* (1961) 1 Q.B. 445 (C.A.); *Goulston Discount Co. Ltd.* v. *Harman* (1962) 106 S.J. 369 (C.A.); *United Dominions Trust (Commercial) Ltd.* v. *Ennis* (1967) 2 All E.R. 345 (C.A.); see also *Lombank Ltd.* v. *Kennedy* and *Whitelaw* (1961) N.I. 192 (C.A.). Compare the divergent views expressed in *Bridge* v. *Campbell Discount Co. Ltd.* (1962) A.C. 600 by Lord Denning and Lord Devlin on the one hand, and Viscount Simonds and Lord Morton of Henryton on the other, as to the effectiveness or otherwise of a minimum payment clause where the hirer exercises his option to return the goods under the agreement; Lord Radcliffe left the question open. See also *Financings Ltd.* v. *Baldock* (1963) 2 Q.B. 104 (C.A.).

[181] N.S.W., s. 12; Vic., s. 12; Q'ld., s. 12; S.A., s. 12; W.A., s. 12; Tas., s. 16; A.C.T., s. 17; N.T., s. 16; Territ. Papua-N.G., s. 20. Under s. 16(7) of the Tasmanian Act where the owner seeks the recovery of the balance owing to him because of the insufficient value of the goods, he must within fourteen days of the termination of the agreement give notice in writing to the hirer of the amount of his claim including, *inter alia*, his estimated value of the goods at the time of their return. As to what constitutes a voluntary return under the New South Wales provision, see *Esanda Ltd.* v. *R. J. Wimborne Pty. Ltd.* (1967) 1 N.S.W.R. 659. See also, *United Dominions Trust (Commercial) Ltd.* v. *Ennis* (1967) 2 All E.R. 345 (C.A.).

[182] N.S.W., s. 12(6); Vic., s. 12(6); Q'ld., s. 12(6); S.A., s. 12(6); W.A., s. 12(6); Tas., s. 16(6); A.C.T., s. 17(6); N.T., s. 16(6); Territ. Papua-N.G., s. 20(6).

[183] (1969) 16 F.L.R. 10.

Such position, it is submitted, requires immediate legislative intervention so as to provide that the hirer's rights on voluntarily returning goods in exercise of his statutory rights under the Hire-Purchase Acts are at least no less than his rights where the owner has repossessed the goods for the hirer's breach of the hire-purchase agreement.

As earlier pointed out, where the goods have been repossessed by the owner, the measure of damages for breach of the hire-purchase agreement is, under the Australian Hire-Purchase Acts, based on a "true measure of damages" principle. The effectiveness of a "true measure of damages" principle in achieving substantial justice as between the interests of an owner and hirer in the goods repossessed, must be dependent ultimately on the determination of the value of the goods at the time of repossession, since whilst the owner must be compensated for the loss arising out of the hirer's breach of contract, the true value of the hirer's "equity" in the goods must also be recognised. The Molony Committee on Consumer Protection, although conceding that in theory, at least, a more equitable result would be achieved by the adoption of such principle, nevertheless cursorily dismissed it on the grounds that:

> Such a provision would inevitably lead to disputes as to whether the true value had been obtained on realisation with subsidiary issues as to the necessity to spend money on repairs, etc.[184]

The Committee preferred the "simpler" formula under the earlier United Kingdom legislation[185] limiting the maximum amount recoverable by the owner to the instalments due up to the date of termination, or, the amount necessary to bring the total of the sums already paid or payable immediately before termination of the agreement to fifty per cent of the hire-purchase price.

The Committee's scant regard for the "true measure of damages" principle was hardly justified, whilst, if the reported case-law on the Australian provisions is any indication, the reason given for its rejection is inaccurate. Thus, although the Australian provisions have now been in operation for over ten years, there are only two reported cases dealing with the question as to whether the assessed value of the goods at the time of the owner taking possession was, "the best price that could be reasonably obtained by the owner at that time".[186] The essence of one of those decisions[187] was not, as one might have expected, a claim by a hirer that the goods had been undervalued, but whether an owner was estopped from subsequently proving a lesser value than that originally estimated.

Before embarking on a discussion of the decisions in those cases, however, it is necessary to consider the apparent safeguards provided by the Australian hire-purchase legislation to minimise the undervaluation of goods by an owner on repossession. As pointed out earlier, a hirer, on receiving a Fourth Schedule

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[184] Report, *supra* n. 178 at 181, para. 548.

[185] U.K. Hire-Purchase Act, 1938, ss. 4, 5(c); see now, U.K. Hire-Purchase Act, 1965, ss. 28, 29(c). However, whilst those provisions enable an owner to recover up to fifty per cent of the purchase price on repossession, or, where such is the lesser amount, the actual loss sustained by the owner in consequence of the termination of the agreement, there is no provision enabling the owner to recover a larger sum where greater loss has in fact been suffered.

[186] *Custom Credit Corporation Ltd.* v. *Van Delft* (1965) W.A.R. 237 (F.C.); *Motor Credits Limited* v. *Trew* (1964) 1 D.C.R. (N.S.W.) 258; see also, *McIntosh* v. *Australian Guarantee Corporation Ltd.* (1969) 1 N.S.W.R. 73 (C.A.).

[187] *Custom Credit Corporation Ltd.* v. *Van Delft* (1965) W.A.R. 237; see also, *McIntosh* v. *Australian Guarantee Corporation Ltd.* (1969) 1 N.S.W.R. 73.

notice from the owner, may within twenty-one days give notice to the owner of the amount he considers himself entitled to recover and in particular, give his own assessment of the value of the goods repossessed. However, the extent to which that provision is availed of in practice may be doubted, since the Fourth Schedule notice need not inform the hirer directly of that right,[188] whilst such claim by the hirer will generally be related to the owner's estimate of the value of the goods, and the hirer will generally find it difficult to prove that the goods, now in the owner's possession, are of greater value[189] than the estimate given.

A further apparent safeguard is that where the owner has sold repossessed goods, the onus of proving that the price obtained for the goods was the best price that could reasonably be obtained at the time of repossession lies on the owner.[190] The most important measure in this context, however, is that by written notice, the hirer may require the owner to sell the goods to a person introduced by the hirer who is willing to pay the owner's estimate of their value stipulated in the Fourth Schedule notice.[191] Where the hirer does introduce such person, the value of the goods is the price paid for them by that person.[192]

The effect of these provisions according to R. Else-Mitchell and R. W. Parsons[193] is that:

> If the owner undervalues he runs the risk that the hirer will introduce a purchaser and the owner will thus lose some of the value of his security. In truth the owner is posed with a dilemma. If he puts a substantial value on the goods in order to discourage an introduction he will find it difficult to prove some less value when he seeks later to recover from the

[188] After setting out an account of the owner's estimate of the amounts necessary to reinstate or finalise the agreement, the Fourth Schedule notice must state: "*If you don't reinstate or finalise the agreement* you will be liable for the owner's loss unless the value of the goods repossessed is sufficient to cover your liability. If the value of the goods is more than sufficient to cover your liability you will be entitled to a refund." The notice must then give the owner's estimate of the value of the goods and stipulate that on the basis of such estimate, the hirer is entitled to a refund or liable to pay the owner the balance resulting. However, although the notice must warn the hirer that he will lose his rights if he does not act within twenty-one days, it does not directly inform the hirer that where he is entitled to the recovery of an amount on the repossession of goods, or where he disputes the owner's estimate of the value of the goods, he must within twenty-one days inform the owner in writing of such claim.

[189] The divergent nature of the owner's and hirer's concept of "value" of repossessed goods is discussed *post*.

[190] N.S.W., s. 15(3); Vic., s. 15(3); Q'ld., s. 15(3); S.A., s. 15(3); W.A., s. 15(3); Tas., s. 19(3); A.C.T., s. 20(2); N.T., s. 19(3); Territ. Papua-N.G., s. 23(2).

[191] *Supra* n. 161.

[192] *Ibid.* R. Else-Mitchell and R. W. Parsons have commented that: ". . . there would appear to be some risk for the hirer that the person introduced will buy for less than the value which the owner has put on the goods: it is the actual price paid by the person introduced which is taken as the value of the goods under s. 15(2)(b). The hirer may not in such circumstances require the owner to establish that the price obtained was the best price that could be reasonably obtained." *op. cit.* at 119. However, the section earlier provides that the hirer may require the owner to sell the goods to any person introduced by the hirer ". . . who is prepared to buy the goods for cash at a price not less than the estimated value of the goods set out in the first-mentioned [Fourth Schedule] notice." Where the hirer does introduce such third party, then if the latter and the owner subsequently agree on a lesser price, query whether the courts would take the view that it is implicit in the earlier provision, if the hirer's rights are not to be prejudiced, that the owner will not sell at a lower price than the value estimated in the Fourth Schedule notice and which the person introduced by the hirer must be prepared to pay, without the previous consent of the hirer.

[193] *Op. cit.* at 114.

hirer or if the hirer asserts his statutory right to recover the value of his equity. . . .

However, in practice, the repossession provisions in the Australian hire-purchase legislation would clearly seem to favour an undervaluation rather than an overvaluation by the owner of repossessed goods. This is particularly so since apparently it is only in a small minority of cases that a hirer is able to find a person willing to pay the owner's estimated value of the goods in cash.[194] Accordingly, the latter's risk of losing some of the value of his security by undervaluation is, in most cases, correspondingly only slight.[195]

Assuming that the hirer has not within twenty-one days of the owner serving a Fourth Schedule notice claimed that the goods are of a greater value than that assessed by the owner, should the goods after the expiry of that period realise a higher price than that initially assessed by the owner, the latter would stand to gain as further profit the difference between the assessed and realised values. Although the retention of such profit would constitute an offence against the Acts thereby rendering the owner liable to a penalty not exceeding four hundred dollars,[196] it would seem very unlikely, in most circumstances, that a hirer who had not made a claim within twenty-one days of the service of the Fourth Schedule notice or disputed the owner's estimate of the value of the goods within that period, would become aware of the price subsequently realised by the owner on sale of the goods.

With reference to the opinion expressed by R. Else-Mitchell and R. W. Parsons cited earlier,[197] it is difficult to appreciate why the owner should put a substantial value on the goods merely in order to discourage the introduction by the hirer of a person willing to pay the owner's estimated value of the goods. Thus, there would seem little reason why the owner of a repossessed motor-vehicle, believing that the vehicle will realise $800, should estimate its value at $1,000 merely to discourage the introduction by the hirer of a person willing to pay $800 cash. The primary reason why he should deliberately stipulate a higher assessment in the Fourth Schedule notice would, it is respectfully submitted, be not to discourage its sale but rather the reverse in the hope that the hirer would be able to introduce a third party to purchase at the higher figure and so perhaps save the owner the trouble of subsequently having to institute proceedings against the hirer to recover the statutory balance of the hire-purchase price. The only other apparent reason for such higher assessment would be to leave room for bargaining between the parties so that in the event of the owner dropping his estimated value, he might nevertheless recover the full value of his security in the vehicle.

To initially overvalue the goods, however, could result, as R. Else-Mitchell

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[194] In the event of the hirer introducing a person to buy at the undervaluation, he would, unless he had made some previous bargain: ". . . simply be making a gift to that person of the difference between the owner's valuation and the true value". R. Else-Mitchell and R. W. Parsons, *op. cit.* at 119.

[195] The balance payable to the owner on repossession of goods where the latter are estimated to be insufficient to cover the owner's loss arising from the hirer's breach of contract is recoverable as liquidated damages by a default summons: *Lombard Australia Ltd.* v. *Atkins* (1963) 80 W.N. (N.S.W.) 1337 (D.C.); *Latec Finance Pty. Ltd.* v. *Wilkins* (1963) 80 W.N. (N.S.W.) 1333 (D.C.); *Lombard Australia Ltd.* v. *Smeaton* (1966) V.R. 272.

[196] N.S.W., ss. 15(1)(c), 50; Vic., ss. 15(1)(c), 39; Q'ld., ss. 15(1)(c), 46(1); S.A., ss. 15(1)(c), 39; W.A., ss. 15(1)(c), 39; Tas., ss. 19(1)(c), 49; A.C.T., ss. 20(1)(b), 44; N.T., ss. 19(1)(c), 51; Territ. Papua-N.G., ss. 23(1)(b), 55.

[197] *Supra* n. 192.

and R. W. Parsons have pointed out, in the owner finding it difficult to prove a lesser value on the hirer claiming his statutory "equity" in the repossessed goods. In this respect, it would seem more likely that on a hirer suddenly being informed that he was indebted to the owner for a further $200 in addition to his initial estimated liability, he would more readily resort to the services of a solicitor to ascertain his rights than would have been the case had the owner's original assessment placed a lower value on the goods than might in fact be realised on their eventual sale.

However, in *Custom Credit Corporation Ltd.* v. *Van Delft*,[198] the Western Australia Full Supreme Court held that the over-valuation of a repossessed vehicle by an owner's agent in a Fourth Schedule notice did not preclude the owner from subsequently establishing what the true value of the vehicle was on the date of repossession. In that case, the defendant hirer entered into a hire-purchase agreement with the plaintiff company for a 1958 Citreon Goddess sedan on 19 January 1963. The cash price of the vehicle according to the agreement was £895, and after allowing £228 for a trade-in and adding terms charges of £185, the balance payable was £852. On 6 January 1964, he was served with a notice of intention to repossess the vehicle in respect of arrears which then stood at £46, and the vehicle was seized on 30 January 1964. The agent effecting the seizure appraised the vehicle at £545, which figure was inserted in the Fourth Schedule notice served on the defendant. The latter consulted a solicitor who wrote on 12 February that he accepted the valuation of £545 and offered to pay the balance of £100.10.0 by four monthly instalments of £25.2.6.

Meanwhile, the car had been held in the plaintiff's storage yard after repossession; evidence was given that the vehicle was in very rough mechanical condition, and from the extent of the deteriorated paint-work, it was apparent that it had been left out in the weather for probably twelve months or more. A number of people including car dealers and wreckers inspected the vehicle but only two offers, one of £60 and the other of £185, were submitted. On the plaintiff company consequently becoming aware that the initial valuation had been excessive, their officer telephoned the defendant's solicitor on 17 February, 1964 and informed him that an error had been made in the appraisal, and that the plaintiff had not been able to obtain a higher offer than £180.[199] He said that they proposed to sell for that figure and was told that would be alright. The following day the officer wrote to the solicitor confirming what he had told him.

The plaintiff subsequently commenced an action in the Local Court at Perth claiming the sum of £462.6.0 against the defendant comprising moneys payable on termination of the hire-purchase agreement in respect of the repossessed motor-car. The defendant contended that the owner was bound by the initial estimated valuation figure inserted in the Fourth Schedule notice, and therefore the plaintiff was only entitled to recover £100.10.0. The magistrate accepted that contention stating that there was no evidence other than the plaintiff's estimate of value at the time of taking possession; he said that

[198] (1965) W.A.R. 237. See also, *McIntosh* v. *Australian Guarantee Corporation Ltd.* (1969) 1 N.S.W.R. 73 (C.A.).

[199] The report makes it clear that the plaintiff was offered £185 for the vehicle but that the plaintiff's officer had informed the defendant's solicitor that the highest offer received was £180 (*Id.* at 239), although this fact did not apparently evince any comment from the Court.

if the plaintiff was so negligent as to permit an erroneous value to be placed on the car, he was bound by it, adding that the method employed by the plaintiff showed a total disregard of the defendant's interests.

The plaintiff's appeal against that decision was upheld by the Full Supreme Court,[200] Wolff, C.J., rejecting the magistrate's proposition that the plaintiff was, in effect, estopped from establishing the vehicle's true value at the date of seizure, there being ample evidence of the initial overvaluation.[201] The plaintiff's agent had arrived at his initial assessment "because there was approximately £800 outstanding on the account",[202] but as the Chief Justice pointed out "that is no reason for making an appraisement of £545".[203] The defendant had further contended that the Fourth Schedule notice was invalid because on the plaintiff's own evidence it did not state a correct estimate of value and therefore disentitled the plaintiff from receiving anything at all. Wolff, C.J. rejected that contention since the agent's estimated value inserted in the notice was "a genuine estimate even though it was erroneous".[204] From a hirer's point of view, however, it may well be difficult to comprehend how an estimate of value made with no justifiable basis could be held a "genuine" assessment although erroneous.

Virtue, J., whilst in "substantial" agreement with the reasons given by the Chief Justice for allowing the plaintiff company's appeal, nevertheless expressed a note of caution in view of the possible consequences which might follow the decision. Thus, he said that their decision should not be taken to mean that it would ordinarily be sufficient for an owner who has repossessed a vehicle:

> . . . to do no more than expose it for sale for two or three weeks in a storage yard filled with vehicles exposed for a like purpose and, having received an offer or two, to accept the highest offer and regard the price paid as satisfactory evidence of the value. Such evidence would indeed be quite inadequate to establish proof of the best price which could be reasonably obtained by the owner at the time of repossession to which the hirer is entitled to credit . . .[205]

He said that had the defendant's solicitor not acquiesced in the sale of the car at the highest price offered to the plaintiff:

> . . . I would have had grave doubts whether the rest of the evidence in fact established proof of value sufficient to support his claim. However, this evidence really clinches the matter and justifies the conclusion that the magistrate's decision cannot be supported and that this appeal should be allowed.[206]

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[200] Wolff, C.J., Virtue, and Hale, JJ.

[201] Apparently the purchaser of the vehicle had bought it with a view to repairing and reselling it at a profit. However, although purchasing the vehicle at £185, he spent about £466 and incurred another £130 in labour costs and estimated that after allowing a trade-in of £400, he lost approximately £196 on the deal.

[202] (1965) W.A.R. at 237.

[203] *Ibid.*

[204] *Id.* at 238. In *McIntosh* v. *Australian Guarantee Corporation Ltd.* (1969) 1 N.S.W.R. 73, where the owner finance company had similarly overvalued a repossessed vehicle, the New South Wales Court of Appeal (Walsh, Jacobs and Holmes, JJ.A.) inclined to the view, without finding it necessary to decide the point, that the estimate given ought to be a genuine attempt to appraise the value of the particular vehicle repossessed if the notice was to comply with the notice set out in the Fourth Schedule.

[205] *Id.* at 239.

[206] (1965) W.A.R. 237 at 240. Hale, J., whilst in "substantial agreement" with the judgment of Wolff, C.J., also concurred in the additional comments of Virtue, J.

However, despite the criticism of Virtue, J. as to the finance company's method of disposing of and determining the "true" value of the repossessed vehicle, the procedure adopted in that case varies little from that generally followed by such companies. Thus, it is apparently not unusual for the finance company on repossessing goods to inquire from two or three dealers the amount they are willing to pay for the repossessed goods and determine their value on the highest offer received. In fact, one may query what other method could be employed by a finance company except, of course, to auction the goods which would not necessarily result in a higher bid being made for them. What is evident, is that generally the value of the goods repossessed is determined not by their retail market value paid by the hirer, but their wholesale value, with the result that a substantial proportion of the hirer's "equity" is liable to be lost simply because of the difference between those values.

In fact, it is fairly clear from what little case-law there is on the question that a sum which may have been irrecoverable under a minimum payment clause providing for the payment of a fixed percentage of the hire-purchase price as compensation for depreciation in the event of termination of the agreement, owing to the probability of it being held penal, is nevertheless recoverable under the "true measure of damages" principle adopted by the Australian hire-purchase legislation. Thus, in *Van Delft's Case,* the hire-purchase agreement entered into on 19 January, 1963 gave the cash price of the goods as £895 and terms charges of £185, making the total balance payable under the agreement £1,080. An allowance of £228 was made for a "trade-in", judgment was given in favour of the owner for £462.6.0, and conservatively estimating the instalments already paid by the hirer at £50,[207] approximately £740.6.0 or sixty-nine per cent of the hire-purchase price had been paid or was payable by the hirer on the company repossessing the car on 30 January, 1964, that is, just over twelve months of the hire-purchase agreement being executed.

The facts reported in *Lombard Australia Ltd.* v. *Smeaton*[208] disclose a similar situation. In that case, the total amount payable under the hire-purchase agreement for a car including terms and insurance charges was £620. Some £365 had already been paid by the hirer when the goods were repossessed. However, since the value of the goods on repossession was estimated at only £70, the owners claimed £135[209] against the hirer which

[207] It is not clear from the facts given in that case exactly how much had been paid by the hirer in instalments but the balance payable after deposit was £852, whilst the company's agent had initially estimated the value of the vehicle at £545 because there was approximately £800 outstanding on the account. However, since on 6 January, 1964, the defendant was in arrears in instalments amounting to £46, which had increased by 3 February, 1964, to £69, this would indicate the payment of instalments at £23 per month. Since the agreement was in operation for just over twelve months, the hirer presumably paid at least nine instalments amounting to £207, with the result that the amount paid or payable on repossession was not 69% but 83% of the total purchase price. However, that figure does not tally with the agent's initial estimate being given on the basis of there being approximately £800 outstanding on the account, which would on the above figure be only approximately £645.

[208] (1966) V.R. 272 (Hudson, J.) The issue in that case was whether a claim for the balance payable to the owner on the repossessed goods being estimated at a value insufficient to make up the difference between the total amount payable and the amount already paid by the hirer was a claim for "a liquidated amount" in respect of a cause of action determinable summarily under s. 102(1)(b) of the Justices Act, 1958, as amended, and entitling the complainant to issue a special default summons.

[209] That sum includes an allowance of £50 made in respect of the statutory rebates of terms charges and insurance.

represents eighty per cent of the original sum payable under the agreement, not including the expenses incurred by the owner in repossessing the vehicle.

However, the facts disclosed in those cases are insufficient to draw any real conclusions as to the adequacy or otherwise of the estimated values generally given in Fourth Schedule notices in respect of repossessed goods, since there was little or no evidence of other important factors, for example, a drop in market values after the hire-purchase agreement was entered into, or whether, particularly in respect of motor vehicles, their value had seriously depreciated because of neglect or accident. They do perhaps indicate, however, that in many, if not in most cases of repossession, the hirer's "equity" in the goods is likely to be of limited value and generally bears little relation to the amount actually paid under the hire-purchase agreement.

That point, and one of the reasons for it, is exemplified by the facts reported in *Universal Guarantee Pty. Ltd.* v. *Carlile*.[210] In that case, the defendants, husband and wife, entered into a hire-purchase agreement for a refrigerator on 6 October, 1954. The hire-purchase price was £200, made up of the refrigerator's "list-price" of £152.5.0, interest charges of £46, and £1.15.0 insurance charges. The refrigerator early proved defective but the plaintiff's liability in this respect had been excluded. The husband subsequently fell ill and could not pay any further instalments. On 22 May, 1955, the plaintiff company repossessed the refrigerator, the defendants having paid only £34 by way of initial deposit and instalments. After allowing for the statutory rebate, the plaintiff claimed £97.1.0 from the defendants, the value of the repossessed refrigerator being estimated at £40.16.0.

The importance of the case in the present context is the mode of determining that value. The evidence as to value was given by one Doyle, who first saw the machine over a month after repossession. It was then damaged, the estimated cost of repairs being put at £17.18.1. Once put into repair its value at that time would, it was said, have been £95, that is, a drop of £57 from its new price in just under eight months. However, Doyle had then proceeded to:

> . . . deduct thirty per cent from £95 in order to ascertain the second-hand wholesale price, upon the basis that the value to the complainant was to be ascertained on the assumption that it would have to sell the refrigerator to a reselling retailer, who in turn would expect to make forty per cent gross profit. Accordingly Doyle deducted £28 10s., leaving £66 10s., as the second-hand wholesale price at that date of a machine in good order.[211]

The cost of repair was then deducted leaving £48.11.11 which was arbitrarily reduced to £45, and after deducting £4.4.0 for repossession expenses, the figure of £40.16.0 was arrived at. Although told by counsel that "this was the usual method by which finance companies calculated in such cases the value to be credited to the hirer", Sholl, J. said that for the purpose of calculating value, it must be assumed that the owner would sell by the best means and at the best price reasonably available, but that in the case before

[210] (1957) V.R. 68 (Sholl, J.). That case was decided prior to the passing of the Victorian Hire-Purchase Act, 1959, but the views expressed by Sholl, J. as to the determination of the "value" of goods on repossession are nonetheless relevant since the coming into operation of the later Act.

[211] (1957) V.R. 68 at 71-72 *per* Sholl, J.

him "no evidence appears to have been given to explain why the company could not itself resell by retail, or by auction, or by other form of private sale by advertisement or otherwise; or whether, if it could not resell except to a retailer, it could not get better than the wholesale price".[212] He accordingly held that unless at the further hearing below, the company was allowed to reopen its case on the point, the amount recoverable should be based on the *retail* value of the refrigerator less the cost of repairs and repossession charges.[213]

It would also seem implicit from the judgment of Monahan, D.C.J. in *Motor Credits Limited* v. *Trew*[214] that the "best price that could be reasonably obtained by the owner"[215] of repossessed goods is to be determined by the *retail* value of the goods rather than their wholesale value on the sale of the goods by a finance company to a dealer. Thus, in that case, the defendant hirer entered into a hire-purchase agreement with the plaintiff finance company for a 1957 Holden station wagon on 29 March 1963. The true cash price of the vehicle was £525 and on the hirer surrendering the vehicle on 3 June, 1963, it was resold by the plaintiffs to the original dealer for £380. The plaintiffs then claimed the sum of £171 alleged to be owing under the hire-purchase agreement from the defendant hirer, one of the defences raised by the latter being that the plaintiffs had not obtained the best price reasonably obtainable by them.

The dealers had apparently placed the price of the vehicle on the windscreen as being £425 but had managed to persuade a Mr. Bryson to purchase the vehicle for £530. Monahan, D.C.J. rejected the plaintiff's contention that the £380 was the best price that could reasonably be obtained by them and also rejected the resale price of the vehicle to Bryson for £530 as being the best price that could reasonably be obtained by the owners since he regarded that sum "as a fancy price obtained by a smart dealer from a somewhat innocent purchaser".[216] Independent witnesses assessed the vehicle at varying values from between £350 to £450 but the learned judge regarded the value of £425 put on the car by the dealers as being its true value at the time of repossession by the finance company and reduced the amount payable by the hirer to the plaintiff finance company accordingly.

The difficulty in accepting the £425 put on the windscreen by the dealers as the resale price of the vehicle as also representing the best price which could be obtained for the vehicle by the owner finance company is that the £425 was the retail value of the vehicle to the dealers selling from trade premises which, it is submitted, did not necessarily reflect the best price which could be reasonably obtained by the owner finance company, assuming that it did not possess direct retail outlets for the sale of vehicles, and which would therefore, generally have to resell the repossessed goods to dealers who

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[212] *Id.* at 72.

[213] He later added: "It is, I think, important in this type of case to see that finance companies, whose business after all is closely akin to money lending, do not interpret the provisions as to 'value' in s. 4, or in clauses which embody its terms, too favourably to themselves, and to the disadvantage of hirers, who are likely in many cases to be persons in a humble station of life, lacking legal knowledge and commercial experience." *Id.* at 82.

[214] (1964) 1 D.C.R. (N.S.W.) 258. The point discussed here was not affected by the subsequent appeal to the New South Wales Court of Appeal in *Trew* v. *Motor Credits (Hire Finance) Ltd.* (1966) 1 N.S.W.R. 196.

[215] N.S.W., s. 15(2)(b)(i).

[216] (1964) 1 D.C.R. (N.S.W.) 258 at 260.

in turn would only be prepared to purchase at a price at which they would anticipate selling at a profit.

To impose on the finance company the burden of reselling the repossessed goods at their *retail* market value is, it is submitted, placing on them an unrealistic burden which does not necessarily reflect the best price which could be reasonably obtained by them. However, what little authority there is on this point[217] suggests that the retail price of the goods is to be regarded as the "best price that could be reasonably obtained by the owner". If this proposition is correct, then it would seem evident that some of the finance companies will have to adopt other procedures for disposing of goods, for example by auction, instead of those commonly practised at present; otherwise they may find themselves liable in an action by the hirer for not having obtained the best price which could reasonably have been obtained by them.[218] It is hoped that should the question arise for determination in the superior courts a more realistic and more constructive interpretation of the repossession provisions will be given than they have hitherto received.

However, if the courts adhere to the view that the value of repossessed goods must be their retail value, some method should be adopted which would relieve owners who operate solely as financiers from the burden of having to sell by retail but would nevertheless give full recognition to the hirer's equity in the goods. It is suggested that a procedure such as the following might best achieve these aims: First, the owner should be required to obtain an independent objective assessment of the retail value of the goods as at the date of repossession. Secondly, an obligation should be imposed on the dealer, whose transaction has been financed and who is in many cases responsible for the initial inflated hire-purchase price,[219] to buy the goods at not less than their assessed value. A procedure such as this could also operate in relation to retailers who finance their own hire-purchase transactions and who have an incentive to assess repossession values at a figure which ensures them a profit on re-sale of the goods. At the present time supply exceeds demands in most consumer products.[220] Providing for independent valuations

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[217] *Universal Guarantee Pty. Ltd.* v. *Carlile* (1957) V.R. 68; *Motor Credits Ltd.* v. *Trew* (1964) 1 D.C.R. (N.S.W.) 258; cf. *Custom Credit Corporation* v. *Van Delft* (1965) W.A.R. 237.

[218] R. M. Goode and J. S. Ziegel in *Hire-Purchase and Conditional Sale: A Comparative Survey of Commonwealth and American Law*, 1965, at 120, n. 25, query whether: ". . . it is entirely fair to the owner to value on the footing of the *best* price reasonably obtainable. This places him in a less favourable position than a mortgagee, whose duty is limited to acting fairly and without recklessness in the exercise of a power of sale. It is submitted that the proper approach is the flexible one adopted by the American Uniform Commercial Code, which requires simply that the sale must be commercially reasonable in every aspect, including the method, manner, time, place and terms ss. 9-504 (3)." See further Hogan, "The Secured Party and Default Proceedings under the U.C.C." (1962) 47 *Minn. Law Rev.* 205.

[219] See e.g. *Toft* v. *Custom Credit Corporation Ltd.* (unrep.) discussed by M. J. Trebilcock in his article "Re-opening Hire-Purchase Transactions" (1968) *41 A.L.J.* 424. The plaintiff hirer had agreed to purchase a car for £445 on being offered £150 on a "trade-in", but the judge found as a fact that on the plaintiff taking possession of the vehicle its true value was only £100 and the value of his "trade-in" only £50. Even allowing for the "jacked-up" price of both vehicles, the plaintiff had nonetheless agreed to purchase a vehicle for £345 whose true value was only £100, so that his "equity" in the vehicle at the outset was worth comparatively little. However, the hirer failed in his attempt against the finance company and dealer to have the transaction re-opened on the ground of its being "harsh and unconscionable" under s. 24 of the South Australian Hire-Purchase Agreements Act, 1960-1966.

[220] E.g. in the 1950's, a time of mushroom growth of hire-purchase finance in Australia, some twenty-seven companies began manufacturing television sets in Australia of which only seven survived; *Sydney Morning Herald*, Nov. 17, 1965.

would tend to ensure that repossession values closely approximate current retail values. Indeed, provision could be made for licensing valuers.

Conclusions

Although the Australian provisions regarding the repossession of goods under hire-purchase agreements would, in general, appear to be working out in practice reasonably well, and whilst recognizing that the question of repossession is as much a social as well as a legal problem,[221] it is submitted that there are nevertheless practical problems which deserve attention and further clarification. Thus, the penal sanctions against the unlawful entry on premises for the purpose of repossession should be made more certain in most of the States, since the possibility of civil action being taken against them is generally in practice an insufficient deterrent, at least to less reputable companies. In this respect, the licensing provisions operating in Victoria and New South Wales could well be adopted, together with the Victorian provision whereby the unlawful entry is a cause for the withdrawal of a licence, in addition to a statutory penalty. In the event of the smaller States not considering it worthwhile to provide for the licensing of such agents, the sanctions against unlawful entry for the purpose of repossession should nevertheless be clarified. Direct provision should also be made, as under the South Australian legislation, for the specific recovery of goods by legal process on application to the local court or court of petty sessions in the event of the hirer refusing to deliver up goods on demand being made of him. Such provision would obviate, at least in New South Wales, the considerable time spent in the process of laying an information, summons, imposition of a fine, and repetition of the procedure until the possible award of compensation by the magistrate. Legislative intervention is also required so as to provide that the hirer's rights on voluntarily returning goods in exercise of his statutory rights under the Hire-Purchase Acts are at least no less than his rights where the owner has repossessed the goods for the hirer's breach of the hire-purchase agreement. Finally, further clarification needs to be given to the determination of the value of repossessed goods than has yet been given by the courts.

[221] Mr. E. A. Edwards, a former Chairman of the Australian Hire-Purchase and Finance Conference (now re-named the Australian Finance Conference) estimated that about £75 million had been written off by Australian credit sources between 1961-1964; *The Australian*, Nov. 24, 1965. The electrical retailing industry in particular has suffered heavy losses as a result of bad debts caused, in many instances, by the granting of easy credit in order to sell goods on an overproductive market, the most notable in this respect being the provision made for bad and doubtful debts totalling over $8 million in 1965 by H. G. Palmer, formerly one of Australia's largest electrical retailers. See *The Australian*, Oct. 9 and 12, 1965, and Nov. 11 and 21, 1965. The collapse of the Reid Murray and Latec groups of finance companies in the early 1960's was also partially, at least, attributable to bad debts.