

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

Report
(LRC 28-1989)

REPORT ON
DEBT COLLECTION:
(2) RETENTION OF TITLE

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St. Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General twenty-seven Reports containing proposals for reform of the law. It has also published eleven Working Papers, one Consultation Paper and Annual Reports. Details will be found on pp. 30-33.

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NOTE

This Report was submitted on 8th March, 1989 to the Attorney General, Mr. John L. Murray, SC, under Section 4(2)(c) of the Law Reform Commission Act, 1975. It embodies the results of an examination of, and research in relation to, the problems presented by "Retention of Title" clauses in the context of debt collection which was carried out by the Commission at the request of the former Attorney General, Mr. John Rogers, SC, together with the proposals for reform which the Commission were requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public at this stage, in the form of this Report, so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

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CHAPTER 1: INTRODUCTION

1. On 6th March, 1987, the then Attorney General requested the Law Reform Commission to formulate proposals for the reform of the law in a number of areas. These included the law relating to sheriffs, collection of taxes and debt collection. The Commission decided to address in the first instance the specific problems associated with the law of sheriffs in Ireland. Its Report on those problems was published in October 1988 under the title *Debt Collection: (1) The Law Relating to Sheriffs*.

2. In the course of its enquiries into this question, it was emphasised to the Commission by sheriffs that the greatest single problem confronting them in executions today was the prevalence of "Retention of Title" clauses. Briefly stated, retention of title clauses provide that the ownership of goods remains in the seller until payment has been made. Their frequent use in modern business conditions means that, when a sheriff effects a seizure, he will often find that the only saleable assets of the debtor consist of goods which are immediately claimed by his suppliers as belonging to them because they have not been paid for. In our Report we said that:

"The Commission appreciates the anxieties of sheriffs in this regard and, while it would be inappropriate to deal with the difficult legal problems arising from such clauses which have provoked much litigation in recent years in the relatively limited context of sheriff law, it has already decided to undertake an immediate examination of the problem. It will accordingly be making a further Report to the Attorney General on this topic in the relatively near future".

3. As a first step in our examination of the problem we commissioned a Research Paper from Ms. Barbara Maguire, LL.B. Ms. Maguire's Paper having been furnished to the Commission, it was decided to

establish a small working group to examine the results of her research and to consider what proposals for reform might usefully be made.

4. The working group consisted of the President, Mr. John Buckley, Mr. Justice Henry Barron, Mr. Marcus Beresford, Solicitor, Mr. John Cooke, SC, Mr. Laurence Crowley, FCA, Mr. Brian Lenihan, Barrister-at-Law, Lecturer in Law, T.C.D., and Mrs. Jane Marshall, Solicitor. The Commission would like to express its deep gratitude to the members of the working group from outside the Commission who contributed so helpfully to the preparation of this Report. It should, however, be emphasised that the Commission is solely responsible for the contents of the Report.

5. The ideal solution to the retention of title problems might be to have a unified system of control of all security interests in personal property similar to Article 9 of the US Uniform Commercial Code.¹ Such a system could provide reasonably simple and efficient rules for the creation of valid security interests in personal property, whether they take the form of chattel mortgages, hire purchase agreements, retention of title clauses or whatever. But such a proposal would go far beyond the terms of the Attorney General's request.

The proposals contained in Chapter 4 for changes in the law should not be thought of, however, as precluding more wide-ranging reforms, whether proposed by this Commission or some other body charged with reviewing the existing law. Thus, should our proposal for the establishment of a system of registration of retention of title clauses be accepted, there would be no fundamental difficulty in expanding such a system into a more comprehensive registration system at some time in the future.

The Report consists of a summary of the present law as to retention of title and of the comparative law in some other jurisdictions and sets out proposals for reform together with heads of a proposed Bill. We have decided to publish Ms. Maguire's Paper separately at the same time, since it contains a most valuable and comprehensive statement of the existing law and of the law in other jurisdictions. The Research Paper may be obtained on application to the Commission.

¹See para. 38 below.

CHAPTER 2: THE PRESENT LAW OF RETENTION OF TITLE

6. Reading recent text-books, articles and case law might lead one to the conclusion that retention of title clauses have only been used and recognised by the law since the landmark English decision in 1976 in *Aluminium Industrie Vaassen BV v Romalpa Aluminium Limited* (known as the *Romalpa* case).¹ However, although this decision undoubtedly played a major part in attracting the attention of the legal professions in England and Ireland to the use of such clauses, they have been used by sellers of goods for centuries in one form or another to delay the passing of property in the goods to the buyer until payment is made.

In Ireland the use of a retention of title clause was approved by the Court of Exchequer Chamber in *Bateman v Green and King*² in 1868 and in 1895 the Irish case of *McEntire v Crossley Brothers Limited*³ went to the House of Lords which upheld a seller's claim under a retention of title clause to a gas engine supplied by the seller to the buyer who became insolvent before he had paid the price. Lord Watson said that:

“It does not in the least follow that, because there is an agreement of sale and purchase, the property in the thing which is the subject matter of the contract has passed to the purchaser.

That is a question which entirely depends on the intention of the parties. The law permits them to settle the point for themselves by any intelligible expression of their intention”.³

7. This recognition by the law of retention of title clauses was given statutory effect by s. 19(1) of the Sale of Goods Act, 1893 which provides:

“Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are

fulfilled. In such cases, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled".

This provision clearly authorises the seller of goods to insert a term in the contract of sale between himself and the buyer providing that property in the goods is not passed from the seller to the buyer until a specified condition is fulfilled. The condition may be that the purchase price of the goods must be paid in full or even that the buyer must discharge all his indebtedness to the seller arising out of other transactions.

8. Legal questions of a somewhat similar nature arise in the case of hire purchase agreements, but we are not concerned in this Report with such agreements. They are governed by the strict requirements of the Hire Purchase Acts 1946 to 1960 and are also subject to other provisions of consumer law.

9. Because retention of title clauses are used to protect the seller of goods in the event of the buyer becoming insolvent, questions as to their validity and scope generally only arise when and if the buyer becomes insolvent. In many cases the buyer's assets are also subject to a floating charge, in which case the receiver appointed by the holder of the floating charge, in order to fulfil his duty of repaying the debt secured by the charge out of the buyer's estate, attempts to include as many assets as possible within the scope of that estate. Therefore, if the seller of goods claims that goods in the possession of the buyer are in fact owned by him (the seller) because of a retention of title clause in the contract of sale, the receiver generally challenges the validity of such a clause. Similarly, a sheriff attempting to enforce a judgment against the buyer's estate also tries to reject a claim by the seller of goods based on a retention of title clause.

A receiver or sheriff challenging the validity of a retention of title clause generally relies on two main arguments.

- (1) *In the first place, he argues that the retention of title clause has not been properly incorporated into the contract of sale between the buyer and seller and so the buyer is not bound by it.*
- (2) *If this argument fails, he goes on to argue that even if the retention of title clause is part of the contract it is an attempt by the seller to create a charge over the buyer's assets and so is void because it has not been registered under the relevant company legislation⁵ or Bills of Sale Acts.⁶*

Incorporation of a Retention of Title Clause

10. It is a general principle of the law of contract that a party is not bound by a term of the contract unless, at the time the contract was made, he knew or ought to have known of its existence and the other party took all reasonable steps to bring it to his notice.⁷ A number of

decisions in Ireland and England in recent years illustrate the application of this principle to cases where it is sought to rely on a retention of title clause.⁸

The cases establish that the onus is on the seller who is seeking to rely on a retention of title clause to prove that it has been effectively incorporated into any contracts between the parties. In resolving such an issue, the court will consider the facts of the case, including the knowledge and prior experience of the parties, the particular documents involved and any previous dealings between them.

11. In some of the cases, what has become known as a “battle of the forms” develops. Both buyer and seller use standard forms and both appear to enter into the contract on the basis that their own general conditions will apply. There are two main approaches to such problems. One is that there is no contract because there is no true agreement between the parties as to terms.⁹ The alternative is that the last set of forms sent by either party before the contract was entered into governs and so its terms apply.¹⁰ Again it is a matter for the court to decide if the parties have truly agreed as to whether or not the retention of title clause is to apply.

Validity of Retention of Title Clause

12. Once it has been established that a retention of title clause does form part of a contract of sale, questions sometimes arise as to its validity and scope. The resolution of such questions depends on the type of clause used by the seller. Because each buyer of goods may intend to use them for a different purpose, for example, resale or use as a raw material, a number of different types of retention of title clause has developed to try to protect the seller as fully as possible in each situation. Each type of clause must be considered separately in determining its validity and effectiveness.

(a) A “simple” retention of title clause

13. A “simple” retention of title clause is so called because it simply purports to reserve title in the goods in the seller until the buyer pays the price of the goods. It is the most basic form of retention of title clause and is generally used at least as the first part of such a clause even where the clause goes on to extend ownership further. In such a case, even where the extended part of the clause is, for some reason, found to be invalid, the “simple” part can be severed and will itself be valid.¹¹

No particular form of words is necessary to constitute a valid “simple” retention of title clause. The wording usually makes clear that both the legal and the beneficial ownership of the goods is being retained by the seller: where only the beneficial ownership is retained, other considerations will arise.¹²

A “simple” retention of title clause does not necessarily prevent the buyer from reselling or using the goods supplied before payment is made. It is taken to be the intention of the parties on entering into the contract that the buyer is free to use the goods as he pleases because otherwise they would, in effect, be useless until paid for in full. The

clause itself may expressly provide that the buyer is free to use the goods pending payment,¹³ but even if such a right is not expressly provided for, it will in some cases be implied in order to give “business efficacy” to the contract.¹⁴

Problems have also arisen in cases where the goods which are subject to a “simple” retention of title clause are mixed by the buyer with other goods or used in the manufacture of other goods. Where it is no longer possible to identify the original goods, the retention of title clause will normally be of no effect. It is clear, however, from the leading Irish decision on the topic, *Somers v Allen*,¹⁵ that where the goods remain identifiable, the retention of title clause will continue to be effective.

It has also been argued on occasions that such “simple” retention of title clauses require registration under the relevant companies legislation or (in the case of an individual) the Bills of Sale legislation. This depends on whether a “simple” retention of title clause creates a charge over the goods supplied. While there has been some divergence of judicial opinion, the better view would appear to be that a clause by virtue of which the seller retains ownership in the goods supplied pending payment of the price by the buyer (the typical “simple” retention of title clause) does not require any form of registration to be valid.¹⁶ This would appear to be in conformity with the provisions of s. 19(1) of the *Sale of Goods Act, 1893* which envisages the retention of title by the seller although the goods have been delivered.

(b) *A “current account” retention of title clause*

14. Such clauses are also known as “all sums due” clauses because they purport to reserve ownership in the seller in the goods supplied until not only the purchase price for the actual consignment of goods has been paid but also any outstanding sums owed by the buyer to the seller in respect of other transactions. Such clauses, therefore, are extended variations of “simple” retention of title clauses and are frequently added on to such clauses or may stand on their own. Their validity as an effective means of protection for the seller has been questioned. They were upheld by our courts in a number of cases,¹⁷ but the possible frailties do not appear to have been explored in any detail. However, it would seem that any remaining doubts as to their validity have been dispelled by the decision of the Court of Appeal in England in *Clough Mill Ltd. v Martin*.¹⁸

15. As in the case of “simple” retention of title clauses, no particular form of words is necessary and the same general rules apply in relation to the buyer’s freedom to use the goods before he has paid the seller all sums outstanding. At first sight it might appear that, unlike “simple” clauses, “current account” clauses should be treated as creating a charge and hence requiring to be registered, since the seller is effectively seeking to create a security for sums owed to him by the buyer. However, it was held in *Frigoscandia (Contracting) Ltd. v Continental Irish Meat Ltd.*¹⁹ by McWilliam J that they did not create a charge and a similar view was taken by the Court of Appeal in England in *Clough Mill Ltd. v Martin*.²⁰ It was said in the latter case

that no charge could be created until the buyer became the owner of the goods and such a transfer of ownership was precisely what the clause prevented.²¹ A different view has, however, been taken in Scotland.²²

16. A difficulty may arise in relation to such clauses where there is a running account between the buyer and seller. If the account is never fully paid off by the buyer, the property in the goods never passes to the buyer because of the terms of the clause that all sums due must be paid. Even if the account from time to time has been paid in full, it may be difficult to ascertain the goods in relation to which the property has passed. Moreover, if the buyer has paid part, but not all, of the sums due and the seller exercises his power to repossess and resell the goods supplied, it is not clear how much of the goods he is entitled to resell or how he should deal with any surplus which remains after resale and deduction of any sums due. It would obviously be unfair to allow the seller keep such excess if, for example, the market value of the goods supplied rose substantially between their original delivery to the buyer and their later resale by the seller. In *Clough Mill Ltd. v Martin*,²³ a distinction was drawn between cases where:

- (a) the contract was still subsisting; and
- (b) it has been determined by the seller's acceptance of the buyer's repudiation.

It was held that, if the contract was still existing, the seller could only resell so much of the material as was necessary to pay the outstanding part of the purchase price. If he sold more, he would have to account for the surplus to the buyer. If, however, the contract had been determined, the seller could sell them for his own account but would be bound to repay any part of the purchase price already paid by the buyer on the ground of failure of consideration.

Retention of Title Clause and Manufactured Products

17. We have already referred to the problems that may arise where goods supplied by the seller under a retention of title clause are mixed with other goods or are used in the manufacture of another product.²⁴ Where the original goods can still be identified — as in *Somers v Allen*²⁵ — a “simple” retention of title clause will generally be effective and will not be avoided by lack of registration. Where, however, they can no longer be identified, a “simple” retention of title clause will generally not be effective: if the seller wishes to extend the security to cover goods consumed in a manufacturing process, he must ensure that the agreement contains a stipulation to that effect.²⁶

Moreover, in such a case, the courts will usually treat the agreement as creating a charge which will be void for non-registration under the relevant legislation.²⁷ The same considerations apply where the goods do not lose their identity, but cannot be removed without material injury to the goods to which they are attached. In such cases, a retention of title clause to be effective would have to extend to the whole product and, again, it is clear from the authorities that this necessarily involves the creation of a charge which would require registration.²⁸

Retention of Title Clause and Proceeds of Sale

18. Problems of particular complexity arise where goods which are the subject of a retention of title clause have been resold by the buyer and the original seller claims to be entitled to the proceeds of sale. Three distinct questions may arise.

First, the original agreement of sale including the retention of title clause may not expressly empower the seller to satisfy the debts out of the proceeds of sale, in which case the question will arise as to whether that right should be implied. In the second place, the proceeds may no longer be identifiable: they may, in the most difficult case, have been paid into the buyer's bank account and hence mixed with other funds. The question then arises as to whether it is possible for the seller to "trace" the money owed to him into the bank account. In the third place, the question may arise as to whether, even assuming a right to payment out of the proceeds coupled, where necessary, with a right to trace, such a clause necessarily involves the creation of a charge over the proceeds of sale which must be registered under the relevant legislation.

19. As to the first question, even where the original agreement does not expressly oblige the buyer to account to the seller for the proceeds of sale of the goods in the event of their being resold, it would appear that he will normally be under such an obligation. This was so held in the *Romalpa* case²⁹ itself, where the agreement did not expressly entitle the buyers to resell. The Court of Appeal in England considered that it was necessary to imply such a term in order to give business efficacy to the contract, but that it was also necessary to imply a term that the buyers were obliged to account to the sellers for the proceeds of sale in order to give effect to the purpose of the retention of title clause, which was to protect the sellers against the buyer's non-payment.³⁰ In a number of cases, our High Court has adopted a similar approach.³¹

20. The second question — as to the seller's right to "trace" the proceeds — gives rise to greater difficulty. While the right to "trace" has been an established feature of the law since the celebrated judgment of Jessel MR in *Re Hallett's Estate*,³² it has also generally been acknowledged that something more than a mere relationship of debtor and creditor is required for the remedy to be available. It will only be available to a person who is entitled to the beneficial or equitable interest in the property in question against a person who holds the property in a fiduciary capacity and against any third party to whom the property has been transferred (other than a *bona fide* purchaser for value without notice).³³ While the essence of a retention of title clause is that the seller retains at least the equitable interest in the goods, more difficulty arises from the requirement that the person against whom it is sought to trace is a fiduciary. In a number of English decisions, it was held that if under the terms of the original agreement the buyer was free to deal with the goods or the proceeds of sale thereof as he pleased, no fiduciary relationship existed between him and the seller.³⁴ Those decisions suggest that in that jurisdiction the courts are

unlikely to hold that a fiduciary relationship exists unless certain distinguishing features exist, e.g.

- (a) The existence of a "current account" retention of title clause;
- (b) a requirement to store the goods separately;
- (c) an express acknowledgement of a fiduciary relationship;
- (d) an indication that the buyers are selling as agents for the sellers or on the sellers' account.

In Ireland, however, in a number of cases a broader approach has been adopted and the courts have found a fiduciary relationship to exist simply because the seller has reserved title in the goods supplied pending payment in full by the buyer.⁵⁵ These cases, of course, represent the law in this jurisdiction, but it may be that the question cannot be regarded as satisfactorily settled at this stage.

21. The third question — as to whether such a clause must be treated as a charge requiring registration under the relevant legislation — cannot be definitively answered. It has not been considered in any case in Ireland which we have been able to trace and the English authorities are somewhat sparse. It appears, however, that the courts will not hold such a clause to be a charge where the seller retains ownership of the goods and is, as a result, entitled to trace the proceeds of sale. If, however, he ceases to own the goods because, for example, they lose their identity or the parties must have intended him to lose ownership, then the courts would regard any claim to the proceeds of sale as a charge which is void if it is not properly registered. This only applies, however, where the charge is created by a company: in the case of an individual, no registration is necessary since it is not a bill of sale under the Bills of Sale Acts. (Such bills only relate to security over goods and not over the proceeds of sale).

Retention of Title Clause and Assignments of Book Debts

22. In cases where the buyer is free to resell the goods supplied by the seller under a retention of title clause before payment is made, as an added protection against non-payment in the event of the buyer's insolvency, the seller may stipulate in the contract of sale that the buyer must assign to the seller all his claims arising against the sub-purchasers of the goods supplied.⁵⁶ In such a case even if the seller cannot trace the proceeds of sale because the buyer's bank account is overdrawn and the proceeds of sale are not identifiable, he may proceed against the sub-purchasers of the goods who have failed to pay the buyer for them.

There has again in such cases been some debate as to whether the clause constitutes a charge which requires registration under s. 99(2)(e) of the *Companies Act 1963* as a charge on the company's book debts, assuming the buyer is a company. It has been suggested that no such charge should normally arise, because the usual form of clause has the effect of vesting the claim against the sub-purchaser in the seller from the moment of its creation. Hence, it is argued the buyer never has any interest in the goods and consequently cannot create such a charge. However, against this it is argued that, since the contract of sale in relation to which the claim arises is between the

buyer and the sub-purchaser and the seller is not a party to it, the buyer must get some interest in the claim, however temporarily, before it vests in the seller. It has also been argued that the provisions of s. 99(2)(e) are only applicable to existing book debts whereas the buyer's claims against the sub-purchasers are, in fact, future book debts. However, there are both Irish and English decisions³⁷ to the effect that retention of title clauses which provide for such assignments of book debts will be void for non-registration under the Companies Act.

Retention of Title Clauses Creating Floating Charges

23. The wording of a retention of title clause may have the effect, perhaps unintended by the parties, of creating a floating charge which, in the case of a company, will require registration under s. 99(2)(f) of the *Companies Act, 1963*. Thus, the clause may purport to reserve the "equitable" or "beneficial" ownership only in the seller, enabling the legal interest to pass to the buyer. In such cases, it has been held that a charge is created by the buyer over the goods as soon as the legal title vests in him and that the charge thus created is a floating charge within the meaning of s. 99(2)(f).³⁸

The Doctrine of Reputed Ownership

24. Under this doctrine, which remained part of our law of bankruptcy until very recently, property of which the bankrupt was the apparent owner, although not the actual owner, was available for distribution amongst his creditors. The doctrine did not apply to insolvent companies. The doctrine could, accordingly, render ineffective a retention of title clause covering goods in the apparent possession of an individual trader or firm which was not a company. It was generally regarded as an unjust and anomalous doctrine and has now been abolished by the *Bankruptcy Act, 1988*.³⁹

The Position of the Bona Fide Purchaser

25. The principle enshrined in the maxim *nemo dat quod non habet* should, in general, prevent a buyer of goods subject to a retention of title clause from effecting a valid sale to a third party. There are, however, important exceptions. It is clear from a number of decisions that if a buyer of goods under a retention of title clause, which precludes property in the goods passing to him until he has paid the seller, resells those goods before payment is made, the sub-purchaser can get a good title despite the existence of the retention of title clause, provided he buys in good faith and without notice of the seller's claim to the goods subject to the retention of title clause.⁴⁰ Hence a retention of title clause will usually be ineffective if the buyer resells the goods to a bona fide purchaser before payment is made.

Goods Attached to Land

26. Where the goods which are subject to retention of title clauses become attached to land, the general principle is that such goods are, subject to a number of exceptions, regarded as forming part of the land and so belonging to the owner of the land. If the seller wishes to be sure of being permitted to remove the goods attached in the event of the

buyer defaulting, he may have to provide expressly for this in the contract of sale, since if he does not do so the courts may be reluctant to imply such a right of removal.⁴¹

Liability of Official Assignee, Liquidator, Receiver, or Sheriff for Wrongful Sale or Seizure

27. Goods which are not the property of a bankrupt, because of the operation of a retention of title clause, do not vest in the Official Assignee in bankruptcy and he may, accordingly, be liable in conversion if he wrongfully disposes of them. Section 70 of the *Bankruptcy Act, 1988*, however, now affords the Assignee greater protection. A person claiming property which is in the possession of the bankrupt at the date of the adjudication must file an affidavit of claim with the Assignee. If he fails to do so within one month of receiving notice from the Assignee requiring him to do so, the latter may dispose of the property free of that person's interest in it.

28. A receiver appointed by a debenture holder to enforce the latter's security does not become a party to contracts in existence to which the company is a party and cannot vary them. Accordingly, if a buyer company is bound by a retention of title clause giving the seller of goods ownership in the goods until the purchase price is paid, the receiver is bound by the clause. If the receiver sells the goods supplied under the retention of title clause without the seller's permission, he is personally liable to the seller in conversion, but may, in some circumstances, as where he is not guilty of negligence, be able to claim an indemnity out of the buyer company's assets in priority to the claims of debenture holders.⁴² A liquidator of a company is similarly liable in conversion to the seller of goods supplied under a retention of title clause if he wrongfully sells the goods in which the seller has an interest. A sheriff will also be guilty of conversion if he wrongfully seizes goods which belong to the seller under the terms of a retention of title clause but which are in the possession of the buyer.

¹(1976) 2 All E.R. 552. In Ireland, however, retention of title clauses had already been considered in *Re Interview Limited*, (1975) I.R. 382.

²(1868) I.R. 2 C.L. 166.

³(1895) A.C. 457.

⁴(1895) A.C. 457, at p. 467.

⁵Companies Act, 1963, s. 99.

⁶Bills of Sale (Ireland) Acts, 1879 and 1883.

⁷*Parker v S. E. Ry.*, (1877) 2 CPD 416; *Thompson v L. M. & S. Ry.*, (1930) 1 KB 41.

⁸*Re Stokes and McKiernan*, unreported, High Court, 12 December 1978, McWilliam J; *Western Meats v National Ice and Cold Storage Company*, (1982) ILRM 99; *Sugar Distributors Limited v Monaghan Cash and Carry Limited*, (1982) ILRM 399; *Kruppsthall AG v Quitmann Products Limited*, (1982) ILRM 551; *Union Paper Company Limited v Sunday Tribune*, (unreported, High Court, 27 April 1983, Barron J); *Carbery Pig Producers Co-Operative Society Limited v Lunham Brothers Limited*, (unreported, High Court, 16 April 1986, Carroll J); *Aluminium Industrie Vaassen BV v Romalpa Aluminium Limited*, (1976) 2 All ER 552; *Re Bond Worth Limited*, (1979) 3 All ER 919; *John Snow and Company Limited v DPG Woodcroft*, (1985) BCLC 54.

⁹*Hyde v Wrench*, (1840) 3 Beav 334.

¹⁰*Butler Machine Tool Company Limited v Ex-Cell-O Corporation (England) Limited*, (1979) 1 All ER 965.

¹¹*Clough Mill Limited v Martin*, (1984) 3 All ER 982.

¹²See para. 22 below.

¹³As in *SA Fonderies du Lion MV v International Factors (Ireland) Limited*, (unreported, High Court, 1 March 1984, Barrington J).

¹⁴*Four Point Garage Limited v Carter*, (1985) 3 All ER 12; *Hendy Lennox (Industrial Engines) Limited v Grahame Puttick Limited*, (1984) 2 All ER 152; *Re Andrabell Limited*, (1984) 3 All ER 407.

¹⁵(1984) ILRM 437.

¹⁶*Clough Mill Limited v Martin*, above.

¹⁷*Re Interview Limited*, above; *Re Stokes & McKiernan*, above; *Re Frigoscandia (Contracting) Limited v Continental Irish Meat Limited*, (1982) ILRM 396; *Kruppsthall AG v Quitmann Products Limited*, above.

¹⁸Above.

¹⁹Above, 396.

²⁰Above.

²¹At p. 987.

²²*Emerald Stainless Steel Limited v Southside Distribution Limited*, (1983) SLT 162; *Deutz Engines Limited v Terex Limited*, (1984) SLT 273; *Armour v Thyssen Edel Stahlwerke AG*, (1986) SLT 452; *Glen v Gilbey Vintners Limited*, (1986) SLT 553.

²³Above.

²⁴See para. 13 above.

²⁵Above.

²⁶*Borden (UK) Limited v Scottish Timber Products Limited*, (1979) 3 All ER 961, at p. 971, per Bridge LJ.

²⁷*Ibid.*; *Kruppsthall AG v Quitmann Products Limited*, above.

²⁸*Specialist Plant Services Ltd. v Braithwaite Ltd.*, (1987) BCLC 1.

²⁹Above.

³⁰At p. 564.

³¹See the cases referred to in fn. 35 below.

³²(1880) 13 Ch. D. 696.

³³See Keane, *Equity and the Law of Trusts in the Republic of Ireland*, pp. 281/2.

³⁴*Aluminium Industrie Vaassen BV v Romalpa Aluminium Limited*, (1976) 2 All ER 552; *Borden (UK) Limited v Scottish Timber Products Limited*, (1979) 3 All ER 961; *Re Bond Worth Limited*, (1979) 3 All ER 919; *Re Peachdart Limited*, (1983) 3 All ER 204; *Hendy Lennox (Industrial Engines) Limited v Grahame Puttick Limited*, (1984) 2 All ER 152; *Re Andrabell Limited*, (1984) 3 All ER 407; *Pfeiffer Weinkellerei-Weineinkauf GmbH and Company v Arbuthnot Factors Limited*, (1988) 1 WLR 150.

- ³⁵*Re Stokes and McKiernan Limited*, above; *Sugar Distributors Limited v Monaghan Cash and Carry Limited*, (1982) ILRM 399; *SA Fonderies du Lion MV v International Factors (Ireland) Limited*, (unreported, High Court, 1 March 1984, Barrington J). A similar approach to the Irish cases has been adopted in New Zealand: *Len Vidgen Ski and Leisure Limited v Timaru Marine Supplies (1982) Limited*, (1986) 1 NZLR 349.
- ³⁶See, for example, *Re Interview Limited*, (1975) IR 382.
- ³⁷*Re Interview Limited*, above; *Pfeiffer Weinkellerei-Weineinkauf GmbH and Company v Arbuthnot Factors Limited*, above.
- ³⁸*Re Bond Worth Limited*, above. In *Stokes and McKiernan Limited*, above, McWilliam J held that an agreement containing such a clause was not void for non-registration, but *Re Bond Worth* was not referred to.
- ³⁹Implementing a recommendation to that effect by the Budd Committee on *Bankruptcy Law and Procedure*. The *Irish Bankrupt and Insolvent Act, 1857*, s. 313 of which embodied the doctrine, was repealed by the 1988 Act.
- ⁴⁰*Re Interview Limited*, above; *Union Paper Company Limited v Sunday Tribune*, above; *Four Point Garage v Carter*, above; *Archivent Sales and Developments Limited v Strathclyde Regional Council*, (1984) 27 BLR 98.
- ⁴¹*Re Yorkshire Joinery Company Limited*, (1967) 111 Solicitors Journal 701. By contrast in *Re Galway Concrete Limited*, (1983) ILRM 402, the court was able to imply a right on the part of the seller to recover goods which were "tenant's fixtures".
- ⁴²*Re British Power Traction and Lighting Company*, (1906) 1 Ch. 497.

CHAPTER 3: COMPARATIVE LAW OF RETENTION OF TITLE

29. Proposals for changes in the law relating to retention of title have been made in a number of other jurisdictions and in some instances actually implemented. In this chapter, we summarise the major alterations which have been suggested or actually carried through.

England and Wales

30. The Report of the Crowther Committee on *Consumer Credit* in March 1971¹ recommended a rationalisation of the law relating to credit transactions in both England and Scotland. They proposed the introduction of a new Lending and Security Act, based on Article 9 of the Uniform Commercial Code in the United States. Their proposals were intended to provide a new legal framework for the regulation of all personal property security interests and were not confined to retention of title clauses as such. Their proposals envisaged a system of registration of all security interests in goods other than consumer goods. The effect of a failure to file details of a security interest would be to subordinate the secured parties' rights to the goods secured to those of a subsequent buyer of the goods. These proposals have, however, never been implemented.

31. Retention of title clauses were also considered in the Cork Committee Report on *Insolvency Law and Practice*². While their proposals were not as sweeping as those of Crowther, they did consider that the case had been established for some form of registration and recommended an adapted version of Article 9 of the U.S. Uniform Commercial Code. They also suggested that, in the event of the buyer's insolvency, there would be a 12 month moratorium during which time the seller would be unable to dispose of goods the subject of the retention of title clause.

32. The last mentioned recommendation presumably inspired certain recommendations in the U.K. *Insolvency Act 1986* relating to

retention of title clauses. This legislation provides for the appointment by the Court of an officer known as the "administrator" charged with the duty of attempting to rescue companies which are in financial difficulties. The legislation provides for the avoidance of retention of title clauses for an indefinite period where such an administrator has been or is about to be appointed³. In providing for the avoidance of such clauses for an indefinite period, the provisions go further than Cork, but being confined to cases in which an administrator is appointed (as distinct from cases where a receiver is appointed or the company is wound up) they are significantly more restricted.

33. More recently, Professor A. L. Diamond has submitted a new report to the Minister for Corporate and Consumer Affairs entitled *A Review of Security Interests in Property*⁴. His main recommendation is that there should be a new law on security interests based on the existing models in Canada and the United States. He recommends the setting up of a new register of security interests to replace the existing register of company charges. The new law should apply to security interests created by companies, partnerships and individuals in the course of their business. He also recommends that, since his main proposals would take some time to implement, immediate improvements should be made in the system of registration of charges under the Companies Acts.

Other European Jurisdictions

34. The concept of reservation of title is generally accepted in all of the other Western European countries and is applied in a manner similar to that in which it is applied in Ireland and England. However, some jurisdictions are stricter than others in relation to the freedom they give to a seller of goods to protect himself against non-payment by the buyer and each jurisdiction has its own approach to the question of the validity of extended forms of retention of title clauses. Thus, French law permits a seller of goods which are subject to a retention of title clause to recover them where the buyer is bankrupt, but only subject to stringent conditions, i.e.

- (1) The retention of title clause must be in writing and executed no later than the date of delivery of the goods to the buyer;
- (2) The goods covered thereby must be tangible personal property; and
- (3) The goods covered thereby must be identifiable and not incorporated in other goods or transformed in nature or kind⁵.

The final condition means that only "simple" or "current account" clauses will be effective in the event of the buyer's bankruptcy. By contrast, in West Germany the attitude to retention of title is more relaxed and accepts extended retention of title clauses⁶.

Retention of Title Under EC Law

35. Article 220 of the Treaty of Rome provides that the Member States must enter into negotiations for the harmonisation of the laws governing economic life within the community. This provision has led to a number of draft conventions and draft directives being drawn up in relation to retention of title in an effort to harmonise the relevant law.

36. A draft convention on *bankruptcy, winding-up, arrangements, compositions and similar proceedings*⁷ was published in 1970. A revised draft appeared in 1980⁸. The proposed directive of 1980 on *the legal consequences of agreements creating simple reservation of title to goods*⁹ also deals with a number of aspects of reservation of title.

37. The proposed directive of 1980 goes further than any other measures suggested by the institutions of the European Community. It attempts to achieve uniformity in both the recognition and the effects of simple types of retention of title clauses in all Member States. It deals with many aspects of such clauses and attempts to clarify a number of problems arising in relation to their use. However, some doubts exist regarding the interpretation of the directive. It is not entirely clear whether all the provisions of the directive apply to extended retention of title clauses.

The directive has not yet been implemented and because of the uncertainties which arise in relation to it it is doubtful if it will be implemented in its present form. As with the other proposals for reform of the law of reservation of title which have been suggested under EC law, they reflect the context in which they have been proposed. Because they are an attempt to achieve uniformity between a number of vastly different legal systems, they tend to consist of measures aimed at establishing the minimum requirements necessary for reform in order to comply with basic principles of as many of the legal systems and existing law of the Member States as possible. As a result, they generally lack the detail which would be required if the law of retention of title of an individual State were to be reformed and the many problems arising under it were to be dealt with properly.

The United States

38. Article 9 of the Uniform Commercial Code in the United States introduced into the common law for the first time a unified system of control of all personal property security interests based not on their form but on their substance. The distinctions between the various security interests such as chattel mortgages and retention of title clauses are abandoned and one form of security interest established to replace all the others. Where there is a retention of title clause, it cannot prevent the ownership of the goods passing to the buyer as soon as they are delivered: the clause ranks merely as a security interest. If the secured party wishes to make this security interest effective against third parties, he must perfect the security interest by effecting a valid filing in a document known as a "financial statement". This is effective for five years from the date of filing, and the perfection of the

security interest thereupon ceases unless a continuation statement is filed by the secured party within six months prior to the expiration of the five year period.

The main conflicts which arise in connection with security interests in goods relate to their priority and effect as against third parties. An unperfected security interest in the goods is not effective as against third parties but a perfected security interest is. If there is conflict between a number of perfected security interests in the same goods, priority is, in general, determined by reference to the date of filing or perfection of the security interests and the first to be filed or otherwise perfected has priority. There are also provisions enabling an unpaid seller of goods under a retention of title clause to obtain a security interest in the goods where they have become fixtures or accessions or have lost their identity in a manufacturing process.

39. Article 9 of the Uniform Commercial Code has been accepted by 49 of the 50 States of the United States and has also been recommended and followed as a model for similar reform in many other common law jurisdictions¹⁰. This is because it provides a comprehensive, yet simple, framework for dealing with all personal property security interests. If it was thought necessary to reform the law completely in this area rather than tackle some only of the problems relating to it, the article could provide a useful model for such a radical reform.

Canada

40. The law of retention of title in Canada has developed in a manner very similar to its development in the United States. Retention of title clauses have been recognised there for many years as a valid means of security for an unpaid seller of goods and have, in the past, been treated separately from other security interests such as chattel mortgages.

41. In Canada, a contract of sale which incorporates a retention of title clause is treated as a conditional sales agreement and is subject to the very strict rules which have developed governing such agreements. Even in the last century, it was recognised that conditional sales agreements should be registered in a public register in order to protect third parties. By the turn of the century, almost all of the provinces had adopted this requirement of registration of conditional sales agreements. Nearly all the provinces now have conditional sales Acts which lay down detailed rules governing conditional sales. Generally speaking, they must be evidenced in writing and contain a description of the goods supplied and the sum secured. Registration of a conditional sale is necessary in order for it to be valid as against third parties. However, a distinction is generally made between registration where the buyer is an individual and where he is a company and a separate system of registration is provided for each situation.

42. More recently, there has been a movement towards reforming the law along the lines suggested by Article 9 of the U.S. Uniform Commercial Code. In 1967 Ontario became the first province to

introduce a Personal Property Security Act based on Article 9 and there have also been similar developments in other provinces¹¹.

Australia and New Zealand

43. In Australia, although it is recognised that retention of title clauses give rise to many problems, there is no great movement towards a complete reform of the law¹². In New Zealand, by contrast, there has been more interest in establishing a unified law of personal property securities along the same lines as the systems adopted in the United States and some Canadian provinces¹³.

¹Cmnd 4596, March 1971.

²Cmnd 8558, June 1982.

³Insolvency Act 1986, ss10 and 11. The Companies (No. 2) Bill 1987 contains similar provisions for the appointment of an officer to be called an "Examiner", but there is no provision corresponding to ss10 and 11 of the UK Act.

⁴London, HMSO, 1989.

⁵Law No. 80-335 of 12 May 1980, article 1.

⁶*Bürgerliches Gesetzbuch*, §455.

⁷Doc. 3.327/1 XIV/70-E.

⁸Doc. III D/72/80-EN.

⁹XI/446/73/E REV. 1.

¹⁰See the Crowther Committee Report on Consumer Credit in England, the Diamond Report on *Security Interests in Property*, New Zealand Law Commission Preliminary Paper No. 6 of May 1988 on *The Reform of Personal Property Security Law* and the laws and recommendations of many of the Canadian provinces.

¹¹E.g., Manitoba, Saskatchewan and the Yukon Territory. Similar reforms have been recommended by the Law Reform Commissions of provinces such as Alberta, Quebec and British Columbia.

¹²In a Discussion Paper published in August 1987 (General Insolvency Inquiry, Discussion Paper No. 32), the Australian Law Reform Commission said they were unable to reach a firm conclusion as to whether there should be a system established for the registration of retention of title clauses and felt that this was a matter of security law and therefore outside its terms of reference, which were confined to insolvency law.

¹³See for example the New Zealand Law Commission Preliminary Paper No. 6, May 1988, *The Reform of Personal Property Security Law*.

CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

44. Retention of title clauses are not in themselves objectionable. They may indeed serve a useful function in trade and industry by enabling suppliers to offer credit terms with greater confidence to their customers. The frustration experienced by suppliers, moreover, when goods which have not been paid for are taken by a sheriff or receiver and sold to meet some one else's debts is understandable, particularly when the goods may still be in their pristine, unwrapped state in the buyer's premises. It is quite natural that suppliers should seek to protect themselves by the use of retention of title clauses.

There is also, however, understandable concern that the widespread use of such clauses means that many firms who appear to have large and easily realisable stocks of goods on their premises may have no title to them because of the existence of such clauses. While it may be that in practical terms many traders, possibly the overwhelming majority, would continue to extend credit even if they were aware of the existence of such clauses, it seems undesirable in principle that particular traders should be able to make themselves secured creditors in respect of large and easily realisable assets without having to bring the fact to the notice of the general public by complying with some form of registration. Creditors who have been misled as to the availability of easily realisable goods on their debtor's premises into continuing to afford him credit have a legitimate grievance if, when they send the sheriff in to execute a judgment, he reports to them that all the stocks are in fact owned by the suppliers.

It has also to be borne in mind that recourse to a retention of title clause is an option which is available only to suppliers of goods. Those who supply services of one sort or another without supplying any goods cannot protect themselves in this manner. Moreover, involuntary creditors of a business, such as those with claims in damages for tort or breach of contract (including victims of personal injuries) will also be at this disadvantage. (The same could be said of the Revenue,

although in their case it should be remembered that they have certain statutory advantages denied to other creditors, such as the right to seize the tax defaulter's goods without a court order and their preferential rights in bankruptcy and winding-up.)

45. Apart from these considerations, the present law is in any event uncertain and has given rise to complex and expensive litigation. In particular, the doubts as to whether retention of title clauses can be availed of by an unpaid seller where the goods have been sold by the buyer to a third party or have lost their identity by being used in the manufacture of, or mixed with, other goods have caused unnecessary complications for all concerned.

46. While the ideal solution might be to have a unified system of control of all security interests in personal property, we have already indicated our view that the desirability of such a proposal goes well outside our present terms of reference. Our approach has therefore been to confine suggested alterations in the law of retention of title to those aspects which are demonstrably causing difficulties for all those concerned in the collection of debts. The object should be to reconcile the competing legitimate interests of suppliers of goods subject to retention of title clauses on the one hand and ordinary creditors who may have no means of securing the payment of their debts on the other hand.

47. In the first place, it should be possible to reduce uncertainty in the law as to the enforceability and scope of retention of title clauses. Disputes as to whether a retention of title clause had in fact been part of the contract between seller and buyer could be to some extent avoided by a provision that such clauses should only be enforceable where evidenced by a note or memorandum in writing signed by the buyer.

The inclusion of a typical retention of title clause effectively makes an agreement for the sale of goods a conditional sale agreement under which the property in the goods is not to pass to the buyer until payment. It is most unlikely that the mass of traders intend to achieve anything more than this, and in far too many cases artificial inferences have been drawn as to the existence of charges on the goods. The Commission believes that the law should be simplified and clarified in this area by a provision that such charges are not to be deemed to arise unless the parties expressly so stipulate.

The Commission accordingly recommends that *legislation should provide that:*

- (a) *a retention of title clause should not be enforceable unless it is evidenced in a note or memorandum in writing signed by or on behalf of the buyer; and*
- (b) *such a clause should not be deemed to create any form of charge over the goods or the proceeds of sale of the goods or over any other interests in property, real or personal, unless it is expressly so stipulated at the time the contract for sale is entered into between the parties.*

48. If the recommendations in the preceding paragraph are implemented, it will mean that a charge will only arise as a result of a retention of title clause if the parties expressly so stipulate. If such a charge does arise, it will under the existing law be void as against a liquidator or creditor (in the case of a company) or official assignee (in the case of an individual) unless it is registered under the appropriate legislation. Even where no such charge arises, however, it appears to the Commission undesirable and anomalous that retention of title clauses should be exempt from requirements as to registration, since they can have the same consequences for the general body of unsecured creditors as security interests which under the present law must be registered.

There are three principal arguments against such a system of registration of retention of title clauses. First, it can be said that the only bodies which are likely to search any register of charges are banks and other financial institutions. Such lenders, it is said, hardly need the protection of registration of retention of title clauses: they normally advance funds on the basis of a fixed charge over buildings and land etc. and a floating charge over other assets. Their floating charge will in any event extend only to such goods as remain in the borrower's possession when the loan is called in. Hence, the argument runs, they will derive no additional protection from a retention of title clause registry. Other traders do not in practice search the current register of charges before extending credit and are unlikely to search a retention of title registry.

There is some substance in this contention, but similar arguments could be advanced against existing registration systems, such as the statutory provisions requiring charges created by companies to be registered. However infrequent the inspection of such registers by potential lenders may be, they represent a residual safeguard which should not lightly be abandoned. We are not aware of any seriously maintained view that the existing register of charges which companies are obliged to maintain should be dispensed with and, consistently with this, there should be a similar requirement for retention of title clauses.

The second argument usually advanced is that it would not be possible simply by inspecting such a register to determine whether the goods had been paid for or whether the supplier was owed any further sums by the buyer where a "current account" clause was being employed. This is true, but the same can be said to some extent of the typical bank charge securing the present and future indebtedness of a company: an inspection of the register is no guide to the lender as to the current state of the company's overdraft.

Thirdly, it is said that such a system would place an intolerable burden on suppliers who would have to register every fresh transaction with customers. The system will undoubtedly create difficulties for suppliers, but they can be substantially mitigated in two ways.

First, there should be an exemption from the registration requirement where the amount secured is less than a stated ceiling. Second, a

supplier should be allowed effect a single registration in respect of repeated deliveries to the same customer over a period of up to five years. Hence, a fresh registration would only be required for a delivery to a new customer and then only where the price exceeded the statutory ceiling.

The Commission accordingly recommends that:

- (a) *a retention of title clause should be void as against any official assignee in bankruptcy, liquidator or creditor of the buyer unless particulars of the contract of sale and the relevant clause are registered in a prescribed manner;*
- (b) *legislation should further provide that priority should be determined by the date of registration and that, accordingly, a valid retention of title clause will take priority over interests in the goods created subsequently to the date of registration of the retention of title clause;*
- (c) *legislation should facilitate the registration by suppliers of a single retention of title agreement covering the repeated supplying of goods over a period not exceeding five years;*
- (d) *a retention of title clause intended to secure the payment of a sum not exceeding £500 should be exempt from the registration requirements.*

It would seem desirable that the time within which retention of title clauses must be registered should correspond with that prescribed for the registration of charges by companies in the relevant legislation¹. The Commission, accordingly, recommends that *the legislation provide that particulars of such clauses must be registered within 21 days from the date on which the relevant contract is entered into. Provision should be made enabling the court to extend the time where it appears just and equitable to do so.*

49. As we have pointed out already, one of the features of the present law which has given rise to most concern is the frustration of executions by sheriffs who find that the only realisable assets of the judgment debtor consist of goods held subject to a retention of title clause. The law can hardly be regarded as being in a satisfactory state when creditors put themselves to the expense and inconvenience of pursuing proceedings to judgment against a business which appears to have a large stock of realisable goods sufficient to satisfy the judgment only to be told by the sheriff that they belong to someone else. Usually, the judgment creditor's only option at this stage will be to petition for a winding-up or bankruptcy. But as far as he is concerned, this may simply mean throwing more money away. In the view of the Commission, the law should require the supplier of the goods which have been seized by the sheriff to elect between abandoning his retention of title clause and undertaking the burden himself of petitioning for a winding-up or bankruptcy.

The Commission accordingly recommends that *where a contract for the sale of goods contains a retention of title clause and the goods in*

question are taken in execution by a sheriff, the sheriff should be entitled to deal with the goods in a manner inconsistent with the title of the seller provided:

- (a) the sheriff gives notice in writing to the seller within 48 hours of any such execution of the fact that the goods have been seized, and*
- (b) The seller does not within 7 days from the receipt of such notice serve a notice of demand in accordance with s. 214 (a) of the Companies Act 1963 on the buyer or (in the case of an individual) issue a debtor's summons and, in either event, give notice in writing to that effect to the sheriff.*

In the event of any such notice being served by the seller on the sheriff, the power of the sheriff to deal with the goods contrary to the title of the seller should be suspended but should revive unless a petition for winding-up or bankruptcy is presented by the seller within a further period of eight weeks and notice thereof given to the sheriff.

50. If the recommendations in the preceding paragraph are implemented, a judgment creditor will be in a position to compel the supplier of goods which are subject to a retention of title clause to elect between abandoning his rights under the clause and petitioning for a bankruptcy or winding-up. The question then arises as to whether any further protection should be afforded to unsecured creditors or the holders of floating charges (who are effectively unsecured until their charges crystallise).

The unsecured creditor could be afforded additional protection by a provision that, in the event of a winding-up order or adjudication in bankruptcy, there should be a moratorium for a specified period — e.g. 12 months — during which the goods could be sold for the benefit of the general body of creditors. Alternatively, the liquidator or official assignee could simply be empowered on the making of the winding-up order or adjudication in bankruptcy to dispose of the goods for the benefit of the general body of creditors in a manner inconsistent with the retention of title clause. Similarly, a receiver, prior to a winding-up order or adjudication in bankruptcy, could apply to the court for an order allowing him to sell such goods in a manner inconsistent with the seller's title.

Any such provisions would, however, erode the efficacy of retention of title clauses almost to vanishing point. Even a relatively modest version of such proposals would effectively confine the supplier's remedy for non-payment to a peaceful seizure of the goods effected before any seizure by a sheriff or commencement of liquidation or bankruptcy proceedings. We think that the object of the law in this area should be to seek a reasonable balance between the right of a supplier to protect himself by agreement with the buyer against the latter's default in payment and the right of the other creditors to reasonably precise information as to the nature and extent of the protection afforded to such suppliers. *The Commission accordingly*

does not recommend the adoption of any of the proposals discussed in this paragraph.

51. The Commission further recommends that *the new requirements as to retention of title clauses should be applicable to all suppliers, whether companies, partnerships or individuals.* In order to avoid administrative expense, however, the Commission recommends that *the proposed register be maintained by the Registrar of Companies at the Companies' Office. The register should be open for inspection by members of the public on payment of a small fee. Either the buyer or the seller should be entitled to enter the prescribed particulars of the retention of title agreement in the register.*

¹Companies Act, 1963, s. 106.

CHAPETER 5: SUMMARY OF RECOMMENDATIONS

1. A retention of title clause should not be enforceable unless it is evidenced by a note or memorandum in writing signed by or on behalf of the buyer.
2. Such a clause should not be deemed to create any form of charge unless it is expressly so stipulated at the time of the contract for sale.
3. There should be provision for the registration of retention of title clauses in a register to be maintained in the Companies' Office.
4. Any clause not registered should be void in the event of the winding-up or bankruptcy of the buyer.
5. A valid retention of title clause should take priority over interests in the goods created subsequently to the date of registration of the retention of title clause.
6. Particulars of the clause should be registered within 21 days from the date of the relevant contract, subject to the power of the court to extend the time where it appears just and equitable to do so.
7. The register should be open for inspection by members of the public on payment of a small fee.
8. Either the buyer or the seller should be entitled to enter particulars of the retention of title clause in the register.
9. Legislation should facilitate the registration by suppliers of a single retention of title agreement covering the repeated supplying of goods over a period not exceeding five years.

10. A retention of title clause intended to secure the payment of a sum not exceeding £500 should be exempt from the registration requirements.

11. A retention of title clause should be of no effect in the event of a seizure of the relevant goods by the sheriff unless within 7 days of the giving of notice in writing by the sheriff of the seizure the seller takes the necessary preliminary steps for the winding-up or bankruptcy of the buyer.

12. The new requirements as to retention of title clauses should be applicable to all suppliers, whether companies, partnerships or individuals.

CHAPTER 6: GENERAL SCHEME OF A BILL TO PROVIDE
FOR AMENDMENTS OF THE LAW IN RELATION TO
RETENTION OF TITLE CLAUSES AND OTHER MATTERS
CONNECTED THEREWITH.

1. Provide that the Act may be cited as the *Sale of Goods (Amendment) Act 1989*.
2. Provide that, for the purposes of the Act:
 - (a) “retention of title clause” means any clause in a contract for the sale of goods whereby the beneficial and/or legal ownership of the goods is retained by the seller until certain conditions are fulfilled and includes any clause whereby the seller reserves the right of disposal of the goods until certain conditions are fulfilled, and
 - (b) “company” means a company within the meaning of s. 2 of the *Companies' Act 1963*.
3. Provide that a retention of title clause shall not be enforceable against the buyer unless it is evidenced by a note or memorandum in writing signed by or on behalf of the buyer.
4. Provide that a retention of title clause shall not be deemed to create any form of charge over the goods or the proceeds of sale of the goods or over any other interests in property, real or personal, corporeal or incorporeal, unless it is expressly so stipulated at the time the contract for sale is entered into between the parties.
5. Provide that a retention of title clause shall be void against any official assignee in bankruptcy, liquidator or creditor of the buyer unless the prescribed particulars of the clause are delivered to or received by the Registrar of Companies for registration in the required manner within 21 days after the date of the contract.
6. Provide for the keeping by the Registrar of Companies of a register in a prescribed form of retention of title clause and for the payment of

fees to the Registrar in relation to the entering in the register of particulars of such clauses.

7. Provide that the High Court on being satisfied that the omission to register a retention of title clause within the prescribed time or the omission or mis-statement of any particular with respect to any such clause was accidental or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of creditors of the buyer, or that on other grounds it is just and equitable to grant relief, on the application of the buyer or any person interested, and on such terms and conditions as seem to the court just and expedient, may order that the time for registration shall be extended, or, as the case may be, that the omission or mis-statement shall be rectified.

8. Provide that, subject to any entry to the contrary in the register, retention of title clauses which are registered as relating to the same buyer shall rank according to the order in which they are entered in the register and not according to the order in which the respective contracts of sale were entered into and that a retention of title clause shall rank in priority to any interests, legal or equitable, in the goods created or arising since the registration of such retention of title clause.

9. Provide that the register may be inspected during prescribed hours by any member of the public on payment of the prescribed fee.

10. Provide that where a person in the ordinary course of his business supplies goods regularly to the same buyer subject to a retention of title clause, that person shall be entitled to enter particulars of the said retention of title clause in the register whereupon all the provisions of the Act in relation to retention of title clauses shall apply to each delivery of goods by the said seller to the said buyer in the same manner as if particulars were entered in the register in respect of each individual transaction, but so that the registration shall cease to have effect at the expiration of five years from the date on which the particulars are first registered.

11. Provide that a retention of title clause intended to secure the payment by the buyer to the seller of a sum not exceeding £500 shall be exempt from the requirements of the Act as to registration.

12. Provide that where any goods the subject of a retention of title clause are taken in execution by a sheriff, the sheriff shall be entitled to deal with or dispose of the goods in a manner inconsistent with the title of the seller thereto provided:

- (a) he gives notice in writing to the seller within 48 hours of such goods having been taken in execution of the fact that they have been so taken; and
- (b) the seller does not within seven days from the service of such notice on him serve a demand in writing on the buyer (where the buyer is a company) requiring the payment of any sums

due or issue and serve a debtor's summons within the meaning of the *Bankruptcy Act 1988* on the buyer in respect of any such sums and give notice in writing to the sheriff accordingly.

13. Provide that in the event of the seller not presenting a petition for the winding-up of the buyer (where the buyer is a company) or for the adjudication in bankruptcy of the buyer within eight weeks from the service of a notice in writing by the seller on the sheriff pursuant to s. 12, the sheriff shall thereafter be entitled to deal with or dispose of the goods in a manner inconsistent with the title of the seller thereto.

14. Provide that the Act shall not apply to contracts of sale entered into before the coming into force of the Act.

