



COMMISSION OF THE EUROPEAN COMMUNITIES

STUDIES

*The Law of Property
in the
European Community*

The purpose of this study has been to bring into being the basic information which is necessary for the preparation of legal texts whose role would be to unify the rules of conflict of laws in relation to real rights of property. It deals only with certain aspects of those rights in the Member States of the Community. It is divided into three parts. The first deals with security interests in movables in the six original Member States. These are so described as to pinpoint the main similarities and differences.

Part two covers the legal systems of England and Wales, Scotland, Northern Ireland and Ireland. It is divided into three sections. The first section deals with immovables, the second with movables (including security interests therein) and the third with intellectual property.

Part three covers the law of property in Denmark and includes some references to Norwegian law. It is divided into three sections. Section one describes the law of property in general, section two treats of security interests in rem and section three covers intellectual property.

This study in comparative law contributes remarkably to current knowledge on the subject of real rights of property in the Member States of the Community.

**The Law of Property
in the
European Community**

STUDIES

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TITLE I

MOVABLES AS SECURITY
IN BELGIUM, FRANCE, GERMANY
ITALY, LUXEMBOURG AND THE NETHERLANDS

by

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F O R E W O R D

The present study is intended to serve as working material to assist the European Communities in their projected comprehensive unification of private international law. This purpose determines the objectives and also the limits of the study.

1. Given such a purpose, it would not be appropriate to pursue the usual objectives of comparative studies of law. The present work therefore cannot, and is not intended, either to set out concrete proposals for the material unification of the law (1), or to offer new solutions to problems remaining unsolved within the national legal systems. Specific private international law problems have also been left to be dealt with in other studies.

The present work is therefore chiefly confined to a comparative description of the prevailing law and to the highlighting of striking similarities and divergences.

2. The special regulations governing rights in aircraft will not be dealt with in this study. Although aircraft are movables, security rights in aircraft are largely based on the prevailing immovable property law and for that reason tend to fall outside the scope of this investigation. Moreover, for the majority of the member states of the European Communities (2) the Geneva convention of 19th June 1948 on the international recognition of rights in aircraft is now in force (3). Under the convention the signatories are obliged to a certain extent to harmonise real (in rem) rights in aircraft (particularly contractual non-possessory charges). Furthermore, the convention contains (4) the private international law stipulation that the basic law to be applied is the law of the country in which the aircraft is registered (lex loci siti). In this situation there appears to be little room for the inclusion of these rights in aircraft in the future harmonisation plans of the European Communities. But careful consideration will be needed when it comes to defining the limits of the harmonisation. If aircraft are to be completely excluded from the scope of a future agreement (5), there could be undesirable consequences. Thus, for example, the transfer of title to an aircraft is governed in German law by the general provisions of the Bürgerliches Gesetzbuch (civil code) relating to movables (6) and registration is not required. Retention of title ("Eigentumsvorbehalt") without the necessity for observation of any formalities and no doubt also fiduciary transfer of title by way of security ("Sicherungsübereignung") are thus permissible under German law (7). If a German aircraft under retention of title, were to be sold in France for instance, or if an aircraft subject to fiduciary transfer of title by way of security in Germany were to be legally seized in France, French law could not recognise these prior charges : they would come within the scope neither of the Geneva convention nor of the projected agreement.

There are of course good reasons for holding the view that this would be a useful result, because the person wishing to have a "secure security" would be forced to make use of the mortgage procedures laid down by the Geneva convention with their attendant publicity.

It would be possible to include aircraft in an agreed solution which avoided conflict with the provisions of the Geneva convention and was merely superimposed on them. From the point of view of private international law the lex loci sitae rather than the lex rei sitae would have to be declared to apply - contrary to the general rule - and this would have to be extended beyond the cases (8) dealt with in the Geneva convention (9). But the types of security recognised by the Geneva convention would have to continue to have precedence (10). This solution would not appear to be very sound.

3. Similar problems arise in the case of ships and ships under construction which can be mortgaged. In this sector however there is as yet no settlement comparable to the Geneva convention, although it appears that draft proposals are in the course of preparation (11). For this reason ships will also be excluded from the discussions which follow.

Notes

- (1) This would require, in addition, a detailed discussion of the legal systems outside the European Communities and in particular of the legal concept of the "security interest" under the American UCC.
- (2) Namely France, Italy, the Netherlands and Germany (see German BGB1. II, Appendix : index reference B, position at 31.12.1969, p. 142).
- (3) German BGB1. II, 1959, 129.
- (4) Art. 1 I of the convention.
- (5) As for example by the Fédération Bancaire in Art. 5 of their plan.
- (6) ss. 929 ff. BGB.
- (7) RONKE in ERMAN, Handkommentar zum Bürgerlichen Gesetzbuch, 4th ed., Vol. II, 1967, Introduction to s. 1204, end of note 6.
- (8) Art. 1 I.
- (9) See MAKAROV in RabelsZ 29 (1965), pp. 454, 455, under B.
- (10) Art. 1 II of the Geneva convention.
- (11) See FEDERATION BANCAIRE, p. 16.

A. I N T R O D U C T I O N

I. THE POSITION OF THE INDIVIDUAL TYPES OF SECURITY WITHIN THE LEGAL SYSTEM AS A WHOLE

A description of the types of security on movables in the legal systems of different countries cannot be restricted to the portrayal in isolation of individual legal concepts such as, say, retention of title. In order to grasp the full economic and legal significance of the different types of security, it is necessary to have regard to the position they occupy in relation to the remainder of the civil law system in question. Thus in the case of contracts of sale, for example, the full implication of retention of title does not become apparent until one has at least glanced at the other legal relationships between seller and buyer.

II. METHOD OF PRESENTATION

The above-mentioned considerations have determined the method of presentation used in this study. Instead of taking a horizontal section through all the countries for each individual type of security, when the examples grouped under any one type may perhaps resemble each other in name only, it has been thought preferable to present a total picture for each country. The classification of types of security in each national section has been carried out as uniformly as possible, so that it should be relatively easy to follow cross-references for a given legal concept from country to country. For the sake of clarity the text contains a certain amount of deliberate repetition, particularly in the treatment of the closely-related systems of Italy and France.

Some types of security can only be used to cover credit in the form of loans (1), others only for credit on goods (2).

This has made classification according to these two major economic purposes appear advisable. Legal concepts which feature in both types of loan (3) were classified according to their most typical economic purpose. Thus one can imagine, say, a debt for the purchase price of an article which is urgently required for current use being secured by the pledging of another asset which can be temporarily dispensed with (e.g. securities). Nevertheless the pledge is more typically used to secure a loan; this aspect has therefore taken precedence for classification purposes.

Efforts have been made in this presentation not to portray the national legal systems merely, as it were, from within, but to show how they stand in relation to the systems of their neighbours (4). It is possible however that the subjective viewpoint of the author, whose legal ideas are coloured by the influence of his native Germany, may have played a part here. The reader is expressly warned of this to enable him to make allowances for possible bias.

III. THE PASSING OF OWNERSHIP IN MOVABLE OBJECTS (5) (6)

1. As a rule the transition of the object sold out of the legal sphere of the vendor into that of the purchaser is not completed from one moment to the next, but in certain stages. The question as to who is formally the owner at any given time appears to be less important than, for example, the question of who bears the risk. In France, Belgium, Luxembourg and Italy the bearing of risk is admittedly linked as a general rule to the formal transition of ownership since these countries follow the maxim res perit domino. In Germany and the Netherlands on the other hand the change of ownership and the transition of risk constitute two completely distinct areas of problem under non-mandatory law (7).

Even when the purchaser is regarded, according to the letter of the law, as being already the owner of an object which is still in the possession of the seller, the question arises under French and Italian law, for example, as to whether his title is valid in the event of seizure by third party creditors or on the bankruptcy of the seller.

Again, the formal position as owner enjoyed by a person who has had property transferred to him by way of security on a fiduciary basis under German or Dutch law is no guide to the position of the same recipient of security on the bankruptcy of the giver of the security.

These points, selected by way of example, are merely intended to demonstrate that the statement that someone is the owner of a certain object does not have unequivocal force. His true material position in law is by no means always, but only tends to be, that of an unlimited power of disposition over the object against the whole world. An accurate idea of the legal power of the "owner" cannot be gained from the concept of ownership on its own but only from its functional role within the legal system as a whole. The present study attempts - without claiming to be exhaustive - to include the most important points of view in each case.

2. Leading specialists in this subject have moreover stressed, no doubt rightly, that the apparently fundamental divergence between the different legal systems arising in the case of the more technical problems, problems of legal construction, is often merely superficial. In the practical sphere, they maintain, there is a strong tendency to convergence (8).

In any case at least an outline knowledge of the different systems of transfer of ownership is necessary for an understanding of the general legal relationship between creditor and debtor. We will therefore examine this problem briefly from a general point of view (9) before turning to a detailed country-by-country analysis.

3. The attribution of movable objects to individual legal persons cannot be unalterably fixed once and for all; the legal system must therefore provide a set of instruments which makes possible a change of attribution. The following are the main solutions which may be considered feasible :

a) Principle of simple contract

The contract of sale also embodies the transfer of ownership. Transmission of the object to the buyer is not required in order to effect the transfer. This is basically the system prevailing in France, Belgium, Luxembourg and Italy.

b) Principle of transmission within the framework of a unitary contract

The contract of sale also embodies the legal elements necessary for the transfer of ownership. However, by way of further evidence of the change of ownership, an actual act of transmission is required, to publicise what has occurred. This was the rule laid down by the Prussian Allgemeines Landrecht of 1794 (10).

c) Principle of contract with separation rule

The intention, binding on the parties to the contract, to alter the attribution of goods (the contractual act which creates the obligation) is distinct from the realisation of the intention (the fulfilling disposition). The two legal acts may, but need not, take place at separate times. On the other hand there is no need for actual transmission of the object by way of publicity in order to effect the change of ownership (11).

d) Principle of transmission with separation rule

Intention and execution, the creating of the obligation and the real ("dinglich") fulfilling disposition are two distinct, but not necessarily time-separated, legal acts. But the disposition which transfers the title also requires, in addition to the legal element, the actual transmission of the object as an act of publicity. This principle applies in German and Dutch law (12).

4. The separation rule (c and d above) must be distinguished from the abstraction rule (13).

- a) The separation rule merely states that creation of obligation and actual disposition constitute two distinct legal acts. The abstraction rule goes a step further and states that the validity of the act of disposition must be judged without reference to the existence or efficacy of the act of creation of obligation on which it is based (14). In other words : the separation rule implies that creation of obligation and the act of disposition constitute two distinct steps; the abstraction rule, on the other hand, increases this separation to the point where the second step can even be made independently of the first. This connection between separation and abstraction rules has been a special characteristic of German law since the time of SAVIGNY (15).

- b) This will immediately lead one to query whether, under the German system, the purchaser may validly retain the object which has effectively become his property even if the legal contract of sale is void. That would indeed be an unjust result. The purchaser has certainly become the owner under the abstraction rule, but this does not mean that he may also remain the owner. Rather, the vendor has a contractual right to claim the retransfer of title back to himself because an "unjustified enrichment" has taken place (16).
- c) It is also possible that within a legal system the separation rule can apply but not the abstraction rule. In this case although the creation of obligation and the act of disposition still remain two distinct legal steps, the second (disposition) is not effective without the first (valid creation of obligation) : the causal act of disposition.

This is the predominating view of modern judicial practice in the Netherlands (17).

- 5. The principles of unity and separation (and abstraction) and the rules of consent and actual transmission are not embodied in pure form in any of the legal systems under consideration. Instead one finds many kinds of compromise between opposing principles (18).

- a) In the case of debts incurred in respect of items determined by generic description ("Gattungsschulden") even when the principle of consent is fully applicable the property cannot pass immediately upon conclusion of the contract of sale. Rather, an "individualisation" is required, which often does not take place until the time of transmission of the goods to the purchaser or to a carrier (19).

Then again, the transmission principle, in German law for instance, is no more than a general legal rule which has been considerably restricted by the admission in law of various substitutes for transmission (20).

- b) The separation principle in turn is merely a theoretical notion in the case of cash purchases. On the other hand the parties may agree, even when the unity principle applies, that the transfer of ownership should not take place immediately on conclusion of the contract but should be deferred, for example until payment of the last instalment of the purchase price (21). But if the transfer of ownership depends upon the agreement of the parties, this constitutes without question a step away from the unity principle in the direction of the separation principle.

Moreover, under the unity principle preliminary agreements can to a large extent assume the function of contracts of sale with a purely contractual effect that does not transfer ownership (22). Here, too, we see a result that constitutes an approach towards the separation principle.

- c) Nor is the abstraction principle of German law always strictly adhered to. Thus we find continued attempts to upset the act of disposition with the help of the same defect as the act of creation of obligation ("defective identity") by means of Sections 119 II, 123, 134 and 138, particularly para. 2, of the Bürgerliches Gesetzbuch. There is also nothing, in principle, to prevent disposition being made expressly conditional upon a valid creation of obligation ("conditional connection") (23). Finally, if one regards the acts of creation of obligation and of disposition as a "uniform act", one can in the case of

an invalid act of creation of obligation even cast doubt on the efficacy of the act of fulfilment through Section 139 BGB (24).

The acceptance of the principles of separation and abstraction in Germany following SAVIGNY (25) was a notable advance in the safeguarding of transactions. As common law followed the maxim nemo plus juris transferre potest quam ipse habet it did not recognise an acquisition in good faith by a person not entitled to acquire. (Easier acquisition by possession ("Ersitzung") only provided an imperfect substitute).

In this situation it aided the clarity and security of legal relationships that the transfer of ownership should be separated from shortcomings in their legal basis or from the complete absence of a legal basis. Once the acquisition in good faith by a person not entitled to acquire had been accepted (26), the abstraction principle largely ceased to have a function as transactions in good faith were no longer based upon it. The remaining effects of the abstraction principle are less desirable. Among these are the fact that, for instance, the right to claim restitution as a result of "unjustified enrichment" is not an effective weapon in the face of seizure by third-party creditors and only ranks as a normal debt in a bankruptcy. This explains the manifold attempts to find some means of circumventing the abstraction principle which has been indubitably established by the German Bürgerliches Gesetzbuch.

- d) In conclusion the situation can perhaps be summed up as follows : the solution for the regulation of the transfer of ownership offered by any one of the systems described above could equally well be arrived at under any of the remaining systems if the necessary express agreement were made by the parties. Thus the differences, at first sight fundamental, are finally reduced to the meaning of a rule of interpretation (27). No general assertion can be made however as to what tests are applied to the proof of an agreement which deviates from statute law.

Notes

- (1) E.g. the charge on a "fonds de commerce" under Belgian and Luxembourg law.
- (2) E.g. the "gage automobile" of French law, retention of title, and the seller's privilege.
- (3) E.g. the pledge; the motor vehicle mortgage in Italian law.
- (4) This may perhaps justify the risk inherent in entrusting the investigation to a single author rather than commissioning national reports from the various member states.
- (5) In the context of the present study this question has particular significance with regard to retention of title and fiduciary transfer of title by way of security.
- (6) Mention should be made of a private international law convention on this subject : the Hague convention on the law applicable to the acquisition of title in international purchases of movable objects, of 24.10.1956, reproduced in : Conférence de la Haye de droit international privé, Actes de la Huitième Session, 3 au 24 octobre 1956, La Haye, 1957, p. 340 ff. This convention has so far only been signed by Greece and ratified by Italy. There is little prospect of it ever coming into force (see KEGEL, Internationales Privatrecht, 2nd ed., Munich/Berlin (Beck), 1964, p. 255).
- (7) For more details see WAELBROECK, pp. 49 - 71.
- (8) v. CAEMMERER, Rechtsvergleichung und Reform der Fahrnisübergangung, in RabelsZ 12 (1938/39), 675, 682, 697 ff.; FRIEDRICH in SCHLEGELBERGER's RvglEWB, VI, "Übereignung"; GOTTHEINER, Zum Eigentumsübergang beim Kauf beweglicher Sachen, in RabelsZ 18 (1953), 356, 358 f.
- (9) For details see v. CAEMMERER, FRIEDRICH and GOTTHEINER, (as in previous footnote); BAUR s. 5 IV, s. 51 I; BIANCA, Riflessioni sul principio del consenso translativo, in Riv. dir. civ. 1969, I, 533; FLUME, Allgemeiner Teil des Bürgerlichen Rechts, Vol. II : Das Rechtsgeschäft, Berlin-Heidelberg-New York (Springer), 1965, s. 12 I, III; LARENZ II, s. 35 II; RABEL I, pp. 27-29; WAELBROECK, passim; ZAPHIRIOU, The Transfer of Chattels in Private International Law, A Comparative Study, London (Athlone), 1956, pp. 4-13.
- (10) ALR I 9, s. 3; I 10, s. 1. Demanded de lege ferenda for Germany by BRANDT, Eigentumserwerb und Austauschgeschäft, Leipzig (Weicher), 1940; KRAUSE, Das Einigungsprinzip und die Neugestaltung des Sachenrechts, in AcP 145, 312; LARENZ, II, s. 35 II d.
- (11) This is the normal rule under German law, not for the transfer of title to movables, but for the assignment of debts and other rights. See ss. 433 I 2, 398, 413 BGB.
- (12) See ss. 433 I 1, 929 first sentence BGB; the Dutch BW is still based on the concept of titulus and modus acquirendi which was current at the time of compilation (cf. Arts. 639, 667, 1495 BW). In teaching and practice however transfer of title is recognised as a particular, real ("dinglich") contract (see ASSER-BEEKHUIS, p. 148 ff. with further references; VÖLLMAR, Inleiding, No. 130; WAELBROECK, No. 31 f.).
- (13) See BAUR, s. 5 IV, 1, 2.
- (14) See BAUR, s. 5 IV, 1, 2.
- (15) s. 433 I 1 BGB stipulates that the contract of sale shall embody the creation of an obligation on the vendor to transfer the ownership. s. 929, first sentence, BGB governs the execution of the transfer of ownership; this provision does not make valid creation of obligation a prerequisite for the efficacy of the passing of title.
- (16) s. 812 I, 1, first alternative, BGB (the so-called "Leistungskondiktion") which, in the context of the validity of the abstraction principle, is of major practical significance.

- (17) In particular H.R. 10.12.1952, N.J. 1953, 550. In this connection see ASSER-BEEKHUIS, p. 157 ff. with further references; VÖLLMAR, Inleiding, No. 131; WAELBROECK, No. 33. Similarly Swiss law, at least in the case of transfer of title to real property, Arts. 656 I, 965 I, 974 II, 975 I ZGB. For movables Art. 714 ZGB merely lays down the transmission principle. Yet the causal character of the act of transfer of title is also recognised in the case of movables, see BGE 55 (1929), 302; GMÜR, Das schweizerische Zivilgesetzbuch, verglichen mit dem deutschen Bürgerlichen Gesetzbuch, Bern (Stämpfli), 1965, p. 146 f. BGE 55 (1929), 302 admits a particular, real act of disposition also for movables and thus recognises the separation principle; criticism thereon in HAAB/SIMONIUS, Kommentar zum Schweizerischen Zivilgesetzbuch, Vol. IV, Part I, 7th ed., Zürich (Schulthess) 1948, Art. 714 ZGB, notes 34-45. The existence of such a system of separation without abstraction in Germany is supported de lege ferenda by HECK, Das abstrakte dingliche Rechtsgeschäft, Tübingen (Mohr) 1937; NOLTE, Zur Reform der Eigentumsübertragung, Stuttgart (Kohlhammer) 1941; Heinrich LANGE, Rechtsgrundabhängigkeit der Verfügung im Boden- und Fahrnisrecht, in AcP 146 (1941), 28; by the same author, Rechtswirklichkeit und Abstraktion, in AcP 148 (1943), 188.
- (18) v. CAEMMERER, FRIEDRICH and GOTTHEINER (see footnote 8) are apposite.
- (19) See for instance Art. 1378 of the Italian CC, particularly the second sentence.
- (20) See ss. 929 a - 931, 934 BGB; SÜSS, Das Traditionsprinzip - ein Ativismus des Sachenrechts, in Festschrift für Martin Wolff, Tübingen (Mohr) 1952, p. 141. Admittedly the wording of the Dutch BW does not expressly provide for the transmission-substitutes of constructive possession and assignment of claim to restitution (see Art. 667 BW); but judicial practice and teaching have unanimously declared these concepts to be admissible (see H.R. 22.5.1953, N.J. 1954, 189 for constructive possession; its admissibility is a precondition for the recognition of a fiduciary transfer of title by way of security; see H.R. 1.11.1929, W. No. 12059 and 3.10.1934, W. No. 12851 for assignment of claim to restitution, and in this connection also ASSER/BEEKHUIS, pp. 187-189.
- (21) See for instance Arts. 1523/1524 Italian CC.
- (22) See HENRICH, Vorvertrag, Optionsvertrag, Vorrechtsvertrag (comparative studies), Berlin/Tübingen (de Gruyter/Mohr), 1965, p. 20 ff. (esp. p. 27), p. 41 ff. (esp. p. 49); COLLIN/CAPITANT/JULLIOT DE LA MORANDIERE, II, p. 339; MALAURIE in D. Rép. civ., "Promesse de vente", No. 11; JCI Civ., Art. 1589, No. 5 ff.; FERRI, Manuale di diritto commerciale, unchanged reprint of 2nd ed., Turin (UTET) 1966, p. 597 f.; DISTASO, I contratti in generale, Vol. I, Turin (UTET) 1966, p. 439 ff.
- (23) For transfers of title to real property this way is however barred by s. 925 II BGB.
- (24) In connection with these breaches of the abstraction principle see BAUR, s. 5 IV 3. In the case of the transfer of title to real property German law similarly observes the separation-and-abstraction principle, but attempts to prevent disposition without the valid creation of obligation by making the transfer dependent on the evidence of a contract of sale - s. 925 a BGB.
- (25) See SAVIGNY, System des Heutigen Römischen Rechts, Vol. III, Berlin 1840, pp. 312 f., 359-361, Vol. IV (1841), pp. 158-160, Vol. V (1841), pp. 521 f.; by the same author, Das Obligationsrecht als Theil des Heutigen Römischen Rechts, Vol. II, Berlin 1853, pp. 256-260. For further details see FELGENTRAEGER, Friedrich C.v.Savignys Einfluss auf die Übereignungslehre, Leipzig (Deichert), 1927.
- (26) For movables see ss. 932 ff. BGB.
- (27) One exception must be made to this thesis however : where the principle of causal acquisition of property applies there is no possibility at all of abstract acquisition of property.

B. F R A N C E

I. CREDIT IN THE FORM OF LOANS

1. The pledge

- a) For the traditional pledge French law requires, in addition to the pledging contract, the divesting of possession by the pledgor either to the pledgee or to a third party agreed by both pledgor and pledgee (the "tiers convenu" or pledge-holder) (1). If the object is in the possession of a third party, notice must be given to him and his formal acceptance of the fact that henceforth he holds the object for the pledgee must be obtained (2). Qualified co-possession by (would-be) pledgee and pledgor (3) is not sufficient to create a pledge.
- b) The requirements as to form differ in civil and commercial law. Under civil law the pledging requires public declaration or a private document which gives precise details of the debt secured and the pledged object (4). The law further stipulates (5) that where a private document is used it must be "dûment enregistré", i.e. it must bear the duty stamp and an authenticated date. It is however accepted that any other form of "date certaine" (6) is sufficient (7). According to the predominating view, these requirements as to form do not affect the relation of the parties one to another but are merely a prerequisite for the validity of the transaction against third parties (8).

Under commercial law the creation of a pledge without observation of the formal requirements is also valid against third parties (9). Commercial law is applicable when the secured debt arises from a commercial transaction, whether the pledgor is a trader or not (10).

- c) The effect of the pledging is that the pledgee gains the right to preferential satisfaction in the case of execution or bankruptcy, with - in recent years - precedence over all other creditors in the case of bankruptcy (11). He further has a right of retention (12) which in French law is also valid against third parties (13). So long as a bona fide acquisition does not supervene, the pledgee can also uphold his right against third-party purchasers ("droit de suite").
- d) The realisation of the pledged property requires a court decision (14) in civil law, whereas in commercial law sale by public auction is permissible when repayment becomes due, after 8 days notice given by the pledgee to the pledgor and to any person having the object on hire or lease (15).
- e) If the pledge-holder (16) is a general warehouse ("magasin général"), the goods stored can be pledged by means of a special "warrant". The warrant is an instrument transferable by endorsement, which embodies both the debt (17) and the security created for the debt (18). This method enables credit to be mobilised particularly easily.

A certain relaxation of the strict rules governing pledges and a small step in the direction of a non-possessory pledge are evidenced by the fact that in the case of the warrant the requirement of giving notice to the pledge-holder and the latter's declaration (19) that henceforth he wishes to hold the object on behalf of the new pledgee are dispensed with (20).

A further point worth noting is that the principle of real subrogation has gained explicit legal recognition with this form of security (21).

Finally it should be mentioned that it is possible to use as security a portion, determined solely by quantity, of a larger parcel of goods (22). Physical separation or other "individualisation" of the goods is not required. Here we see the principle of speciality abandoned.

Until recently a creditor who held security in the form of one of these warrants had a special advantage over the normal pledgee in that his claim had precedence over that of the tax authorities. This precedence is now granted to every pledgee (23).

2. Sale and repurchase

As long ago as the era of canonical law, when the charging of interest was prohibited, a stopgap formula was found in the device of the sale with a repurchase clause. In this way an attempt was made to create what was in effect an interest-bearing loan, either by treating the sum lent as the "purchase price" and the interest on the loan as "rental" for the object which was left with the "vendor" "by way of hire", or by compensating the purchaser by allowing him to use the object. This same formula could be used today to provide the lender with a real security for his loan. Only by making use of his right of repurchase and by repaying the "purchase price" would the debtor regain his property (24). An advantage over the genuine pledge, and thus the purpose of this device, would be that the borrower would not need to let the object out of his hands but could continue to use it as a "hirer".

Such an arrangement was in fact sanctioned by several fairly old decisions (25), but in later years contracts of this type were held to be prohibited forfeitable pledges (26) and were refused recognition on account of being designed to circumvent the law (27).

But if the parties are primarily concerned with creating a non-possessory pledge rather than a forfeitable pledge, they could agree to a disposal of the object pledged as security in a manner analogous to that provided by the rules governing pledging and could thus escape incurring nullity on the grounds of violation of the prohibition on forfeitable pledges.

As far as one can see, cases of this kind do not occur in practice nowadays. From the prevailing economic point of view we are dealing with a typical example of a trust by way of security (fiduciary transfer of title by way of security). But in common with all other legal systems based on Roman law the French system takes exception on principle to legal acts of a fiduciary nature (27 a). This rejection of fiduciary transactions appears to go so far in France (28) that the variant of the "sale with repurchase clause" just described is barely discussed at all in present-day judicial practice and literature (29).

3. The "gage automobile"

It should be mentioned by way of explanation at this juncture that under French law the "gage automobile" can only be used to provide security for the purchase of the motor vehicle itself, i.e. for the debt due to the vendor or to a third-party financing the purchase but not for any other debts (30).

4. The "warrant agricole"

a) In imitation of the warehouse warrant (31) the legislators have created a whole series of mutually similar non-possessory pledges. They are also called "warrants" and are documents transferable by endorsement which embody both the debt secured and the real security. But whereas in the case of the warehouse warrant the goods serving as security are in the possession of a third party as pledge-holder and the transaction can thus be classified immediately as a pledge, the goods serving as security in the case of the warrants to be discussed here under headings 4 - 8 remain in the direct possession of the pledgor. We are therefore dealing with non-possessory pledges ("warrantage à domicile").

b) The urgent credit requirements of agriculture were the first to be catered for in this way, when the "warrant agricole" was created (32). This type of warrant makes it possible for farmers and farming cooperatives (33) to provide security for loans.

The farm equipment, to the extent that it belongs to the loan debtor, serves as security (34). The contract by which it is agreed that this form of security shall be provided must be entered in a special register with the "juge de paix" (35).

c) As far as its effect against third-party creditors is concerned the registered warrant resembles the normal pledge in that the creditor receives preferential satisfaction (36).

d) Despite the publicity attendant upon entry in the public register the creation of a warrant does not ensure validity against bona fide third-party purchasers, i.e. does not confer a "droit de suite". But bona fide acquisition of freedom from encumbrances is possible (37).

In the case of wine and other liquors the recipient of security can gain a great degree of protection against third-parties acquiring in good faith in that the authorisations which must be obtained from the tax authorities prior to sale can be made to be dependent on his approval (38).

e) The realisation of the goods serving as security follows a procedure which lies midway between the realisation of pledges under civil law and the realisation of pledges under commercial law : after the due date has passed and after a reminder by the creditor which has proved ineffective, the creditor may serve on the debtor a final demand for payment, by means of a registered letter. Fifteen days thereafter the "juge de paix", on application from the creditor, fixes a date for the auction of the goods serving as security (39).

5. The "warrant hotelier"

Another special law (40) gives hoteliers the possibility of using the hotel equipment as security for loans. The individual provisions of this law correspond for the main part to those of the "warrant agricole" (41).

This form of security has acquired practically no importance (42), chiefly, no doubt, because creditors prefer the greater scope offered by the "nantissement du fonds de commerce" (43).

6. The "warrant pétrolier"

Licensed importers of petroleum can use a warrant to create a non-possessory security on the basis of their stocks of petroleum and petroleum products (44), a right which was in part granted as compensation for the state-imposed obligation to hold reserve stocks. As this form of security, too, has gained relatively little acceptance (45), it should suffice if attention is drawn here to a peculiarity worthy of note : the security consists of a given quantity of petroleum or petroleum products of a given quality, without any requirement that it should be separated from the main body of the stocks in question (46). The principle of speciality has thus been abandoned.

7. The "warrant sur stocks de guerre"

This form of warrant was conceived to meet wartime needs and resembled the "warrant pétrolier". The law which introduced it was only temporary and was not renewed after the end of the second world war (47).

8. The "warrant industriel" (47 a)

This form of non-possessory real security can be utilised by industrial concerns in possession of a so-called "lettre d'agrément" (48). The "lettre d'agrément" is a request from the state to produce goods of a stated type and quantity. These end products can be pledged with the help of the "warrant industriel". This warrant breaches the speciality principle in the same way as does the "warrant pétrolier".

9. The "nantissement d'un fonds de commerce"

As well as the seller of a "fonds de commerce" being able to secure for himself a bankruptcy-proof seller's privilege in respect of the "fonds", (49) the owner of a "fonds de commerce" can likewise use it to provide himself with a bankruptcy-proof security for credit (50).

In contrast to the seller's special privilege however the "nantissement" cannot cover stocks of goods (51). The assets to be charged thus consist largely of intangibles although movables consisting of goods not intended for resale are included. A further difference from the privilege of the seller of a "fonds de commerce" lies in the fact that a "nantissement" does not involve a division of the assets charged into separate elements such as "plant and equipment" and "intangible assets" (52).

For further information the reader is referred to the section dealing with the seller's special privilege (53).

10. The film mortgage

- a) Since all films to be shown in France and indeed all film-making projects in progress, are, for different reasons, entered in a central public register, an obvious course was to make this register the basis of a special film-mortgage system (54). The object charged can be the film material itself or the copyright or both at the same time (55).
- b) Acquisition in good faith is excluded, realisation takes place on the order of the president of the tribunal de commerce de la Seine under the provisions applying to the "fonds de commerce". The mortgagee has first claim on the sale proceeds, even in priority to debts due in respect of wages and salaries (56).

II. CREDIT ON GOODS

1. The general rule applicable to sales

- a) Under French law the general rule is that the buyer of a specified individual movable object (species) acquires the property therein directly upon conclusion of the contract of sale (57).

Influenced by opinions as to what is natural and reasonable, (58) the French Code Civil adheres to the principle of consent between the parties (59) and a physical act of delivery is therefore not regarded as essential for a transfer of ownership (60).

Although an informal contract for the sale of movables is valid (61), it should be noted that in the case of a dispute involving a value of over 50 F proof can as a rule only be effected by means of documents (62).

Unlike German law, for instance, French law recognises no division between the act of creation of obligation and the act of disposition. On the contrary, the contract of sale and the passing of title constitute a single uniform act in law (63). Efforts (64) to introduce a separation between obligations and proprietary rights in France have not succeeded up to now.

There are however isolated authors in French legal literature who argue that the principle of separation and hence the concept of the "real contract" are already in existence (65). These voices remain in the minority. Certainly there appears to be no mandatory legal provision which would stand in the way of an express arrangement by the parties to bind themselves initially as to obligation only and to defer agreement about the transfer of ownership until a later point in time.

- b) The property also passes immediately on conclusion of the sale in accordance with the rule just described above when goods are sold en bloc. This is so even where the price is based on weights, quantities or dimensions which have not yet been established (66).

- c) In the case of debts incurred in respect of items determined by generic description (genus) (67).

There is no question of an immediate passing of title upon conclusion of the sale. There is no express legal provision governing the transition of ownership in this case (68). It is accepted that with debts of this kind (69) the ownership passes in principle when the goods are "individualised" (70). However, the point in time at which an individualisation can be said to take place is disputed (71).

- d) If future objects are sold, the buyer acquires ownership in them at the time when they come into being (72), not at the time of delivery.
- e) A contract for the sale of an object belonging to someone else is declared by a specific legal provision (73) to be void (74).

As this rule has been fundamentally unsuccessful, it has been interpreted very narrowly (75). Thus there is agreement that only the buyer can invoke this nullity clause (76). The situation can be remedied by subsequent ratification on the part of the true owner (77) and the buyer then acquires the title at the moment of ratification. More important, the situation is also remedied if the seller subsequently acquires the object (78). Even here the seller no doubt first holds the title for a theoretical second of time before it passes on to the buyer.

There is from the outset no question of nullity if the parties agree that, contrary to the general rule (79), the title shall not pass to the buyer immediately upon conclusion of the sale (80).

- f) The circumstance that the buyer is already the owner of the goods upon the conclusion of the sale does not however endanger the security for the purchase price debt. This is because the seller has the right of retention of the goods. He can withhold delivery (81) until the purchase price has been paid, except when he has contracted to make delivery before receiving payment (82). Even in the latter case he can invoke his right of retention if the buyer becomes bankrupt or insolvent and fails to provide security (83). The right of retention is also valid against third parties (84). It can thus be upheld for example against a third party purchaser to whom the buyer has meanwhile resold the goods and who for his part has already become the owner (85).

2. The right to restitution (revendication)

- a) If the seller has made delivery before payment even though he was not obliged to do so, he can restore the status quo by instituting an action for the return of the goods within 8 days of delivery, i.e. of physical transmission to the buyer (86). A prerequisite for the success of this course of action is that the goods should still be in the possession of the buyer and should be in an unaltered condition.
- b) In the event of the bankruptcy of the buyer the seller does not have this right to reclaim the goods (87). He can however, even in this event, retake the goods so long as they are still in transit to the buyer or his selling agent (88). Even this possibility is closed to the seller if the buyer has meanwhile sold the goods to a third party as "goods in course of transportation" by means of invoices or consignment documents (89).

3. Rescission of contract in the event of non-payment

- a) Should the buyer not pay the purchase price when it falls due, the seller may take steps to rescind the contract. As a rule he must first bring an action to this effect and the court will pronounce as to rescission (90).
- b) Rescission of the contract restores the title to the goods to the seller and thus gives him the possibility of reclaiming them as owner. In the event of the bankruptcy of the buyer this would result in the segregation of the goods from the rest of the estate. Segregation is only admissible however if rescission of the contract has taken place before the commencement of the bankruptcy (91) or if the action for rescission had already been instituted before the commencement of the bankruptcy (92). The rescission itself is therefore subject to the same restrictions (93).

In cases where rescission of the contract is admissible, the seller may reclaim not only the goods themselves but also the proceeds of a further sale of the goods ("Ersatzaussonderung") (94).

- c) The stipulation that rescission of the contract has to be effected by the bringing of an action is not mandatory. The parties may thus agree that under certain conditions a dissolution shall take place automatically (95).

Tacit agreement to a clause of this kind is however barely admissible. An express understanding ("clause résolutoire expresse") is generally required (96). Without such an express clause the seller cannot unilaterally rescind the contract of sale (97).

- d) The "condition" must nevertheless have occurred before the commencement of bankruptcy, as rescission due to "the occurrence of a condition" is subject to the same limitations (98) as rescission by action at law (99). The mere "occurrence of a condition" - payments falling into arrears for instance - is not of itself sufficient. Rather, the seller ought to have declared unequivocally before the commencement of the bankruptcy that he intended to invoke rescission of the contract (100). We are therefore dealing basically with a "right to reconstitution" ("Gestaltungsrecht").

4. The seller's privilege

- a) Every seller of a movable object has a special privilege with regard to that object in respect of the unpaid purchase price (101).

It is open to dispute whether special privileges with regard to movables should in general be considered to constitute genuine absolute rights in the goods in question (102). In practice the question does not generally arise as the third-party purchaser in any case usually acquires the title to the goods free of encumbrances as a result of acquisition in good faith (103). The problem of an absolute right against the whole world ("droit de suite") only becomes really significant therefore when we are not dealing with acquisition in good faith, i.e. in the event of bad faith on the part of the purchaser or when the goods have been lost by or stolen from the owner (104). Moreover, by virtue of an express provision (105), the seller's privilege in particular is dependent on the buyer still having the

goods in his possession. The question as to the "droit de suite" is thus only relevant in those cases where the buyer has resold the goods but still has them in his possession. It is disputed whether in such a case the seller can validly invoke the seller's privilege or not (106).

There is, on the other hand, agreement that the privilege extends to the purchase price debt and the purchase price resulting from a further sale (107).

There is also a type of subrogation on the sale of seed-corn and similar items to farmers. The seller's privilege here extends to the proceeds of the harvest in question (108).

- b) In the bankruptcy of the buyer the seller's privilege only applies in the same limited way as rescission of contract and the resultant segregation of the goods (109). The reader is therefore referred to the section of this study dealing with these matters (110).

It is to be noted that the seller's privilege is chiefly to be seen at work in the case of an individual execution, whereas in bankruptcy it is only effective in certain - admittedly important - exceptional cases.

- c) A particular case : the privilege of a seller of a "fonds de commerce"

The sale of a "fonds de commerce" (111) involves not only movables but also all goods, means of production, intangibles etc., excluding land and, in principle, contractual relationships (112).

Nevertheless movables constitute a substantial part of a "fonds de commerce" as a rule, so it will be appropriate to examine briefly the aspects of the sale of a "fonds de commerce" which are relevant to our investigation.

The special peculiarity of the seller's privilege in this case is that it can be upheld in bankruptcy (113) and also against third-party purchasers ("droit de suite") (114). But a "droit de suite" is only valid against the third-party purchaser of the entire "fonds de commerce". Individual movable objects, by contrast, can be acquired in good faith free of encumbrances.

In order for the privilege to be valid, the contract of sale requires at least a stamped private document, duly authenticated, and entry in a special register at the office of the "tribunal de commerce" at the relevant place of business within 15 days from the conclusion of the sale (115). The privilege remains in force for 10 years and this period can be extended (116). This special seller's privilege includes only the firm name and the right to rent shop-premises and/or workshops and customer goodwill, unless further-reaching arrangements have been made in the contract (117).

In contrast to the creation of a "nantissement" (which gives security in the form of a charge) of a "fonds de commerce" in respect of other debts than those arising from the sale of the "fonds de commerce" itself (118), the subject of the seller's privilege which we are discussing here is not a unified whole. For a start the sale price has to be apportioned over the groups "goods", "plant and equipment" and "intangibles" (119). Partial privileges arise accordingly; both

voluntary payments by the debtor and the proceeds of a compulsory sale must be divided up and allocated over the groups (120). As there is a possibility under this rule that the seller does not receive full satisfaction in the "goods" group, for example, while in the "plant and equipment" group a surplus is achieved for the other creditors, a "nantissement" which does not permit the apportionment of the security over several groups is often agreed in practice (121).

5. Retention of title

a) The legal construction

The rules under which a purchaser acquires the title to goods directly upon concluding the contract of sale (122) are not mandatory. The parties are at liberty to agree that the property in the goods shall pass at a different point in time (123).

Thus the transfer of title can be fixed for the time when payment of the purchase price is completed. An agreement of this kind is usually made by means of the "réserve de propriété" clause. There is almost unanimous concurrence that the whole contract is not subject to this one condition. For if the seller wished to arrange, by means of a condition, that he did not lose his title until payment was completed, it would be a condition precedent (124). In that case the efficacy of the contract of sale would depend on the will of the buyer, that is, on whether he paid. The seller would not be able - for lack of a fully valid obligation - to sue for payment.

It would be easier to regard the "réserve de propriété" as a "clause résolutoire expresse" (125). But this would mean that the buyer would have to be treated as the owner. In a bankruptcy the seller would from the outset have no chance of having the goods segregated (126), nor could he oppose seizure by a third-party creditor, as he would not himself be the owner.

One solution favouring the seller would be to assume the existence of a real act of transfer of ownership distinct from the contractual sale agreement. In this case the sale would be unconditional and the transfer of ownership subject to a condition precedent (127). But the separation principle and with it the idea of the real ("dinglich") contract are rejected by the prevailing opinion in France (128).

Opposed to this predominating view however there is a not inconsiderable school of thought which holds that, in a sale with retention of title, the contract of sale is unconditional and only the transfer of ownership is subject to a condition precedent (129). If the sale is regarded as unconditional and the passing of the property as conditional, this would argue to a certain extent the existence, at least in theory, of two distinct legal acts - in other words the separation principle (130). This is by no means the only possible interpretation. One could also suppose that there was a single legal act that was made unconditionally but with a view to conditional transfer of ownership. Finally, one could make the dogmatic interpretation that by virtue of the autonomy of the parties payment of the purchase price was a characteristic feature of the transition of ownership.

In conclusion it may be said that the dogmatic interpretation of retention of title in France remains much disputed, frequently without any great degree of conceptual clarity (131).

b) The moment of agreement

There appears to be little doubt in France that retention of title must be agreed immediately upon conclusion of the sale. A later declaration - upon delivery, say - that there is to be retention of title, made unilaterally by the seller, is ineffective because the buyer has already acquired ownership under the general rules.

Even a mutually agreed subsequent retention of title comes up against objections from the point of view of legal construction. The problem becomes important in the practical sphere when, for example, a normal contract of sale is first concluded but the parties later agree to postponement of payment with retention of title. In this case the title would first be transferred back to the seller, then transferred once again to the buyer, this time subject to a condition precedent.

But it is questionable whether this construction would find favour. If one considers the economic result which the parties are aiming at, one can hardly deny that the buyer, who has already acquired the title to the property, makes a fiduciary transfer of title to the seller by way of security. This concept is not however recognised by French law.

c) Efficacy inter partes

Although the efficacy of retention of title inter partes is accepted, it is not particularly important in commerce. In the event of non-payment the seller could bring about the rescission of the contract (132) and by the same means would regain the title to the goods. Thus to reach this goal the seller does not require retention of title. On the contrary : by retaining the title the seller may be taking upon himself a far-reaching disadvantage. For, following the maxim res perit domino (133), the seller would have to bear the risk of the chance loss of the goods right up to the time of completion of payment. Admittedly the bearing of risk is not linked to ownership by virtue of mandatory law and the parties may agree otherwise (134); but it is doubtful whether the courts would recognise the mere retention of title clause as constituting at the same time a contrary agreement with regard to the passing of risk (135).

d) Efficacy against third parties

Whilst there has been much controversy over the theoretical problems of retention of title, there is a large measure of unity concerning its actual effect including its efficacy in relation to third parties. Here - in contrast to Italian law in particular (136) - there is no difference between third-party creditors and third-party purchasers.

Retention of title has no doubt been "invented" by sellers primarily in order to give them a better position in a bankruptcy than ordinary creditors. Judicial practice has however substantially denied recognition to retention of title in this most important situation (137). It can only be invoked subject to the same restrictions as the action for rescission, the "clause résolutoire expresse" and the demand for restitution in the case of a cash sale (138).

But it is generally admitted that retention of title can be upheld against seizure by a third-party creditor in an individual execution (139) and that the seizure can be set aside by means of an "action en distraction" (140).

In maintaining retention of title in the face of third parties in this way, the observation of a particular form is not required, at any rate not in substantive law (141). But even here the particularities of the French law of evidence must be observed. Apart from the rules already mentioned (142), it should be noted that retention of title against third parties requires a "date certaine" (143). In commercial law this does not apply however (144).

e) Alteration of the goods

If goods subject to retention of title are joined with other goods, the owner of the principle part of the goods becomes the owner of the whole, but must reimburse the owner of the subsidiary part for his share (145). Separation can be demanded, in spite of the possible damage which might occur to the principle part of the goods, if the subsidiary part is substantially more valuable than the principle part and if the "joining" has taken place without the owner's knowledge (146).

In the case of an inseparable mingling or mixing of the goods a proportional ownership arises. If it is possible to separate the goods again, any owner who was unaware that mixing was going to take place, may demand separation (147). If one owner's share of the goods is superior to the others in quantity and value, he can acquire the ownership of the whole if he reimburses the other owners (148).

If material has been transformed so that the value of the new object is substantially greater than that of the original material, the person who has carried the work of transformation can acquire the ownership of the new object if he reimburses the original owner for the value of the material (149). When material belonging to different owners is transformed, proportional ownership arises on the basis of the values of the material used and the value of the work involved (150).

f) Installation of the object into real property

The retained title expires if the object in question is so installed in real property as to become "immeuble par nature" (151). On the other hand, in cases where an object normally becomes "immeuble par destination" (152), there is no extinguishment of title for only an object belonging to the owner of the real property can be "immeuble par destination" (153).

g) "Extended" retention of title

As retention of title has proved to be ineffective in bankruptcy in French law and sellers have therefore preferred to use other forms of security, retention of title as such has no great practical significance. This is even more true of its extended forms, which in German law have gained wide currency and have been the subject of perceptive discussion in judicial practice and jurisprudence. As far as one can see, such questions have not become topical in France.

The chief case of extended retention of title, namely the assignment in advance of debts due in respect of resale, meets with considerable difficulties in French law. The difficulties arise firstly from the fact that an assignment by way of security (fiducia cum creditore) is involved, which is not generally recognised in France (154). Secondly, for the assignment to be effective - at least in relation to third parties - notification to the third-party debtor is required ("signification") (155). Moreover, if this complicated course should be taken there is no reason why the action should not be regarded as a normal pledging (156) and not as an assignment by way of security. Finally, and quite apart from the problems of "signification", the admissibility of the assignment of future debts in French law is disputed (157).

Even the so-called transformation clause, by means of which the supplier of materials attempts to extend to the finished products his right of retention of title is evidently almost unknown in French practice (158).

6. "Location-vente"

- a) Whereas a seller in Italy, for example, has at his disposal a fairly wide range of methods of security that will withstand bankruptcy, and in Germany is comprehensively covered in this respect, in France - as already stated - this is not so. This state of affairs has stimulated the imagination of sellers in France to find other ways of obtaining a security that is, above all other qualities, proof against bankruptcy. As it is acknowledged that a landlord or lessor can have his property segregated in the bankruptcy of his tenant, attempts have been made to build into the contract of sale elements of a letting in such a way as to give the seller the right of segregation in the bankruptcy of the purchaser. The buyer is designated the "lessee" and the instalments of the purchase price are described as "rent". Once the amount of "rent" paid has reached the value of the goods, the "lessee" becomes the owner (159).
- b) Judicial practice has established however that this procedure merely constitutes a change of name which cannot alter the character of the contract of sale. The courts have therefore correctly treated such contracts as credit sales (with retention of title ?) (160).
- c) Attempts to suggest that a loan ("prêt à usage") or deposit ("dépôt") of the goods has been made by the seller to or with the purchaser have met with a similar fate (161).
- d) As an interim conclusion it may be stated that all clauses by means of which the seller tries to extend his preferential right in law ("privilège") beyond the point of commencement of bankruptcy are unsuccessful (162).

7. "Location - promesse de vente", leasing, "essai-location"

- a) One type of transaction however has proved to be capable of withstanding a bankruptcy. This is where the later seller of the goods leases them initially to the future purchaser, but where the lessee - in contrast to the lessee in a "location-vente" - remains free to decide whether or not on the expiration of the rental period he will accept the lessor's offer of sale (163). Judicial practice insists that the contract should be

clearly worded to distinguish this type of transaction from a "location-vente". The possible purchaser's freedom of decision must be unequivocally stated (164). Furthermore the rent charged must be reasonably consistent with the usage value of the object, and the transfer price must not be merely a symbolic amount (165).

- b) A particular variety of the "location - promesse de vente" which has gained ground recently is the "leasing" or "crédit-bail" (166).

The leasing firm's ownership permits it to segregate its property in the bankruptcy of the leasing customer, provided the transaction is not in reality a concealed credit sale (167).

- c) Similar to the "location - promesse de vente" is a method which combines elements of rental with sale on approval ("essai-location"). Here too the subject matter is not definitely sold, but the lessee remains free to decide whether he will eventually acquire it or not (168). And here too the (possible) seller can have the goods segregated in the bankruptcy of the (possible) purchaser (169).

8. The "gage automobile"

- a) When, in 1934, the Cour de Cassation laid down, in two decisions of principle (170), that retention of title could not be upheld in a bankruptcy, the legislators felt that some action was required of them. Accordingly a special law (171) was passed which now gives sellers of motor vehicles (172) and third parties financing the purchase of motor vehicles (173) the chance to obtain a real security whose chief characteristic is that it is proof against bankruptcy. Technically this has been achieved by the creation of a special kind of pledge ("gage automobile"). In fact it is basically more a question of a mortgage on movables.

- b) It is disputed whether what is involved here is a means of security provided by the law or one which must be agreed contractually (174). However that may be, the sale or financing contract must be evidenced by a private document duly stamped and authenticated in order to be valid against third parties (175). This provision as to form applies to commercial acts as well (176).

The contract also requires entry in a public register at the prefecture which licensed the vehicle (177). The seller receives an official confirmation of the registration which carries with it the legal fiction that he is the owner. The seller or the financing third-party is thus treated as a pledgee and accordingly retains his preferential position even in a bankruptcy.

The charge lasts initially for 5 years only and can then be extended once for another period of 5 years (178).

- c) The publicity attendant upon the charge could be a justification for the exclusion of bona fide acquisition free from encumbrances. Whether this conclusion can in fact be drawn is however the subject of controversy (179).

- d) Realisation in every case follows the provisions of commercial law. Under these provisions the creditor need only inform the debtor, after the debt has fallen due, of his intention to realise. 8 days thereafter he has the right to realise the security at a public sale, without obtaining any judicial authorisation (180).

In the bankruptcy of the buyer the creditor may demand satisfaction before all other privileged claims as though he were a genuine pledgee (181).

9. Relationship between retention of title and the "gage automobile"

Under Italian law the seller of a motor vehicle, with retention of title and the special motor vehicle mortgage, has two equally valuable means of security at his disposal. The relationship of the two types of security to each other has therefore a certain practical significance in Italy (182).

As retention of title is ineffective in a bankruptcy under French law, no seller will omit to secure himself by means of a "gage automobile". Only if he has forgotten to do this but claims to have retained the title to the vehicle and the vehicle is then the subject of individual execution, does the problem of the relationship between retention of title and a non-possessory charge in the shape of the "gage automobile" arise under French law. In this rather theoretical case one should not regard the "gage automobile" as the only possible form of security for the seller, but should also take account of retention of title with its usual scope.

10. "Nantissement de l'outillage et du matériel d'équipement professionnel"

- a) In order to promote the sale of capital goods the legislators have created for the sellers or financing third parties of such goods a further bankruptcy-proof means of security (183).

Not only traders but all the professions, for example, are considered as potential givers of security. The decisive factor is simply that the objects purchased should consist of equipment used for professional purposes. The charge lasts 5 years and can be renewed twice (184).

The credit and security agreement must be contained in the contract of sale and must be entered within 15 days in a special register at the office of the tribunal de commerce at the purchaser's place of business (185). At the creditor's request the equipment serving as security must also be marked with a notice to the effect that it bears a charge (186).

- b) Only when this notice of pledging is affixed to the equipment serving as security will the creditor's rights be valid against third-party purchasers (187); the publicity attendant upon registration is thus not of itself sufficient to exclude acquisition in good faith (188).
- c) Realisation takes place in a similar manner as with the "gage automobile" (189).

- d) Validity against third-party creditors is not dependent on the display of the notice mentioned above. The creditor has the right to preferential satisfaction of his debt - even, and particularly, in a bankruptcy - with precedence over all other privileges except court and maintenance costs and certain claims in respect of wages and salaries (190).

To preserve precedence over possible prior mortgagees, over the vendor of the undertaking and over creditors with a "nantissement" on the "fonds de commerce", notice must however be given to these creditors within 2 months (191).

- e) If the equipment serving as security is installed in real estate the creditor's preferential right remains intact in the event of the equipment becoming "immeuble par destination" (192).
- f) Regarding the relationship to other forms of security it is the rule that the "nantissement de l'outillage etc." cannot extend to motor vehicles, ships or aircraft (193). In the case of these objects, therefore, the seller must make use of the appropriate means of security provided by special legislation.

As far as retention of title is concerned, the same considerations apply as in the discussion of the "gage automobile" (194).

11. Particularities of instalment-purchase of consumer goods

Mention has already been made of the special rules for the purchase of motor vehicles and professional equipment on credit.

Unlike the other countries France has undertaken no general comprehensive codification of the law relating to instalment-purchase. Various provisions are to be found which contain rules for the protection of the inexperienced buyer from exploitation. Under these rules the seller or financing third-party must make clear disclosure of the credit terms to the borrower. In addition the permitted credit amounts and duration are laid down (195). Violation of these provisions not only results in penal sanctions but leads to the complete nullity of the transaction (196). The provisions do not however contain any special rules regarding the seller's security.

Notes

- (1) Arts. 2071, 2076 C. civ., Art. 92 C. com. : see Cass., 12.11.1958, JCP 1958, IV, 177. The municipal pawnbroking houses are bound by the special provisions of the decree of 20.5.1955, No. 55-622 (reproduced in D. 1955, Législation 266).
- (2) Cass., 3.8.1896, S. 1897, 1, 85; GABOLDE in D. rép. civ., "Gage", no. 77; J.-C1. Rép. dr. priv., "Gage", No. 38 with further references.
- (3) As under s. 1206 of the German BGB.
- (4) Art. 2074 I C, civ. There is an exception in Art. 2074 II C. civ. for cases in which (following Art. 1341 C. civ.) the secured debt or the value of the pledged object does not exceed 50 F.
- (5) Art. 2074 I C. civ.
- (6) As prescribed by Art. 1328 C. civ.
- (7) See BECQUE/RIEG in J.-C1. civ., Arts. 2071-2083, No. 52 with further references.
- (8) See BECQUE/RIEG (previous footnote), No. 54 f. with further references.
- (9) Arts. 91 I, 109 C. com. See FOYER in HAMEL, pp. 17 ff., especially pp. 51 ff.
- (10) Art. 91 I C. com. See HAMEL/LAGARDE/JAUFFRET, II, No. 1285.
- (11) Arts. 2073, 2093 f., 2102 No. 2 C. civ., Art. 83 III law no. 67-563 of 13.7.1967.
- (12) Art. 2082 I C. civ.
- (13) See II 1 (f).
- (14) Art. 2078 I C. civ. The court can transfer the object of the pledgee at a valuation instead of payment, if the pledgee so requires. A lex commissoria is excluded, Art. 2078 II C. civ., Art. 93 IV C. com.
- (15) Art. 93 I C. com. See FOYER in HAMEL, pp. 55 ff.
- (16) Art. 2076 C. civ.; Art. 92 C. com.
- (17) It is normally a debt due in respect of a loan that is involved, but in the case of the warrant it frequently happens that a seller is the pledgee (see VIVIER, Revue du Marché Commun, 1962, 279).
- (18) Order of 6.8.1945, particularly Arts. 24, 27, 28 (reproduced in DALLOZ, Code de Commerce, 56th ed. 1960, p. 787). For further details see HAMEL/LAGARDE/JAUFFRET, II, Nos. 1299 ff., 1506 ff.; VIVIER (see previous footnote); GRANGER in HAMEL, pp. 156 ff.
- (19) See footnote 2.
- (20) Only the first acceptor of the warrant is required to notify the warehouse of the transaction, Art. 25 III of the order.
- (21) Art. 20 II and III of the order.
- (22) Art. 20 IV of the order.
- (23) Art. 83 III law no. 67-563 of 13.7.1967. On the rule which has been superseded : HAMEL/LAGARDE/JAUFFRET, II, No. 1511, 4a, p. 603, footnote 2.
- (24) Arts. 1659 ff. C. civ.
- (25) Cass., 24.6.1845, D.P. 1845, 1, 309; Cass. 23.12.1845, D.P. 1854, 1, 422; Cass., 14.1.1873, D.P. 1873, 1, 185.
- (26) Art. 2078 C. civ.
- (27) Since Cass., 11.3.1879, D.P. 1879, 1, 401 = S. 1880, 1, 53. See HAMEL in PLANIOL/RIPERT, X, No. 187 bis; J.-C1. civ., Arts. 1659-1673, Nos. 7-9. No criticism is made of the conflict with the pledge principle.
- (27a) This important point is overlooked by EHRIG, Das Faustpfandprinzip und die dinglichen Sicherheiten an beweglichen Sachen im französischen Recht, dissertation Frankfurt, 1969, pp. 77-83.
- (28) But see HAMEL/LAGARDE/JAUFFRET, II, No. 1275, who see the elements of a fiduciary transfer in certain special cases.
- (29) This is not the case in Italy, see E I 3.
- (30) For further details see II 8, Different in Italy, see E I 2.
- (31) See 1 e.
- (32) Bt the law of 18.7.1898, the most recent version of which is reproduced in DALLOZ, Code rural - Code forestier, 3rd ed. 1960, p. 602.

- (33) Art . 1 I and IV of the law. The law speaks of "emprunter", by which term judicial practice understands only loans, whereas literature regards this interpretation as being to a certain extent too narrow. See PLANIOL/RIPERT, XII, No. 257 with further references.
- (34) Art. 1 I of the law. For the relationship between the statutory privilege of the landlord and the warrant, see Art. 2 of the law.
- (35) Arts. 3 and 4 of the law.
- (36) Art. 12 of the law.
- (37) HAMEL/LAGARDE/JAUFFRET, II, No. 1310. FARGAUD, Nos. 29-31.
- (38) Art. 8 II of the law. See CABRILLAC, p. 275 f.
- (39) Art. 11 of the law.
- (40) Law of 8.8.1913 (J.O., 10.8.1913).
- (41) See FARGAUD, Nos. 43-46; HAMEL/LAGARDE/JAUFFRET, II, Nos. 1312, 1514.
- (42) FARGAUD, No. 129.
- (43) HAMEL/LAGARDE/JAUFFRET, II, No. 1312.
- (44) Law of 21.4.1932, (J.O. 29.4.1932; reproduced in D.P. 1933, 4, 33).
- (45) FARGAUD, No. 131.
- (46) Art. 1 III of the law. Cf. previous mention under footnote 22.
- (47) For details see FARGAUD, Nos. 50-55.
- (47a) For more details see DURAND in HAMEL, pp. 388 ff.
- (48) Law of 12.9.1940 (J.O. 13.9.1940, p. 4980; reproduced in D.P. 1940, 4, 275). For the varied fortunes of this regulation during and after the war, see FARGAUD, Nos. 56-63.
- (49) See II 4 c.
- (50) Law of 17.3.1909, particularly Arts. 8 ff., latest version reproduced in DALLOZ, Code de commerce, 64th ed. 1968, pp. 441 ff.
- (51) See Art. 9 of the law.
- (52) See Art. 1, III and IV of the law.
- (53) II 4 c. For the practical significance of this form of security, see KUNZLER, Das nantissement du Fonds de Commerce, Frankfurt/Berlin (Metzner), 1960, esp. pp. 98 ff.; EHRIG, Das Faustpfandprinzip und die dinglichen Sicherheiten an beweglichen Sachen im französischen Recht, dissertation Frankfurt, 1969, p. 135 f.
- (54) Arts. 31 ff. Code de l'industrie cinématographique of 27.1.1956 (J.O. 13.1.1956, p. 1267, reproduced in D.S. 1956, 88). See CABRILLAC, pp. 55-60, 90-95; PATARIN in HAMEL, p. 346 ff.
- (55) For further details, see HAMEL/LAGARDE/JAUFFRET, II, No. 1280 f.
- (56) HAMEL/LAGARDE/JAUFFRET, II, No. 1283 with further references.
- (57) Arts. 711, 1138 II, 1583 C. civ.
- (58) For the course of their development, see MARTY/RAYNAUD, II, 2 No. 52; MAZEAUD, II, No. 1602 ff.
- (59) See A III 3.
- (60) See particularly Art. 1583 C. civ. Minority opinion holds the view - with reference especially to the wording of Art. 1583 C. civ. - that in the absence of a physical act of delivery the buyer would only acquire a "relative" title, i.e. only in relation to the seller (thus MARTY/RAYNAUD, II, 2, No. 418; HOUIN, Some comparative aspects of the law relating to goods in French law, in: International and Comparative Law Quarterly, Supp. No. 9 (1964), p. 23 f.). Majority opinion, particularly judicial practice, on the other hand, opposes the concept of "relative" ownership (Cass., 24.4.1845, D. 1845, 1, 309; Cass., 22.7.1909, S. 1916, 1, 20).
- (61) Art. 1138 C.civ., Cass., 17.7.1930, S. 1931, 1, 297. Art. 1582 C. civ. II does not constitute a divergence from this principle of absence of formalities. (See MALAURIE in D. Rép. civ., "Vente" No. 286 f.; J.-C1. civ., Art. 1582 No. 38). Written form is only required for the sale of ships and aircraft (Art. 195 C. com., Art. 10 Code de l'aviation, J.O. 6.12.1955, p. 11815).

- (62) Art. 1341 I C. civ. In commercial questions the court may, at its discretion, also admit evidence against a trader by means of witnesses, Art. 109 C. com. See WEILL, No. 383.
- (63) Art. 711 C. civ. : "La propriété des biens s'acquiert et se transmet ... par l'effet des obligations". Art. 1138 II C. civ. : "Elle (l'obligation) rend le créancier propriétaire ..." See PLANIOL/RIPERT/PICARD No. 618.
- (64) See Travaux de la Commission de Réforme du Code civil, 1946/47, pp. 612, 617; 1948/49, p. 88 ff.
- (65) BUFNOIR, Propriété et contrat, 2nd ed., Paris 1924, p. 52; NIBOYET, Traité de droit international privé français, Vol. IV, Paris 1947, p. 258. SCHEFOLD, Der Zeitpunkt des Eigentumsübergangs beim Kauf beweglicher, körperlicher Gegenstände nach französischem Recht, dissertation Tübingen, 1968, pp. 21-35 also adopts this view.
- (66) Art. 1586 C. civ. See Cass., 5.2.1964, D. 1964, som. 82; J.-C1. civ., Arts. 1585/1586, No. 27 ff.; GORE, p. 38 with further references in footnote 6. For delimitation of Art. 1585 and Art. 1586 C. civ., see Cass., 18.4.1967, J.-C1. P. 1968, 15481.
- (67) Art. 1129 C. civ.
- (68) Art. 1585 C. civ. deals only with the passing of risk. But it is agreed that property and risk usually pass at the same time following the maxim res perit domino, so that Art. 1585 C. civ. would also indirectly regulate the transfer of ownership (Cass. 30.6.1925, D.P. 1927, 1, 29; 31.10.1955, Bull. civ. 1955, III, 254; HAMEL in PLANIOL/RIPERT, X, No. 300).
- (69) See GORE, Le transfert de la propriété dans les ventes de choses de genre, in : Etudes de droit contemporain, Contributions Françaises aux IIIe et IVe Congrès internationaux de Droit Comparé, Vol. II, 1959, pp. 37-50 = D. 1954, Chronique, p. 175 ff.; HEENEN, Le transfert des risques et le transfert de la propriété dans les ventes de choses de genre, Rev. dr. int. dr. comp. 1954, spécial issue, p. 111 ff.; van HECKE, Le transfert de la propriété, Journal des tribunaux, 1947, p. 49 ff.; by the same author, Le transfert de la propriété des choses de genre, Rev. crit. jur. belge, 1952, p. 255 ff.
- (70) COLIN/CAPTANT/JULLIOT de la MORANDIERE, II, No. 552, TALLON in HAMEL, p. 105; LIMPENS, No. 24 bis, 1076 ff. Art. 1585 C. civ. is only one - imperfect - example of this : Cass. 19.3.1929, S. 1929, 1, 245; different opinion : Cass. (belge) 3.1.1952, Pas. 1952, 1, 225 (opposing this van HECKE, as prev. footnote).
- (71) In particular it is disputed whether individualisation can be effected unilaterally by the debtor or whether agreement is needed. For details, see GORE (as footnote 69), p. 41 ff.
- (72) Cass., 1.8.1950, S. 1951, 105 = Rev. trim. droit civ., 1951, 388, observation CARBONNIER = Rev. trim. droit com., 1951, 105, observation HEMARD.
- (73) Art. 1599 C. civ.
- (74) The buyer can however demand compensation if he did not know that the object belonged to a third-party, Art. 1599, second half-sentence C. civ.
- (75) See J. C1. civ. Art. 1599, No. 1 ff.; LIMPENS, No. 152 ff.
- (76) Cass., 17.7.1958, D. 1958, 619.
- (77) Cass., 20.7.1925, S. 1926, 1, 221; Cass., 26.7.1926, Gaz. Pal. 1926, 2, 599.
- (78) Cass., 23.1.1956, Bull. civ. 1956, I, 29; Cass., 12.7.1962, D. 1963, 246.
- (79) Arts. 711, 1138, 1583 C. civ.
- (80) Arrangements of this kind are possible. In this connection see 5 a for details.
- (81) Art. 1603 C. civ.
- (82) Art. 1612 C. civ. See RABEL, I, p. 130 ff., 233 f. ; II, p. 36 f.
- (83) Art. 1613 C. civ. (see also Art. 1188 C. civ. Financial discomfiture short of insolvency is not sufficient, see RABEL, I, p. 235). In commercial law, previously : Arts. 550 f. C. com., now : Art. 63, Law 67-653 of 13.7.1967 (J.O. 14.7.1967).

- (84) See NERSON/FROSSARD in J.-C1. civ., Appendix to Arts. 2092-2094, No. 65 ff., particularly No. 68 with further references; RODIERE, Note in D. 1965, jur. S. 59; CATALA-FRANJOU, De la nature juridique du droit de rétention, in : Rev. tr. dr. civ. 1967, 9 ff. This differs from the right of retention under German law for instance where, under ss. 320, 322 BGB, the effect is solely inter partes. From a practical point of view however there is no difference, as under German law the seller does not require greater protection; for the buyer can in any case assign his contractual debt to a third-party. Against this third-party the seller is given protection by s. 404 BGB. The third-party cannot become the owner of the goods - in contrast to the position under French law.
- (85) By virtue of Arts. 711, 1138, 1583 C. civ.
- (86) Art. 2102 No. 4, para. 2 C. civ. See BILGER in J.-C1. civ., Art. 2102, Book 1 B, No. 6, 57-63, 75 f. with further refs.
- (87) Art. 534 C. com., now : Art. 60 Law 67-563 of 13.7.1967.
- (88) Art. 549 I C. com. (now : Art. 62 I, Law No. 67-563); relevant are : BILGER in J.-C1. civ., Art. 2102, Book 1 B, No. 67-69; HEMARD, J.-C1. com., Arts. 437-614, Fasc. 71 No. 29 ff., each with further references.
- (89) Art. 549 II C. com. (now : Art. 62 II, Law No. 67-563). In this connection see HEMARD (as previous footnote), No. 103 ff. with further references.
- (90) Arts. 1184, 1654 C. civ. Details, see J.-C1. civ., Arts. 1654-1657, Nos. 6-11, 15-19, 29 ff. with further references. The court may grant postponement of payment for a suitable period, Art. 1184 II C. civ. For a comparison between French, Italian and German law and the uniform sales law of 1964, see : LANDVERMANN, Die Auflösung des Vertrages nach richterlichem Ermessen als Rechtsfolge der Nichterfüllung im französischen Recht, Frankfurt/Berlin (Metzner) 1968. In the event of default in acceptance of the goods the seller has a "right to reconstitution" ("Gestaltungsrecht") rather than a "right to sue for reconstitution" ("Gestaltungsklagerecht") - Art. 1657 C. civ.
- (91) Art. 548 I C. com. (now : Art. 61 I Law No. 67-563 of 13.7.1967).
- (92) Art. 548 II C. com. (now : Art. 61 II Law No. 67-563).
- (93) Art. 60 Law No. 67-563. Previously a corresponding statutory provision had been lacking, but application of the relevant Belgian legislation (Art. 546 Belgian C. com.) had been advocated (French Cass., 21.4.1884, D. 1884, 1, 241).
- (94) Art. 66 Law No. 67-563.
- (95) See Art. 1656 C. civ.
- (96) See HAMEL in PLANIOL/RIPERT, X, No. 165.
- (97) Contrary to the case in Italian law (Art. 1517 CC), see E II 3.
- (98) Art. 61 I Law 67-563 (formerly Art. 548 I C. com.).
- (99) See b, also HEMARD in J.-C1. com., Art. 437-614, Fasc. 72, No. 22.
- (100) Art. 61 I Law 67-563 : "condition résolutoire acquise". See HEMARD (as previous footnote), Nos. 20-25 with further references, also in Rev. tr. dr. com. 1965, 123 No. 5.
- (101) Arts. 2095, 2102 No. 4, para. 1 C. civ.
- (102) The predominating tendency of judicial practice is to reject this view, see DONNIER in J.-C. civ., Art. 2095, Nos. 52-57 with further references.
- (103) Art. 2279 I C. civ.
- (104) Art. 2279 II C. civ.
- (105) Art. 2102 No. 4, para. 1 C. civ.
- (106) See BILGER in J.-C1. civ. Art. 2102, Book 1, B, Nos. 49-51 with further references.
- (107) This subrogation has recently received statutory recognition in Art. 66 Law No. 67-563. See also BILGER in J.-C1. civ. Art. 2102, Book 1, B, No. 50 f. with further references.
- (108) Art. 2102 No. 1, para. 4 C. civ. with the peculiarity that this privilege has precedence over that of the lessor or landlord (as in the sale of agricultural machinery), contrary to the rule in Art. 2102 No. 4, para. 3 C. civ.

- (109) Art. 60 Law No. 67-563.
- (110) See 3.
- (111) This concept does not correspond completely to the "Handelsgeschäft" of ss. 22 ff. of the German HGB.
- (112) See HAMEL/LAGARDE/JAUFFRET II, No. 1014 ff.
- (113) See HAMEL/LAGARDE/JAUFFRET II, No. 1071.
- (114) Art. 22 I of the law of 17.3.1909 (reproduced in DALLOZ, Code de commerce, 64th ed. 1968, pp. 441 ff.).
- (115) Art. 1 I of the law. See HAMEL/LAGARDE/JAUFFRET, II No. 1072.
- (116) Art. 28 of the law.
- (117) Art. 1 II of the law.
- (118) See I 9. Furthermore a "nantissement" cannot cover goods.
- (119) Art. 1 III of the law.
- (120) Art. I IV - VI of the law.
- (121) See I 9 and also HAMEL/LAGARDE/JAUFFRET, II, No. 1074.
- (122) Arts. 711, 1138 II, 1583 C. civ.
- (123) Cass., 31.10.1928, D.H. 1918, 591; Cass., 3.5.1935, S. 1935, 1, 227; Cass. 26.10.1938, D.H. 1939, 84; MARTY/RAYNAUD, II, 2, p. 65; LIMPENS, No. 2106. A minority opinion infers from this possibility the necessity for current French law of a separate real contract alongside the contract of sale (See 1a).
- (124) The express choice of such a construction has in any case been declared to be possible and admissible, in a similar case: Cass., 8.3.1951, Rev. trim. dr. civ. 1951, 389, observation CARBONNIER; see also Cass., 28.3.1934, D.P. 1934, 1, 157. But see also the justified reservations of VANDAMME, D.P. 1934, 1, 151, (153, sub B); D. rép. civ., "Vente", Nos. 876-878. For Belgium: LIMPENS, Nos. 1363, 1367.
- (125) In this connection see 3c for more details.
- (126) See 3d.
- (127) See s. 455 of the German BGB.
- (128) See 1a.
- (129) Trib. Valenciennes, 30.11.1956, Gaz. Pal. 1957, 1, 461; VANDAMME, D.P. 1934, 1, 151 (153 sub. C.); MALAURIE in: D. rép. civ., "Vente" No. 45 with further references in No. 42; BRULLIARD/LAROCHE, Précis de droit commercial, 6th ed., Paris (Presses universitaires), 1968 No. 678; ECOLIVET in J.-C1. com., Annexes: Ventes com., Fasc. XXX, No. 70; SAUVAGE in J.-C1. com., Annexes: Ventes com., Fasc. X, No. 129; HEMARD in J.-C1 com., Arts. 437-614, Fasc. 72, Nos. 35 ff. The "réserve de propriété" is conceived of as a "clause résolutoire expresse" at the same time (see HOUIN in D. rép. com. "faillite", No. 2087 with further references; SAUVAGE, 1, c.).
- (130) As do some authorities; see end of 1a.
- (131) See for example SOMMADE, Nos. 353-356.
- (132) See 3.
- (133) Arts. 1624, 1302, 1138 II C. civ., Art. 100 C. com.
- (134) See Art. 100 C. com. Also WAELBROECK, No. 43.
- (135) Opposing view: MALAURIE in D. rép. civ., "vente", No. 42; LIMPENS, No. 1359 with further references.
- (136) See E II 6d, e.
- (137) See the leading decisions Cass. 28.3 and 22.10.1934 (D.P. 1934, 1, 151, VANDAMME's note).
- (138) If an action for retention of title is instituted before the commencement of bankruptcy, restitution can still take place after the commencement of bankruptcy. See Trib. Pau, 20.11.1963, J.-C1. P. 1964, II, 13917. But even here retention of title goes no further than does a normal action for rescission of contract.
- (139) Thus the much-quoted decision of Trib. Valenciennes, 30.11.1956, Gaz. Pal. 1957, 1, 461; see also Colmar, 3.6.1965, J.-C1. P. 1966, II, 14472, note P. L.; SOMMADE, No. 354; WAELBROECK, No. 127; MASSIN, Revue du Marché Commun, 1962, p. 304, right-hand column; contrary opinion (without references): MERTENS, p. 99.

- (140) By virtue of Art. 608 C. proc. civ.; see ROBINO in J.-C1. proc. civ., Arts. 607-612, No. 29. As retention of title only represents a security for the purchase price, the interests of the seller would be satisfied by preferential payment (by virtue of Art. 609 C. proc. civ.). This view has no adherents in France however, contrary to the case in Germany for example.
- (141) Relevant to this point only : MERTENS, p. 98.
- (142) See 1a.
- (143) Art. 1328 C. civ. See PERROT in D. rép. civ., "preuve", Nos. 584 ff., particularly Nos. 636 f. with further refs.; Contrary opinion : ROBINO in J.-C1. proc. civ., Arts. 607-612, Nos. 40 f.; see also Colmar, 3.6.1965, J.-C1. P. 1966 II, 14472.
- (144) See J. C1. civ., Art. 1328, Nos. 63 ff.; PERROT in D. rép. com. "preuve", Nos. 62 ff, each with further references; Trib. Valenciennes, 30.11.1956, Gaz. Pal. 1957, 1, 461.
- (145) Art. 566 C. civ. The designation as principal part or subsidiary part follows the function of the goods or, subsidiarily, the value, or, subsidiarily to that, the volume, Arts. 567, 569 C. civ.
- (146) Art. 568 C. civ.
- (147) Art. 573 II, 575 C. civ.
- (148) Art. 574 C. civ.
- (149) Arts. 570, 571 C. civ.
- (150) See Art. 572 C. civ.
- (151) Art. 518 C. civ. (Claim for indemnity : Art. 554 C. civ.). The concept is certainly narrower than that of the substantial component part ("wesentlicher Bestandteil") under Ger. law.
- (152) Art. 524 f. C. civ. (MERTENS, p. 101, footnote 14, incorrect here - he regards Art. 525 C. civ. as governing the "immeuble par nature"). The concept is no doubt slightly wider than that of "accessories" (Zubehör) under German law.
- (153) RIPERT/BOULANGER, I, No. 2647 with further references.
- (154) BECQUE in PLANIOL/RIPERT, XII, No. 81. See also KLOPP, Die Verwendung von Forderungen zur Kreditsicherung im deutschen und französischen Recht, dissertation Münster 1970.
- (155) Art. 1690 I C. civ.
- (156) Art. 2075 C. civ., Art. 91 III C. com. (additional requirement : recording and authentication, except in commercial law). More details in HAMEL/LAGARDE/JAUFFRET, II, Nos. 1290 f.
- (157) See J.-C1. civ., Arts. 1689-1695, Fasc. A, Nos. 35 ff. with further references; KLOPP (footnote 154), pp. 41-43 with further references.
- (158) See FEBLOT/MEZGER, Eigentumsvorbehalt und Rücktrittsklausel bei Lieferungen nach Frankreich, in RabelsZ 20 (1955), 662; ROSSKOPF, Die Sicherungsrechte des Verkäufers beim Fahrniskauf in Frankreich, dissertation Freiburg 1955.
- (159) See SOMMADE, Nos. 361 ff.; SAUVAGE in J. C1. com., Annexes; Ventés com., Fasc. X, Nos. 74 ff., 93 ff.; ECOLIVET in J.-C1. com., Annexes : Ventés com., Fasc. XXX, Nos. 25 ff.
- (160) See Cass., 20.2.1968, Gaz. Pal. 1968, 2, som. 4; Paris, 20.2.1963, J.-C1. P. 1963, II, 13145, HOUIN's note; SOMMADE, SAUVAGE, ECOLIVET (as previous footnote). Colmar, 3.6.1965, J.-C1. P. 1966, II, 14472, note P. L., rejects - no doubt incorrectly - the admissibility of retention of title in the application of Art. 1602 C. civ. and accepts sale with immediate passing of title as a general rule.
- (161) See SAUVAGE (footnote 159) Nos. 64 ff. : ECOLIVET (footnote 159), Nos. 22-24, 46-48.
- (162) HOUIN in : Les grands arrêts de la jurisprudence commerciale, Vol. II, Paris, 1962, pp. 502 f. - Bibliothèque de droit commerciale.
- (163) SAUVAGE (footnote 159), Nos. 105 ff.; ECOLIVET (footnote 159), Nos. 53 ff., both with further refs.
- (164) See Cass., 26.7.1965, J.-C1. P. 1966 II, 14472, note P. L.; Paris, 20.2.1963, J.-C1. P. 1963, II, 13145, HOUIN's note.

- (165) Cass., 22.12.1909, D.P. 1910, 1, 63.
- (166) See Art. 1 of Law No. 66-455, of 2.7.1966 (J.O., 3.7.1966); also :
CHAMPAUD, J.-C1. P. 1965, I, 1954; ditto J.-C1. P. 1966, I, 2021,
particularly item III; ECOLIVET, J.-C1. com., Annexes : Ventes com., Fasc.
XXX, Nos. 55 f.; GAULLIER, ibid., Fasc. XXXII bis, Nos. 23 ff.
- (167) Trib. com. La Rochelle, 26.6.1964, Gaz. Pal. 1964, 2, 346, in this
connection R. HOUIN, Rev. trim. dr. com., 1964, p. 857, No. 58 and LELOUP,
J.-C1. P. 1965, II, 14331 bis; Trib. com. Vervins, 18.4.1967, J.-C1. P.
1967, II, 15291, LELOUP's note; GAULLIER, J.-C1. com. : Annexes, ventes
com., Fasc. XXXII bis, Nos. 29-31; HAMEL/LAGARDE/JAUFFRET, II, No. 1277.
- (168) Paris, 19.1.1966, J.-C1. P. 1966, II, 14865 H. GUERIN's note; ECOLIVET in
J.-C1. com., Annexes : Ventes com., Fasc. XXX, Nos. 90 f.
- (169) See ECOLIVET (as previous footnote).
- (170) Cass., 28.3. and 22.10.1934, D.P. 1934, 1, 157, VANDAMME's note.
- (171) Law of 29.12.1934, now embodied in the decree of 30.9.1953 (DALLOZ, Code
civil, 69th ed. 1969-70. pp. 959 f). See LAPP in HAMEL, pp. 211 ff.
- (172) For the types of vehicle chargeable, see the text of Art. 1 of the law, and
in this connection MAILLARD in J. C1. com., Annexes : Ventes com., Fasc.
XXXI, Nos. 9-12.
- (173) In contrast to the position in Italy, only the purchase of the motor vehicle
itself can be secured, not any other debt at will.
- (174) See, for example, on the one hand HEMARD, Le gage contractuel sans
déplacement en droit français, in : Etudes de droit contemporain, Vol. II,
1959, pp. 75, 76, on the other hand MAILLARD (footnote 172) Nos. 15
ff.; taking a central position : FARGAUD, No. 69, also CABRILLAC pp. 79 f.
- (175) Any other form of "date certaine" ought also to be admissible. see I 1b.
- (176) Evidence from witnesses (Arts. 91 I, 109 C. com.) is in this case -
exceptionally - also excluded in commercial law, (HAMEL/LAGARDE/JAUFFRET,
II, No. 1317).
- (177) Art. 2 I, II of the law. Entry in the register can only be made in the 3
months after the vehicle is first licenced (Art. 5 I of the law).
- (178) Art. 2 V 1 of the law.
- (179) See HAMEL/LAGARDE/JAUFFRET, II, No. 1321; CABRILLAC, pp. 52-55; KAY,
pp. 47 f.
- (180) Art. 3 of the law and Art. 93 C. com.
- (181) Art. 83 III Law No. 67-563 of 13.7.1967.
- (182) See E II 9.
- (183) Law of 18.1.1951 (reproduced in DALLOZ, Code de commerce, 64th ed. 1968,
pp. 459 ff.). See CORNU in HAMEL, pp. 442 ff.
- (184) Art. 11 of the law.
- (185) Arts. 2, 3 I, 16 I 2 of the law.
- (186) Art. 4 of the law.
- (187) Art. 7 II of the law. See CABRILLAC, pp. 31-34, 175 ff.
- (188) A substantial number of French authors take the view that this rule must
also apply to the "gage automobile" by analogy. See FARGAUD, Nos. 77 ff.
with further references.
- (189) Art. 14 of the law.
- (190) Art. 9 I, II of the law.
- (191) Art. 9 III of the law.
- (192) Art. 8 of the law. It should be pointed out in this connection that the
concept of "immeuble par destination" goes further than that of "Zubehör"
in German law (see footnote 152). With reference to the questions of
precedence, see d.
- (193) Art. 19 of the law.
- (194) See 9.
- (195) See Conseil national du crédit, JCP 1970, III, 36648.

- (196) More detail in SOMMADE, particularly Nos. 13 ff., 71 ff.; ECOLIVET, in J.-C1. com., Annexes : Ventes com., Fasc. XXX, Nos. 92 ff.; SCHEFOLD in : Aussenwirtschaftsdienst des Betriebsberaters, 1964, 337, 339; REISS in : Aussenwirtschaftsdienst des Betriebsberaters, 1971, 22.

C. B E L G I U M

Belgian law follows French law to a large extent. The present review will therefore deal only with the most important divergences (1).

I. CREDIT IN THE FORM OF LOANS

1. The pledge

Belgian law, unlike French law, does not require the entry of the first acceptor in the pledge-holder's registers in the case of the warrant (2).

2. The "warrant charbonnier"

- a) As a result of a crisis in the Belgian coal industry the means of creating a non-possessory charge on stocks of coal was provided by legislation passed in 1958 (3). The "warrant charbonnier" is the only form of security of this type under Belgian law.
- b) It was modelled on the French "warrant pétrolier", "warrant sur stocks de guerre" and "warrant industriel". Additional reliability is provided by the fact that the existence and value of the stocks of coal subject to the charge are certified by the national authorities (4).

3. The pledging of a "fonds de commerce"

Although manifestly an imitation of the equivalent French law, the Belgian provisions (5) nevertheless have certain special features which deserve underlining.

- a) The creditor can only be a bank or specially-authorized credit institution (6).
- b) The security consists of the whole "fonds de commerce" (again excluding land and accounts receivable), unless limitations are agreed (7).

Whereas under French law there is no question of stocks being charged (8), under Belgian law they can be included among the assets forming the security if agreement to that effect is expressly made (9).

An interesting solution to the conflict of interests between the secured creditor and other creditors has been devised in this case : only half the proceeds of sale of stocks goes to the secured creditor, leaving the other half available for the remaining creditors (10).

- c) It is disputed whether a bona fide secured creditor can acquire a charge on objects which do not belong to the giver of the security (11). Equally controversial is the question as to whether the charge extends to "immeubles par destination" (12).
- d) The duration of the charge is 10 years (13); an extension appears possible even in the absence of an express provision to that effect (14).

4. The privilege on agricultural loans

The credit requirements of agriculture, particularly of the tenant-farmer, were catered for by the creation of a "privilège agricole" (15).

- a) The debt due in respect of the loan is not ipso jure guaranteed by this form of security : instead, an express agreement is required upon conclusion of the loan contract (16) and entry must be made in a public register (17).
- b) The right has a duration of 10 years and can be extended beyond this period (18).
- c) The security itself consists of the assets of the farming business to the extent that they are subject in law to the lessor's privilege (19). Included are the last harvest and all objects used in the carrying on of the farming business (20). If the borrower also owns the land, the right extends to his "immeubles par destination" and to standing crops (21). If the lender is in good faith the right also covers assets which do not belong to the borrower (22).
- d) Strictly speaking, therefore, this is not a genuine privilege, for the latter only embraces the debtor's assets.

Moreover, the creditor also has a "droit de suite" (23), limited in time, so that the right thus constitutes a genuine real right effective against even third-party purchasers acquiring in good faith (24). It would thus be more correct to describe it as a mortgage on movables (25).

II. CREDIT ON GOODS

1. Rescission of contract

Rescission of contract on account of non-payment is only possible in relation to third parties to the same extent as the claim for return of the goods, that is to say, in the case of sale without deferment of payment only within 8 days from delivery (26), and in the case of sale with deferment not at all (27).

2. General privilege of the seller

Under Belgian law the general privilege of the seller is extinguished if the object sold becomes "immeuble par destination" (28).

3. Enlarged seller's privilege applicable to capital business assets

- a) On the sale of movable capital business assets the seller's privilege can be considerably strengthened (29). To obtain this extension of his rights, the seller has only to submit a copy of the contract of sale or invoice to the commercial court at the buyer's place of business within 15 days from delivery or completion of installation. The court then enters the contract in a public register.

This special seller's privilege lasts for 5 years. If within this period execution or commencement of bankruptcy takes place, the privilege will be valid beyond the end of the 5-year period until such time as the proceedings are wound up. There are no other possibilities of extending the duration.

- b) The significant enlargement of the seller's privilege in this case compared with the general seller's privilege lies in the fact that it is bankruptcy-proof (30) and remains intact even if the object is installed into a piece of real property ("immeuble par destination ou par incorporation") (31). In the same way as the general seller's privilege this special form only subsists so long as the object forms part of the buyer's assets. On resale to third parties the privilege attaches to the debt for the purchase price after its payment to the original buyer.

4. Retention of title

- a) This concept, although not completely unknown (32), gives the seller even fewer advantages than in France. The effects of retention of title are confined to the parties to the contract. As in France it is ineffective against third-party purchasers acquiring in good faith and on the bankruptcy of the buyer, but beyond this it is also ineffective even in the case of individual execution on the object sold (33).

- b) Within the European Communities it is thus Belgium which rejects retention of title most firmly as being a "secret lien", at least under the prevailing law. But it is noticeable in this connection that the way is being opened for a change of view on the part of the Belgian legislators in that the instalment-purchase law of 1957 (34) gave the executive the power to make retention of title valid against third parties by introducing compulsory or voluntary registration in a public register (35). No use has yet been made of this power (36).

5. "Location-vente" and similar devices

In the instalment-purchase law mentioned above there is an explanatory definition of this type of transaction. The statute rightly stresses that the deciding factor in classifying a sale as an instalment-purchase transaction is not the terms used by the parties but the commercial intention behind the transaction. By "vente à tempérament" is meant "toute convention, quelle que soit sa qualification ou sa forme, qui doit normalement emporter acquisition de meubles corporels et dont le prix s'acquitte en quatre paiements au moins".

6. Absence of special forms of seller's security

The "gage automobile" and the "nantissement de l'outillage et du matériel d'équipement professionnel" do not exist in Belgian law.

7. Instalment-purchase

The instalment-purchase law of 1957 has already been mentioned (37). For the sake of ease of reference it may be repeated that this statute confers upon the executive the power to make retention of title into an effective means of security (38), a power that has not yet been used.

Notes

- (1) A more detailed review is provided by WAELBROECK in : *Revue du Marché Commun*, 1962, 292 ff.
- (2) WAELBROECK, *Revue du Marché Commun*, 1962, 292, 295, before item 4.
- (3) Law of 5.5.1958 (Mon. 22.5.1958 - B.L. 1958, 340), modified by the law of 31.12.1958.
- (4) Art. 5 of the law.
- (5) Law of 25.10.1919 in the version of 30.3. and 4.5.1936 (reproduced in : *Les Codes Larcier*, 1959 issue, Vol. I, p. 256).
- (6) Art. 7 of the law.
- (7) Art. 2 I of the law.
- (8) See B I 9 footnote 51.
- (9) Art. 2 II of the law.
- (10) Art. 2 II of the law.
- (11) See VAN RYN/HEENEN, IV, No. 2602 with further references.
- (12) See VAN RYN/HEENEN, IV, No. 2604 with further references.
- (13) Art. 9 I of the law.
- (14) VAN RYN/HEENEN, IV, No. 2601.
- (15) Law of 15.4.1884, latest modification by the law of 12.7.1952, reproduced in *Les Codes LARCIER*, 1959 issue, Vol. I, p. 480.
- (16) Art. 4 of the law.
- (17) Arts. 5 I, 15 of the law.
- (18) Art. 6 of the law.
- (19) Art. 4 I of the law.
- (20) Art. 20 No. 1 para. 1 loi hypothécaire.
- (21) Art. 12 II of the law. In this connection DE PAGE, VII, No. 295, footnote 4.
- (22) DE PAGE, VII, No. 295, footnote 3 with further references.
- (23) Art. 7 of the law.
- (24) This is the effect of Art. 7 of the law, Art. 20 No. 1 para. 5 loi hypothécaire; Arts. 826 ff. CPC. See DE PAGE, VII, Nos. 135, 180.
- (25) DE PAGE, VII, No. 294 footnote 1.
- (26) Art. 20 No. 5, para. 7 loi hypothécaire -this law replaced Arts. 2091 ff. C. civ. in 1851).
- (27) Cass. (Belgian), 23.5.1946, Pas. 1946, I, 204; see WAELBROECK, No. 139, also in : *Revue du Marché commun*, 1962, 292, 293.
- (28) Art. 20 No. 5 para. 2 loi hypothécaire.
- (29) Art. 20 No. 5 loi hypothécaire in the version of 29.7.1957; Art. 546 C. com.; see LIMPENS, No. 2079; FARGAUD, No. 153; MERTENS, pp. 80 ff.
- (30) Art. 546 C. com.
- (31) Art. 20 No. 5 paras. 2 and 3 loi hypothécaire; Art. 546 V C. com.
- (32) Art. 4 s. 2 of the instalment-purchase law of 9.7.1957 (Mon. of 26.7.1957) even makes express mention of retention of title.
- (33) Cass. (Belgian), 9.2.1933, Pas., 1933, I, 103; Cass. (Belgian), 31.5.1956, J. Trib., 1956, 697 = *Rev. crit. jur. belge* 1956, 241, KLUYSKENS' note.
- (34) Law of 9.7.1957 (Mon. 26.7.1957), Art. 30.
- (35) In this connection see DE CALUWE, *Les ventes, les prêts et les prêts personnels à tempérament*, Brussels (Bruylant), 1965, pp. 276 ff.
- (36) It appears doubtful whether this power applies to all forms of instalment-purchase envisaged by Art. 1 of the instalment-purchase law and the cases listed under Art. 2 Nos. 1-5. See DE CALUWE (previous footnote), No. 205, footnote 282.
- (37) See footnote 32.
- (38) See 4b.

D. L U X E M B O U R G

In the sphere in which we are interested for the purposes of this study the law of Luxembourg is basically the same as that of France and Belgium. It will be sufficient to emphasise the particularities. Most of the special forms of security in the form of movables offered by French and Belgian law are unknown in Luxembourg. Thus the "gage automobile", the "nantissement de l'outillage et du matériel d'équipement professionnel", the film mortgage and most of the specialised warrants do not exist here. The sole special forms of security in this connection are the "warrant agricole" and the "nantissement d'un fonds de commerce".

1. The "warrant agricole"

Farmers and farming cooperatives can make use of a "warrant agricole" (1) to provide security for their borrowings. The charge is embodied in an endorsable document and entered in a public register. It covers the harvest and other products of the farming business including livestock.

If the provider of the security is not the owner of the business but only a tenant, the value of the warrant is primarily dependent on its relationship to the landlord's privilege. The three parties affected thus have the possibility of determining the details of the order of precedence.

Further description of the "warrant agricole" can be dispensed with since it is very little used in practice (2).

2. The "nantissement d'un fonds de commerce"

The provisions governing this form of security (3) are closer to those of their Belgian predecessor than to the French example (4). Only certain credit institutions and breweries specially authorised by the state can become secured creditors under this heading. As in the Belgian model stocks of goods can also be declared to form part of the security and here again only 50% of the sale proceeds accrue to the secured creditor, so that something shall be left for the unsecured creditors.

Notes .

- (1) Law of 3.5.1934. See FARGAUD, Nos. 180-184.
- (2) MACKEL in : Revue du Marché Commun, 1962, 296, 297 left.
- (3) Order of 27.5.1937.
- (4) See FARGAUD Nos. 186 ff.; MACKEL (prev. f'note).

E. I T A L Y

I. CREDIT IN THE FORM OF LOANS

1. The pledge

- a) Under Italian law the classical pledge basically requires, besides the consent of pledgor and pledgee, the physical transmission of the object to the pledgee or the physical transmission of the documents which give an exclusive right of disposition over the object (1).
- b) Transmission can also be made to a third-party designated by the main parties as pledge-holder ("terzo designato") (2). Should the object already be in the possession of a third-party, for storage purposes for instance, it is not clear whether, in order to create a pledge, the agreement of the third-party that henceforth he holds the object on behalf of the pledgee must be obtained in addition to the giving of notice to him by the pledgee and pledgor (3).
- c) Whilst there is no question of constructive possession by way of substitute for actual transmission being acceptable (4), the granting of qualified co-possession (concustodia) (5) is sufficient, following the German example (6). In this situation not only is the pledgor effectively unable to dispose of the object serving as security on his own but also - for instance if the object remains on his premises - the pledging must be adequately publicised by means of a clearly visible notice (7).
- d) If the secured debt amounts to more than 5,000 Lire, the pledging contract requires a document with "data certa", i.e. as a rule official authentication (8). Simple written form is sufficient in the case of state-authorized credit institutions (9).
- e) In practice the pledging of movables usually takes one of the following forms :
 - aa) Small loans by pawnbroking establishments ("Monti di pieta") (10).
 - bb) Pledging of securities. Bearer securities are movables in Italian law also and obey the same principles of transfer (11).
 - cc) Pledging of movable objects by means of a representative document (12).
 - dd) Pledging of goods stored in a public warehouse by means of a special certificate ("nota di pegno") (13).

In all these cases the pledgee has the right to realise the object pledged (14); but he can only claim preferential satisfaction (15) in respect of debts of over 5,000 Lire if the right to do so is based on a document with "data certa" (16).

2. The motor vehicle mortgage

The mortgage on motor vehicles under R.D.L. 1927 can - unlike its equivalent in France - be used not only as security for the purchase price of the motor vehicle but for other loans as well (17).

3. Sale and repurchase

- a) In Italy the law does not openly recognise a non-possessory real security of general application corresponding to the system of fiduciary transfer of title by way of security in Germany and the Netherlands. A transfer of full rights of this type, in which the object constituting the security remains with the debtor, is at least approved by judicial practice in Italy, even if under a different name. We refer to the revival of the formula of sale with a repurchase clause, previously also current in the other countries but there correctly described as transfer of title by way of security (18).

If a person requires money and cannot or does not wish to provide any other kind of security, he may "sell" an object belonging to him to a bank. When the contract is concluded the property in the object passes (19) to the bank. The bank advances the money. But basically neither the customer nor the bank really intend to make a disposition or an acquisition, as the case may be, and they thus do not intend a genuine sale to take place. For this reason the customer retains the object "on hire" or "on loan" and also has a "right to repurchase" (20). Under Article 1503 I of the Codice Civile the restoration of the original position of the parties - and at the same time, by virtue of Articles 1376 and 1470 Codice Civile, the restoration of the title - is brought about by a declaration of intent and by repayment of the purchase price" In other words the bank's customer can only finally keep the object in his ownership by repaying the "purchase price". In reality this is a loan on the security of a fiduciary transfer of title (21).

It is a peculiarity of this type of transaction that the bank has "purchased" the object constituting the security and could thus deal with it as it pleased and retain any profit arising on resale. For this reason the device runs the risk of nullity for being conceived as a means of circumventing the law (22), as it can be interpreted as a circumvention of the law relating to mortgages and charges which prohibits the forfeiture clause (lex commissoria) (23). In judicial practice and jurisprudence the problem has most often been discussed from this angle (24). It should be noted however that the prohibition of forfeiture clauses only concerns a particular type of realisation of a security. This prohibition should not be allowed to have a bearing on the question of what kinds of security one is permitted to create (25).

- b) The evolution of the formula of a "vendita con patto di riscatto a scopo di garanzia" is evidently still very much in a state of flux in Italy and no definite assertions can be made about it. The objects forming the security in the cases decided by judicial practice are primarily, though not exclusively, real property. But there is no reason why other considerations should apply to movable property. It also appears to be disputed whether the object serving as security may remain in the direct possession of the giver of the security ("the seller"). Thus the supreme court, which recognises the formula of the sale with repurchase clause in principle as a means of creating security, sanctioned a prohibited circumventory act in a recent decision (26) because, among other reasons,

the object serving as security remained in the possession of the party providing the security. But it is doubtful whether this circumstance alone is sufficient to characterise an act as circumventory.

As to the effects of this type of security in an individual execution or a bankruptcy, particularly of the giver of the security, jurisprudence and judicial practice do not arrive at a definite conclusion. As the fiction of a genuine sale is maintained, the recipient of the security should not only be able to claim preferential satisfaction of the debt due in respect of his loan but also release of his property or segregation of the object from the bankrupt's estate.

4. The privileges

Besides the means of creating security based on movables there are special privileges (27). They are valid not only in a bankruptcy but in an individual execution as well. As well as being used to secure various types of debt in general this formula also finds application in securing certain kinds of loan.

- a) If a bank specially authorised for the purpose finances the purchase of machinery, the bank acquires a privilege in the machines in the same way as the seller (28).

Where the finance for the purchase price has only partly been provided by the bank and payment of the purchase price is deferred, the privileges of seller and bank compete with each other. In this case precedence follows the order of the entries in the register of the competent regional court (29).

- b) For machines costing 500,000 Lire or more the privilege is not confined to special banks but is available to any financing third-party (30).
- c) Agricultural banks are given a privilege in the fruits of the land in respect of loans for the carrying on of farming business and for the sale, treatment and transformation of the products thereof (31). For loans for the purchase of livestock and implements they have a privilege in the objects purchased with the help of the loan (32). By agreement between the parties these privileges can be extended to all farm assets and can also be created in respect of loans for improvement work on land (33).
- d) For certain business loans to craftsman-traders there is a privilege on the entire equipment of the business (33a). The scope of this privilege can be restricted by contractual agreement to specific machines. The privilege is only valid against third parties if the loan agreement has been drawn up in writing, makes reference to the special statute and has been entered in a special register at the "Ufficio del registro" at the place of business of the trader in question. If the machines serving as security have a value of more than 500,000 Lire, registration of the loan agreement as provided by Article 1524 II Codice Civile is required to secure validity against third parties.
- e) Certain loans to small and medium-sized industrial concerns are secured by a privilege in the stocks of raw materials and goods of these undertakings (33b). Publicity is effected in this case by publication of the loan agreement in an official gazette (33c), permitting the scope of the privilege to be specified more exactly.

This special law was originally due to expire in 1959 (33d). It has not yet finally become clear whether it has been extended, but there are no indications that it has.

II. CREDIT ON GOODS

1. The general rule applicable to sales

Under the general rule of Italian law the buyer of a specified individual movable object (species) acquires the title to it directly upon conclusion of the contract of sale without any requirements as to form and without physical transmission of the object being necessary (34). The separation principle and therefore also the abstraction principle of German law are foreign to Italian law (35). Instead, "creation of obligation" and "disposition" constitute a single, complex legal act (36).

Acquisition of title takes place in this way not only in the case of specified individual movable objects but also in the case of objects en bloc, even if the objects must be counted, weighed or measured to achieve certain effects (for example, in order to determine the amount of the purchase price) (37). With objects determined by generic description the principle of immediate passing of title can naturally only apply subject to the proviso that the title does not pass to the purchaser until the moment the goods are "individualised" (38).

Transactions of this type thus fall under the cases set out in Article 1476 No. 2 of the Codice Civile, in which the buyer does not acquire the title upon the conclusion of the contract of sale, but where the seller must provide him with the title. To this group belong also the sale of a future object and the sale of an object belonging to a third-party. In all these cases, although the buyer does not acquire the title immediately upon conclusion of the contract, no special additional legal act is required for the title to pass. Rather, the rights are acquired ipso facto upon individualisation (39), upon the coming into being of the object (40) or upon acquisition by the seller (41).

The buyer can thus already be the owner of goods which are to be delivered to him while they are still in the possession of the seller. There is no real danger in this for the seller; he can oppose the claim for delivery (42) by adducing the fact that the purchase price has not been paid (43). This also applies if the buyer goes bankrupt and the trustee in bankruptcy sues for delivery (44). In the bankruptcy of the seller, on the other hand, the buyer can segregate the goods, which already belong to him, from the rest of the bankrupt's assets (45), and in the case of seizure he can demand the release of his property (46). A prerequisite for this is however that the acquisition of the property should already have received "data certa" (47) or been entered in the appropriate register (48) before seizure or commencement of the bankruptcy as the case may be.

2. The right to restitution

The real danger to the security of the purchase price debt does not arise until the buyer has acquired possession of the goods. Should the buyer fail to make payment on delivery, despite the fact that payment is due, the seller can institute an action for the return of the goods if he does so within 15 days of delivery, under Article 1519 Codice Civile and thus restore the status quo (49).

In the event of the bankruptcy of the buyer this rule undergoes a modification (50). The right to reclaim the goods in this case is not dependent on a cash sale having been agreed but applies to every type of contract of sale. On the other hand, the seller cannot demand the return of the goods once they have reached their destination and come under the power of disposition of the bankrupt or the trustee in bankruptcy; he can only do this while they remain in transit. In this way the seller can "at the last moment" have the contract regarded as unfulfilled by either side and therefore subject to special rules (51).

3. Rescission of contract in the event of non-payment

If the purchase price remains unpaid the seller may, by virtue of a special provision of the law of sale, rescind the contract within 8 days after payment falls due by a unilateral declaration (52). If he fails to act during this period he can still bring an action for rescission ("risoluzione") under the general law of contract (53).

If the contract of sale contains the appropriate clause, rescission can even take place ipso jure (54). Rescission is no longer possible after the commencement of bankruptcy, however (55).

A valid rescission has a retroactive effect (56), making the seller once more the owner and obliging the buyer to make restitution of the goods (57).

4. General rule : no seller's privilege

Unlike French, Belgian and Dutch law, Italian law does not as a general rule give the seller a preferential right (privilege) (58).

5. Exception : privilege on machinery

a) A person selling machinery at a price of over 30,000 Lire can obtain a privilege on the machinery delivered, by virtue of Article 2762 Codice Civile. This privilege does not require special agreement between the parties but arises from the law. In order to be valid however, entry in a register at the office of the regional court for the district in which the machinery is installed is necessary (59).

The privilege is only valid for three years after the conclusion of the contract of sale and in addition - except in the case of fraudulent removal of the machinery - only so long as the machinery remains in the buyer's possession and in the district in question (60). The privilege confers the right to preferential satisfaction in an individual execution (61) and also, more importantly, in a bankruptcy (62). It has precedence over the lessor's privilege (63). On the other hand, in spite

of its publicity, it does not offer any protection against third-party purchasers (64).

The machinery privilege here described is also available to specially authorised banks which have financed the purchase price, if they register in the appropriate manner (65).

- b) These rules only give the seller a very limited degree of security. For this reason a law promulgated in 1965 (66) attempts to widen the scope of the privilege applying to machinery priced at 500,000 Lire and over and also to link it to greater publicity requirements. This special rule (67) only applies to new and unused machine tools and manufacturing machinery. If the seller wishes to make use of the special form of machinery privilege, the contract of sale requires official authentication (68). A sign must be affixed in a clearly visible place on the machine, showing the name of the seller, the type and serial number of the machine, the year of its make and the name of the competent court of registration (69).

Upon entry in the register of the competent court this special form of machinery privilege of the seller or a financing third-party (70) becomes valid even against third-party purchasers (71).

The privilege lasts for 6 years (72) and it does not terminate on removal of the machine from the district covered by the court (73).

6. Retention of title

a) The legal construction

The rule under Article 1376 Codice Civile, whereby the buyer becomes owner of the object purchased immediately on conclusion of the contract of sale, is not mandatory. The parties may agree that the title shall not pass to the purchaser until a later point in time (74). But even in this case the fact remains that no special further legal act is required to make the property pass (75). Nor is there any question of a conditional sale as prescribed by Articles 1353-1361 CC; for the sale must be unconditional (76) and it is only the transfer of title that is postponed. Change of ownership is valid - and here again it differs from the doctrine applicable to conditional sales - not retroactively, but ex nunc. Sale with retention of title ("riserva di proprieta") under Articles 1523-1526 CC is a particularly important application of this type of sale contract (77). Articles 1523-1526 CC mention retention of title in connection with instalment purchases; but it is possible in every type of sale contract (78).

b) Moment of agreement

Retention of title must be agreed directly upon conclusion of the contract of sale. Later agreement as to retention of title is viewed very critically by the courts, even when the parties come to such an arrangement by mutual agreement. The question arises as to whether an agreement of this type relating to sales of specified objects (species) is invalid from the outset because the buyer is already the owner. For since Italian law does not recognise an isolated, abstract passing of title, it is doubtful whether the seller could recover ownership through a subsequent agreement that he would be able to retain his title. In any case it is the rule that subsequently agreed retention of title

cannot be effective in a bankruptcy, whether because it ranks as a gratuitous disposition (79) or because it constitutes "performance for inadequate consideration" (80).

c) Efficacy inter partes

For validity against the buyer it is sufficient if there is agreement; there are no requirements as to form. But in relation to the buyer retention of title has no practical value. Even without this clause the seller would retroactively become the owner of the goods again after rescission ("risoluzione") of the contract (81). In this respect, therefore, the seller does not require retention of title as a means of security.

d) Efficacy against third-party creditors

The interests of the seller (82) are assured against third-party creditors of the buyer if the retention of title is based on a document which received "data certa" (83) before the recourse to execution.

If the retention of title has received its "data certa" before the seizure, the seller may demand the release of his property (84). Retention of title which received "data certa" before the commencement of bankruptcy (85) gives, above all, the right of segregation of the goods in the bankruptcy of the buyer (86), unless the trustee chooses complete performance (87). The trustee's right of choice is based on the fact that, according to the prevailing - though disputed - view, sale with retention of title constitutes a contract of sale where there has not yet been complete performance on either side (88).

A very tricky and much-disputed question arises if, although retention of title has been agreed immediately upon conclusion of the contract of sale, "data certa" has not been obtained until later, for example at the same time as the whole, unified document of sale. According to the view which has prevailed lately, retention of title should not be regarded here as having first been agreed at the time of the "data certa", that is, after the contract of sale (89). Instead, following Article 1524 II CC, the only question to be decided is whether the retention of title can be upheld against third-party creditors and hence also against creditors in bankruptcy. But as evidence that retention of title was agreed immediately upon conclusion of the sale all other means of proof are admissible (90).

e) Efficacy against third-party purchasers

aa) By contrast retention of title as a rule gives no protection against bona fide third-party purchasers. Protection of commercial transactions has priority (91).

bb) There is an exception in the case of fittings ("pernitenza") of real property or movables which have been entered in public registers (92). Normally the legal fate of fittings follows that of the main object (93), that is, on the sale of the main object to a third-party purchaser they pass to the new owner together with the main object. But if the fittings - due to retention of title, for instance - belong to a third-party, the latter can uphold his rights even against the honest purchaser of the real property or the registered object as the case may be if his rights are based on

a document which has received "data certa" before the time of acquisition by the third-party (94).

No publicising of the retention of title is needed in this case. This is perhaps based on the consideration that the third-party purchaser has acquired the main object and can put up with the loss of the missing fittings. It appears doubtful whether this solution takes account of modern business situations in which the "fittings" of a piece of land are often of enormous value (95). Nor would a restrictive interpretation of the concept of "fittings" provide a complete solution.

- cc) Sellers of machinery at prices over 30,000 Lire can (96) to a certain extent also uphold their retention of title against third-party purchasers.

It is a prerequisite that the agreement to operate retention of title should be entered in a special public register at the office of the regional court in whose district the machinery is installed. But third parties in good faith need only let this retention be used against them if the machine at the moment of acquisition was still situated in the district in which it was registered. As third-party purchasers otherwise have no opportunity of discovering the existence of a retention of title with the help of the register, the law in this case gives their interest as a purchaser precedence over the interest of the security of the first seller.

- dd) If the seller of machinery at prices from 500,000 Lire upwards has observed the special provisions of the 1965 statute (97), his retention of title is valid against third parties from the time of registration without any limitation (98). This security is also available to financing third parties (99).

- ee) It is conceivable that there could be a case where a retention of title in machinery which was eligible for registration was not in fact registered but nevertheless obtained "data certa" as provided by Article 1524 I CC. The prevailing opinion here is that this retention of title, although not opposable against third-party purchasers can be upheld against third-party creditors of the buyer (100).

If retention of title is registered as provided by the law it simultaneously acquires "data certa" (101) and can be upheld against third-party creditors without further action.

- ff) If a retention of title in machinery has been agreed and could have been registered but in fact was not, the question arises as to whether it could not at least be upheld against third-party purchasers acquiring in bad faith. Predominant opinion (102) rejects this possibility, pointing out that the wording of the law does not differentiate between third-party purchasers acquiring in good and bad faith. Furthermore they cite the fact that the registration is designated not as "iscrizione" but as "trascrizione". This, they say, indicates that the rules normally applicable in the case of a "trascrizione" should be applied (103).

f) Alteration of the goods

If the goods which are subject to retention of title become (from a business point of view) inextricably mixed or joined, a co-ownership comes into being in proportion to the value of the parts (104). If however the object in question can be regarded as the principle object or if it has a much higher value than the rest, then the seller's retained title extends to the whole object; he is only required to recompense the other owner or owners for the value of their shares of the whole (105).

If the object is transformed (106) the seller only loses his retained title where the value of the transformed object considerably exceeds that of the original material and the person who carried out the transformation recompenses the seller for the value of the original material (107).

g) Installation of the object into real property.

Installation of the object causes the retained title to lapse if the object cannot be moved without severe damage to the building (108). If the seller does remain in ownership, he has 6 months from the time of learning of the installation in which to institute an action for restitution (109).

If specially marked machines of a total price of not less than 500,000 Lire are involved, they qualify as movables in spite of being installed into a piece of real property (110).

h) "Extended" retention of title

There is a substantial limitation of the scope of retention of title deriving from the fact that under Italian law all forms of extension by means of which the seller attempts to secure for himself the "surrogate" of the original object sold are denied recognition (111).

If an extending clause of this nature is agreed, then not only is the extension as such held to be ineffective but in addition the retention of title itself - on account of internal contradiction. For it would be illogical for seller and purchaser to agree that on the one hand the seller should retain the title to the property while on the other hand the buyer, either expressly or in certain circumstances, should have the power to deal with the property as owner - to resell, transform or consume it (112). Judicial practice and jurisprudence have not however concerned themselves very deeply or comprehensively with this matter. One of the reasons for this may be that the enlargement of retention of title through assignment in advance of debts arising on resale does not, for other reasons, have as great a practical importance as it does in Germany for instance. One explanation for this could be that retention of title chiefly occurs in Italy in the case of sales to final consumers. Where wholesalers and retailers obtain a large part of their goods not by simple purchase but by means of commission and other devices, there is no room for retention of title.

Judged from the prevailing Italian point of view, there is from the outset no place for any "extended" form of retention of title. For if the authority to resell or to transform the goods is invalid due to internal contradiction, the agreement that the new product or the debt arising from the resale should take the place of the (in fact invalidly)

retained property ceases to have any meaning. Even if one disregarded this, there would still be a further objection to recognition of an extended retention of title : the so-called extension of retention of title presupposes not only the recognition of actual retention of title by existing law, but more than this. Thus the extension of retention of title to debts due from customers constitutes an assignment of future debts for the purpose of security. But Italian law does not admit an abstract assignment as such, only the sale of debts, the release of debts, etc. An assignment for the purposes of security however is still rejected by most authorities in Italy, as well as all trusts created with the same purpose in mind (fiducia cum creditore) (113).

7. Relationship between retention of title and machinery privilege

Where the seller has retained his property in a way that is valid against third-party creditors, it is questionable whether, in place of the release of his property in an individual execution (114) or the segregation of his property in a bankruptcy (115), he can demand preferential satisfaction by invoking the seller's privilege (116). The doubt arises because a privilege can in principle only attach to the assets of the debtor whereas the goods sold under retention of title still belong to the seller.

The question is however largely theoretical, since there is no obvious advantage to the seller in applying his privilege rather than relying on his legal position as conferred by retention of title. Moreover the buyer or his trustee in bankruptcy might very well agree to such a demand by the seller and there would then be nothing to prevent the seller receiving satisfaction according to the rules governing the seller's privilege. So for all these reasons we may leave the question as to the relationship between retention of title and seller's privilege unanswered (117).

8. The motor vehicle mortgage

The seller of motor vehicles has a special form of security at his disposal, namely a mortgage. For a better understanding of the problems involved, a few general observations must first be made, particularly since this legal material has not been fully incorporated into the Codice Civile of 1942. The main relevant provisions are contained in a royal decree of 15.3.1927, no. 436 (118), the details of which have since been revised. Since then Italy has had a transcription system for motor vehicles analogous to that for real property (119). It is based on the Pubblico Registro Automobilistico (P.R.A.) maintained by the Italian motoring organisation ACI.

Every change of ownership must be entered in this register. The register enjoys the confidence of the public : all third parties can rely on its contents and must accept that its contents are valid against themselves. Therefore acquisition on the strength of mere possession by a person not entitled to acquire is not possible (120). Registration of change of ownership has a declaratory rather than a constitutive force (121).

The existence of this public register enables motor vehicles to be used as a basis for credit without being pledged in the strict sense of the word. The vehicle serves as security for the debt due to the seller or to a financing third-party in respect of the purchase price or the balance of the purchase price (122). No special agreement between the parties is required; the right derives from the law itself, although it does not come into existence until registration in the P.R.A. has been effected (123). The right lasts 5 years initially and can then be renewed for a further period of 5 years (124).

In contrast to French law, Italian law permits the motor vehicle to be used as security not only for its own purchase price but also for any other debt (125), even debts to third parties. There can be no question of a title conferred by the law itself here. Applying Article 2821 CC what is needed is an act which is at least supported by a private document (in which case a unilateral declaration by the giver of the security is sufficient) and registration in the P.R.A.

R.D.L. 1927 describes this form of security as a "privilege". This is incorrect (126). A special privilege (127) is only valid so long as the object in question still belongs to the debtor. The motor vehicle mortgage is valid even against all third parties (128). Accordingly it has the character of a real security ("garanzia reale"). For this reason it is unanimously accepted that it is not a privilege but a mortgage on movables (129).

It is worth mentioning, bearing in mind the international aspect, that a mortgage under R.D.L. 1927 can only be created on motor vehicles licensed by the Italian authorities.

9. Relationship between the motor vehicle mortgage and retention of title

With the form given to retention of title by Articles 1523 ff. of the CC 1942 it seems doubtful whether it has been sensible to retain R.D.L. 1927 alongside it as an institution for securing the purchase price. For under Article 1524 II CC a retention of title publicly registered in a certain way can be upheld not only against third-party creditors but also against third-party purchasers. A seller covered in this way would have just as much security as through a vehicle mortgage. No doubt the second use which the vehicle mortgage provides, that is, creation of security for any other debts, has been a decisive factor in favour of the preservation of the R.D.L. 1927 provisions. The introduction of this use of the vehicle mortgage may have been greatly influenced by the fact that a motor vehicle is often the only item available as security and that credit without security is virtually unobtainable.

In the present legal situation the question arises as to whether a person selling a vehicle, instead of using the special mortgage provided by R.D.L. 1927, can make use of a retention of title under Articles 1523 ff. CC to secure his debt for the purchase price. Until recently the general opinion held that in the case of motor vehicles the only means of obtaining security lay by way of the special provisions of R.D.L. 1927 (130).

However, according to the latest decisions of the Italian appeal court a retention of title is also possible in the case of motor vehicles. It does not have to be registered as provided by Articles 1524 II CC but must be entered in the vehicle register (P.R.A.) (131). For validity against third-party creditors a document with "data certa" (132) ought to be sufficient in this case (133).

10. Hire purchase

Although mentioned in legislation (134) hire purchase does not play a very large practical part in Italian law. This is evidently because retention of title goes some way towards satisfying the seller's need for security - even though subject to certain conditions.

11. Particularities of instalment purchase

The Italian instalment-purchase law (135) applies to sales of certain new and unused articles by traders to private persons. It covers hire purchase and also applies to third parties providing finance. The law contains mandatory provisions for the protection of the debtor which go beyond Articles 1525-1526 CC and which deal particularly with the amount of the payments and the repayment period. The law does not however contain any special provisions regarding property relationships or security for the seller.

Notes

- (1) Arts. 2786, I, 1996 CC, and in this connection NOVITA in NAPOLETANO/BARDIERI/NOVITA, I contratti reali, Turin (UTET), 1965, p. 352.
- (2) Art. 2786 II, 1st alternative CC.
- (3) NOVITA (footnote 1), pp. 357 f. with further references
- (4) NOVITA, as footnote 1.
- (5) Art. 1206 BGB. Different in French C. civ., see B I 1a.
- (6) Art. 2786 II, 2nd alternative CC.
- (7) Cass., 16.5.1956, n. 1655 in Riv. dir. comm., 1956, II, 428 = Giust. civ. 1956, I, 1524. This area is disputed, see NOVITA (footnote 1), pp. 353-355; GASSNER/WOLFF, Item I 1c, each with further references.
- (8) Art. 2787 III CC. See footnote 45 for more detail.
- (9) Art. 2787 IV CC. With reference to detailed requirements as to form, see NOVITA (footnote 1), pp. 363-371.
- (10) See Art. 2785, 2nd alternative CC and law of 10.5.1938, n. 745.
- (11) The transfer of title here probably does not involve a real contract ("Realvertrag") but a consensual contract ("Konsensualvertrag") in the sense of Art. 1376 CC. Art. 2003 CC only means that for legitimation possession is also required. See FIORENTINO in SCIALOJA/BRANCA Arts. 1992-1002 CC., n. 15, Art. 2003 CC., n. 1.
- (12) Art. 2786 para. 1, 2nd alternative, Art. 1996 CC. This includes : the consignment note ("lettera di vettura"), the bill of lading ("polizza di carico") and the warehouse warrant ("fede di deposito regolare"). See GORLA in SCIALOJA/BRANCA Art. 2784 CC, n. 11; Art. 2786 CC, n. 2b.
- (13) Arts. 1792, 1793 II CC. See FIORENTINO in SCIALOJA/BRANCA Arts. 1793-95 CC, nn. 3, 4.
- (14) Art. 2796 CC, in a bankruptcy somewhat limited by Art. 53 1st case.
- (15) Art. 2787 I CC, Arts. 543 I, 2nd alternative, 499/500, 510 II CPC, Art. 54 1st case.
- (16) Art. 2787 III CC (Exceptions - particularly for banks - in IV).
- (17) See II 8
- (18) See B I 2 and F footnote 34
- (19) By virtue of Arts. 1376, 1470 CC.
- (20) By virtue of Arts. 1500 ff. CC. However, in the case of movables the maximum length of the repurchase period is two years, under the mandatory provisions of Art. 1501 CC.
- (21) See Cass., 20.4.1968, n. 1221, in Giur. it., 1969, I, 1, 1169, with detailed references in an editorial note E(nrico) MO(SCATI), also GRECO/COTTINO in SCIALOJA/BRANCA, Arts. 1500-1503, n. 1, and SIEHR, footnote 8.
- (22) Art. 1344 CC.
- (23) Art. 2744 CC.
- (24) See Cass. 20.4.1968, n. 1221, in Giur. it., 1969, I, 1, 1169; Cass., 11.2.1969, n. 465; 6.5.1969, n. 1980, in Foro it., Rep., "Patto commissorio", n. 1 and 2; Cass., 17.5.1969, n. 1712; 6.6.1969, n. 1980, in Foro it., 1969, Rep., "Vendita", n. 135/136, 137/138; TRABUCCHI, p. 159. According to these authorities sale with repurchase is valid when the property is transferred immediately to the "buyer", but invalid when passing of title does not occur until non-payment supervenes. For general invalidity : BIANCA, Il divieto del patto commissorio, Milan (Giuffrè), 1957, pp. 145 ff.
- (25) Thus in Germany the prohibition of the lex commissoria (s. 1229 BGB) applies by - admittedly disputed (see F I 4k) - analogy also to the transfer of title by way of security. But if the object serving as security should be realised in a manner analogous to the provisions governing pledges, the prohibition of the lex commissoria cannot stand in the way of the transfer of title by way of security.

- (26) As footnote 21.
- (27) Arts. 2741 II, 2745, 2747 II, 2755 ff. CC.
- (28) Art. 2762 IV CC. For greater detail see II 5a.
- (29) Art. 2762 V CC.
- (30) Art. 6 II of the law of 28.11.1965, n. 1329 (G.U. 14.12.1965, n. 311). For greater detail on this special law, see II 5b.
- (31) Art. 2766 together with the law of 29.7.1927, n. 1509, particularly Arts. 8 and 9 (see MURE, in Enciclopedia del diritto, XI, 1962, "Credito agrario", n. 1, 2, 6.).
- (32) Art. 2766 II CC.
- (33) Art. 2766 III CC.
- (33a) Art. 40 of the law of 25.7.1952, n. 949 (G.U. 29.7.1952, n. 174).
- (33b) Art. 5 of the law of 16.4.1954, n. 135 (G.U. 5.5.1954, n. 102).
- (33c) Art. 5 I 3 of the law.
- (33d) Art. 4 of the law.
- (34) Arts. 922, 1376, 1470 CC. See TRABUCCHI, pp. 708, 773; BARBERO I, p. 486; II, p. 271.
- (35) See A III.
- (36) MENGONI/REALMONTE, Disposizione (Atto di), in : Enciclopedia del diritto, XIII, Milan (Giuffrè), 1964, p. 190.
- (37) Art. 1377 CC.
- (38) Art. 1378 CC. For delimitation between Art. 1377 and Art. 1378 CC, see Cass., 21.4.1951, n. 988, in Foro it., Rep. 1951, "Vendita", nn. 328-332; TRABUCCHI, p. 709; BARBERO I, pp. 483 ff. Under Art. 1378 CC individualisation takes place on the mutual agreement of the parties or in the manner arranged by them.
- (39) Art. 1378 CC.
- (40) Art. 1472 I CC.
- (41) Art. 1478 II CC.
- (42) Art. 1476 No. 1 CC.
- (43) See details of Arts. 1460, 1461 CC. These provisions only relate to actions prescribed by law. But this is sufficient for the buyer cannot apply the rei vindicatio (Art. 948 CC) here since the latter is excluded in contractual relationships.
- (44) See Cass., 18.11.1961, n. 2684, in Giur. it., 1963, I, 1, 543 = Dir. fall. 1962, II, 59. When the seller has not yet made delivery and the buyer has not yet made payment, the sale has not yet been fulfilled on either side, although the buyer has already gained the title by virtue of Art. 1376 CC. The trustee in bankruptcy must then choose between rescission of the contract or full performance by both sides, Art. 72 II 1st case.
- (45) By virtue of Art. 103 1st case. Although in this case, too, the sale has not yet been fulfilled by either side, the trustee in bankruptcy has no right to elect (Art. 72 II 1st case) - see Art. 72 IV, I, 1st case).
- (46) Arts. 619 ff. CPC.
- (47) "data certa" under Arts. 2702-2704 CC has been obtained when the signatures to the document have been officially authenticated; the document also has "data certa" from the date of submission to the "Ufficio del Registro" and from the death or other evident impossibility of signing by one of the signatories. The "data certa" requirement is not designed for the purpose of publicising the legal act in question but only for the purpose of proof. It is intended to prevent subsequent manipulations by simulation of the legal act. In connection with "data certa" see GIACOBEE, in Enciclopedia del diritto, XI, 1962, pp. 700 ff.
- (48) Arts. 2914 No. 4, 2915 II, 2683 CC; Art. 45 1st case. See RUISI, pp. 514-517 with further references.

- (49) This claim for the return of the goods does not however affect preferential rights of lessors and landlords which have come into being in the meantime, Art. 1519 II together with Arts. 2764, 2765 CC, nor the lien of bona fide third parties which they have acquired by seizure, Art. 1519 III CC.
- (50) Art. 75 1st case. In this connection see RUISI, pp. 510-514.
- (51) Namely Arts. 72, 73 1st case; see Cass., 13.7.1954, n. 2458, in Foro it., Mass., 1954, 494.
- (52) Art. 1517 CC.
- (53) Art. 1517 III, 2nd half-sentence, together with Art. 1453 CC.
- (54) Art. 1456 CC.
- (55) PROVINCIALI I, pp. 912 ff. It is questionable whether this also applies in the case of seizure.
- (56) Art. 1458 I. But by virtue of para. 2 of this provision rights of third parties acquired in the interim remain unaffected.
- (57) There is no room for the rei vindicatio alongside this provision, Cass. 13.5.1969, n. 2101, Foro it., Rep. 1969, "Rivendicazione", n. 17.
- (58) For the privilege on the sale of certain machinery, see 5.
- (59) Art. 2762 II CC.
- (60) Art. 2762 III CC. (Installation of the machinery into real estate does not, by virtue of Art. 2762 I CC, lead to extinguishment of the privilege).
- (61) See Arts. 2741, 2776 No. 11 CC, Art. 510 II CPC.
- (62) See Art. 54 1st case.
- (63) See Art. 2778 Nos. 11 and 13 CC.
- (64) See BARBERO II p. 154.
- (65) A similar equality of treatment of the financing third-party with treatment of the seller is evident in Art. 1 last para. of the instalment-purchase law of 15.9.1964, n. 757 (G.U., 22.9.1964, n. 233).
- (66) Law of 28.11.1965, n. 1329 (G.U. 14.12.1965, n. 311).
- (67) For greater detail see the text of the law itself, which is self-explanatory, and also Special Publication No. 1/67 of the Verein deutscher Maschinenbauanstalten.
- (68) Art. 2 I of the law.
- (69) Art. 1 of the law.
- (70) There is no restriction to specially authorised banks as in Art. 2762 IV CC in Art. 6 II of the law.
- (71) Art. 3 IV of the law.
- (72) Art. 6 I 1st alternative of the law.
- (73) Art. 6 I 2nd alternative as against Art. 2762 III 2nd alternative CC. For the fact that the corresponding reciprocal debts can benefit from this privilege, see Arts. 10 ff. of the law and also GASSNER/WOLFF Item II 3 (at the end).
- (74) Cass., 3.3.1969, n. 676, in Giur. it., 1969, I, 1, 2162-2164; Cass., 4.3.1969, n. 692, in Giur. it., 1969, I, 1, 2162; Cass., 9.5.1969, n. 1606, in Foro it., Rep. 1969, "Vendita", n. 10.
- (75) Trib. Roma, 29.11.1968, in Foro it., Rep. 1969, "Vendita", n. 158.
- (76) Cass., 4.3.1968, n. 708, in Foro it., Rep. 1968, "Vendita", nn. 15/16.
- (77) BARBERO II, pp. 308/309; TRABUCCHI p. 788; MIRABELLI, Arts. 1523-1526 CC, n. 1; DISTASO, I contratti in generale, Vol. II, Turin (UTET), 1966, p. 974.
- (78) MIRABELLI, Arts. 1523-1526 CC, n. 2; GRECO/COTTINO in SCIALOJA/BRANCA, sub Art. 1523 CC, p. 366.
- (79) Art. 64 1st case.
- (80) Art. 67 1st case. Cass., 1.2.1967, n. 292, in Foro it., 1967, I, 983; Cass., 5.5.1967, n. 863, in Giur. it., 1968, I, 1, 162 with BUCOLO's note; App. Bologna, 22.5.1965, in Giur. it. 1965, I, 1, 792; TRABUCCHI, p. 789; MIGNOLI, pp. 345 ff., SCHETTINI, Sull'opponibilita al fallimento del patto di riserva di proprieta nella vendita a rate, in Riv. dir. fall., 1965, II, 242 ff.; BONDONI, Patto di riservato dominio, registrazione non contestuale alla vendita,

e sua opponibilita al fallimento, in Riv. dir. fall., 1965, II, 636.

- (81) By virtue of Art. 1517, Arts. 1453-1458 CC.
- (82) By virtue of Art. 1524 I CC.
- (83) See footnote 47.
- (84) Arts. 619 ff. CPC, corresponding to the provisions of s. 771 of the German ZPO on third parties' right of action in opposition ("Drittwiderrspruchsklage").
- (85) "Data certa" as provided by Art. 1524 I CC is sufficient, registration under Art. 1524 II CC is not necessary. See MIGNOLI, pp. 342 ff., 348-350.
- (86) Art. 103 1st case. See Cass. 15.5.1966, n. 1249, in Foro it., 1967, I, 808; 10.8.1966, n. 2179, in Giur. it., 1967, I, 1, 1043. See also FERRI, L'opposabilité de la réserve de propriété en droit italien des faillites, in : Idées nouvelles dans le droit de la faillite, Brussels (Bruylant), 1969, p. 273. This is a particularity of Italian law in comparison with that of France, Belgium and Luxembourg, which do not recognise retention of title in bankruptcy. Moreover, as no publicity is required, Italian law comes close to German law with regard to third creditors, although in the matter of the position of third purchasers it goes its own way (see e).
- (87) Art. 72 II, III 1st case. The possibility of the seller himself offering complete performance against partial satisfaction (Art. 72 I 1st case) should not have any practical importance.
- (88) Art. 72 1st case. See MIGNOLI, pp. 332-338; RUISI, pp. 522 f; SAUVEPLANNE, p. 36, is incorrect in thinking that the bankruptcy of the buyer is subsumed under Art. 73 1st case. This provision only deals with the bankruptcy of the seller.
- (89) If this was the case, the problems described in b would arise.
- (90) See the references under footnote 80 above, esp. BUCOLO.
- (91) Art. 1153 CC. The protection of commercial transactions by Italian law exceeds that given by German law in that it extends to objects that have been lost. The erroneous belief in good faith that the previous owner had for his part acquired the property in good faith is not sufficient however if the person acquiring it was aware of the illegal origin of the property, Art. 1154 CC. It is disputed whether the protection of good faith also extends to gratuitous acquisition (refuted by BARBERO I, pp. 316 f., similarly DE MARTINO in SCIALOJA/BRANCA, Art. 1153 CC, n. 4, each with further refs.; see also UNIDROIT, L'unification du droit, Annuaire 1967-1968, Vol. I, Rome (Unidroit), 1969, pp. 142-147).
- (92) Ships, aircraft, motor vehicles.
- (93) Art. 818 I CC.
- (94) Art. 819 2nd sentence CC; see DE MARTINO in SCIALOJA/BRANCA, Arts. 818/819 CC, n. 4, p. 49. There is doubt whether Art. 818 2nd sentence also applies to the machinery detailed in Art. 1524 II CC - see cc. If one adopts the prevailing view, according to which if there is failure to register under Art. 1524 II CC retention of title cannot be opposed even to third parties acquiring in bad faith (see ff), one would suppose that in the case of Art. 818 2nd sentence CC "data certa" would not be sufficient against third-party purchasers acquiring in good faith; contrary opinion : DE MARTINO in SCIALOJA/BRANCA, Art. 818/819 CC, n. 4, p. 49, who sees Art. 818 2nd sentence CC as a lex specialis in relation to Art. 1524 CC.
- (95) E.g. a gravel-pit with machinery and vehicle-fleet.
- (96) By virtue of Art. 1524 CC, see also Art. 1156, 2nd alternative CC.
- (97) See 5b.
- (98) Art. 3 IV of the law. This provision does not contain the limitation of Art. 1524 II CC, under which retention of title only applies as long as the machine remains in the original district. Apparently coming to a different conclusion : SIEHR (in footnote 34).

- (99) Art. 6 of the law.
- (100) Cass., 10.11.1955, n. 3698, in Giur. it., 1956, I, 1, 902; Cass. 14.4.1961, n. 809 in Foro it., Rep. 1961, "Vendita", nn. 124/125; MIGNOLI, p. 350; BARBERO II, pp. 309/310; COING is incorrect - p. 77, footnote 27 - in not distinguishing between third-party creditors and third-party purchasers and in considering that in the case of machinery over 30,000 Lire registration as provided by Art. 1524 II CC is also required for the efficacy of acquisition of title against third-party creditors.
- (101) By virtue of Art. 1524 I CC.
- (102) Cass., 23.10.1956, n. 3835, in Foro it., 1957, I, 1219; Trib. Salerno, 1.2.1966, in Foro nap., 1966, I, 223, quoted in Foro it., Rep. 1966, "Vendita", n. 167; App. Milano, 14.3.1952, in Riv. dir. comm., 1952, II, 273 with a concurring note by SACCO, (with a note in disagreement L. FERRI in Giur. it., 1952, I, 2, 607); GRECO/COTTINO in SCIALOJA/BRANCA, sub. Art. 1524 CC, pp. 368 f.
- (103) Thus Arts. 2996, 2685 II, 2644 I CC.
- (104) Art. 939 I 2 CC.
- (105) Art. 939 II CC.
- (106) The purchaser may not transform the object and the seller cannot allow him to do so without losing his retention of title. See h.
- (107) Art. 940 CC.
- (108) Art. 935 I CC; MERTENS appears to be incorrect, p. 154. He is of the opinion that, if the retention of title has acquired "data certa", it does not lapse even if the object cannot be separated again without severe damage to the main object. MERTENS bases his argument solely on the wording of Art. 816 CC, which does not however provide a basis for such a view. (For the significance of this provision, see the end of e).
- (109) Art. 935 II CC.
- (110) Art. 5 of the law of 28.11.1965, n. 1329 (G.U., 14.12.1965, n. 311).
- (111) In the case of transformation, the new object (with reference to the different constructions existing under German law, see BAUR, s. 53 b III 3), in the case of resale, the resultant purchase price debt by way of an anticipated assignment.
- (112) Cass., 21.5.1949, n. 1298, in Foro it., Rep. 1949, "Vendita" No. 265. App. Napoli, 5.7.1955, in Foro it., 1956, I, 101; Trib. Salerno, 30.7.1954, in Foro it., 1955, I, 618 = Giur. it., 1955, I, 2, 143; GRECO/COTTINO in SCIALOJA/BRANCA sub Art. 1523 CC, pp. 365 ff.; Mirabelli, Arts. 1523-1526 CC, n. 2. MERTENS (pp. 42 and 149) and WUNNER (in NJW 1960, 1846, 1847, Item II) rightly criticise the view prevailing in Italy as too theoretical and not taking sufficient account of actual interests.
- (113) In fact a transfer by way of providing security has nevertheless developed under the cover of a sale with repurchase clause. (See I 3 for greater detail). One might therefore think that the seller was retaining his title and the buyer for his part was "selling" him the future debt from the customer in advance (with repurchase clause), in order to achieve an extension of the retention of title in this way. But Italian legal practice knows of no attempts of this kind. They would presuppose that such clauses were not - as stated - considered invalid on account of internal contradiction. With reference to this whole problem, see MANCINI's recent work, *La cessione dei crediti futuri a scopo di garanzia*, Milan (Giuffrè), 1968.
- (114) Arts. 619 ff. CPC.
- (115) Art. 103 1st case.
- (116) See Arts. 2741, 2776 No. 11 CC, Art. 510 II CPC; Art. 54 1st case.

- (117) SIEHR is of the opinion (in footnote 30) that the seller has a choice. He bases his argument on judicial decisions dating from before the new CC was introduced and also, especially, on ANDRIOLI in SCIALOJA/BRANCA, Art. 2762 CC n. 2 (p. 190) who however is of exactly the opposite opinion (even though based on the rather theoretical grounds that a privilege is one's own property is not possible). In footnote 31 SIEHR further asserts that the law of 28.11.1965 (see footnote 66) recognises the co-existence of retention of title and seller's privilege. This view cannot be accepted. The wording of Art. 1, which SIEHR invokes, gives no support for such an interpretation. Art. 3 IV, although it deals with retention of title and seller's privilege together, is silent on whether a seller, in addition to retention of title, can also and at the same time rely on seller's privilege.
- (118) Hereafter abbreviated to R.D.L. 1927.
- (119) See Arts. 2643, 2644 CC on the one hand and Arts. 2683, n. 3, 2685 II CC on the other.
- (120) See Art. 1153, 1156, 2nd alternative CC. In the case of certain agricultural vehicles registration is optional. For other details see the complete description in UNIDROIT, Vente à tempérament, pp. 140 ff. and FERRARA F. jr. in Novissimo Digesto Italiano, Vol. XV., Turin (UTET) 1968, pp. 172 ff.
- (121) Cass., 3.7.1967, n. 2527, in Foro it., Rep. 1968, "Autoveicolo", n. 11; Cass., 22.3.1968, n. 915, in Foro it., Rep. 1968, "Autoveicolo", n. 12.
- (122) Art. 2 I, II R.D.L. 1927.
- (123) Cass., 27.4.1968, n. 1303, in Giur. it., 1968, I, 1, 1931, 1933. So contrary to the case with change of ownership registration is constitutive in the case of the vehicle mortgage.
- (124) Art. 2 I, V R.D.L. 1927. For sales of new vehicles to private persons the provisions of the instalment-purchase law of 15.9.1964, n. 755 (G.U., 22.9.1964, n. 233) must be observed. Under these, instalment purchases have a maximum term of 24 months and deferred purchases a maximum term of 12 months (Art. 2 II, III of the law).
- (125) Art. 2 III R.D.L. 1927.
- (126) See RAISER, Das Kraftfahrzeugregister in Italien, in RabelsZ 3 (1929), 418, 419.
- (127) Arts. 2755-2766 CC.
- (128) Art. 2 R.D.L. 1927.
- (129) See Art. 2810 III CC, also TRABUCCHI, p. 659; BARBERO II, p. 174; UNIDROIT, Vente à tempérament, p. 160.
- (130) See UNIDROIT, Vente à tempérament, pp. 183-191 : WAELBROECK, p. 150. Retention of title could be admitted, even according to this view, if it related not to the vehicle as a whole but to separately delivered parts in the sense of Art. 939 I, 1 CC, e.g. special lorry bodies (refrigerated containers etc.).
- (131) Cass., 10.9.1969, n. 3089, in Foro it., 1970, I, 149.
- (132) Art. 1524 I CC.
- (133) See SIEHR (footnote 38) with further references.
- (134) Art. 1526 III CC, Art. 1 II of the Italian instalment purchase law of 15.7.1964, n. 755 (G.U. 22.9.1964, n. 233), Art. 1 of the law of 28.11.1965, n. 1329 (G.U. 14.12.1965, n. 311)..
- (135) Law of 15.7.1964, n. 755 (G.U. 22.9.1964, n. 233).

F. G E R M A N Y

I. CREDIT IN THE FORM OF LOANS

1. The pledge

a) Largely supplanted by the fiduciary transfer of title by way of security, the classical pledge now enjoys only very limited application. It occurs mainly in the following forms :

aa) Security for small loans from professional pawnbrokers (1)

bb) Security for bank loans in the form of the pledging of securities, precious metals and goods ("Lombarddarlehen").

cc) The banks' lien, based on their "general conditions of business" (2), particularly on securities and on goods represented by documents of title (3).

Regarding the pledging of securities which have been entrusted to a professional depository or have been acquired by a buying agent, there are various provisions to protect the owner or principal (4). They are designed to prevent third parties being able to acquire pledging rights in the securities through good faith in respect of debts which have nothing to do with the principal or owner.

b) The charge is accessory, but can also be created in respect of future or conditional debts (5).

c) To create the charge the pledgor must usually deliver the object to the pledgee (6). Where the object is already in the possession of the would-be pledgee, simple agreement between the parties that the property shall pass is sufficient (7). If the object is in the possession of a third party, the transfer of indirect possession to the pledgee (8) and the giving of notice of the charge to the third party (9) are sufficient. It is not necessary to obtain the agreement of the third party that henceforth he holds the property on behalf of the pledgee.

Although creation of a charge by constructive possession is excluded (10), it is possible, in contrast to the position in other legal systems, for pledgor and pledgee to establish qualified co-possession. By this is meant that neither one of the two parties alone is able effectively to dispose of the object (11). In this way both parties have a great degree of protection against a disposition by the other party which would violate the contract.

It is mandatory that any return of the pledged object to the pledgor has the effect of extinguishing the charge (12).

d) The pledging contract is not subject to any requirements as to form.

e) On repayment falling due the pledgee can give warning that he will realise the object and after one month carry out the realisation without further

action being necessary (13). No judicial or other authorisation is required for realisation. As a rule realisation takes place by means of public auction (14), though agreements to the contrary are admissible (15).

2. The registered charge on ocean cables

As physical delivery of ocean cables is impossible, the possibility of creating a registered charge has been provided by legislation (16),

- a) To create the charge there must be consent and entry must be made in a special register; the approval of the Federal Minister of Posts is also required. Unlike the land register, for example, the register does not enjoy public confidence as far as property relationships are concerned. The registration of an existing charge merely precludes the possibility of a third party acquiring the title to the cable in question in good faith and free of encumbrances.
- b) The objects charged are ocean cables which have obtained the necessary approval of the Federal postal authorities. The charge covers debts due to the owner arising from a transfer of the cable business to third parties, i.e. usually debts from leasing; it can be extended to fittings.
- c) Realisation follows the principles of immovable property execution.

3. The charge under the law on loans to tenant farmers (Pachtkreditgesetz) (17).

- a) With the aid of this special non-possessory registered charge agricultural credit institutions authorised by the state can obtain security for their loans to tenant farmers (18).
- b) The charge is created by the deposit of a detailed written pledging contract at the district court for the district where the farming business is carried on (19). By this means the existence of the charge is publicised.
- c) The object charged consists of the total net assets of the tenant farmer (20). Exceptions may be agreed (21).
- d) It might be asked why the legislators created a registered charge in 1951 when fiduciary transfer of title by way of security was fully accepted in Germany. The significance of the Pachtkreditgesetz (22) lies in the fact that the charge can be acquired in good faith from non-owners (23), partially with precedence even over other rights (24). Agricultural credit institutions have a further guarantee beyond that conferred by fiduciary transfer of title by way of security in that third parties cannot acquire the assets in good faith and free of encumbrances from the tenant farmer outside normal business (25). But if the purchaser then resells to a third party the latter acquires a title free of encumbrances if the purchase was made in good faith. This is justified because the third-party purchaser cannot be expected to investigate whether or not the assets he has purchased belonged previously to a tenant farmer and had been pledged by him.
- e) Realisation of the assets charged takes place by sale (26).

4. Fiduciary transfer of title by way of security ("Sicherungsübereignung")(27)

This method of providing security is now widespread and of great practical importance, particularly with regard to bank credit. Here the giver of security transfers the property in the object constituting the security to the creditor. The contractual security agreement lays down when and how the creditor may realise the security. Prevailing opinion holds that transfer of title by way of security is a fiduciary act(28), a trust for the benefit of its creator.

a) This legal form has a strange history which is worth brief examination from the standpoint of comparative law(29). Transfer of title by way of security is not dealt with in the Bürgerliches Gesetzbuch(30). But it would be wrong to suppose that this formula was still unknown at the end of the 19th century or had been indirectly rejected by the acceptance of the existence of the pledge principle(31) and could only exist praeter or contra legem(32). Some early decisions of the Reichsgericht - influenced to some extent by local laws - are certainly based on the ancient doctrine of titulus and modus acquirendi with regard to acquisition of title(33). As the security agreement, particularly under the Prussian Allgemeines Landrecht, was not recognised as a valid titulus, resort was made to describing transfer of title by way of security as a sale (for the purpose of security)(34). Nevertheless there are numerous decisions even before 1900 - especially in common law - which recognise "pure" transfer of title by way of security in the modern sense(35). This line of judicial thinking continued undaunted after the coming into force of the Bürgerliches Gesetzbuch(36). Neither did the legislators who brought in the Bürgerliches Gesetzbuch wish to forbid the transfer of title by way of security through constructive possession and they rejected a proposal which would have had this effect(37). Later moves towards legislative reform, in particular towards the introduction of a general registered charge have hitherto all foundered(38).

b) The creation of fiduciary ownership normally comes about through the passing of property in the object serving as security by means of constructive possession(39); here the rights and duties of the parties arise from the contractual obligations of the security agreement(40). There are no requirements as to form, nor any need for publicity such as affixing notices of the charge to the object constituting the security. Such a step would certainly give the creditor a measure of protection against otherwise bona fide third-party purchasers, but it is unusual except where it is necessary for the individualisation of certain sections of goods in a warehouse(41).

It is disputed whether in cases of doubt the transfer is one which is subject to a resolutive condition which is brought about by the extinguishment of the secured debt(42) or a transfer which is unconditional and merely carries with it a contractual right to restitution(43). What is not disputed however is that the transfer of title by way of security involves a non-accessory security which neither necessarily presupposes the existence of the debt which is to be secured nor automatically passes with the secured debt to an assignee(44).

c) Where the security consists of a single movable object which is still subject to retention of title by a third party, then the recipient of the security cannot as a rule acquire the ownership of the object in good faith(45); but he does acquire the giver of security's so-called right of expectation

arising from the sale under retention of title(46). On payment of the last instalment of the purchase price to the title-retaining seller this fiduciary right of expectation becomes a normal fiduciary ownership and without any intermediate acquisition by the giver of security (47).

- d) Motor vehicles provide a particularly good security in that the recipient of security can to a large extent protect himself against acquisition in good faith by third parties. For if he has the motor vehicle certificate ("Kfz.-Brief") handed over to him the third-party purchaser will generally be regarded(48) as grossly negligent(49).

Moreover with the help of the official register the vehicle can usually be quickly traced, so that the secured creditor can also realise his security.

Thus the case of the motor vehicle is one where the German system of fiduciary transfer of title by way of security functions particularly well. A mortgage system according to, say, the Italian model, which in any case requires a certain amount of administrative expenditure, can be dispensed with(50). It could be regarded as a shortcoming that the creditor cannot acquire the object forming the security in good faith from someone not having a good title(51). But this contains a danger for the creditor only in the very rare case of a non-owner being in possession of a motor vehicle certificate. If the certificate is missing on the other hand the creditor receives clear enough warning from this fact and does not require protection.

- e) If the object serving as security is the subject of a document of title (a transferable title-conferring instrument)(52) there is a distinction between the transfer of rights arising from the document under the rules governing securities ("Wertpapiere") and the acquisition of ownership of the object itself(53). The transferring effect of the transmission of an endorsed document of title only indicates that the transfer of title by way of security does not take place through assignment of the right to restitution(54) but is to be regarded as the product of consent and delivery(55). The recipient of security thus also acquires fiduciary ownership(56) when the giver of security is not the indirect possessor of the object serving as security(57).

The existence of a document of title does not, it is true, preclude the possibility of transfer of title by simply assigning the right to restitution, that is, without endorsing the document; but the document must be handed over in every case to make the assignment of the right to restitution effective(58).

- f) If the security consists of goods which are in the hands of the railways as carriers, transfer of title occurs in the normal manner by consent (as to the passing of the title) and informal assignment of the right to restitution (59). Yet it is useful for the creditor to be given the duplicate consignment note, for only then can he give the railways instructions concerning the goods and at the same time be sure that the giver of security is not making arrangements in other quarters(60).
- g) With the transfer of title to stocks the law of property principle of speciality demands attention. While the giver of security may certainly commit himself contractually to the creation of a security with an abstract value of, say, DM 10,000, in the law of property the transfer of title to

a portion of stocks according to description by volume, value or proportion is void(61). The goods forming the security must be exactly determined in a real contract, not merely be capable of being determined.

The requirement as to exact determination is deemed to be complied with if all goods stored in a particular area are transferred ("Raumsicherungsvertrag") or if the goods to be transferred out of the stock are individually marked ("Markierungsverträge").

Legal characterisation for each individual item as being in the complete ownership of the giver of security and goods under retention of title is not required (62) (63).

- h) As with retention of title (64) transfer of title by way of security also has its extended forms.

Admittedly a real subrogation does not occur ipso jure (65); nevertheless there is nothing to prevent the substitute for the goods forming the security being legally included. In particular, in the case of fluctuating stocks of goods, future goods which have not yet been acquired can serve as security (66).

Apart from such replacements transfer of title by way of security can be extended to debts arising from a resale of the goods serving as security (67).

Finally the goods forming the security are often raw materials or semi-finished products which the giver of security intends to transform and must transform. Usually he does not become the owner until he has transformed them (68). In this case the recipient of security can have his security extended to the finished products by means of the so-called transformation clause (69).

- i) As regards its scope transfer of title by way of security is subject to certain restrictions (70).

Both the contractual security agreement and, despite the abstraction principle (71), disposition as a real act of transfer are void if they conflict with public morality (72). This may give rise to claims for damages (73). A valid transfer of title by way of security may furthermore be declared void both outside (74) and within (75) a bankruptcy (actio Pauliana) (76). Finally, the recipient of security who has all the assets of the giver of security or vital parts of them transferred to him by way of security may lay himself open to liability on account of his legal duty to the creditors of the transferor (77) and may thus gain additional creditors instead of security (78).

- j) In the case of individual execution of the security prevailing opinion holds that the recipient of security has the right to action in opposition to the execution as a third party ("Drittwiderrspruchsklage") (79) and does not have to be content with preferential satisfaction (80) (81).

In the bankruptcy of the giver of the security the creditor cannot however segregate the goods forming the security (82) as would normally be appropriate to his formal status as owner. The purely securing function of this ownership means that it merely confers a right to preferential satisfaction (83).

On the other hand the giver of security does have the right to segregation of the goods in the bankruptcy of the creditor (84), against which however the trustee in bankruptcy can set up a right to possession in accordance with the security contract (85).

Similar principles apply in composition proceedings (86) (87).

- k) Realisation of the security is usually governed by contractual provisions (88). Only in exceptional cases therefore does the controversial question of whether or not the provisions of pledge law are to be applied by analogy arise (89).

II. CREDIT ON GOODS

1. The general rule applicable to sales

Following the separation principle (90) there is a distinction between the contractual agreement of sale which merely creates obligations (91) and transfer of title as a real fulfilling disposition (92).

Under the normal rule the seller can protect himself against an unpaid delivery by exercising a right of retention (93). If the buyer becomes bankrupt the trustee in bankruptcy can only demand delivery against full payment of the purchase price (94).

2. The right of pursuit

Exceptionally it can happen that the buyer is already the owner of the goods before they are delivered to him (95). If the buyer or his trustee in bankruptcy does not obtain direct possession of the goods until after the commencement of bankruptcy, the seller may claim to have the title transferred back to him if the trustee does not make payment in full (96). In view of the fact that it is almost always agreed that there shall be retention of title, this case has even less practical importance than that of unrestricted performance in advance by the seller.

3. General rule : no seller's privilege

German law does not recognise a seller's privilege in respect of the proceeds of realisation of the object sold either in an individual execution or in a bankruptcy.

4. Exception : the charge on agricultural products

A kind of seller's privilege is granted to the seller of seed-corn and fertilisers and to financing third parties (97). German law has however chosen the form of a statutory charge. The charge arises ipso jure on the fruits of the next harvest without any requirements as to publicity.

5. Retention of title

a) The legal construction. The right of expectation

Contrary to the situation where the principle of consent applies, no difficulties arise with the legal construction under German law. The separation principle (98) makes it possible to conclude the contractual agreement of sale unconditionally without further action - but with a transfer of title subject to a condition precedent (99). With the transfer of title subject to a condition precedent the buyer acquires a so-called right of expectation which is converted into full ownership on payment of the last instalment of the purchase price. This right of expectation can itself be transferred, even by way of security, and can be subject to an execution (100).

b) Form and moment of agreement

Neither the contract of sale nor the conditional transfer of title need be clothed with any kind of form. Instead they are valid in every respect (101) without formal expression. Accordingly the retention of title clause can even be agreed tacitly. Despite the widespread use of retention of title it cannot be assumed that it is a rule (102). If it is established that retention of title was agreed in the contract of sale, then in cases of doubt the transfer of title will proceed on this basis. If on the other hand the contract of sale was concluded without this clause and if the seller does not declare unilaterally until the time of delivery that he is unwilling to make delivery except under retention of title, this is regarded as a proposal for alteration of the contract of sale. If the buyer does not agree to this he does not have to refuse to accept the goods. Instead he may accept the insufficient offer and demand complete performance as provided by the contract, if necessary through action in the courts.

Sometimes a sale and transfer of title takes place initially without retention of title (because the parties assume immediate payment) and only later does the necessity arise for the contract to be converted by mutual consent into a credit sale with retention of title. This is possible both from the point of view of personal and property law (103).

c) Alterations to the retained property

If the retained goods are joined with another object in such a way that they form vital components (104) of a single new object, or if the retained goods are mixed with other goods, co-possession generally arises; but if one object can be regarded as the principal object its owner acquires sole ownership (105). The same applies in the case of transformation (106) unless the contract specifies otherwise (107). If the object is installed in a piece of real property as a vital component retention of title is similarly extinguished (108).

d) Extended forms (109)

Extension of retention of title to substitutes for the goods in question is possible under the contract and is widespread in practice. Problems arise here which are analogous to those met with in the case of transfer of title by way of security (110).

Protection against loss of ownership as a result of transformation (111) is provided by the so-called transformation clause. The seller can allow the person purchasing the goods which are subject to retention of title to resell them and have the future debts due from customers assigned to him in advance for security purposes. This involves an anticipatory assignment by way of security (112).

When extended retention of title and other assignments by way of security come into collision, problems of considerable commercial significance arise (113). The terminology used here could cause confusion. It is not retention of title itself but only one of its extended forms, namely the anticipatory assignment by way of security to the original supplier of debts due from customers to the buyer which could come into conflict with another assignment of the same debts by way of security to a third party, usually a bank. Two assignments for security purposes are thus in competition. Judicial practice has granted preference to extended retention of title (114). Retention of title can not only be extended, as in the forms described, i.e. made to cover substitutes, but can also be enlarged. The force of this is that the retention of title is not extinguished until the buyer has settled other liabilities besides the purchase price debt which are outstanding from him to the supplier (115) (116).

e) Effect of execution and bankruptcy on retention of title

If goods subject to retention of title are seized by third-party creditors of the buyer, the seller has a right of action in opposition as a third party ("Drittwiderrspruchsklage") (117). In the buyer's bankruptcy the prevailing view is that the seller may have the goods segregated (118) unless the trustee in bankruptcy opts for performance of the contract (119) and makes full payment (120) (121). In the event of unauthorised resale the right of segregation extends to the proceeds of this transaction (122).

In the bankruptcy of the seller it is doubtful whether the trustee in bankruptcy has the usual right of choice (123) in respect of a contract which has not been completely performed by either side (124). Parallel problems arise in composition proceedings supervised by the court (125).

f) "Realisation"

If the person buying goods subject to retention of title makes default in payment, the seller can withdraw from the contract without further action (126). He can also stipulate a period of grace and then demand compensation (127). In both cases retention of title has the advantage that the seller is not forced to reply on a contractual claim for transfer of the property back to himself but can demand the restitution of the goods as owner. The security from the seller's point of view lies in the fact that the buyer would not have the right to make any disposition of the goods (128) and, especially, in the fact that the seller has such an advantageous position in the event of execution on or bankruptcy of the buyer - as described above (129). Unless provided by a clause in the contract, the seller does not have the right, on default of payment by the buyer, to retake the goods to himself provisionally by way of additional security nor to sell the goods and to recoup the purchase price from the proceeds. The buyer continues to have the right to possession so long as the contract of sale continues in existence (130).

Notes

- (1) See order of 1.2.1961 (BGB1. I, 58) in revised version of 27.2.1969 (BGB1. I, 181). Public pawnbroking establishments are regulated by the law of the "Land" see Art. 94 EGBGB and also HARTMANN in SOERGEL/SIEBERT, Art. 94 EGBGB note 4 with further references.
- (2) Item 19 II; does not apply to objects not belonging to the debtor (OLG Hamburg, MDR 1970, 422).
- (3) The warehouse warrant, ss.363, 424 HGB; the inland bill of lading, ss.642 ff. HGB.
- (4) ss. 4, 9, 12, 30, 32 f. securities deposit law (Depotgesetz) of 4.2.1937 (RGB1. I, 171).
- (5) s. 1204 II BGB.
- (6) s. 1205 I 1 BGB.
- (7) s. 1205 I 2 BGB.
- (8) Under s.870 BGB.
- (9) s. 1205 II BGB.
- (10) By unanimous opinion, see for instance BGH WPM 1956, 258.
- (11) s. 1206 BGB : joint-owing co-possession, even if through the medium of the pledge-holder.
- (12) s. 1253 BGB.
- (13) s. 1234 BGB. If the pledging is a commercial transaction on the part of both sides, (see ss. 343 f. HGB), the period is one week, s. 368 I HGB.
- (14) ss. 2135 ff. BGB.
- (15) s. 1245 BGB.
- (16) Kabelpfandgesetz of 31.3.1925 (RGB1. I, 37). See Reichstagsdrucksache N° 607 of 3.3.1925 (draft, giving reasons for proposed legislation), and PICK, JR 1925, 647.
- (17) P KrG of 5.8.1951 (BGB1. I, 494); this follows a previous law dating from 1926.
- (18) s.1 PKrG.
- (19) s. 2 PKrG.
- (20) s. 3 PKrG. The concept of net assets (see MAZGER in SOERGEL/SIEBERT, ss. 586-590 note 1; SICHTERMANN, Pachtkreditgesetz, Berlin (de GRUYTER) 1954, s. 1 note 5a) is covered by the concept of fittings ("Zubehör") under s. 97 f. BGB, particularly s. 98 N° 2 (see BGHZ 41, 6, 7). The charge also covers the tenant farmer's expectancy in objects which have been delivered to him under retention of title, BGHZ 54, 319, 331.
- (21) S. 3 I 2, II 2 PKrG.
- (22) See SICHTERMANN (footnote 20), p.1.
- (23) s. 4 I, III PKrG. A fiduciary transfer of title by way of security under ss. 929 1st sentence, 930, 933 is however not effective until there is transfer of possession from giver of security to receiver of security.
- (24) s. 4 II, 1 PKrG. In the case of assets owned by the tenant farmer a mortgage has precedence however, s. 7 PKrG. In relation to the landlord's charge (ss. 581 II, 559, 585 BGB) there is a 50:50 sharing of the proceeds of realisation, S. 4 II 2, s. 11 PKrG.
- (25) s. 5 PKrG, as against ss. 932, 936 BGB.
- (26) s. 10 PKrG.
- (27) Concise survey of non-possessory charges under German law in BAUR, Das besitzlose Pfandrecht als Mittel der Kreditsicherung, in: Estudios de derecho civil en honor del Prof. Castan, Pamplona (Univ. Navarra), Vol.I, 1968, pp. 95-112; somewhat more detailed but no longer completely up to date : FLUME, Besitzloses Fahrnispfand im geltenden deutschen Recht, in: Deutsche Landesreferate zum IV. Internationalen Kongress für Rechtsvergleichung in Paris 1954, Düsseldorf (Triltsch), 1955, pp. 67-83.

- (28) Roman law influence: transfer of full rights with contractual binding of the parties; see KLAUSING in SCHLEGELBERGER's Rvgl HwB "Fiduziarische Rechtsgeschäfte" A II 3.
- (29) See SERICK I, s. 4 II 1; GAUL AcP 168 (1968), 351, 357-361.
- (30) s. 223 II BFB presupposes the general possibility of a transfer of title by way of security; one cannot definitely infer from this the admissibility of a transfer of title by way of security per constitutum possessorium. Several more recent laws do however proceed from the assumption that a transfer of title by way of security of this type is possible, e.g. s. 11. N° 1 Steueranpassungsgesetz of 16.10.1934 (RGL. I, 925), ss. 6 I 3, 27 II Vergleichsordnung of 26.2.1935 (RGL. I, 321).
- (31) ss. 1205, 1206, 1253 BGB.
- (32) Although this view is quite widespread, WOLFF/RAISER, s. 179 II 2; BAUR, s. 56 I 2; BOEHMER, Grundlagen der bürgerlichen Rechtsordnung, Vol. II, 2nd part, Tübingen (Mohr) 1952, pp. 147 f.
- (33) See RGZ 2, 173; RG JW 1896, p. 82 N° 71, pp. 211 f. N° 47.
- (34) See for example RGZ 2, 168. This construction continued to be used for a time even after the BGB came into force, see SERICK I, s. 4 II 1 with further references in footnote 22.
- (35) RGZ 13, 200; 24, 45 (general, relating to transfers by way of security); 26, 180; RG JW 1896, 645 N° 28; 1900, 670 N° 32.
- (36) RGZ 57, 175; 59, 146 and constantly.
- (37) See MUGDAN, Die gesamten Materialien zum BGB, Vol. III, 1899, p. 626, also GAUL AcP 168 (1968), 351, 357 ff. with further references. By contrast there is an express prohibition in Art. 717 of the Swiss ZGB.
- (38) In this connection see the interesting study from the political science standpoint by MELSHEIMER, Sicherungsübereignung oder Registerpfandrecht, Cologne/Opladen (Westdeutscher Verlag), 1967.
- (39) ss. 929 1st sentence, 930 BGB; transfers under s. 929 1st sentence and 931 BGB occur more frequently, under s. 929 1st or 2nd sentence alone less frequently, particularly in connection with documents of title. See SERICK I, s. 20 I.
- (40) The BGB does not contain provisions governing this contractual relationship either, hence the many disputes in cases where the parties have made no express agreement. Model contracts are to be found in SCHUTZ pp. 587 ff.
- (41) See g.
- (42) By analogy with s. 455 BGB.
- (43) See SERICK III, s. 37 I with further references. The banks agree in general an unconditional transfer of title, see Item 11 ASB (Allgemeine Sicherungsübereignung-Bedingungen), reproduced in SCHUTZ, pp. 587 ff., also BGH WPM 1971, 410.
- (44) ss. 401, 412 BGB are not directly applicable, but are analogous in that even in the absence of an agreement to that effect the assignee is under an obligation to transfer the property in the object constituting the security. See SERICK II, s. 26 V.
- (45) ss. 929 1st sentence, 930, 933 BGB; but according to judicial practice by virtue of ss. 929 1st sentence, 931, 934 BGB; BGHZ 50, 45; see SERICK II, s. 23 I, esp. 7, 8.
- (46) BGHZ 35, 85, 90 f.; 50, 45, 48 f.; 54, 319, 330.
- (47) BGHZ 20, 88. See SERICK I, s. 11 III 5.
- (48) BGH NJW 1970, 653. Details in SERICK I, s. 6 I 3; II, s. 22 II 4, s. 23 I 6a; SCHLECHTRIEM, NJW 1970, 2088.
- (49) By virtue of s. 932 II BGB.
- (50) Transfer of title by way of security functions as it were more quietly.
- (51) On account of s. 933 BGB.
- (52) Warehouse warrant to order, s. 424 HGB and regulations on warehouse warrants to order of 16.12.1931 (RGL. I, 763); inland bill of lading, ss. 444 ff., 450 HGB; bill of lading, ss. 642 ff., 650 HGB. With reference to the so-called

- bill of delivery ("Lieferschein") see SERICK II, s. 2^o II 1.
- (53) Greater detail in SERICK II, s. 22 I.
- (54) ss. 929 1st sentence, 931 HGB.
- (55) s. 929 1st sentence BGB.
- (56) Under ss. 929 1st sentence, 93^o BGR.
- (57) Contrary to s. 934 1st alternative BGB.
- (58) BGHZ 49, 160. In this instance the document does not have a transferring effect, SERICK II, s. 2^o I 1c.
- (59) ss. 929 1st sentence, 931 BGB.
- (60) ss. 72, 95 II Eisenbahn-Verkehrsordnung of 8.9.1938 (RGB1. II, 663).
- (61) French law, in the "warrant pétrolier" and the "warrant industriel", differs, see B I 6 and 8. Possible, but unusual, is the creation of co-possession of the whole body of stocks, see SERICK II, s. 21 II 3a.
- (62) BGHZ 28, 16; SERICK II, s. 21 IV 2. If "transfer of title" takes place without distinction, the creditor acquires the right of expectation to the retained goods, BGHZ 35, 85, 90 f.; 50, 45, 48 f.; 54, 319, 330.
- (63) If, besides retained goods, there are other non-owned goods in the warehouse, acquisition of the title in good faith is not possible, s. 933 BGB (exception: documents of title). Why, in the case where the creditor is known, the entire transfer of title should be void is not easily understandable (this is however the opinion of SERICK II, s. 21 IV 1 b), especially as there is no "entire" transfer, but - following the speciality principle - only transfers for each individual object. See also the end of s. 139 BGB.
- (64) See II 5 d.
- (65) Prevailing opinion, see BAUR s. 57 III 2c; SERICK II, s. 19 II 3; see same references for the carefully considered exceptions for surrogates consequent on destruction, damage or removal of the goods.
- (66) Technically the passing of property takes place in this case by anticipated consent and agreement of a possession-transferring relationship for the future or assignment of a future right of restitution, as the case may be, or by a "transaction with oneself" ("Insichgeschäft") (s. 181 BGB.). More detail in SERICK II, s. 20 00; s. 21 III; SCHUTZ, p. 589, specimen n^o 463.
- (67) Since under s. 398 BGB assignment of a debt does not require notice to the debtor, the anticipatory assignment of future debts does not present any particular difficulties to German law. (Similar questions arise in the case of extended retention of title, see II 5d). Example in SCHUTZ, p. 590, specimen n^o 465. See SERICK II, s. 19 III 1a, c and detailed treatment in Vol. IV (not yet published).
- (68) s. 950 BGB.
- (69) BGHZ 46, 117; BAUR s. 53 b III 3; SERICK I, s. 15 VII 2 b; II, s. 19 III 1a and detailed treatment in Vol. IV (not yet published). Specimen contract in SCHUTZ, pp. 589 f.n specimen n^o 464. Here too retention of title throws up the same problems.
- (70) But the rules are not over-strict, see BGH WPM 1971, 441.
- (71) See A III 4.
- (72) s. 138 BGB. This is the prevailing view, see SERICK I, s. 4 II 6a, particularly footnote 39. Chief cases: incapacity of the giver of security (see SERICK III, s. 30 VII) and - partially overlapping s. 826 BGB - endangering third-party creditors (see BAUR s. 57 V 5; SERICK III, s. 30 VI, s. 31 I).
- (73) s. 826 BGB. See also SERICK III, s. 31
- (74) Anfechtungsgesetz of 21.7.1879 (RGB1. 227).
- (75) ss. 29 ff. Konkursordnung (bankruptcy regulations).
- (76) See SERICK III, s. 32.
- (77) s. 419 BGB.

- (78) Some conflict on this point, see BGHZ 54, 101, 104; BGH WPM 1971, 441, 442 under b; SERICK III, s. 33.
- (79) s. 771 ZPO. See SERICK III, s. 34 I. Conversely, so does the recipient of security if the security - exceptionally - is in the direct possession of the recipient of security, SERICK III, s. 34 I 3, s. 35 I 6.
- (80) s. 805 ZPO.
- (81) Contrary opinion held by, e.g., WOLFF/RAISER, s. 180 IV 1; also s. 886 III of the draft ZPO, 1931.
- (82) s. 43 Konkursordnung.
- (83) s. 48 Konkursordnung by analogy (see s. 27 II Vergleichsordnung = composition regulations). SERICK III, s. 35 I.
- (84) Under s. 43 Konkursordnung.
- (85) SERICK III, s. 35 II.
- (86) Vergleichsordnung of 26.2.1935 (RGBl. I. 321).
- (87) See particularly s. 27 II, also s. 26 I Vergleichsordnung; SERICK III, s. 36 II.
- (88) See for example Items 20, 21 III 1 of the Allgemeine Geschäftsbedingungen der Banken (general conditions of the banks) in SCHUTZ, p. 26; Items 10 and 11 of the Allgemeine Sicherungsübereignungs-Bedingungen (ASB) (= general conditions for transfer of title by way of security) in SCHUTZ, pp. 587 f. specimen n° 462. The validity of a forfeiture clause (Verfallklausel or lex commissoria) is hotly disputed, see SERICK III, s. 38 III.
- (89) See SERICK I, s. 19 IV 2; III, s. 38 I 2.
- (90) See A III 3 d, 4 a.
- (91) ss. 433 ff. BGB.
- (92) ss. 929 ff. BGB.
- (93) ss. 320, 322 BGB.
- (94) ss. 17, 59 N° 2 Konkursordnung.
- (95) E.g. by delivery of documents of title or by assignment of the right to restitution.
- (96) ss. 44, 17 Konkursordnung.
- (97) Gesetz zur Sicherung der Düngemittel - und Saatgutversorgung, of 19.1.1949/30.7.1951 (BGBl. I 476). See EBELING, Das Fruchtepfindrecht, Hamburg (Agricola), 1955.
- (98) See A III 3 d, 4 a.
- (99) See ss. 455, 929, 158 I BGB.
- (100) In connection with all these points, see SERICK I, s. 11; s. 12 III, IV; BAUR s. 59 V.
- (101) In contrast to Italian law in particular, see E II 6 c - e.
- (102) SERICK I, s. 5 II 3.
- (103) SERICK I, s. 5 II 5; BAUR s. 57 V 7 b. One can also regard this as a transfer of title by way of security, see the references in SERICK I, s. 5 II 5 footnote 70, and, more recently, BGH WPM 1971, 347, 349 left. All this shows how closely related retention of title and transfer of title by way of security are in their functions.
- (104) s. 93 BGB.
- (105) ss. 947, 448; right to compensation: s. 951 BGB.
- (106) s. 950 BGB.
- (107) See d.
- (108) ss. 946, 94, 95 BGB, s. 951 BGB.
- (109) Detailed treatment in SERICK IV (not yet published).
- (110) See I 4 h.
- (111) s. 950 BGB.
- (112) This demonstrates once again how similar are the functions of retention of title and transfer by way of security. See also footnote 103.
- (113) BAUR s. 59 VI; detailed treatment in SERICK IV (not yet published).

- (114) BGHZ 30, 149; BGH NJW 1968, 1516; 1969, 318; 1971, 372.
- (115) Examples of this enlargement occur in retention of title in respect of current accounts and groups of companies. See BGHZ 42, 53, 59; BGH WPM 1971, 348; BAUR, s. 59 I 4 c, d.
- (116) To the extent that the enlarged retention of title secures more than just the purchase price debt, it is again evident that it has practically the same effect as far as security is concerned as does transfer of title.
- (117) Under s. 771 ZPO, prevailing view, see SERICK I, s. 12 II, 2, 3; contrary opinion RAISER, Dingliche Anwartschafter, Tübingen (Mohr), 1961 p. 91 f.: only right of action is for preferential satisfaction, s. 805 ZPO.
- (118) s. 43 Konkursordnung. See SERICK I, s. 13 II 3. There is a certain conflict between this interpretation and the same problem as it occurs in the case of transfer of title by way of security (see I 4 j). For this reason a minority opinion holds that the security-providing character of retention of title ought to be dominant and should merely confer the right to preferential satisfaction ("Absonderung") under s. 48 Konkursordnung. Thus RAISER (as in previous footnote) p. 95. There is much to be said for this solution particularly where the purchase price itself has already been paid and retention of title only continues to subsist because of "enlargement" or when it is a question of "extension" of retention of title (JAEGER/LENT, Konkursordnung, Berlin (de Gruyter), Vol. I, 1958, s. 43 note 371; FLUME NJW 1950, 841, 849 f.); thus recently also BGH WPM 1971, 71, 72 Item 4 for extended retention of title, WPM 1971, 347 for enlarged retention of title.
- (119) Under s. 17 Konkursordnung.
- (120) s. 59 n° 2 Konkursordnung.
- (121) In connection with all these points see SERICK I, s. 13 II.
- (122) So-called substitute segregation ("Ersatzaussonderung") under s. 46 Konkursordnung. See MORITZ, Die Rechte des Vorbehaltsverkäufers nach s. 46 KO im Konkurs des Käufers, dissertation Tübingen, 1970.
- (123) Under s. 17 Konkursordnung.
- (124) Left open by BGH NJW 1967, 2203, 2204 Item 3a; NJW 1968, 2106, 2108 Item 2; supported by e.g. SERICK I, s. 13 III 1; opposed by BOHLE-STAMMSCHRADER, Konkursordnung, 9th ed. Munich (Beck), 1969, s. 17 note 3b.
- (125) See particularly ss. 25-27, 36 Vergleichsordnung; in this connection BGH WPM 1971, 347; SERICK I, s. 14 I-III.
- (126) In this respect s. 455 BGB is less severe than s. 326 BGB.
- (127) s. 326 BGB.
- (128) Acquisition by third parties thus being only possible on the basis of good faith (ss. 932 BGB, s. 366 HGB).
- (129) See e.
- (130) BGHZ 54, 214 (disputed). The demand for restitution can be deemed by inference to constitute a declaration of withdrawal from the contract; see s. 5 Abzahlungsgesetz which actually makes mandatory provision to this effect.

G. THE NETHERLANDS

I. CREDIT IN THE FORM OF LOANS

1. The pledge

- a) As regards the creation of a pledge Dutch law follows the separation principle, that is to say it differentiates between the contractual obligation to create a pledge and the real act of creation itself (1). Verbal agreement is sufficient for both acts (2).

In addition, physical transmission of the object to the creditor or to a third party as pledge-holder is required (3). Creation of a pledge by constructive possession is excluded (4), and qualified co-possession is not deemed to be sufficient either. A substitute for physical transmission in the form of assignment of the right to restitution, although not provided for by law, is accepted by judicial theory and practice at least in the case of the transition of ownership (5). There should therefore be no objection to this procedure in the case of creation of a pledge,

- b) On default by the debtor the creditor has the right to realise the pledge. This takes place without the need for execution or other authorisation by means of a public sale (6), and in the case of commercial goods the creditor may sell without restriction through the medium of two brokers (7). Contrary agreements are permissible but not until the debt has fallen due (8). In particular any forfeiture clause agreed before the debt has fallen due is void (9).

After the debt has fallen due the court may, on application from the creditor, order a different type of realisation from the usual or allot the pledged object to him, its estimated value being set against the debt (10).

- c) In practice the area of application of the pledge is very small (11), chiefly because Dutch law recognises fiduciary transfer of title by way of security (12). So the pledge is mainly used only in the pledging of securities and in small loans by the pawnbroking trade (13).

2. Fiduciary transfer of title by way of security

- a) In the Netherlands transfer of title by way of security has evolved and established itself praeter legem in the same way as in Germany (14) (15). The principal reasons for this parallel development are as follows : First of all a connection became established in legal doctrine and judicial practice between the separation and transmission principles (16) which - where ownership is to be transferred - require, in the case of the first-mentioned principle, a distinction to be made between the contractual creation of obligations and the real disposition and, in the case of the second, the physical transmission of the object. Both assignment of the right to recover the property and constructive possession are admitted as substitutes for physical delivery (17). Then, due to the recognition of

fiduciary acts (18) by Dutch law, nothing stood in the way of the interpretation of transfer of title by way of security as a trust for the purpose of security. Finally, in 1929 (19) the Supreme Court set aside the objections arising from the principle of the pledge against a transfer of title by way of security through constructive possession.

- b) Accessory nature of transfer of title by way of security. Dutch law differs slightly from German in that, although it follows the separation and transmission principles, it does not apply the abstraction principle (20). The transfer of title by way of security is therefore only effective if there has been a valid agreement concerning the security. This does not mean to say that it is accessory to the extent of depending on the existence of the debt which is to be secured; for the debt to be secured and the agreement as to security are two different things.

It is disputed whether the property in the object serving as security is accessory to the extent that it is extinguished with the secured debt or whether it must first be transferred back to the giver of security on the basis of the security agreement (21). Similarly it is not completely clear whether on assignment of the secured debt the property in the object passes ipso jure to the assignee as an accessory right (22).

- c) It is important, particularly in the case of fluctuating stocks of goods, to decide whether goods which will not be acquired until a future time can also be the object of a transfer of title by way of security. According to judicial practice the recipient of security acquires the title at the moment of delivery of the goods to the giver of security, unless the latter lets it be known clearly that he does not wish to hold the goods for the recipient of security (23).
- d) Acquisition of the title to the security by a person not entitled to do so by means of constructive possession is not possible. Acquisition in good faith (24) is excluded, since a person possessing on behalf of someone else cannot make himself the actual owner by a mere act of will (25) and therefore cannot transfer (indirect) possession to the (new) recipient of security either (26). This question is of particular significance when the goods forming the security are still subject to retention of title or have previously been transferred by way of security to another person. The seller's privilege (27) is not adversely affected by a transfer of title by way of security by means of constructive possessio.. (28).
- e) Extended forms evidently do not play so great a role as in Germany. It is questionable in particular whether possible debts from customers arising from the sale of the goods forming the security can be assigned in advance (29).
- f) The effect of transfer of title by way of security in the bankruptcy of the giver of security is that the recipient of security, like a pledgee (30), can obtain prior satisfaction (31). The claim of the recipient of security however - unlike that of the pledgee - ranks behind the seller's privilege which in Dutch law is proof against bankruptcy (32) (33).

Whether in an individual execution of the goods serving as security the recipient of security can demand their release (34) or can only claim...

preferential satisfaction is not certain (35).

- g) It is disputed whether realisation must follow the pledge provisions strictly or whether the parties are free to make their own arrangements (36).

3. Sale with repurchase clause

The economic result of transfer of title by way of security was in earlier years obtained by means of the sale with repurchase clause (37). Once transfer of title by way of security became fully accepted this makeshift formula became superfluous, but it still lives on in guarantee practice (38).

4. In the course of preliminary work towards a reform of the Dutch civil code the possibility of creating a registered charge has been raised both by the government side and by well-known authorities on jurisprudence (39). MEIJERS' plan would limit the registered charge to objects belonging to business undertakings (40). He suggests that the goods which will not be acquired by the giver of security until a future date could also serve as security, especially fluctuating stocks of goods (41).

He goes on to suggest the possibility of a non-possessory non-registered charge on movables belonging to a business concern but only to secure loans to the concern in question (42).

Transfers by way of security would be expressly forbidden: the providing of security is not seen as a valid reason for transfer of title (or of any other rights) (43). Whether these proposals will become law remains to be seen.

II. CREDIT ON GOODS

1. The general rule applicable to sales. Dutch law follows the transmission principle and also the separation principle but not the abstraction principle (44). The property can thus only pass to the purchaser if there is a valid contract of sale. Therefore the seller, in the absence of a valid causa, does not as in Germany have to rely on a contractual right of re-transfer of title (45). Although the parties are at liberty to agree otherwise, the normal rule is that the property passes to the buyer with delivery (46).

Thus in the case of debts incurred in respect of items determined by generic description, individualisation does not result in passing of title as it does under French law, but only in the passing of the risks of performance and price to the buyer (47). Here individualisation has a somewhat different (mainly less important) meaning than "Konkretisierung" (putting into concrete form) under German law (48).

2. The right to restitution

- a) Where a sale takes place without any agreement permitting deferred payment, the seller can demand the return of the goods within 30 days from delivery if the buyer fails to pay ("recht van reclame") (49). It is disputed whether

this constitutes a real claim to restitution (50) or merely a contractual claim which leaves the contract of sale undisturbed and only restores the status quo (51).

The right to reclaim the goods only subsists as long as the goods remain unchanged (52) and in the hands of (53) the buyer (54).

- b) If the buyer has resold the goods in the meantime, the right of reclaim can also be directed against the third-party purchaser, if the latter has acquired in bad faith (55). If the third party has acquired in good faith (56) the seller can recover the outstanding debt from the original purchaser (57).
- c) It is a striking particularity of Dutch law that this right of reclaim is also valid in bankruptcy and moreover to an enlarged degree, in that even sellers who have sold on credit have this right (58).

The seller is thus not dependent on the protection of retention of title.

3. Rescission of contract in the event of non-payment

- a) Like French law (59), Dutch law gives the seller, as a party to a mutually-agreed contract, the right to demand rescission of the contract if payment is not made in due time (60) (61).

The law initially assumes the fiction that the necessary resolatory condition has been agreed (62). However, dissolution does not come about ipso jure but requires intervention by the court (63) - even where the condition is not fictional but has really been agreed (64). This is what in modern terminology is called a right to sue for reconstitution ("Gestaltungsklagerecht") (65).

- b) Nevertheless, it is the unanimous view, especially in practice, that the parties can validly agree, over and above the mere condition, that the sale contract shall be rescinded for non-payment without the intervention of the court (66). But even here the construction of a condition (which ought to take effect ipso jure) is not fully adhered to. Instead the seller must call for rescission (67); in other words: he has a right to reconstitution ("Gestaltungsrecht") (68).
- c) As the cancellation of the contract is construed according to the French pattern as a resolatory condition, its initial effect is that the contract of sale is voided ex tunc (69). In this study however we are chiefly interested in the legal fate of the object being sold. In effect Dutch law agrees with French law here too: ownership reverts ipso jure to the seller, although Dutch law, unlike French law, is following not the contract principle but the separation principle (70). But the liquidation of the contract also nullifies the transfer of title as the latter is conceived of not as an abstract but as a causal act of disposition (71). So rescission of contract also has a real effect (72). The seller thus does not need to have recourse to retention of title (73).
- d) It is noteworthy that the right to (sue for) reconstitution just described can still be exercised after the commencement of bankruptcy and even then has its full real effect. (74). In this way the seller can recover his

goods even without retention of title. The seller is therefore only forced to rank as an ordinary creditor in bankruptcy if the goods have been consumed, lost or sold in the meantime.

4. The seller's privilege

- a) The seller has a privilege in the delivered movable goods as security for the debt due to him in respect of the purchase price (75). But the goods must still be "in the hands of" the buyer, i.e. they must still be in his ownership (76). If the goods are resold the privilege continues, attaching to the debt arising from the resale (77).

Contrary to the case with the right to reclaim the goods (78) the creation of the privilege is not dependent on whether the sale is on credit or on cash terms (79). Nor is the valid enforcement of the privilege linked to the observation of a time scale.

- b) On the basis of his privilege the seller may claim preferential satisfaction (80). Again in deviation from the French pattern this right is applicable not only in an individual execution but also in a bankruptcy (81).

So to enforce the payment of the debt due to him for the purchase price the seller need not rely upon retention of title either.

5. Retention of title

- a) The preceding paragraphs have shown that the seller is granted fairly comprehensive safeguards in the shape of the rights of reclaiming of the goods, rescission of contract and preferential satisfaction, rights which can actually be upheld in the face of bankruptcy and which can equally well secure for him either the dissolution of the failed contract or the enforcement of the purchase price debt. With these safeguards, which are provided by the law itself, the position of the seller in the bankruptcy of the buyer is singularly secure in comparison to that of his counterpart in the other member states of the European Communities.

One might wonder whether retention of title still had any importance at all as a means of security in such a system. It certainly does not play anything like such a decisive role as it does in Italy, say, or even in Germany.

- b) Despite the existence of the types of security available to the seller as described above, retention of title is possible (82), although the only provision for retention of title actually laid down by law is that occurring in the statute governing instalment purchases (83). It is also held to be admissible in other situations. Except as regards instalment purchases it is valid without any requirements as to form.
- c) In comparison with the seller's other forms of security, the function of retention of title seems to be basically that it forbids the buyer to resell it or transform the goods without the seller's permission (84). This prohibition is reinforced by a penal sanction (85).

Retention of title does not have any great significance in Dutch law beyond what has already been mentioned. It would therefore be inappropriate to embark on a detailed analysis in this study (86).

6. The particularities of instalment purchase

- a) Instalment purchase subject to seller's retention of title is designated under the law in question by the confusing name of "huurkoop" (87). This nomenclature is merely intended to convey that the property does not pass on delivery (88) but at a later point in time - in cases of doubt, on completion of payment of the purchase price (89).
- b) A "huurkoop" agreement requires documentary confirmation or the signature of the purchaser (90). If this is lacking the transaction is deemed to be a normal instalment purchase not a "huurkoop" (91). Another stipulation is that the seller's copy of the document must be on pre-stamped duty-paid paper or must have had a duty stamp affixed to it (92); if these stamp-duty stipulations have not been observed the "huurkoop" agreement will not be recognised by the courts (93).
- c) On default of payment the seller can only demand the return of the goods if there is an express agreement to this effect (94). The retaking of the goods leads to dissolution of the contract, unless express agreement to the contrary has been made (95). The purchaser has however the right to regain the goods by paying the overdue instalments; if default occurs more than once the buyer can only regain the goods by paying up the whole balance of the purchase price still outstanding (96). Dissolution of the contract is revoked if the buyer regains the goods in the manner just described (97).

Notes

- (1) See A III 3d.
- (2) See Art. 1197 BW.
- (3) Art. 1198 I BW, including brevi and longa manu traditio.
- (4) Art. 1198 II BW.
- (5) HR 1.11.1929, NJ 1929, 1745: in contrast to French law, for example, no action by the direct possessor is required. See also ASSER/BEEKHUIS, pp. 187 ff.
- (6) Art. 1201 I BW.
- (7) Art. 1201 II BW.
- (8) HR 1.4.1927, NJ 1927, 601; 17.1.1929, NJ 1929, 622. See also VOLLMAR, Inleiding, n° 180.
- (9) Art. 1200 BW.
- (10) Art. 1202 BW.
- (11) See VOLLMAR, Inleiding, n° 175.
- (12) See 2.
- (13) Governed by the Pandhuiswet of 1910 and the law of 28.10.1946. Here it is noteworthy that the pawnbroker's only recourse is to the proceeds of sale of the pledge and he must bear any shortfall himself (see VOLLMAR, Inleiding n° 184).
- (14) See therefore the text under F I 4 for the essential points.
- (15) The supreme court did not recognise this means of security until a fairly late stage, HR 25.1.1929, NJ 1929, 616; 21.6.1929, NJ 1929, 1096. Survey of its evolution in note Ph. A.N. H (OUWING) to HR 6.3.1970, NJ 1970, N° 433, pp. 1238-1241; JAROLIMEK, pp. 15 ff. See also FARGAUD, Nos. 236 ff.
- (16) See A, footnote 12.
- (17) ASSER/BEEKHUIS, pp. 184 ff. ; VOLLMAR, Inleiding N). 118, 132; WAELBROECK, N). 32.
- (18) ASSER/BEEKHUIS, pp. 328 ff.
- (19) See footnote 15.
- (20) See A III 4c.
- (21) See JAROLIMEK, p. 132.
- (22) See JAROLIMEK, pp. 23 f. with further references.
- (23) HR 22.5.1953, NJ 1954, No. 189. The significance of this judgment is disputed, see JAROLIMEK, pp. 91 f. with further references.
- (24) Under Art. 2014 BW.
- (25) Art. 592 BW.
- (26) HR 22.5.1953, NJ 1954, No. 189; 29.9.1961, NJ 1962 No. 14.
- (27) See II 4.
- (28) HR 6.3.1970, NJ 1970 No. 433. See also JAROLIMEK, pp. 115 ff.
- (29) VOLLMAR, Inleiding, No. 133, Item 5; JAROLIMEK, pp. 92 ff. with further references.
- (30) Art. 57 FW.
- (31) HR 3.1.1941, NJ 1941, No. 470; VOLLMAR, Handels- en faillissementsrecht, No. 76, footnote 1; POLAK (see footnote 36), pp. 148 ff.
- (32) From Arts. 1185 No. 3, 1190 BW. See BLOM in: Idées nouvelles dans le droit de la faillite, Brussels (Bruylant), 1969, 277.
- (33) HR 6.3.1970, NJ 1970, No. 433.
- (34) Under Art. 456 Rv.
- (35) This question also appears to be unanswered in the case of the pledge, see HUGENHOLTZ, Hoofdlijnen van Nederlands burgerlijk Procesrecht, 8th ed.; Leiden (Brill), 1958, p. 186.
- (36) See JAROLIMEK, pp. 112 ff. with further references; POLAK, Faillissement en surséance van betaling, 6th ed., Groningen (Wolters-Nordhoff), 1969, pp. 153 ff.; FARGAUD, Nos. 245 f.
- (37) See for example HR 25.1.1929, NJ 1929, 616; in this connection JAROLIMEK, pp. 15 ff.

- (38) See JAROLIMEK, p. 18 footnote 49, together with the specimen contract reproduced on pp. 148 f. of the same.
- (39) Particularly MEIJERS, *Ontwerp voor en nieuw burgerlijk wetboek, Tekst und Toelichting*, S - Gravenhage (Staatsdrukkerij) 1954/1955, Art. 3.9.3.1-5.
- (40) Art. 3.9.3.1.1.
- (41) Art. 3.9.3.1.3.
- (42) Art. 3.9.2.2.
- (43) Art. 3.4.2.2.3.
- (44) See A III 3d, 4c; G I 2a.
- (45) On this point retention of title, too, does not therefore under Dutch law give the seller any more security than he already has.
- (46) Art. 1495 BW, see also Art. 639 BW.
- (47) Art. 1497 BW. See Art. 1496/for sale of specified objects (species).
- (48) s. 243 II BGR. \int , 1498 BW.
- (49) Art. 1191 BW.
- (50) The position is surely that the exercise of the right to restitution dissolves the sale contract and that, following the causality principle, the transfer of title also lapses.
- (51) In connection with this controversy see VOLLMAR, *Inleiding*, No. 171; *Handels- en faillissementsrecht*, I, Nos. 480 ff.
- (52) Art. 1191 II BW, Art. 231 WK.
- (53) By this is meant "in the ownership of" (see Art. 238 WK, also VOLLMAR, *Handels- en faillissementsrecht*, I, No. 483).
- (54) Art. 1191 I BW.
- (55) Art. 1192a I BW.
- (56) It is disputed whether knowledge of the possibility of reclaim constitutes bad faith or only knowledge of the exercise of the right of reclaim (see VOLLMAR, *Handels- en faillissementsrecht*, I, end of No. 488).
- (57) Art. 1192a II BW, Art. 238 III WK.
- (58) Arts. 230, 232 WK, see BLOM (footnote 32), p. 278. This rule is based on the idea that deferment of payment lapses with the commencement of bankruptcy (VOLLMAR, *Handels- en faillissementsrecht*, I, No. 484).
- (59) Arts. 1184, 1654 C.civ., see B I 3.
- (60) As to whether there must be default or whether even chance occurrences preventing performance are sufficient, see ASSER/RUTTEN, 3/II, pp. 334 ff.
- (61) Arts. 1302 f., repeated in Art. 1553 BW.
- (62) Art. 1302 I BW (see Art. 1184, French C.civ.).
- (63) Art. 1302 II BW.
- (64) Art. 1302 III BW. Only the granting of a period of grace by the judge is excluded in this case, Art. 1302 IV BW.
- (65) See ASSER/RUTTEN, 3/II, pp. 349 ff.
- (66) Only in the case of failure to accept the goods is the right of reconstitution ("Gestaltungsrecht") given ipso jure, Art. 1554 BW (corresponding to Art. 1657 French C.civ.).
- (67) See Art. 1303 BW, also: ASSER/RUTTEN, 3/II, pp. 349 ff.
- (68) In Italian law the seller can exercise this right to reconstitution within 8 days after the occurrence of the default even in the absence of an express clause to this effect (Art. 1517 CC, deviating from the basic rule of Arts. 1453, 1456 CC, see E II 3).
- (69) The corresponding process in German law would be avoidance of the contract ("Anfechtung" - see s. 142 I BGB) rather than withdrawal from the contract (under ss. 327 1st sentence, 346 ff. BGB), which only leads to a change in the contractual relationship and a duty to retransfer the ownership.
- (70) See A, footnote 12.
- (71) See A III 4c.
- (72) ASSER/RUTTEN, III/1, pp. 161 ff.; III/2, p. 357.

- (73) In contrast to Germany where withdrawal from the contract without a corresponding agreement to that effect is actually excluded in a sale with deferred payment (s. 454 BGB) and even a valid withdrawal leads only to a contractual obligation to retransfer ownership (ss. 327 1st sentence, 346 ff. BGB).
- (74) This view is completely predominant but has been criticised. HR 27.6.1952, NJ 1953 No. 564; POLAK, p. 108, with further references; VOLLMAR, Handels- en faillissementsrecht, III, No. 56; BLOM, as footnote 32.
- (75) Arts. 1185 Item 3, 1190 BW. Admittedly the BW, in Art. 1190, states that the seller has a "voorregt op den koopprijs van die goederen"; but by this is meant a preferential right in the goods on account of the purchase price (VOLLMAR, Inleiding, No. 170).
- (76) VOLLMAR, as previous footnote. Transformation of the goods does not prejudice the privilege (BLOM, as footnote 32, pp. 277 f.).
- (77) Art. 1192 II BW.
- (78) See 2.
- (79) Art. 1190 in fine BW.
- (80) Art. 1180 I BW.
- (81) See POLAK, P. 384. BLOM, as footnote 32.
- (82) See ASSER/KAMPHUISEN, III/3, pp. 182 ff. with further references, particularly with regard to the different types of legal construction which are possible.
- (83) Arts. 1576 h ff. (esp. Arts. 1576 j I, 1576 p BW), inserted by the law of 1936; greater detail in 6.
- (84) See VAN BRAKEL, Leerboek van het nederlandse verbintenissenrecht, 2nd ed., Part 2, Zwolle (Willink), year of publication not stated, p. 68; VOLLMAR, Nederlands burgerlijk Recht, III, 2nd ed., Zwolle (Willink), 1952, No. 849.
- (85) Arts. 321 ff. WB of penal law.
- (86) See also BLOM (footnote 32), p. 278.
- (87) Arts. 1576 h ff. BW. See ASSER/KAMPHUISEN, III/3, p. 182.
- (88) Art. 1576 I BW.
- (89) Art. 1576 p BW. The wording of this provision also appears to admit an enlarging of retention of title.
- (90) Art. 1576 i BW.
- (91) Art. 1576 j III BW.
- (92) Art. 59a-c Zegelwet.
- (93) Art. 15 Zegelwet.
- (94) Arts. 1576 q, 1576 s BW. There is no general right of reclaim (2) here as a result of deferred payment.
- (95) Art. 1576 s BW.
- (96) Art. 1576 I, III BW; dispositive in favour of the buyer, see Art. 1576 V BW.
- (97) Art. 1576 II BW.

H. C O M P A R A T I V E S U M M A R Y A N D
C O N C L U S I O N S (1)

1. The need for security for credit

- a) The jurist must base his considerations on the economic fact of the escalating credit requirements which are evident in our present-day national economies. Any comment on the possible instability of an economic situation such as this would be out of place.
- b) The striving to obtain real safeguards for every credit is understandable and deserving of legal protection.

The obtaining of security for credit is primarily of course in the interest of the creditor; he will not wish to find that in a bankruptcy, for instance - the most serious crisis that can occur in this connection - he must content himself with a low dividend (2). On the other hand, the ability to create a real security is equally in the interest of the debtor. For without security he will either obtain no credit at all or will only obtain it on substantially less favourable terms; unsecured "personal" loans are necessarily dearer than first-class mortgages.

The great risk of unsecured credit and hence its high cost (if not the impossibility of obtaining it at all) lies in the fact that real types of security are readily available. Anyone who can call upon assets as security will do so rather than have recourse to expensive unsecured credit. The situation would be different if the rule of the equality of all creditors were to be taken seriously and to be treated as a legal principle. Imagine the following system for example : real security for credit not to be recognised in the legal system, preferential rights to be reduced to the absolute minimum, and in particular preferential claims of the tax authorities to be abolished; further, debts above a certain size only to be effective if entered in a public register (3); in a bankruptcy all creditors to be paid pro rata (4). In such a system the dividends from the bankrupt estate would usually be very high and the credit risk relatively low (5). The individual creditor would thus not have such a pressing need to secure himself. Under the present system, by contrast, anyone who relies on the principle of the equality of all creditors and neglects to obtain a real security for himself must, if the worst comes to the worst, bear the negative balance between the debtor's liabilities and assets almost alone.

The alternative scheme sketched out above, which is purely theoretical, is merely intended to underline the causes for the often-quoted irresistible urge of business to find security for credit. The causes lie in the fact that the different systems of law have violated the principle of equality of treatment for creditors by admitting a host of preferential rights. Faced with the alternative of either obtaining a preferential right which will give him full satisfaction or losing almost his entire debt, the creditor is forced to make every effort to procure a suitable security for himself. So we see attempts made in practice to extend the existing methods of security ever further and to establish new methods. The legislators are

continually under pressure to legalise such efforts, mainly the result of specific crises in the economic sphere. In this connection the greatest success goes to those groups of creditors whose particular sector of industry is exceptionally important for the national economy at the time or whose interests are especially well organised. Thus there are no obvious reasons of principle for permitting the creation of non-possessory security on stocks of coal for instance but not on stocks of mineral oil or on motor vehicles (as in Belgium), or for permitting the reverse to apply (as in France).

Apart from these differing commercial and political factors, economic objectives also play a significant role in causing divergences in the type and form of security in the form of movables which are permitted. So we find in a number of countries a certain coolness towards consumer credit while loans for productive purposes are clearly regarded as particularly worthy of support. Lastly, divergent opinions in legal doctrine and theory have left their traces in the law now applicable, especially, for example, with regard to the admissibility of transfers of full rights for purposes of security. In the face of these influential factors the countless fortuitous occurrences of a more technical nature lose their significance.

Before entering on a comparative summary of the different types of security which are available to different types of creditor (6), we must first examine the legal foundation and all possible areas of application of the various security rights in movables.

2. The pledge

- a) One general advantage of the classical pledge is thought to be its publicity. Through this publicity the debtor's other creditors are supposed to be protected from overestimating his creditworthiness. This publicity aspect has only limited value however (7). It is not completely appropriate in the case where pledgor and debtor are different persons and is even less so in the case of qualified co-possession of pledgor and pledgee as allowed in Germany and Italy. But above all only one side of the coin as it were is visible: the loss of possession by the debtor. It is overlooked that, as an inevitable corollary of the foregoing, the creditors of the pledgee for their part may now have an unreliable security (8). The purpose of the pledge principle can hardly be intended to protect the creditors of one party by misleading the creditors of the other party. Moreover, the mere holding of an object does not, either in theory or in practice, constitute an acceptable basis for credit, because of the possible existence not only of non-possessory charges but of rental, lending or leasing arrangements or possession by a person as agent.

Nevertheless the publicity of the pledge still has a valuable use even today: its function as evidence. Possession makes it possible to prove instantly that it is this object and no other that has been pledged.

- b) But the real value of the pledge principle lies probably in the fact that it guarantees the creditor that he can put into effect his right of realisation. The creditor has the certainty that in the event of the debt falling due the goods serving as security are really at his disposal as the pledgor cannot in the meantime either tamper with them or sell them to third parties. He

even has this certainty in the case of qualified co-possession by pledgor and creditor as allowed under Italian and German law. This is no doubt the reason for the admission of this legal formula. Apart from this the pledgor has no need to demand the return of the object in order to realise it since it is already at his disposal. This circumstance makes possible the realisation of the pledge without the intervention of the court or execution institutions.

Against this the risk of misuse, sale or unjustified realisation by the pledgee is of little importance, for the debtor has the counter-value (as a rule the amount of the loan) as security (9).

- c) Despite these indisputable advantages the pledge has only a modest area of application especially when compared to the other types of material security based on movables. This is because the pledge is suited to simple and static business relationships. In the present day on the other hand not only jewellery and similar assets but all movables are used as a basis for credit. This applies above all to the debtor's indispensable production requisites and stocks which the creditor moreover can hardly take into his custody.
- d) The area of application of the pledge has been expanded somewhat by the device of creating the so-called document of title, which represents the goods in question. Here the transmission of the relevant document carries the fiction of the transmission of the object itself. The decisive factor is not the theoretical formula but the fact that in business practice the transmission of the document has exactly the same effects as the physical transmission of the object itself.

This is possible because legal relationships in certain situations must be, and are, based on the existence of such transferable documents. The recipient is safeguarded against legal dispositions of the object itself because third-party purchasers are always regarded as being in bad faith as everyone is assumed to know about the workings of the document of title system. Thus it is universally known that goods in the course of transportation by sea-going or inland-waterway vessels or in warehouses can only be disposed of by means of such documents. Against actual disappearance or deterioration of the goods serving as security there is the safeguard that the warehouses are either state-owned or else operated by organisations under concession from and subject to inspection by the state. Also there is little likelihood of collusion between the giver of security and the transport undertaking to the detriment of the recipient of security (10). Finally, there is a further safeguard for the creditor in that in consequence of the fiction of transmission he can acquire a charge in good faith from someone without a good title.

To a certain extent the fiduciary transfer of title by way of security and the retention of title in motor vehicles, especially under German law, fall into this category. Although the official document which every motor vehicle must have, the motor vehicle certificate, is not regarded as a document of title under the prevailing opinion de lege lata (11), but is considered to be merely ancillary to the vehicle in property law (12), nevertheless possession of the appropriate vehicle certificate is in practice used as a means of publicity (13) and is generally recognised by the courts as well (14). The recipient of security who is in possession of the motor vehicle certificate

is in practical terms just as well secured against legal dispositions of the security as is a pledgee. But only insurance can protect him against the actual loss of the object which has remained in the hands of the giver of security himself.

All these pledges which are effected by means of documents are thus characterised by publicity, by protection against legal dispositions and to a certain extent by protection against actual loss, in other words by almost all the benefits of a genuine pledge. They thus enjoy the chief advantage of the non-possessory charges; the giver of security can continue to use the goods, while the recipient of security has no need to store them. Hence this method of providing security for credit in the form of movables can be regarded as extremely successful, especially as it avoids the cumbersome and expensive procedure of the public register.

3. Non-possessory real security based on movables: the instruments available

- a) Apart from the security rights just described (15) which are effected by means of documents and have been classed with pledges, the simplest and clearest solution from the legal point of view is to be found in the genuine mortgages on movables. They have however only a very limited application.

A prerequisite for the creation of a mortgage of this type is the existence of relatively long-lived business assets which, in addition, can be identified either by individual characteristics of their own or with the help of official registration documents. Every person to whom the object is offered, either for sale or as security, must be able to establish immediately and without difficulty which register he must consult in order to check the legal status of the object. This degree of publicity makes it possible to exclude acquisition in good faith by third parties outside the register. This protection against loss through bona fide acquisition of freedom from encumbrances further makes it possible to allow the giver of security to sell the object serving as security to third parties. The imposition of a ban on sale is thus superfluous.

The mortgage on movables is mainly suited to officially registered objects such as aircraft and ships. With these usually very valuable objects a mortgage system has the additional advantage that it is easy to use the value of the object to secure several different loans. By contrast a transfer of title by way of security for instance can generally only be made to a single creditor (16), which makes it difficult if not impossible to use the full value of the object (17).

The following charges can be characterised as genuine mortgages on movables: the French charge on cinema films (18), the charge on a "fonds de commerce" under French (19), Belgian (20) and Luxembourg (21) law, the German charge on ocean cables (22) and the Italian charges on motor vehicles (23).

The French "gage automobile" (24) can only be mentioned in this connection with reservations. For whereas mortgages can normally secure money debts of any kind, the French "gage automobile" - unlike its Italian counterpart - can only be used towards the purchase of the object serving as security. The limited application of this method can be explained by its origin: in

1934 the government wished to counter the sales crisis in the automobile industry following the Cour de Cassation's refusal to recognise retention of title in bankruptcy. Moreover further problems arise if one wishes to describe the "gage automobile" as a mortgage on movables, due to the fact that it is disputed in French judicial practice and jurisprudence (25) whether acquisition in good faith free of encumbrances is possible outside the public register (26).

- b) Although not designed as mortgages certain special forms of retention of title with publicity (27) have the same practical effects as mortgages on movables.

The chief example under this heading is the retention of title in machinery worth over 500,000 Lire under the special Italian law of 1965 (28). This is another method characterised by the fact that it cannot be used to secure any debt desired but only the debt arising on the purchase of the actual object serving as security. The publicity of this charge and hence its efficacy against all other parties is not obtained by means of a register but through a notice affixed to the machinery on the authority of the court.

The formula of the "nantissement de l'outillage et du matériel d'équipement professionnel" found in French law (29) fulfils the same function. Unlike the special retention of title under Italian law just described this seller's security is dependent on entry in a public register. But this register does not serve to give protection against third party purchasers as does the publicity of the mortgage. For this the facultative marking of the actual pieces of equipment themselves on the request of the seller is required. Thus as a rule the charge is a normal registered charge effective only against third party creditors, but it has the capability of being upgraded to a right against all parties.

- c) Some registered charges, in spite of their publicity, are not effective against third parties purchasing in good faith but are only unrestrictedly effective against third-party creditors of the giver of security. They are therefore not genuine mortgages on movables. To this type of registered charge belong the "warrant hôtelier", the "warrant pétrolier", the "warrant sur stocks de guerre" and the "warrant industriel" of French law, the "warrant charbonnier" of Belgian law and the "warrant agricole" of French, Belgian and Luxembourg law. The efficacy of the French "gage automobile" is disputed in this respect (30).
- d) The charge under German law on credit for tenant farmers (Pachtkreditgesetz) (31) belongs among the legal formulas which occupy a peculiar position between the genuine mortgage on movables and the registered charge without effect against third-party purchasers. This means of security has a relatively small field of application; but the statute, thanks to its extremely logical drafting, shows up the typical problems of non-possessory types of security on movables with exemplary clarity.

A creditor can only be said to have a genuine guarantee if he can acquire the charge in good faith from a person not having a good title and if his rights are valid against all parties. On the other hand the rights of third parties in legal relationships can only be expected to be maintained if there is an opportunity to discover the existence of these rights. In the

case of non-possessory types of security on movables this publicity is brought about, as already discussed, by the marking of the object itself (32) or by means of a document appertaining to the goods forming the security (33). If these ways are not open the only solution is the creation of a register. No problems arise with those business assets where it is immediately obvious which register must be examined for the purpose of verification (34). In all other cases the only course is to base the register not directly on the actual goods serving as security but on the person of the giver of security (35). But if this is done the protection of the recipient of security is only effective to the extent that third parties cannot acquire a valid title from the giver of security himself. If these third parties resell the goods the register can no longer exclude acquisition in good faith as the further purchasers cannot know what register they ought to have examined. This is the solution adopted by the Packtkreditgesetz (36).

In this intermediate region between the mortgage on movables and the registered charge without effect against bona fide third-party purchasers there also belongs the Italian retention of title in machinery worth over 30,000 Lire (37). Here third-party purchasers have only to undertake a search in the local register for the district in which the machinery is installed. However, if the machinery is used in a different location they can acquire in good faith. So here again the publicity afforded by a register has only limited effect against third parties.

At this point one must also mention the security rights in respect of agricultural loans introduced in Belgian law, a contractual charge which is called - not quite correctly - a privilege (38). Here the registered charge can be upheld against third-party purchasers; but it must be put into effect within very short periods of time, which can often be said to be the same as complete lack of validity against third parties.

- e) Examples of genuine "secret" charges without any publicity are fiduciary transfer of title by way of security under German and Dutch law and the regular form of retention of title (39).

In the author's opinion these two forms of security rights have completely identical functions: both secure a pecuniary debt by giving a right of realisation in the form of non-possessory "temporary ownership". To a certain extent the differing nomenclatures merely reflect the differing histories of the goods serving as security: in one the recipient of security obtains them, in the other he retains them (40).

The proposition that retention of title and transfer of title by way of security are basically identical does not however accord with the prevailing view. Instead the two forms of security are ordinarily treated as different legal concepts. Retention of title is recognised in preference to transfer of title by way of security which is only admitted in Germany and the Netherlands and is strictly rejected in the other countries. The reason for the generally less critical attitude to retention of title may be that retention of ownership is only a variant of a movement of goods which takes place anyway, whereas transfer of title by way of security constitutes an additional transfer of rights made specially for the purposes of security. In addition it may be that in the case of retention of title there is the guarantee that a productive credit is involved which directly assists the selling of goods; with a loan secured by transfer of title this is not

necessarily the case - it may merely serve to facilitate the settlement of existing debts. Finally, a part may be played by the irrational consideration that a person "deserves" a security right more if the goods serving as security were formerly his goods than if he has hitherto had no legal relationship to them. But none of this justifies the different treatment of two means of security - retention of title and transfer of title by way of security - which are identical both in their function and even in the details of their legal structure. Since a distinction is nevertheless made in statute law, particularly that of France and Italy, the two concepts will be treated separately in the discussion which follows.

aa) Retention of title still encounters stiff resistance in some quarters, most of all in Belgium and Luxembourg where its validity is admitted only inter partes (41).

In France on the other hand retention of title is effective against both third-party purchasers and third-party creditors, the legal position here being no different to that in Germany. There is however one very important limitation: in the bankruptcy of the buyer retention of title is not recognised in principle (42). This is due less to the absence of publicity (which indeed is also lacking in an individual execution) than to the greater emphasis placed upon the principle of "égalité des créanciers dans la faillite".

In Italy retention of title as a secret security right is only successful in relation to third-party creditors, though here it is also valid in bankruptcy (43). Against other third parties it is only effective in certain cases where there is special publicity (44).

Retention of title is most widespread and important in Germany. It is valid without any requirements as to form and its efficacy is only limited by the possibility of acquisition in good faith. In the important practical sphere of the motor trade we are however no longer dealing with a secret right, since withholding of the motor vehicle certificate has the practical effect of giving publicity. Acquisition in good faith by third parties, though theoretically possible, is thus in reality as good as excluded (45).

In the Netherlands, too, non-formal retention of title is recognised as a secret right valid against all parties. It has nothing like the same significance as in Germany however. The seller has less need of such protection as statute law already provides him with sufficient - even bankruptcy-proof - safeguards (right of reclaim, rescission of contract, seller's privilege) (46).

The legal position regarding retention of title as described here will perhaps change within the foreseeable future. The preliminary draft of a convention on bankruptcy within the European Communities (47) contains a stipulation (48) that the national legal systems must recognise that "the retention of title, which relates to the object sold and provides security for the payment of the purchase price, is effective against the buyer's creditors insofar as the retention of title is supported by a simple document issued before delivery. This document is not subject to any requirements as to form". The trustee

in bankruptcy would however be able to offer evidence by any means available that the document or its date were drawn up with the intention of deceit or were incorrect.

In the present legal state of affairs the countries most affected by these provisions would be Belgium and Luxembourg. For if retention of title is to be recognised as effective in bankruptcy, it will hardly be possible to exclude it in an individual execution. For France the projected arrangement would ease formal requirements, but above all would make retention of title a bankruptcy-proof security. In Italy, besides relaxing formal requirements, it would widen the field of application beyond machinery valued at 30,000 Lires and upwards. The planned harmonisation of the national laws would not however imply a total adoption of the German position. The wording of the draft does not contain an unequivocal commitment to admit the subtle and ramified forms of enlargement and extension of retention of title as evolved in Germany. Nor would the draft commit the member states either to a recognition of the so-called subsequent retention of title or to the introduction of validity against third-party purchasers. Above all it is not clear from the draft whether or not this "seller's security" is meant to be available to a financing third party. This is essential unless it is desired to vitiate a decisive practical aspect of the harmonisation right from the beginning (49).

The provisions envisaged would not only be of great importance within the national legal systems, they would also put at the disposal of exporters a universally recognised and - apart from the difficulties mentioned - simple means of security. It would put an end to at least the majority of the large number of disagreements (50) which have existed in this field.

- bb) Fiduciary transfer of title by way of security per constitutum possessorium as the second main type of "secret" security right has not taken on as many differentiated forms in the individual countries as has retention of title.

In Germany and the Netherlands transfer of title by way of security is held to be fully valid. Acquisition of title in good faith by constructive possession from a person not having a good title is excluded. The acquisition of apparent legal rights by third parties is possible on the other hand. These two points somewhat diminish the guarantee given to the creditor by this form of security, but this minor weakness has not been sufficient to halt its triumphant advance.

In the four other countries on the other hand transfer of title by way of security has been firmly rejected (51). The reasons given range from the presumption of a fictitious act through characterisation as an act designed to circumvent the law (by evading the prohibition of the lex commissoria) to its rejection as a fiduciary transaction. However, the obvious criticism that by constitutum possessorium the transfer of title is circumventing the precept of physical delivery of a pledge is rarely made. An explanation, though certainly not a justification, for the rejection of transfer of title by way of security could further be found in the fact that the countries in question do not recognise the principle of separation between the contractual act giving rise to

obligations and the fulfilling disposition. This could make it somewhat harder to accept the security agreement alongside the classic types of contract of sale, gift, etc. as being a valid legal basis for the transfer of full rights. The preliminary draft of the convention on bankruptcy which has been mentioned (52) does not provide for a general introduction of transfer of title by way of security. This may on the one hand be due to the fact that the misgivings felt in many countries about this form of security are more deeply rooted than in the case of retention of title. On the other hand transfer of title by way of security does not play such a prominent role in the conduct of international transactions as does retention of title. A harmonisation of this aspect of the law may therefore not be so urgent for the cause of the uniform development of a common market. But at some time in the future the necessity will be seen for the harmonisation of this aspect too, especially as there are really no differences in principle between retention of title and transfer of title by way of security (53).

- cc) The total picture would not be complete were mention not to be made, alongside the legal concepts of retention of title and transfer of title by way of security - usually termed secret charges - of certain other means of obtaining security for credit. The first concepts to be considered under this heading are the privileges. These are in principle (54) preferential rights which are conferred on a debt by law on the grounds of its legal quality and which are a charge on the object serving as security only so long as the latter is numbered among the debtor's assets. From the outset therefore this means of security does not lay claim to efficacy against third-party purchasers. In the case of credit on goods a charge of this kind plays a significant role as a seller's privilege. In Germany however it is not met with at all, which is possibly the reason why retention of title has acquired such major importance there. By contrast the seller's privilege is a particularly efficient instrument in the Netherlands, where it is even deemed to be a security valid in bankruptcy (55) and thus makes retention of title superfluous. In France, Belgium and Luxembourg on the other hand the seller's privilege has to yield to the principle of "égalité des créanciers dans la faillite".

In Italian law the seller's privilege in machinery (56) cannot be classified under secret rights because of its publicity.

The German charge on the fruits of the harvest (57) however, because of its function, does fall under this heading. As a statutory charge its legal construction corresponds almost exactly to that of the privilege and in its practical effects one could say it was identical. The charge on the fruits of the harvest is not however based on the actual objects sold but on the objects produced with their help. According to its function therefore one could describe it as a legally ordained "transformation clause".

- f) Compared with the questions of principle regarding the legal structure and possible area of application of non-possessory forms of security on movables which have been discussed above, the remaining problems are of minor importance. The rules which have been made and the judicial decisions which

establish precedents are often quite random in their effects - and this applies not only to purely technical problems of law. In this category of problems belong, for instance, the formalities and the moment in time of the act creating the charge, the duration of the security rights, the detailed regulation of the relationship between creditor and giver of the security before the debt falls due, the commencement of the right of realisation, the procedures for realisation, the relationship between the charge and the debt (the question of the accessory nature of types of securities) and similar matters. These points have largely been dealt with in the sections devoted to the individual countries and a comparative summary can be dispensed with here. Just one particularly important problem of universal relevance still requires more detailed investigation: the determination of the object to be charged.

Determination of the object to be charged involves no problems in the case of credit on goods sold to the final consumer. The object sold serves as security. The problem of the extension of the security right to substitutes for the original security is of merely subordinate importance. In the case of loans to private individuals too this question should seldom arise. But this situation is different in the case of credit granted to business concerns, especially when the latter wish to resell or transform the goods serving as security. The charge on the actual goods serving as security can then only be of very short duration and is therefore relatively valueless. If no other security can be obtained, the only possibility remaining is to have recourse to the substitutes for the original goods. It is already open to question in the case of the so-called transformation clause (58) whether the provisions governing original acquisition of title through transformation are non-mandatory law. If one denies that they are non-mandatory there can no longer be any question of the original security being maintained but instead one must admit the creation of a new security on the new object - one might say a transfer of title by way of security. The transformation clause must then be rejected in those countries which do not recognise a transfer of title by way of security. Furthermore with every kind of registered charge on single individually-specified objects the transformation clause is impracticable because the new product cannot usually be individualised in the manner required for registration before its actual manufacture. But the situation is completely different if an aggregate of objects can serve as security in the state in which it is at any given time, since it is then only a matter of describing the aggregate of objects (59).

Anticipatory assignment by way of security and pledging of the debt arising on resale cause difficulties to the extent that they generally presuppose notice to a third-party debtor and in addition anticipatory assignments tend to encounter other objections of principle. Also the problem arises, much discussed in Germany in particular, of the conflict of such future assignments arising from a credit on goods on the one hand and a bank loan on the other (60). But these are matters which go beyond the boundaries of security in the form of movables and thus exceed the scope of this study. They deserved mention however on account of their close correlation.

Whereas in the case of credit on goods the delivered goods themselves serve as security, in the case of credit in the form of loans there is often the additional problem of determining the original security. This gives rise to problems particularly where a large aggregate of objects is security for a debt which by no means exhausts the full value of this aggregate.

The simplest solution of this problem is where a registered charge is available in respect of the aggregate (if possible in the state in which it is at any given time). Here the aggregate of objects is charged as a single unit in respect of a relatively low debt and further securities, ranking subordinate to the first, can be created. Contrary to the position with real property however realisation would not require the sale of the entire object charged. Instead successive sales could take place until all secured creditors were satisfied.

If there is no such registered charge available but for example only transfer of title by way of security as in German and Dutch law, difficulties arise. If the title to the entire stock is transferred, there is the danger of incurring nullity on the grounds of excessive security. If individual items are marked the security can be undermined by continuing transformation work or sales and would have to be continually renewed (61).

For these reasons it will often be more sensible to designate as security a spatially defined portion of the aggregate in the state in which it is at any time (anticipatory creation of security in goods which are not to be taken in until a future time) (62).

Even this solution cannot always be carried out, where for instance the only available security is a giant storage tank containing oil or other liquids or a heap of coal. Transfer of title by way of security with its principle of determination appears to fail in this situation. One answer - though not one which is much put into practice - is to create fractional fiduciary ownership of the total stocks at any time as co-ownership. This solution has an obvious disadvantage compared with charging the entire stock mortgage-fashion: if the value of the total stock declines, the security diminishes in proportion to the co-ownership fraction. The creditor runs the risk of partial loss even though the proceeds of realisation of the whole stock far exceeds his debt.

4. The instruments available and the needs to be fulfilled.

In conclusion we will briefly review the kinds of credit that can be secured by creating non-possessory forms of security on movables in the various countries concerned. Ignoring most matters of detail - for example the degree of guarantee obtained or the legal construction - we will concentrate simply on the question as to whether any forms of security on movables exist at all and what importance the individual forms have within the individual national legal systems. Once again we shall adopt the distinction between credit in the form of loans and credit on goods which is made in statute law, without thereby signifying our approval of the continuance of this distinction. Loans in the form of finance for (instalment) purchases will be classified under credit on goods - in accordance with certain laws in force.

a) In considering credit in the form of loans it will be appropriate in view of the precepts set out above to give separate treatment to farmers, other "non-traders" ("Nichtkaufleute") and traders.

aa) Farmers can use the assets of their business as security for loans in all the countries (63). In most cases special legislation to this effect has been in existence for a long time. This clearly reflects the extent to which the position of agriculture has always been regarded as a social

and political problem.

In France and Luxembourg the "warrant agricole" is available (64), in Belgium a specially-registered "privilege" (so-called) which must be agreed contractually (65). In Italy too there is a special privilege (66). In Germany and the Netherlands farmers can make use of the general transfer of title by way of security. While in the Netherlands - so far as one can discern - the matter was carried no further, in Germany there is in addition the special registered charge under the Pachtcreditgesetz (67) that provides a better guarantee than transfer of title by way of security and thus makes it easier for farmers to obtain credit.

- bb) "Non-traders" other than farmers do not have such good opportunities. In Germany and the Netherlands alone transfer of title by way of security is open to them to the same extent as to their colleagues in other occupations. In France, Belgium and Luxembourg on the other hand there are no non-possessory forms of security on movables for this sector. This is no doubt the expression of a generally unfavourable attitude towards "non-productive" credits. In Italy, in contrast, there exists the motor vehicle mortgage, a very significant instrument in practical terms (68).
- cc) For traders there is a whole series of special instruments introduced by statute, especially in France. This demonstrates how the legislators feel themselves impelled to take positive action when it comes to the furtherance of credits for industry and commerce.

Nevertheless the "warrant hôtelier" (69), the "warrant industriel" (70) and indeed the "warrant pétrolier" (71) lead a shadowy existence in French law. The mortgage on films (72), although functional within its own sphere, is only used by a minute proportion of the total number of those engaged in all sectors of industry. Only the formula of the "nantissement d'un fonds de commerce" has been able to some extent to fulfil the functions allotted to it in France, Belgium and Luxembourg (73).

The Belgian "warrant charbonnier" and the French warrants are the expression of an ad hoc intervention by the governments concerned and only serve to highlight the general lack of security on movables to secure loans to the industrial sector.

The same comment applies to Italy. Here too the creation of a special privilege for certain loans to small traders and craftsmen and to sectors of industry lacking in capital resources (74) merely underlines the great lack of a general means of providing security for credit (75). Possibly this lack is one of the reasons for the revival which is becoming apparent of sale and repurchase as a means of obtaining security for credit; this formula is basically nothing less than a poorly disguised transfer of title by way of security and could gain the great practical importance of the latter as it were by stealth.

In Germany and the Netherlands transfer of title by way of security (76) offers a relatively easily manageable means of security. Its weaknesses, namely the exclusion of acquisition of the security right

in good faith and the danger of acquisition of the object serving as security by third parties in good faith, evidently do not prevent its use in practice. The special form of providing security for credit in Germany in the shape of the mortgage on ocean cables remains to be mentioned (77); in its exclusiveness and structure it is comparable to the French film mortgage.

- b) In the case of credit on goods the picture is to a great extent one of uniformity, at least if one takes into account the provisions contained in the preliminary draft of the convention on bankruptcy (78) which has already been mentioned several times. These provisions give the seller the (simple) right of retention of title as a bankruptcy-proof means of security, requiring no registration but merely written agreement before delivery. But the position of a third party financing the transaction in the goods, extremely important for practical purposes, remains problematical (79).

In the survey that follows the envisaged alteration of the law will be left out of account and only the current legal situation will be considered. Germany and the Netherlands can be dealt with first, while in the case of the other countries separate consideration of sales to private consumers, to industrial consumers and to persons reselling the goods has been thought appropriate.

- aa) Firstly, Germany and the Netherlands enjoy a comprehensive means of security in the form of retention of title (80). In Germany it is the sole effective practical security for sellers, as the right to restitution, rescission of contract with a real ("dinglich") effect and seller's privilege are all unknown. In the Netherlands on the other hand these three legal securities for the seller - contrary to the case in other countries - are actually proof against bankruptcy. Retention of title does not therefore have the same outstanding importance as in Germany, merely a supplementary function. In the Netherlands there appears to be no sign of any further special statutory forms of security for sellers, and in Germany only the charge under the fertiliser security law (81).
- bb) In the case of sales to private consumers all the countries provide sufficient security for the seller in the shape of the right to restitution, rescission of contract and - with the exception of Italy - a statutory seller's privilege. The limitations on the efficacy of these rights in bankruptcy in Italy, France and Luxembourg do not apply in the case of private consumers since the latter cannot go bankrupt under the bankruptcy laws of these countries.

Although Italy has no general seller's privilege in addition to her right of restitution and rescission of contract (82), it can be created for machinery from 30,000 Lire upwards by registration (83).

The motor vehicle mortgage has a somewhat different function with regard to sales to private individuals in France (84) compared with Italy (85). Whereas in France it only provides additional protection against third-party purchasers, in Italy it also renders registration of a retention of title (86) or a machinery privilege (87) superfluous.

Thus the only complete gap in security for credit in the case of sales

to private consumers is in Italy for those goods not covered by the description "machinery".

- cc) For credit on goods for industrial consumers in France, Belgium and Luxembourg the general methods of security consisting of the right of restitution, rescission of contract and the seller's privilege have, with a few exceptions, no effect in a bankruptcy. Retention of title is similarly valueless. Consequently the legislators in France have provided a remedy in the form of a special registered charge for capital goods (88) and their counterparts in Belgium have done the same (89). In France there is also the motor vehicle mortgage (90). In Belgium motor vehicles may fall into the category of capital goods. There is thus only a gap in Luxembourg. In Italy the machinery privilege (91), the retention of title in machinery over 30,000 or 500,000 Lire as the case may be (92) and the motor vehicle mortgage (93) provide the corresponding securities for the buyer.

The main gap here is that no security that is effective in bankruptcy is available to sellers for sales of raw materials and supplies.

- dd) In the case of deliveries to persons reselling the goods not all the same legal devices are available as for sales to consumers. Thus the French "nantissement de l'outillage et du matériel d'équipement" (94) cannot be applied in respect of objects which do not become "equipment for professional purposes" until they reach the hands of third-party purchasers but which from the trader's point of view are simply goods in which he trades. The same comment applies to the analogous Belgian formula (95).

But even in situations where the use of the same means of security as in sales to industrial consumers is theoretically possible, such use is often inappropriate on practical grounds. Thus all registered charges for use in connection with ordinary merchandise are too expensive and too cumbersome. Where registered charges are valid even against third-party purchasers in good faith, as in the case of the Italian motor mortgage, their use could also be dangerous for the buyer. In order to acquire the object free of encumbrances he would have to settle the purchase price debt due from the trader to the manufacturer. For these different reasons the manufacturers will therefore avoid the use of such securities. Consequently they can only safeguard themselves by not selling the goods to the trader but by consigning them to him as agent (by way of "dépôt" or "consignation").

Notes

- (1) Interesting points relevant to this in FARGAUD, esp. Nos. 271 ff.; COING, Zeitschrift für Rechtsvergleichung, 1967, 65 ff.; KAY, pp. 9 ff., 28 ff., 51 ff., 58 ff. most recently K. SIMITIS, Archiv für die civilistische Praxis 171 (1971), 94 ff.
- (2) This also applies in those countries like France where bankruptcy is restricted to traders and where the priority principle does not apply in individual execution but where a proportional distribution of the proceeds takes place ("distribution par contribution").
- (3) Possibly showing a running cumulative balance. Advantage of such a system: only one simple register at the debtor's place of business/residence; the difficulty of clearly determining the object serving as security is obviated.
- (4) One could also envisage the settlement of debts in the order in which they are entered in the register. According to the amount of prior registered debts the credit risk would increase and with it the rate of interest.
- (5) Perhaps greatest for long-term credit, which would justify an exception for mortgages on real estate.
- (6) 4.
- (7) Also critical: KAY, p. 59, with further references.
- (8) Publicity as a means of publicising the pledging to the whole world would only be complete if the professional pledge-holders or public services were included, so that everyone would be aware that the objects were merely in their possession by way of custody.
- (9) If debtor and pledgor are not the same person, the pledgor - who as a rule stands in a relationship of trust to the debtor - may secure himself by making the latter undertake only to make repayment against restitution of the pledge intact. The debtor is unlikely to have cause to infringe this obligation.
- (10) In addition the recipient of security is usually covered by insurance.
- (11) See BGH NJW 1970, 653.
- (12) By analogy with s. 952, German BGB.
- (13) Even if not for the purposes of a pledging in the strict sense of ss. 1204 ff. BGB, then at least for transfer of title by way of security and retention of title which do have the same function as a pledge. While these security rights are generally "secret charges", with the help of the motor vehicle certificate they become clearly recognisable by everyone.
- (14) See F I 4 d. But acquisition of the security right in good faith from a person not having a good title is not possible (for that the vehicle certificate would have to be a document of title). This does not give rise to practical difficulties however as the holder of a vehicle certificate in his own name is also in almost every case the true owner.
- (15) 2d.
- (16) Ownership of fractional parts of an object by way of security belongs mainly to the realm of theory.
- (17) The so-called expectation ("Anwartschaft") of the debtor of the return of the goods serving as security would hardly be accepted in practice as a fully-valuable basis of credit.
- (18) See B I 10.
- (19) See B I 9, II 4c. The charge has a different form according to whether it is securing the debt arising from the sale of the "fonds de commerce" or another debt.
- (20) See C I 3.
- (21) See D 2.
- (22) See F I 2.
- (23) See E I 2, II 8.
- (24) See B I 3, II 8.

- (25) See B II 8c.
- (26) Italian law differs again: here publicity by means of the register is linked to the exclusion of acquisition of apparent legal title outside the register. See E II 8, esp. footnote 116.
- (27) Not the normal form without publicity.
- (28) See E II 6e (dd).
- (29) See B II 10.
- (30) See footnotes 24 and 25.
- (31) See F I 3d.
- (32) As with the Italian retention of title in machinery worth 500,000 Lire and upwards and optionally with the French "nantissement de l'outillage et du matériel d'équipement", see b.
- (33) As with retention of title and transfer of title by way of security of motor vehicles, particularly under German law.
- (34) As with films and trading organisations in France, ocean cables in Germany, motor vehicles in France and Italy, and aircraft and ships in all countries.
- (35) To a certain extent a "personal roll" instead of a "property roll".
- (36) s. 5 I PKrG. By contrast the registers of the French warrants and the Belgian "warrant charbonnier" and enlarged seller's privilege for business assets are only effective against third-party creditors; according to a disputed view this would also apply to the register of the French "gage automobile" (see B II 8c).
- (37) Art. 1524 II CC. See E II 6. As credit on goods is involved, the question of an acquisition of the charge in good faith does not arise as the recipient of security himself is the predecessor in title.
- (38) See C I 4.
- (39) Excluding the special forms introduced by Italian law in respect of machinery worth over 30,000 and 500,000 Lire (E II 6).
- (40) Because of the differing origins of the goods serving as security the problem of an acquisition of the charge in good faith does not arise with retention of title; for the goods serving as security come from the recipient of security himself.
- (41) See C II 4
- (42) See B II 5d
- (43) See E II 6d. The "data certa" requirement (partly applicable also in France for purposes of proof, see end of B II 5d above) does not provide publicity but is intended to give protection against manipulation after the onset of a crisis situation.
- (44) See b and e., also E II 6e.
- (45) See end of 2d.
- (46) See G II 2-5.
- (47) According to the position at 4.7.1969 published in: *Idées nouvelles dans le droit de la faillite*, Travaux de la Quatrième Journée d'études juridiques Jean Dabin, Brussels (Bruylant), 1969, pp. 397 ff.
- (48) Art. 39 I 2-4 of the preliminary draft.
- (49) Opposing view: FARGAUD, Nos. 277-279. The difficulties of construction thrown up only prove how little sense there is in differentiating between retention of title and transfer of title by way of security, in admitting one formula and rejecting the other. Basically it is a question of a single security right.
- (50) In this connection see COING, *Zeitschrift für Rechtsvergleichung*, 1967, 65 ff.; KEGEL, *JuS* 1968, 162 ff.
- (51) Italy appears to be an exception to a certain extent (see E I 3). But the real import of the revival of the formula of the sale with repurchase clause as a means of obtaining security for credit must be regarded as uncertain.

- (52) See footnote 47.
- (53) See also footnote 49.
- (54) There are some exceptions laid down by statute law. Thus for example the charge in respect of agricultural loans under Belgian law is also called a "privilège" (see C I 4) although it requires contractual agreement and, by virtue of the publicity provided by registration, is valid even against third-party purchasers.
- (55) See G II 4.
- (56) See E II 5.
- (57) See F II 2.
- (58) It is intended to preserve the object serving as security for the benefit of the recipient of security even in the event of transformation into a new object. See F II 5d.
- (59) For example: all items of equipment or all goods of a "fonds de commerce" or the entire net assets of a farming business or of a hotel.
- (60) See E II 5d.
- (61) Even in the case of a transformation clause and anticipatory assignment of the debts arising from the sale of security being permissible the surety gradually diminishes as the customers pay up the purchase price.
- (62) It is necessary here too for the creditor to ensure that the giver of security does in fact keep the location in question continually filled.
- (63) In this connection see CAPELLI, *La legislazione europea sul credito agrario*, Milan 1960 (to which the author did not have access); JACOBI, *Absicherungsformen des Mobiliarkredits im europäischen Agrarrecht*, in: *Recht der Landwirtschaft*, 1968, 197 ff.; by the same author, *Le garanzie del credito mobiliare nella legislazione agraria di alcuni paesi europei*, in: *Rivista di diritto agrario*, 1969, I, 481.
- (64) See B I 4 and D 1.
- (65) See C I 4.
- (66) See E I 4c.
- (67) See F I 3.
- (68) See E I 2.
- (69) B I 5.
- (70) B I 8.
- (71) B I 6.
- (72) B I 10.
- (73) FARGAUD, No. 19. Critical: KUNZLER, *Das nantissement du fonds de commerce*, Frankfurt/Berlin (Metzner), 1960, pp. 106 ff.
- (74) See E I 4d, e.
- (75) The motor vehicle mortgage which is open to all (E I ?) is a noteworthy step, but a very small one in relation to the total problem.
- (76) F I 4 and G I 2, 3.
- (77) F I 2.
- (78) Footnote 47.
- (79) In this connection see 3e (aa).
- (80) See F II 5 and G II 5.
- (81) F II 4.
- (82) See F II 4.
- (83) E II 5.
- (84) See B II 8.
- (85) See D II 6.
- (86) E II 6d and e (cc).
- (87) E II 5.

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TITLE II

THE LAW OF PROPERTY
IN THE UNITED KINGDOM AND IRELAND

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PART I

IMMOVABLES

Chapter 1: INTRODUCTION

TERMINOLOGY

The purpose of this report is to discuss the basic principles of the law, and since the use of technical legal terms can cause difficulties when the report is translated, an attempt will be made to use non-technical language whenever possible. It is, of course, impossible to write about law without using some technical terms but when it is not unified legally and it is therefore desirable to describe briefly a term used for the first time its meaning will be explained. There is also a glossary at the end of the report in which the meaning of the terms used will be given.

TERRITORIES COVERED BY THE STUDY

This study covers the United Kingdom and Ireland. Although the United Kingdom is politically a unitary state, different countries make up the United Kingdom of Great Britain and Northern Ireland. These countries are England, Wales, Scotland and Northern Ireland. England and Wales were integrated in 1536 and have the same system of law and the same system of courts. They may, therefore, be treated as one unit for the purpose of this study. Scotland was originally a separate state with its own king, parliament and legal system. In 1603, however, James VI of Scotland became king of England (where he was known as James I of England) and there was consequently a personal union between the two countries. In 1707 England and Scotland were united (as the United Kingdom of Great Britain) and their parliaments were merged into the British Parliament. Scotland, however, retained its own legal system, which was distinct from English Common Law, and its own system of courts. This is still the position today, though there is an appeal in certain circumstances from the Scottish courts to the House of Lords (in its judicial capacity). Although there is no separate parliament for Scotland, the U.K. Parliament often passes statutes which apply only to Scotland so that the Scottish legal system is still quite distinct in many matters from that of England.

Ireland was united with Britain in 1801 (though it had been ruled by the English kings for centuries) but the southern part was separated from the United Kingdom in 1922 and is now the independent Republic of Ireland. Northern Ireland, however, remains part of the United Kingdom but it has its own Parliament (though this was suspended in 1972). It also has its own system of courts with a right of appeal to the House of Lords. Although both parts of Ireland have separate legal systems, they are both based on the Common Law and are therefore fundamentally the same as that of England. Differences occur where there has been different legislation.

The legal systems covered by this study are, therefore, as follows:

1. England and Wales;
2. Scotland;
3. Northern Ireland; and
4. The Republic of Ireland.

The study will not be concerned with those dependencies of the British Crown which are not part of the United Kingdom. In Europe these are the Channel Islands, the Isle of Man and the Colony of Gibraltar.

As Ireland had its own parliament from the thirteenth century until 1800 the legal systems of Northern Ireland and the Republic have a great deal in common and it will often be possible to deal with both parts of Ireland together. The term "Ireland" will, therefore, be used where it is wished to refer to both parts of Ireland.

THE COMMON LAW

The term "Common Law" is used in a number of different senses:

1. Originally it referred to those rules of law that were common to the whole Kingdom of England as distinct from local customs. It is only rarely used in this sense today.
2. It is also used to refer to the body of law developed by the courts as distinct from that laid down by Parliament in statutes. In this sense it distinguishes judge-made law from legislation.
3. Finally, it is used in a narrow and more technical sense in contrast to Equity. The meaning of Equity will be explained shortly, but it is sufficient to say that historically it was the system of rules administered by the Court of Chancery; while Common Law (in this sense) was the law administered by the Courts of Common Law.

SCOTTISH LAW

Like English law, Scottish law is largely uncodified. The most important difference between the two systems is that, while English law was influenced only marginally by Roman law, Scottish law is based to an important extent on the principles of Roman law. The reception of Roman law in Scotland began in the sixteenth century and from this time until the latter part of the eighteenth century Scottish students often went abroad, mainly to France and the Low Countries, to study law. Civil law principles, as expounded in European universities at this time, were brought back to Scotland by these students and they formed the foundation for the development of Scottish law by the great legal writers of this period. At a later time English law was also an important influence, especially after the introduction of an appeal in civil matters to the House of Lords. It may, therefore, be best to classify Scottish law as a mixed system, based partly on Romanistic and partly on Common Law principles.

THE DEVELOPMENT OF EQUITY

The origin of Equity can best be explained historically. At the end of the thirteenth century the principal English courts were : (i) various local courts; and (ii) the Royal Courts, which consisted of the courts of Kings Bench, of Common Pleas and of Exchequer. These Royal Courts administered the Common Law and were consequently known as the Courts of Common Law.

For various reasons, however, these courts were not always able to provide a remedy and litigants therefore turned to the King to obtain justice. The King was regarded as having a residual judicial power and he was able to grant a remedy where he considered that injustice had occurred. These petitions were initially heard by the King in his Council but subsequently they were often referred to the Chancellor who was an important member of the Council. The Chancellor, who was usually an ecclesiastic, was the head of the King's Secretarial Department and was Secretary of State for all Departments. The next step was for petitions to be addressed directly to the Chancellor who in time began to grant a remedy on his own authority. Thus during the fourteenth and fifteenth centuries the Chancellor came to be regarded as a court.

This new court was known as the Court of Chancery. It did not administer the Common Law but granted remedies on the basis of justice in those cases where the Common Law courts were unable to provide a satisfactory remedy. These principles of justice were known as Equity and, though they initially varied with different Chancellors, they gradually developed into a well-established body of rules. Thus two parallel systems of judge-made law grew up in England, Common Law and Equity: the one administered by the Common Law Courts and the other by the Court of Chancery. However, English lawyers often used the word "Law" to refer to the Common Law alone and therefore drew a distinction between "law" and "equity", even though equity was part of the law of England. This distinction still applies today so that the word "law" can be used in two senses: the wide sense meaning law in general and the narrow sense in which it is contrasted with equity. The same ambiguity applies to the adjective "legal" which can be used in a general sense or in contrast to "equitable".

In 1875 the Court of Chancery was merged with the Courts of Common Law to form the Supreme Court of Judicature. The position today is that there is one court, the Supreme Court, which has various Divisions, including the Chancery Division. All Divisions can apply both Common Law and Equity but the two systems are still analytically distinct. (1) The reason for this is that rights created by the Common Law (legal rights) are different from rights created by equity (equitable rights).

Equitable Rights

The difference between legal and equitable rights is sometimes expressed by saying that legal rights are in rem while equitable rights are only in personam. While it is true that legal rights in property are rights in rem (droits réels) it is not accurate to regard equitable rights as being mere rights in personam (droits personnels). This is because an equitable right in property will in general be enforced against anyone except a bona fide purchaser of the property for value, i.e. someone who purchases the property for value in good faith and without notice of the equitable rights in question. The position can be made clear by an example. Assume that A is the legal owner of land and B has an equitable servitude over it. If A sells the land to C, who takes without notice of B's right, C is not bound by the servitude. If A had given the land to C or if C had had notice of B's rights, then he would take the land subject to the servitude. Moreover, B's rights would also prevail against someone who acquires the land by succession from A or against A's creditors if he went bankrupt. If, however, B had a legal servitude, it would be good against anyone, including the bona fide purchaser for value.

The rule regarding notice applies to both actual and constructive notice. Constructive notice applies to any facts which the purchaser would have found out if he had made those enquiries that a prudent purchaser would make. If he deliberately or carelessly fails to make such enquiries he is bound by any equitable rights which he would have discovered had he made those enquiries.

This rule increases the protection for equitable rights in land. However, there is also a rule that if a purchaser takes without notice, and is therefore not bound by the equitable right, anyone to whom he transfers the property is likewise not bound, even if such subsequent owner does have notice of the equitable right (2). The only exception is where the property is sold back to someone who had previously owned it and had been bound by the equitable right (3). This can be illustrated by another example. Assume that B has an equitable right over A's land. A transfers the land to C, who has notice of B's right. C is therefore bound by the right. C sells the land to D, who has no notice and is not bound by B's right. If D sells the land to E, E will not be bound either, even if he did have notice; but if it is sold back to C, the latter would be bound.

Important changes to the doctrine of notice have been brought about by statute, especially the Land Charges Act 1925 (applicable only in England). Under this Act a number of equitable rights can now be registered in a public register. These rights include estate contracts (contracts to purchase land) restrictive covenants made after 1925 and equitable easements created after 1925 (4). Where an equitable right is registrable, registration takes the place of notice: if the right is registered it is good against the whole world and if it is not registered it is usually not binding on third parties. Notice is irrelevant. The doctrine of notice still applies to non-registrable equitable rights.

It will be apparent from what has been said that an equitable right is superior to a normal right in personam. Whether it is truly a right in rem is a matter of some controversy: some writers feel that it is, others say that since it is not valid against a purchaser without notice it is not a right in rem. One solution would be to refer to it as a right quasi in rem, thus indicating its special character. A registered equitable right is clearly a right in rem.

Trusts

The best known and most important creation of equity is the trust. The trust is a mechanism whereby the management and control of property can be separated from the beneficial enjoyment of the property. The parties involved are usually the settlor (who is the person who creates the trust), the trustee (who is the person who manages and controls the property), and the beneficiary (who is the person for whose benefit the property is held). The settlor is the original owner of the property and he gives it to the trustee in trust for the beneficiary. The powers and duties of the trustee depend on the terms of the trust. If the trustee fails to carry out the trust the beneficiary has a number of remedies. He can obtain an order from the court against the trustee to carry out the trust or he can even have the trustee replaced by someone else. If the trustee sells the trust property the trust will attach to the proceeds so that whatever the trustee does with it, the trust will still apply.

Even though the trustee is the legal owner, the beneficiary has equitable rights over the property and these will prevail over the rights of any subsequent legal owner to whom the property is transferred contrary to the terms of the trust, except for a bona fide purchaser for value without notice. If the trustee goes bankrupt the beneficiary's rights prevail over those of the trustee's creditors; they also prevail over the successors on death of the trustee. It is, of course, quite possible that the trustee will have the power under the trust to sell the property and in this case the purchaser will take free from the trust irrespective of notice. A trust for sale is in fact a common kind of trust that is often used to provide for one's family after one's death. Thus, for example, a man might provide in his will that his property is to be held by trustees who are to pay the income from the property to his wife for her life and then to give the capital to the children when they reach the age of 21. The property in question may be a number of houses or a block of flats which are let to tenants. If the trust is a

trust for sale the trustees have the power to postpone the sale for as long as they like and they may retain the property for many years if they think that this will be most advantageous for the beneficiaries. On the other hand they might sell the land fairly early on and invest the proceeds in securities.

Equitable Remedies

One important difference between legal and equitable remedies is that equitable remedies are always discretionary. Thus, while a person who asks a court for a legal remedy will always be granted it (provided he is entitled to the remedy), a court will not grant an equitable remedy unless it considers that it is fair and proper in the circumstances that it should be granted. The principal equitable remedies are specific performance and injunction. Specific performance is an order to someone to carry out his contractual obligations and an injunction is an order to a person not to do something (or, more rarely, to put right something already done). The sanction for disobedience to these orders is imprisonment for contempt of court. Damages on the other hand, is a common law remedy and originally could not be granted by a court of equity. Thus at one time if a plaintiff wanted damages to compensate him for a trespass to his land and an injunction to prevent the defendant from trespassing on the land in future, he had to apply to the Common Law Courts for the first remedy and the Court of Chancery for the second. This is no longer the case today.

Ireland

Equity applies in Ireland in the same way as it does in England. There was a Court of Chancery which administered equity in the same way as the English one and the principles developed in England were followed in Ireland. A Supreme Court of Judicature was created in Ireland at the same time as in England. Today there is still a Chancery Division of the High Court in Northern Ireland but in the Republic the High Court is undivided and law and equity are administered by the same court.

Scotland

Equity in the English sense does not exist in Scotland. Equity in the sense of fairness and natural justice is applied in Scotland by all courts but it is not in any way a separate body of rules. What has been said above does not, therefore, apply to Scotland. Trusts are known to Scottish law but their legal basis is somewhat different.

CLASSIFICATION OF PROPERTY: ENGLISH AND IRISH LAW

The main classification adopted by English law is that between Real Property (Realty) and Personal Property (Personalty). This distinction used to be of fundamental importance but it is much less important today. Its origin is historical. The distinction was originally based on the remedies that the courts would grant an owner if he was dispossessed. In the early law property was considered real if the courts would restore to a dispossessed owner the thing (res) itself; if the only remedy he could obtain was damages, the property was considered personal. In the early law if a person was dispossessed of his freehold land (5) he could bring a real action by means of which he would be put in possession of the land again. This was not, however, possible in the case of movable property and the only remedy available was a personal action against the dispossessor in which the latter would be given a choice by the court either to return the property or pay damages.

In general, rights in land are classified as real property. The main exception to this is that leaseholds (the right to occupy land for a fixed length of time) are classified as personalty. The reason for this is that it was not until the end of the fifteenth century that a leaseholder (the owner of a leasehold) was able to recover the land from a third party, and by this time the classification of leaseholds as personalty was too firmly established to be changed. However, because of their special nature, they are referred to as chattels real and are always dealt with in books on the law of real property.

Objects attached to the soil are in law regarded as part of the land. Thus trees, crops and buildings are all part of the land and belong to the owner of it. If, for example, X steals bricks from A and builds a house with them on the land of B, the house belongs to B (7). In English law the term "fixtures" is used to designate anything which has become so attached to the land as to form part of the land. It is not, of course, always easy in practice to decide whether a particular object is a fixture and in answering this question there are two main elements to be considered: the degree of annexation, and the purpose of annexation. In general, in order for an object to be a fixture, there must be a substantial connection between it and the land (or a building on the land). Thus an article which merely rests on the ground by its own weight is usually not a fixture, while something attached to a building will normally be a fixture even if it can be removed with little difficulty.

In modern law, however, the purpose of the annexation is very important: if it was to effect a permanent improvement to the land or a building, the object will be regarded as a fixture; if, on the other hand, the purpose was to effect a merely temporary improvement or it was to allow the enjoyment of the object, it will not be regarded as a fixture. Thus, it has been held by the courts that statues forming part of a general architectural design were fixtures, even though they were only attached by their own weight; (8) while a tapestry attached by tacks to wooden strips fastened to the wall by two inch nails was held not to be a fixture because the only way it could be enjoyed was to attach it to the house in this way (9).

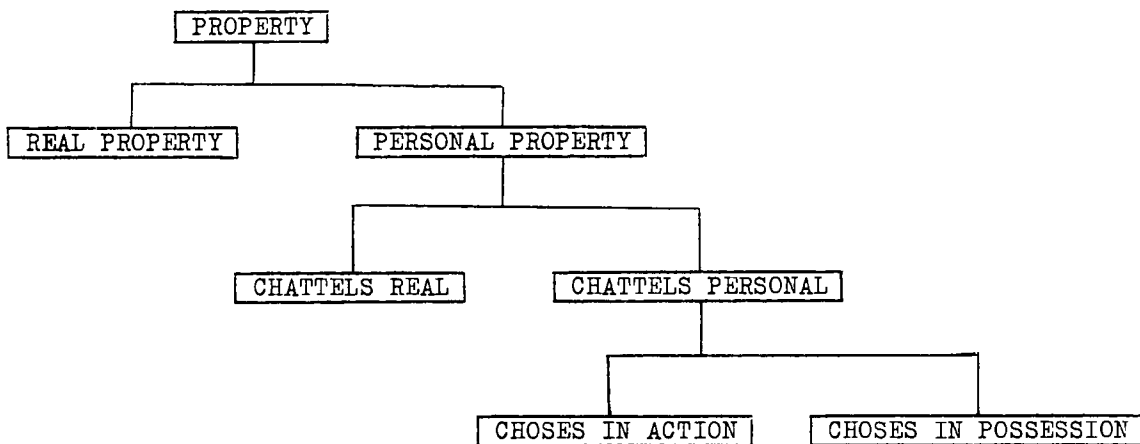
There is no equivalent in English law to the French concept of "movables by anticipation". There is a rule that in certain circumstances crops sown by a tenant can be reaped by him after the tenancy has come to an end; he can also remove certain fixtures. In neither case, however, are the objects concerned considered to be personal property until after they have been separated. There is no English equivalent to the French doctrine of "immovables by destination". Thus cattle on a farm or machinery on a farm or in a factory are considered to be personal property unless, in the case of machinery, it is a fixture.

The common law rules on the division between realty and personalty are modified to a certain extent by the equitable doctrine of conversion. Under this doctrine in certain cases land is regarded as personalty and money is regarded as realty. The doctrine is an application of the maxim of equity that what ought to be done is deemed to have been done and it applies where there is a legal duty to sell land or to use money to buy land. Thus if land is given to trustees on trust for sale the rights of the beneficiaries are deemed to be rights in personalty even before the land is sold and if money is given to trustees to be used to buy land the rights of the beneficiaries are deemed to be rights in land even before the land is bought. Another situation in which the doctrine applies is where a contract for the sale of land has been entered into but the land has not yet been transferred to the buyer. Here the rights of the buyer are regarded as being realty.

The doctrine of conversion was evolved at a time when the rules of intestate succession differed according to whether the property in question was real or

personal. The most important application of the doctrine was in the field of succession and if, for example, the beneficiary under a trust for sale of land died, his rights in the trust property were treated as personal property, even if the land had not in fact been sold. Today the same rules of intestate succession apply to all property (10) and the doctrine has consequently lost much of its importance.

Individual items of personal property are known as chattels. Chattels are divided into two classes - chattels real and chattels personal or pure personalty. The only important example of the former today is a leasehold. Chattels personal are themselves divided into two classes - choses in action and choses in possession. Choses in action are intangible property. The term was first applied to debts but today it is often applied to other forms of intangible property such as industrial property (patents, registered designs, trade marks and trade names, and copyright). Choses in possession are tangible movables. The classification of property in English law may be shown diagrammatically as follows:



It should finally be mentioned that in conflict of laws the distinction between realty and personalty does not apply. Instead, the distinction between movables and immovables is adopted. This will be considered in chapter 4.

CLASSIFICATION OF PROPERTY: SCOTTISH LAW

The main distinction in Scottish law is between heritable and movable property. Heritable property is immovable property and it is called "heritable" because prior to the Succession (Scotland) Act 1964 the rules of intestate succession were different for these two classes of property: the principle of primogeniture applied to heritable but not to movable property. Today the same rules of intestate succession apply to heritable and movable property, although the distinction is still of importance for certain purposes.

Heritable property consists of land, buildings and crops. The rules concerning fixtures discussed previously in the context of English law apply also to Scotland. In certain cases, however, corporeal (tangible) movables have been held to have become heritable property for succession purposes even without being annexed to the land. This occurs where the owner of the land before his death manifested a clear intention to annex them to the land but this was not done before he died. In these circumstances the movables are considered to be heritable "by destination". Thus, for example, window-frames and building material collected on

the ground for use in a building in the course of erection by the deceased, and the funds necessary to complete the building, have been held to be heritable for the purpose of succession to his estate. (11)

What has been said about the doctrine of conversion in the section on English law also applies to Scotland.

Another distinction applicable in Scottish law is that between corporeal (tangible) and incorporeal (intangible) property. Corporeal property consists of material things while incorporeal property consists of rights. This distinction cuts across the division between heritable and movable property, and incorporeal property can be either heritable or movable. Thus jura in re aliena, for example servitudes, are incorporeal heritable property. Rents are heritable since they are the product of heritable property but in questions of succession arrears of rent (i.e. rent which should have been already paid but has not) are classified as movable; in other words the law treats arrears of rent as if they have already been paid and are therefore money. A lease is also heritable property. Rights "having a tract of future time" are heritable. These are rights such as pensions and annuities which cannot be immediately paid by the debtor but which carry on for a number of years without relation to any capital sum. Where there is a capital sum, however, its character will determine the character of the income; thus the income from a sum of money is always movable. All claims to money are movable, including damages for injury to immovable property. Shares in a company and an interest in a partnership are movable even if the property of the company or partnership includes land. Patents and copyright are also movable.

As in English law, the distinction between movables and immovables is adopted for purposes of conflict of laws. This distinction is not very different from that between heritable and movable property but some of the rules of the latter distinction which are based on history rather than logic - for example the classification of an annuity as heritable - may not be applied for purposes of conflict of laws. This question is discussed further in chapter 4.

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Notes

- (1) If there is a conflict between law and equity the 1875 legislation provides that equity will prevail.
- (2) Harrison v. Forth (1695) Prec. Ch. 51; Wilkes v. Spooner [1911] 2 K.B. 473.
- (3) Gordon v. Holland (1913) 82 L.J.P.C. 81.
- (4) Restrictive covenants and easements are both similar to servitudes. They are discussed below. The example of the equitable servitude given above would, therefore, be strictly correct only if the servitude was created before 1926.
- (5) See p. 19 below.
- (6) See p. 20 below.
- (7) Gough v. Wood & Co. (1894) 10 T.L.R. 318.
- (8) D'Eyncourt v. Gregory (1866) L.R. 3 Eq. 382.
- (9) Leigh v. Taylor [1902] A.C. 157.
- (10) England: Administration of Estates Act 1925, ss. 45-46; Northern Ireland: Administration of Estates Act (Northern Ireland) 1955, ss. 1 and 6; Republic of Ireland: Succession Act 1965, ss. 11 and 66.
- (11) See authorities cited in Gloag and Henderson, Introduction to the Law of Scotland (7th ed.), p. 494.

Chapter 2: IMMOVABLES IN THE INTERNAL LAW OF ENGLAND AND IRELAND

INTRODUCTION

English land law is one of the most technical and complicated branches of English law. It also contains many concepts which are peculiar to English law and for this reason it is more difficult to describe in general terms than other branches of the law. History plays a very large part in English land law; this is partly because, unlike most Continental legal systems, English law has developed continuously and without any abrupt transformation (such as codification) from the Norman conquest of England in 1066 until the present time. Many principles and rules of English law (especially land law) can only be explained by reference to the historical development of the law and for this reason it will occasionally be necessary to make a short digression into legal history.

Some very important reforms of English land law (which were not, however, a codification) were brought about by a series of statutes passed in 1925 and which came into force on 1 January 1926. These statutes were : the Settled Land Act, the Trustee Act, the Law of Property Act, the Land Registration Act, the Land Charges Act and the Administration of Estates Act. These statutes do not, however, apply in either Northern Ireland or the Republic of Ireland. The law will therefore be described both as it existed before 1926 and after 1925. The pre-1926 law will represent the position in Ireland and the post-1925 law will represent the position in England today.

Tenure

Although in everyday speech Englishmen talk about buying a house or owning land, in strict law nobody can own land in England except the Crown. The origin of this doctrine can be traced back to the Norman conquest of England in 1066. William I, the Norman King, regarded the whole of England as his by right of conquest. He granted land to his followers (and some of the English) but they were not given absolute ownership of the land: they held the land from the Crown on certain conditions, e.g. that they should provide a certain number of men to fight for the king. The person holding the land was called a tenant and these conditions were referred to as the tenure on which the land was held. Tenure is no longer of any practical importance but the term "tenant" is still used today.

ESTATES IN LAND

Since absolute ownership of land is impossible in English law (except in the case of the Crown), it follows that all rights in land must be rights less than ownership. Some of these rights, however, come very close to the concept of ownership and these are known as estates (1) in land. There are various different kinds of estates and the difference between them is based on the length of time for which the tenant (or his successors) can hold the land. When an estate terminates the land reverts to the person who granted the estate. The important point to note, however, is that in English land law the subjects of ownership are rights in land, not the land itself. This is one important difference between the

law of immovables and movables: in the case of tangible movables (chattels) one can own the thing itself; this is never possible in the law of immovables.

The Law before 1926

Estates in land were divided into two classes: estates of freehold and estates less than freehold. The estates of freehold were:

- (i) fee simple;
- (ii) fee tail; and
- (iii) life estate.

Fee simple was originally an estate which lasted as long as the tenant or any of his heirs (blood relations) survived. Thus the estate would terminate if the tenant died without leaving blood relations even if before death he had conveyed (transferred) his estate to someone else who was still alive. By the fourteenth century, however, it was settled that where the estate had been conveyed to someone else it would continue as long as there were heirs of the new tenant. Today a fee simple will last until the tenant for the time being dies intestate and without any relatives to succeed to the land. (2) It has therefore become virtually permanent and thus corresponds most closely with the concept of ownership in Continental legal systems.

A fee tail was an estate which continued for as long as the original tenant or any of his descendants (as distinct from other blood relatives) survived. Thus if the original tenant died leaving a brother but no descendants (children, grandchildren, etc.) the estate would terminate if it was in fee tail but not if it was in fee simple. The way a fee tail was normally created was that a person with the fee simple in the land (the grantor) would convey the land in fee tail to another person (such as his son or daughter's husband). This person (the original tenant) would hold the land for life and on his death it would pass to his descendants.

If any tenant died without descendants the land would revert to the grantor (or his heirs) who would hold the land in fee simple again.

If a tenant in fee tail alienated his estate the original position was that the transferee's rights in the land would terminate on the death of the transferor and the land would then pass to the transferor's descendants or, if there were none, to the grantor and his heirs. At an early date, however, it became possible to "bar the entail" and once this was done the tenant in fee tail could convey an estate in fee simple to a third party and thus defeat the rights of his descendants and of the grantor and his heirs. The procedure for barring the tail was originally rather complex and was based on a fictitious law suit but the position was considerably simplified by the Fines and Recoveries Act 1833.

A life estate lasted for life only. This was normally the life of the tenant but it could be for the life of some other person, in which case it was called an estate pur autre vie. This could arise either if the estate was granted to A for the life of B, or if it was granted to A for life (i.e. his own life) and A conveyed it to X. In this case X would have an estate pur autre vie and his right to the possession of the land would cease when A died.

Originally the three estates of freehold were the sole estates recognised by law but by the sixteenth century leaseholds were also recognised as estates (but not estates of freehold). The most important kinds of leaseholds were as follows:

1. A fixed term of certain duration. Here the land was held for a definite length of time, usually a certain number of years. It could be for any length of time and 99 and 999 years were common forms of leasehold. When the period came to

an end the estate terminated but in the case of a lease for a very long time there was not very much practical difference between a leasehold and a fee simple in this regard.

2. A fixed term with duration capable of being made certain.

This was also known as a periodical tenancy and ran from week to week, month to month or year to year. The tenancy was ended if either landlord or tenant gave notice to end it but would continue indefinitely in the absence of notice. The length of notice required depended on the period of the tenancy.

The main difference between leaseholds, on the one hand, and fee tails and life estates, on the other, was that the latter were usually used for the purpose of providing for one's family while the former was normally used in a commercial relationship. The tenant either bought the leasehold for a lump sum, or paid a periodic rent, or both.

It will be seen from what has been said above that a fee simple was the greatest estate that could exist and the other estates were all less than fee simple. The difference between these estates lay primarily in the time element: what happened was that the owner of the fee simple transferred the right to possess the land for a certain length of time. He retained the right to possess the land once this time was up. Thus the doctrine of estates allowed rights in land to be divided up in time.

If the owner of the fee simple granted a lesser estate to another person, the right that he retained was known as the reversion and he was called the reversioner. When he granted the estate, however, he might give this residual right to another person. When this was done the residual right was known as a remainder and the person to whom it was given was called the remainderman. Thus A, the grantor who owned the fee simple, might grant the land to B for life with remainder to C in fee simple. A had now disposed of his entire interest in the land: B would possess the land (3) for his lifetime and on his death it would go to C. A more complex grant would be to B for life remainder to C in fee tail remainder to D in fee simple. Here the land would pass to C on B's death but would only go to D if the estate in fee tail terminated. If the entail was barred D would lose his rights entirely.

It should also be mentioned that a fee simple could be either absolute (unconditional) or modified. Thus it was possible to create a fee simple that would terminate on the happening of some uncertain future event or one which would not commence unless such an event occurred. In this way it was possible for English lawyers to make extremely complicated dispositions of land in which provision was made for every possible contingency. The creation of future interests in land (i.e. rights to the possession of land at some future time) was however, controlled by a number of rules and any disposition which was contrary to these rules was void. (4)

In the history of English land law there have always been two conflicting forces: on the one hand the desire of individuals to tie up land for the benefit of their families and on the other hand the public interest that land should be freely alienable. The courts and Parliament have at various times intervened in order to promote the free alienability of land: the development by the courts of the procedure for barring the entail is one example of this. A more recent example is the Settled Land Acts, of which the most important was the Settled Land Act of 1882. Settled land was land which belonged to two or more persons in succession, e.g. to A for life remainder to B. In this case the life tenant (A) could not give a greater interest in the land than he had; therefore if he wanted to sell the land all he could give the purchaser was an estate pur autre vie, i.e. an interest only lasting as long as A lived, which not many people would want to buy.

The Settled Land Acts solved this problem by allowing the tenant for life to convey the fee simple to a purchaser provided the latter paid the purchase money to trustees. The settlement would then be transferred to the purchase money, that is to say the trustees would hold the money in trust for A during his life and then for B. The money would be invested and A would be entitled to the income and on his death the money would be paid to B. It was also provided that the purchase money should for all purposes be treated as if it were land. In other words, the interests of the various parties were simply transferred from the land to the money, or rather to a fund since the money would be invested to provide an income for the life tenant. The Acts contained various safeguards for the rights of the parties and since the purpose of making a settlement was usually to make financial provision for one's family it was not unfair to transfer their rights to a trust fund in this way. The technical term to describe the process whereby interests in land were transferred to a trust fund is "overreaching". The effect of the Settled Land Acts was to reduce the classes of people who could have real rights (droits réels) in land: their rights were not extinguished but since they could be overreached they were not real rights in the land.

The 1925 Legislation

Radical changes were brought about by the reforms of 1925. The only legal estates that can now exist in England are a fee simple absolute in possession and a leasehold (5). A fee simple absolute in possession is a fee simple which is unconditional and in which the owner has a right to immediate possession of the land. There is, however, a rule that if the owner of the fee simple absolute in possession gives a lease over the land to another person, the owner of the fee simple is still regarded as being in possession of the land. Thus if A, the owner of the fee simple, gives B a lease for 99 years, both A and B have legal estates in the land: A is still regarded as having a fee simple absolute in possession and B has a leasehold estate.

All the other estates and interests in land which have previously been discussed can now exist only in equity. These include estates in fee tail, life estates, conditional fee simples and interests in reversion. These estates are now created by means of a trust: the fee simple is given to a trustee on trust, e.g. for A for life with remainder to B. The rules relating to settled land are, however, continued under the Settled Land Act 1925.

CO-OWNERSHIP

There are two main kinds of co-ownership in English law. These are joint tenancy and tenancy in common. The difference between the two is expressed in theoretical terms by saying that while tenants in common hold undivided shares in the land, joint tenants do not own shares but each owns the whole subject to the concurrent ownership of the other or others. In practical terms the most important difference is that if a tenant in common dies his share passes to his successors either by will or on an intestacy but if a joint tenant dies his share passes to the other joint tenants. (6) If there is only one other joint tenant, the latter takes as sole owner. A joint tenancy cannot pass under a will or intestacy. (7)

Joint tenancy is the more advantageous form of co-ownership in the case of trustees since if one trustee dies the others can carry on as before; it is also sometimes desirable in the case of husband and wife. In other cases, however, it is rather unfair since it is a matter of chance which co-owner will die first.

If the land is sold to a third party the process of transferring the land is less complicated in the case of a joint tenancy because there is only one title to the land. In the case of tenancy in common each tenant has a separate title to the land and a purchaser would have to investigate the validity of each title. For this reason it was provided in England by the Law of Property Act 1925 that a legal estate cannot be held by tenants in common but only by joint tenants. Tenancy in common can still exist in equity so that if two people wish to own land as tenants in common, the land must be conveyed to them as joint tenants in trust for themselves as tenants in common. If one co-owner dies the other will be sole owner in law but will hold a half share in the land in trust for the successors of the deceased co-owner. It was also provided by the 1925 Act that joint tenants hold the land subject to a trust for sale. Consequently if the land is sold the purchaser will take the land free from the rights of all co-owners in equity provided he pays the purchase money to at least two trustees. All equitable rights over the land are then transferred to the purchase money.

Ireland

The position in Ireland is the same as that in England prior to the reforms of 1925.

INCORPOREAL HEREDITAMENTS

Incorporeal hereditaments can best be regarded as rights in the property of another person. The most important are rentcharges, easements and profits à prendre. They can exist both in law or in equity.

Rentcharges

A rentcharge is a right to a sum of money payable periodically at specified intervals, for example, annually, which is charged upon land. It is payable by the person who is for the time being owner (8) of the land and is sometimes used to finance the purchase of land. Various remedies are provided both at common law and by statute if the rentcharge is not paid when it is due. Under section 1 of the Law of Property Act 1925 a rentcharge can exist as a legal estate only if it is either perpetual or for a fixed length of time.

Easements

Easements are similar to servitudes. They exist in favour of a dominant tenement and against a servient tenement. They are real rights and run with the land, i.e. they bind the servient tenement irrespective of who owns it and they benefit the dominant tenement irrespective of who owns it. Easements are of two kinds: positive and negative. A positive easement gives the owner of a dominant tenement the right to go into the servient tenement and do something (but not to take anything from it); a negative easement prevents the owner of the servient tenement from doing certain things. There is no numerus clausus of positive easements. Examples are: a right of way, a right to divert the course of a stream on the servient tenement for irrigation purposes, and the right to lay electric cables together with the right to repair them. There is a numerus clausus of negative easements. Examples are: a right to light (i.e. that the flow of light to a window on the dominant tenement shall not be unreasonably obstructed); a similar right to the free flow of air through a defined aperture; and a right to the support of a building.

Profits à prendre

A profit is similar to an easement. It is the right to go onto the land of another (servient tenement) and take some produce of the land. Examples are: the right to take fish or game; the right to cut turf; and the right to pasture cattle. One difference between a profit and an easement is that there does not always have to be a dominant tenement in the case of a profit: a profit can belong to a person who is not the owner of a dominant tenement (9). A profit of this kind is known as a profit in gross and the owner of it can alienate it freely. Shooting and fishing rights are probably the most common examples.

Ireland

The above applies also to Ireland.

RESTRICTIVE COVENANTS

A restrictive covenant is similar in many ways to a negative easement except that it operates in equity and not in law. There is also a dominant and a servient tenement and it also binds the owners of each for the time being. It is created by a promise contained in a deed (10) in which the owner or purchaser of land promises the owner of another piece of land not to do certain things on his land, e.g. not to use it for industrial or commercial purposes. It must be a negative promise and it must be a promise which benefits the dominant tenement. As it operates against subsequent purchasers only in equity, it will not bind a subsequent purchaser unless he had notice of it. In England (but not Ireland) a restrictive covenant created after 1925 is, however, registrable under the Land Charges Act 1925 and registration then takes the place of notice. The doctrine of notice still applies, however, to restrictive covenants created before 1926 and to all restrictive covenants in Ireland.

MORTGAGES

A mortgage is a transaction by which an interest in land is used as a security for the repayment of a loan of money. The parties to a mortgage are the mortgagor (the owner of the land and the borrower of the money) and the mortgagee (the lender of the money). Important changes were made in the law of mortgages in England by the 1925 legislation and it is again necessary to consider the position both before and after this date.

Before 1926

Before 1926 a mortgage of a fee simple estate in land was normally effected in two parts. First, the mortgagor would enter into a personal covenant (promise contained in a deed (4)) with the mortgagee to repay the loan with interest on a fixed date, generally six months from the date of the mortgage deed, and to pay interest after this date should the capital not be repaid. This simply gave the mortgagee a right in personam against the mortgagor: the land was not affected. The second part was a formal transfer of the fee simple to the mortgagee who then became the owner in law of the fee simple. There was also, however, a proviso for redemption under which the mortgagee agreed to transfer the land back to the mortgagor if the loan was repaid by the date stipulated in the personal covenant.

At common law the mortgagor lost the right of redemption (right to have the property transferred back to him) if he failed to repay the loan by the due date; but equity considered that the right of redemption should continue so that if the capital and interest were repaid at any future time the mortgagee was obliged in equity to retransfer the land (12). This equitable right to redeem was enforced by the Court of Chancery by means of a redemption action. The result was that there were two rights of redemption: a legal right to redeem which expired on the date stipulated in the personal covenant, and an equitable right to redeem which continued indefinitely. Normally mortgages were intended to last much longer than the six months stipulated in the personal covenant, so the equitable right was the most important feature of a mortgage in practice.

The position of a mortgagor once the legal right of redemption was lost was as follows: he retained possession of the land but in law the mortgagee was the owner of the fee simple. His equitable right of redemption, however, gave him an equitable right in the land, corresponding to his original fee simple, which was called the equity of redemption. This equity of redemption could be sold, could pass under a will or could even be mortgaged in turn. It was, however, no more than an equitable right and consequently was not binding on a purchaser for value without notice but, since the mortgage would be an essential link in the mortgagee's title, it would be almost impossible for him to sell the land without the purchaser learning of the mortgage.

The remedies which the mortgagee had to obtain repayment of his loan were as follows. First, he could bring a personal action against the mortgagor. Secondly, he could sell the property - provided he first gave notice to the mortgagee - and take the money owed to him out of the purchase price, giving what was left to the mortgagor. The purchaser took the property free of the equity of redemption. Thirdly, the mortgagee could apply to court for an order of foreclosure. The effect of this was to extinguish the equity of redemption and make the mortgagee full owner of the property. Fourthly, the mortgagee could take possession of the land and receive the rents and profits. Finally, he could appoint an agent to take possession of the land and receive the rents and profits. The rights of the mortgagee could be restricted by agreement between the parties but he could not be given the right to foreclosure without a court order.

If the mortgagor wished to obtain a second mortgage on the land this could be done in a similar way but as he was no longer owner of the fee simple in law, the second mortgage (which was a mortgage of his equity of redemption) could only exist in equity. The rights of the second mortgagee were, of course, subject to those of the first. An equitable mortgage could also be created as a first mortgage in certain situations in which there was no formal transfer of the property to the mortgagor.

After 1925

The Law of Property Act 1925 provides for two ways of creating a legal mortgage. The first is for the mortgagor to give the mortgagee a leasehold estate for a long period of time, usually 3000 years, subject to a proviso that the leasehold will cease when the loan is repaid. Otherwise the position is similar to that before 1926: there is a fixed redemption date, still usually after six months, and after that the mortgagor has only an equitable right of redemption. Since the mortgagor still has the legal fee simple, it is possible, however, for second and subsequent mortgages to be legal. This is done by granting further leaseholds, each being usually one day longer than the last: i.e. three thousand years and one day.

The second method is a charge by way of legal mortgage. Here no legal estate is transferred to the mortgagee but the statute provides that he has the same

protection, powers and remedies as if he had been given a leasehold for 3000 years.

In both cases the rights of the mortgagee are similar to those of a mortgagee before 1926. (13)

Ireland

The position in Ireland is in general the same as that in England before 1926.

TRANSFER

Estates in land are normally transferred inter vivos by means of a deed of conveyance. This is a document in which the transferor conveys (transfers) the property to the transferee. The deed must be signed by the transferor and sealed by him. The seal need not be his personal seal and today it is normally represented by a piece of red paper gummed to the document. The deed must be delivered to the transferee.

Registration

There are two forms of registration at present found in England, registration of incumbrances and registration of title; but a third form of registration, registration of deeds, was until recently in force in the county of Yorkshire and is still in force in Ireland and Scotland. Registration of incumbrances is not concerned with estates in land but only with certain rights less than ownership. The most important examples include restrictive covenants, estate contracts (see below), certain kinds of mortgages, and equitable easements created after 1925. Failure to register may mean that subsequent purchasers of the land are not bound by the right. Registration of incumbrances is governed by the Land Charges Act 1925 and applies to all land in England, except that subject to the system of registration of title.

Registration of title is a system where each piece of land is described in a register together with the name of the owner. The state guarantees the title of the person registered as owner and will compensate anyone who suffers on account of a mistake in registration. The only estates in respect of which the proprietor can be registered are legal estates (not equitable estates) but incumbrances can also be registered. Registration of land is compulsory only in certain areas (including most big cities) but is optional elsewhere. Once land has been registered it can only be transferred by registering the name of the new owner. Unregistered land can be transferred by deed without registration.

Estate Contracts

Where land is sold the conveyance (transfer) of the land is normally preceded by a contract of sale (which must be in writing) (14). This is a contract in which the owner of the land agrees to sell it to the purchaser. The legal title still remains with the seller until the conveyance of the land takes place but since equity will normally enforce the contract by means of a decree of specific performance (i.e. an order to the seller to convey the land to the buyer) the purchaser is the owner of the land in equity as soon as the contract is made. In England before 1926 and in Ireland today the equitable rights of the purchaser would prevail against any third party except the bona fide purchaser for value without notice; in England since 1925 an estate contract (contract for the sale of land) can be registered under the Land Charges Act 1925 and is then good against the whole world. Thus if A enters into a contract to sell land to B and

then, in breach of that contract, transfers it to C, B's rights will prevail over those of C in English law provided the contract is registered. In Irish law B's rights will prevail unless C had no notice, actual or constructive, of the sale to B. On the other hand, as from the date of the contract, the purchaser must bear the risk of any damage suffered by the property, for example by fire.

Capacity

A disposition by a minor of any right in land is voidable at the option of the minor on his attaining majority or within a reasonable time thereafter. Since 1925 in England a minor cannot hold a legal estate in land though he can hold an equitable interest. If it is wished to transfer land to a minor the land is, therefore, conveyed to trustees in trust for the minor. Married women suffer no disability with regard to the ownership of land.

Ireland

Registration of title is found in Ireland but there is no equivalent to the Land Charges Act 1925. Registration of title is similar to that in England and is compulsory in certain cases and voluntary in all others. As in England, once land is registered it can only be transferred by changing the register. Incumbrances on registered land are also registrable. Registration of deeds applies to all unregistered land. Under this system all deeds relating to land must be registered or they are void against subsequent purchasers. In other words an unregistered transfer does not give a real right. The registration of a deed transferring land is not any guarantee of the title of the transferor.

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Two short general books on English land law are: F.H. Lawson, Introduction to the Law of Property (1958) (which also covers movables) and A.D. Hargreaves, An Introduction to the Principles of Land Law (4th ed. 1963). A more detailed - but still fairly short - work often used by students is R.E. Megarry, A Manual of the Law of Real Property (4th ed. 1969). Another textbook is G.C. Cheshire, The Modern Law of Real Property (11th ed. 1972). The most detailed work on the law of real property as a whole (as distinct from works on selected topics) is: R.E. Megarry and H.W.R. Wade, The Law of Real Property (3rd ed. 1966). Irish law is covered by an Irish supplement by L.A. Sheridan (published in 1956) to the third edition of Challis's Law of Real Property (1911). The reason why this old book is used is that it describes English law prior to the reforms of 1925. There are also some comments on Northern Irish land law by Sheridan in George W. Keeton and Dennis Lloyd, The United Kingdom: The Development of its Laws and Constitutions (1955) at pp. 453-481.

Notes

- (1) The word "estate" in English has two other meanings in addition to that given in the text: (i) it can refer to a large piece of land owned by a single person (though parts of it may often be leased to other people); (ii) it can also mean the sum total of a person's assets, especially on death. The word will not normally be used in either of these senses in this report.
- (2) It then reverts to the Crown.
- (3) While B was alive C would have a fee simple estate in remainder. He would have no right to possession of the land but he could sell or otherwise alienate his fee simple in remainder.
- (4) For a consideration of the rules governing future interests, see Megarry, A Manual of the Law of Real Property, chap. 4; Megarry and Wade, The Law of Real Property, chap. 5.
- (5) Law of Property Act 1925, section 1.
- (6) This is known as the right of survivorship.
- (7) A joint tenancy can, however, be converted into a tenancy in common if the joint tenant wishes to claim his share. This is known as severance and it can only take place during the lifetime of the joint tenant.
- (8) More accurately, the freehold tenant in possession of the land.
- (9) In other words, it is equivalent to a personal, as distinct from a praedial, servitude.
- (10) A deed is a document under seal: see p. 31, below.
- (11) See below, p. 31.
- (12) The right to redeem could be extinguished if the mortgagee exercised his right to sell the land in order to recover his loan or if he obtained an order of foreclosure from the court. The rights of the mortgagee are discussed below.
- (13) Certain kinds of mortgages must be registered, otherwise they will not be valid as against purchasers for value of an interest in the land.
- (14) England: Law of Property Act 1925, s. 40; Ireland: Statute of Frauds (Ireland) 1695, s. 2. If the contract is not in writing it is not void but it cannot be enforced by action unless part performance has taken place.

Chapter 3: IMMOVABLES IN THE INTERNAL LAW OF SCOTLAND

The Scottish law of immovables, like that of England, was originally based on feudal principles. However, unlike in England, these principles are still of some practical importance and it is therefore necessary to consider them briefly. The basic principle of the feudal system was that all land belonged to the king and all rights in land were derived from his grant. The persons to whom the king granted land (the tenants of the king) would in turn grant some of it to their tenants so that the whole structure of feudal society was built up on the relation between a lord and his vassal (or tenant). In return for a grant of land the tenant would be obliged to perform services for his lord; and the nature of these services would vary with the tenure on which the land was held. A common example in England was knight service, in which the tenant was required to provide mounted soldiers to fight for his lord.

These feudal principles are no longer of practical importance in England for two reasons: today all freehold land is held directly from the Crown - there is no intervening tenant in chief - and the feudal services have been abolished. For these reasons an Englishman who owns a fee simple estate in land may for all practical purposes be considered the owner of the land. In Scotland, however, most land is held on a tenure known as feu tenure (1). Such land is not held directly from the Crown but from a feudal superior and the tenant is still obliged to pay him a periodic sum of money, known as feu duty, which is the modern equivalent of the feudal services. Thus feudalism is still of some practical importance in Scottish law: but the Government has announced its intention of abolishing the feudal system in Scottish land law in the near future and when this is done feu duty will also be abolished.

Another difference between English and Scottish law is that Scotland never adopted the doctrine of estates. Instead Scottish lawyers sought to fit feudal land law into the structure of Roman Law. The problem in doing this was to decide who had dominium, the Roman concept of ownership. The solution eventually adopted was that of divided ownership: the feudal superior has dominium directum in the land and the tenant has dominium utile. Thus the latter, though he is still burdened with the obligation to pay feu duty, is said to own the land; while his English counterpart, the fee simple owner, owns a mere estate in the land. Except for his feudal obligations, however, the owner of land in Scotland is in a similar position to the owner of a fee simple estate in England or the owner of land in Continental systems.

The Scottish equivalent of an estate for life is a liferent. The person with residual ownership in the land is known as the fiar and the person who has the liferent is called the liferenter. Liferent involves the division of ownership in time and the liferenter is in fact a temporary owner.

At one time Scots lawyers thought of a liferent as a personal servitude but this view is no longer adopted and it is now regarded as an independent right in property. The liferenter is entitled to the possession of the property and to its fruits but he must leave the substance intact. He is obliged to pay feu dues and taxes and he is responsible for normal repairs. He can take crops in the case of agricultural land and if the land is leased he can take the rent.

A liferent normally lasts for the life of a liferenter (2) and is created either by constitution or by reservation. A liferent is created by constitution when the owner of the land grants a liferent over it in favour of another person (in which case the original owner is the fiar) or when he grants a liferent to one person and grants the ownership to a second person (who then becomes the fiar). In the

latter case the original owner has disposed of his entire interest in the property. A liferent by reservation is created where the original owner transfers the ownership of the land to another person but reserves the liferent to himself. He is then the liferenter and the other person is the fiar.

A liferent of the kind described (known as a proper liferent) creates a real right. A more common form of liferent today, however, is a trust liferent in which the full ownership is vested in trustees in trust for a beneficiary liferenter with directions to transfer full ownership to the fiar on the death of the liferenter. In this situation the beneficiaries under the trust have no real rights (equitable rights are unknown in Scottish law and the beneficiary under a Scottish trust has a personal right only).

A lease in Scottish law originally conferred only a personal right on the tenant so that if the property was sold he had no rights against the new owner. This rule was changed by a statute, the Leases Act 1449, which provided that the lease would give the tenant a real right once he had entered into possession (3). Under a later statute, the Registration of Leases Act 1857, a tenant under a lease of 31 years or more can obtain a real right without entering into possession provided he registers the lease in a public register (4). A lease in Scottish law is heritable property (5).

As in English law, there are two kinds of co-ownership in Scottish law: common ownership and joint ownership. They are similar to their equivalents in English law but joint ownership can only exist in Scottish law if there is some special relationship between the co-owners based on trust or some contractual or quasi-contractual bond. Examples of joint owners are co-trustees, members of a partnership or members of an unincorporated association (6) such as a club.

As in English law, each common owner has a separate title to the property. He can alienate his share and on death it passes to his successors. Each common owner has the right to demand the division of the property but if this is impracticable or unfair to the other common owners the property will be sold instead. In the case of joint ownership there is only one title and a joint owner does not have the right to alienate his share. On his death his share passes to the other joint owners and does not go to his successors. A joint owner has no right to demand the division of the property.

The law of servitudes in Scotland is similar to that in England. The term "servitude" is, however, used in Scotland and Scottish servitudes are the equivalent of easements and profits à prendre in English law. All Scottish servitudes are praedial: they burden the servient tenement and benefit the dominant tenement (7). As in England, they are classified as either negative or positive. In a negative servitude the owner of the servient tenement is prohibited from doing something; in a positive servitude the owner of the dominant tenement is entitled to do something on the other's land. Most of the specific kinds of servitudes found in England exist also in Scotland, for example right of way, right of support for buildings, the right to pasture cattle and the right to light. Unlike most real rights in Scottish law, servitudes do not have to be registered.

The law relating to mortgages in Scotland is now governed by statute, the Conveyancing and Feudal Reform (Scotland) Act 1970. This act created a new kind of security in land known as the standard security which supersedes all existing forms of security in immovable property. It is recorded in the Register of Sasines (see below) and gives the creditor a real right. As in England, the creditor cannot foreclose (take the land as his if the debt is not paid) unless he first obtains a court order. Besides foreclosure, the creditor has the right to sell the land provided he first gives notice to the debtor so that the latter can pay off the debt. If the land is sold the buyer takes it free of the

debtor's right to redeem and the creditor is obliged to pay the balance of the purchase money to the debtor after he has deducted the amount of the debt, the costs of the sale, and any other debts secured over the land. The creditor also has the right to enter into possession of the property and take any income, e.g. rents. The rights of the parties can be varied by agreement except in the case of foreclosure and sale.

Registration is an important feature of Scottish land law and as a general rule real rights in land cannot be created or transferred without the registration of the transaction (8). The register is known as the Register of Sasines and was created by statute in 1617 (9). It is, however, a register of deeds, not of title: registration is no guarantee of the validity of the title of the transferor. Failure to register, however, means that the transferee does not have a real right. His right will not, therefore, prevail against third parties. Thus if the owner of land agrees to sell it to X but the transfer is not registered, and he subsequently agrees to sell it to Y and registers the transfer, Y will be the owner of the land.

The Government has announced its intention of introducing a system of registration of title in Scotland on the same lines as the English system. It will probably be introduced gradually in certain parts of the country but will eventually cover the whole of Scotland. The Register of Sasines will be replaced by a new Land Register. The State will guarantee all titles on the register and will indemnify anyone who suffers because a mistake is made in registration.

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Notes

- (1) Some land is held directly from the Crown on a tenure known as "blench tenure" and there is also some allodial land, i.e. land not held of any feudal superior, such as ecclesiastical property of the Church of Scotland. In the Shetland and Orkney Islands there is a tenure known as "udal tenure" which is also non-feudal. These islands were settled by Vikings and they originally belonged to the Kings of Norway. In 1468-9 Christian I of Norway pledged them in security for the unpaid balance of Princess Margaret's dowry upon her marriage to James III of Scotland. The pledge was never redeemed and the islands were annexed by Scotland in 1612.
- (2) According to Professor T.B. Smith, Scotland: The Development of its Laws and Constitution, p. 486 a liferent can also exist until the happening of some event, e.g. marriage, or for a fixed number of years. However, the normal case is where it lasts for the life of the liferenter.
- (3) The statute did not apply unless: (i) the lease was in writing (if it was for more than a year); (ii) a specific rent was agreed upon; and (iii) the lease was for a definite term.
- (4) This is the Register of Sasines; it is discussed.
- (5) In English law a leasehold is personal property: a chattel real.
- (6) An unincorporated association is a group of people lacking a corporate personality.
- (7) The only possible exception to this is a liferent, which older writers regarded as a personal servitude. Today, however, it is not regarded as a servitude at all.
- (8) Servitudes are an exception.
- (9) The Registration Act 1617.

Chapter 4: IMMOVABLES IN PRIVATE INTERNATIONAL LAW

English, Irish and Scottish private international law are all very similar. Except where special mention is made of Scottish or Irish law, it can be assumed that what is said below concerning English law applies also to Scotland and Ireland.

THE DISTINCTION BETWEEN MOVABLES AND IMMOVABLES

Although English and Irish law adopt the distinction between personalty and realty for domestic purposes, the distinction between movables and immovables is applied for the purpose of private international law. Likewise, Scotland adopts the distinction between movable and heritable property for internal purposes, but that of movables and immovables for private international law.

Confusion can sometimes arise in discussing the distinction between movables and immovables if the difference between things and rights is not kept clearly in mind. This confusion can arise because some legal systems talk of ownership of land while others talk of ownership of a right (or estate) in land. This difference is one of terminology rather than substance but it is probably desirable to give separate consideration to the classification of things and of rights.

English conflict of laws applies the rule that the question whether a thing is movable or immovable is decided by the law of the place where the thing is situate (lex situs). Thus the lex situs will decide whether a building or some other object attached to the soil is movable or immovable. It will also decide whether an object which is physically movable (movable by nature) is deemed by the law to be immovable or vice versa. Thus if under the law of country X agricultural machinery is deemed to be part of the land on which it is normally used, and therefore an immovable, an English court will accept this classification with regard to such machinery situate in country X. If the physically movable object is not actually situate on the land in question, it is probable that an English court would look to the law of the place where the object is situate, not where the land is situate. For example:

Assume that under the law of country X agricultural machinery is deemed to be part of the land where it is normally used. If a tractor is normally used on land in country X but is temporarily in country Y for repairs, the question whether the tractor is movable or immovable will be decided by the law of country Y. (1)

The question whether a right or obligation connected with a thing is movable or immovable is decided by the lex situs of the thing. Likewise the classification of a document connected with a thing (for example, a title deed) probably depends on the lex situs of the thing (for example, the land) rather than the lex situs of the document. The classification of a right or obligation not connected with a material thing (for example a debt which is not connected with property, or a patent) probably depends on the lex situs of the right. To ascribe a situation to a right of this nature is obviously a fiction but there are various rules in English conflict of laws which determine the situation of intangible property (2).

If the property is situate in England, English law will decide whether it is movable or immovable. It is important to note that English law regards the distinction between movables and immovables to be different from that between personalty and realty. The fact that property is personalty does not mean that

it is movable. Likewise in Scotland the fact that property is heritable does not mean that it is immovable.

In general any right connected with English land is considered immovable while a right connected with movable property or unconnected with any material thing is considered movable. This applies to both legal and equitable rights. The following are examples of rights in immovables (immovable rights); leaseholds (which are personal property in the domestic classification), mortgages (i.e. the interest of the mortgagee in the land including his right to the repayment of the debt) and rentcharges. It is interesting to note that courts in Australia and New Zealand have classified mortgages on land in those countries as movables (3).

The equitable doctrine of conversion (see above, p. 126) does not apply to the distinction between movables and immovables. This is illustrated by the case of Re Berchtold (4) in which the facts were as follows. A Hungarian count owned freehold lands in England and on his death he left a will in which he divided this land to English trustees on trust for sale with the power to postpone the sale for so long as they should think fit. The main beneficiary under the trust was the testator's son. The land was never in fact sold and after the death intestate of the son the question arose which law should govern the devolution of the son's interest in the land. The rule of English conflict of laws is that succession to movables is governed by the law of the domicile of the deceased (in this case Hungarian); while succession to immovables is governed by the *lex situs*.

It was argued by one of the parties to the case that under the doctrine of conversion the beneficiary's interest in the lands was to be regarded as personalty even though they had not been sold and that therefore the interest was movable and governed by Hungarian law. This was rejected by the court which held that:

..... this equitable doctrine of conversion only arises and comes into play where the question for consideration arises as between real estate and personal estate. It has no relation to the question whether property is movable or immovable (5).

The decision of the court was that the son's interest in the lands was immovable and consequently governed by the *lex situs*.

Difficult problems arise under the Settled Land Act 1925. This deals with the sale of settled land and provides that where such land is sold the rights of the beneficiaries attach to the purchase money (regarded as capital money) (See p. 133 above). Section 75 (5) of this Act provides:

Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall for all purposes of disposition, transmission and devolution be treated as land ...

In Re Cutcliffe (6) English land was sold under the Act and the proceeds invested in the stock of a British company. The question before the court was whether the interest of a beneficiary was movable or immovable.

The court held it was immovable on the basis of the statute. The difference between this statute and the equitable rules of conversion is that the statute did not say that the money and the securities in which it might be invested should be treated as realty; it said they should be treated as land. Since land is immovable the securities must also be immovable.

In Ireland there is an identical provision to the above in section 22(5) of the Settled Land Act 1882. However, if Irish land were sold under the Irish Act and

invested in English securities an English court might hold the interest of a beneficiary to be movable. The reasons are as follows. The securities are situate in England and therefore the *lex situs* - English law - decides whether they are movable or immovable. The Irish Act cannot apply because it is not part of the *lex situs*. The English Act cannot apply either because its provisions are limited to money "arising under this Act", i.e. the proceeds of the sale of English land. Therefore neither Act would apply and the common law classification of the securities as movable would prevail (7).

If, however, the proceeds of the sale of English settled land were invested in Irish securities and the case came before an English court the result might be different. This is because the court might interpret the English Act as overruling the normal conflict of laws rule that the *lex situs* classifies the property as movable or immovable. Since the securities would come within the terms of the English Act (being investments of money "arising under this Act") the court would have to apply it even though the securities were in Ireland. It is, of course, possible that the court would consider that the Act was not intended to abrogate the normal conflict of laws rule but this is unlikely.

JURISDICTION

Law in England

All actions concerning land in English law are actions in personam (8). The basic principle of English private international law is that the jurisdiction of an English court in an action in personam depends on either the submission of the defendant to the jurisdiction of the court or on the service of a writ on the defendant. There is no difficulty in serving a writ on the defendant if he is in England but if he is in a foreign country the leave of the court must first be obtained. The court will only grant leave if the case comes within one of the provisions of the Rules of Court (9). In fact the Rules provide that service of the writ may be allowed outside England if the subject matter of the action is land situate in England (10). It is also provided that the writ may be served outside England if an act, deed, will, contract, obligation, or liability affecting land situate in England is sought to be construed, rectified, set aside, or enforced in the action begun by the writ (11). It will be seen from this that the court can always obtain jurisdiction over English land though, where the defendant is not in England, the court may in its discretion decide not to allow service of the writ.

In Scotland the fact that the subject matter of the action is Scottish land in itself gives the courts jurisdiction in any possessory or proprietary action (12); in addition the fact that the defendant owns land in Scotland (or has a beneficial interest in such land) also gives the Scottish courts jurisdiction to hear an action in personam against him even if it is unconnected with the land (13).

Foreign Land

As a general rule an English court has no jurisdiction to hear an action concerning title to, or the right to the possession of, foreign land. In addition the court lacks jurisdiction to hear certain actions in tort (*delict*) concerning foreign land. The most important decision on this point is the case of British South Africa Co. Ltd. v. Companhia de Moçambique (14). This concerned a dispute between a British company (the British South Africa Co.) and a Portuguese company (the Companhia de Moçambique) over land in Africa. The Portuguese company was the plaintiff and it claimed that the British company had wrongfully entered their

land and ejected them from it. They claimed three remedies: 1. a declaration (15) that they were lawfully in possession of the land; 2. an injunction (16) restraining the defendants from asserting any title to the land; and 3. damages for trespass (17) on the land in the sum of £ 250,000. When the case reached the House of Lords (the highest court of appeal in England) the plaintiffs dropped their first two claims and merely asked for damages. Nevertheless the court held that there was no jurisdiction to hear the claim.

It is not clear exactly what the scope of this rule is. There is some controversy whether it is limited to actions for the tort of trespass or whether it extends to all torts (delicts) concerning foreign land. The Canadian courts have interpreted the Moçambique case as prohibiting all actions in tort concerning foreign land. The following example illustrates the position taken in Canada:

X owns land in Canada; Y owns land across the border in the USA. Due to X's negligence a fire started on his land spreads across the border and destroys trees on Y's land. Y sues X in Canada for the tort of negligence, claiming damages for the destruction of his trees. The Canadian courts have no jurisdiction (18). It is not clear whether the English courts would adopt the same approach. The rule in the Moçambique case has been criticised and the courts may try to limit its application; on the other hand there are reasons for believing that they might interpret it in the same way as the Canadian courts have done (19).

There are three exceptions to the Moçambique rule. First, if the English court has jurisdiction to administer an estate or trust, and the property includes movables or immovables in England and immovables in a foreign country, the court has jurisdiction to determine questions of title to the foreign immovables for the purposes of the administration. Secondly, English courts have jurisdiction to hear an action in rem against a ship to enforce a maritime lien on the ship for damage to foreign immovables. The case which established this exception concerned a ship which had damaged a wharf in Nigeria (20).

The third exception is more important for the purpose of this report. Under this exception the court can hear an action relating to foreign land if the action is based on either a contract or an equity between the parties to the action. This exception was developed by the Court of Chancery and is based on equitable principles. The idea is that there must be some personal link between the parties and the defendant must have acted in a way which equity considers to be unconscionable. If this is so the court can hear the case even though rights in foreign land are involved.

It is, of course, essential that there should be jurisdiction in personam over the defendant (21) but if this exists the court may order him to deal with the land in the way that the court directs. Thus if X enters into a contract with Y to sell him land in a foreign country and then fails to transfer the land, the court will, if it has jurisdiction over X, make an order of specific performance against him, that is an order that he do whatever is necessary according to the *lex situs* to transfer the land to Y. Likewise, if A fraudulently induces B to transfer land to him (or a right in land, such as a mortgage), the court will, if it has jurisdiction in personam over A, have jurisdiction to order him to transfer the land back to B.

The effectiveness of a judgment in a case of this kind depends on the circumstances. If the defendant is present in England he can be imprisoned for contempt of court if he refuses to obey the court's order. If he has assets in England, these can be sequestrated. Otherwise the judgment may not be effective unless it is enforced by a foreign court. Since all equitable remedies are discretionary, however, the court may decide not to make an order if it cannot be enforced.

This jurisdiction has been criticised as being excessive and it is doubtful whether an English court would recognise a foreign judgment given in similar circumstances. This question has never arisen in England but there is a Canadian case in point. The facts were as follows:

A had agreed with B in California to sell him land situated in the Canadian province of British Columbia. A and B were both residents of California. A transferred the land to B in accordance with the provisions of British Columbia law. Subsequently A brought an action against B in a Californian court to have the transfer set aside on the ground that B was guilty of fraud. The Californian court ordered B to transfer the land back to A and, when he refused to do so, the clerk of the court purported to transfer the land in B's name. Later A brought an action in Canada for a declaration that he was the owner of the land, but the court refused to grant such a declaration (22).

CHOICE OF LAW

The general rule with regard to choice of law is that the *lex situs* governs (23). It is not easy, however, to determine the exact scope of this rule because there are not many judicial decisions on the point. It seems likely that most questions concerning real rights (*droits réels*) will be decided by the *lex situs* (24). This will probably include: the kinds of estates and rights that can exist in land; the rights flowing from ownership and other real rights in land; the creation and transfer of such rights (including the form of deeds and other documents creating or transferring rights in land); the classes of persons who are incapable of owning land or rights in it; and the rights of third parties. It is not certain what law governs capacity to transfer land. It may be governed by the *lex situs* but some writers think that capacity to transfer land (as distinct from capacity to own land) should be governed by the personal law of the transferor, which in English private international law is the law of the domicile (25).

It is important to distinguish a contract relating to land from a conveyance (transfer) of land. A contract for the sale of land is governed by the proper law (26) of contract. This will normally be the *lex situs* of the land but this will not always be the case. For example:

A and B are both domiciled and resident in England. They enter into a contract in which A agrees to sell B some land in France. The contract is made in England, is in the English language and uses English legal terminology. An English court would probably decide that the parties intended English law to govern the contract. The rights of the parties under the contract would then be governed by English law but the transfer of the land would be governed by French law.

If the seller fails to carry out the contract an English court may, if it has jurisdiction over him, order him to do whatever is necessary under the *lex situs* to transfer the land.

There are some exceptions to the rule that a contract relating to land is governed by its proper law. If the contract involves dealing with the land in a way that is illegal by the *lex situs* (i.e. involves doing something in the country where the land is situated which is a criminal offence by that law), the contract will be void irrespective of the proper law. If the contract involves doing something that is not legally possible by the *lex situs*, the position is less clear. Specific performance will not, of course, be ordered but damages may be awarded.

It is also unclear what law governs capacity to make a contract relating to land. There is a decision of the Court of Appeal (28) that the *lex situs* governs this question, but this has been strongly criticised by writers. The other possibilities are the proper law of the contract or the law of the domicile of the person concerned (29). A contract relating to land is probably valid as to form if it complies with the requirements of either the proper law or the law of the place where the contract is made (30). The question as to what remedies are available - damages or specific performance, for example - is a question of procedure to be decided by the law of the forum (31). In English domestic law it is provided by section 40(1) of the Law of Property Act 1925 that:

No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

This provision was originally found in section 4 of the Statute of Frauds 1677 (31) (32). It does not say that a contract which is not in writing is invalid but merely that it cannot be enforced by action (33). For this reason it was decided in the case of Leroux v. Brown (34) that this provision relates to procedure and not substance. Since procedure is governed by the *lex fori* the provision would be applicable in all cases before an English court irrespective of the proper law or the *lex situs*. This characterisation (qualification) of the provision has, however, been criticised by writers; a better characterisation, it is felt, would be that it relates to the formal requirements for such a contract (35).

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Note: In England the term "conflict of laws" means exactly the same as "private international law" and covers choice of law, jurisdiction, and recognition of foreign judgments.

Notes

- (1) Dicey and Morris, The Conflict of Laws (8th ed. 1967), p. 504.
- (2) Ibid., pp. 508-15.
- (3) For the citation of legal decisions covering the rules mentioned in this paragraph, see ibid., pp. 504-5.
- (4) /1923/ 1 Ch. 192 (Chancery Division).
- (5) At p. 206 (per Russell J.).
- (6) /1940/ Ch. 565.
- (7) This is the solution put forward in Dicey and Morris, op. cit., p. 507. The reasoning seems logical but the end result is rather strange.
- (8) See Dicey and Morris, op. cit., p. 169
- (9) See the Rules of the Supreme Court, Order 11.
- (10) Ibid. Order 11, rule 1(1) (a).
- (11) Ibid. rule 1(1) (b).
- (12) Anton, Private International Law, p. 124.
- (13) Ibid., pp. 102-5.
- (14) /1893/ A.C. 602 (House of Lords).
- (15) A declaration is a statement by the court of the rights of the parties.
- (16) See, p. 10
- (17) Trespass is a tort (delict) which is committed by anyone who wrongfully interferes with another person's possession of land or other property.
- (18) Boslund v. Abbotsford Lumber Co. /1925/ 1 D.L.R. 978; Winnipeg Oil Co. v. Canadian Northern Railway (1911) 18 W.L.R. 424; Brereton v. C.P.R. (1898) 29 O.R. 57; Albert v. Fraser Companies Ltd. /1937/ 1 D.L.R. 39.
- (19) Dicey and Morris, op. cit., pp. 149-50.
- (20) The Tolten /1946/ P. 135. This exception may cover all actions in respect of damage done by a ship to foreign land: Dicey and Morris, op. cit., pp. 156-7.
- (21) See, p. 44
- (22) Duke v. Andler /1932/ 4 D.L.R. 529.
- (23) See Dicey and Morris, op. cit., pp. 519-30. Where the lex situs is a foreign legal system renvoi would be applied where appropriate.
- (24) A difficult problem could arise in the case of a servitude if the dominant tenement was in one country and the servient tenement in another. The lex situs of the servient tenement would probably apply (see the American case of Caldwell v. Gore, 175 La. 501; 143 So. 387 (1932)) though it could be argued that the servitude must exist under both laws.
- (25) See Morris, The Conflict of Laws, pp. 304-6; compare Dicey and Morris, op. cit., pp. 521-3.
- (26) This is the law intended by the parties to govern the contract or the law most closely connected with the contract.
- (27) (1) Dicey and Morris, op. cit., pp. 787-8.
- (28) (2) Bank of Africa v. Cohen /1909/ 2 Ch. 129.
- (29) (3) See Dicey and Morris, op. cit., pp. 789 and 522-3; Morris, The Conflict of Laws, pp. 305-6.
- (30) (4) Dicey and Morris, op. cit., p. 789.
- (31) (5) Ibid., pp. 1091-2.
- (32) In Ireland the relevant provision is still the Statute of Frauds (Ireland) 1695, s.2.
- (33) A court of equity will, however, enforce it if there has been part performance of the contract.
- (34) (1852) 12 C.B. 801; 138 E.R. 1119. The decision was actually on another part of section 4 of the Statute of Frauds but the wording was similar to the provision under discussion.
- (35) Dicey and Morris, op. cit., p. 1098.

PART II

MOVABLE PROPERTY
AND REAL SECURITIES

Chapter 5. MOVABLE PROPERTY IN INTERNAL LAW

INTRODUCTION

The English, Scottish and Northern Irish law relating to tangible movable property is much less complex than that concerning immovables. The concepts and general approach will not be unfamiliar to a Continental lawyer and most of the legal principles in this branch of the law have their analogues in Continental systems. The differences between the various legal systems covered in this report are not great. The law relating to the sale of goods has been codified in the Sale of Goods Act 1893 and this applies throughout the United Kingdom. The same is true of another important statute, the Factors Act 1889 (1). This chapter will, therefore, describe the law in England. Where there are differences in the other countries covered by the report, these will be noted; otherwise it may be assumed that what is said regarding England applies to the other countries as well.

It should also be mentioned that there is no separate system of commercial law in England. However, the term "commercial law" is sometimes used to refer to those branches of the law of special interest to businessmen, e.g. sale of goods or negotiable instruments.

OWNERSHIP AND POSSESSION

The doctrine of estates does **not** apply to movable property. One normally talks of **owning** a chattel and the concept of ownership of movables in English law is similar to that in Continental legal systems. It is, however, possible to create successive interests in movable property by means of a trust. A trust can, of course, apply to movables just as much as to immovables. Movable property, usually money or stocks and shares, can be given to a trustee on trust for X for life and then for Y. The trustee will invest the money and pay the income to X for his life and then give the capital to Y on X's death (2).

Possession is important in English law for a number of reasons. It is evidence of ownership; most of the remedies that the law gives to protect rights in property are based on possession or the right to possession, rather than title; and, as will be seen below, a person in possession of property can in certain circumstances make an innocent third person owner of the goods even though the possessor has no title at all to the goods. The concept of possession is based on both a physical and a mental element. The mental element is to hold the property for one's own benefit (3). The physical element is that of control over the property. Its exact nature will depend on the circumstances: a greater degree of control is normally possible in the case of a wrist watch than in the

case of a sunken ship. Various factors are taken into account by the courts in deciding who has possession of a chattel and it is possible that the concept of possession varies depending on the purpose for which it is used.

BAILMENT

It is not easy to give an exact definition of bailment in English law but it can be said that in general a bailment occurs whenever one person gives possession of a chattel to another with the intention that it should be returned at a later date. The essence of bailment is, therefore, the transfer of possession (but not ownership) for a limited purpose. The person who transfers possession is the bailor and the person to whom possession is transferred is the bailee. Examples of bailment are: the loan of a book to a friend; hiring a motor car; giving a watch to a jeweller for repair; depositing furniture in a warehouse for safekeeping; or handing goods to a pawnbroker as security for a loan (pledge).

The rights and duties of the bailee can be laid down by contract between the parties but in the absence of such an agreement the common law rules apply. Under these rules the bailee is not, subject to two exceptions, liable if the property is damaged or destroyed unless the damage or destruction was caused by his negligence. The question of whether the bailee is guilty of negligence depends largely on whether he took reasonable care of the property. The degree of care required depends on the circumstances. Some authorities say that if the bailment is for the sole benefit of the bailee (for example, if I lend a book to a friend free of charge) the bailee must take the highest degree of care of it; if, on the other hand, the bailment is for the sole benefit of the bailor (e.g., if I look after your watch while you go for a swim) the degree of care is much less. If the bailment is for the benefit of both parties (e.g. if I hire a car in return for a payment) then a normal degree of care must be exercised. This approach has, however, been criticised as being too rigid: who benefits from the bailment should be only one of the factors taken into account and the degree of care should depend on what a reasonable man would expect in the circumstances.

The two exceptions to the above rules are common carriers and innkeepers. A common carrier is someone who holds himself out as being willing to carry for reward the goods of anyone who employs him and he is liable for damage to the goods (subject to certain exceptions) irrespective of negligence unless he contracts out of this liability. Most firms in the transport industry today, however, reserve the right to choose what goods they accept and are not common carriers. The common law also made innkeepers (hotel proprietors) liable for the goods of guests irrespective of negligence but this has now been modified by the Hotel Proprietors Act 1956 which allows hotel proprietors to limit their liability in certain circumstances.

Scotland

The terms bailment, bailor and bailee are not normally used in Scotland and the terms used normally relate to the specific kind of transaction, e.g. lender or hirer. The term "custodier" is, however, used as the Scottish equivalent of "bailee" in the Sale of Goods Act 1893 (see section 62 (1) of that Act). The law stated above does, however, apply to Scotland, including the Hotel Proprietors Act 1956.

TRANSFER OF OWNERSHIP BY A NON-OWNER

All modern legal systems have to reconcile two conflicting policies. On the one hand there is the desire to protect the security of ownership, on the other there is the desire to protect the security of commercial transactions. If property is sold to a bona fide purchaser by someone who is not the owner of it and has no right to sell it, the question arises whether the law should protect the rights of the original owner by holding that the purchaser obtains no title to the property, or whether the bona fide purchaser should be protected by recognising him as owner. In situations such as this it is likely that one or other of two innocent people will have to bear the loss and it is not easy to decide what the best solution is.

Most legal systems effect some kind of compromise by upholding the title of the original owner in certain situations and that of the bona fide purchaser in others; but they tend to draw the line in different places. In English law somewhat greater protection is given to the original owner than in many Continental legal systems.

The rules in English law for the transfer of title are rather complicated. The basic rule (which is subject to very important exceptions) is that no one can give a better title than he has. In other words, a purchaser from a non-owner gains no title to the goods. This rule is usually referred to by the Latin maxim, Nemo dat quod non habet, which is often shortened to nemo dat. This rule, of course, involves giving the fullest protection to the rights of the original owner at the expense of the bona fide purchaser. In addition to this, the general rule (which will be considered in more detail below) as to the passing of property between buyer and seller (who is owner) is that when there is a sale of specific goods property passes to the buyer when the parties intend that it should pass and this is assumed, in the absence of indications to the contrary, to be when the contract is made.

Ownership of goods can pass from seller to buyer by mere agreement without the necessity of delivery. This rule, coupled with the nemo dat rule could completely undermine the security of commercial transactions. However, the nemo dat rule is subject to very important exceptions and these largely (but not completely) nullify the rule concerning the passing of property between buyer and seller in so far as third parties are concerned and also give protection to innocent purchasers in other situations as well. However, these exceptions do not destroy the nemo dat rule: there is no general principle that a person in possession of goods, even with the owner's consent, can give a good title to a bona

fide purchaser. Thus if a bona fide purchaser buys the goods from a person who borrowed or hired them from the original owner, the purchaser generally acquires no title.

The principle of nemo dat is a basic principle of the common law but it has been given statutory recognition in section 21 (1) of the Sale of Goods Act:

Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

This provision, of course, only applies to sales, but the principle is in fact one of general application and applies to all transactions which purport to transfer ownership or some lesser real right such as a pledge.

As was said previously, the exceptions to the nemo dat rule are almost as important as the rule itself. The most important of these exceptions will now be considered in detail.

Estoppel

This exception is referred to in the provision just quoted (section 21 (1) of the Sale of Goods Act). This ends with the words: "...unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell". Estoppel is a general principle of the common law and its application is not limited to questions of transfer of title; it will, however, be considered here only insofar as it concerns this question. The basic idea of estoppel is that if someone leads another person to believe that a certain state of affairs exists, he cannot subsequently deny this if the other person has acted in reliance on what he was led to believe.

There are two kinds of estoppel. The first is called estoppel by representation and arises where the true owner by his words represents to the buyer that a third party (the seller) either is the true owner or has the owner's authority to sell. The second is called estoppel by conduct and it arises where the true owner by his conduct allows the seller to appear as the owner or as having the owner's authority to sell. In both cases, however, the doctrine cannot operate unless the owner either intended to mislead (i.e. was guilty of fraud) or was negligent. In other words there must be some blameworthiness on the part of the true owner; he must have been responsible for the creation of a deceptive situation which misled the buyer.

It is important to realise the limits of this doctrine. The mere fact that the owner gives possession of the goods to another person is not considered to be a representation that that person is the owner or has authority to sell the goods. Thus the owner is not prevented from denying the authority to sell of the person to whom he gave possession of the goods. The position might, however, be different if the owner knew that the person in possession was holding himself out to third parties as being the owner or if the owner also gave him documents of title to the goods.

Scotland

In Scotland the term "personal bar" is used instead of "estoppel" but what has been said above applies to Scotland as well as England.

Dispositions by a Mercantile Agent

Dispositions by a mercantile agent (factor) come under section 2 of the Factors Act 1889. Section 21 of the Sale of Goods Act (this is the provision which embodies the nemo dat principle) expressly preserves the Factors Act as an exception to the nemo dat principle. Section 21 (2)(a) reads:

Provided also that nothing in this Act shall affect the provisions of the Factors Acts, or any enactment (1) enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

Various Factors Acts were passed by Parliament from 1823 onwards and the present Act is that of 1889. Section 2 (1) of the Factors Act 1889 reads:

Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

This provision may be summarised by saying that if the owner gives possession of the goods to a mercantile agent, a sale by the latter will give a good title to a bona fide buyer provided that the requirements of the Act are complied with. The first point to consider is the meaning of the term "mercantile agent". This is defined in section 1 (4) of the Factors Act as "a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods". It is not always an easy question whether a person is a mercantile agent for the purpose of this section. A common example of someone who would come within the section is a car dealer who sells cars on behalf of the owners for a commission. A person may be a mercantile agent even though he is acting for only one principal and, since every business must have a beginning, a person may be a mercantile agent in respect of a transaction even though he has never acted as such before. On the other hand a mere servant of the owner is not a mercantile agent. It is a requirement of the Act that the goods must be in the possession of the mercantile agent with the consent of the owner. Thus the section would not apply if the goods had been stolen or if the owner gave possession to a third party who in turn passed them on to the mercantile agent without the owner's consent. If, however, the owner did give his

consent it seems that the case would come within the section even if the owner's consent was obtained by fraud (5).

It is provided by section 2 (2) of the Factors Act that if the agent obtains possession with the consent of the owner, the rights of the purchaser will not be affected by the withdrawal of consent, unless the purchaser had notice of this. It is also provided by section 2 (6) that if the agent is in possession of the documents of title by virtue of his possession of the goods, he is deemed to have possession of the documents with the owner's consent. Finally, section 2 (4) states that "For the purpose of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary".

The section will not, however, apply if the owner gives the goods to the agent for some purpose which has nothing to do with his business as a mercantile agent:

The owner must consent to the agent having them for a purpose which is in some way or other connected with his business as a mercantile agent. It may not actually be for sale. It may be for display, or to get offers, or merely to put in his showroom; but there must be a consent to something of that kind before the owner can be deprived of his goods. (2)

A buyer will obtain a good title under the section only if he is in good faith and if the mercantile agent was acting in the ordinary course of his business when the sale was made. These provisions overlap to some extent because if the sale is not in the ordinary course of business it might be argued that the buyer could not be in good faith since he should have known that the transaction was not entirely honest. What the Act requires is that the sale should appear, as far as the buyer is concerned, to be a normal business transaction. The phrase "acting in the ordinary course of business of a mercantile agent" means:

"... acting in such a way as a mercantile agent in the ordinary course of business as a mercantile agent would act, that is to say, within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee (7) to suppose that anything is done wrong, or to give notice that the disposition is one which the mercantile agent had not authority for." (8)

Finally it should be mentioned that, although a pledge is expressly included within the protection of the section, section 4 of the Factors Act excludes a pledge for an antecedent debt. In other words, the loan secured by the pledge must be given at the same time as the pledge, not at an earlier time.

Sale in Market Overt

This exception is constituted by section 22 (1) of the Sale of Goods Act:

Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods,

provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

A sale in market overt is a sale in an open, public, legally-constituted market. Such a market may be constituted by statute, charter or long-standing custom. Markets are held in many English towns and by custom every shop in the City of London is considered to be a market overt for the purpose of this rule. (The City of London is not the whole of London but only the small area which constituted the medieval city.) The goods must be of a kind normally sold in the market in question and the goods must be in the market at the time of the sale. The sale must conform to the normal usage of the market and must take place at the normal time when the market is held. If these conditions are all fulfilled the seller obtains a good title, provided he is in good faith, even if the goods were stolen. The Sale of Goods Act originally contained a provision in section 22 (2) to the effect that if the goods were stolen and the thief was convicted of the theft, the title would re-vest in the original owner; but this was repealed by the Theft Act 1968, s. 33 (3), 36 (3) and Sch. 3, Part III (for England) and the Theft Act (Northern Ireland) 1969, s.31 (2) and Sch. 3 (for Northern Ireland).

The rules concerning market overt do not apply in Scotland (9) and Wales (10).

Sale under a Voidable Title

If goods are "sold" under a void contract ownership will not pass from seller to buyer even if there is delivery (11). A void contract is one which in the eyes of the law is deemed never to have existed. On the other hand if the contract is not void but merely voidable, ownership of the goods will pass to the buyer. A voidable contract is one which can be avoided (set aside) by one of the parties. If the party concerned does not avoid the contract it is regarded as valid; but if the contract is avoided the buyer will be divested of his title and the ownership will re-vest in the seller. The buyer's title is, therefore, voidable because it is liable to be divested if the sale is set aside.

What happens if a buyer who has a voidable title sells the goods to a second buyer? This question is dealt with by section 23 of the Sale of Goods Act:

When the seller of goods has a voidable title thereto but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

The important points to note with regard to this section are: first, when is the sale voidable and when is it void? And secondly, what does the original owner have to do to avoid the sale?

The distinction between void and voidable contracts concerns the law of contracts, rather than that of property, and will not be considered in detail. The most important situation in which the distinction can operate should, however, be mentioned. Assume that B induces S to sell him goods by falsely leading him to think that he (B) is a creditworthy

person. Here the sale is voidable by reason of B's fraud but B has a good title until S discovers his mistake and sets the contract aside. Assume, on the other hand, that B represents to S that he (B) is not B at all but C, who is a creditworthy person. If S would be prepared to give credit to C but not to B, the sale is void because S thinks he is selling to C, not to B. The first case is an example of a contract vitiated by fraud (and therefore voidable), the second is the case where no contract comes into existence at all because the parties were never in agreement about a basic aspect of the contract. If B re-sells to X before S realises his mistake, X's title to the goods will depend whether the original sale between S and B fell into the first or the second category.

The normal way in which a seller avoids a voidable contract is by notice to the buyer. If this takes place before the buyer re-sells to a third party, the latter will not be protected. Thus the second buyer's rights may depend on whether the original seller communicated with the first buyer. If the original seller communicated with the second buyer before the sale, the latter would cease to be in good faith and would not, therefore, be protected if he still bought the goods. It has been held, however, in the case of Car & Universal Finance Ltd. v. Caldwell (12) that the contract can be avoided without informing either of these persons (which the seller might, of course, be unable to do if he cannot trace the first buyer and is unaware of the existence of the second). In this case S sold his car to B and was paid by cheque. He gave possession of the car to B. The following day S discovered that the cheque was worthless and immediately informed the police. B was eventually found and arrested but meanwhile the car had been sold several times and was eventually found in the hands of X. The court held that title vested in S, not X, because S had avoided the contract by informing the police and otherwise taking all steps open to him in the circumstances to set aside the contract. In this case the fraudulent party had deliberately avoided contact with the original owner and the court left open the question whether the same rule would apply if the original owner's inability to inform the buyer is not due to deliberate evasion by the latter. The rule will not, of course, apply if it is possible for the original owner to contact the first buyer.

Caldwell's case might seem at first sight to cut down considerably the protection given to an innocent purchaser and a similar case in Scotland was in fact decided in the opposite way (13). However, it will be shown below that in practice Caldwell's case will be of limited application because normally the facts will come within another exception to the nemo dat rule, namely that of a buyer in possession (Section 25 (2) of the Sale of Goods Act).

It should finally be mentioned that although section 23 of the Sale of Goods Act refers only to a sale, the same rule would probably apply under the common law to the case where the buyer pledges the goods to an innocent person.

Sale by a Seller in Possession

It was mentioned earlier that when goods are sold, title passes to the buyer by agreement between the parties (provided the goods are ascertained) and delivery to the buyer is not necessary. It is therefore quite

possible that the seller might retain possession of the goods even though title has passed to the buyer. This is the situation dealt with by section 8 of the Factors Act 1889, which was reproduced with the omission of a few words in section 25 (1) of the Sale of Goods Act. Section 8 of the Factors Act reads as follows (the words underlined are omitted from the corresponding section of the Sale of Goods Act (14):

Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

The effect of this is that if a seller retains possession of the goods and re-sells them to a second buyer (and delivers them), the second buyer obtains title to the goods provided he is in good faith.

A number of older cases have held that the section only applies if the seller is in possession as seller and not in some other capacity. This approach can be illustrated by the case of Staffs Motor Guarantee Ltd. v. British Wagon Company Ltd (15) in which S sold a lorry to B and then hired it back from him under a hire-purchase (16) contract, the lorry having remained all the time in S's possession. Later S sold it to X and when S fell into arrears with his hire-purchase payments, B claimed the lorry. The court held that B had title to the lorry: X was not protected by the provision under discussion because when the sale to X was made, S held the lorry as hirer and not seller.

This decision was, however, rejected by the Privy Council (17) in the important case of Pacific Motor Auctions Pty., Ltd. v. Motor Credits (Hire Finance) Ltd. (18). This was a case from Australia where a provision identical with the English provision was in force. It was held in this case that it does not matter in what capacity the seller retains possession so long as there is no break in his possession. The only case in which the second buyer would not be protected, in the view of the Privy Council, is where the goods are actually delivered to the buyer and later returned to the seller as hirer. This seems the preferable approach since under the doctrine laid down in the Staffs Motor Guarantee case the rights of the second purchaser could be affected by a private agreement between the seller and the first buyer. It should finally be noted that in one important respect a buyer has less protection under this section than in the case of the exceptions to the nemo dat rule previously discussed: in this section the goods or documents of title must be delivered to the buyer. Thus if a seller sells goods first to one buyer and then to a second, retaining possession himself throughout, the rights of the first buyer will prevail over those of the second unless the case comes within one of the other exceptions. However, in another respect this section goes further than section 2 of the Factors Act: it applies even if the sale is not in the ordinary course of business - so long as the second buyer retains his bona fides.

Sale by a Buyer in Possession

Since the transfer of ownership of specific goods as between buyer and seller depends on the intention of the parties and not on delivery, it is quite possible that the seller may remain owner of the goods even though they have passed into the possession of the buyer. The rights of third parties in this situation are protected by section 9 of the Factors Act 1889, which was reproduced, with the omission of a few words, in section 25 (2) of the Sale of Goods Act. Section 9 of the Factors Act reads as follows (the words underlined are omitted from the corresponding section of the Sale of Goods Act):

Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Section 25 (3) of the Sale of Goods Act provides the term "mercantile agent" is to have the same meaning as in the Factors Act. The meaning of this term in the Factors Act has already been explained (19).

Section 9 only applies where a person has "bought or agreed to buy goods", in other words there must be a contract of sale. Thus if the "buyer" has a mere option to purchase the goods, there is no sale until the option is exercised. This is important because under a hire-purchase contract the "buyer" normally hires the goods with the option to purchase after a certain number of payments have been made. Such a transaction would not come within the section until the option is exercised and a third party who bought the goods from the "buyer" would not be protected by the section. On the other hand, if the transfer of ownership is, under the terms of the contract, conditional on the price being paid, the transaction is nevertheless a sale and should come within the section. This was originally so, but the position has now been altered by the Hire-Purchase Act 1965 (2). Section 54 of this Act provides that for the purpose of section 9 of the Factors Act and section 25 (2) of the Sale of Goods Act "the buyer under a conditional sale agreement shall be deemed not to be a person who has bought or agreed to buy goods". The term "conditional sale agreement" is defined by section 1 (1) of the Hire-Purchase Act 1965 as follows:

"conditional sale agreement" means an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled.

The Hire Purchase Act, therefore, only applies where the price is payable by instalments; where this is not the case the Act will not apply. Thus if the price is payable in one lump sum and the buyer is given credit, the transaction would come within section 9 of the Factors Act where the buyer is given possession of the goods. Moreover, there are two other important limitations on the application of the Hire-Purchase Act 1965. First, it is provided by section 2 (2) that the Act does not apply when the price exceeds £ 2,000. Secondly, section 4 provides that the Act will not apply where the buyer is a corporation (company), as distinct from a private person.

Section 9 of the Factors Act only applies if the goods were in the possession of the buyer with the consent of the seller. This is a similar requirement to that in section 2 of the Factors Act. As was pointed out when that section was being discussed (21), the seller's consent would probably still be considered to have been given if the buyer obtained it by fraud. The importance of this lies in its effect on the decision in Car & Universal Financial Company v. Caldwell (22). It will be remembered that under section 23 of the Sale of Goods Act if the sale is voidable (for example, by reason of the buyer's fraud) a re-sale by the buyer to an innocent third party will give the latter a good title provided that the original seller has not avoided the contract before the second sale. Caldwell's case, however, held that if the original seller could not contact the buyer, he could nevertheless avoid the sale by actions such as informing the police. This decision severely restricted the protection afforded by section 23. However, it was held in the case of Newtons of Wembley Ltd. v. Williams (23) that section 9 of the Factors Act can apply even if the sale was voidable and was avoided by the seller before the buyer re-sells.

The decision in the Newtons of Wembley case largely nullifies the effect of that in the Caldwell case since the innocent second buyer is protected by section 9 of the Factors Act instead of section 23 of the Sale of Goods Act. There is, however, one difference between these two provisions: section 23 of the Sale of Goods Act will protect any bona fide purchaser but section 9 of the Factors Act will only protect someone who buys from the original buyer. For this reason the actual decision in Caldwell's case does not conflict with that in the Newtons of Wembley case. The facts in Caldwell's case were that the seller (S) sold the car to the buyer (B), who in turn sold it to C, who in turn sold it to D. The original sale between S and B was voidable on account of B's fraud. C would have been protected under section 9 of the Factors Act if he had been in good faith; but he was not in good faith and therefore obtained no title to the car. D was in good faith but he was not protected by section 9 because C was not in possession of the goods with the consent of the original owner (S). (24) If, on the other hand, S had not avoided the contract with B before the sale to D, section 23 of the Sale of Goods Act would have protected D: B's title would have been voidable and he would have passed this on to C, who would therefore be a seller with a voidable title within section 23.

Finally, it should be mentioned that, as in the case of section 8 of the Factors Act, the second buyer is protected only if the goods (or the documents of title) are delivered to him. Assume for example that S sells goods to B, subject to the condition that title will not

pass until the price is paid, and delivers them to B. B sells them to C but retains possession of the goods. S is still the owner of the goods and if he regains possession his rights will not be affected by the sale to C.

The Hire-Purchase Act 1964

Some of the provisions of the Hire-Purchase Act 1965 have already been mentioned. The Hire-Purchase Act 1964 was an earlier statute which was largely replaced by the 1965 Act. Part III of the 1964 Act is, however, still in force and this contains an important exception to the nemo dat rule. It provides that if a person in possession of a motor car under a hire-purchase or conditional sale agreement sells it to a bona fide purchaser for value, the latter obtains a good title. It has already been shown (25) that the rule concerning a sale by a buyer in possession (section 9 of the Factors Act) does not apply to a hire-purchase contract because it is not a sale; while a conditional sale (which is a sale) has, subject to certain exceptions, been excluded from the scope of section 9 of the Factors Act (and section 25 (2) of the Sale of Goods Act) by virtue of section 54 of the Hire-Purchase Act 1965 (26). In these cases, therefore, a sale to a bona fide third party will not normally pass a good title. The importance of the Hire-Purchase Act 1964 is that it gives direct protection to such a third party in the very important case of a sale of a motor car.

Section 27 (1) and (2) of the Hire-Purchase Act 1964 reads:

- (1) The provisions of this section shall have effect where a motor vehicle has been let under a hire-purchase agreement, or has been agreed to be sold under a conditional sale agreement, and at a time before the property in the vehicle has become vested in the hirer or buyer, he disposes of the vehicle to another person.
- (2) Where the disposition referred to in the preceding subsection is to a private purchaser, and he is a purchaser of the motor vehicle in good faith and without notice of the hire-purchase agreement or conditional sale agreement, that disposition shall have effect as if the title of the owner or seller to the vehicle had been vested in the hirer or buyer immediately before that disposition.

It is important to note that the protection of this section is limited to a disposition to a "private purchaser" who is anyone other than a "trade or finance purchaser". Section 29 (2) of the Act defines this term as follows:

In this Part of this Act "trade or finance purchaser" means a purchaser who, at the time of the disposition made to him, carries on a business which consists, wholly or partly, -

- (a) of purchasing motor vehicles for the purpose of offering or exposing them for sale, or

(b) of providing finance by purchasing motor vehicles for the purpose of letting them under hire-purchase agreements or agreeing to sell them under conditional sale agreements,

and "private purchaser" means a purchaser who, at the time of the disposition made to him, does not carry on any such business.

In other words, car dealers and finance companies are outside the protection of the section. However, if a "trade or finance purchaser" acquires a car from a hirer in possession under a hire-purchase agreement and then disposes of it to a private purchaser, the latter will be protected by section 27 (3),
This provides:

Where the person to whom the disposition referred to in subsection (1) of this section is made (in this subsection referred to as "the original purchaser") is a trade or finance purchaser, then if the person who is the first private purchaser of the motor vehicle after that disposition (in this section referred to as "the first private purchaser") is a purchaser of the vehicle in good faith and without notice of the hire-purchase agreement or conditional sale agreement, the disposition of the vehicle to the first private purchaser shall have effect as if the title of the owner or seller to the vehicle had been vested in the hirer or buyer immediately before he disposed of it to the original purchaser.

It is important to note that these provisions apply to the case where the vehicle has been hired under a hire-purchase agreement (i.e. where the hirer has the option to purchase); they do not apply to a simple hiring of a car. Finally it should be mentioned that "disposition" is defined in section 29 (1) to include a sale or letting under a hire-purchase agreement.

The definition is as follows:

"disposition" means any sale or contract of sale (including a conditional sale agreement), any letting under a hire-purchase agreement and any transfer of the property in goods in pursuance of a provision in that behalf contained in a hire-purchase agreement, and includes any transaction purporting to be a disposition (as so defined), and "dispose of" shall be construed accordingly;

A pledge is not covered by this definition.

Scotland and Northern Ireland

The provisions of the 1964 Act discussed above apply in Scotland. The Act does not apply in Northern Ireland but similar provisions are found in sections 62-4 of the Hire-Purchase Act 1966, a statute of the Northern Ireland Parliament.

Other Exceptions

The exceptions to the nemo dat rule which have been mentioned are the most important ones for the purposes of this report. There are, however, a number of other exceptions and the more important ones should be mentioned briefly. These exceptions are recognised by section 21 (2) of the Sale of Goods Act which provides:

Provided also that nothing in this Act shall affect -

- (a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;
- (b) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

The more important of these miscellaneous exceptions are:

1. A sheriff (an officer of the court) has the power to seize and sell goods of a defendant under a writ of execution. (See section 15 of the Bankruptcy and Deeds of Arrangement Act 1913). The buyer acquires a good title even if the goods did not belong to the person against whom execution issued.
2. A pledgee can in certain circumstances sell the pledged property (27).
3. An innkeeper (hotelier) can in certain cases sell goods brought into the inn (hotel) by guests who fail to pay their bill (28).
4. Certain powers of sale in respect of uncollected goods are conferred by the Disposal of Uncollected Goods Act 1952.
5. The Supreme Court has wide powers to order the sale of goods in various circumstances under the rules of the Supreme Court.
6. Under section 29 of the Sale of Goods Act an unpaid seller can re-sell the goods and by section 48 (2) the second buyer obtains a good title (29).
7. Finally it should be mentioned that landlords, trustees in bankruptcy, warehousemen and the liquidators of companies have certain powers of sale (30).

TRANSFER OF OWNERSHIP BETWEEN SELLER AND BUYER

The transfer of property as between buyer and seller depends on whether the goods are ascertained (or specific) on the one hand, or unascertained, on the other. The terms "ascertained" and "specific" mean the same thing. The Act defines "specific goods" in section 62 as "goods identified and agreed upon at the time a contract of sale is made". In other words, if the purchaser agrees to buy a particular car or bag of grain or picture, the sale is one of specific (or ascertained) goods. If this is not the case the goods are unascertained. Thus if the buyer agrees to buy goods that are to be manufactured or grown by the seller at some future time, or if he agrees to buy purely generic goods (e.g. 100 tons of wheat of a specified quality), or an unidentified part of a specified whole (e.g. 100 tons out of a specified load of wheat which is greater than 100 tons), in all these cases the goods are unascertained.

The basic rule as regards specific goods is laid down in section 17 of the Act. This provides:

- (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
- (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

In practice, however, the parties do not usually form any clear intention as to when the property shall pass. In this case section 18 of the Act comes into play. It provides:

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Five rules are then laid down. The first four of these concern specific goods and the fifth concerns unascertained goods. The first rule states:

Rule 1. - Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

It will be seen that this rule only applies if the contract is unconditional, in other words the effectiveness of the contract must not be dependent on some uncertain future event. Secondly, it only applies

in the case of specific goods. Thirdly, the goods must be in a deliverable state. Section 62 (4) of the Act states:

Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

This provision was probably put into the Act to cover the case where the buyer has agreed to accept goods as they are even though they would not normally be considered to be in a deliverable state. It should be noted that the provision does not purport to be a complete definition; it does not say that goods are in a "deliverable state" only when the buyer is bound to take delivery of them (31). There may, therefore, be circumstances in which the goods would be in a deliverable state for the purpose of Rule 1 even though the buyer was not bound to take delivery.

Rules 2 and 3 state:

Rule 2. - Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. - Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 3 would apply, for example, where A agrees to buy three specific sacks of corn from B at a price of so much per pound, it being understood that B will weigh the sacks. The property passes under this rule when B has weighed them and told A the weight. It should be noted, however, that the rule only applies where the seller has to weigh them. If the buyer is to do this, the rule is not applicable (32).

Rule 4 reads as follows:

Rule 4. - When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property there-
in passes to the buyer:-

- (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:
- (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Paragraph (a) of this rule applies not only when the buyer communicates his acceptance of the goods to the seller but also where he does "any other act adopting the transaction". This includes any act inconsistent with his ability to return the goods to the seller. Thus if the buyer

pledges the goods or re-sells them to a third party this will be an adoption of the transaction. The rights of the third party will consequently be protected as against the original seller. Under paragraph (b) the property can also pass to the buyer without any communication from him to the seller: merely by retaining the goods beyond a certain length of time he loses his right to return the goods. It should be pointed out, however, that this only applies where the buyer and seller have previously agreed on the terms of the sale: if unsolicited goods are sent with an offer to sell them, the person to whom the goods are delivered will not be committed to buying the goods merely because he does not return them (33).

If property in the goods does not pass to the buyer, in other words, if the sale does not take place the "buyer" is in the position of a bailee and is not liable for damage to the goods unless this is caused by his negligence. Again it should be emphasised that these rules can be altered by express agreement.

Where the goods are unascertained the position is somewhat different. The basic rule is laid down in section 16:

Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

This is a negative rule. Section 18, rule 5, indicates when property does pass. This states that, subject to a contrary intention:

Rule 5. - (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Paragraph 2 of this rule is an example of one situation in which an unconditional appropriation of the goods takes place. It should be noted, however, that in view of section 16, paragraph 2 cannot apply where the seller delivers the goods to a carrier still mixed with other goods. Thus if the seller gives 190 boxes of fish to a carrier with instructions to deliver 20 to a particular buyer (without indicating which 20) property will not pass until the carrier sets aside the 20 boxes for the buyer (34).

Where the goods are to be manufactured by the seller, the general presumption is that property will not pass until the article in question has been completed. This rule can, however, be altered by express

agreement. Thus in one case S agreed to build a ship for B and the contract provided that the price would be paid in instalments as the work proceeded. The contract provided that on the payment of the first instalment "the vessel and all materials and things appropriated for her should thenceforth... become and remain the absolute property of the purchaser." S went bankrupt after the first instalment had been paid but before the ship had been completed. The court held that the property in the unfinished ship passed to the buyers but this did not apply to the materials which S had obtained to complete the ship: they had not been sufficiently appropriated (35).

As has been said previously, all these rules apply only in the absence of specific agreement. Section 19 (1) emphasises this point:

- (1) 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 case, 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 is important in the case where the passing of the property is conditional on the payment of the price. The goods will be delivered to the buyer but he will not be owner of them until he has paid for them.

THE EFFECT OF THE TRANSFER OF OWNERSHIP

It has already been pointed out that the rules concerning the transfer of ownership from seller to buyer do not affect third parties to a very great extent since either a buyer or seller in possession of the goods can give a good title to a bona fide third party irrespective of whether ownership has passed from seller to buyer. However, where none of the exceptions to the nemo dat rule applies, the rights of third parties will depend on whether property has passed from the seller to the buyer.

The following is an example of such a case:

S sells goods to B and delivers them. Subsequently B returns them to S for alteration and then S sells them to C and delivers them to him. The question whether B or C has the better title depends on whether property in the goods passed to B. This would normally be the case unless the contract between S and B provided otherwise (36).

The most important effect of the passing of the property is that this usually determines who must bear the loss if the property is damaged or destroyed; it can also be important when one of the parties goes bankrupt. These matters will be considered briefly.

TRANSFER OF THE RISK

The question of "risk" is concerned with the question who should bear the loss if the goods are damaged or destroyed without any fault on either side. In these circumstances the person at whose risk the goods are must bear the loss.

The goods are initially at the seller's risk but the risk is transferred to the buyer at a certain point in the transaction. The basic rule is that this is a question to be agreed upon by the parties but if no agreement is reached on this point the risk follows the property in the goods. In other words, the person who is owner must bear the risk. This is the most important application of the rules discussed above for the transfer of property in the goods between seller and buyer. The general rule that the risk passes with the goods is laid down in section 20 of the Sale of Goods Act:

Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

There are, however, two provisos to this. These are:

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

Since the concept of "risk" is concerned only with accidental damage or destruction it is natural that where one party is at fault that party should bear the loss. The first proviso therefore deals with the case where delivery is delayed through the fault of one party. The second proviso permits the common law rules concerning the liability of a bailee (in English and Irish law) and a custodier (in Scottish law) to continue as before. It will be remembered (37) that under these rules a bailee or custodier is liable for negligent or deliberate damage to the goods. Consequently if one party remains in possession of goods which belong to the other party, the person in possession could be liable as a bailee if the goods are damaged through his fault.

Finally, section 33 should be mentioned. This provides:

Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

This means that if deterioration is inevitable when goods of the kind in question are transported, the buyer bears the risk of this even if the goods are delivered at the seller's risk, unless the contrary is specifically agreed.

RIGHTS OF AN UNPAID SELLER AGAINST THE GOODS

Besides the various personal remedies that a seller has against a buyer, a seller also has certain remedies (sometimes called "real remedies") against the goods. These rights only belong to an "unpaid seller" and they are three in number (38). First, there is a lien over the goods. A lien is a right that a creditor may have over goods belonging to a person who owes him money. It gives him the right to retain goods already in his possession which belong to the debtor until the latter pays him the debt (39). In the case of a contract of sale an unpaid seller has the right to retain the goods even if the ownership of the goods has passed to the buyer. The second right is that of stoppage in transitu. This arises where the goods have been sent off to the buyer but have not yet reached him. If the buyer becomes insolvent while the goods are still in transit, the unpaid seller has the right to retake possession of the goods and hold them until he is paid. Finally, in certain cases an unpaid seller has the right to re-sell the goods.

Since the rights belong only to an "unpaid seller" it is necessary to define this term. This is done in section 38 of the Sale of Goods Act:

- (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act -
 - (a) When the whole of the price has not been paid or tendered:
 - (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise
- (2) In this Part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

The only comment that needs to be made on these provisions concerns subsection 1 (b). The seller's acceptance of a cheque (or other negotiable instrument) in payment for the goods may be conditional on the cheque being honoured. If it is dishonoured he remains an unpaid seller. On the other hand the acceptance of the cheque may be unconditional (or absolute) in which case he loses his rights against the goods, though he can sue the buyer on the cheque. Whether the accept-

ance of the cheque is conditional is a question of fact. It should be noted that the fact that credit was given does not affect the question whether the seller is "unpaid".

Unpaid Seller's Lien

This right only applies when the seller is still in possession of the goods: once they have left his possession the lien is lost. The lien only exists if the seller is "unpaid" as defined above and, in addition, the case must come within one or other of the three cases set out in section 41 (1). The relevant provisions are sections 41, 42 and 43 of the Sale of Goods Act:

41. Seller's lien

- (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:-
 - (a) Where the goods have been sold without any stipulation as to credit;
 - (b) Where the goods have been sold on credit, but the term of credit has expired;
 - (c) Where the buyer becomes insolvent.
- (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

42. Part delivery

Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43. Termination of lien

- (1) The unpaid seller of goods loses his lien or right of retention thereon-
 - (a) When he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
 - (b) When the buyer or his agent lawfully obtains possession of the goods;
 - (c) By waiver thereof.
- (2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

There are several comments which should be made on these provisions. First of all, the lien only operates where the ownership of the goods has passed to the buyer. If the seller is still owner he does not obtain a lien (since the goods are still his) but he can retain possession until he is paid. In fact it is provided by section 39 (2) that he has the same rights as in the case where ownership has passed to the buyer:

Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

It is important to note that a seller is "unpaid" until the whole price is tendered or paid; consequently if the price is to be paid by instalments the lien continues until the last payment is made. (Of course, if the buyer is given possession the lien is lost).

The situation where section 41 (2) (above) would apply is where the buyer asks the seller to store the goods for him or effect repairs or alterations. In this situation the seller is holding the goods as bailee (or in Scotland custodian) of the buyer; nevertheless the seller can still exercise his right of lien. If, however, the seller gives possession to the buyer he loses his lien and it is not regained if he later gets possession of the goods again (40). The only exception is where he exercises his right of stoppage in transitu. If, however, the buyer takes possession without the seller's consent, for example by theft, the lien is not lost: this follows from the word "lawfully" in section 43 (1) (b).

If the buyer re-sells the goods while they are subject to the seller's lien (or right of stoppage in transitu), the rights in the second buyer are subject to the lien unless the seller consented to the re-sale. The only exception is where the seller gives the buyer a document of title to the goods and the latter is transferred to the second buyer. If the latter takes the document in good faith he will not be bound by the seller's lien.

The relevant section here is section 47:

Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

Stoppage in Transitu

This is the right of the seller to retake possession of the goods after they have been sent off to the buyer but before they have reached him. The circumstances in which it can be exercised are, however, narrower than in the case of the lien: the right exists only if the buyer is insolvent. The general rule is laid down by section 44:

Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

The meaning of "insolvency" both with regard to stoppage in transitu and the unpaid seller's lien is explained by section 62 (3):

A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debt in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become bankrupt or not.

Thus insolvency (as the term is used in the Act) is a wider concept than bankruptcy and a buyer can be insolvent even though he has not been declared bankrupt.

Since the right of stoppage only exists while the goods are in transit, it is important to know when transit begins and ends. This is covered by section 45:

- (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier,
- (2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.
- (3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods **on** his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.
- (4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

- (5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.
- (6) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.
- (7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

This right is exercised by the seller retaking possession of the goods or by giving notice of his claim to the carrier. Once this is done the seller is in the same position as if he had never parted with possession and the goods were subject to his lien. Section 46 provides:

- (1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.
- (2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Once the seller has regained possession he is in the same position as he was before he sent the goods off; in other words, he has a lien over the goods. The position when the buyer re-sells goods subject to a right of stoppage in transitu is covered by section 47, which has already been dealt with (41).

Re-sale by the Seller

It has already been shown that a seller in possession of the goods can pass a good title to a bona fide third party even though the ownership of the goods has passed to the original buyer (42). A similar rule applies under section 48 (2) where the seller has exercised his right of lien or stoppage in transitu:

Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

This provision to a large extent overlaps with that in section 8 of the Factors Act and section 25 (1) of the Sale of Goods Act; but it is wider than these provisions in that it does not require that the seller be in possession (though normally he will lose his lien if he parts with possession to the buyer) or that the new buyer be in good faith.

If a seller in possession re-sells the goods to a second buyer the seller will normally be liable to the original buyer in damages; in other words, the fact that the seller has the power to give a good title to the second buyer does not mean that he has the right to do so as regards the first buyer. An unpaid seller does, however, have the right to re-sell the goods in three cases: if the goods are of a perishable nature; if he gives reasonable notice to the buyer of his intention to re-sell and the latter does not pay the price; and if this right is expressly reserved in the original contract. This is provided in section 48 (3) and (4):

- (3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.
- (4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

BANKRUPTCY OF BUYER OR SELLER

The rights of a seller on the bankruptcy of the buyer or of the buyer on the bankruptcy of the seller normally depend on whether property has passed from the seller to the buyer. There are, however, two exceptions to this. First, if the seller has a lien or a right of stoppage in transitu his position will be protected on the bankruptcy of the buyer even if property has passed to the buyer. He cannot be forced to surrender the goods unless he is paid in full and he can always recover his money through his right of re-sale.

Secondly, under section 38 (2)(c) of the Bankruptcy Act 1914 goods in the possession of the bankrupt at the commencement of the bankruptcy will vest in the trustee in bankruptcy for the benefit of the creditors if the following conditions are fulfilled even if the goods are the property of someone else. The conditions are:

1. the goods must be in the possession of the bankrupt in his trade or business;
2. they must be in his possession with the consent of the true owner;
3. they must be in his possession in circumstances such that he is the reputed owner of them.

If these conditions are fulfilled the true owner loses his rights over the goods. These conditions could quite often be fulfilled when the seller goes bankrupt if he is a trader in the goods in question. The buyer's ownership of the goods might, therefore, be defeated if the seller retains possession after property has passed to the buyer (43). These rules only apply, however, to the bankruptcy of an individual: they do not apply when a company goes into liquidation.

Scotland

The Bankruptcy Act 1914 does not apply in Scotland and there is no equivalent provision to section 38 (2)(c).

Northern Ireland

The Bankruptcy Act 1914 does not apply in Northern Ireland. There is a slightly different provision in section 313 of the Irish Bankrupt and Insolvent Act 1857.

HIRE-PURCHASE

Hire-Purchase is a contract for the hire of goods in which the hirer has an option to purchase the goods. This option may be either passive, in which case the goods automatically become the property of the hirer after a certain number of instalments unless he decides to terminate the agreement, or it may be an active option, in which case he will have the right to purchase the goods for a nominal payment after a certain number of instalments have been paid. It is the main form of consumer credit in the U.K. today. Economically - and as far as the man in the street is concerned - it is no different from a credit sale in which the price is paid in instalments and the buyer is given immediate possession of the goods, but legally it is very different. This form of contract was originally devised in the latter part of the nineteenth century to avoid the consequences of section 9 of the Factors Act 1889. Before this statute was passed it was common, especially in the furniture trade, to use a conditional sale as a vehicle for consumer credit. Under this transaction the buyer was given immediate possession of the goods and was allowed to pay the price in instalments. It was provided in the contract that ownership would not pass until the final instalment was paid. The drawback of this transaction from the seller's point of view was, however, that under section 9 of the Factors Act the buyer could re-sell the goods before he had paid all the instalments and give a good title to the second buyer provided the latter was in good faith (44).

The crucial difference between a conditional sale and a hire-purchase contract is that in the case of the latter the hirer merely has an option to buy. He is not obliged to buy and was therefore not a person who had "bought or agreed to buy" the goods within the meaning of section 9 of the Factors Act and section 25(2) of the Sale of Goods Act. Consequently the rule of nemo dat applied and the second buyer did not obtain a good title (45). This made the hire-purchase transaction very advantageous for the "seller". In addition to this he was protected on the bankruptcy of the hirer since he was still the owner of the goods (although this also applied in the case of a conditional sale). The only case where the "seller" could lose his rights on the bankruptcy of the hirer was where the hirer had the goods in his possession in his trade or business in which case the reputed ownership provision of the Bankruptcy Act might apply (46). In view of these advantages it is not surprising that hire-purchase became so popular.

The important differences between hire-purchase and conditional sale have, however, been considerably lessened by section 54 of the Hire-Purchase Act 1965. The effect of this is that, provided the transaction comes within the scope of the Act, a sale by the buyer under a conditional sale no longer gives a good title (47). The Hire-Purchase Act 1964, however, provides that in the case of a motor car a hirer under a hire-purchase contract or a buyer under a conditional sale can give a good title to a private buyer in good faith (48).

The partial assimilation of hire-purchase and conditional sale contracts which has been brought about by the Hire-Purchase Acts is fully justified from the economic point of view. In a hire-purchase contract the payments made by the hirer bear little relation to the value of the hire of the goods but are based on the normal sale price of the goods plus interest. It should also be pointed out that in practice a hire-purchase transaction is usually much more complicated than has been indicated. Thus in the motor trade the seller, i.e. the car dealer, normally obtains finance from a finance company. The dealer sells the car to the finance company and the finance company then enters into a hire-purchase agreement with the buyer (hirer). The car is, of course, delivered directly by the dealer to the hirer who is probably unaware that he is not dealing directly with the dealer. The price that the hirer pays is the cash price plus "hire purchase charges". From the economic point of view the transaction is a sale by the dealer to the buyer financed by a loan from the finance company to the buyer. The hire-purchase charges are the interest charged by the finance company. This is not, however, the legal position. A final complication is that the finance company usually requires the dealer to guarantee the hire-purchase contract and if the hirer defaults the dealer may be obliged to pay off the outstanding instalments to the finance company and then seek to recover his money by retaking possession of the car from the hirer.

In the period up to the beginning of the Second World War unscrupulous firms used hire-purchase contracts to exploit consumers, especially those who were poorer and less well educated. Doorstep salesmen tried to talk wives into signing contracts which they did not understand while their husbands were at work. The contracts were so worded as to minimise the rights of the hirer and if there was any delay in payments the seller

took possession of the goods so that the hirer lost both the goods and the instalments already paid. Legislation was introduced in 1938 to curb these malpractices and this has now been replaced by the Hire-Purchase Act 1965. This Act only applies where the hire-purchase price is not greater than £ 2000 and where the hirer is a private individual (not a company). Where the contract comes within the scope of the Act the hirer is given important rights.

First of all the Act lays down various formal requirements designed to enable the hirer to understand his rights. The agreement must be in writing and signed by the hirer. There are detailed regulations about the form of the document including the size of the type and the exact wording of certain notices that inform the hirer of his rights. The hirer must also be told the cash price of the goods and the total hire-purchase price (so that he knows how much more it will cost him to obtain the goods on hire-purchase). The hirer must also be given a copy of the agreement. If these requirements are not complied with the owner (seller) cannot enforce the agreement nor does he have the right to recover the goods from the hirer. The latter can, therefore, enjoy possession of the property without having to pay for it. However, the court has power to dispense with certain of the requirements if it considers that the hirer has not been prejudiced by the failure of the owner to comply with them.

Secondly, where the agreement was signed elsewhere than at "appropriate trade premises" (the normal business premises of the owner) the hirer has the right to cancel the agreement within four days after he has received a copy of the agreement. This is popularly known as the "cooling-off period" and is designed to operate where the hirer is talked into signing by a door-to-door salesman. This right is exercised by notice sent to the owner. The hirer has to return the goods (provided the owner comes to collect them) and he is entitled to have all payments made by him returned. The hirer is not obliged to allow the owner to regain possession of the goods until any money paid by him has been returned. The hire-purchase contract must contain a notice informing the hirer of this right.

Thirdly, the owner cannot repossess the goods without a court order (even if the hirer has defaulted on the payments or has otherwise acted in breach of the contract) once one third of the total price has been paid. If the owner recovers the goods in contravention of this provision, the hirer is released from all liability under the contract and can recover all payments made by him. If the owner goes to court, the court has various powers: it may, for example, order the return of the goods but postpone the operation of the order on condition that the hirer pays the balance of the price in such instalments as the court thinks just. A notice informing the hirer of these provisions must also be included in the contract.

Fourthly, the owner may not in any case terminate the contract by reason of the hirer's failure to pay the instalments unless he sends the hirer a notice of default which sets out the amount which has become due and gives the hirer at least seven days to pay this. If payment is not made within the period specified in the notice the agreement may be terminated.

Finally, the hirer has the right to terminate the agreement at any time before the final instalment has been paid. If he does so, however, he must pay all instalments that are due up to the date when he exercises this right. If the total sum paid by him is then less than half the full price, he must also pay an additional sum to bring the total amount he has paid up to half the full price. However, if the loss of the owner is less than this, the court has power to reduce the amount payable so that the owner receives no more than the amount of his loss. The contract may give the hirer the right to terminate on more favourable terms than these but it cannot impose on the hirer any greater liability. This in fact applies to all the provisions that have been mentioned to protect the hirer: none of them can be excluded by the contract.

The Hire-Purchase Act 1965 also applies to conditional sales if the price is less than £ 2000 and the buyer is not a company (that is, the same conditions as in the case of a hire-purchase agreement.) The provisions mentioned above also apply to conditional sales. Credit sales (i.e. where the buyer is given credit but ownership does pass to him) are also within the scope of the Act subject to the above conditions and provided also that the price is payable by five or more instalments. However, the various provisions mentioned above do not apply except for the provisions concerning formalities and the "cooling-off period" and these apply only if the price is above £ 30.

Scotland

The 1964 Act applies to Scotland but the 1965 Act does not. Similar provisions are, however, contained in the Hire-Purchase (Scotland) Act 1965.

Northern Ireland

Neither the 1964 nor the 1965 Act applies in Northern Ireland but similar provisions are found in the Hire-Purchase Act 1966 (a statute of the Northern Ireland Parliament).

LIENS

A lien is a right given to a creditor in certain situations to retain possession of the property of a person who owes him money. It usually arises where the property is already in the creditor's possession before the debt is due. At common law there is no power to sell the property: it is simply retained as a means of bringing pressure on the debtor to pay (49). Certain statutes do, however, give the right of sale. A lien can arise by operation of law or by agreement. A lien may be either general or particular. A general lien is one that allows the creditor to retain possession of the goods until all the claims he has against the debtor are satisfied; a particular lien only relates to claims of a certain kind, usually claims connected with the chattel in some way.

A general lien can exist only as a result of a special agreement or by the custom of particular trades. There is often a term in a warehousing contract giving the warehouseman a lien over the goods stored in the warehouse. An example of a lien resulting from custom is the lien which a solicitor has over papers belonging to his client. He can retain these until his costs are paid.

Examples of particular liens are: first, the lien which anyone has who does work on a chattel, e.g. repairs; he can retain the chattel until his charge is paid. Secondly, an innkeeper (hotelier) has a lien over the goods which a guest brings into the hotel. This lien is for the hotel charges. It cannot be exercised over the guest's motor car (50) but the innkeeper does in certain circumstances have the right of sale: see the Innkeepers Act 1878. The lien which an unpaid seller has over the goods has already been discussed.

A lien does not arise if possession of the goods was wrongfully obtained, and if possession was obtained from someone other than the owner the lien will not normally prevail against the owner unless the owner gave his consent. For example: If A lends his car to B who takes it to a garage owned by C for repairs, C cannot claim a lien against A unless A expressly or impliedly gave his consent to B to have the car repaired. This is an application of the rule, nemo dat quod non habet. Most of the exceptions to this rule apply to liens other than market overt and the Hire-Purchase Act 1964. The innkeeper's lien is also an exception: it applies even to goods that have been stolen provided the innkeeper did not know this.

A lien is normally lost if possession is voluntarily given up and it does not revive if possession is re-obtained. It also ceases if payment is made or offered.

Scotland

The law is generally the same but there are differences of detail. The Innkeepers Act and the Hotel Proprietors Act both apply to Scotland.

PLEDGES

A pledge is a delivery of goods by a debtor to his creditor as security for the debt. The original owner of the goods is the pledgor and the person to whom they are delivered is the pledgee. The delivery of the goods into the possession of the pledgee is an essential element of a pledge. Delivery of documents of title to the goods does not operate as a pledge of the goods unless the person holding the goods (a third party) is informed and agrees to hold the goods for the pledgee (51). Bills of lading are an exception to this rule; another exception is created by section 3 of the Factors Act 1889, which applies to all documents of title but only where the pledge is made by a mercantile agent.

The pledgee is under a duty to take care of the goods. He is liable if they are damaged or destroyed due to his negligence but he is not

liable if they are accidentally destroyed. The same applies if the goods are stolen. The pledgee has a real right in the goods and he can recover them from the pledgor or a third party if they are wrongly taken from him. He must, however, redeliver them to the pledgor when the loan is repaid. If the pledgee voluntarily gives up possession he loses his rights in the goods, except that he may return them to the pledgor for a limited purpose.

The pledgee has the right to sell the goods if the debt is not paid by the date agreed upon or, if no date for repayment was agreed upon, after the pledgor has been asked to repay and he has not done so within a reasonable time. The pledgee can deduct from the price obtained from the sale the amount of the loan together with interest (52) and expenses. The balance must be returned to the pledgor. If the sale does not provide enough money to satisfy the pledgee's claim, he still has a right of action against the pledgor for the balance.

The rule nemo dat quod non habet applies to pledge as much as to other transactions. Therefore, if the pledgor is not the owner, the rights of the pledgee will be subject to those of the owner unless the transaction falls within one of the exceptions to the rule of nemo dat. (Most of the exceptions mentioned previously apply to pledge except market overt and the provisions of the Hire-Purchase Act 1964). If the pledgor is the owner he can transfer his rights to a third party, e.g. sell the property, but the rights of the new owner will be subject to the pledge: he will have to repay the debt to get the property.

If the pledgee is a pawnbroker, that is a person who carries on the business of taking goods in pawn (pledge), and if the loan is £ 50 or less, the Pawnbrokers Acts 1872 and 1960 will apply. These Acts provide for the licensing of pawnbrokers and lay down various rules that apply to the transaction. Pledges covered by the Acts are redeemable within six months and seven days. If not redeemed, the pledge becomes the property of the pledgee if its value is £ 2 or less; if it is more than this the article must be sold at a public auction. If the property is destroyed by fire the pawnbroker is liable to pay the value of the pledge, less the amount of the loan and expenses, to the pledgor provided he applies within the period during which the pledge would have been redeemable. If the loan is over £ 5 the parties may contract out of the provisions of the Acts provided a "special contract" is signed by the pledgor.

Scotland

The Pawnbrokers Acts apply in Scotland as they do in England but the position where the Acts do not apply is not quite the same: the most important difference is that the pledgee does not have a right of sale without first applying to court unless the contract expressly gives him this right.

Northern Ireland

The Pawnbrokers Acts do not apply in Northern Ireland. Similar, but not identical, provisions are contained in the Pawnbrokers Act 1954. This is a statute of the Northern Ireland Parliament. The common law is, of course, the same.

BILLS OF SALE ACTS

There are two principal Bills of Sale Acts, those of 1878 and 1882 (53). These Acts do not apply in either Scotland or Northern Ireland but similar provisions have been introduced into Northern Ireland by the Bills of Sale (Ireland) Acts 1879 and 1883. What follows, applies to England and Northern Ireland but not Scotland.

A bill of sale is a document which transfers the ownership of goods from one person to another. The transfer may be by way of sale, gift or any other means but the Acts only apply where the goods remain in the possession of the transferor. A bill of sale may be either absolute or conditional; an absolute bill of sale is an outright transfer, while a conditional bill of sale is one given by way of security for a loan. The Act of 1878 originally applied to both absolute and conditional (security) bills of sale but it was considerably amended, and largely replaced, by the Act of 1882 in so far as conditional bills of sale are concerned. The latter are, therefore, largely governed by the Act of 1882, while the former are governed entirely by the earlier Act.

The objects of the two Acts were very different. The situation which the Act of 1878 was intended to cover was where the grantor of the bill (the original owner of the goods) transferred ownership of the goods to the grantee (transferee) but retained possession of them. Where this occurs other persons might give credit to the transferor on the supposition that he was the owner of the goods and was consequently a man of substance. If, however, they tried to recover the money owing to them either by means of execution (54) or in bankruptcy proceedings the grantee of the bill would step in to claim the goods and produce the bill as proof of his ownership. Such a bill might be completely fraudulent or it might be genuine, but the creditors would find that they could not recover what was owing to them. It, was, therefore, provided by the Act of 1878 that the bill would be void as against the creditors unless it was registered within seven days after it was made.

The Act of 1882, on the other hand, only applies to bills of sale given by way of security for the payment of money, i.e. security bills of sale. It covers all transactions where the owner of goods borrows money on the security of goods - provided the transaction is put into writing - whether it is in the form of a sale to the lender with a right to buy the property back or in any other form. It does not, however, apply to a pledge, that is where the possession of the property is given to the lender. The purpose of the Act is to protect the borrower from undue exploitation and in certain cases the transaction will be void as between lender and borrower. The other creditors of the borrower, however, get the same protection as in the case of an absolute bill.

A definition of a bill of sale is given in section 4 of the Act of 1878 and this applies to the later Act as well. It is drafted in very wide

terms but it excludes a number of documents including a marriage settlement, a transfer of goods in the ordinary course of trade, a warehouse keeper's certificate and a bill of lading. Bills of sale relating to goods in a foreign country or at sea are also excluded. Moreover, since the Acts are concerned only with documents, their provisions do not apply to any oral transactions. However, since the Acts are concerned with the situation where the goods remain in the possession of the transferor, the transferee would normally desire a written document as proof of his ownership. The formalities of registration are, subject to one exception, the same under both Acts. Registration must take place within seven days of the making of the bill. A copy of the bill and an affidavit must be filed with the registrar. Registration must be renewed every five years but assignments of the bill need not be registered. There are provisions for searching the register and taking copies of bills; thus persons intending to lend money to someone can discover whether any bills of sale are registered against his name. The bill itself must set forth the consideration for which it was given and any condition to which it may be subject. If two or more bills are registered with regard to the same property, priority is determined by the date of registration. Absolute bills must have their execution attested by a solicitor who must state that he explained the meaning of it to the grantor, but security bills may be attested by any credible witness.

If an absolute bill is not properly registered it is void as against the grantor's creditors if they levy execution against him or if he becomes bankrupt, provided the goods in question are in the possession of the grantor at the time of execution or bankruptcy. In other words, the property can be taken to satisfy the grantor's debts if it remains in his possession. However, if an absolute bill is registered the property concerned will not fall within the reputed ownership clause of the Bankruptcy Act 1914 (55). This last provision does not apply to security (conditional) bills.

If a security bill is not duly registered as described above (e.g. if it does not truly set forth the consideration for which it was given) it is void not only as regards the creditors of the grantor but also as between the grantor and grantee insofar as it gives the grantee a security interest in the goods; the personal obligation to repay the loan with interest remains. In other words, the grantee can bring a personal action against the grantor but he has no rights in the goods.

There are a number of other provisions that apply only to security bills. First, the bill must follow the form of words laid down in the Act: it must produce the precise legal effect - neither more nor less - of the form. Secondly, the consideration (sum borrowed) must not be less than £ 30. If either of these provisions is not complied with the bill is absolutely void not only as regards the lender's interest in the goods but also as regards the personal obligation. The lender can, however, recover the money lent plus a reasonable rate of interest (five per cent). Thirdly, the bill must contain a list of the goods to which it relates and the bill is void as against third parties (but not between grantor and grantee) as regards any property of which the grantor was not the owner at the time the bill was made.

The Act of 1882 lays down the circumstances under which the grantee of a security bill of sale can seize the goods. These provisions cannot be changed by the parties. The circumstances include a default in payment by the grantor if the grantor becomes bankrupt, if execution is levied against the grantor, or if he fraudulently removes the goods from his premises. The grantor may apply to the court for relief within five days of the seizure and the court may restrain the grantee from removing or selling the goods if the cause of the seizure no longer exists, for example if the grantor pays the money owing.

It should also be mentioned that a sale which is intended merely to operate as a security transaction will not come within the scope of the Sale of Goods Act. This is provided by section 61 (4) of the Sale of Goods Act which states:

The provisions of the Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

People who lend money sometimes try to get round the provisions of the Bills of Sale Acts by means of a hire-purchase agreement. Assume that the borrower has a chattel, for example a motor car, which he is prepared to offer as security for the loan provided he retains possession. The parties may then enter into a transaction in which the borrower "sells" the car to the lender and is paid cash for it (the loan). The lender then enters into a hire-purchase agreement with the borrower under which he hires the car for agreed monthly payments and is given the option to purchase it after a certain number of payments. These payments represent the repayment of the loan together with interest. If the borrower defaults on the payments the lender can take possession of the car. Transactions of this kind have caused difficulties for the courts. In many cases they have been prepared to look behind the form of the agreement and hold it void as a security bill of sale that does not comply with the Act. In other cases, however, such transactions have been upheld (56).

FLOATING CHARGES

A floating charge is a security interest in the property of a company. It exists over all the property for the time being belonging to the company but while it is still floating it does not prevent the company disposing of its property in the ordinary course of business. Once the property has been disposed of by the company the floating charge ceases to affect it, but it does apply to any new property acquired by the company. The fact that the charge does not prevent the company from dealing with its property makes this a very useful security in the case of companies which have a large stock in trade which is constantly turning over. If the company is wound up the charge crystallises, i.e. becomes fixed and applies to all the property belonging to the company at that time. Debts secured by a floating charge take priority over most unsecured debts but not normally over a fixed charge (mortgage).

Part III of the Companies Act 1948 provides that floating charges must be registered (57). If they are unregistered they are void as against the liquidator and the other creditors.

Floating charges were unknown in Scotland until they were introduced by the Companies (Floating Charges) Scotland) Act 1961. The position under floating charges are only possible in the case of companies (which are excluded from the Bills of Sale Acts). In England and Northern Ireland a floating charge over the property of an individual would be contrary to the Bills of Sale Acts; in Scotland floating charges are prohibited by the Scottish Common Law and can only exist when statutory provision is expressly made for them.

AGRICULTURAL CHARGES

Under the Agricultural Credits Act 1928 a farmer can charge his farming stock as security for a loan. The term "farming stock" is widely defined and includes crops, livestock and agricultural machinery. The charge may be either fixed or floating and must be registered in a central register to be valid against third parties.

MORTGAGES OF MOVABLES

Mortgages of movables (chattel mortgages) are possible under the English common law and the same basic rules apply to them as in the case of a mortgage of land. (The legislation of 1925 does not, however, apply to movables.) Basically, what happens is that the mortgagor (owner of the property and borrower) transfers ownership of the chattel to the mortgagee (lender) and it is agreed that the latter will re-transfer it when the debt is repaid. Chattel mortgages today, however, normally come within the terms of the Bills of Sale Acts since the document setting out the mortgage agreement will be a security bill of sale. The common law could still apply, however, in those cases which do not come within the Bills of Sale Acts. One example of this would be where no document is given; but this would be extremely unlikely in practice. The Acts do not apply where a company is the mortgagor and companies do give chattel mortgages (fixed charges) but they have to be registered under the provisions of the Companies Act discussed above. In practice, therefore, common law chattel mortgages are extremely rare.

BIBLIOGRAPHY

A general work on the law of movable property, which covers a wide range of topics, is J. Crossley Vaines, Personal Property (4th ed. 1967). A shorter work, which is less comprehensive, is H.W. Wilkinson, Personal property (1971). There are many general works on commercial law. Two of these are: Charlesworth's Mercantile Law (12th ed. 1972 by Clive M. Schmitthoff and David A.G. Sarre) and Stevens and Borrie's Elements of Mercantile Law (15th ed. 1969 by Gordon J. Borrie). There

are also a great number of books on the sale of goods and hire-purchase. Two of the best short works are: P.S. Atiyah, The Sale of Goods (4th ed. 1971) and Aubrey L. Diamond, Introduction to Hire-Purchase Law (2nd ed. 1971). The Report of the Committee on Consumer Credit (Cmnd. 4596/1971 H.M.S.O.) (Crowther Committee) makes important proposals for the reform of the law. These proposals have not yet been acted upon.

Movable property is covered in the general works on Scottish law listed in the bibliography on page 17. One additional book should be mentioned here: J.J. Gow, The Mercantile and Industrial Law of Scotland (1964). This covers the topics dealt with in this chapter as regards Scottish law.

Notes

- (1) Originally the Factors Act did not apply to Scotland but it was extended to Scotland by the Factors (Scotland) Act 1890.
- (2) The beneficiary, of course, only has an equitable right in the property: see pp. 7-9. In Scotland the beneficiary has only a personal right.
- (3) Thus a servant (or agent) may hold something on behalf of his master (or principal); in this case the latter, not the former, possesses it.
- (4) This appears to be a reference to the reputed ownership clause of the Bankruptcy Act 1914. See p.93.
- (5) See Pearson v. Rose & Young (1951) 1 K.B. 275; Folkes v. King (1923) 1 K.B. 282. See also Du Jardin v. Beadman Brothers Limited (1952) 2 Q.B. 712, which was decided on the basis of a similar provision in s.9 of the Factors Act.
- (6) Pearson v. Rose & Young (1951) 1 K.B. 275 at 288 per Denning L.J.
- (7) This case concerned a pledge by the agent but the same would apply in the case of a sale.
- (8) Oppenheimer v. Attenborough (1908) 1 K.B. 221 at 230-1 per Buckley L.J.
- (9) S.22 (3) of the Act.
- (10) Laws in Wales Act 1542, s.47
- (11) The relationship between the contract of sale and the transfer of ownership is not absolutely clear in English law. If the contract is void for mistake as to the identity of the buyer, ownership does not pass: Cundy v. Lindsay (1878) 3 App. Cas. 459. On the other hand there is an obiter dictum by Lush J. in Stocks v. Wilson (1913) 2 K.B. 235 at 246 to the effect that if the contract is void because the buyer is a minor, ownership would pass by delivery. Moreover, if the contract is illegal ownership can still pass notwithstanding the illegality: Elder v. Kelly (1919) 2 K.B. 179; Singh v. Ali (1960) A.C. 167. It should, however, be said that minors' contracts and illegal contracts are not absolutely void in the sense of being regarded as non-existent.
- (12) (1965) 1 Q.B. 525
- (13) McLeod v. Kerr 1965 S.C. 253.
- (14) It is not very clear why Parliament omitted these words.
- (15) (1934) 2 K.B. 305.
- (16) Hire-purchase contracts are discussed.
- (17) The Privy Council is a court which hears appeals from certain Commonwealth countries. Most of the judges are the same as those who sit in the House of Lords (in its judicial capacity) and decisions of the Privy Council are consequently accorded a great deal of respect, though they are not, strictly speaking, binding on English courts.

- (18) (1965) A.C. 867.
- (19) See , p.59
- (20) This Act does not apply in Scotland or Northern Ireland but similar provisions are found in section 50 of the Hire-Purchase (Scotland) Act 1965 and in section 54 of the Hire-Purchase Act 1966. The latter statute is an Act of the Northern Ireland Parliament.
- (21) See , p.60
- (22) (1965) 1 Q.B. 525; discussed , p.64.
- (23) (1965) 1 Q.B. 560. Note this case was decided shortly after Caldwell's case.
- (24) For a further discussion of this point, which seems at first sight to be contrary to the actual words of section 9, see P.S. Atiyah, The Sale of Goods (4th ed. 1971) pp. 206-7 and W.L. Cornish, "Rescission without Notice" 27 Modern Law Review 472.
- (25) See pp. 68-9.
- (26) Ibid.
- (27) See , pp. 102-104
- (28) See, pp. 100-101
- (29) See , p.91
- (30) See J.C. Vaines, Personal Property (4th ed.1967) pp. 189-190;193-6.
- (31) See P.S. Atiyah, The Sale of Goods (4th ed. 1971) p.146
- (32) Nanka Bruce v. Commonwealth Trust Ltd. (1926) A.C. 77.
- (33) See the Unsolicited Goods and Services Act 1971 under which the recipient is in certain circumstances allowed to keep unsolicited goods as an unconditional gift.
- (34) Healey v. Howlett and Sons (1917) 1 K.B. 337.
- (35) Re Blyth Shipbuilding Co. (1926) Ch. 494.
- (36) Section 8 of the Factors Act does not apply because S's possession of the goods was broken by the delivery to B: see p.66. It is assumed that S is not a mercantile agent and that the sale to C was not in market overt.
- (37) See , pp. 54-55.
- (38) See section 39 (1) of the Sale of Goods Act. In Scotland the seller can also attach the goods while they are in his hands: section 40 of the Sale of Goods Act.
- (39) See , pp. 100-101.
- (40) Valpy v. Gibson (1847) 4 C.B. 837; Pennington v. Motor Reliance Works Ltd. (1923) 1 K.B. 127.
- (41) See , p. 88.
- (42) See , pp. 65-67

- (43) The same result would follow, even if the seller is not a trader, if he gave the buyer a bill of sale for the goods and if the buyer did not register it as provided by the Bills of Sale Acts 1878 and 1882. If it is registered, however, the provisions of the Bankruptcy Act will not apply provided it is an absolute bill of sale: see, pp. 105-109.
- (44) See, p. 67 et. seq.
- (45) The case in which this was first decided was Helby v. Matthews (1895) A.C. 471.
- (46) See, p. 93.
- (47) See, pp. 68-69.
- (48) See, pp. 72-74.
- (49) An application can, however, be made to court for an order to sell.
- (50) The Hotel Proprietors Act 1956; s.2(2). For Northern Ireland see the Hotel Proprietors Act 1958, s.2(2). This is a statute of the Northern Ireland Parliament. The Innkeepers Act 1878 applies in Northern Ireland.
- (51) J.C. Vaines, Personal Property (4th ed. 1967), pp. 411-12.
- (52) If provided for in the contract.
- (53) The Bills of Sale Acts of 1890 and 1891 are not important.
- (54) If a judgment creditor (a person who has obtained judgment from a court for a sum of money) cannot obtain the money from the debtor he may take proceedings to have the judgment executed. Normally an officer of the court will seize and sell the property of the debtor to satisfy the judgment.
- (55) Section 38 (2)(c). See, p.93.
- (56) See A.L. Diamond, Introduction to Hire-Purchase Law (2nd ed. 1971), pp. 77-82.
- (57) For Northern Ireland see the Companies Act 1960 (Northern Ireland Parliament) s.93.

Chapter 6. MOVABLES IN PRIVATE INTERNATIONAL LAW

JURISDICTION

Unlike in the case of immovables, there is no rule preventing an English court from taking jurisdiction in an action in personam concerning movables in a foreign country, even if the plaintiff's cause of action raises the question of title to the goods. There is also no reason in principle why an English court should not grant a decree of specific performance in the case of a contract for the sale of goods situated in a foreign country, though there appears to be no reported case of this having been done. However, though an English court can in domestic law grant a decree of specific performance in the case of a sale of movable property, it would be only in fairly rare cases that it would do so. This is because movable property, unlike land, is not often of peculiar or unique value to the plaintiff and damages will normally be a sufficient remedy. Nevertheless, since English courts are prepared to grant a decree of specific performance in the case of foreign land, there seems to be no reason why they should not have the power to do this in the case of movables (1).

CHOICE OF LAW

There have been very few cases decided by the English courts on the subject of choice of law with regard to the transfer of tangible movables and for this reason the law is not very certain on many points. It seems clear, however, that in principle the lex situs governs: earlier theories in favour of a different law have been discarded (2). Thus Diplock L.J. said in the Court of Appeal in the case of Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association (3).

The proper law governing the transfer of corporeal movable property is the lex situs. A contract made in England and governed by English law for the sale of specific goods situated in Germany, although it would be effective to pass the property in the goods at the moment the contract was made if the goods were situate in England would not have that effect if under German law...delivery of the goods was required in order to transfer the property in them.

Although most of the cases concern the transfer of ownership, the same rule would apply to the creation, transfer or extinction of any real right. Thus in Inglis v. Robertson (4) it was applied to the creation of a pledge. In this case A, a wine merchant in London, bought whisky from B, a wine and spirit merchant in Glasgow (Scotland). The whisky was stored in a warehouse in Glasgow and it was transferred to A's name

in the books of the warehouse company and delivery orders were given to A. Later A borrowed money from C, another English merchant, and purported to pledge the whisky as security for the loan. A endorsed the delivery warrants to C, who did not, however, give notice of his interest to the warehouse company. The court held that the question whether this created a valid pledge (i.e. a real right that would be valid against A's creditors) should be decided by the law of Scotland, the *lex situs*.

If the goods are moved from one country to another any real rights validly acquired under the law of the former situs at the time when the goods were there will be recognised in the country of the new situs. This applies, for example, to the question of when a non-owner can give a good title to a bona fide purchaser. Thus in a Scottish case (5) a horse had been stolen in Ireland and sold to a bona fide purchaser in an open market in Ireland and subsequently brought to Scotland where it was claimed by the original owner. The court upheld the title of the purchaser even though a sale in market overt does not give a good title in Scotland (6). The result would probably have been the same if the horse had been stolen in Scotland and then sold in an open market in Ireland. If, therefore, goods were stolen in France and sold in an open market in England, an English court would hold that the purchaser obtained a good title.

Another case which illustrates this is Cammell v. Sewell (7). In this case a cargo of timber was shipped from Russia to England in a Prussian ship which was wrecked off the coast of Norway. The captain of the ship had the cargo sold by public auction in Norway. Under Norwegian law this gave a good title to the buyer and this was recognised when the goods were subsequently brought to England even though under English law the buyer would not have obtained a good title.

A problem could arise with regard to the doctrine of estoppel (8). In strict theory this is a doctrine of evidence, not substantive law. In other words, the person against whom it operates is not permitted to bring evidence to prove that the sale to the bona fide third party was not with his consent. In spite of this, of course, its effect is that of a rule of substantive law but if it is classified (qualifié) as a rule of evidence for conflict of laws purposes the governing law would be the *lex fori* not the *lex situs*. It is to be hoped that an English court would not adopt such a classification (9).

In the case of a sale it is important to distinguish those questions concerned with real rights (which are governed by the *lex situs*) and those concerned with contractual or personal rights (which are governed by the proper law of the contract). Thus the transfer of ownership between seller and buyer will be decided by the *lex situs*. The English rule (10) is that this depends on the intention of the parties and section 17 (11) of the Sale of Goods Act provides that to ascertain this "regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." If the goods are situated in England an English court will, therefore, look to the contract to see whether any intention as to the passing of property is expressed in it.

The way this would work in practice may be illustrated by the following examples in which it is assumed that the *lex situs* is English law but that the contract is governed by German law (12). First, if there is an express clause providing that ownership will not pass until delivery, or until the price is paid, this will be upheld. Secondly, if there is an express clause that German law is to govern the passing of the property, this will also be followed. Thirdly, if there is no express agreement the court will look to see whether there is any implied agreement that can be deduced from the factors mentioned in section 17 (2) (above). It is only if the court can discover no agreement, express or implied, that it will apply the five rules set out in section 18. The fact that the parties intended the contract to be governed by German law will not be regarded as automatically proving that they intended the German rules for the transfer of property to be applied; but this will be one factor taken into account by the English court in deciding what their intention was (13). This is shown by the following quotation from the judgment of Lord Parker in The Parchim: (14)

The (Sale of Goods Act) codifies the rules by which that intention is to be ascertained, but the inferences based on the rules may always be displaced by the terms of the contract itself or the surrounding circumstances including the conduct of the parties. No doubt the municipal law with reference to which the parties entered into the particular transaction is material in considering their intention as to the passing of property, and if it appears that they contracted with reference to a municipal law other than English, and it be further proved that that municipal law is different in any respect from the English law, this rule of course has to be taken into account, in determining their intention.

It is hardly necessary to add that if the *lex situs* is the law of a foreign country, an English court will not look to the contract unless it is required to do so by the foreign law.

There is no English authority on the law governing the passing of the risk but this would probably be regarded as a contractual matter governed by the proper law of the contract (15). Under English law the passing of the risk is primarily a matter to be agreed upon by the parties but in the absence of such agreement the risk passes with the property: res perit domino (see section 20 of the Sale of Goods Act) (16). If the contract was governed by English law the court would, in the absence of an agreement, look to the *lex situs* to see when the property passed to the buyer.

The rights of an unpaid seller against the goods (17) could give rise to difficult problems and there is no satisfactory English authority on the way they should be treated in conflict of laws (18). The rights of an unpaid seller against the goods in English law are effective not only against the buyer but also against third parties and should therefore be regarded as real rights. If this is correct the *lex situs* should govern, but difficulties could arise in the case of stoppage in transitu if the seller seeks to exercise his right after the goods have entered another country or while the goods are on a ship on the high seas. Analogous rights in foreign legal systems might, of course, be merely personal and in such a case a conflict of classification could arise (19).

Where documents of title to goods are situated in a different country from the goods themselves the normal rule seems to be that the *lex situs* of the goods, not the documents, decides whether real rights in the goods can be created or transferred by a delivery of the documents (20). One situation which may be an exception to this is where the goods are on a ship on the high seas. Here there is no actual *lex situs* of the goods (21) and it may be that the *lex situs* of the document governs, at least if the document is regarded as representing the goods under the law of the country in which the ship was loaded. In North Western Bank v. Poynter (22) a cargo on board a ship bound for Glasgow (Scotland) from Liverpool (England) was pledged by a delivery in Liverpool of the bills of lading. English and Scottish law were in fact the same as regards the validity of the pledge but the court appeared to consider that if there had been a difference the law of England would have applied (though this seems to have been based partly on the domicile of the parties) (23).

Finally it should be mentioned that most English writers consider that if the *lex situs* is a foreign law the theory of total *renvoi* should be applied where appropriate. The object of this is to ensure uniformity of decision with courts of the *situs* (24). There are, however, no decisions on the point.

SECURITY INTERESTS WITHOUT TRANSFER OF POSSESSION

The problem to be considered here is that dealt with in paragraphs 13-15 of Professor Arndt's report and in the Draft Convention of the Banking Federation of the EEC, that is the extent to which security interests without transfer of possession constituted in a foreign country would be recognised in England if the property were brought to England. This is, of course, only one aspect of the wider problem of the recognition in one country of real rights created in another which are of a kind unknown in the country to which the property is brought. However, the most important examples in practice seem to be security interests in which the debtor remains in possession of the property, such as a sale with reservation of title under German law or a pledge of a motor vehicle under French law.

It will be recalled that the most important security interests of this kind in English law are hire-purchase and conditional sale. These transactions are normally to secure vendor credit (i.e. the price of the article in question) and security interests to secure lender credit would normally come under the Bills of Sale Acts if the debtor remains in possession. There are no provisions for registration in the case of hire-purchase and conditional sale and since the seller/creditor is still the owner of the property his interests are well protected. The extent to which his rights can be defeated by a transfer to a bona fide third party or on the bankruptcy of the buyer/debtor have already been considered (25). Where a bill of sale is given, registration is necessary but if this is done the creditor is also well protected (26). The Bills of Sale Acts do not apply to companies but there are other provisions requiring charges over the assets of a company to be registered (27).

There are no cases in which the question of recognising a foreign security interest of this kind has come before the English courts (28) and it is not, therefore, certain what the attitude of the courts would be. However, there seems no reason in principle why a real right of this kind, validly created under the *lex situs* when the chattel was in a foreign country, would not be recognised in England if the chattel were subsequently brought to England. The English court would probably try to find an analogous English transaction and, at least in questions such as priorities, treat the parties to the foreign transaction as if they had entered into the analogous English transaction.

Thus the question whether the rights of the creditor in the property would be defeated by a transfer to a *bona fide* third party would depend on whether any of the exceptions to the *nemo dat* rule were applicable. A sale with reservation of title under German law would be regarded as a conditional sale in England which would come within section 9 of the Factors Act (and section 25 (2) of the Sale of Goods Act) unless section 54 of the Hire-Purchase Act 1965 were applicable (29). If a motor vehicle were involved the Hire-Purchase Act of 1964 would apply (30). However, it is not clear how far a court would hold that the Hire-Purchase Acts would apply to a transaction entered into a foreign country. In particular it is unclear whether those provisions designed to protect the buyer - for example those limiting the right of a conditional seller to retake possession of the goods - would apply to a foreign transaction.

There is nothing in the common law to prevent a mortgage of movables (chattel mortgage) but normally such a transaction would be subject to the Bills of Sale Acts. These Acts do not, however, apply if the goods are outside England at the time of the transaction. This is because the term "bill of sale" is defined by section 4 of the Act of 1878 not to include "bills of sale of goods in foreign parts or at sea". The Acts would not, therefore, apply if the goods were in a foreign country at the time of the transaction and it would probably make no difference if the goods were subsequently brought to England. If this is correct, a foreign transaction analogous to a mortgage of movable property would be recognised in England. It should be mentioned that under an English mortgage the debtor transfers ownership of the property to the creditor and the creditor agrees to re-transfer it on payment of the debt. The debtor normally retains possession.

Special provisions apply to security interests created by a company over its property. Section 95 (1) of the Companies Act 1948 provides:

".....every charge created....by a company registered in England and being a charge to which this section applies shall, so far as any security in the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless...(it is registered).

This provision applies to a charge (security interest) over property in a foreign country of an English company even if the charge is created in the foreign country, and there are provisions for the registration of such charges (31). Section 95 (2) defines the charges to which the section applies and includes a charge created by an

instrument which, if executed by an individual, would require registration as a bill of sale. It also includes floating charges. It will be seen from this that under the present law if the French branch of an English company created a security interest under French law over its French property, this would not be valid in England if it was not registered in England.

If an English company created a security interest (charge) over its property in a foreign country, it would be recognised in England if it is valid by English law and registered in England even though it is invalid by the *lex situs*. This applies to movable and immovable property. Thus in the case of In re The Anchor Line (Henderson Brothers) Ltd. (32) an English company which owned movable and immovable property in Scotland executed a charge in Scotland in favour of a Scottish bank whereby the bank was given a floating security (33) over all the company's property wherever situated. The charge was registered in England. At that time floating charges were unknown to Scottish law but the English court nevertheless held that it was valid as regards both movable and immovable property in Scotland. This decision has been criticised in Scotland and if the case had come before a Scottish court the floating charge would not have been recognised (34).

It is provided by section 106 of the Companies Act that the provisions regarding the registration of charges also apply to charges on property in England created by companies incorporated outside England which have an established place of business in England.

THE DRAFT CONVENTION OF THE BANKING FEDERATION

The relevant provisions of English law have already been considered. I assume that the Draft Convention would apply to security interests granted by companies. If this is so, the provisions of the Companies Act considered above would have to be altered insofar as they apply to property outside England. (The same would apply, of course, if the UK became a party to the Draft Convention on Private International Law.) It would also be necessary to make clear what English security interests would come within Article 2 of the Convention. I assume that the convention applies to vendor credit as well as lender credit. It is especially important that hire-purchase and conditional sales should come within the scope of the convention since these are most important security interests in the United Kingdom. The rights of the lender under these transactions are, of course, based on the fact that he is still owner of the property.

BIBLIOGRAPHY

Besides the general works on private international law mentioned in the bibliography on page 51, there are two important monographs on the subject of movables: G.A. Zaphiriou, The Transfer of Chattels in Private International Law (University of London, The Athlone Press, 1956) and Pierre A. Lalive, The Transfer of Chattels in the Conflict of Laws (1955).

Notes

- (1) For a discussion of this point in relation to foreign land, see above pp. 46-7.
- (2) The only modern writer who has not supported the *lex situs* is Dr. Cheshire. He put forward the view that the *lex situs* applied only when third parties were involved; in questions between the parties to the transfer he considered that the *lex actus* (the law of the country with which the transfer has the most real connection) should be applied: see G.C. Cheshire, Private International Law (7th ed. 1965), pp. 404-19. In the latest edition of this book, however, (which is edited by P.M. North) this view has been abandoned and the orthodox approach adopted: Cheshire's Private International Law (8th ed. by G.C. Cheshire and P.M. North 1970) pp. 507-23.
- (3) (1966) 1 W.L.R. 287 at 330; affirmed by the House of Lords (1969) 2 A.C. 31.
- (4) (1898) A.C. 616 (House of Lords on appeal from the Court of Session in Scotland).
- (5) Todd v. Armour (1882) 9 R. (Court of Session) 901.
- (6) For the law of market overt, see above pp. 61-2.
- (7) (1860) 5 H. & N. 728 (Court of Exchequer Chamber).
- (8) For a discussion of estoppel, see above, pp. 57-8.
- (9) See Dicey & Morris, The Conflict of Laws (8th ed. 1967)p. 1102.
- (10) See the quotation by Diplock L.J. at p. 114, above.
- (11) See above, pp. 77-82.
- (12) For a fuller discussion, see G.A. Zaphiriou, The Transfer of Chattels in Private International Law (1956) at pp. 53-65.
- (13) Zaphiriou, op. cit. p.59.
- (14) (1918) A.C. 157 at 161.
- (15) Zaphiriou, op. cit. , pp. 97-102.
- (16) See above, pp. 83-4.
- (17) See above, pp. 85-92.
- (18) The old case of Inglis v. Usherwood (1801) East 515 seems to support the *lex situs* as the law governing stoppage in transitu but the reasoning of the court is not clear.
- (19) For a general discussion of the question dealt with in this paragraph, see Zaphiriou, op. cit., chap. XIII.
- (20) See Inglis v. Robertson, above p. 114-115.
- (21) It would be arbitrary to apply the law of the nationality of the ship since businessmen normally choose the most convenient ship without regard to its nationality.
- (22) (1895) A.C. 56 (House of the Lords on appeal from Scotland).

- (23) For a full discussion of this topic, see Zaphiriou, op. cit. pp. 199-208.
- (24) See, for example, Cheshire's Private International Law (8th ed. 1970) p. 517 and Dicey and Morris, The Conflict of Laws (8th ed. 1967) pp. 547-8. The English doctrine of renvoi - total renvoi, or the foreign court theory - is different from the doctrine applied in Continental countries. For a discussion of the differences, see Cheshire, op. cit. pp. 54-75 and Dicey and Morris, op. cit. pp. 55-71.
- (25) Above pp. 68-9, 72-4, 93, 95-6.
- (26) Above pp. 105-9.
- (27) See above, pp. 110-1.
- (28) The only exception is a series of decisions concerning security interests over ships. These cases do not lay down any clear principle but in one of them, The Colorado (1923) p. 102, a French Hypothèque was recognised. For a discussion of these cases, see Zaphiriou, chap. XIV.
- (29) See above, pp. 67-71.
- (30) See above, pp. 72-4.
- (31) S. 95(3) and (4).
- (32) (1937) Ch. 483.
- (33) For a discussion of floating charges, see above, pp. 110-1.
- (34) See A.E. Anton, Private International Law (1967), pp. 256-7, 397, and 406-7. It should be noted that today floating charges are recognised in Scotland: the Companies (Floating Charges) (Scotland) Act 1961. The willingness of the English court to apply English law to foreign property may have been due to the fact that a floating charge is an equitable right.

PART III

INTELLECTUAL PROPERTY

Chapter 7 : PATENTS, INDUSTRIAL DESIGNS, TRADE MARKS AND COPYRIGHT

INTRODUCTION

The law on the matters to be dealt with in this chapter is almost entirely a matter of statute and these statutes are the same throughout the United Kingdom. The principal statutes are the Patents Act 1949 (as amended), the Registered Designs Act 1949, the Trade Marks Act 1938, and the Copyright Act 1956 (as amended by the Design Copyright Act 1968). The discussion that follows will be concerned only with the basic principles of the law.

PATENTS

In order to obtain a patent it is necessary to make an application to the Patent Office in London. A patent can be obtained for any invention - which means any improvement in manufacturing technique - so long as it has not already been patented and comes within the rules to be discussed. The application can either be made by the inventor (or, in the case of a foreign invention, by the importer) or by the owner but in the latter case the inventor or importer must give his consent. If the invention is made by the employee of a firm - as is normally the case - the question whether the invention belongs to the employee or the employer depends on the terms of the contract of employment. If the contract does not specifically deal with this question, it depends on the kind of work normally done by the employee - in other words, whether it is part of his job to make that sort of invention. If it is not part of his work, the invention belongs to the employee even if it was done in his employer's time or with his materials.

The complete specification filed with the Patent Office as part of the patent application must contain a description of the article, process or apparatus to be patented and a description of how it is made or worked (1). It must also contain what are called claims. A claim is a description of the exact scope of the monopoly right that is claimed by the applicant. When the patent is obtained, anyone wanting to know whether anything will be a breach of the patent will look at the claims in order to see whether his product, etc. fits within the description of one of the claims (2).

The complete specification will be examined by expert examiners at the Patent Office before it is accepted. The examiner will not pass it if he considers that the invention is not something that can be patented - that it describes no "manner of manufacture". A patent cannot be granted for an idea as such : there must be something concrete that can be manufactured. For example, it has been held that the idea of extinguishing incendiary bombs by spraying them with a particular liquid, already used for other purposes, could not be patented (3). The examiner will also ascertain whether the specification is in the proper form and contains sufficient instructions for working the invention. He must also make sure that the "claims" describe things that are new - they must not have been described before in any document published in the U.K. (4). It is also necessary that the invention be a sufficient advance over what was previously known, i.e. it must not be something which would be obvious to a skilled but uninventive worker in the field in question.

It will be seen from the above that it may not always be easy to get the specification accepted by the Patent Office. However, the mere fact that the specification has been accepted does not mean that the patent will be granted. Shortly after the specification has been accepted it is published and there is then a three month period during which anybody can oppose the application. If it is opposed the case is heard by a senior official at the Patent Office. To a large extent the grounds on which it may be opposed are the same as those on which it can be rejected by the examiner, but there are certain additional grounds.

If there is no opposition or if the opposition fails, "letters patent" will be granted to the applicant (now called the patentee). This, however, does not prevent the validity of the patent from being attacked subsequently in the courts. If the patentee brings an infringement action against someone whom he accuses of infringing his rights, the defendant may attack the validity of the patent and if he is successful not only will the action fail, but the patent will be revoked. There are a number of grounds on which the court can declare a patent invalid and it is common for the defendant in an infringement action to attack the validity of the patent as well as arguing that what he has done is not a breach of it. Some of these grounds correspond broadly to those on which the application could have been rejected by the examiner at the Patent Office but others are different. These include the following : that the invention will not work in the way that the specification says that it will or lacks the special advantage claimed for it; that at the date when the complete specification was filed the applicant knew a better way of carrying out the invention (one of the objects of the patent system is to induce inventors to make their inventions public in exchange for being given a monopoly for a certain length of time); that the intended use of the invention is contrary to law (e.g. a process for forging banknotes); and that the patentee has unreasonably refused to supply his invention to the Government.

A patent granted in London is valid for the whole UK and remains in force for four years from the date when the complete specification is filed. It can be renewed annually after this for a total of 16 years from that date. Beyond this it can be extended only in special cases.

The owner of a patent can be found from a register kept at the Patent Office and ownership of a patent can be transferred by deed followed by the registration of the name of the new owner in the register.

TRADE MARKS

A trade mark is a word or design which is used to indicate a connection in the course of business between the owner of the mark and his goods (5). Trade marks can be registered and this gives the owner the right to prevent other persons using the mark. There is, however, a difference between marks registered under Part A of the register and those under Part B. The protection given to marks registered under Part B is slightly less in that, if the owner of the mark brings an action for infringement, it will be a good defence if the defendant can show that the way he used the trade mark was not likely to mislead the public. This is not a defence in the case of a Part A mark (6).

Trade marks are always registered in relation to certain kinds of goods and registration gives the owner of the mark the exclusive right to use it in relation to those goods; it does not, however, give him the right to prevent others using it in relation to other kinds of goods.

An infringement will take place not only if the same mark is used but also if any other mark is used which is so similar that it is likely to mislead the public. Infringement will not, however, take place unless the mark was used in the course of trade.

There are a number of special exceptions to the general infringement rules. A trade mark can be used in relation to accessories and spares intended to be used in connection with the goods of the trade mark owner, provided that there is no suggestion that they are made by the owner of the trade mark : for example I can say that my make of brake-lining is intended to be used on an Austin car. Another exception is that a businessman cannot be guilty of infringement if he is bona fide using his own name; if he is using it to deceive, however, he may be liable in a passing-off action. (This action is not dependent on registered trade marks : anyone who so conducts his business as to mislead the public into believing that his goods are someone else's is liable to be sued for passing-off). Finally, registration will not prevent someone else from using the mark if he was using it before its registration and before the registered owner first used it.

If infringement takes place, the owner can sue anyone who put the mark on to the goods, or who imported the goods (if the mark was put on them in a foreign country) or anyone who trades in them. As in the case of a patent, the defendant in an infringement action is entitled to challenge the validity of the registration and if he succeeds in this the court will cancel the registration.

To be registrable a mark must be intended to be used as a trade mark (either by the manufacturer, importer, distributor, etc.) and it must be distinctive. Words which are merely descriptive of the goods cannot be registered nor can common words such as the name of a well known town or a common surname. In one case it was held that the name "Electrix" could not be used because it sounded the same as "electrics" - it was in fact used for electrical goods (7). It must also not be so similar to other trade marks as to mislead the public.

Applications for registrations are made to the Registrar of Trade Marks (in the Patent Office). As stated previously, a mark can only be registered in relation to a particular class of goods, that is those goods on which the applicant intends using it (and goods of the same description). The application must normally be made by the person or company using or intending to use the mark. The Registrar may object to the application on various grounds, for example that it is not distinctive, that the class of goods for which it is wished to register it is too wide, that the mark is immoral, illegal or misleading, or that it is too similar to existing marks. The standard of distinctiveness for a Part B mark is lower than that for a Part A mark, and the Registrar may, therefore, allow a mark to be registered on Part B of the register but not Part A.

If the Registrar has no objections, the mark will then be advertised in The Trade Marks Journal to allow members of the public to oppose registration. Opposition may be based on any of the grounds on which the Registrar could have opposed it but the most common ground is that it is too similar to a mark used by someone else. In certain special cases where there is likely to be confusion, the Registrar may impose limitations on the use of the mark, e.g. by restricting it to goods sold in a particular area. If the opposition is unsuccessful, the mark will then be registered. Even after registration, application can be made for the removal of the mark from the register but such an application is less likely to succeed than one made before registration. Once seven years have elapsed from the date of registration, a Part A mark can only be removed from the register on very limited grounds, e.g. that it was obtained by fraud or is likely to deceive or cause confusion through the blameworthy act of the registered proprietor (8).

A mark that was validly registered in the first place may lose its validity in certain circumstances. For example, if a mark is not used for five years it can be removed from the register unless the owner can prove that special circumstances in the trade were responsible for the non-use. Moreover, if the mark has been used only for some of the goods covered by the registration, an application can be used to limit the goods for which it is registered to the kind of goods for which

it has actually been used. Finally, if the owner of a mark wants to transfer it to someone else and he does not at the same time transfer his whole business to that person, the new owner must apply to the Registrar within six months for directions and must comply with any directions that are given. Normally he will be told that he must advertise the change in ownership of the mark so that the public will not be misled into thinking that the goods are still made by the firm. Likewise if he wishes to grant another person a licence to use the trade mark there must be provision for some kind of quality control of the goods produced by the licensee.

GOODWILL

In English law goodwill is usually regarded as a form of incorporeal property. Goodwill is the reputation which a man's business or goods have with the public; it is what distinguishes an established business from a new one. Trademarks are closely connected with goodwill because a trademark allows the public to identify a product with a particular manufacturer. Goodwill, however, can exist without a registered trademark. It is protected by means of an action for passing-off (9). If anyone conducts his business so as to mislead the public into thinking that his products or services are the products or services of some other person, he will be liable for passing-off. It does not matter whether his actions were deliberate or accidental so long as confusion results (10).

Anyone who has suffered financial loss as a result of passing-off can sue the person responsible and obtain damages to compensate him for his loss and an injunction. He must, however, prove that his goods were sufficiently well known to the public for the public to be deceived. In other words he must have goodwill. A passing-off action therefore will protect an established business which has already got extensive goodwill but will not be of any assistance in building up goodwill in the first place. One of the advantages of registering a trade mark is that it is then not necessary to prove that it is known to the public.

COPYRIGHT

Copyright is given to protect the author of a literary, dramatic, musical or artistic work. There is also a separate copyright in cinematograph films, sound recordings, the typography of published books and music (i.e. the form of the printing as distinct from the contents) and radio and television broadcasts. The owner of the copyright has the right to prevent anyone from reproducing the work without his consent. There is no system of registration of copyright in the U.K. and copyright attaches automatically in appropriate circumstances. Foreign copyrights are protected in the UK under the provisions of the Berne Convention and the Universal Copyright Convention.

There are various different kinds of works that may be the subject of copyright and the period of copyright is not the same for all of them. There are also differences as regards the acts that constitute a breach of copyright. Thus the period of copyright for literary and dramatic works is 50 years from the death of the author or the date of publication, whichever is later. The following are an infringement of such a copyright : reproduction, publication, performance in

public, broadcasting, an offer for sale of records of the work, or an adaptation of the work (e.g. a strip cartoon based on a book). There are similar provisions for musical words. The position is slightly different in the case of artistic works. The copyright period for photographs is 50 years from the date of publication; for an engraving it is 50 years from the date of publication or the death of the author (whichever is the later); and for other artistic works it is 50 years from the death of the author.

Copyright can only exist in a "work" : an idea cannot be copyright. Thus the plot of a novel cannot be copyright (though the words in which it is expressed can be) and a painter who has painted a particular view cannot prevent other artists from painting the same view. The merit of the work is not, however, significant, but illegal or immoral works - such as a libellous article or an obscene picture - will not be protected. Copyright can exist in a translation, independent of the copyright in the original, since the translator will have expended skill and work in making the translation. The translator, of course, will be guilty of a breach of copyright unless he obtains the author's consent.

The original owner of a copyright is normally the author, that is the person who has created the work in question. In the case of a photograph, however, the author is the person who owns the negative at the time when the photograph is taken (not necessarily the man who actually takes it) and in the case of a sound-recording it is the person who owns the original record when the recording is made. There are two important exceptions to the rule that the owner of the copyright is the author : first, if the author is an employee, the copyright will belong to his employer if the work was made in the course of his employment. This only applies if the author is employed under a contract of service and would not apply, for example, where an author is commissioned by a publisher to write a book. (Of course, this rule may be varied by the terms of the contract). Secondly, if an engraving, photograph, portrait or sound-recording is commissioned by someone who pays for it, copyright in it belongs to the person who commissions it.

Copyright is infringed only if the work is copied : if the same result is created independently there is no infringement. It is also necessary that a substantial part of the work be copied. Exactly what is a "substantial part" will depend very much on the circumstances. However, copyright will not be infringed by "fair dealing" with a work for the purposes of research or private study. Thus a student could make notes from a textbook as part of his studies. Fair dealing for the purpose of criticism or review is also permitted : a critic could quote a passage from the book he is reviewing in order to illustrate his point.

Copyright can be assigned (transferred) by an agreement in writing. The transfer can be limited to a particular field - e.g. the film rights in a novel can be transferred separately from the right to print and publish it - and the copyright in one country can, of course, be transferred separately from that in another. There is a distinction between a transfer of the copyright itself and a licence to do something that would otherwise be an infringement, e.g. publishing a book. There is also a distinction between a licence and a mere consent to do something that is covered by the copyright. If consent is given there is no breach of copyright but the difference is that a consent can be withdrawn at any time (but this cannot affect acts done before it was withdrawn) and if the copyright is transferred to someone else the consent does not bind the new owner - i.e. there will be a breach of copyright unless the new owner gives his consent.

There are special rules relating to copyright in industrial designs. These will now be considered.

INDUSTRIAL DESIGNS

An industrial design is the artistic element in a manufactured product. The law relating to industrial designs has been changed in various important ways by the Design Copyright Act 1968. Under this Act the owner of an industrial design can protect it by means of artistic copyright under the Copyright Act 1956 for a period of 15 years after it was first marketed by him. Copyright does not depend on registration but protection is only given against copies of the design : someone who creates the same design independently will not be guilty of a breach of copyright. It is also possible to register an industrial design and if this is done it is protected from any design that resembles it even if it was independently created. However, the registration will be invalid unless it shows substantial novelty over its predecessors. A design registration lasts for five years in the first instance and may be renewed for two further periods each of five years. It is not very widely used in practice and copyright has now probably become more important as a means of protection. It seems that a design which is not capable of being registered may be the subject of artistic copyright for a term of the author's life and 50 years (11).

In order for copyright to arise there must be an artistic creation to which copyright can apply. This will normally be the original model on which the article is based or the drawings made by the designer. In order for the model to have copyright it must be classified either as a "sculpture" or as a "work of artistic craftsmanship". If the drawings are copyright an infringement will occur if the defendant's article "would appear, to persons who are not experts in relation to objects of that description, to be a reproduction" of the drawing (12).

CONFIDENTIAL INFORMATION

Copyright only prevents the reproduction of the work, it does not prevent another person making use of the ideas in it. For example, if a businessman obtains a letter or other document from a competitor which contains confidential information (e.g. a list of customers or of some special technique that is not patented) he will not be guilty of a breach of copyright if he makes use of it. English law, however, also protects information given in confidence. Thus if information is given in circumstances giving rise to a bond of confidence - for example, if the person given the information is told that it is in confidence - then that information cannot normally be used without the consent of the person who gave it. If the information is used, an action for breach of confidence can be brought. There are, however, certain exceptions : thus a person cannot be prevented from informing the authorities that a criminal offence has been committed even if he obtained the information in confidence. The remedies obtainable are similar to those in the case of copyrights, patents etc.

The existence of these remedies gives rise to the question whether confidential information is a species of property in English law. Businessmen often make contracts for the sale of "know-how" - i.e. unpatented technical information - and it seems that confidential information may be a form of property in English law - at least for certain purposes.

REMEDIES

The object of the rights covered in this chapter is to secure for the owner a monopoly of some kind, for example the exclusive right to manufacture and sell products of a certain kind or to use trade names and marks of a particular description. The essence of these rights is that other people - especially competitors - can be prevented from infringing this monopoly. This is done by an action in the courts for the infringement of the right in question. There are various possible remedies. An injunction can normally be obtained, that is an order by the court forbidding the person to whom it is addressed to do something - in this case to continue to infringe the right in question. The ultimate sanction to enforce an injunction is imprisonment for contempt of court.

An injunction can be obtained by bringing an action either after the infringement has taken place or as soon as it is threatened. In the former case it is possible to obtain compensation as well as an injunction. In an action for infringement the question of liability is normally decided first. If the plaintiff wins on this point, the court then considers the question of compensation. Normally there are two possible ways of measuring the compensation and the plaintiff can choose whichever one he prefers. The first (damages) is based on the loss that the plaintiff has suffered through the infringement and the second (account of profits) is based on the profit that the defendant has obtained from the infringement.

If the plaintiff chooses damages for the loss he has suffered, the court will order an investigation to assess how much he has been injured. In the case of patents, designs and copyright, however, no damages can be obtained if the defendant was not aware, and had no reasonable grounds for supposing, that the right was infringed. (An injunction can still be obtained in these circumstances). In the case of a patent or registered design it is not necessary that the infringer should have actually copied anything from the plaintiff's invention or design : it may have been discovered independently. In the case of copyright, however, there is no infringement if the same thing is produced independently. There is, however, an additional remedy in the case of copyright : that is an action for conversion. The plaintiff can claim that he be treated as owner of all the copies of the work that infringe his copyright and he can obtain damages from anyone who has destroyed or disposed of them. It is thus possible to sue a dealer who was not himself responsible for copying the work. However, this rule does not allow the plaintiff to get damages twice for the same loss; moreover a dealer will be protected from an action in conversion if he did not know that the copies in his possession were an infringement of copyright; but any copies still in his possession will have to be handed over to the owner of the copyright.

If the plaintiff chooses profits instead of damages the court will order an investigation to assess how much profit the defendant has made from the infringement. This is often rather difficult because it may not be possible to discover exactly what part of the defendant's profits result from the infringement, e.g. if only a small part of a book is a breach of copyright. It should also be said that the plaintiff has to make his choice between damages and profits before the investigation takes place; he cannot, therefore, be sure exactly how much the profits are likely to be.

CONFLICT OF LAWS

Patents, registered designs, trade marks, goodwill, and copyright are all regarded as intangible (incorporeal) property. The rights in each country are regarded as a separate item of property ; thus a U.K. patent is a separate item of property from a French patent even if they both cover the same invention. Likewise a trademark or design is a separate item of property in each country where it is registered. Goodwill is also regarded as property and, though it is not registered, is a separate piece of property in each country where business is done and the goodwill exists (13). Copyright is also not registered in the U.K. but the U.K. rights are separate from the rights in other countries.

It is also settled that these rights are classified as movable property even though, strictly speaking, they can exist only in the country where they are granted : i.e. a British patent or copyright is of no effect outside the U.K. (14). The situs is the country granting the right. Being movable property, these rights devolve on death according to the law of the domicile of the owner though, in the case of a foreign right, an English court would probably respect any rule of the foreign law that would be applied by the foreign court : it would not normally be possible for an English court to enforce a judgment regarding a foreign patent or other right if it was in conflict with the foreign law.

One of the consequences of the territoriality of these rights is that foreign law could not normally affect a U.K. patent (except in the case of devolution on death). Thus a law passed in the country where the owner of the right is domiciled (or of which he is a national) which had the effect of confiscating all his property could not affect his U.K. rights. One example of this is the case of Lecouturier v. Rey (15). This case concerned goodwill and trademarks in Britain connected with Chartreuse liqueur. These belonged to the Order of Carthusian Monks who had their monastery in France. Under the French Law of Associations passed in 1901 their property was confiscated. The monks moved to Spain and continued to manufacture their liqueur. It was held by the British court that the trademarks and goodwill in Britain continued to belong to the monks and was not affected by the French legislation. A similar decision concerning copyright was reached in Novello & Co. v. Hinrichsen (16). In this case the property of a Jewish firm in Germany had been taken over during the Nazi period but the English court held that this did not affect a U.K. musical copyright owned by the firm.

Questions concerning the assignment of these rights will normally be governed by the law of the country granting the right (lex situs). This will apply to the essential validity of the assignment (i.e. whether the right can be assigned at all) and probably also to the formalities of the assignment, at least where there is any question of registration. Even in the case of a non-registrable right, such as a copyright, it is probable that an English court would require that U.K. formalities be complied with for the transfer of a U.K. right. For example, an oral assignment of a U.K. copyright would be invalid irrespective of the lex loci actus (17).

A good example of this problem is the case of Campbell Connelly & Co. Ltd. v. Noble (18). The facts were that by an English contract an English composer assigned to a publisher all rights in all countries in a song. Under American law the period of copyright was 28 years but if the composer was still living at the end of this time he could renew the copyright for a further 28 years. The question before the court was whether the assignment included the renewal period in America. The court held that whether a foreign copyright could be assigned and under what conditions it was assignable was a matter for the foreign law. Under American law the renewal copyright was assignable before the beginning of the renewal period. American law also provided that copyrights could be assigned by an instrument in writing signed by the owner. Since the renewal copyright was capable of being assigned by means of the contract in question, the next question was whether the contract should be interpreted as including the assignment of the renewal copyright. The court considered that this question of interpretation should be decided by English law since that was the proper law of the contract.

In view of the territoriality of all these rights it is not possible for an act in the U.K. to constitute an infringement of a foreign right or for an act in a foreign country to infringe a U.K. right. It has also been held by the Australian courts that an infringement of a foreign patent in a foreign country cannot give rise to a legal action in Australia (19). The reason given by the High Court of Australia for this rule - which is a rule of jurisdiction - was based on an extension of the principle in British South Africa Company v. Companhia de Mocambique (20). This principle, it will be remembered, prevents an English court from taking jurisdiction to hear cases concerning rights to foreign land. This rule has not, however, been adopted in Canada (21) and it is not clear whether it would be applied in England.

It has, on the other hand, been held that an action can be brought in England for the tort (delict) of passing-off when the wrongful act - in this case, selling whiskey under a false label - occurred in a foreign country (22). The court in this case applied the normal English rule concerning torts in the conflict of laws, namely that there must be liability by both the lex loci delicti and the lex fori. There was no question in this case of a registered trademark.

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CONCLUSIONS

In general the law of the U.K. does not present any great difficulties as regards the proposed convention on private international law, although certain changes in U.K. law might be desirable if the U.K. became a party to such a convention. These have already been considered.

One problem that might cause some difficulty, however, is whether equitable rights would come within the scope of the convention. It will be remembered (23) that rights of this kind bind third parties if they have actual or constructive knowledge of them; but not otherwise. It would be unfortunate if equitable rights, and especially rights under trusts, were governed exclusively by the lex situs. The English rules concerning trusts and equity in conflict of laws are rather obscure and confused but the lex situs of the trust property does not play a major role (24). This applies even in the case of land and there have been a number of decisions in the English courts in which English rules of equity have been applied to foreign land without any consideration of the lex situs (25). It will be remembered that cases involving equity constitute an exception to the rule that an English court has no jurisdiction in questions relating to title to foreign land (26). If it were insisted that the lex situs be applied to all questions concerning trusts, it would mean that the rights of **beneficiaries** could be prejudiced if the trust property were taken to a foreign country. This might make it impossible for trustees to invest trust money in Community countries outside the U.K. This could be of some significance economically since trusts are quite important in England. For these reasons it would be better either to exclude equity and trusts from the scope of the convention or to have special rules governing these questions.

GLOSSARY

The page number is a reference to the place in the text where a fuller definition is given.

	Page	
BAILMENT	160	A transfer of possession for a limited purpose
BAILOR	160	The person who transfers possession under a bailment
BAILEE	160	The person to whom possession is given under a bailment
BENEFICIARY	124	The person for whose benefit a <u>trustee</u> holds property under a <u>trust</u> (q.v.).
BILL OF SALE	190	Document which transfers ownership in goods
CHATTELS	127	Items of <u>personal property</u> (Q.v.)
CHATTELS REAL	127	<u>Leaseholds</u> (Q.v.) and other interests in land which are personal property
CHATTELS PERSONAL	127	All other kinds of chattels (= <u>pure personalty</u> q.v.)
CHOSSES IN ACTION	127	Intangible (incorporeal) property
CHOSSES IN POSSESSION	127	Tangible movables
COMMON LAW	122	This term has several meanings. The most common are : 1) the traditional system of judge-made law in England; 2) the above but excluding Equity
COVENANT	136	Promise contained in a <u>deed</u> (q.v.)
DEED	138	Document under seal
EASEMENT	135	Similar to a servitude
EQUITY (equitable)	122	Special system of law developed by the Court of Chancery to supplement the Common Law
ESTATE	131	Rights in land analogous to ownership
ESTOPPEL	162	A legal principle that if one person leads another person to believe that certain facts exist, he cannot subsequently deny this if the other person acted in reliance on it and suffered loss as a result.
FEE SIMPLE	131	An estate in land. Comes nearest to ownership.

	Page	
FEE TAIL	132	An <u>estate</u> (q.v.) which continues as long as the original <u>tenant</u> (q.v.) or any of his descendants live
FIXTURE	126	Things attached to land or buildings
FORECLOSURE	137	A court order making the mortgagee full owner of the land
FREEHOLD	132	Certain <u>estates</u> (q.v.) in land are estates of freehold. Freehold can also refer to <u>tenure</u> (q.v.)
FUTURE INTEREST	133	Right to the possession of land at some future time
HERITABLE	127	Land and certain other kinds of property in Scottish law
JOINT TENANCY	134	A form of co-ownership under which the surviving owner takes a full share in the property
LEASEHOLDS	132	An <u>estate</u> (q.v.), not <u>freehold</u> (q.v.) lasting for a fixed term
LEGAL	123	In a technical sense, refers to the Common Law as distinct from Equity
LIEN	178 187-188	Right of a creditor to retain possession of goods belonging to a person who owes him a debt
LIFE ESTATE	132	An <u>estate</u> (q.v.) in land lasting only for life
LIFERENT	143	Interest in land in Scotland lasting for life only
LIFERENTER	143	The person who has a liferent
FEU TENURE	143	Form of <u>tenure</u> (q.v.) in Scotland
FIAR	143	In Scotland a person entitled to land subject to a liferent (q.v.) in favour of another person
MARKET OVERT	165	A public market. The buyer of goods in such a market obtains a good title even if they were stolen
MORTGAGE	136	Similar to a hypothec.
MORTGAGOR	136	Owner of land who agrees to a mortgage
MORTGAGEE	136	Person lending money secured by a Mortgage
OVERREACHING	134	Process whereby <u>future interests</u> (q.v.) in land are transferred to a trust fund on the sale of the property
PASSING-OFF	215	Anyone who so conducts his business as to mislead the public into confusing his goods with those of another person is liable to be sued for passing-off

	Page	
PERSONAL PROPERTY (Personalty)	125	Personal property is property which is not <u>real property</u> (q.v.). Pure personalty is the same except it excludes <u>leaseholds</u> (q.v.). It is roughly equivalent to movable property.
PROFIT A PRENDRE	136	Form of easement (servitude) giving the right to take produce from another's land
PROFIT IN GROSS	136	A form of profit (see above) which does not run with a dominant tenement
PUR AUTRE VIE	132	<u>Estate</u> (q.v.) in land lasting for the life of some person other than the owner
REAL PROPERTY (Realty)	125	Real property consists of rights in land (except <u>leaseholds</u> (q.v.))
REDEMPTION, PROVISIO FOR	136	Agreement by which a <u>mortgagee</u> (q.v.) undertakes to retransfer the land once the debt is paid
REDEMPTION, EQUITY OF	137	Equitable right of mortgagor to obtain retransfer of land once debt is paid
REMAINDER	133	Name for <u>reversion</u> when given to another person (not the owner of the original fee simple), (q.v.)
REMAINDERMAN	133	Person owning the remainder
RENTCHARGE	135	Right to a periodical sum of money charged on land
RESTRICTIVE COVENANT	136	Similar to a negative easement (servitude) which operates in equity
REVERSION	133	The interest in land retained by the owner of the <u>fee simple</u> (q.v.) when a lesser <u>estate</u> (q.v.) is granted to another person
REVERSIONER	133	Person owning the reversion
SETTLED LAND	133	Land which belongs to two or more persons in succession
SETTLOR	124	The person who creates a trust (q.v.)
STANDARD SECURITY	144	Scottish security on land (mortgage, hypothec)
TENANCY IN COMMON	134	Form of co-ownership under which the share of each co-owner can pass by will or intestacy
TENURE	131	Terms on which land is held
TENANT	131	Person holding land
TRUST	124	A trust is a legal institution in which one person (trustee) has the legal title in property which he manages for the benefit of another (beneficiary).

Notes

- (1) It is possible to file a provisional specification before the complete specification is ready. This is important because in U.K. law priority depends on the date of filing of the application, not the date of the invention.
- (2) U.K. law adopts the "boundry post" theory, not the theory based on the essential nature of the invention.
- (3) G.E.C.'s Application (1943) 60 R.P.C.1.
- (4) It has been proposed in a government report that this be changed to include publication anywhere in the world : The British Patent System (Cmnd. 4407/1970).
- (5) In U.K. law a trade mark relating to a service cannot be registered.
- (6) Thus the use of a Part A trade mark for the purpose of comparative advertising (not normally illegal in England) would be an infringement. See s. 4 (i) (b) of the Trade Mark Act 1938.
- (7) Electrix Ltd.'s Application (1960) A.C. 722.
- (8) General Electric Co. v. The General Electric Co. Ltd. (1972) 2 All E.R. 507.
- (9) It should be noted that there is no general action for unfair competition in U.K. law.
- (10) For example, the word "champagne" cannot be used to describe wine that does not come from the Champagne district of France. If it were used to describe Spanish wine, for example, the person concerned could be sued for passing-off.
- (11) Sifam v. Sangamo Weston (1971) 2 All E.R. 1074.
- (12) Copyright Act, 1956, ss. 3 (1), 9 (8).
- (13) R.J. Reuter Co. Ltd. v. Malhens, (1954) Ch. 50 at 95-6.
- (14) Re : Usine de Melle's Patent (1954) 91 C.L.R. 42 at 48 (High Court of Australia).
- (15) (1910) A.C. 262 (House of Lords).
- (16) (1951) Ch. 595.
- (17) See the Copyright Act 1956, 36 (3).
- (18) (1963) 1 W.L.R. 252.
- (19) Potter v. Broken Hill Proprietary Co. Ltd. (1906) 3 C.L.R. 479. See also Norbers Steinhardt and Son Ltd. v. Meth (1960) 105 C.L.R. 440.
- (20) See , p. 45.
- (21) Patex Snowmobiles v. Sno-Jet Inc. (1970) 62 C.P.R. 79 (Que.)
- (22) John Walker & Son v. Henry Ost & Co. (1970) 1 W.L.R. 917.
- (23) pp. 7-10.
- (24) See J.H.C. Morris, The Conflict of Laws (1971), pp. 401 et. seq.
- (25) pp. 46-7.
- (26) Ibid.

TITLE III

THE LAW OF PROPERTY
IN DENMARK WITH SOME COMMENTARY ON NORWEGIAN LAW

by

Dr. Ole Lando, Professor in Copenhagen

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PART I

THE LAW OF PROPERTY
IN GENERAL

I. INTRODUCTION

A. DANISH AND NORWEGIAN LAW

Danish law has been formed by an almost uninterrupted development since the earliest times. The oldest legal rules still valid are to be found in the casuistically edited "Christian den Femtes Danske Lov" of 1683. Many rules of law from the "Land laws" of around 1200 AD for Seeland, Schonen and Jutland are however repeated in this codification. Danske Lov was introduced in Norway in 1687 as Norske Lov and in the process eliminated a great part of the older Norwegian common law. Since the beginning of the 19th century, most parts of the Danske Lov in Denmark and the greater part of the Norske Lov in Norway have been rescinded by new laws.

It was only at a late period that Roman law influenced Danish and Norwegian legal developments. Before the Danish writer Anders Sandoe Orsted (1778-1860), who is famous in Scandinavia and is considered the father of an independent Danish legal science, Danish jurists were influenced by Roman and German law. Through these authors continental sources influenced Danish and Norwegian law. However, this influence was never strong as regards the content of Nordic law, and Roman concepts of law, such for example as those which formerly existed in the field of transfer of property, were later abolished. However, continental European law, and thus Roman law, have, even according to Orsted, exercised a considerable influence on the legal system and language of the two countries. General legal thinking in Denmark and Norway is closer to continental legal doctrine than to the Anglo-American. Although the Danish and Norwegian jurists since Orsted, like the English, work more, pragmatically, less theoretically and with greater freedom from concepts than, for example, the Germans and French, law has essentially developed as a dialogue with continental law and legal thinking.

After the Danske Lov and the Norske Lov of the 17th century no new codification of Danish and Norwegian law has been carried out. In both countries written law mainly consists of individual laws many of which are the result of Scandinavian cooperation (for example, the law on purchase, the law on settlements, and the law pertaining to contracts). In other fields the law of one Scandinavian country has influenced the law of the other. Thus, for example, the Danish "Tinglysningslov" of 31 March 1926, which governs the transfer of real property rights, has influenced the new Norwegian legislation in this field.

The number and the importance of the individual laws are great in both countries. However, certain important fields of law have

remained uncodified. For example, neither in Denmark nor in Norway, is there any general regulation of property rights. The matters which are governed by the second book of the French Code Civil and the third book of the German BGB (Bundesgesetzbuch) have largely remained unwritten law in Denmark and Norway. The law obtaining in this field is the result of reciprocal influence between common law, writings and case law. The legal development is here also more similar to the continental than to the Anglo American model. The influence of writers on jurisprudence has been great. However, since the middle of the last century, case law has been the most important source for practising lawyers who want to know what is valid law. But, with us, as in continental Europe, there is no doctrine of stare decisis and, precisely in the field of property law, we see that case law, partly under the influence of theory, has constantly developed further.

Continental legal doctrine has influenced the Danish and Norwegian methods of interpreting laws. The written law is seen as the primary source of law. The tendency of the Anglo-American courts to interpret written law narrowly is found as little in Scandinavia, as in continental countries. Rather is there a tendency to conceive of individual rules of the "central" laws, for example, in the field of property law, the law on purchases, as general principles of law. As in the continental countries, the work preparatory to the laws is also taken into consideration.

B. PARTICULAR FEATURES OF DANISH AND NORWEGIAN PROPERTY LAW

1. The transfer of property is "multilateral"

The particular features of Danish and Norwegian property law come out mainly in the way the acquirement and loss of property by transfer is governed. As mentioned, there are no legal provisions containing general rules on these questions such, for example, as Articles 711 and 1138 of the French Code Civil and Section 714 of the Swiss Civil Code, which govern the question of transfer both between the parties and also in relation to third parties. The Scandinavian laws on purchase of 1905 - 1907 contain provisions concerning the relationship between the parties and practically none concerning the transfer of property in relation to third parties. The silence of the law has left our authors and courts free to deal with the questions of property transfer in an undogmatic fashion.

According to the opinion of the Scandinavian authors, which jurisprudence has accepted, "property transfer" is not a unified concept. It consists of a number of different legal effects which are settled independently of each other.

In the first place, the questions of the passage of the risk, the acquisition of the products and other component parts belonging to the fruits of the property, and the right of lien

including "stoppage in transitu" of the unpaid seller are not dealt with as questions of property transfer. In Scandinavian law these questions belong to the law appertaining to debt and they are governed in the general laws on purchase as regards the buying of personal property. The risk as a rule is transferred at the time of delivery (Law on purchase Sec. 17) and the fruits of the property which occur before delivery belong as a rule to the seller and after delivery to the buyer (Law on purchase Sec. 18 - 20). As a rule the seller can retain the property and prevent its delivery until such time as the good has come into the possession of the buyer at the place of delivery (Law on purchase Sec. 39).

In the event of an international-private law settlement of these questions the possibility can therefore not be excluded that Danish lawyers, as was the case at the Hague conferences in 1951, and in 1955 during the negotiations for a IPR Convention on the transfer of property when movables are bought, will insist that these questions be dealt with separately from those of passage of title.

Secondly, as far as the passage of title vis-à-vis third parties is concerned, the concept in Scandinavia is that this question consists of several special questions each of which must be dealt with separately. Here, the most important questions are: When is the acquirer of a property protected against the creditors of the seller who are demanding execution by distraint? When is the acquirer protected against other purchasers of the same property? Under what conditions can a bona fide purchaser of a property become owner if the property did not belong to the seller? As is shown below, each of these questions is dealt with separately and the protection of the acquirer and the seller begins and ends in different stages of the process of selling according as one or the other of these questions is at issue. This separation concerns the selling both of real and movable property rights and claims.

2. No real contract

In Danish and Norwegian law the transfer of the property occurs solely on the basis of the contract without there being any question of a real instrument of execution along with the contract. Simple agreement regarding the matter is sufficient; the property does not need to be transferred and the price does not yet need to be paid. But, as will be seen, only a few legal effects occur when the contract is concluded. For the occurrence of other effects, which are to protect the buyer against third parties, Danish and Norwegian law demand what is called a security instrument which can consist either of "Tinglysning", of the cession of the property or, when it is a question of transfer of claims, in communication to the debtor. These security instruments fulfil the function of the German real contract in certain respects.

C. REAL PROPERTY RIGHTS AND RIGHTS TO MOVABLE PROPERTY
INTANGIBLE PROPERTY RIGHTS, CLAIMS AND SECURITIES

The difference between "tangible" or material property (things) and other intangible properties such as intellectual goods (trademarks, patents, etc.) and rights (securities and claims) exists in Scandinavia as in other countries. In principle the provisions of the law of property are not applicable to intangible goods. The transfer of claims and securities has been placed under special legal provisions by the law on debentures of 1938.

Since the transfer of rights to landed property has been settled by the special provisions of the "Tinglysningslovs", the differentiation between movable and immovable goods is of fundamental importance. Immovable goods include land and buildings, even buildings which are situated on other people's land (T.G. Sec. 19). As in other legal systems movable property which is considered to be part of, a building or an appartenance to a piece of land, is treated in certain respects as real property (T.G. Sec. 37 and 38).

Although ships and aircraft belong to the category of movable property, the special rules of the ships' register law (Nr. 93 of 29 March 1957) and of the aircraft register law (Nr. 135 of 31 March 1960) apply to the transfer of rights in these means of transport. These regulations were modelled in many respects on the provisions of the Tinglysnings law on the registration of landed property rights.

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II. REAL PROPERTY IN DANISH LAW

A. THE HISTORICAL DEVELOPMENT OF THE RULES CONCERNING REAL PROPERTY

In the days of the Laender laws, i.e. around 1200, the transfer of property rights in real estate was effected by conveyance.

The parties concerned held the cap of the purchaser in their hands and the seller threw a handful of earth into it. This act was known as "Skodning" ("Schötung"). The seller designated the land which he wanted to sell and in this way transferred the property right to the buyer.

In those days written contracts were little known and the "Schötungs" process therefore served the purpose of imprinting what had happened on the minds of the participants and thus ensuring proof of the transfer.

It gradually became the rule that the Schötungs process should no longer take place on the property itself but in the court (the Ting). The purpose was to increase certainty as regards conditions of ownership by carrying out the "Schötung" in the presence of a wider circle, and thus strengthening the proof that a transfer of property had taken place. Even though the "Schötung" took place in the Ting, it was possible for the contract nevertheless to be invalid in substantive law.

Meanwhile, the use of the written form imposed itself and the oral "Schötung" in the Ting was usually replaced by a confirmation in writing (Schöte). Legal provisions dating roughly from the year 1550 recognize this practice as valid.

However, in this way, public opinion learned nothing of the agreements reached and this led to abuses. As mortgage rights on landed property were also gradually recognized, new possibilities of abuse arose. The same piece of land could be sold or encumbered several times, by the same person. Endeavours were made to prevent this by taking the real property relationships as the starting point. It was attempted to reintroduce the "Schötung" in the Ting or the reading of the written contracts in the Ting (Tinglesung). Encumbrances were also made known by reading.

Secret written transfers were gradually pushed into the background. Schöte protocols, mortgage protocols and registers open to the public were introduced. In the Schöte protocols and in the mortgage protocols the whole content of the documents was reproduced, whereas in the register only a note was made referring to the Schöte and mortgage protocol. In relations with third parties the reading in the Ting, the Schöte and the mortgage

protocols were determinant. In relations between the parties to the contract oral or written agreement was sufficient.

The practical emphasis was gradually shifted from the reading in the Ting, i.e. reading out in the court, to registration. The formal legal effect, however, always remained linked with the reading in the Ting, which gradually lost its practical interest. With the "Tinglysningsloven" of 31 March 1926, Law No. 111, which entered into force on 1 April 1927, the present "Tinglysning" system was introduced.

B. "TINGLYSNINGSLOVEN" OF 31 MARCH 1926 - NEW PRINCIPLES

- a) The Tinglysning law (T.L.) introduced the entry of documents (Tinglysning) as the decisive act vis-à-vis third parties. The documents are now no longer entered in a Schöte and mortgage protocol. Instead of this, copies are placed in the archives in a dossier for each individual property. The copies must be prepared on specially standardized paper by the person who notifies the document. The Administrative Court responsible for the "Tingslysning" then checks whether the copy conforms to the original, which is sent back to the party filing the document. In this way the Court is spared elaborate clerical work. At the same time, a considerably greater insight is achieved into each individual property. All the copies of the documents concerning a property are collated in the dossier of that property, whereas the old Schöte and mortgage protocols were arranged chronologically.
- b) The earlier registers have been replaced by Ting books which are kept as loose-leaf registers. Each property has its leaf in the Ting book and new leaves can be fitted in accordance with the designation of the register of lands (see below under D) in the same way as full pages can be copied.
- c) Publication, which was previously done by means of the Ting reading is now effected by notification in an official journal - issued daily as a part of the Statstidende (Official Gazette) and by posting up in the Court on "Tingsningslisten" concerning sales and encumbrances.
- d) According to the law previously applying, not all rights required Ting reading in order to be valid vis-à-vis third parties. In particular, rights which were based in acquisition under the statute of limitations or through expropriation did not require any reading. This naturally led to a reduction of security in trade with real property. The greater the certainty that the leaf in the Ting book gives accurate and complete information concerning the ownership situation, the greater is the value attaching to the system of registration.

Sec. 1 T.L. (see greater detail at C) has therefore set up a general claim for Tinglysning of all landed property rights. There are only limited exceptions to this main rule. (1)

- e) With the Tinglysning law an (enlarged) duty of investigation was also introduced for the Tinglysning judge. He must now check that a private document, in order to be validly entered in the Ting book, has been drawn up by the person who, according to the Ting book has power to dispose of the right in question, or that the document is drawn up with the approval of the person having such power. Any public legal act, for example a public expropriation, must, if it is to be made notifiable to the Ting, concern that person who is empowered by the Ting book to dispose of the property.
- f) With the Tinglysning law the credibility of the Ting book has been basically confirmed. Under the law applying earlier the purchaser who, without any "annotation" from the court and in good faith had his right confirmed by Ting reading could not be completely certain of this right. The "annotation" was a remark by the judge on the document. It shows that another person has a real right which in some way is irreconcilable with that of the document. After the Tinglysning law of 1926 it is now the principal rule that any party who, in good faith, has acquired by contract a right to a property notifiable in the Ting can no longer have the invalidity of the transfer invoked against him.

A document which is false or falsified or whose drawing up was illegally obtained by force against the person, or was made out by an individual incompetent to contract, has no validity even if it has been entered in the Ting book. Even a bona fide acquirer cannot derive any right from such a document. But in such a case the bona fide acquirer is entitled to be compensated by the public purse for the loss he has incurred. And in the case of lack of or an inexact entry in the Ting book the bona fide partner to a contract either acquires the right which has been entered or compensation from the Treasury. The Tinglysning law in this way tries to provide an effective security in real property business without requiring as for example under German law - a very thorough examination of the identity and legal capacity of the person signing the document.

- g) According to the Tinglysning law a document which is made known to the Ting has legal effects in relation to third parties as from the date on which it is notified to the court. The document is then entered in the daily log book. In this way the Tinglysning law has shifted the decisive point in the time from the day of formulation, which was previously determinant, to the day of notification.
- h) The Tinglysning system is under the authority of the "Underret" (the Administrative Court) (105 in all). Appeal may be made against the decisions of the Tinglysning judge to the "Landeretten" (Land Court).

C. THE LEGAL EFFECTS OF THE TINGSLYSNING

The most important legal effects of the Tinglysning follow from sec. 1 and sec. 27 of the Tinglysning law.

a) Sec. 1 of the Tinglysning law

1. Sec. 1 reads: "Rights to a piece of real property have to be notified to the Ting in order to have validity vis-à-vis contracts concerning the property and court decisions, in particular in the event of distraint concerning the property.

By means of contracts or through execution a right which has not been notified to the Ting can only be set aside when such contract or execution themselves have been notified to the Ting and the acquirer is bona fide on the grounds of the contracts".

Sec. 1 has in mind a transfer of rights which has not been notified to the Ting. The situation may be illustrated by the following figure



B and C are the persons who derive their right from A - possibly through one or more intermediary members.

Sec. 1 gives C the possibility of demanding a right in preference to B to a real property, although B has acquired a right to this property by contract, execution, prescription or any other way at an earlier point. If in fact B does not notify his right to the Ting, C, in accordance with sec. 1 T.L., can supersede him in this right, where C is a prosecuting creditor or a bona fide acquirer under the terms of a contract. Sec. 1 (2) lays down the so-called priority effect to the Tinglysning. It accords precedence to the right which was first notified to the Ting. The way in which B's right, which is superseded, was acquired, is of no importance, as a rule. It may for example be a matter of acquisition by contract, court decision, confiscation or prescription.

According to Sec. 1 of the law; the Tinglysning is determinant for enforcing creditors and acquirers by contract. However, in the relationship between the partners to the contract the latter has legal effect without any consideration of the Tinglysning. It is not even necessary that there should be a document. Even oral contracts have validity inter partes and in relation to others than enforcing-creditors and acquirers by contract.

Only vis-à-vis bona fide "turnover acquirers" and in the case of distraint is the Tinglysning necessary. In relation to expropriators and the heirs of the partners to a contract, contracts concerning real property are valid even when they are informally concluded and not notified to the Ting. It further follows from Sec. 1 T.L. that an acquirer through a contract who is not in good faith must also recognize the rights which have not been notified to the Ting.

The motivation for a general demand for Tinglysning (3) of all rights to real property (see Sec. 1 T.L.) is seen most clearly in the relationship to the bona fide "turnover acquirer". The basic idea of the Tinglysning system is to call upon everyone who has rights to notify these to the Ting. In this way, the situation regarding property rights becomes clear and those who buy land or grant loans against real property pledges are protected against disappointments which can arise if distraint on the property occurs or the owner has previously disposed of it to the advantage of others. The Tinglysning guarantees that other - unknown - rights which might possibly conflict with the right of the acquirer cannot be asserted.

If Sec. 1 T.L. also demands Tinglysning of rights to real property so that these rights have to be taken into account in the event of distraint, this means a break with the general rule of Danish law according to which the creditor can only enter into possession of what belongs to the debtor at the time of the distraint. The grounds why the demand for Tinglysning is made also in relation to the enforcing creditor is the need for ascertaining the point in time at which the right concerned originated. In this way, any predating of documents intended to deceive the enforcing creditor is excluded. The Tinglysning further prevents the possibilities of carrying out pro forma transactions whose purpose is to pretend to withdraw from the debtor assets which are threatened by the distraint.

Particularities concerning the extinction of rights (the supplanting of older rights) of bona fide partners to contracts

The priority effect of the Tinglysning operates from the day on which the document is notified for Tinglysning and entered in the day book. However, after it has been entered in the day book, the document must also be recorded in the Ting book. A document which, after examination by the judge, is considered as not suitable for entry in the Ting book is therefore rejected, loses its priority effect as a document notified to the Ting. Later distraints or contracts concerning the property can supplant rights rejected in this way without any consideration for their notification.

Conflicting rights to the same property which are notified on the same day have equal rank.

Sec. 5 T.L. lays down what is to be understood by bona fide. Good faith exists when the acquirer of the right was not aware of the unnotified right to the Ting and his ignorance was also attributable to gross negligence. The good faith must exist at the time of the notification of the contract to the Tinglysning and, when mortgage debentures (which do not need any Tinglysning) are transferred, at the time of such transfer. It should be pointed out that the requirement of good faith applies only for the partner to the contract. Creditors who wish to appeal to extinction in accordance with Sec. 1 T.L. do not need to be in good faith.

In Danish law distraint means particularly the general judicial measures for execution which are implemented by creditors: confiscation, seizure, bankruptcy and arrest. Even division of the estate without acceptance of the debt (in the event of insolvency of the estate) is considered as a judicial proceedings.

In general it is not necessary for extinction that the party which has notified its right to the Ting should contest the right not notified to the Ting.(4)

From the angle of property transfer the following should be noted on this point:

The acquirer of a right to a piece of landed property is only protected against executing creditors of the seller if he has notified his right to the Ting. He is also only protected against subsequent bona fide acquirers who have come into possession of the same right through a contract if he had notified his right to the Ting.

Vis-à-vis other acquirers and also those contractual creditors and acquirers who have not notified their right to the Ting the acquirer is protected from the time of the origin of his right. This means that the acquirer under a contract is protected from the point in time when the contract was concluded.

2. Rights which are exceptions to the general requirement of the Tinglysning in Sec. 1

There are certain exceptions to the general requirement of Tinglysning. The transfer of mortgage debentures, which have been notified to the Ting, contracts concerning usual rent and lease relationships, which in Danish law establish material rights to the property, taxes, payments and fire insurance amounts which encumber properties, do not need any Tinglysning. In addition, rights established before the entry into force of the Tinglysning law on 1 April 1927 and which, according to the rules of that time, did not have to be read in the Ting, are excepted from Tinglysning. This is of particular importance for older prescription

rights. Finally, there is the exception to Sec. 1. that certain private rights of way do not have to be notified to the Ting. The general limitations which apply to the exercise of the right of property also do not have to be notified.

Leaving aside these - limited exceptions - the Tinglysning requirement under Sec. 1 applies to all rights.

b) Sec. 27 of the Tinglysning law

In Sec. 27 T.L. it is laid down: "When a document is entered in the Ting book no objection against the validity of this document can be advanced against bona fide acquirers of rights in the property on the strength of contracts notified to the Ting or of endorsements on a mortgage bond. The objection that a document is false or has been falsified or that it was made out in illegal fashion by the use of force against the person or threat of the immediate application of such force, or that the person making it out was under age at the time continue however to apply even vis-à-vis a bona fide acquirer".

The situations which are governed by Sec. 27 T.L. can be illustrated in the following way:

A - B - C

A originally has the property right to the real estate X. By means of an invalid or ineffective contract or the misuse of A's name, B has had a property right to X entered in the Ting book. According to Sec. 27 T.L. the Tinglysning of B's right has the effect that a contract concerning X which B makes with the bona fide C will be valid. The objections which A can assert against B can then not be maintained against the bona fide C, who notifies his property right to X to the Ting. This effect is generally called validity effect, and it is understood in such a way that the originally invalid document which accords a right to B is made valid by the Tinglysning in relation to third parties.

The rule in Section 27 T.L. means that a former owner or holder of a limited right to the real estate cannot raise objection to the material validity of the contract on which the right entered in the Ting book rests. Nor can he assert that he is entitled to withdraw from the contract because this results from the contract or because his partner to the contract who had the notifiable right entered has not paid the remuneration agreed upon. The same applies when a right later ceases through contract, fulfilment, compensation or judgment and is not cancelled in the Ting book. Vis-à-vis the subsequent bona fide acquirer the former owner can also not assert that the seller was not entitled to dispose of the property but was only legitimized according to the Ting book. Thus section 27 attributes to the entry in the Ting book a so-called legitimation effect.

Section 27 now applies for the benefit of bona fide partners to contracts but not in favour of creditors of the partner to the contract who are pursuing distraint proceedings. Should the right of a debtor to the real estate be defective, this legal defect can also be affirmed vis-à-vis his creditors although the debtor can be proven from the Ting book to have a perfect notified right.

Exception from extinction according to the T.L.

The original holder of the title does not always lose his right. The objection that a document is false or falsified or that it was made out in illegal fashion through force against the person or threat of immediately applying such force, or that the person making it out was not capable of contracting at the time, continue however to exist even vis-à-vis a bona fide acquirer. (Sec. 27 clause 2 T.L.).

D. THE CADASTRAL SURVEY SYSTEM

In Denmark a division of all property and land had been undertaken - the cadaster survey system. Each piece of property has a cadaster number. The pieces have been surveyed and charts and a common register concerning them drawn up. The cadaster (official lands register) represents an essential precondition for the Tinglysnings system.

If the provisions of the T.L. deal with real property it is primarily to the pieces laid down in the cadaster that reference is made. To these must be added the buildings standing on a property. According to the T.L., on the other hand, the movables which are normally included in the contractual sales or encumbrances of a property as a rule do not belong to the real estate. When it is a matter of stock, warehouses, garden equipment, etc., the legal effects, which flow from sections 1 and 27 T.L. generally do not find application to such movables. Here the rules concerning the acquisition of ownership of movable property apply.

- E. The T.L. furthermore contains provisions which lay down what belongs to the real property when this is encumbered. Section 37 T.L. reads as follows: "Where a piece of real estate is permanently equipped for the purposes of a particular productivity activity, mortgage bonds on such property which have been notified to the Ting, unless otherwise agreed, also include the business stock and business apparatus, among them machines and technical plant of all kinds, and in the case of agricultural properties, also the cattle population, fertilizers, yields and other products belonging to the property, to the extent that they are not separated from the property in question as part of an organized exploitation.

If a piece of real estate is insured, mortgage bonds which have been notified to the Ting include, unless otherwise agreed, also

the insured sum of the bond. The same rule applies to the appurtenances mentioned in paragraph 1.

Section 38 T.L. further lays down: "If a building is completely or partially erected and if machines, boilers, ovens or such like at the cost of the owner are connected with use for the property of for an industrial undertaking situated on it, in particular rights to the materials of the building or to the appurtenances mentioned cannot be asserted either as property rights or in any other way. Mortgage bonds notified to the Ting on such property also include these appurtenances without any special agreement being necessary.

This provision has given rise to problems of interpretation. When are "appurtenances" bound?

Before the T.L. decisive importance was attached to whether the particular object was actually nailed to the building. The law and the subsequent case law however have abandoned this point of view and use an industrial operation criterion. Those things belong to the landed property which, from an economic point of view, normally and naturally have a permanent place upon it. There are many decisions concerning this question. Fixed appurtenances are treated as real property where propertyless seizure rights cannot be exercised on such objects.

F. THE RIGHTS TO A PIECE OF REAL ESTATE

As in all known systems of law, the Danish system also makes a distinction between different rights to real property. Each of these rights has its own nature. However, it is often difficult to classify a legal relation under one or other and thus lay down its legal effects.

a) Full ownership

Full ownership gives its holder the most extensive powers. The owner can dispose of the property from every point of view, to the extent that no special limits are set to his right by law, contract or any other factors.

Danish legal theory considers as the most important feature of full ownership the fact that this right gives its holder the possibility of restoring the original legal situation. If, for example, a right of use or a seizure right has been constituted in favour of a third party, the right of disposal of the holder of full ownership is reduced for as long as the limited right continues to exist. But as soon as this right expires the powers of the owner are automatically restored to their original extent.

b) Restricted rights

Contrary to full ownership, restricted rights have a limited content which has been determined essentially by legislation and common law but which, however, in each individual case can be laid down by the contract between the parties. The most important restricted rights are usufructuary rights, real servitudes, mortgage and perpetual charge.

1. Usufructuary right*

The right which most resembles full ownership as regards its content is usufructuary right. By this is meant the right to possess a real property and to draw advantage from its exploitation.

The concrete substance of the usufructuary right in question must be defined more closely by verbal arrangement or with the aid of the general legal provisions (for example those appertaining to rent and leasing). In this way for example enjoyment of the property can be limited by excluding certain forms of exploitation.

2. Real servitude

As in German law, real servitude is related with usufructuary right. It entitles the holder to draw the advantages from a property which is not his own. The exploitation is limited however. The holder of the right can either enjoy a form of exploitation which he would not have had according to the general legal provisions (positive servitude) or he can claim that a state of affairs shall be maintained on the property in question to the maintenance of which he would otherwise have had no right (negative servitude).

Among the "positive" servitudes is the so-called "appropriation servitude" which allows its possessor to appropriate certain fruits of the property under servitude, for example the right to cut peat or to pasture cattle.

Real servitude and usufructuary right have similarities which make it difficult to establish a sharp distinction between the two servitudes. It is often a matter of appreciation by a judge whether a usufructuary right or a real servitude exists, and it is universally recognized that differing use is made of this discretion. In this field Danish courts work "without concepts". A right can be regarded as a real servitude from one angle and from another as a usufructuary right.

3. Mortgage

In the creation of a mortgage there arises in Danish as in other systems of law a security which an unsecured claim does not afford the creditor. A mortgage gives the holder of a pledge better possibilities than a simple claim to be satisfied if the debtor does not pay up of his own free will. The holder of a pledge can demand satisfaction from the encumbered property before other creditors.

A mortgage can only be granted as a propertyless pledge. It is not permitted to give real property as lien.

The mortgage can be based, in the relationship between the pledge creditor and the pledge debtor, on an informal contract which may be verbal or written.

However, in order to be protected vis-à-vis bona fide acquirers under contracts and creditors taking proceedings for distraint, a mortgage instrument must be drawn up and notified to the Ting (see C above).

The mortgage instrument must be written on a particular pro forma which is authorized by the Ministry of Justice.

The mortgage instrument must show the names of the creditor and debtor, the encumbered estate, the amount of money (it must mention a specific amount) the interest payments and amortization. Although they have so far seldom occurred, value clauses (gold value clauses, price index clauses and clauses which provide for repayment in accordance with the value of a foreign currency) are permissible.

Mortgages must bear the signatures of two witnesses or of a Danish lawyer. These persons must bear witness that the writer of the mortgage is capable of contracting and has himself signed on the date given. The profession of notary does not exist in Denmark. In order to prevent any falsification the document of transfer most recently notified to the Ting ("Schöte") must be lodged along with the notification of the mortgage for Tinglysning.

The mortgage instrument is dealt with by the Tinglysning authorities in the same way as other documents notified to the Ting. In this way, it is entered in the day book and, after the judge has examined the document, also in the Ting book, while a copy is placed in the dossier.

Transfers of negotiable mortgages do not need to be notified to the Ting (see above C (2)). Mortgage bonds are often ceded in Denmark. By dispensing with Tinglysning in such cases turnover of these securities has been facilitated.

As mentioned above under E, the Tinglysnings law contains special provisions on the extent to which lien includes appurtenances of the real estate as such and of the buildings.

The owner retains possession of the real estate. He may however not dispose of it in any way which reduces its value and would jeopardize the security of the mortgage creditor (pledgee).

The Tinglysnings law lays down that mortgage rights shall retain the rank which they had at the time they were registered.

The priority principle applies as between mortgage creditors. A subsequent mortgage, however, moves up gradually when a prior one is redeemed, or is completely paid back at the time determined in advance. If, however, a mortgage expires unexpectedly, the next in order does not automatically advance. The owner of the property may immediately or later conclude a new mortgage in the order of priority and for the amount which the earlier one, now expired, possessed.

Should the amount of the principal mortgage claim, the interest or the instalments not be paid on time, the mortgage creditor can obtain satisfaction from the property by means of distraint.

If the creditor wishes to make good his claim against the debtor he must normally begin by bringing a complaint before the court in order to obtain a judgment against the debtor. After this, he may turn with the executable judgement to the enforcement judge who will have the distraint implemented against the debtor. However, if the mortgage claim is due because it has not been paid at the date laid down in the instrument, the owner of the mortgage notified to the Ting can go straight to the enforcement judge and ask for distraint on the basis of the mortgage without any prior judgement.

If the claim is then not paid, auction by order of the court can be put in hand. This means that the property is auctioned by order of the enforcement judge and that in this way the mortgage creditors are satisfied, in accordance with their priority under the order of mortgage, from the proceeds of the sale. Those rights which lie outside the sum offered after the auction are cancelled in the Ting book as unsatisfied and the unpaid mortgage creditor retains his personal claim against the debtor. A mortgage creditor whose mortgage is threatened by expiry can make a bid which partially covers his mortgage. If this bid is accepted as the highest, he can put a stop to the auction and take over the property as an "unsatisfied pledgee".

The pledgee whose claim is not paid on the due date can also, with the help of the enforcement judge, take the

property into his possession and administer it, i.e. take it over under antichresis. In this way, for example, his claim would be settled by rents flowing from the property. A pledgee who has taken over the property under antichresis must see to its administration and account for this to the owner.

4. Perpetual charge

Perpetual charge is to be understood as the duty to provide certain recurring services from the property. This duty is encumbent on the owner or possessor of the property at any time.

Since the law of 1918 it has been forbidden to encumber real estate with perpetual charges in cash or in kind. However, this prohibition concerns only perpetual charges which, like the earlier forced labour and other levies of the farm to the landed proprietor, could not be denounced unilaterally either by the party profiting from them or from the owner of the land. It is still permitted as in the days prior to the law, to constitute annuity rights.

III. FIXATION IN DANISH LAW
INSTITUTIONS HAVING LEGAL STATUS

Danish law ignores the transfer of property under the condition that the acquirer shall indeed be free to dispose of the object acquired, whereas the latter, however, is to be removed from the reach of the creditor who is pursuing for distraint. Such provisions concerning "partial fixation" cannot be maintained against the creditors of the acquirer.

As against this a donor and, in his will, a testator can determine the fixation. Through this the donee of the heirs are prevented from disposing of the objects acquired. In addition these objects are not exposed to the reach of the creditors of the acquirer. How and by whom the administration of the object left is to take place is laid down by the donor or the testator.

Immobilized assets are often invested with the senior court of guardianship or in a finance institute. The entitled party cannot dispose of the capital in his lifetime - but of course mortis causa. He can only draw the interest thereon. In this way, the fixation fulfils certain functions of the English trust.

Moreover, in Danish and Continental law, the rules concerning the administration of the assets of persons unable to contract and institutions such as foundations, which can contract take over some of the functions fulfilled by the trust in common law. These rules concerning institutions having legal capacity are not codified. Such institutions acquire a certain legal capacity when they are founded without any public approval or entry being necessary. The founder is fairly free to lay down the content of the foundation document. However he can decide that its contents shall be approved by public authorities (generally a Ministry). When according such an approval the Ministry examines the content of the document to a certain extent. Subsequently it will supervise the administration and have the resources of the institution checked.

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Notes

- (1) The Tinglysning law has however - as is the case also in other countries - been obliged to renounce any application of Sec. 1 to older, validly published rights. The point here is that rights to landed property which were validly founded with legal effect vis-à-vis third parties before the entry into force of the Tinglysning law of 1 April 1927 shall retain their validity without Tinglysning in the future also.
- (2) In Denmark there are two Land Courts, one in Copenhagen and one in Viborg.
- (3) If there has been no Tinglysning, the acquirer of the right runs the risk that his right will be superseded by an earlier one (cf. Sec. 1 T.L.). This shows how important it is to notify a right to the Ting.
- (4) Only in individual cases has the T.L. laid down the requirement that the acquirer must assert his right in order to supersede a right not notified to the Ting. This obtains for the supplanting of rights under prescription not notified to the Ting. Where a right under prescription has been established and not notified to the Ting and, would, in accordance with Sec. 1 T.L., otherwise cease against bona fide partners to a contract or enforcing creditors who have notified their rights to the Ting, a right under prescription not notified to the Ting will nevertheless remain valid in relation to these acquirers if they have not asserted their right vis-à-vis the party profiting under the prescription within two years after the Tinglysning. The acquirer notified to the Ting can in any case assert his right.

PART II

SECURITIES OVER MOVABLES

I. CREDIT IN THE FORM OF LOANS

1. PLEDGING OF MOVABLES UNDER HAND

- a) There is no law in Denmark governing pledges under hand from the general aspect. The provisions applying are found in various legal instruments, the oldest of these being the "Danske Lov" of 1683, and in case law.
- b) A pledge on movables constitutes a contract (1). The contract itself is evidence of its applicability to the contracting parties. In order that the contract embodying the pledge may be secured as regards the pledging creditors or other contracting parties it is customary to require (in good faith) the execution of a "guarantee deed" by which the debtor is effectively deprived of his freedom to dispose of the object pledged. This protection remains effective as long as the position continues to be covered by restricted powers of disposal (?).

The grantor may be deprived of his powers of disposal by the fact that the pledging creditor has gained possession of the pledge or by the latter being transferred to a third party.

A creditor under pledge who has taken possession of the object is protected vis-a-vis third parties, even if he is unable to dispose of the pledge without the debtor's cooperation. The deed of guarantee will remain effective even if the grantor and the creditor under the pledge have to combine in order to obtain access to the pledge. This may arise where access to the object requires the use of two keys, held by the creditor and by the debtor respectively (3). It is clear in this case that the grantor has lost his power of disposal, as in the case of "qualified co-possession" for which German law provides (4). The pledge similarly remains effective even though the object pledged is situated on the grantor's commercial premises, provided that steps have been taken to exclude the possibility of a unilateral act of disposal by the debtor. The creditor under the pledge must continually ensure that the object pledged remains available. He must take necessary measures (5) to prevent incorrect and unilateral disposal by the grantor. The pledge will continue to exist even if the grantor disposes of the object pledged without the knowledge of the creditor under the pledge.

The requisite deed of guarantee also remains effective where a third party holds the object pledged for the benefit of the creditor under pledge and undertakes not to pass this on to the debtor without the creditor's consent. The deciding factor here is similarly the fact that the creditor under the pledge may effectively rely on the object not being returned to the debtor without the creditor's permission.

- c) No particular form is required for a pledge to be valid. Written, oral, formal and silent contracts are all acceptable (6). Rights under a pledge may be set up not only to secure pecuniary indebtedness for a specific sum but also pecuniary indebtedness for an unspecified amount.
- d) The conclusion of a contract for a pledge enables the creditor thereunder to require execution of the deed of guarantee as described under (b) above.

As long as the claim of the creditor under the pledge remains outstanding, the latter similarly retains the right to withhold the object pledged vis-a-vis third parties.

A creditor under a pledge who retains the object pledged is responsible for it in accordance with the general provisions applying in respect of liability for negligence (culpa).

In accordance with the law applying to pledges the creditor under the pledge is not in fact entitled to use the object pledged. If the latter yields revenue, the creditor is not obliged to render this up to the debtor but, nevertheless, he may not assign such revenue as long as he is not permitted to sell the object pledged. Only in the event of it proving impossible to store any revenue accruing is he entitled to sell it earlier (7).

Under a contract of pledge the creditor may neither assign nor re-pledge his rights thereunder in the absence of express agreement to the contrary. Nor may a pledge on movables be assigned for a sum of money greater than that which the creditor under the pledge has himself remitted to the debtor (8).

The debtor may set up secondary charges under pledge. In this case, the second creditor under pledge must respect the rights of the first creditor. Where this occurs, the deed of guarantee is incorporated in the notification to the first creditor under the pledge of the second charge thereunder. The provisions stated under (b) above relating to pledges where the object pledged is in the possession of the third party are of corresponding application.

- e) Realisation of the pledge. In the event of foreclosure or of the debtor's bankruptcy the creditor under the pledge has a preferential right to payment in respect of the object pledged over other creditors. In the event of bankruptcy, the creditor may, by virtue of his rights under pledge and independently of the realisation and general distribution of the bankrupt's estate, claim settlement of his claim under the object pledged (9).

The creditor under pledge has a choice between various methods of realisation.

- aa) He may appropriate title to the pledge consequent upon a valuation carried out by two persons (appointed by the debtor and by the creditor respectively) after having paid any excess value to the owner of the pledge (10).
- bb) The creditor under pledge may proceed to sell the pledge by public auction. In this case he must pass the proceeds from the sale to the debtor after subtracting his due (11).
- cc) The creditor under pledge and the debtor may agree on other methods of settlement. Recourse may be made to the Commissoria Lex, under which the pledge becomes the property of the creditor thereunder if the claim it secures is not settled by the appointed time, but this may nevertheless be made subject to investigation by the court with regard to equity.

2. HYPOTHECATION OF MOVABLES (CHATTELS MORTGAGE)

Contrary to the position under German and Norwegian Law, Danish law enables certain kinds of movable property to be hypothecated. Securities or claims, on the other hand, cannot be bound by hypothec.

- a) In the past, the holder of a hypothec on movables enjoyed only limited protection in the event of bankruptcy, vis-a-vis the bankrupt's creditors. Acts numbers 176 of 29 April 1960 and 177 of even date have improved the creditor's situation in many respects and the chances of charging movables, and chattels in their entirety in particular, under a hypothec have been widened. Nevertheless, little avail is made of pledges of this kind as a means of securing credit in the form of loans (13).
- b) The pledge is set up by contract as between the creditor thereunder and the grantor. So that the pledge may be secured vis-a-vis creditors or the grantor's fellow contracting parties bona fidei, the movables hypothec must be "tinglyset" (14). As regards "tinglysning", a letter of pledge must be drawn up and signed by the grantor (15). "Tinglysning" is undertaken before the court having jurisdiction over the grantor personally or, should the latter not fall within the jurisdiction of any Danish court, before the court of first instance at Copenhagen (16). As under German law, the jurisdiction of the court is determined in relation to the place of permanent residence of the party concerned (17). If the debtor has several permanent addresses the "tinglysning" must be undertaken as regards each of them (18). The competent court may similarly be that of the former Danish address of the debtor if he has not subsequently created any closer personal links abroad (19). As regards companies and unincorporated bodies the competent court is that of their chief registered office (20). If the debtor is a limited company, the "tinglysning" of the pledge must be undertaken at the place where the company's administrative centre is established (21). As regards partnerships, it suffices if the "tinglysning" is undertaken wherever the partnership is entered on the commercial register (22).

On the other hand, no "tinglysning" is required before the court within whose jurisdiction the partners concerned fall individually (23). Where an unincorporated body has no registered office, the competent court is that of the place where any member of its management committee has his permanent address.

In order that the protection of the debtor's other creditors and his fellow contracting parties bona fidei may continue to be ensured, the "tinglysning" must be renewed within ten years if the pledge constitutes movable property (24). As regards the pledging of industrial plant, see (g) below.

The court presiding over a "tinglysning" will only take general note of the contents of the letter of pledge submitted in this connection. The court will ensure that the signatory to the document, where another person is the owner of the pledge, is entitled to dispose of the latter on the grantor's behalf. The court undertaking "tinglysning", on the other hand, is in no position to confirm whether the grantor is the owner of the objects pledged or if the latter are, e.g., charged under an unexpired clause reserving title. The creditor under hypothec must respect such rights.

A further "tinglysnings" of rights under pledge is unnecessary if the debtor leaves the area over which the court that undertook "tinglysnings" had jurisdiction. This reduces the practical possibility of confirming whether the objects pledged had not already been pledged previously to another creditor which might perhaps represent one of the reasons why this means of security is so little used. No advantage has yet been taken of the opportunity available under statute to create a central register for all hypothecs.

- c) So that "tinglysnings" may be undertaken, a letter of pledge must be drawn up in a specified form.

The Danish Minister of Justice, who has to authorise standard forms, has permitted the use of routine forms, on the one hand, and of special forms on the other hand, for certain kinds of pledge (e.g. pharmaceuticals). Where the entirety of chattels are pledged (see (g) below), no specific forms are required.

So that the letter of pledge may be "tinglyset", it must indicate the nature of the object pledged, the name and address of the creditor under the pledge and of the debtor, and the sum of the debt, the rate of interest, and the period within which it must be paid off.

There is no need for preferential rights of pledge that may exist on one and the same object to be indicated. As regards hypothecs for the maximum sum (registration relates to the maximum sum secured without the sum pledged being stated), such maximum sum must be shown.

The letter of pledge must be countersigned by witnesses certifying the name (profession) and address of the debtor. The requirement is that such certification must be by either two witnesses or one Danish lawyer.

- d) Effectiveness inter partes.

As long as objects remain pledged the debtor is bound to maintain them so as to avoid any loss in their value. The creditor under the pledge is entitled to inspect them as to their condition.

The grantor, as has already been stated, may set up a secondary hypothec (25) on the same object, if the creditor under the second pledge agrees to recognise the rights of the first creditor under the pledge.

The debtor is not permitted to sell the pledge of his own accord or to re-pledge in the form of a pledge on movables (26). The creditor under pledge may demand that the object remain in the debtor's possession.

- e) Effectiveness vis-a-vis third parties.

Once "tinglysnings" is carried out (see (b) below), the creditor under the pledge is similarly protected vis-a-vis third parties against sale or re-pledging by the debtor and against distraint by other creditors (27).

Other creditors may, however, while respecting the rights of the creditor under the pledge, distrain the object pledged by compulsory individual foreclosure (and thereby remove it from the debtor's possession). The creditor under the pledge may, moreover, without intervention by the grantor, demand that a pledge that has entered into third parties' possession be returned to the debtor.

f) Realisation of the security.

If the debtor fails to comply, the creditor will require enforceable title. He must obtain a court order enabling him to enforce his title so as to include the objects pledged in the compulsory foreclosure and so as to release the pledge for compulsory sale by auction. The proceeds of the sale by auction will be paid to the debtor after the sum due as secured by the movables hypothec has been deducted (28).

If the debtor becomes bankrupt the object pledged merges into the estate and is realised by the liquidators. Certain special claims take precedence over the rights of the creditor under a pledge. This applies in the case of funeral expenses payable by the survivors, and to the costs of winding up the estate insofar as the object pledged is affected (29). With regard to the remainder, the creditor under hypothecated pledge is accorded a privileged claim and is reimbursed before any other creditors.

g) Special types of hypothec.

Any present or future title of the debtor may not give rise to rights under pledge (30). Nor may the entirety of rights or of objects be pledged, i.e. "groups of objects of the same kind or of the same destination bearing a general description" (e.g. stocks of goods) (31).

Nevertheless, certain statutory provisions allow the entirety of chattels to be pledged. In this way, a right of pledge has arisen similar in certain respects to the "floating lien" under English common law.

Where an undertaking is pursued on leasehold commercial premises the owner may pledge the equipment forming part of the undertaking, including machinery and technical plant of all kinds. Where an agricultural project is granted on lease, the farmer may, moreover, pledge the livestock forming part of the project, his fertilizer, his crops, and other products. The pledge does not prevent these things from being abstracted from the project within the course of normal management (32).

They are other statutory opportunities for the entirety of objects, to be hypothecated. Pursuant to a. 65 of Act no. 209 of 11.6.1954, a pharmacist may charge his equipment and stock, including fire insurance premiums, under hypothec in order to secure loans granted in respect of what it has been agreed may be called the substance of the pharmacist's business. This also applies where the pharmacist is the owner-occupier of the premises.

In accordance with Act no. 50 of 14.2.1951, owners and farmers under agricultural projects may - with the consent of the local council - hypothecate their crops in order to secure payment for seed, artificial fertilizers and seed-potatoes. The security comprises only the crop following the grant of the loan. These "securities for the pledging of crops" are "tinglyset" in

accordance with the provisions relating to the "tinglysning" of rights under the pledge of real estate. Within the brief period to which the rights under pledge relate - the compulsory foreclosure procedure must have been introduced by 1st January following the harvest - this has preference over all the rights under pledge previously charged on the agricultural project.

According to the provisions of Act no. 242 of 8.6.1966, owners and users of agricultural projects who are not debtors under "tinglyset" "securities for the pledging of crops" may during the period between 1st August and 15th October pledge the crop in order to secure a loan intended to maintain and improve the project. In this case, too, the owner pledges the crop in accordance with the provisions relating to hypothecs on movable property; however, the registration is made in the "ting register" on the page relating to the project concerned. No precise description is required of the pledged crop.

3. TRANSFER OF TITLE TO GOODS HELD IN TRUST

A form of credit against security that once strongly exercised both theory (1) and practice (2) was what came to be called "loans on movables". The lender purchased the articles - in the specific case of movables - from the borrower but nevertheless left them with the "vendor" who, in return, paid a "rent". The vendor "repurchased" the movables once he had paid the "purchaser" a "rent" equal to the amount of the loan plus interest.

The contracting parties in this way ought to adapt the provisions of the law relating to pledges under lien, particularly those regarding publicity which was assured by "tinglysning", by transferring the right of ownership to the purchaser by virtue of the provisions relating to transfer of ownership without it being necessary for actual delivery of the article.

In both theory (3) and practice (4) it has, however, been long considered that contracts of this kind have no effect on the "vendor's" creditors insofar as they do not constitute "normal" transactions recognised at law. When it comes to deciding whether a transaction may be considered as "normal", the courts in principle endeavour to determine whether the purchaser has need of the article, whether this must rest within the vendor's keeping, and whether the contract has been concluded shortly before the vendor became bankrupt.

If the chief intention behind the transfer of ownership was to secure the rendering of some other service for the purchaser (repayment of the loan), the contract cannot be upheld against the vendor's creditors as the conditions underlying the act of pledging have not been fulfilled (6).

In certain specific cases, however, the conditions underlying pledges have been waived, namely where the transfer of the article has been carried through because the "purchaser" wished to give assistance to the vendor where the latter was a relative or a person close to him. This is the case, for example, where movables have been purchased by a friend of the vendor as he wished to protect the latter against the claims of his creditors (7). In this event, the validity of the contract often depends decisively on whether any business relationship existed between the purchaser and the vendor.

II. CREDIT ON GOODS

1. SIMPLE PURCHASE

a) General Points regarding Transfer of Ownership

As was stated in the first part of the study (1), transfer of ownership is not, under Scandinavian legislation, considered as a single legal act. Transfer proceeds by stages and during each stage, within the scope of the various relationships, legal consequences take effect which, considered as a whole, constitute transfer of ownership in relation to third parties. The problems raised by the transfer of ownership inter partes are not considered as a matter falling under the law of property but, rather, under the law of contract.

Danish law relating to the transfer of ownership in the case of the purchase of movable property creates a distinction between the following situations:

- the position of the purchaser vis-a-vis other purchasers of the same object;
- the position of the purchaser vis-a-vis the vendor's creditors instituting legal proceedings in connection with the security or compulsory execution in respect of the article;
- the relationship between the vendor and the purchaser's creditors, and, finally
- the relationships between the vendor and persons to whom the purchaser has passed the article even though the vendor has the right to it.

In each of these situations the various interested parties lose and acquire rights at various stages during the process of transfer. Rights may therefore be conveyed in one situation where this is not yet the case in another.

We shall restrict ourselves below to examining matters relating to the purchase of goods. As a general rule, other types of contract (e.g. gifts, exchange) will be disregarded.

b) The position in relation to third parties

1. Conflict between the purchaser and the vendor's creditors

In considering at what moment in time the purchaser is protected against the vendor's creditors a distinction must be drawn between individually defined services (a), services not defined by their nature (standard types of debt) (b) and goods which at the time the contract is concluded are not yet ready to be delivered (c).

a) Individually defined services

In the purchase of certain immovable property a simple contract suffices to protect the purchaser under Danish and Norwegian law, even if the purchase price has not yet been paid (2). In this case,

the interests of the purchaser and those of the vendor's creditors by and large overlap. The purchaser wishes to acquire the object. If the vendor is bankrupt the creditors in bankruptcy will wish to realise the assets and insofar as this may be effected by executing a contract already concluded they will normally wish to see the sale completed. However, in the event of bankruptcy, compulsory measures within the scope of which the assets are normally sold does not constitute an advantageous form of sale.

Similarly, under Danish and Norwegian law, it is generally held that the purchaser who has paid the purchase price in advance is protected against the vendor's creditors from the moment the contract is concluded (3). This interpretation has the support of several decisions by courts of major instance and by a judgement of the Supreme Court (UfR 1950 A, page 287). Under these judgements, two persons who acquired the annual gross output of a particular peat bog, against part payment in advance, were legally protected from the moment the contract was concluded from the claims of a creditor of the vendor who after the sale had been concluded attempted to impose a distraint order on the peat. The judgement applied to a specified sum total of objects; there are grounds for supposing that it would similarly apply to particular objects (species).

b) Services defined only by their nature (objects by nature)

In the case of objects by nature, it is indispensable that the objects should have been individually specified other than under the provisions of the contract, if the purchaser is to be protected against the vendor's services.

In Danish legal doctrine some writers have attached particular importance to whether the acquisition of individual identity is sufficiently final for the vendor to be unable to dispose of it without himself acquiring some liability (4). The requirements that they make for the acquisition of individualised liability to be considered as final are not stringent. Final acquisition of individual identity may therefore also be effected tacitly. Other writers attach importance to the question whether acquisition of the individual identity constitutes a normal act within the scope of the vendor's activities or whether his sole intention was to show favour to the purchaser to the detriment of his (other) creditors (5). There is general agreement in legal thinking that transfer - "traditio" - is unnecessary for the protection of the purchaser but that this question may become important when it comes to proving whether the sale was a normal one.

There is no more recent decision that clearly and unequivocally lays down the way in which individual identity is acquired. The difference between the two concepts referred to is not very great but, nevertheless, some uncertainty persists in Danish law.

c) Transfer of future articles

When the articles sold cannot be delivered at the time the contract

is concluded the purchaser cannot compel the vendor's creditors, e.g. his creditors in bankruptcy, to manufacture the goods. The purchaser may, however, remove the article at the stage it has reached at the time of compulsory enforcement or of bankruptcy.

If the article cannot be removed, e.g. in the case of a crop that has not yet ripened, the purchaser has no right to take delivery of the harvest. This is why it reverts to the vendor's creditors. In the absence of special circumstances, such as those above, however, the prevailing opinion in Danish law (6) is that the purchaser is protected as from the time the contract is concluded, provided that the necessary acquisition of individual identity has been made. The purchaser must then complete the transaction himself.

2. The purchaser in conflict with other purchasers of the same article

If the vendor has intentionally or by mistake passed on an article that he had already sold to another person, the rule that normally prevails is that of prior tempore potior jure. The first purchaser, i.e. the one who was first in concluding a contract with the vendor relating to an individually specified object or who is the first to have benefitted from the acquisition of individual identity of a part of a normal debt, has privileged right to the article. This is the case when the article has been transferred to none of the parties; this is also the case when the article has been passed to the first purchaser and has subsequently been delivered to the subsequent purchaser and where the latter, at the time of delivery, knew or should have known that it had been sold to another person. When the article has been passed on to a second purchaser in good faith, certain writers consider that it should nevertheless be returned to the first purchaser. Other writers, on the other hand, assert that the second purchaser has a right to the article (7).

When the article has not been passed to the first purchaser, this rule does not apply if there is any doubt as to whether the contract concluded between himself and the vendor was mandatory upon the two parties or as to whether it should have been executed. This rule does not apply, either, where the agreement does not constitute a normal purchase but a transfer by way of security (8).

The following case raises a special problem: a merchant had assigned his claim on a debt to a bank constituting the purchase price and, in conjunction with it, his reservation of ownership. The first purchaser had to return the article that had been passed to him to the merchant, consequent upon which the merchant (vendor) sold it to a second purchaser who did not know of the bank's reservation of title.

The Danish Supreme Court which, in the ordinary way, customarily grants the holder of a reserve of title greater protection vis-a-vis third parties than do courts in other countries (see (2) below) in this case granted ownership in the articles sold to the second purchaser in good faith. Emphasis was laid on the fact that the bank had not exercised any effective control on the process of the legal relationships between the vendor and the first purchaser (9).

3. Conflict between the vendor and the purchaser's creditors

The relationship between an unpaid vendor and the purchaser's creditors is strictly tied to the contractual relationship between the vendor and the purchaser who is in arrears of payment of the purchase price. The question arises here whether the vendor can cancel the contract, or, without cancelling it, may claim restitution of the article before and after it has passed into the purchaser's possession.

a) Has the vendor any retention rights on the article sold before this is passed over ?

Within the framework of the relationship between the parties an unpaid vendor has retention rights under a. 14 of the Scandinavian Act on commercial transactions of 1905-1907. The vendor is not bound to deliver the articles sold unless the purchase price is paid simultaneously. This obligation on the purchaser in a cash-on-the-nail transaction does not apply, however, where the vendor has granted the purchaser deferred payment terms.

Pursuant to a. 39 of the Act on commercial transactions, the purchaser's insolvency nonetheless gives the vendor the right to retain the article, even if credit has been given to the purchaser (10). If the article has been dispatched, the vendor can, moreover, prevent delivery to the purchaser or its inclusion in the bankrupt's estate. This retention right and the right to prevent delivery of the article, which corresponds to "stoppage in transitu" under English law, devolves upon the vendor in the following cases :

- When after a contract of sale has been concluded, the purchaser becomes bankrupt or if a court imposes composition proceedings on him in lieu of bankruptcy,
- When in the event of distraint he does not have sufficient funds to settle his debts and
- When the purchaser's circumstances are such that it may be taken that he will be unable to pay the purchase price when it becomes due.

The same applies in the case of a trader who ceases to make payments.

This right of retention or the right to prevent delivery does not, however, give the vendor any right to cancel the contract. The vendor may cancel it only when the purchase price is due or the delivery period has overrun. The purchaser may, however, oppose retention of the object by giving security; he may, nevertheless, cancel the purchase if payment is not immediately due or in the event of security being lodged. Like English law, Danish law makes no provision for "Mahnung" ("formal notice") and for the "Nachfrist" ("extension") that exist in German law, nor for "sommatation" ("writ of summons") and "délai de grace" ("days of grace") as exist under French law. In the case of a commercial sale, any delay in paying the price entitles the vendor to cancel the transaction forthwith.

a. 39 of the Act on Commercial Transactions applies immediately only to the relationship between the purchaser and the vendor, but it also applies to any conflict arising between the vendor and the purchaser's creditors. In the event of individual enforced execution, and in the case of bankruptcy, the vendor has the same rights of retention and to prevent delivery of the object against creditors as he has against the purchaser himself. a. 16 of the Danish Bankruptcy Code applies to contractual relationships other than those of purchase and, on broad lines, makes the same provisions as those of the Act on Commercial Transactions. A declaration by the bankrupt's administrators stating that it impinges on the contract is sufficient in this case to prevent cancellation by the vendor. There is no need to put up security (11).

b) Transfer of the article

Under Danish law - as is the case under many other legal systems (German, English and U.S.) - the vendor may not cancel the contract for failure to pay the purchase price once the purchaser has taken possession of the goods. Similarly, the goods cannot be repossessed: c.f. a. 28 (2) of the Act on purchases. The "action en revendication" ("proceedings for repossession") is unknown in Denmark.

Transfer occurs when the goods enter into the physical possession of the purchaser or his employees or if they are stored in such a way as by all accounts and purposes to form part of the purchaser's business (12).

When transfer to the purchaser has taken place and the vendor cannot cancel the transaction or retain the goods, he can no more demand restitution of the object from the purchaser's creditors. An object that has entered into the purchaser's possession may be the subject of particular enforced execution or fall within a bankrupt purchaser's estate.

c) Repossession after transfer of the article

Certain exceptions exist, however, to the rule by which the vendor may repossess the goods after they have passed to the purchaser when the purchase price has not been paid. This is the case where the sale has been made on a cash basis, where it has been made subject to a clause reserving title, and when transfer has taken place after the purchaser has become bankrupt.

Payment in cash

a. 16 (2) of the Bankruptcy Code provides that restitution must take place "when the vendor, in the event of failure of consideration, has made a valid reservation as regards restitution, or when there are grounds for assuming that the vendor does not wish to transfer his title before having received consideration, e.g. in the case of a cash sale without the vendor having expressly or implicitly granted credit to the purchaser". a. 28 (2) of the Act on Commercial Transactions makes the same provision, which is interpreted in the same way.

Cash payment implies that consideration by the two parties must be given simultaneously. It is nevertheless accepted that transfer of the object by the vendor does not necessarily always mean that it is his intention to allow credit to the purchaser and that consequently he loses his rights to repossess the object (13). Transfer on approval or for purposes other than sale is accepted and the vendor is similarly given the right to repossess an object that he has passed over by mistake. In the latter case, the vendor must, however, repossess the article within the shortest possible time and if he does not do so it is accepted that he has allowed credit to the purchaser. Under Norwegian law, any transfer of the object with a view to selling it undertaken without simultaneous payment must be considered as a credit purchase, resulting in loss of repossession rights.

Reservation of title, c.f. item 4 below. (14)

Services rendered to the estate in bankruptcy

When a service is rendered to the estate in bankruptcy of the beneficiary, the renderer may, by virtue of a. 4 of the Bankruptcy Code, require that what has been rendered be excluded from the estate unless the receiver declares directly that appropriate consideration will be payable. This provision applies in principle to all contracts relating to things. Nonetheless, as regards sales, a. 41 of the Act on Commercial Transactions restricts the scope of a. 4 of the Bankruptcy Code; under the terms of this article it is insufficient for the receiver to state his intention to deal separately with the sale and he must also put up security. The vendor may insist on immediate security.

This rule does not apply when the vendor has rendered a service to the estate or has made a transfer to the bankrupt knowing that bankruptcy has been opened or that application has been made for the institution of proceedings. In this case, all he has is a claim to the purchase price as a non-preferential creditor.

4. SALE BY A PERSON OTHER THAN THE OWNER

Under both Danish and Norwegian law, the vendor's protection against resale by a purchaser who does not own the goods is similarly regarded as a question of transfer of title. The purchaser may lack authority to resell the object owing to the invalidity of his contract with the vendor, or because the object was encumbered with a clause reserving title or with some other corporeal right.

When the contract is invalid as to its substance, the vendor is in many cases entitled under Danish law to free return of the object, even if the second purchaser has acquired the object from the first purchaser in good faith. The case is such, for example, when the purchaser has acquired the object by threat, misrepresentation or illicit money-lending. Legal opinion has criticised this approach and is disposed towards acquisition of title by a purchaser in good faith (16). This attitude has not, however, so far met with real success in precedent (17). Indeed, if the nullity of the initial

contract results solely from the fact that the vendor has made a mistake or has proceeded on the basis of incorrect conditions precedent, the vendor cannot require restitution of the object from a purchaser in good faith. In such circumstances title has been transferred.

5. PURCHASE FROM UNAUTHORISED AGENTS

The same applies when the purchaser has acquired the object from an agent or custodian. According to a. 54 and a. 55 of the Scandinavian Agency Act, a purchaser in good faith in such cases acquires title to the object if at the time the contract is concluded the agent or custodian had the object in his possession. There is no requirement under the Act, in fact, as is the case in other instances where title is transferred in good faith, for the article purchased to have been passed on to the purchaser. The acquisition of title by the purchaser occurs as soon as the contract is concluded.

6. COMMON ASPECTS OF ACQUISITION OF TITLE FROM PURCHASE FROM PERSONS OTHER THAN THE OWNER

As has been stated above, the prevailing rule in Denmark and in Norway is that of vindicatio. In theory, this applies equally to the sale of articles that have been stolen, pilfered or obtained by false pretences and to the sale of articles encumbered by a clause reserving title (c.f. 2 below).

There are, however, exceptions to this rule to which the following two considerations apply (18).

A purchaser in good faith may acquire title when the previous owner has failed to prove proper prudence. He may, for example, have passed the object onto a person while well aware that the latter would be likely to sell it without being entitled to do so.

Failure to act on the part of the former owner may similarly give rise to acquisition of title by a purchaser in good faith. The owner may, for example, have failed to act despite being aware that the article had been sold, that the conduct of the first purchaser had been unlawful when the object was sold, or that unlawful resale had taken place.

7. REVIEW OF THE RULE RELATING TO CORPOREAL RIGHTS AFFECTING THE PURCHASE OF MOVABLE PROPERTY

Discussions were begun in 1960 in the Scandinavian countries regarding the problem of acquisition of title upon the purchase of movable property. A report was prepared in respect of each Scandinavian country. As regards Denmark, this was filed in 1964 (19). Subsequently, in 1967, the Nordic Council recommended the governments to enact a uniform Scandinavian law on the basis of existing Scandinavian studies and of a Norwegian government draft relating to acquisition of movable property in good faith, an act which - except

as regards theft and pilfering - is founded on the general principle of the acquisition of movables in good faith.

In Denmark, no bill has yet been put to Parliament. The essential effect of the bill would be to extinguish the rights of the initial owner, except in cases where loss of the object may be attributed to theft or pilfering. Evidence of the purchaser's good faith is nevertheless made subject to strict conditions.

c. The relationship inter partes

The relationship between the contracting parties is considered in Denmark to be a matter of the law of contract.

The purchaser of an object whether it be particularly identified or of standard type may require performance in kind, unless delivery of the object has become impossible. As has already been stated, the vendor is obliged to deliver the object only against payment, unless he has allowed credit to the purchaser. If the vendor has to dispatch the object, he is bound to undertake such dispatch without simultaneous payment, even if payment is to be made on a cash basis. He may, however, seek refuge in warranties and stipulate that the object will not be delivered to the purchaser at destination until the latter has paid the price. In the event of the purchaser's insolvency or bankruptcy, the vendor, further, as has already been stated, is entitled to retain possession of the object and to prevent its delivery to the purchaser. If the object has entered into the purchaser's possession, the vendor cannot normally repossess it (c.f. b (3) above).

d. Repossession rights

c.f. (3) and see above.

e. Vendor's preference

Danish law allows the vendor no preferential claim to the product of the article sold, whether under individual enforced execution proceedings or under bankruptcy.

2. SALES WITH CLAUSES RESERVING TITLE

a) General

We have stated above, under 1 (b) 3. c, that the vendor is generally able to reserve title to movable property. The necessary grounds for valid reservation of title are not generally governed by law; they tend to derive from principles developed in theory and practice (1). These rules apply equally to general reservation of title and to reservation of title accorded under the Act on Sale by Hire Purchase.

The general conditions under which reservation of title may be validly made are as follows: (2)

The reservation of title must be clear and evident. It must arise from the terms of the contract (3). There is in Denmark no commercial practice by virtue of which reservation of title can be agreed without an agreement in terms (4). Agreement may, however, have been made orally (5).

The reservation of title must apply to specific objects mentioned in the contract. No reservation of title may be made as to things that cannot be differentiated from other things in the purchaser's possession, such as e.g. cereals sold to a trader (6). No reservation of title may be made on goods intended for resale in the absence of consignment contract. In order that a reservation of title may be set up against the consignee's creditors, legal precedent requires that the latter have the right to return unsold goods, that he settle his accounts with the consignor after each resale transaction or at least on a regular basis, that the product of the article sold should be kept separate from the consignee's own belongings, and that the consignor exercise some control over the deposited goods and the accounts. These four requirements made by legal precedent need not always be cumulative. It might suffice if three of them apply.

The contract relating to reservation of title must at the latest be concluded simultaneously with the passing-over of the object to the purchaser. The vendor cannot reserve his right to title on goods already in the purchaser's possession; however, where this is the case, transfer against future guarantee in favour of the vendor is not permissible. It is not therefore possible to stipulate that reservation of title to goods delivered subsequently should similarly apply to goods delivered previously (7).

Reservation of title may be set up against third parties only with regard to the vendor's claims arising out of the contract of sale (8).

Older, unsecured claims or subsequent entitlement to damages in respect of the object are not included amongst claims secured by the reservation of title. On the other hand, security will apply to all services linked to the performance of the contract of sale, e.g. to any risk supplement, to interest, etc.

When these general conditions have been fulfilled, reservation of title does not apply solely inter partes, but also with regard to the purchaser's

creditors and further purchasers in good faith. The vendor may demand restitution of the object from the purchaser making improper use of it for the benefit of third parties or if the object is pledged or incorporated in the estate on the purchaser's bankruptcy; cf. 1 (b) 6 above.

b) The Act on Sale by Hire Purchase

The Danish law of 11 June 1974 on sale by hire purchase contains special provision regarding the sale of movables in this way. The Act applies to contracts of sale that provide for instalment payments one or more of which become due after the articles sold have been passed on to the purchaser, contracts in the case of which vendor has reserved the right to demand restitution of the object if the purchaser does not fulfil his obligations, or where the vendor has reserved the right of title to the object until payment has been made in full or to a specified extent.

The vendor may reserve the right either to demand restitution of the object or right of title to the object if, not later than when the latter is passed on to the purchaser, he has not received a down payment of at least 20 % of the agreed aggregate price. In any event, such a down payment must be at least 50 crowns (9). Insofar as these conditions have not been fulfilled, reservation of title cannot be opposed either by the purchaser or by the purchaser's creditors or persons to whom the purchaser has improperly sold the object.

The Act on Sale by Hire Purchase lays down no monetary limit as to its scope. It applies equally to sales governed by the Civil Code and to sales governed by the Commercial Code. For example, the sale of ten lorries to a transport undertaking falls within the scope of the Act even though the sale is a commercial one of substantial value and falls beyond the object of the Act (protection of consumers and limitation of the period for performance). This legislation further obliges many businessmen, and particularly motor vehicle dealers selling to transport undertakings and car hire companies, to resort to other forms of security such as, e.g., hypothecation (cf. I 2 above) and leasing (cf. 3 below).

Moreover, the Act contains detailed provisions on the procedural stages in the event of repossession of the object for failure to pay.

The Act provides that contracts stated to be hire contracts or in the case of which payment is considered as consideration for utilisation of the object are nevertheless to be considered as analogous to hire purchase transactions when it may be assumed that the possessor of the object will also become its owner (10).

3. LEASING

In Denmark and in Norway leasing is not governed by law. In both theory and practice it is generally held to be a bailment although strictly speaking it amounts to credit on goods. However, as has already been stated, the Act on sale by hire purchase also covers bailments that allow the bailee a purchase option and, moreover, as certain leasing contracts offer the "lessee" the right to purchase and also contain other features that are not essentially those of a bailment, the question whether and on what conditions a leasing contract should be considered as a sale by hire purchase is controversial as to theory and has not yet been cleared up by legal precedent. In a judgement on 9 November 1971, the Maritime and Commercial Court of Copenhagen recognised that the "lessor" had a right of title to five excavators that had been passed to a construction undertaking held to be the "lessee", on the grounds that the contract had provided no purchase right in favour of the "lessee" (1). Both this judgement and other decisions have put leasing companies on their guard against concluding standard leasing contracts the tenor of which differs too greatly from that of the customary bailment, and which could therefore be considered by the courts as hire purchase contracts.

Several writers nevertheless have cast doubts on the need for such subtleties (2). The tenor of the contract apart, leasing, by means of which the acquisition of motor vehicles and other plant is financed by finance companies in the capacity of "purchasers" or by plant manufacturers as vendors, should not fall within the scope of the Act on sale by hire purchase as the object of this is to protect the consumer; its provisions are inadequate to deal with commercial contracts such as those of leasing.

Bibliography - abbreviations

Abbreviations have been underlined.

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Notes

- (1) No further account shall be taken of pledges based in extinctive acquisition in good faith, nor of statutory rights of pledge. These forms of rights under pledge are rarely met with.
- (2) See 5-7-1 and 5 "Danske Lov". Vinding Kruse, Br III p. 1630, von Eyben II, p. 389 et seq. and UFR 1951/1011, UFR 1957 A p. 264 HD.
- (3) See UFR 1916 A p. 283 (The shop in which the object pledged was contained had in fact to be locked by means of two different keys. The one was held by the creditor under the pledge, the other by the debtor).
- (4) See a. 1206 of the German Civil Code and Gravenhorst p. 86, but, contra to French law, Gravenhorst p. 15.
- (5) UFR 1957 A, p. 264 HD and UFR 1961 A p. 1011 HD. For greater detail see von Eyben II, p. 392, Illum, UFR 1959 B p. 1 et seq., Trolle TFR 1958 B 321 et seq., Vinding Kruse, TFR 1959/9 et seq. Kastel, Bankjura, 3rd edition, Copenhagen, 1959 p. 204 et seq.
- (6) See Vinding Kruse, ER III, p. 1629, von Eyben II, p. 62 et seq., and p. 387.
- (7) See von Eyben II, p. 87 et seq., Vinding Kruse, ER III, p. 1408.
- (8) See von Eyben II, p. 497.
- (9) See aa. 6 and 37 of the Danish Bankruptcy Code of 25 March 1872 (KO), Gomard, Skifteret, 2nd edition, Copenhagen 1969, p. 191 et seq.
- (10) 5-7-2 and 3 Danske Lov.
- (11) a. 155 of the Danish Bankruptcy Code.
- (12) This legislation has modified the law concerning "tinglysning" and the Bankruptcy Code.
- (13) See von Eyben, tribute to Jacob Arnholm page 365 et seq.
- (14) Article 47 (1) of the tinglysning Act.
- (15) Article 3 (1) of the tinglysning Act.
- (16) Article 47 (2) of the tinglysning Act.
- (17) Article 235 of the Procedural Code of 11 April 1916.
- (18) UFR 1952/174.
- (19) Article 236 of the Procedural Code and Hurwitz and Gomard, Twistemal, 4th edition, Copenhagen 1965, pages 46 et seq. and Trolle, UFR 1966/B, page 251 et seq. UFR 1966 page 245.
- (20) Article 238 of Procedural Code.
- (21) Article of the Act of 15 April 1930 concerning companies limited by shares.
- (22) UFR 1954/1 UD.
- (23) von Eyben, 11, page 408.
- (24) Article 47 (3) of the tinglysning Act.
- (25) Vinding Kruse, ER III, page 1644, von Eyben II, page 412.
- (26) Vinding Kruse, loc. cit. and von Eyben II, page 413.
- (27) Article 47 (1) of the tinglysning Act.
- (28) See von Eyben II page 414, Vinding Kruse, ER III, page 1646.
- (29) Articles 37 and 38 of the Bankruptcy Code, Gomard, Skifteret, 2nd edition, Copenhagen 1969, page 184 et seq.
- (30) Article 151 of the Bankruptcy Code, von Eyben II, pages 65 et seq.
- (31) Article 152 (2) of the Bankruptcy Code, von Eyben II, page 69 et seq.
- (32) Article 152, (2), of the Bankruptcy Code, von Eyben II, page 69 et seq.
- (33) UFR 1890/592 H, UFR 1888/479 H, UFR 1893/1171 H.
- (34) Jul Lassen, UFR 1890/B page 609 et seq. Ernst Møller, TFR 1896 page 147 et seq.
- (35) von Eyben I, page 222 et seq., Illum, page 127 et seq.
- (36) UFR 1888/479 H, UFR 1893/117 H, UFR 1911/735 H, UFR 1912/923 H, UFR 1909/910 H.
- (37) There is little concordance on this point between either Danish or Norwegian law and German law on this point, c.f. Gravenhorst page 89 et seq. on "transfer and security".
- (38) c.f. UFR 1912/923 H and von Eyben I page 222 et seq.
- (39) c.f. UFR 1942/168.
- (40) See I, B, 1.

- (41) See von Eyben I, p. 189 et seq., Ross, p. 114 et seq., Illum, p. 117, as regards Norwegian law, see Braekhus-Haerem, p. 508 et seq.
- (42) See von Eyben I, p. 191 et seq., Illum, p. 115 et seq., Braekhus-Haerem, p. 508 et seq.
- (43) O.K. Magnussen, Ufr. 1925 B, p. 277 et seq., (pp. 286-90), K. Sind-balle UFR 1949 p. 305 et seq. (p. 314).
- (44) Vinding Kruse, ER II, p. 1200, von Eyben I, p. 207 et seq.
- (45) von Eyben I, page 203 et seq., Illum, p. 119 et seq.
- (46) Torben Jensen, page 252 et seq.
- (47) von Eyben I, p. 21 et seq., c.f. Illum, p. 223 et seq.
- (48) See Supreme Court judgement in UFR 1964, p. 38, Th. Gjerulff, UFR 1964 B, p.158 et seq. and von Eyben I, p. 272 et seq.
- (49) On this point, see H. Ussing, Køb p. 100 et seq.
- (50) See H. Ussing, Alm del, p. 170 et seq.
- (51) Judgement of the Supreme Court in UFR 1957 p. 324, cf. Lorenzen, TFR 1958, p. 323, Rabel, The Law of Sales II, p. 40.
- (52) H. Ussing, Alm del, pp. 96 and 170 Køb p. 91, von Eyben I, p. 243 et seq.
- (53) See also Torben Jensen, pp. 75-130, von Eyben I, p. 244 et seq.
- (54) The court decided by analogy with 6-17-5 D.L., see Vinding Kruse, ER II p. 1243 et seq., Ross, p. 136 et seq., von Eyben, p. 266.
- (55) O.K. Magnussen, UFR 1925 B, p. 277 et seq. (pp. 297 and 298), von Eyben I, p. 265 et seq.
- (56) See Torben Jensen, p. 249 et seq.
- (57) von Eyben I, p. 275
- (58) Scandinavian report no. 370/1964 and M. Kockverdgaard, Juristes 1965, p. 288 et seq.
- (59) Torben Jensen, p. 79, von Eyben I, p. 244 et seq.
- (60) Torben Jensen, p. 85 et seq., von Eyben I, p. 244.
- (61) Illum, p. 148, von Eyben I, p. 245, Torben Jensen, p. 85 et seq.
- (62) Illum, p. 148, von Eyben p. 244.
- (63) UFR 1928 A p. 1075 Y, Illum p. 149.
- (64) Torben Jensen, p. 90 et seq., von Eyben I, p. 246.
- (65) Torben Jensen p. 90 et seq., von Eyben I, p. 246, Illum p. 149 et seq. Vinding Kruse ER, p. 1527
- (66) Torben Jensen p. 94 et seq., Illum p. 152 et seq., von Eyben I p. 247, as regards German law, cf. Gravenhorst, p. 101.
- (67) Article 1 (4) of the Act on Sale by Hire Purchase.
- (68) Article 1 (2) of the Act on Sale by Hire Purchase.
- (69) Judgement of 9 November 1971 by the Maritime and Commercial Court at Copenhagen (case Bo no. 30/1971).
- (70) Suenson, Juristen 1972, p. 90, Fisher-Moller, UFR 1972, p. 69, Lando, Advokatbladet 1972 no. 9 - 10.

PART III

INTELLECTUAL PROPERTY

INTRODUCTION

The Danish legislation on intangibles is, like the legislation on intangibles in Finland, Norway and Sweden, the result of close cooperation between the Northern countries. With the exception of the laws on unfair competition, all the laws mentioned below are uniform in Scandinavia. (1)

I. COPYRIGHT

A. DANISH COPYRIGHT LAW FOR TANGIBLE GOODS

The most important source in the area of copyright law is Act no. 158 of May 31, 1961 on copyrights for literary and artistic works (cpl). The law was most recently amended by Act no. 174 of March 21, 1973 which takes into account the latest changes, in 1967 and 1971, in the Berne Convention and the World Convention which are described below.

The law covers a literary or artistic work, whether this consists of a piece of fiction which is written or spoken, a musical or theatrical work, a film, a picture, a piece of architecture or functional art, or of any other form (cpl § 1). The copyright is valid until 50 years after the year of death of its owner, or, in the case where a work has two or more people responsible for it and it is not possible to separate the individual contribution as independent works, until 50 years after the year of the death of the last of them (cpl § 43, in connection with § 6). The copyright holder can transfer his rights to the work in whole or in part (cpl § 27). Unless otherwise agreed, the transfer does not give the recipient the right to change the work, nor does it usually give the right to transfer the rights further to a third party. (cpl § 28). The copyright cannot be the subject of suits by creditors, either against the original owner or anyone to whom it has passed by virtue of marriage or inheritance (§ 31).

Cpl § 51 forbids the publication of a literary or artistic work under a title, a pseudonym or an insignia likely to cause confusion with a previously published work or its author. § 52 lays down that the name or insignia of an artist may not, unless he consents, be put on a work of art created by somebody else. Nor may the name or insignia of an artist be put on a copy of a work if this could lead to confusion with the original. Under § 53, a literary work must not be changed or made public in conflict with the regulations in § 3, paras. 1 and 2, if cultural interests are thereby infringed, even if the copyright has expired. Under § 3, para. 1, the author has the right to have his name published when normal business practice would dictate this and on copies of the work itself, when it is made available to the public. Under § 3, para. 2, the work must not be changed or made available to the public in a way which is injurious to the literary or artistic reputation or style of the author. The Ministry of Culture has laid down certain guidelines in guide no. 269 of December 27, 1967, for the basic principles which can be expected to underlie the statements made by the Ministry in cases affecting public responsibility for the personal moral rights (droit moral) of deceased authors.

The cpl is published in English in *Le droit d'auteur* 75: 1962 pp 144-149. A French translation of the cpl can be found in: *idem* 74: 1961, pp 295-301. The amendment to the law of 1973 is not included here.

Act no. 157, of May 1961, on the rights to photographic pictures (phl) protects the producer of a photograph. Under phl § 1, he has the right to produce copies of the picture by photography, printing, drawing or any other method, and to show it publicly. The right is valid for 25 years from the end of the year when the picture was first produced (phl § 15).

The phl has also been amended, by a law on March 21, 1973 (Act no. 175).

A French translation of the phl of 1961 is to be found in *Le droit d'auteur* 74: 1961, pp 293-295, and an English translation in *idem* 75: 1962, pp 142-143.

Denmark has ratified the Berne Convention for protection of literary and artistic works, revised in Brussels on June 26, 1948, the World Convention on copyright, of September 6, 1952, the European Agreement of June 22, 1960, on protection of television transmissions, and the International Convention of October 26, 1961, on protection of practising artists, producers of records and radio and television productions. Under Royal Decree no. 365 of September 23, 1965, on the use of the cpl and phl in relation to foreign countries (*forei*), the rules in these international agreements are made law in Denmark. This is done under the cpl, § 60, and the phl, § 20, which permit the extension of the regulations in the two laws in relation to other countries, if this extension is mutual (see below).

Literature in English, French and German on Danish and Norwegian copyright law:

Bogsch, Arpod: The law of copyright under the Universal Convention. 3rd rev. ed. Leyden 1968. 696p. (Denmark pp 286-95).
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Lund, Torben: Articles on copyright in: World copyright. An encyclopedia. Ed. by E.L. Pinner. Vold 1-5. Leyden 1953-60.
se også Dansk Juridisk Bibliografi (Bibliography of Danish Law) ved Jens Søndergaard /DJB/p. 395.

B. DANISH INTERNATIONAL COPYRIGHT LAW

1. The use of the cpl in relation to the outside world. The legal rights of aliens to copyright.

The Danish copyright laws, cpl and phl, are based on the principle that Danish courts and authorities only use the provisions of these laws on the protection of authors³⁾. The law of copyright in other countries is not used. In principle, a work which is not covered by the provisions of the laws is not protected by copyright in Denmark⁴⁾. There are, however, isolated, exceptions as shown below.

The protection of the cpl is, under § 58, extended to the following types of work:

- 1) works by Danish citizens and persons resident in Denmark,
- 2) works initially published in Denmark, possibly simultaneously with publication in another country,
- 3) films, the producer of which has his headquarters in Denmark or is resident in Denmark,
- 4) architectural works built in Denmark and

5) art works forming part of buildings or other constructions in Denmark.

The protection of the pbl covers, under § 20, photographic pictures produced by the persons under category 1 above, photographic pictures initially published in Denmark or published in Denmark within 30 days after initial publication elsewhere, and pictures forming a part of buildings or other constructions in Denmark.

As stated above, the regulations of the law can be extended to apply in relation to other countries, and to be made applicable to works and photographic pictures which are initially published by international organizations, as well as to unpublished works and pictures whose publishing rights are owned by these organizations. This has been done, by Royal Decree no. 365 of September 23, 1965 (forei), which was mentioned above.

Under forei § 1, the regulations in the cpl-with the exception of those in Chapter V (see below) - are extended to include the following works covered by the Berne Convention:

- 1) works by foreign authors who are citizens in countries belonging to the International Union for the Protection of Literary and Artistic Works (the Berne Union) - in the case of published works assuming that the works were either initially published in a foreign country belonging to the Union, or published in a country belonging to the Union simultaneously with or within 30 days of their initial publication in a country not belonging to the Union,
- 2) works of foreign authors who are not citizens in countries belonging to the Union, if the works are intially published in a foreign country belonging to the Union or published in a country belonging to the Union simultaneously with or within 30 days of their initial publication in a country not belonging to the Union.
- 3) building works by foreign authors, if the building works are constructed in a foreign country belonging to the Union,
- 4) works of graphic or plastic art by foreign authors, if the work forms a part of a building situated in a foreign country belonging to the Union.

Forei § 6 extends the cpl - with the exception of Chapter V - to include the following works, which are covered by the World Convention:

- 1) works by foreign citizens of countries which have ratified the World Convention of 1952 on copyright,
- 2) works by foreign authors, when the works are first published in a foreign country which has ratified the Convention,
- 3) works by foreign authors resident in a foreign country which has ratified the convention, if this country has brought its own legislation into agreement with the World Convention in this way,
- 4) works by stateless persons and refugees who are permanently resident in countries which have ratified Supplementary Protocol 1 to the World Convention.

§ 9 lays down that:

The regulations in the law on copyrights for literary and artistic works - with the exception of chapter V - apply to works first issued by the United Nations Organization (UNO), by the specialized agencies connected with UNO or by the Organization of American States, as well as to unpublished works which the organizations mentioned have the right to publish.

The cpl gives a greater extent of protection in Chapter V than in § 58 for the production of literary or artistic work by practising artists (see § 45-48), for publishers of catalogues and programmes (see § 49) and for press releases (§ 50).

In addition, the cpl § 58, para. 2 lays down that the regulations on "droit moral" in § 51-53 of the law applicable to all works (cf. the description of these regulations above, under A).

2. The application of foreign legal regulations on copyright;

Danish courts and authorities use foreign copyright regulations, to a limited degree: Forei § 2 deals with foreign works covered by the Berne Convention. It lays down that:

Para 1. When the period of protection of copyright for a work has expired under the current legislation of the country of origin of the work, the work is no longer protected under the regulations of the law on copyright with the exception of 51-53.

Para 2. For published works, the country of origin is deemed to be the country where the work is initially published, or, in the case of simultaneous publication or publication within 30 days in two or more countries belonging to the Union, the country with the shortest period of protection of the copyright. In the case of works published in a country belonging to the Union simultaneously with or not more than 30 days after the initial publication in a country not belonging to the Union, the country belonging to the Union is considered as the sole country of origin.

Para 3. For unpublished works, the country of origin is deemed to be the country of the author. In the case of building works and works of graphic or plastic art which form part of buildings, however, the country of origin is deemed to be the country belonging to the Union in which these works have been constructed or included as part of a building.

3 lays down that:

In the case of these kinds of works of functional art, as well as industrial models and patterns which are only protected as models and patterns in their country of origin, protection is only extended under the Danish legislation on patterns.

Forei 7 and 8 deal with works covered by the World Convention

7 lays down that:

Para 1) When the period of protection for a work under the current legislation of its country of origin has expired, the work is no longer protected under the regulations of the law on copyright, with the exception of 51-53.

Para 2) When a work was published for the first time in the country which has ratified the Convention, this country is regarded as the country of origin of the work. In the case of simultaneous publication or publication within 30 days in two or more countries which have ratified the Convention, however, the country which has the shortest period of protection among these is regarded as the country of origin of the work.

Para 3) When a work is initially published in a country which has not ratified the Convention, the country of origin of the work is deemed to be the country of which the author is a citizen.

Para 4) In the case of unpublished work, the country of origin is deemed to be the country of which the author is a citizen.

8 lays down that:

The regulations in 6-7 do not apply to works whose country of origin is, under the rules in 2, one of the members of the Berne Union or a former member which has withdrawn more recently than January 1, 1951.

Under forei 5 and 10, equivalent rules apply to photographic pictures. Under 11, para. 2 and 12, para. 2, the principle that the period of protection is only that laid down in the country of origin of the work is held to apply to television transmissions covered by The European Agreement of June 22, 1960, and to practising artists, producers of records and radio and television productions covered by the International Convention of October 26, 1961.

II. INDUSTRIAL PROPERTY LAW

Both the law of patents, trade marks and patterns in connection with tangible goods and the regulations governing conflicts of these industrial rights - the international civil law - bear the mark of the fact that Denmark has ratified the Paris Convention of March 20, 1883, with the amendments and additions adopted in Brussels on December 14, 1900, in Washington on June 2, 1911, in The Hague on November 6, 1925, in London on June 2, 1934, in Lisbon on October 31, 1958, and in Stockholm on July 14, 1967.

A. THE LAW ON TANGIBLE GOODS

1. Inventions (patents (5) and know-how)

- a) Patents are governed in Denmark by Act no. 479 of December 20, 1967, the Patent Act (pat). As a result of the pat, the Government issued proclamation no. 481 of December 20, 1967 on applications, etc., in connection with patents (patpro). Under 1, a patent can be registered for an invention which can be used in industry, but not for species of plants or animals or for important biological methods for the production of plants or animals, nor - until such time as the Minister of Trade may determine otherwise - for discoveries of foodstuffs and medical preparations or methods for the treatment of foodstuffs (pat Chapter XI, section 1, para. 2).

Under the pat, 2, patents are only registered on inventions which differ substantially from what was already known before the day the patent application was submitted. The invention must in other words be new, in that anything which has become publicly available through written material, lectures, use or in any other way, is deemed to have become public knowledge. It follows from patpro 28, para. 2, that the investigation of whether this condition is satisfied is to be undertaken on the basis of registered patents and patent applications in Denmark, Sweden, Finland, Norway, Germany, Great Britain, France and the United States, in addition to any available literature in cases where consideration of this is thought necessary. If these investigations arrive at the conclusion that the invention under consideration does not differ in any major way from others described in foreign patents or applications for patents, then the patent will not be registered.

The patpro also lays down that a person seeking a patent in this country for an invention for which he has previously applied for a patent elsewhere must state what the relevant patent institution has told him about its investigation of the entitlement to patenting of the invention. He must deliver verified documentation of this, if the Danish patent authorities so request. In addition, the Danish patent authorities have made agreements with a number of foreign authorities on exchange of results of their investigations into the novelty of patent applications (see patpro 32 on this subject).

In addition to novelty, the invention must represent an advance. The invention must be substantially different from what was previously known and from results which are considered as obvious for an expert in the relevant field (7).

The Danish patent authorities are the Directorate for Patents and Trade Marks (Direktoratet for patent- og varemaerkevaesenet, abbreviated here Dir) and the Patent Appeals Board (Patentankenaevnet), which deals with appeals against the decisions of the Directorate. The Dir also deals with cases on trade marks and patterns and runs the trade marks and pattern registers in addition to the patent register.

An application for a patent must, by 9, be submitted to the Dir and must among other things include an exact description of what is desired to be protected by the patent (the patent request). When the application has been submitted, the Dir undertakes an investigation of the invention, to test among other things whether it satisfies the requirements of novelty and being an advance. If these and a number of formal requirements are satisfied, then the invention is made available to public inspection to give members of the public at large the opportunity to object to the patent. The availability of the invention for inspection is announced publicly. Objections must be made to the patent authorities within 3 months of the announcement (pat 19-21).

When the application has been finally approved, the patent is registered. This must be announced publicly, and letters of patent must be made out (pat 26).

A registered patent can be maintained for up to 17 years from the day the application was submitted (pat 40).

A compulsory licence can be announced for several reasons in Denmark. A compulsory licence can be announced if the patented invention is not used to a reasonable extent during a certain period of time (pat 45), in the case of legal dependency (pat 46), when it is important to the public interest (pat 47) and in certain cases of previous use (pat 48).

Cases on the invalidity of patents, on interventions against patents and on compulsory licences are decided by the courts. Decisions by the patent Directorate to register patents can be brought before the Patent Appeals Board: if the patent is alleged to be invalid, then the case may also be taken to the courts. Cases where the patent is refused by the Directorate must be brought to the Patent Appeals Board not more than 2 months after the decision. The decision of the Patent Appeals Board can be brought before the courts. If the decision of the Patent Appeals Board is that the patent should not be registered, then the case must be brought not more than 2 months after this decision (cf. pat 24-25 and 52-53).

There are no rules in Denmark saying that cases on invalidity of patents must be decided by a special invalidity case in the courts.

Chapter III in the pat (28-38) includes, like the laws in the other Northern countries, rules on Northern patent applications. These lay down that a person who wishes to patent an invention in all 4 Northern countries, or in 3 of them, can apply for this in one of the countries and have a patent made out there applying to all the relevant countries. However, these rules have not yet been put into force, and it is not known whether they ever will be.

- b) Inventions are also regulated by Act no. 18 of January 27, 1960, as amended by Act no. 215 of May 31, 1968 on secret patents (war materials or methods for the production of war materials), which was formulated with a view to cooperation within NATO, and by Act no. 142 of April 29, 1955, with later amendments, on inventions by employees.

- c) The pat has been published in English in a special publication, "The Danish Patent Act 1967", published by the Association of Danish Patent Agents, 1968. The Northern patent law is translated into French in "La propriété industrielle 84": 1968, pp 168-185, and the Danish law on inventions by employees appears in French idem 72 : 1956 pp 196-197.
- d) Know-how is a legal phenomenon known in Denmark, but there has not been any special legislation on it. Know-how is protected to a certain extent by the rules in legal proclamation no. 145 of May 1, 1959 on unfair competition (coml), in particular by 11 in this, forbidding the passing on or use of trade secrets which have come to the knowledge of a person who has been employed with or cooperating with or carrying out duties for a firm, and by 15 (general clauses) which forbid "actions taken in connection with business which, even if they are not covered by the other stipulations of the law, conflict with honest business ethics". The latter rule, the contravention of which (by contrast to 11) cannot lead to punishment, but only to a ban on such practices and duty to give compensation, has given rise to an extensive range of cases, and has among other things been used in some cases of appropriation of the know-how of others, which has been used by the copier in a dishonest way, and which do not come under 11 of the law (see e.g. UFR 1960 - 1042 H.).

2. Designs (9)

Designs are regulated by the Act on Designs, no. 218 of May 27, (des). As a supplement to the law, a proclamation was issued: no. 388 of August 20, 1970, on applications and registration of designs (despro). 1, para 1 of the law defines a design as the outline for the appearance of an article of goods or for an ornament, and thus covers both useful and ornamental designs. There are no rules in the Northern countries protecting utility designs (Gebrauchsmuster; brugmuster) (10).

The des, 1, para. 2, gives the producer of a design or the person to whom his rights have passed the right to obtain sole rights to the design by registering it. Under des 2, a design must be substantially different from those known before the day the application was submitted to allow registration to take place. Anything which has been open to public inspection by delineation, exhibition, tendering or in any other way is deemed to be known. A design not generally available for inspection is also considered as previously known, if the design appears in another Danish application for patent rights or trade mark or design registration, if the latter application was submitted before the day that the design application was submitted.

The approach for applying for design right has a certain resemblance with the approach for applying for a patent; however, the investigation with regard to novelty is less exhaustive (cf. des 9-23 and despro 13ff.). The investigation only has to cover the currently valid design registration in Denmark under the current law (1970) and -again under the current law- registrations which have ceased to be valid within the last 5 years, and older registration applications which have not yet been decided upon.

The registration is valid for 5 years and can be renewed for periods of 5 years.

Designs which are not protected under the des, including utility designs, are probably to some extent protected by the rules contained in coml, in particular in 9 of this law, which among other things forbids anyone to use

a business insignia or the like to which he is not entitled, in the course of trade, and in 15 (see the remarks above).

The Northern design laws have been published in French in "La propriété industrielle 87" 1971 pp 226-241.

3. Trade Marks (11)

- a) Trade marks are regulated in Denmark by the Act on Trade Marks, no. 211 of June 11, 1959, as amended by Act no. 151 of May 10, 1967 (tml). As a supplement to the tml, the Minister of Trade has issued proclamation no. 335 of September 21, 1960, on the reporting and registration of trade marks (tmlpro).

The tml covers figures, words or phrases, including slogans, letters or numbers which appear on the goods or the packaging of the goods (tml 1). The rules in the law thus apply both to trade marks consisting of words and pictures, as well as to the symbols appearing on the goods and to slogans. In Sweden and Finland, on the other hand, slogans cannot be registered.

The rules of the law are similarly applied to offers of work and services. Trade marks of services are thus also protected in Denmark.

The trade mark right can, however, also be secured in Denmark (though not in the other Northern countries) by use (see tml 3 para. 3)(12). In addition, trade marks rights can be secured in any of the Northern countries by the more intensive use which is marketing. A trade mark is deemed to be marketed when, in the relevant trade circle in Denmark, it is generally known as an insignia for the goods or services of the holder (see tml 2). The legal effects of use and marketing are, however, roughly the same. (13)

The protection obtained by use and marketing is less than that obtained by registration. The act of registration results in rights to a trade mark being laid down, the existence and extent of which are easy to determine and prove, while the user is often in the case of a conflict forced to try to obtain a legal judgement in his favour. The right to a trademark established by use and marketing ceases when the trade mark is no longer used, while a registration which is maintained gives protection whether it is used or not, as there are no rules in Denmark (or in Norway or Finland) dictating that a registered trade mark ceases to be protected if it is not used. (14)

When an application for registration is made, the Dir considers among other things whether the trade mark has the necessary distinctive appearance. If the Dir decides that there is no reason why the trade mark should not be registered, the trade mark is presented publicly. The trade mark is publicly announced, and is registered (tml § 20) if no objection to the right of possession of the owner is made within 2 months from the announcement. The registration of a trade mark is valid for a period of 10 years, and can be renewed (§ 22).

Unfair use of another's name, firm, business insignia or the like is forbidden as a consequence of coml § 9 and can also under some circumstances be banned by the general clause in § 15, which forbids actions in the course of trade which conflict with honest business practice.

- b) The Act on Standardized Marks no. 212 of June 11, 1959, opens the possibility of association of persons involved in trade to obtain sole rights for their members by registration of use to use certain symbols for goods or work or services, which are offered by members in their activities, and it makes it possible for public authorities, as well as those foundations and other legal individuals, organizations or associations which inspect or lay down norms for goods or offers of work or services, to obtain sole rights to particular symbols to use for those goods, or offers of work or services, which are the subject of inspection or for which norms are laid down. Most of the rules in the tml will apply to these standardized marks.
- c) The Danish Act on Trade Marks has been published in French in "La propriété industrielle" 76: 1960, p. 61 - 67. The Act on Standardized Marks has been published in French idem p. 67 - 68. The tml has been published in German in "Gewerblicher Rechtsschutz und Urheberrecht, Ausland und internationaler Teil", 1960, p. 300 - 303. An English translation of the Swedish tml is to be found in "Unidroits Year Book 1961, Unification of Law, Chapter 1", p. 259. The Swedish Act on Standardized Marks is to be found idem p. 273.

B. DANISH INTERNATIONAL LAW ON TRADE MARKS, DESIGNS AND PATENTS (16)

1. International civil law

Danish law, like that of most other countries, follows the principle of the territorial nature of industrial property rights. The rules of Danish law on industrial rights only apply to Danish territory. Danish rules do not normally protect against violations of Danish sole rights which take place abroad.

Foreign rules on industrial property rights do not apply to Danish territory. Rights arising from foreign laws are not normally protected against violations taking place on Danish territory. The Danish rules, in other words, are "sovereign" on Danish territory but are not "exportable" to other countries.

The rule of the territorial nature of sole rights also holds abroad. Just as Danish courts and authorities do not recognise foreign sole rights on Danish territory, foreign courts and authorities do not take account in their territories of Danish rights.

The opposite of the territorial principle, the principle of universality, under which a trade mark, a pattern or a patent which has been recognised in one country is also protected in all the other countries, has not found support.

The general rule of the territorial nature of intangible rights is, however, broken by exceptions, mainly by those created by the Paris Convention of March 20, 1883, with later supplementary conventions, on the establishment of a union for the protection of industrial property rights. The Convention on International Patent Cooperation (P.C.I.), which was signed in Washington on June 19, 1970 but has not yet come into force, will ease the protection of an invention in several member countries by establishing the same procedure for patenting. The conventions on the European patent and the Common Market patent, which may be expected to be signed in 1973-74, state that a central, supranational authority is to be empowered to issue patents which are simultaneously valid in several member countries. These

conventions do not abolish the territorial principle, but they extend the territory for which the patent is valid.

The basic principle of the territorial nature of intangible rights which has been mentioned here is expressed above in rules which determine the conditions under which the rules of a country will be used by its own courts and authorities. There is no mention of when foreign law applies, and of the rules of which foreign country the courts of a country apply in cases on competition taking place on foreign territory. Which national law then decides whether an alien has intangible rights, and if so then in what they consist and for how long they are valid? This question also arises in the cases where the registration authorities and courts of a country exceptionally take account of foreign intangible rights.

The following questions will be considered here:

- I. The protection against infringement of industrial property rights taking place on Danish territory given by Danish courts and registration authorities
 - A. Rights created under Danish law.
 - B. Rights created under foreign law.
- II. The protection against infringement of sole rights on foreign territory given by Danish courts
 - A. The competence of Danish courts (internationale Zuständigkeit).
 - B. Protection of rights created under Danish law.
 - C. Protection of rights created under foreign law.

Questions I.A. and II.B. are only concerned with the application of Danish law. In connection with questions I.B. and II.C., the problem arises of which national law is decisive for the existence and content of foreign intangible rights.

- I. A. The protection by Danish courts of Danish exclusive rights on Danish territory
 1. A patent registered in Denmark gives its owner sole rights to use the invention. No one else may use it without permission for business purposes by using a method protected by the patent, or by manufacturing, importing, using, transferring, leasing, lending or selling objects protected by the patent, or in any other way. If a patent has been registered on a method for the production of a product, the sole rights also cover the products produced by the use of the method (see pat § 3). The protection is valid on Danish territory.

In the same way, it is laid down in the Design Act, that the design rights give the owner the sole rights to use it for business purposes. No other person is permitted to use it by manufacturing, importing, selling, transferring or leasing goods which are protected by the design rights, or which do not differ in any major way from the design, or goods which contain something which does not differ in any way from the design. This protection is also valid on Danish territory.

There are certain exceptions to this territorial protection for patents and designs. The Minister of Trade can decide that spare parts and equipment for aircraft may be imported regardless of a registered patent or existing design right, for the purpose of repairing aircraft coming from a foreign State which concedes equivalent rights to Danish aircraft

(see pat § 5, para. 2, and des § 7). It is stated by the Ministry of Trade that there has not yet been occasion to introduce regulations of this kind into Denmark. (17)

The following exceptions apply for patents in particular:

The pat § 5, para. 1 lays down that regardless of whether a patent has been registered on an invention, persons other than the patent owner may use the invention during the use of a foreign vehicle, vessel, or aircraft during the temporary or fortuitous presence in Denmark of the relevant means of transport. (18)

In addition, the pat § 3, para. 3 lays down that the patent rights do not cover the use of objects which were sold in Denmark in violation of sole rights in a shop or under similar circumstances, if the purchaser at the time of purchase did not know, and could not have been expected to know, that the sole rights were being infringed.

Thus, objects which were bought in good faith can be freely used and sold to third parties. No consequences follow from the violation of a foreign patent right by the producer and the dealer. (19)

2. The Danish tml § 4 gives the owner of rights to a trade mark under Danish law the sole right to use the trade mark in the course of business.

No one else is permitted to use the mark or a mark with which it might be confused, whether the mark appears on the goods themselves or on the packaging of the goods, or in advertisements, business stationery or in any other way, and regardless of whether the goods are intended for home or export sale.

The sole right of the owner of the trade mark thus applies in a territorial manner. Any use on Danish territory is restricted to the owner of the trade mark. In addition, use abroad by exports is forbidden, but litigation on this can of course only be undertaken through Danish courts (see below, II. A.).

There is, however, an important exception. If the owner of the Danish right to a trade mark has obtained from abroad the right to use a particular type of goods, then he cannot prevent the import and sale in Denmark of goods of the same type - "genuine goods" - which display the same mark and which have been brought into circulation abroad by the original owner of the trade mark or by some other person who has legally obtained the rights to it. This consumption principle does not necessarily apply to patents and designs (see pat § 3 and des § 5.), which both prohibit the import by others of the goods whose patent or design is protected.

B. The protection in Denmark of alien exclusive rights

1. If an invention is specified in an application for a patent, an inventor's certificate or for protection of a utility pattern in another country which has ratified the Paris Convention of March 20, 1883, then priority is given for 12 months for an application for Danish patent rights on this invention, in accordance with the rules of the Convention (see pat § 2 and § 4 in connection with § 6 and patpro § 9). Similarly, protection is given to trade marks and designs (see tml § 30

and tmlpro § 8 and also des § 8 and despo § 8).
The priority in this case holds for 6 months.

As laid down in article 4 A, para. 3 of the Paris Convention, priority is obtained in Denmark for any application in another country belonging to the Union sufficient to be considered an application for a patent, the protection of a design or a trade mark. It is, for instance, irrelevant whether an application for a patent concerns an invention which can be patented in the first country of application. In reality, therefore, this does not protect foreign rights to patents or designs or trade marks, but rather recognises a special legal position with regard to an intangible which is obtained by making applications which fulfil the formal requirements for the granting of sole rights. (21)
The Convention does not only give the applicant priority. He is also entitled to apply for patent rights in several countries in succession for a period of 12 months, without the later applications being adversely affected by the rule that the invention must not already be known abroad (see in the case of Danish law § 2, para. 2 in the pat).

The rules in the Paris Convention, article 11, on priority for exhibition have also been introduced into Denmark in the tml, § 18, para. 2, the pat. § 2, para. 3 no. 2, and the des § 2. As in the Convention, the protection is restricted to inventions, trade marks and designs which have been shown during the previous 6 months at an official or officially recognized exhibition in a country belonging to the Union.

A patent right, design right or trade mark obtained in Denmark on the basis of the priority rules is a Danish intangible right, the granting, extent and period of validity of which is determined by Danish rules.

2. The talequale rule in article 6 d) of the Paris Convention has also been brought into Danish law, as it is laid down in the tml that it may be decided (and would then be laid down) that a trade mark which could not otherwise be registered in Denmark but which is registered in a foreign country may under stated conditions be registered in Denmark in the same way as it is registered in the foreign country. A registration of this kind does not have wider validity than it does in the foreign country. The rule has little practical importance in Denmark, as the tml has made it possible to register all known forms of trade mark. (22)

It is only in connection with the decision on registration that account is taken of the foreign registration. The extent and content of the trade mark right are determined by Danish rules (see UfR 1938-11, in which it was laid down that a mark which was first registered in Germany and later in Denmark did not give its owner "any further protection than registration in this country normally gives"). Conversely, it is assumed in the judgement in UfR 1957-483 that an originally French mark which was registered here gave its owner full protection under the Danish rules, in that it was stated that there "is nothing to prevent the Danish law giving the plaintiff more extensive protection than the French law. (23)

As can be seen from the rules which have been set out here, the application of foreign law which is involved in the protection of foreign rights is only fragmentary. The content and extent of the rights which follow from the priority rules and the tale quale rule are mainly determined by Danish law.

3. Under the tml, § 3, par. 3, no symbol may be used as a trademark which could be confused with a trademark which someone else has used abroad if this is known or should be known to the intending user in Denmark. The decisive point is not whether the mark has been registered abroad but whether it has been used.

If the user of the trademark in Denmark is in bad faith, therefore, he will not be allowed to use the trade mark, and under § 14, no. 7, he will not be able to get it registered either. The law demands that the trade mark is continuing in use abroad, but it does not lay down whether it is only the use abroad or a sole right in connection with the use which is protected. (24) Would the tml § 3, para. 3 and § 14, no. 7 be able to prevent use of registration in Denmark if the relevant person in the country where the mark is being used has not obtained a sole right, for instance because a sole right in that country requires registration, and this has not taken place? Under the wording of the regulation, it is only the use abroad which is decisive, and there is nothing in tmlpro either which shows that it is only use abroad leading to sole rights which exclude registration in Denmark.

It is a necessary condition that the relevant symbol is used as a trade mark abroad. A symbol which is sufficiently distinctive in Denmark but which the applicant knows to be used in another country as a generic name for the goods, in that the symbol is a lapsed trade mark in that country, could probably be registered in Denmark. It is not used as a trademark abroad. It is probably also not possible to demand that the Dir or a person objecting to the registration of the mark after it has been displayed should demonstrate that the use of the mark abroad has created a sole right for the user. If, however, the applicant demonstrates that the user does not have a sole right, for instance because this requires registration in the foreign country and this has not taken place, then the decision is more doubtful.

Under Article 6a of the Paris Convention, which has been ratified by Denmark, Denmark is only bound to take account of foreign trade mark rights when the mark is really known abroad. It could in fact be maintained that a user of a trade mark abroad should not be given better protection for the mark in Denmark than in the country where he is using the mark. Consequently, § 3, para. 3 and § 14, no. 7 should only protect persons who, by their use of a symbol abroad, have obtained trade mark rights there.

The background of the law, however, suggests that it was intended to protect foreign users of trade marks, regardless of whether they had the mark protected in the country where it was used. This solution can be defended in the case where the use of a trade mark in a foreign country gives the user protection under the law on competition, if not under the law on trade marks, by making it unfair competition to use the trade mark of the competitor.

In the cases where the applicant (or the new user) demonstrates that the user abroad is completely unprotected there, the result of the law is hard to accept. In these cases, in my view, the rules in the Swedish and Norwegian trade mark laws, which do not give the user abroad any protection, even if the applicant or the new user is acting in bad faith, would give a more appropriate result, see §§ 3 and 14 of the Swedish and Norwegian Acts).

Under the tml 14, no. 7, a trade mark may not be registered in Denmark when it could be confused with a mark which has been used abroad, by the time that the application for registration has been submitted and which is still being used there, and the applicant knew or should have known of this fact at the time of application.

According to the preliminary work on the law, this means that trade marks which have been used to a certain extent abroad should be known to the applicant and can therefore not be registered. Marks which are only used to a slight extent abroad will be refused registration if it is declared that the applicant knew of them or, on account of special circumstances, should have known of them. Under the tml, § 14, para. 2, registration can take place if sufficient authority is given, e.g. the permission of the foreign trade marks owner, and there is no reason to believe that the registration will cause confusion. It is the use of the mark abroad which is decisive. The law does not lay down specifically whether it must also be required that the foreign use has led to sole rights for the user in the country where the mark is being used (see above).

4. The Danish law on competition prevents the slavish imitation of the products of others, when these are not protected by the pat, tml and des or in some other way (see coml § 15). One judgement once protected a German manufacturer of ladies' blouses against the copying of the blouses by a Danish competitor in view of the fact that it had to be regarded as likely that the blouses would shortly appear on the Danish market. From this judgement (UfR 1958 1211) and others, the conclusion must probably be drawn that protection is not given in Denmark against copying for the Danish market of goods which are only traded abroad, unless their sale in Denmark must be supposed to be imminent (see Kockvedgaard p. 363 and, discussing Norwegian law, the judgement in NRT 1959 712 (717-718) and Per Brunsvig in "Nordisk immaterielt rättskydd" (Northern legal protection of intangibles) 1960 146).

II. The protection against infringement of sole rights on Foreign territory given by Danish courts

Two questions arise here:

- A. Do Danish courts have competence in cases dealing with infringements of sole rights on foreign territory?
If this is assumed to be the case, then the following question arises:
- B. Do the Danish laws apply?
- C. If not: Do foreign laws apply, and if so then the laws of which country?

A. The competence of Danish courts

There is little doubt that Danish courts are competent to deal with cases of violation of Danish sole rights on foreign territory. In the exceptional cases where Danish rules protect against infringements of Danish rights, Danish courts must also be competent to make judgements on infringements.

Can Danish courts then deal with cases referring to the exercise of foreign rights on foreign territory? (25)

Cases dealing with the transfer of foreign sole rights could probably be brought before Danish courts if they are otherwise locally competent, even if the question of the validity for registration of the patent, design or trade mark may be evaluated and thereby prejudiced. (26)

Cases in which the main question is of the validity of a patent, design right or trade mark right registered abroad can probably not be tried by Danish courts. The courts of one country cannot cancel the registration of a sole right made abroad and take effect on everyone concerned. (27)

It is doubtful whether Danish courts can try cases of infringements of foreign rights. For instance, can the owner of an English patent sue a person resident in Denmark in connection with the sale of goods, by the latter in England in conflict with the patent? A Norwegian court has answered this question negatively. The reason for this seems among other things to have been that the validity of the foreign patent could, after all, not be tested by a Norwegian court. (28) Even if this testing would only have been prejudicial to the demand for damages, it would, it is claimed, require such a detailed knowledge of the situation in the foreign country that the Norwegian courts "in the natural course of things seem forced to reject this task". In Swedish doctrine, Sigurd Dennemark has among other things replied to this that testing the existence of a patent, a trade mark or a design under foreign law is no more difficult than other questions on the use of foreign law. (29)

The question does not yet seem to have been decided in Danish legal practice. There are no rules in the pat, tml, des or Administration of Justice Act which prevent litigation of this kind being brought. The plaintiff may have a legal interest in litigation, especially when defendants who are accused of infringement of a foreign right are resident in or have their main business activity in Denmark. Even if the court judicially takes a view on the validity of the patent, the decision will under no circumstances have any effect on anyone except the parties involved. In my view, taking account of this, cases of this kind should be allowed to be brought in Denmark. When the validity of a patent, etc., which is alleged to have been infringed under the rules in the country where the patent was issued can only be tested by a special invalidity case, and the defendant claims that the patent is invalid, then the case must be adjourned to give the defendant the opportunity to bring an invalidity case of this kind in the country of origin of the patent. If the defendant does not cause a case of this kind to be brought and expedited within a reasonable period of time, the Danish court should bring the case against the defendant for infringement of patent, trade mark or design rights to a conclusion.

The question of the possibility of suing persons not resident in Denmark in Danish court is discussed below in the section on the law on aliens.

B. The protection given by Danish courts to Danish sole rights on foreign territory

It follows from the principle of the limitation of sole rights to Danish territory that Danish courts will not extend protection to a Danish patent or design abroad. If an invention or a design is not protected in a foreign country under the legislation in force there, the owner of a Danish patent or design cannot prevent their use in the relevant foreign country.

The question arises, however; what kinds of use are covered by the territorial protection on Danish soil?

The pat and des both forbid the import, sale, transfer or leasing of the goods patented or with protected design. The pat also mentions loans.

The tml should be understood in a similar way, when it in § 4, para. 1, forbids persons other than the owner of the mark to use a mark which could be confused with the trade mark in the course of business.

The pat and des also forbid the use of the goods in Denmark.

In the case of patents and designs, one must, as stated, conclude from the regulations of the law that the marketing abroad of goods which are not produced in Denmark is not covered by the preventive regulations of the law. The same probably applies to the regulations in the tml with regard to trade marks on goods which are neither produced nor stamped with the mark in Denmark (see below).

However, the question arises whether goods only produced for export can be produced in Denmark even if use is thereby made of a Danish patent, design or trade mark belonging to someone else.

Production of this kind must be considered ruled out where patents and designs are involved (see the pat § 3 and des § 4, which both forbid production in conflict with the sole right). This must be interpreted as covering any production in Denmark, even if the purpose is solely export.

The tml 4, para. 1, specifically forbids the use of trademarks in conflict with the right of the owners, regardless of whether or not the goods are intended for export. According to Jan Kobbernagel, it is a condition that the person accused of infringement of the trade mark right conducts business in Denmark. (30) On the other hand, according to the same source, it can probably not be demanded that the marking (31) itself should take place in Denmark. A marking made abroad is also covered by the ban in the law.

It is, however, doubtful whether the law is to be understood in this way. The protection under the tml § 4, para. 1, probably also applies to goods which a foreign firm marks in Denmark with a view to sale abroad. On the other hand, it can probably not be extended to applying to goods which a firm marks and sells abroad. It would probably not conflict with the "Danish" mark belonging to someone else, if the goods are marked abroad. (32) If one were to assume the contrary, it could mean a weakening of the position of Danish firms in competition with foreign rivals.

C. Which national legislation is decisive in a question of the existence and scope of a sole right?

As mentioned above under A., this question can arise prejudicially for Danish courts in cases on the transfer of trade marks, designs and patents, and probably also in cases where a declaration is sought to the effect that the use by the defendant of a trade mark, design or invention is unwarranted.

The general rule in Danish international civil law, as in the foreign equivalents, must be that the law in the country where a sole right is claimed to have come about is decisive whether this claim is justified. Under the law of the same country, it is then decided whether the right must be based on registration, or whether the use or marketing of a trade mark or design gives the user protection, and the law of the relevant country also decides to what extent a sole right is protected and for how long the protection holds good. If the protection is deemed to exist, the right will normally be for the territory of the country, and normally only there.

The question of whether a foreign sole right has been infringed must be decided under the law in the country where the infringement is alleged to have taken place (*lex loci delicti*). As a right can normally only be infringed on the territory where the right has arisen (as it does not apply outside), the law in the country where the right has arisen will normally be the same as the law in the country where the right has allegedly been infringed.

If Danish courts are asked to judge an infringement on foreign territory, they will be entitled to instruct the defendant to pay compensation, if the conditions for this under *lex loci delicti* are fulfilled. As a rule, Danish courts will not be able to order other sanctions against the defendant such as punishment, banning or seizure of goods. Danish executive authorities will not be in a position to act outside the borders of the country, and will therefore not be able to implement a ban or a seizure of goods abroad.

2. The law on aliens

I. In general

Foreign citizens resident in Denmark are in the same position as Danish citizens, with respect to obtaining patent rights and trade mark rights. The laws make no distinction here between Danish and foreign citizens. Individuals resident abroad - whether Danish or foreign citizens - are in principle also placed on an equal footing with Danes resident in Denmark. These rules follow from Articles 2 and 3 of the Paris Convention as far as individuals who are citizens of or resident in countries belonging to the Union are concerned. But Denmark goes further than this. Danish law places in principle all aliens on an equal footing with Danish citizens. In the case of individuals resident abroad, who are described as aliens below, the law does, however, contain some special regulations.

Limited companies and cooperative societies must be considered aliens when they are not registered on the Danish register of limited companies. (33)

The tml, § 28, requires that an individual engaged in trade but not trading in Denmark must demonstrate that an equivalent mark is registered for him in the country of origin for the types of goods for which the application is made. Assuming mutuality, it can be decided by an announcement by the Minister of Trade that this rule should not be applied (see the tml § 28, para. 2). An announcement of this kind has been issued (see proclamation no. 70 of March 14, 1972 by the Ministry of Trade on the registration of trade marks for individuals engaged in trade, etc., belonging to certain foreign states.

Under the tml, § 31, the owner of a trade mark who is not resident in Denmark must have a representative resident in Denmark who can receive on his behalf legal suits and any announcements about the trade mark which have a binding effect on the owner. The name and place of residence of the representative is to be entered in the register of trade marks.

If no proper representative has been registered, the owner of the mark must borout the situation in order before a time limit laid down by the Directorate for Patents and Trade Marks, of which he is informed by registered letter or, if the address of the trade mark is not known, by announcement in the journal of registration (registreringstidende). If a representative of this kind has not been appointed on expiry of the time limit, then the mark is deleted from the register. In this event, an announcement of the deletion must be made in the registration journal. The duty applies both to those who have succeeded in obtaining registraion and those whose applications for registration are under consideration by the Directorate.

The tml does not, by contrast to the pat § 66, para. 2 and the des, § 46, give the Minister of Trade the option of exempting certain foreign owners of rights.

The Swedish tml, § 31, is roughly in agreement with the Danish law, the Norwegian law is framed slightly differently.

In § 45 of the des and § 66, para. 1 of the pat, it is laid down that the owner of a design or a patent who is not resident in Denmark must have a representative entered on the register who is resident in Denmark and entitled to receive proclamations and other announcements regarding the design or patent on his behalf.

Assuming mutuality, however, the Minister of Trade may decide that this rule should not be applied to owners of rights belonging to other countries, or who have a representative entered in the register who is resident in Denmark and can receive proclamations and other announcements, etc. on behalf of the owner (see the pat. § 66, para. 3, and the des, § 46).

If the owner of a patent or design does not have a representative of this kind, and if he is not exempted from so doing, then proclamations, etc., can take place by insertion in the Danish Official Gazette (Statstidende), as well as by notification through the post (see the Administration of Justice Act, § 159, paras. 2 and 3).

The duty to have a representative who lives in Denmark applies not only to the owner of a design or a patent, but also to an applicant for a design or a patent (see the des, § 12 and the pat, § 12). If an applicant fails to have a representative of this kind, the application will not succeed. As far as designs are concerned, the Minister of Trade can announce exemption under the rule in the des, § 46.

The exemption rules in the des, 46 and the pat, 66, para. 3 are in particular intended to be used for individuals who are resident in the other Northern countries.

II. In detail, on the status of aliens in legal cases

A. Aliens as plaintiffs

In cases dealing with patents, trade marks, designs and other intangible rights, aliens have the same freedom to bring cases before Danish courts as they have in other cases of property law. However, individuals who are not Danish citizens, whether they reside in Denmark or abroad, must, under 323 in the Danish Administration of Justice Act no. 90 of April 11, 1961 (described below as the aja), if the defendant so requests, set aside a sum of a size deemed appropriate by the court - cautio judicatum solvi - to secure the costs of the case which may be awarded to the defendant, unless Danes in the relevant foreign State are exempted for this kind of deposition. Denmark has ratified the Hague Conventions of 1905 and 1954, which have also been ratified by most of the members of the EEC, and has an agreement with Great Britain on mutual exemption from the demand for deposition of securities.

B. Aliens as defendants

Aliens can normally not be sued in Denmark. However, there are numerous exceptions.

1. Both the pat and the tml have regulations to the effect that cases against aliens which are brought under these laws can be brought to court in this country. These cases must then in the case of trade marks be heard at the Maritime and Commercial Court (Sø- og Handelsretten) in Copenhagen (see the tml, § 37, para. 3) and in the case of patents at a Copenhagen court, as a rule the Eastern Division of the Danish High Court (Østre Landsret), but otherwise at the City Court (Byretten) or the Maritime and Commercial Court (see the pat, § 64, para. 2, in conjunction with para. 1). Under § 50, cases on compulsory licences must always be decided by the Maritime and Commercial Court.

Suits dealing with the right to a design, the cancellation of a registration or the transfer of a registration to someone else can be brought in Copenhagen when the plaintiff of the owner of the patent entered in the register does not reside in Denmark (see the des, § 45).

When cases under the pat, tml and des are brought against an alien, the suit must be announced to his representative in Denmark (see the tml, § 37, para. 1, the pat. § 66, para. 1 and the des, § 41).

2. The special rules about venue mentioned above must probably take precedence over the general rules in the aja on the competence (Zuständigkeit) of Danish courts in cases against aliens. The rules of the aja are, however, relevant for cases on inventions, designs, and symbols which are not covered by the rules in the pat, des, and tml, and for cases on unfair competition, where other sole rights, e.g. know-how or a copyright, are disputed or for which protection is sought. In cases of this kind, individuals not resident in Denmark can be sued at a Danish court if the special rules about exceptional venues can be used (see the aja, § 248, para. 1). The aja, § 244 has

particular importance here. It lays down that cases where punishment, compensation or redress for the infringement of rights are claimed can be brought at the place (i.e. the legal district) where the damage or infringement has taken place, or, if it took place in several legal districts then in any of these. The regulation is known to have been used on one occasion when an alien had infringed a copyright in Denmark (see UfR 1947 187).

In addition, under the aja, § 248, para. 2, aliens can be sued in Denmark in the legal district where they are to be found or have goods (assets) at the time of the proclamation of the suit. The regulation must be expected to be abolished in relation to individuals who are resident in the area of the EEC, in connection with the ratification by Denmark of the Convention of September 27, 1968 on the competence of law courts and recognition and execution of legal decisions in civil and commercial cases (see Article 3 of this Convention).

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Notes

- 1) Literature in Northern languages: Ragnar Knoph: ^oAndsretten (Oslo 1938) - Torben Lund: Ophavsretten (Copenhagen 1961) and Mogens Koktvedgaard: Immaterialretspositioner (Copenhagen 1965) - (Koktvedgaard). Articles on the law on intangibles in the Scandinavian languages can be found in the periodical "Nordisk Immaterielt Rättsskydd (NIR).
- 2) see Philip: Dansk international privat- og procesret, 2nd. edition (Copenhagen 1972) (Philip) 396.
- 3) Philip ibidem
- 4) Philip 397
- 5) See in particular "Nordisk utredningsserie" 1963: 6 Nordisk patentlovgivning (Oslo 1964) (patpro) and Mogens Koktvedgaard: Patentloven (Copenhagen 1971) (Koktvedgaard pat) and Mogens Koktvedgaard, Immaterialretspositioner (Copenhagen 1965) (Koktvedgaard)
- 6) see Koktvedgaard pat 82
- 7) idem 79 and pat pro 127-128
- 8) see Koktvedgaard PL 210 und 258
- 9) see Betaenkning vedrørende en ny dansk lov on mønstre (betaenkning no. 417) (Copenhagen 1966) (mbet)
- 10) see mbet 36
- 11) see Betaenkning vedrørende en nydansk lov om varemaeker (betaenkning no. 199) (Copenhagen 1958) (vmbet) and Jan Kobbernagel: Konkurrencens retlige regulering II Maerkeretten (Copenhagen 1961) (Kobbernagel)
- 12) see Kobbernagel 57
- 13) idem 67
- 14) see § 25, para. 2 in fine in the Swedish tml Kobbernagel, Preface.
- 15) extract from Dansk Juridisk Bibliography of Danish Law) by Jens Søndergaard, with the permission of the author and of the publisher (Juristforbundets Forlag)
- 16) Mrs. Rigmor Carlsen, department chief in the Directorate for Trade Marks, Professor Jan Kobbernagel of the Business High School in Copenhagen, Professor Mogens Koktvedgaard, LL.D., of Copenhagen University, and Mr. E. Mølgaard, department chief in the Ministry of Trade have read the manuscript for this section and given me several valuable suggestions for improvement. I am grateful to them for their help.
- 17) On the reason for the rule, see pbet ; on the other hand see the Swedish Royal Proclamation of December (1), 1967.
- 18) On the reason for the rule, see pbet 158
- 19) On the reason for the rule, see pbet 150
- 20) See also pbet 149 and the High Court judgement mentioned there in NJA 1938-642.
- 21) See pbet 163.

- 22) See Kobbernagel 176.
- 23) See ibidem.
- 24) See also vmbet 99 and 126.
- 25) Denmark: Om svensk domstol behörighet i internationellt förmögenhetsrätteligen mål 114 ff. (Dennemark)
- 26) Denmark op cit 127.
- 27) See Denmark op cit 115.
- 28) NRT 1939 - 923.
- 29) Denmark op cit 120 ff.
- 30) Kobbernagel 177 and vmbet 102.
- 31) Here and later, the use of the mark in advertisements, business stationery, including in this bills, etc., are regarded as equivalent to marking.
- 32) See vmbet 102, which does not conflict with this interpretation. Whether the situation can constitute a violation of the Danish law on competition, §§ 9 and 15 is very doubtful. This can probably not be assumed.
- 33) See Kockvedgaard pat 125 and Philip 328.
- 34) Reprinted from Jens Søndergaard: Dansk Juridisk Bibliografi (Bibliography of Danish Law) with permission from the author and Juristforbundets Forlag, the publishers.

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