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A Uniform Solution to Common Law Confusion: Retention of Title Under English and U.S. Law

Rolf B. Johnson†

In recent decades, English courts have sacrificed the effectiveness of retention of title clauses to preserve doctrinal consistency. This dogmatic treatment of retention of title clauses has created uncertainty for buyers and sellers and constituted an inefficient rule which has obstructed commercial transactions.

In this article the author compares and contrasts the treatment of retention of title in England and in the United States. The author begins with a brief assertion in favor of the purposes and functions that retention of title clauses serve in the modern commercial context. Following this overview is an analysis of the English courts' treatment of simple, extended, enlarged and all-monies clauses. Here, the author traces the English courts' struggle with competing legal doctrines and demonstrates how the courts have failed to accommodate complex commercial needs. The author then contrasts the English approach with the rules implemented under the Uniform Commercial Code which recognizes the legitimacy of unsecured credit financing, and shows that the advantages derived from the Code's practical and simple rules outweigh any benefit which doctrinal purity may offer.

I.

INTRODUCTION

This article examines the treatment under English law of retention of title (RT) clauses used in commercial transactions involving corporeal personal property and compares this with the treatment such clauses receive under U.S. law. In England at present, an RT clause is virtually the only way a trade creditor—for example, a merchant supplying goods to a retailer or a manufacturer on credit—can obtain security for the credit she extends to her customer.¹ These clauses are therefore significant to business people, lawyers, academics, and others interested in commercial sales transactions.

RT clauses are also of considerable importance in a broader social and economic context. As a recent report on insolvency law in England observed,

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1. Andrew Hicks, *Retention of Title: Latest Developments*, J. Bus. L., July 1992, at 398.

“credit is the lifeblood of the modern industrialized economy.”² A significant proportion of business credit is supplied by trade creditors.³ It is therefore vital to the health and free-flow of this “lifeblood” that sellers wishing to extend credit to merchant buyers be able to obtain security. Where a trade creditor requiring security has little option but to rely on an RT clause, as is currently the case in England, the effectiveness of such a clause becomes extremely important.

Since the mid-1970s and the “revolutionary”⁴ *Romalpa*⁵ case, RT clauses in English commercial contracts have proliferated, in the opinion of some, like a ‘dreadful weed.’⁶ In *Romalpa*, a Dutch exporter sold aluminum foil to an English company under a sales contract containing an RT clause. When it appeared that the English company was about to be placed under receivership, the Dutch company filed an action to recover both the aluminum foil still in the buyer’s possession and the proceeds from subsales of the foil. By virtue of the RT clause, the plaintiff succeeded on both counts. This decision caused a surge in the use of these clauses by trade creditors.⁷ However, in the period since *Romalpa* English courts have proven to be extremely reluctant to uphold RT clauses. Even the most carefully drafted clauses have usually failed when tested in court.⁸ Instead of serving the needs of trade creditors and thus aiding the flow of commercial credit, in England RT clauses have only succeeded in creating a steady stream of litigation and a reliable source of grist for the academic mill.⁹

In contrast, RT clauses have been relatively noncontroversial in U.S. law. The fundamental reason is that the security needs of trade creditors are better met under U.S. law than under English law. This is reflected in the way U.S. law handles RT clauses. Instead of the fog of arcane rules presented by English law, RT clauses under U.S. law are for the most part treated like other security interests. The result is a simpler and more predictable treatment: courts are more certain of the law and how to apply it; parties to a sales contract containing an RT clause are more confident of their respective positions; and, most importantly, trade creditors are able to obtain the necessary security. By comparing the treatment RT clauses receive under English and under U.S. law, this article

2. See, e.g., *UK New Consumer Credit 4.42 Bln. Stg. in April*, REUTERS, June 7, 1993; Keith M. Carlson, *On the Macroeconomics of Debt*, FED. RESERVE BANK OF ST. LOUIS REV., Jan. 1993, at 53.

3. JOHN F. DOLAN, UNIFORM COMMERCIAL CODE: TERMS AND TRANSACTIONS IN COMMERCIAL LAW 203 (1991).

4. IAN F. FLETCHER, THE LAW OF INSOLVENCY 506 (1990).

5. *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.*, [1976] 1 W.L.R. 676 (Eng. C.A.); see also ROYSTON M. GOODE, PROPRIETARY RIGHTS AND INSOLVENCY IN SALES TRANSACTIONS 84 (2d ed. 1989) (“[T]he famous *Romalpa* case . . . [has had] a greater impact on commercial law than almost any other case decided this century.”)

6. IWAN DAVIES, EFFECTIVE RETENTION OF TITLE 10 (1991) (quoting Muir Hunter, Q.C., at the Touche Ross Insolvency Conference, Nov. 1980).

7. *Id.*

8. See *Compaq Computer Ltd. v. Abercorn Group Ltd.*, 1991 B.C.C. 484 (Eng. Ch.), available in LEXIS, Enggen Library, Cases File, at *10.

9. Hicks, *supra* note 1, at 398, 415.

will expose the problems with the English approach, the virtues of the U.S. approach, and the potential benefits of adopting the U.S. system in England.

II. OVERVIEW OF RETENTION OF TITLE

In its simplest form, an RT clause in a contract for the sale of goods is relatively uncomplicated to create—it merely provides that the seller supplies goods to the buyer on the condition that ownership of the goods (title) will not pass to the buyer until the goods have been paid in full. The reason for including this clause in a sales contract is to assure the seller that payment will ultimately be made. This assurance derives from the fact that an RT clause “allows the owner/supplier of goods to seize the property should the debtor fail in one of his primary obligations, notably, payment of the price.”¹⁰ If the seller cannot get her money from the buyer, she can get her goods back.

However, it is not so much the possibility of reclaiming goods supplied that inspires sellers to include RT clauses in their contracts. In general, sellers are probably more interested in payment than the return of their goods.¹¹ The principal significance of an RT clause from the seller’s perspective is the potential priority it may give her vis-à-vis other creditors in the event of the buyer’s insolvency:

The broad purpose of an agreement that a seller retains title to goods pending payment of the purchase price and other moneys owing to him is to protect the seller from the insolvency of the buyer in circumstances where the price and other moneys remain unpaid. The seller’s aim in insisting on a retention of title clause is to prevent the goods and the proceeds of sale of the goods from becoming part of the assets of an insolvent buyer, available to satisfy the claims of the general body of creditors.¹²

Other features can make an RT clause attractive to a seller. The clause is a relatively uncomplicated method of providing the seller with security. “Since the time when the property in goods is to pass to the buyer is a matter for agreement, nothing is simpler than to provide that the property in the goods is to remain in the seller until the price is paid in full”¹³ In the United States, the further step of registering the provision is necessary to make it valid against third parties.¹⁴ Once registered, however, such a clause will secure the seller against other creditors even, in some instances, where other security interests have been registered prior to that of the seller.¹⁵ In contrast, under English law registration is not required. In fact, “registration [of an RT clause] will not

10. DAVIES, *supra* note 6, at 92-93.

11. J. R. Gudgeon, *Retention of Title*, 137 SOLIC. J. 305 (1993).

12. *Compaq*, [1991] B.C.C. 484 (1991), available in LEXIS, Enggen Library, Cases File, at *10.

13. Aubrey L. Diamond, *Security over Corporeal Movables: The Law of England and Wales*, in SECURITY OVER CORPOREAL MOVEABLES 23, 36 (J. G. Sauveplanne ed., 1974) (footnote omitted).

14. See *infra* text accompanying notes 137-141.

15. See *infra* text accompanying notes 126-137.

generally be practicable nor commercially feasible.”¹⁶ The reason for this is that, under English law, “security interests” require registration, and RT clauses, despite the security they provide, are not considered “security interests.”¹⁷ Under U.S. law this might be a disadvantage, but for the English seller it is precisely this feature which underlies another of the attractions of RT clauses for English sellers: when priority rules make other forms of security unavailable, as a practical matter, an RT clause may be the only viable alternative.

For example, a seller might consider accepting a charge over the book debts of the buyer as security for the goods supplied. Unlike an RT clause, a security interest of this kind would require registration. However, the buyer is probably seeking credit from the seller because she has already exhausted other sources of credit; therefore it is likely that an earlier creditor, for instance a bank, has already placed a charge over the buyer’s book debts. Even if the seller registered the charge, it would be secondary to that of the bank. Similarly, a seller might attempt to secure herself with a mortgage over the goods supplied, but she could well discover that a mortgage over the buyer’s assets has already been granted to an earlier creditor. This is a problem because once title to the goods passes to the buyer, the goods become part of the buyer’s assets, and therefore subject to the earlier creditor’s security. If the buyer becomes insolvent, the seller would find herself in second place to the earlier creditor, and thus in virtually the same position as an unsecured creditor. English sellers encountering circumstances such as these are confronted with a situation wherein if they desire security before delivering goods to a buyer on credit, they effectively have but one choice, an RT clause. In view of the potential security an RT clause can provide and the relative simplicity of creation, then, an RT is without doubt an attractive security device for trade creditors. But it is the lack of viable alternative security devices that explains the unusual popularity of these clauses in England.¹⁸

Despite all of the potential advantages RT clauses present for sellers, there are those who feel that these clauses are not fair from the standpoint of other creditors. Why should a trade creditor holding an RT clause of which only she and the buyer were aware be allowed the windfall of removing assets from an insolvent buyer’s possession ahead of other creditors who have duly made public their relationship vis-à-vis the buyer? For creditors who took steps designed to ensure them of a priority over the buyer’s assets, it can seem unfair to see assets depleted which the creditors had expected to defray their losses. At the very least, some might say losses should be borne equally between secured creditors and the RT holder. In fact, this latter solution is the one adopted in certain

16. Hicks, *supra* note 1, at 414.

17. See *infra* text accompanying notes 36-39.

18. SALLY WHEELER, RESERVATION OF TITLE CLAUSES: IMPACT AND IMPLICATIONS 5 (1991).

situations under U.S. law.¹⁹ However, in general the priority given the RT holder in the assets of the insolvent buyer is equitable:

The justification for this special treatment [of RT clauses] is this: whereas a security interest granted over property already owned may effectively remove the property from the debtor's estate, a security interest over newly acquired property to secure the price paid for that property can be regarded at the very least as neutral in its effect. The debt in respect of the price is counter-balanced by the addition of the new property, so other creditors do not lose if the new property enters the debtor's estate subject to a security interest for its price. Indeed, if the property can help the debtor's business to earn profits, the other creditors gain and would in most cases wish to encourage the acquisition even if the newly-acquired goods do not swell their existing security interest. If an earlier creditor could rely on an after-acquired property clause to the prejudice of the purchase money creditor he would obtain a wholly unjustified windfall at the expense of the later creditor whose money enabled the additional property to be acquired.²⁰

The following discussion begins with a description of the various types of RT clauses and their purposes. Next, an overview of English law is presented, followed by an analysis of its treatment of each type of RT clause. Last, there is an overview of U.S. law, also followed by an analysis of its treatment of each type of RT clause.

III.

TYPES OF RT CLAUSES

The simple RT clause, where goods are delivered subject to the condition that title will not pass from the seller to the buyer until the price of those goods has been paid in full, was introduced above. With this type of clause, the connection between goods, title and purchase price/debt remains clear-cut: the title retained by the seller pertains to particular, identifiable goods in the possession of the buyer; the debt owed by the buyer to the seller is clearly associated with these goods. However, in the course of ordinary commercial practice, such plain relationships can often become less certain.

For example, under an RT clause a seller may supply resin to be used by a chipboard manufacturer in making glue.²¹ The resin, combined with other substances and then incorporated into the chipboard, ceases to exist. Since the goods to which the title originally appertained are no longer identifiable, is the seller's retained title voided or does it attach to the products manufactured from the goods supplied by the seller?

A second example arises where a seller supplies synthetic fiber to a carpet manufacturer. The seller's fiber is combined with additional fiber obtained from other suppliers, and the resulting yarn is used to make carpets.²² Here, the seller's goods have not literally lost their identity or ceased to exist, but they

19. See *infra* text accompanying note 170.

20. Diamond, *supra* note 13, § 17.7, at 88.

21. Borden (U.K.) Ltd. v. Scottish Timber Prods. Ltd., 1981 Ch. 25 (Eng. 1979).

22. See *In Re Bond Worth Ltd.*, 1980 Ch. 228 (Eng. 1979).

may be unidentifiable for all practical or legal purposes. Once again, is the seller's title voided or does it attach to the newly made carpet?

A third example arises where goods supplied are later resold. In *Re Andrabell Ltd.*,²³ travel bags were supplied under an RT clause. Andrabell, the buyer, was not in the business of altering the bags in any way; it simply sold them in the ordinary course of its business. Furthermore, both parties understood and intended that Andrabell would be free to resell the goods. The goods remained identifiable, but the linkage between goods, title and debt found under a simple RT clause is no longer readily discernable. In situations such as this, is the seller's title enforceable against the subpurchaser? If not, does the title attach to or give the seller rights in proceeds or in the buyer's claims against the subpurchaser?

Because of these sorts of commercial realities, buyers and sellers have attempted to adapt and expand the scope of the simple RT clause. These more complex versions can be divided into three categories: enlarged, extended, and all-monies RT clauses. Enlarged RT clauses address the problems described in the first two examples above. That is, where the seller's goods are commingled or mixed with other goods such that the seller's goods are no longer separable and/or identifiable, the RT clause is "enlarged" to cover the resulting products. An example of this sort of clause can be found in *Romalpa* where the RT clause provided that, "[The seller] and purchaser agree that, if purchaser should make (a) new object(s) from the material, mixes this material with (an)other object(s) or if this material in any way whatsoever becomes a constituent of (an)other object(s) [the seller] will be given the ownership of this new object(s) as surety of the full payment of what purchaser owes [the seller]."²⁴

Extended RT clauses are designed to cover the situation described in the third example above. These clauses aim to "extend" the seller's rights in the delivered goods to the proceeds of resale and/or to the buyer's claims against subpurchasers. An example of an RT clause extended to cover the latter of these two concerns can be found in *Re Weldtech Equipment Ltd.*²⁵ "In the case of authorized resale of goods supplied by our company . . . all rights to which the purchaser is entitled as a result of the contract with the third party, in particular for payment of the purchase price, are transferred to us automatically upon completion of the sale."²⁶ An RT clause addressed to the former concern was at issue in *Tatung (U.K.) Ltd. v. Galex Telesure Ltd.*²⁷ "The Buyer shall be at liberty to sell the Goods in the ordinary course of business . . . but the benefit of any such contract of sale and the proceeds of any such sale shall belong to the Company absolutely."²⁸

23. [1984] 3 All E.R. 407 (Eng. Ch.).

24. *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.*, [1976] 1 W.L.R. 676, 679 (Eng. C.A.).

25. 1991 B.C.C. 16 (Eng. Ch. 1990), available in LEXIS, Enggen Library, Cases File.

26. *Id.*

27. 1989 B.C.C. 325 (Eng. Q.B. 1988), available in LEXIS, Enggen Library, Cases File.

28. *Id.*

All-monies RT clauses usually arise where the buyer and seller have ongoing dealings in certain goods as, for instance, where a buyer makes regular purchases to replenish his inventory. In this situation, it may be that although the seller supplies goods to the buyer subject to an RT clause, the goods in the buyer's inventory and the goods covered by the RT clause are not the same. For example, suppose a seller supplies identical goods under two contracts, K1 and K2. K1 is subject to a simple RT clause and K2 is not. Further suppose that payment is received for the goods supplied under K1 but not for the goods supplied under K2. Although all the goods supplied under both contracts are identical and remain in the buyer's inventory, the seller no longer has title to any of the goods since the buyer's obligations under K1 have been fulfilled.

All-monies RT clauses attempt to deal with this sort of situation by providing that the seller retains title to any and all of her goods in the buyer's inventory until "all monies" owed by the buyer have been paid. An all-monies RT clause thus offers sellers a potential advantage over a simple RT clause because it may get the sellers "over the often difficult hurdle of linking goods to specific unpaid invoices; the sellers have only to show that the goods were supplied by the supplier and the supplier is still owed money by the buyer in relation to goods supplied and it is irrelevant that the goods in the buyer's possession may have actually been paid for."²⁹ An example of this type of RT clause can be found in *Borden (U.K.) Ltd. v. Scottish Timber Prods. Ltd.*:³⁰ "Property in goods supplied hereunder will pass to the customer when: (a) the goods [which are] the subject of this contract; and (b) all other goods [which are] the subject of any other contract between the Company and the customer which, at the time of payment of the full price of the goods sold under this contract, have been delivered to the customer but not paid for in full, have been paid for in full."³¹

Complex RT clauses are often combinations of enlargement, extension, and all-monies provisions. However, the following analyses of the treatment under English and U.S. law of the different types of RT clauses will examine the treatment of each of these versions separately.

IV.

RETENTION OF TITLE UNDER ENGLISH LAW

Despite the attractiveness of RT clauses for English sellers, there may be one serious drawback to relying on such a clause: if it is subjected to judicial scrutiny the probability is high that it will be held invalid. Indeed, one study found that only 15 percent of claims filed on the basis of an RT clause resulted in recovery for the claimant.³² The problem stems from the inefficacy, in terms of modern commercial practices, of the more basic form of RT clause and from the efforts by buyers and sellers to adapt the simple RT clause to better suit their

29. WHEELER, *supra* note 18, at 29.

30. 1981 Ch. 25 (Eng. 1979).

31. *Id.* at 33.

32. WHEELER, *supra* note 18, at 198.

needs. As the simple RT clause has been expanded and enlarged, English courts have found it increasingly difficult to uphold. This in turn has resulted in a dynamic wherein the rejection by the courts of modified versions of the simple RT clause impels buyers and sellers to devise more creative adaptations. As Professor Davies puts it, "the very profusion of such clauses is a symptom of the law's inability to protect trade creditors."³³

The difficulty these more complicated RT clauses pose for the English courts is that such clauses tend to run afoul of the legal theory upon which the simple RT clause is based. Although courts³⁴ and scholars³⁵ have largely recognized that the objective of an RT clause is security, in theory such a clause does not create a security interest. Under English law, a security interest is created where a debtor grants a creditor rights in an asset owned by the debtor. A fundamental requirement, then, is that the debtor possesses title to the asset prior to the creation of the security interest. However, in a sale under a contract subject to an RT clause where the price has not been paid, the debtor (buyer) never acquires title since, by the terms of the contract, title remains with the creditor (seller). Since *nemo dat quod non habet*, "[h]e who hath not cannot give,"³⁶ no security interest can be created because the buyer never has an interest in the goods which she can grant to the seller.³⁷

The problem with modified versions of the simple RT clause is that, in light of the more sophisticated commercial relations to which such clauses attempt to conform, the assertion that the buyer has no property rights in the delivered goods becomes untenable. Although a sales contract will commonly contain an RT clause, neither the seller nor the buyer understands or intends that the goods will simply be stored in the buyer's warehouse until the price has been paid. Rather, the whole purpose of delivering on credit is to allow the buyer to use the goods, thereby generating revenues with which to pay the seller: a retailer resells the goods to its customers³⁸ or a manufacturer uses the goods to create a new product which is then sold.³⁹ Under circumstances such as these, where the buyer's "rights to deal with the goods [are] so extensive,"⁴⁰ the argument that the buyer has no ownership interest in the goods seems strained.

33. DAVIES, *supra* note 6, at 1.

34. See *Compaq Computer Ltd. v. Abercorn Group Ltd.*, 1991 B.C.C. 484 (Eng. Ch.), available in LEXIS, Enggen Library, Cases File, at *10; *Armour v. Thyssen Edelstahlwerke A.G.*, [1990] 3 W.L.R. 810, 816 (Eng. H.L.) (appeal taken from Scot.) ("Such a provision does in a sense give the seller security for the unpaid debts of the buyer.")

35. Hicks, *supra* note 1, at 399; see generally GOODE, *supra* note 5; DAVIES, *supra* note 6.

36. BLACK'S LAW DICTIONARY 1037 (6th ed. 1990).

37. GOODE, *supra* note 5, at 88, 95.

38. See *Re Andrabell Ltd.*, [1984] 3 All E.R. 407 (Eng. Ch.).

39. See *Borden (U.K.) Ltd. v. Scottish Timber Prods. Ltd.*, 1981 Ch. 25 (Eng. 1979).

40. *Stroud Architectural Servs. Ltd. v. John Laing Constr. Ltd.*, 35 Con L.R. 135 (Eng. Q.B. 1993), available in LEXIS, Enggen Library, Cases File, at *6.

A. *Simple Retention of Title*

In England, simple RT clauses are “impregnably established” as valid.⁴¹ One of the earliest cases to uphold such a clause was the 1895 case of *McEntire v. Crossley Bros.*⁴² Indeed, simple RTs are even sanctioned under Section 19(1) of the Sales of Goods Act of 1979.⁴³ In *Romalpa*, for instance, the court noted, “it is admitted that the [sellers] are the owners of the remaining unsold [goods] held by the receiver, and that they are entitled to an order for its delivery up to them.”⁴⁴ Similarly, in *Compaq Computer Ltd. v. Group Ltd. Abercorn*,⁴⁵ products supplied by the seller and remaining in the buyer’s inventory, which had not been “disposed of by [the buyer] by way of sale, hire or lease,” were returned to the seller by the receiver without contest. Since the mid-1970s, English courts have consistently upheld simple RT clauses.

B. *Extended Retention of Title*

Extended RT clauses are those which attempt to “extend” the seller’s title to the proceeds of the buyer’s subsale of goods supplied. As mentioned above,⁴⁶ the dramatic rise in England of the use of RT clauses dates from the *Romalpa* decision.⁴⁷ That case is generally seen as having established the validity of extended RT clauses, namely that sellers selling goods “under contracts containing [an RT] clause [can] trace their title into money which [constitutes] the proceeds of sale by the buyers of [goods] supplied by the sellers.”⁴⁸ Nevertheless, among the principal RT cases, the validity of extending an RT clause to the proceeds of a subsale has been one of the most commonly litigated issues. That this issue continues to arise more than fifteen years after *Romalpa* illustrates that the seller’s right to claim the proceeds of a buyer’s subsale under an RT clause remains at best “speculative.”⁴⁹ Part of the explanation for the judicial reluctance to uphold extended RT clauses may lie in the historic tension in English law between the security of property rights and the protection of commercial transactions:

In the development of our law, two principles have striven for mastery. The first is the protection of property. No one can give a better title than he himself possesses. The second is the protection of commercial transactions. The person who takes in good faith and for value without notice should get a good title. The first

41. See *Hicks*, *supra* note 1, at 403.

42. 1895 App. Cas. 457 (appeal taken from Ir.).

43. See *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.*, [1976] 1 W.L.R. 676, 680 (Eng. C.A.).

44. *Supra* note 5 at 680.

45. 1991 B.C.C. 484 (Eng. Ch.), available in LEXIS, Enggen Library, Cases File, at *10.

46. See *supra* note 6.

47. *Supra* note 5.

48. *Clough Mill Ltd. v. Martin*, [1985] 1 W.L.R. 111, 114 (Eng. C.A. 1984).

49. *Hicks*, *supra* note 1, at 410.

principle has held sway for a long time, but it has been modified by common law itself and by statute so as to meet the needs of our own times.⁵⁰

Perhaps the ascendancy of "protection of commercial transactions" is such that courts are hesitant to uphold the former principle by extending a seller's title in goods to the proceeds of a sales transaction to which the seller was not a party. In any event, since *Romalpa* "there has been a steady retreat by the courts away from allowing recovery of proceeds of sale of either original goods or products."⁵¹

The difficulty sellers have encountered is that in order to trace the title in goods to the proceeds of a subsale, the seller must establish that the buyer holds those proceeds as the seller's fiduciary.⁵² If this fiduciary requirement cannot be established, the extended RT clause is seen as a charge over the proceeds and as such, void if not registered pursuant to section 93 of the Companies Act of 1989. The basis for this fiduciary requirement can be found in the principle enunciated in the case known as *Re Hallett's Estate*.⁵³ Lord Justice Thesiger expressed this principle as being that "wherever a specific chattel is intrusted by one man to another, either for the purposes of safe custody or for the purpose of being disposed of for the benefit of the person intrusting the chattel then, either the chattel itself, or the proceeds of the chattel . . . may be followed at any time" ⁵⁴ Thus:

An unpaid seller, who contends for a direct claim (other than by way of charge) to the proceeds of sale of goods sub-sold by the original buyer, cannot establish an equitable right to . . . the proceeds simply by relying on the retention of title to the physical goods sub-sold. There is no equity to trace into a mixed fund in the absence of a fiduciary relationship. The unpaid seller must establish that there was a fiduciary relationship between himself and the original buyer affecting the proceeds of sale.⁵⁵

This hurdle was not encountered by the seller in *Romalpa* because a fiduciary relationship was conceded.⁵⁶ However, sellers in later cases, such as *Hendy Lennox* and *Re Andrabell*, found the requirement insurmountable. One factor the courts considered as militating against the sellers was the lack of any "express acknowledgment of a fiduciary relationship" in the terms of the RT clause.⁵⁷ A second factor weighing against the sellers was the extensive control exercised by the buyer over the delivered goods and the lack of limits on such control in the RT clause. For example, the contract in *Re Andrabell* did not

50. Diamond, *supra* note 13, at § 13.2.3 (quoting *Bishopgate Motor Fin. Corp. Ltd. v. Transport Brakes Ltd.*, [1949] 1 K.B. 322 (opinion of Denning, L.J.)).

51. WHEELER, *supra* note 18, at 32.

52. See *Re Andrabell Ltd.*, [1984] 3 All E.R. 407, 411 (Eng. Ch.).

53. *Knatchbull v. Hallett*, 13 Ch. D. 696 (Eng. 1880); see also GOODE, *supra* note 5, at 94.

54. *Hallett*, 13 Ch. D. at 723 (quoted in *Re Andrabell Ltd.*, [1984] 3 All E.R. at 413).

55. *Compaq Computer Ltd. v. Abercorn Group Ltd.*, 1991 B.C.C. 484 (Eng. Ch.), available in LEXIS, Enggen Library, Cases File, at *11.

56. *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.*, [1976] 1 W.L.R. 676, 680 (Eng. C.A.); see also *E. Pfeiffer Weinkellerei-Weineinkauf G.m.b.H. & Co. v. Arbuthnot Factors Ltd.*, [1988] 1 W.L.R. 150, 159 (Eng. Q.B. 1987).

57. *Re Andrabell Ltd.*, [1984] 3 All E.R. at 415; see also *Hendy Lennox (Indus. Engines) Ltd. v. Grahame Puttick Ltd.*, [1984] 1 W.L.R. 485, 498-99 (Eng. Q.B. 1983).

require the buyer to store the seller's goods separately from the buyer's other goods, it allowed the buyer to resell the seller's goods, and it did not state the seller's right to proceeds from sales of the products manufactured from the seller's goods.⁵⁸

The court also considered the buyer's freedom to manage the subsale's proceeds to be significant. First, the buyer was not required to keep the proceeds in a separate account, but rather, was free to mix the proceeds from subsale of the seller's goods with other monies:

It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money to be kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If, on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor.⁵⁹

Second, the buyers were not required to apply the subsale's proceeds against the purchase price owed to the seller. Instead, the contract granted the buyer credit from 30 to 60 days. Thus, for a period of time the buyer was free to use the subsale's proceeds in whatever manner she chose and could satisfy her obligation to the seller out of whatever funds she had available, whether or not these included proceeds from sale of the seller's goods. Such freedom to make use of the proceeds led Judge Staughton in *Hendy Lennox* to conclude:

Of course I must start with the presumption of a fiduciary relationship. That to my mind is neutralized by the agreement between the parties that the buyers should have credit for at least one month, and possibly two months. It is not easy to reconcile that with an obligation to keep the proceeds of re-sale in a separate account.⁶⁰

Sellers have attempted to solve the problems previously encountered by those sellers in *Hendy Lennox* and *Re Andrabell* by modifying the extended RT clauses. For example, the RT clause in *Tatung* provided that the purchaser acknowledges that he is in possession of any goods solely as "bailee" of the seller "until payment of the full price has been received [by the seller]," that the buyer will store the goods on her premises "separately" from the buyer's goods, and that the purchaser "shall be at liberty to agree to sell on any product produced from or with the [seller's] goods on the express condition that such an Agreement to sell shall take place as agents and bailees for the [seller] whether the intending Buyer sells on his own account or not and the entire proceeds thereof are held in trust for the [seller] and are not mingled with any other monies and shall at all times be identifiable as the [seller's] monies."⁶¹ To their chagrin,

58. *Re Andrabell Ltd.*, [1984] 3 All E.R. at 415.

59. *Id.*

60. *Hendy Lennox Ltd.*, [1984] 1 W.L.R. at 499.

61. *Tatung (U.K.) Ltd. v Galex Telesure Ltd.*, 1989 B.C.C. 325 (Eng. Q.B. 1988), available in LEXIS, Enggen Library, Cases File, at *4-5.

however, despite such “carefully drafted, detailed commercial documents,”⁶² the sellers had no greater success than their counterparts in the earlier cases.

The difficulty for sellers is that courts have felt free essentially to ignore the explicit language of an RT clause purporting to create a fiduciary relationship. The justification for this liberal approach has a couple of bases. First, the fact that a buyer is termed a bailee or an agent does not necessarily mean that the buyer is a fiduciary. This point was made in *Hendy Lennox*.⁶³ Second, the interpretive method applied to RT clauses looks to the overall context of the relationship between the buyer and seller to determine the “commercial reality” of the transaction.⁶⁴ As Judge Mummery put it in *Compaq*,

The existence of a fiduciary relationship in [the context of an extended RT clause] depends on whether the parties have agreed [upon] terms, either expressly or by implication, which, when construed in the context of the whole agreement and the surrounding circumstances of the individual case, are appropriate to create such a relationship.⁶⁵

Thus, regardless of the characterization the parties give to their respective positions, the court will feel free to form its own conclusion about the relationship.

Exercising this interpretive freedom, courts more recently have struck down extended RT clauses on the ground that where the seller’s interest in the subsale’s proceeds is determinable upon the buyer’s payment of the purchase price of those goods, then the buyer’s obligation regarding the proceeds is not of a fiduciary nature. The source for this approach is often traced to the dictum of Judge Slade in *Re Bond Worth Ltd.*: “In my judgment, any contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt . . . must necessarily be regarded as creating a mortgage or charge, as the case may be.”⁶⁶ In *Compaq*, Judge Mummery makes clear the problem this poses for a seller claiming a right to the proceeds of the buyer’s subsale under an extended RT clause:

Once it is accepted that the beneficial interest in the proceeds of sale [is] determinable on the payment of debts, [the seller] is faced with the difficulty that the rights and obligations of the parties [are] in reality and in substance characteristic of those of the parties to a charge and not of those in the trustee/beneficiary or other fiduciary relationship.⁶⁷

Because it is difficult to imagine a sales transaction subject to an RT clause in which the seller’s interest in the proceeds would *not* be determinable upon the payment of the buyer’s debts, it seems highly unlikely that any extended RT

62. *Compaq Computer Ltd. v. Abercorn Group Ltd.*, 1991 B.C.C. 484 (Eng. Ch.), available in LEXIS, Enggen Library, Cases File, at *7.

63. *Hendy Lennox Ltd.*, [1984] 1 W.L.R. at 498.

64. *Modelboard Ltd. v. Outer Box Ltd.*, 1992 B.C.C. 623 (Eng. Ch.), available in LEXIS, Enggen Library, Cases File, at *6.

65. *Compaq*, [1991] B.C.C. 484, available in LEXIS, Enggen Library, Cases File, at *7.

66. *Re Bond Worth Ltd.*, [1980] 1 Ch. 228, 248 (Eng. 1979).

67. *Compaq*, 1991 B.C.C. 484, available in LEXIS, Enggen Library, Cases File, at *13; see also *E. Pfeiffer Weinkellerei-Weineinkauf G.m.b.H. & Co. v. Arbuthnot Factors Ltd.*, [1988] 1 W.L.R. 150, 159 (Eng. Q.B. 1987) (“It seems inappropriate to me to describe the relationship of a seller and a buyer in possession to whom title has not yet passed as that of bailor/bailee . . .”).

clause could survive judicial scrutiny. As Professor Hicks has observed, “[t]he *Romalpa* case seems no longer to be a relevant authority, and the courts are now consistently holding claims to proceeds of sale to be charges.”⁶⁸

Attempts to extend RT clauses to cover the buyer’s claims against sub-purchasers have been similarly unsuccessful. For instance, in *Pfeiffer v. Arbuthnot Factors*,⁶⁹ Pfeiffer, a German exporter, sold wine on credit to an English importer. The contract contained an RT clause which provided, inter alia, that “[a]ll claims that [the buyer] gets from the sale or due to another legal reason regarding [the seller’s] goods, with all rights including [the buyer’s] profit amounting to [the buyer’s] obligations towards [the seller], will be passed on to [the seller].”⁷⁰ The buyer sold the wine on credit terms and then sold its claims against the subpurchasers to Arbuthnot Factors. After subpurchasers began making payments to Arbuthnot, Pfeiffer brought an action against Arbuthnot claiming it had a superior title to the payments from the subpurchasers. Judge Phillips first noted “that the normal implication that arises from the relationship of buyer and seller is that if the buyer is permitted to sub-sell in the normal course of his business, he will do so for his own account;”⁷¹ that is, the buyer does not act as the seller’s fiduciary. He then concentrated on the RT clause’s wording which suggested that any claims arising from subsale were owned by the buyer and concluded that since the buyer had contracted to assign the *buyer’s* claims against subpurchasers, Pfeiffer’s interest in the claims were in the nature of a charge and therefore void for want of registration under the Companies Act of 1948.⁷²

In *Tatung*, Judge Phillips reached a similar conclusion. *Tatung*, a manufacturer of television, video and other electrical equipment, supplied goods to Galex under an RT clause. Galex then hired-out some of the goods. Striking down the RT clause as extended to the proceeds of the leases, Judge Phillips held that “what seems to me quite clear on the wording of [the RT clause] is that the [seller’s] interest in the hire debts was agreed to be defeasible upon payment of the debts owed to the [sellers] and, in consequence, an interest by way of security rather than an absolute interest.”⁷³ In a two-page opinion, the court in *Re Weldtech Equipment Ltd.* found it necessary only to cite to Judge Phillips’ analysis in *Tatung* to reach its conclusion.⁷⁴ There, the court held that an extended RT purporting to assign to the seller the buyer’s claims against subpurchasers was limited in effect to a charge and as such, was void against the liquidator for want of registration.⁷⁵ Therefore, as with RT clauses extended to

68. Hicks, *supra* note 1, at 412-13.

69. [1988] 1 W.L.R. 150 (Eng. Q.B. 1987).

70. *Id.* at 154.

71. *Id.* at 159.

72. *Id.* at 160-61.

73. *Tatung (U.K.) Ltd. v Galex Telesure Ltd.*, 1989 B.C.C. 325 (Eng Q.B. 1988), available in LEXIS, Enggen Library, Cases File, at *9.

74. *Re Weldtech Equip. Ltd.*, 1991 B.C.C. 16, 16 (Eng. 1990).

75. *Id.*

the proceeds of a buyer's subsale, it appears that any effort to extend an RT clause to a buyer's claims against subpurchasers of the seller's goods is also likely to prove ineffective.

No court has yet held that an extended RT clause is *prima facie* invalid. Furthermore, scholars continue to imply that, at least in theory, such clauses could be effective.⁷⁶ Nevertheless, considering the commercial context to which these clauses are addressed (i.e., the desire of a seller to secure the payment of goods delivered to a buyer on credit) and that claims based upon extended RT clauses have been consistently unsuccessful,⁷⁷ it is difficult to imagine under what circumstances an extended RT clause would be upheld.

C. Enlarged Retention of Title

Enlarged RT clauses are those which have been "enlarged" to cover products made by the buyer in whole or in part with goods supplied by the seller. There are two broad categories of fact patterns which raise issues pertaining to enlarged RT clauses: 1) where the seller's goods are "commingled" with other goods, as, for example, where the seller's goods are so transformed that they effectively cease to exist; and 2) where the seller's goods are "mixed" with other goods such that they are no longer clearly identifiable or cannot be separated from the other goods.

Regarding the first situation, there is some authority that in certain cases a seller with an RT clause whose goods are commingled will become a tenant in common of the new product; each tenant shares in proportion to her respective contribution.⁷⁸ However, the conclusion drawn from the principal RT cases seems to be that an RT clause will be ineffective in this situation. For example, in *Borden*, where the seller supplied resin to the buyer to be used in making glue for chipboard manufacturing, the court held "there is no doubt that as soon as the resin was used in the manufacturing process it ceased to exist as resin, and accordingly the title to the resin simply disappeared."⁷⁹ The product in which the seller's goods are commingled is therefore subject to a new title, and this title vests in the buyer. As a result, any security interest in the new products held by the seller must arise through a grant by the buyer to the seller and is therefore in the nature of a charge over the newly manufactured products.⁸⁰ As Judge Phillips stated in *Tatung*, where he summarized the current state of the law regarding RT clauses, "[w]here the clause provides that title in [commingled] goods is to vest in the vendor by way of security, this will result in the creation of a charge over the [commingled] goods. Such charge is registrable

76. See GOODE, *supra* note 5, at 97-99; also see DAVIES, *supra* note 6, at 92-93.

77. Hicks, *supra* note 1, at 409.

78. GOODE, *supra* note 5, at 92.

79. *Borden (U.K.) Ltd. v. Scottish Timber Prods. Ltd.*, 1981 Ch. 25, 35 (Eng. 1979).

80. *Armour v. Thyssen Edelstahlwerke A.G.*, [1990] 3 W.L.R. 810, 815 (Eng. H.L.) (appeal taken from Scot.)

under § [93]”⁸¹ In short, any clause purporting to retain title over comingled goods is likely to be held void for want of registration.

The second situation, where an RT clause is enlarged to cover mixed goods, is less clear. Scholars seem to agree that such a clause could be valid.⁸² For example, in *Clough Mill*,⁸³ the seller supplied yarn to be used by the buyer in manufacturing fabrics. Judge Goff commented that “it is no doubt true that, where A’s material is lawfully used by B to create new goods, whether or not B incorporates other material of his own, the property in the new goods will generally vest in B But it is difficult to see why, if the parties agree that the property in the goods shall vest in A, that agreement should not be given effect to.”⁸⁴

However, although a number of the principal RT clause cases have involved mixed goods, the question of an RT clause’s validity regarding these goods was never the decisive issue. For the most part, opinions on this subject have been dicta. Furthermore, while some dicta seems to support the idea of a valid mixed-goods RT clause, as the example just mentioned shows, other statements appear to point in the other direction. In *Re Peachdart Ltd.*,⁸⁵ the seller supplied leather under an RT clause to a manufacturer of high-quality leather handbags. The court’s answer to the question of whether the seller retained title in the leather once it became a handbag is similar to the approach taken in *Borden* regarding resin. Although here the seller’s goods had not ceased to exist and were potentially identifiable even though they were no longer in their original state, it was held that title passed to the buyer nevertheless. Admitting that it did “some violence” to the express language of the RT clause, Judge Vinelott stated:

[T]he parties must have intended that at least after a piece of leather had been appropriated to be manufactured into a handbag and work had started on it . . . the leather would cease to be the exclusive property of the [sellers] . . . and that [sellers] would thereafter have a charge on handbags in the course of manufacture and on the distinctive products which would come into existence at the end of the process of manufacture.⁸⁶

Although opinions point in either direction on this question, there are no reported cases where claims of entitlement to products made from goods sold

81. *Tatung (U.K.) Ltd. v Galex Telesure Ltd.*, 1989 B.C.C. 325 (Eng. Q.B. 1988), available in LEXIS, Enggen Library, Cases File, at *7.

82. One exception to this generality is *Hendy Lennox*, where Judge Staughton’s conclusion that the seller did retain title to its engine after incorporation into the generator set was necessary to the decision. However, this aspect of the decision was described by the Judge as simply a “sub-issue.” Having decided that the seller had retained a proprietary right in the engine, the principal issue was whether that right was transformed upon the sale of the generator set into a proprietary right in the proceeds of the sale.

83. See *supra* note 48.

84. *Hendy Lennox (Indus. Engines) Ltd. v. Grahame Puttick Ltd.*, [1984] 1 W.L.R. 485, 494 (Eng. Q.B. 1983).

85. 1984 Ch. 131 (Eng. 1983).

86. *Id.* at 142-43.

under an RT clause have succeeded.⁸⁷ Furthermore, there are several reasons to believe that such claims are unlikely to succeed in the future. The success of any claim to mixed goods based upon an RT clause is liable to turn on the subjective question of whether the seller's goods remain identifiable. This is suggested by comments like those made by Judge Hart, Q.C., in *Modelboard*: "I see no reason why the [seller] should not retain property in the [good] *so far as it remained identifiable* notwithstanding its having had value added to it by the plaintiff's labour and materials, if that is what the contract on its true construction provides."⁸⁸ Whether a particular good has or has not ceased to be identifiable in the process of being mixed with other goods will be open to a range of possible interpretations. Thus, the court will have a considerable degree of latitude to arrive at whatever it considers to be the appropriate result.

Judge Hart's reference to the "true construction" of the contract points to another factor imparting a great degree of decisional freedom. It is often mentioned that the method employed for interpreting RT clauses is to look to "the whole of the transaction."⁸⁹ As Judge Mummery puts it in *Compaq*, "the rights and duties of the parties depend on the relevant documents and other communications between them, considered in the light of the relevant surrounding circumstances and with particular regard to their practical effect."⁹⁰ Again, with such a broad range of relevant factors, a court faces few constraints in arriving at whatever decision it considers correct.

Of course, such leeway in arriving at decisions need not necessarily be bad from the seller's perspective. It might allow the court to decide in the seller's favor. However, the courts have focused on two factors which suggest such favorable outcomes are not likely. First, there has been discomfort with the potential for windfall profits to the seller if an RT clause covering mixed goods is upheld. As Lord Justice Goff said in *Clough Mill*:

[T]he difficulty of construing the [RT clause] as simply giving rise to a retention by the seller of title to the new goods is that it would lead to the result that, on the determination of the contract under which the original material was sold to the buyer, the ownership of the seller in the new goods would be retained by the seller uninhibited by any terms of the contract, which had then ceased to apply and I find it impossible to believe that it was the intention of the parties that the seller would thereby gain the windfall of the full value of the new product, deriving as it may well do not merely from the labour of the buyer but also from materials that were his, without any duty to account to him for any surplus of the proceeds of sale above the outstanding balance of the price due by him to the seller.⁹¹

Second, where the buyer is authorized to combine the seller's goods with other materials, this has been seen as a factor establishing an agreed upon degree

87. Hicks, *supra* note 1, at 398.

88. *Modelboard Ltd. v. Outer Box Ltd.*, 1992 B.C.C. 623 (Eng. Ch.), available in LEXIS, Enggen library, Cases File, at *10 (emphasis added).

89. *Re Curtain Dream plc.*, 1990 B.C.L.C. 925, 934 (Eng. Ch.).

90. *Compaq Computer Ltd. v. Abercorn Group Ltd.*, 1991 B.C.C. 484 (Eng. Ch.), available in LEXIS, Enggen Library, Cases File, at *7.

91. *Clough Mill Ltd. v. Martin*, [1985] 1 W.L.R. 111, 120 (Eng. C.A. 1984).

of dominion by the buyer over the goods that is inconsistent with characterization of the goods as the seller's sole property. Such was the view of Judge Slade in *Re Bond Worth*:

The implicit authority and freedom of [the buyer] to employ the relevant raw materials, products and other moneys as it pleased and for its own purposes during the subsistence of the operation of the retention of title clause were in my judgment quite incompatible with the existence of a relationship of [the buyer] as trustee and [the seller] as beneficiary solely and absolutely entitled to such assets, which is the relationship asserted.⁹²

The seller's difficulty is that where the buyer has been authorized to mix other goods with the seller's, a court will usually find that the buyer thereby exercised significant control over the seller's goods. Similarly, it might often be found that even where the mixing is slight, it is sufficient to return to the seller a substantial profit were the seller to reclaim the goods. Furthermore, almost any degree of mixing occurring in the context of an ordinary supplier/manufacturer relationship could render the seller's goods arguably unidentifiable. Combining these factors with the considerable interpretative latitude with which courts approach RT clauses, it seems unlikely that any seller with a claim to mixed goods based upon a RT clause will prevail.

In sum, despite some scholarly and judicial support for the possible validity of an enlarged RT clause, with unfavorable dicta in the principal RT cases, with no instances of such an RT clause being upheld and with numerous factors likely to be considered by a court, it is doubtful that an RT clause covering mixed goods would be upheld in England. As a result, it appears enlarged RT clauses, despite their theoretical availability, are ineffective.

D. All-Monies Retention of Title

All-monies RT clauses are those in which the seller retains title to all of her goods in the buyer's inventory until "all monies" owed her by the buyer have been paid. Although it is estimated that about half of all RT clauses contain all-monies provisions,⁹³ the current status of these clauses is uncertain under English law.⁹⁴ As with the "mixed" version of enlarged RT clauses, numerous cases have involved all-monies RT clauses, but in none has the validity of the all-monies provision been the decisive issue. For example, in *Romalpa* the RT clause provided that "[t]he ownership of the material to be delivered by [the seller] will only be transferred to purchaser when he has met all that is owing to [the seller], no matter on what grounds."⁹⁵ However, the issue was the right of the seller to trace her title into the proceeds of the buyer's subsales.⁹⁶ Similarly,

92. In *Re Bond Worth Ltd.*, 1980 Ch. 228, 265-66 (Eng. 1979).

93. Hicks, *supra* note 1, at 400 (citing Spencer, *The Commercial Realities of Reservation of Title Clauses*, 1989 J.B.L. 220, 227).

94. See Diamond, *supra* note 13, § 17.12; see also Hicks, *supra* note 1, at 403.

95. *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.*, [1976] 1 W.L.R. 676, 679 (Eng. C.A.).

96. *Id.*

the RT clause in *Borden* included an all-monies provision, but there the decisive issue was whether an RT clause could be enlarged to cover products resulting from the commingling of the seller's goods with other goods.⁹⁷ Nevertheless, two cases have considered the validity of all-monies RT clauses, albeit by way of dicta.

The earlier case is *Clough Mill Ltd. v. Martin*.⁹⁸ There, Lord Justice Goff raised the issue of how the seller's all-monies RT clause should be interpreted. He concluded that during the contract's subsistence, the seller retained title to the delivered goods and was therefore free to resell them. However, the seller would be limited to selling only an amount of goods necessary to discharge the outstanding purchase price and would have to account to the buyer for any proceeds in excess of this amount:

Once the contract has been determined, as it will be if the buyer repudiates the contract and the seller accepts the repudiation, the seller will have his rights as owner (including, of course, his right to sell the goods) uninhibited by any contractual restrictions though any part of the purchase price received by him and attributable to the material so resold will be recoverable by the buyer on the ground of failure of consideration, subject to any set-off arising from a cross-claim by the seller for damages for the buyer's repudiation.⁹⁹

In *Amour v. Thyssen*,¹⁰⁰ a unanimous House of Lords considered "interesting" Lord Justice Goff's theory that a seller should be accountable to the buyer for part payment of any resold goods, but concluded that a solution was unnecessary both to the decision there and to the decision in *Clough Mill*. Nevertheless, Lord Kinkel opined that:

Where . . . the seller of goods retains title until some condition has been satisfied, and on failure of such satisfaction repossesses them, then he is not obliged to account to the buyer for any part of the value of the goods The same is true, in my opinion, where the provision covers not only the price of the very goods which are the subject of the particular contract of sale, but also debts due to the seller under other contracts.¹⁰¹

For some, these cases have answered doubts as to whether an all-monies RT clause is merely a disguised charge.¹⁰² Yet, the most difficult issue presented by such clauses is still unanswered. Theoretically, an all-monies RT clause permits the seller to repossess all of the seller's goods in the buyer's possession even though some, or possibly most, of these goods have been paid for. Thus, there is potential for significant windfall profits to the seller and forfeiture to the buyer. One wonders whether a court faced with this situation would not strike down the RT clause rather than countenance an inequitable result. The dilemma for a seller is that "[i]f (to lessen the hardship to the buyer) the clause requires the seller to account for any excess proceeds of sale over

97. See *Borden (U.K.) Ltd. v. Scottish Timber Prods. Ltd.*, 1981 Ch. 25 (Eng. 1979).

98. [1985] 1 W.L.R. 111 (Eng. C.A. 1984).

99. *Id.* at 118.

100. [1990] 3 W.L.R. 810, 816 (Eng. H.L.)(appeal taken from Scot.).

101. *Id.*

102. GOODE, *supra* note 5, at 101.

what is owed to him, then this appears similar to a mortgagee's obligation to account for any surplus on realization of security. Such a feature is likely to indicate a registrable charge."¹⁰³ On the other hand, if no such provision is made, a court may still decide the clause is a registrable charge to avoid inequity.

There is some scholarly support for the validity of all-monies RT clauses. Professors Hicks¹⁰⁴ and Goode¹⁰⁵ point out that the difficulty of partial payment is also posed by the unquestionably valid simple RT clauses. That is, where title is retained under a single contract and the buyer makes substantial payments but then defaults, if the seller then repossesses all the goods, the same problem of windfall profits and forfeiture arises. Professor Hicks argues:

The only logical and consistent view must therefore be that if the contractual terms say that the seller can recover everything still identifiable without giving a refund, then retaining title either against payment of the price or against all monies payable must be equally valid in the absence of registration Simple retention is not security, so nor can all-monies clauses be, irrespective of the possibility that part payment may occur.¹⁰⁶

Despite such theoretical support, however, there are a number of reasons to think that were an all-monies RT clause to be tested, it would not be upheld. First, it would be difficult as a practical matter to draft an all-monies RT clause that could survive the requirements the courts have indicated would have to be met. Second, if a case were to test such a clause, there is the possibility that substantial forfeiture to the buyer might be involved and that this would motivate the court to find some way to avoid upholding the clause. Finally, there is the overall reluctance of English courts to give priority to an RT holder over other secured creditors. Thus, however logically consistent it might be to uphold an all-monies RT clause, it seems most likely that in the end, such a clause would be struck down.

To summarize, the validity of simple RT clauses is well established. However, the usefulness of these clauses to English trade creditors is limited. This has led to the creation of a number types of "complex" RT clauses. But whereas simple RT clauses are not very useful, complex RT clauses are not very effective. Extended RT clauses, despite the *Romalpa* decision, have been consistently struck down. Enlarged/commingled clauses are clearly invalid under *Borden*, and while the status of enlarged/mixed clauses is uncertain, no such clauses have yet been upheld or are likely to be upheld in the future. The validity of all-monies clauses is also uncertain. Although there is some theoretical support for such clauses, several factors point to the conclusion that such a clause would not be upheld.

103. Hicks, *supra* note 1, at 401.

104. *Id.* at 403.

105. GOODE, *supra* note 5, at 101.

106. Hicks, *supra* note 1, at 403.

Thus, at the end of a tortuous path through a maze of obscure rules, English law is arriving at the conclusion that, for the most part, RT clauses are invalid and security for English trade creditors is simply not available.

V.

RETENTION OF TITLE IN U.S. LAW

Unlike the RT/security interest distinction under the common law, the U.C.C. clearly recognizes an RT clause as a security interest. First, section 9-202 provides that the placement of title to collateral is irrelevant.¹⁰⁷ Even if the parties choose to couch the grant of a security interest in terms of an RT clause, Article 9 will still apply. Next, several sections establish the equivalency of an RT clause and a security interest explicitly. Section 2-401(1) provides that “[a]ny retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.” Using much the same language as section 2-401(1), section 1-201(37) also equates RTs with security interests: “The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer . . . is limited in effect to a reservation of a ‘security interest.’” Finally, section 9-102(2) provides that, “This Article applies to security interests created by contract including . . . title retention contract” Taken together, a seller who delivers goods to a buyer subject to an RT clause will have something less than an ownership interest in the property: namely, a seller will have a security interest referred to under the U.C.C. as a ‘Purchase Money Security Interest’ (PMSI).¹⁰⁸ “Thus, no matter what the underlying contract may say about the seller’s right to retain title or to reclaim title, these will be irrelevant and, indeed, invalid. Article 9 treats the conditional seller . . . exactly the same as a lender of money who has a security interest in the sold goods.”¹⁰⁹

*Motors Insurance Corp. v. Safeco Insurance Co.*¹¹⁰ provides an example of the irrelevance of any formal placement of title under the U.C.C. Motor Insurance issued a collision policy to an auto dealership, Scott Oldsmobile, Inc., covering automobiles owned and held for sale by Scott. One Friday, a Mr. Grugin bought a car from Scott. Payment consisted of Grugin’s old car and cash. Grugin left his old car with Scott and drove the new car home. “All that remained was for title papers to be processed and for Grugin to return the next day with a check for the cash due on the trade.”¹¹¹ That night, Grugin’s son smashed the car. Grugin nevertheless paid Scott the cash he still owed, and the

107. U.C.C. § 9-202 (1990) (“Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.”)

108. U.C.C. § 9-107 (1990); see *Mayor’s Jewlers v. Levinson*, 349 N.E.2d 475, 476-77 (Ill. App. Ct. 1976).

109. Morris Shanker, *The General Secured Transactions Law Under Article 9 of the American Uniform Commercial Code and the British Crowther Report (Part 5)*, in *SECURITY OVER CORPORATE MOVEABLES* 49, 54 (J. G. Sauveplanne ed., 1974).

110. 412 S.W.2d 584 (Ky. 1967).

111. *Id.* at 585.

sale and title papers were fully executed and delivered. However, Grugin's insurer, Safeco Insurance, Inc., refused to pay for the damage on the ground that title had not yet passed to Grugin at the time of the accident and that therefore, Scott's insurer, Motors Insurance, was liable. The court held against Safeco, noting that Grugin had taken physical possession of the vehicle as purchaser and that under the U.C.C. title passes at the time and place of delivery. The fact that the title papers had not been delivered was irrelevant.¹¹²

However created, under the U.C.C. a security interest will not be enforceable until it has "attached."¹¹³ Indeed, "until the security interest attaches, the putative secured party is, in fact, unsecured."¹¹⁴ Attachment occurs when the three requirements of section 9-204(1) are fulfilled.¹¹⁵ Usually, a formally concluded sales contract containing an RT clause will fulfill these requirements. Once attachment has occurred, the RT clause is enforceable by the seller against the buyer.¹¹⁶

Enforcement against third parties involves an additional step known as "perfection." The requirements for perfection are defined in sections 9-203 through 9-206. In brief, while there are instances in which perfection can be accomplished either automatically or by the secured party taking possession of the collateral, normally perfection occurs when public notice of the security interest is given by the filing of a financing statement.¹¹⁷

Of greater importance to the present discussion are the special priority rules accorded PMSIs under subsections 9-312(3), (4), and (5). The basic U.C.C. approach to priorities is the so-called first-to-file-or-perfect rule. Under section 9-312(5)(b), if two security interests conflict and neither is perfected or has been filed, then the first interest to attach has priority. Under section 9-312(5)(a), if neither interest is perfected and both are attached, then the first to be filed has priority. Finally, section 9-312(5)(a) provides that if both security interests have been filed, then the first to perfect has priority. However, if the security interest is a PMSI, these first-to-file-or-perfect rules may be overridden. Under subsection 9-312(3), the seller has priority even over prior perfected security interests in inventory or identifiable proceeds from inventory if the PMSI is perfected at

112. *Id.* at 585.

113. U.C.C. § 9-203 (1990).

114. JOHN HONNOLD ET AL., *LAW OF SALES AND SECURED FINANCING* 529 (1993).

115. U.C.C. § 9-204(1) & (2) (1990) provide:

(1) Except as provided in subsection (2), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral. (2) No security interest attaches under an after-acquired property clause to consumer goods other than accessions (Section 9-314) when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.

The Official Comments to the 1962 Official Text provide:

1. Subsection (1) states three basic prerequisites to the existence of a security interest: agreement, value, and collateral. When these three coexist a security interest may, in the terminology adopted in this Article, attach.

116. U.C.C. § 9-203(2) (1990).

117. *See* Shanker, *supra* note 109, at 57.

the time the buyer takes possession of the goods and if the seller complies with certain notification requirements. Under sub-section 9-312(4), “[a PMSI] in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the [PMSI] is perfected at the time the debtor receives possession of the collateral or within ten days thereafter.” The rationale for the special treatment accorded PMSIs is essentially the same as the social and economic policy justifications for RT clauses. That is, these special priority rules allow a debtor to obtain additional secured financing when the first-to-file creditor is unwilling to provide it, possibly enabling the debtor to stay in business and pay off the earlier creditor; the prior secured creditors are not made worse off by the PMSI creditor’s priority.¹¹⁸

On balance, “the overwhelming opinion in the United States” seems to be that Article 9 “has worked well.”¹¹⁹ Interestingly enough, approval for Article 9 appears to be overwhelming in England also, at least among scholars.¹²⁰ The treatment of RT clauses under the U.C.C. is one example of the virtues of Article 9. The U.C.C. approach rejects the artificial RT-clause/security-interest distinction employed under English law and thereby avoids the complications this distinction creates.¹²¹ The U.C.C. recognizes the superficiality of such a distinction and the reality, recognized by at least some English jurists, that in most instances RT clauses are nothing more than another form of a security interest.¹²² By recognizing RT clauses for what they are, the U.C.C. approach better conforms to the realities of the commercial world and thus more effectively serves the needs of buyers and sellers. Numerous calls over the last twenty years have been made to reform England’s “profoundly unsatisfactory”¹²³ approach to RTs—and secured transactions in general—along the lines of Article 9.¹²⁴ As one author puts it, “[w]hen eventually a serious attempt is made at [reform], the model most likely to commend itself is the United States’ Uniform Commercial Code, which has the great virtues of directness, relative simplicity and, above all, practicality.”¹²⁵ The following examination of the various types of RT clauses and their treatment under English law will make it easy to appreciate the enthusiasm for Article 9 of the UCC.

A. Simple Retention of Title

Under U.S. law a simple RT clause is valid, even where it has not been perfected. To this extent, the operation of a simple RT clause is virtually the

118. See HONNOLD ET AL., *supra* note 114, at 717-20.

119. Diamond, *supra* note 13, § 4.13.

120. Nearly every book, report, essay and article consulted for this paper discusses with approval the Article 9 approach to RT clauses.

121. See *supra* text accompanying notes 35-37.

122. See *supra* text accompanying notes 12-14.

123. GOODE, *supra* note 5, at 109.

124. See Diamond, *supra* note 13; see also *Report of the Committee on Consumer Credit* (Cmd. 4596, 1971)(also known as the “Crowther Report”); *Report of the Review Committee on Insolvency Law and Practice* (Cmd. 8558, 1982)(also known as the “Cork Report”).

125. JOHN PARRIS, *RETENTION OF TITLE ON THE SALE OF GOODS* 155-56 (1982).

same under either U.S. or English law. All that is required is that the buyer and seller incorporate the clause into their contract. This principle is illustrated by *Kansas State Bank v. Overseas Motosport, Inc.*¹²⁶ There, Kansas State Bank made a \$1,500 loan to Steven Hunter who used the money to buy a motorcycle from Overseas Motosport. When Hunter made out his note to the bank, he also signed a security agreement which described the motorcycle as collateral for the loan. On the back of the money order addressed to Overseas Motosport given to Hunter, the bank stamped the legend, "[t]he endorsers of this money order guarantee that the Kansas State Bank of Manhattan, Kansas, has a recorded first lien against 1974 Suzuki GT-750, #52811."¹²⁷

However, Overseas Motosport never recorded the lien. When Hunter failed to make any payments to Kansas State Bank, the bank brought a breach of contract action against Overseas Motosport. The bank's theory was that it had been unable to recover the motorcycle from Hunter because Overseas Motosport failed to record the lien per the agreement on the back of the money order. However, the court held that the proximate cause of the bank's loss was not Overseas Motosport's breach of its agreement with the bank, but rather the bank's own misunderstanding of its rights.¹²⁸

The court first pointed out that "[t]he [U.C.C.] does not require that a security interest be perfected by filing or otherwise in order to be valid."¹²⁹ It then noted that the three attachment requirements of U.C.C. 9-204(1) had been met between Kansas State Bank and Hunter; there had been an agreement that the security interest would attach, value had been given and the debtor had rights in the collateral.¹³⁰ Thus, the bank had a valid lien, and there was nothing to prevent it from foreclosing against Hunter.¹³¹ Since no third parties were involved, there was no question of priorities.¹³² Therefore, the issue of whether the security interest had been perfected was irrelevant. The bank had failed to appreciate the distinction that perfection is only required to maintain a security interest against a third party; between the creditor and debtor, all that is needed is attachment.¹³³

However, there are differences in the protection provided by a simple RT clause under U.S. law and under English law. First, as mentioned above,¹³⁴ a U.S. seller might not be able to reclaim goods from the buyer because regardless of any terms purporting to retain title in the seller, she will be limited to a PMSI in the goods. Second, should the buyer become insolvent, a seller in the U.S. holding an unperfected RT clause will be unable to enforce her interest against

126. 563 P.2d 414 (Kan. 1977).

127. *Id.* at 415.

128. *Id.* at 418.

129. *Id.* at 415.

130. *Id.*

131. *Id.* at 418.

132. *Id.* at 416.

133. *Id.* at 416-17.

134. *See supra* text accompanying notes 115-116.

the receiver and thus will probably be worse off than a similarly positioned seller in England. This is because under U.S. bankruptcy law, the bankruptcy trustee acquires “the rights and powers of the ideally situated hypothetical lien creditor”¹³⁵ An unperfected security interest is subordinate to the interests of a lien creditor under U.C.C. section 9-301(1)(b). Thus, unless the seller with an unperfected RT clause can avail herself of the special priority rules afforded PMSIs,¹³⁶ she may have to get at the end of the line of creditors seeking satisfaction out of the buyer’s remaining assets.

The creditor in *In re Patricia Sullivan Phillips*¹³⁷ attempted to avoid this result. Phillips took possession of some garment industry equipment from the Middle Tennessee Industrial Development Association (MTIDA) pursuant to a letter sent to her by MTIDA. The letter specified the purchase agreement terms and provided that Phillips would be able to take possession of the equipment upon signing the letter. It also stated that “supporting documentation [would] be drafted and forwarded to [Phillips] promptly” and that by signing the letter, Phillips agreed to “execute such documents as may be reasonably required by [MTIDA].”¹³⁸ Phillips never made any of the agreed upon payments, and shortly after MTIDA demanded the equipment’s return, Phillips entered bankruptcy.

MTIDA argued that despite the purchase terms in the letter and Phillip’s possession, the references to exchanges of documentation showed that no purchase had in fact occurred. Therefore, MTIDA was entitled to the proceeds from the bankruptcy trustee’s sale of the equipment because at the time Phillips entered bankruptcy, MTIDA was still the owner of the equipment. However, the court considered that “[a]t best, the letter shows MTIDA’s intent that title would not pass until the other documents were completed and signed. But retention of title would only have given MTIDA a security interest.”¹³⁹ With no more than a security interest, as MTIDA conceded, it could not prevail against the trustee since it had taken no steps to perfect any such security interest. Through the interaction of 11 U.S.C. § 544’s placing the trustee in the position of an “ideally situated hypothetical lien creditor”¹⁴⁰ and of section 9-301(1)(b)’s subordinating unperfected security interests to those of a lien creditor, MTIDA’s claim was subordinate to the bankruptcy trustee.¹⁴¹

Thus, between the creditor and debtor the operation of a simple RT clause is more or less the same under either U.S. or English law. However, there are instances where between the creditor and a third party, the creditor could be worse off under U.S. law. In such instances, a seller might look wistfully to-

135. *Horizon Processing Co. v. Charter Int’l Oil Co.*, 49 B.R. 513, 517 (Bankr. M.D. Fla. 1985); *see also* 11 U.S.C. § 544 (1988).

136. *See supra* text accompanying notes 124-125.

137. 77 B.R. 648 (Bankr. E.D. Tenn. 1987).

138. *Id.* at 649.

139. *Id.* at 650.

140. *Id.* at 649.

141. *Id.* at 650.

wards the sellers in cases like *Romalpa* and *Compaq*. Although in the U.C.C.'s terminology, the *Romalpa* and *Compaq* sellers merely had unperfected security interests, by virtue of the English law's treatment of simple RT clauses, they were able to reclaim their unsold goods from the buyer's inventory.¹⁴²

However, even in this one narrow situation where a trade creditor might prefer the English treatment of RT clauses, one of the principal virtues of the U.C.C.'s approach, its predictability, is still in evidence. In the *Phillips* case, the creditor MTIDA attempted to argue that no purchase had occurred, despite considerable evidence to the contrary, because it knew that unless it could prevail on this point, there was no question that U.C.C. rules were against its claim. In fact, MTIDA conceded this before the case was heard.¹⁴³ This sort of predictability is in stark contrast to the uncertainty posed by the English law's treatment of RT clauses.

Furthermore, any troubles one might have with the treatment of simple RT clauses under U.S. law are tempered by the observation that the utility to trade creditors of such clauses is limited. As has been discussed,¹⁴⁴ it is the inefficacy of simple RT clauses in terms of modern trade practices that has been one of the forces driving the proliferation of RT clauses in England. Because simple RT clauses usually do not meet the needs of sellers, they are relatively less important and therefore of less concern than other types of RT clauses.

For the most part, sellers relying on simple RT clauses can expect similar treatment under either U.S. or English law. In certain limited situations, however, these sellers might find they fare better under English rules. Nevertheless, given the virtue of the U.C.C.'s predictability, the more restricted role played by simple RT clauses in modern commercial practice, and the advantages of the U.C.C. approach regarding all other types of RT clauses, any limitations in the U.C.C.'s treatment of simple RT clauses are not a cause for concern.

B. *Extended Retention of Title*

The validity of extended RT clauses under the U.C.C. is established by section 9-306. Section 9-306(2) provides that "[e]xcept where this Article otherwise provides, a security interest . . . continues in any identifiable proceeds including collections received by the debtor." This far-reaching provision is limited somewhat by section 9-306(3):

The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless

(a) a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are

142. See *supra* text accompanying notes 46 & 49.

143. *Phillips*, 77 B.R. at 648-49.

144. See *supra* text accompanying notes 38-41.

acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds; or

(b) a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds¹⁴⁵

Therefore, RT clauses extended to cover the proceeds of subsales of goods supplied by the seller are valid under U.S. law subject to the limitations that the seller's interest in the goods generating the proceeds must have been perfected by the filing of a financing statement and that the proceeds received by the buyer remain identifiable. However, as subsection (a) above indicates, under the U.C.C. the term "proceeds" is not restricted to cash received by the buyer. Rather, section 9-306(1) provides that "[p]roceeds" includes *whatever is received* upon the sale, exchange, collection or other disposition of collateral¹⁴⁶ Thus, proceeds in the form of tangible goods or intangibles such as claims of a buyer against subpurchasers may be covered by an extended RT clause under the U.C.C.

The flexibility of this approach and the added security it provides creditors is illustrated by *In re Alcom America Corp.*¹⁴⁷ In the summer of 1983, Alcom contracted with an agency of the Spanish government (FORPPA) to purchase ethanol. After establishing commitments from one company to process the ethanol and from another to purchase some of it, Alcom entered a \$3 million financing agreement with the Arab Banking Corp. (ABC). As security for the financing, Alcom signed two agreements with ABC providing that "a security interest in all [the debtor's] right, title and interest in the following contracts (and all proceeds thereof)."¹⁴⁸ Among the contracts listed in the security agreements was the contract with FORPPA for the ethanol purchase. Alcom had ongoing difficulties meeting its obligations under the financing agreement, and ABC exercised its security rights by asserting a claim to ethanol that had been delivered to the processor. ABC then sold the ethanol to recoup some of its losses.

The court first held that by virtue of the security agreements, ABC held a valid security interest in Alcom's intangible contract rights under the purchase agreement with FORPPA.¹⁴⁹ Specifically, it had an attached and perfected security interest in Alcom's right to receive ethanol from FORPPA. The court then held that the "ethanol received from FORPPA is proceeds of the debtor's rights under the FORPPA contract" because of the definition of proceeds provided by U.C.C. section 9-306(1).¹⁵⁰ The result was that the claim of Alcom's

145. U.C.C. § 9-306(3) (1990).

146. *Id.* § 9-306(1)(emphasis added).

147. 154 B.R. 97 (Bankr. D.D.C 1993).

148. *Id.* at 100. Although this clause is not precisely an RT clause, the case nevertheless serves to illustrate the treatment an extended RT clause would receive since the UCC limits the effect of RT clauses to the reservation of a security interest. *See* U.C.C. §§ 1-201(37), 9-102(2).

149. *Alcom*, 154 B.R. at 106; *see also* *Bogus v. American Nat'l Bank of Cheyenne*, 401 F.2d 458 (10th Cir. 1968) (State liquor license held to be intangible property and security interest in liquor license held to have been attached and perfected).

150. *Alcom*, 154 B.R. at 106.

bankruptcy trustee to the proceeds received from ABC's ethanol sale was defeated, and ABC was able to keep the money.¹⁵¹ Thus, under the U.C.C. an RT clause (that is to say, a security interest) can be extended to cover not only cash proceeds received by a buyer upon the subsale of goods supplied by the seller, but almost anything received by the buyer in a subsale. This sort of flexibility is characteristic of the U.C.C.'s overall treatment of RT clauses and security interests.

Nevertheless, there are instances where the U.C.C. limits a seller's rights to the proceeds of the buyer's subsale under an extended RT clause. For example, section 9-306(3)(b) contains the caveat that for the RT clause to remain perfected in the cash proceeds, the proceeds must be "identifiable." Thus, in the event of insolvency proceedings instituted against the buyer, the primary concern of a seller holding an extended RT clause will be whether the cash proceeds held by the buyer remain identifiable.¹⁵²

However, even where the buyer has commingled the proceeds from the subsale of the seller's goods with other proceeds, the seller may nevertheless be entitled to some portion of the mixed proceeds under section 9-306(4)(d).¹⁵³ The case *Fitzpatrick v. Philco Finance Corp.*¹⁵⁴ illustrates this point. There, Philco provided financing to a large appliance store named Sikking. Philco held a perfected security interest in the appliances purchased by Sikking and in the proceeds of any subsale of the appliances by Sikking. Sikking entered bankruptcy and although the proceeds of subsales of appliances subject to Philco's security interest were commingled with other funds, by the operation of section 9-306(4)(d), Philco was able to recover several thousand dollars.¹⁵⁵ Thus, even when a secured creditor is unable to identify the portion of a bankrupt debtor's cash that was derived from property over which she had a security interest, she may nevertheless be able to recover a portion of what she is owed.

151. *Id.* at 116.

152. *See also* U.C.C. § 9-306(4)(a)-(c).

153. U.C.C. § 9-306(4) provides:

In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:

...

(d) in all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is

(i) subject to any right of set-off; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings, less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subsection (4).

154. 491 F.2d 1288 (7th Cir. 1974).

155. *Id.* at 1292-93.

In *Philco*, the court explained that the justification for this rule is related to the "substitution of collateral doctrine."¹⁵⁶ This rule is similar to the equitable-ness of RT clauses argument mentioned above.¹⁵⁷ Other creditors are not harmed by giving a limited priority to a creditor secured, for example, by an extended RT clause, since the funds removed from the debtor's estate are likely to be offset by assets supplied by the extended RT holder. Thus, despite the appearance that the estate is being reduced, in fact the priority granted the RT holder is probably "neutral in its effect."¹⁵⁸

In sum, whereas a seller holding an extended RT clause in England will probably find that it is legally ineffective, in the U.S. such a seller stands a substantial chance of success. If the U.C.C.'s perfection requirements are complied with and especially, if one can ensure that the proceeds held by the buyer from subsales of goods supplied by the seller are segregated from other funds of the buyer, such proceeds will be recoverable under an extended RT clause.

C. Enlarged Retention of Title

Under the U.C.C., enlarged RT clauses fall within the scope of sections 9-314 (Accessions) and 9-315 (Priority When Goods Are Commingled or Processed). In relevant part, section 9-314(1) provides that "[a] security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in subsection (3) and subject to section 9-315(1)."¹⁵⁹ Subsection (3) qualifies this rule by providing that subsection (1) will not apply where the mixed/commingled product has been subjected to a judicially obtained lien, where the product has been sold to a bona fide purchaser for value, or where a creditor with a prior perfected security interest in the whole has made advances to the buyer.¹⁶⁰

The relevant portions of section 9-315 state:

- (1) If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if (a) the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass
- (2) When under subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.¹⁶¹

In essence, if under sections 9-314 and 9-315 an enlarged RT clause has been perfected, then the seller has a valid security interest in the product into which her goods have been mixed or commingled. It is worth noting that ques-

156. *Id.* at 1291.

157. *See supra* text accompanying notes 19-21.

158. *Philco*, 491 F.2d at 1291.

159. U.C.C. § 9-314(1) (1991).

160. *Id.* § 9-314(3)

161. *Id.* § 9-315.

tions concerning the application of sections 9-314 and 9-315 do not arise very often and few cases directly place these sections in issue. This is probably because the rules are clear. Such a paucity of cases emphasizes the efficacy of the U.C.C.'s approach. Indeed, the striking contrast between the absence of cases in the U.S. and the enormous controversy surrounding enlarged RT clauses in England serves to illustrate that perhaps one of surest signs of an effective system of rules is that it does not breed litigation.

Nevertheless, one case which does provide an example of the application of section 9-315 is *In the Matter of San Juan Packers, Inc.*¹⁶² There, San Juan Packers bought cans on credit from National Can Corp. to be used in processing vegetables. As security San Juan granted National Can Corp. a floating lien over all its inventory. San Juan then bought vegetables from various farmers, three of whom had obtained financing from a local bank. The three farmers had granted the bank a security interest in their crops and any proceeds of the crops. Before San Juan paid for the vegetables but after it had received, processed and sold some of them, it filed for bankruptcy. The bank brought an action to establish the priority of its security interest in the processed vegetables or proceeds thereof over the interests of all other creditors in the same. As agreed between the parties, the remaining vegetables in San Juan's possession were then sold by the trustee and the sale proceeds were placed in a separate fund pending the outcome of the litigation.

The court held that U.C.C. section 9-315 applied because the vegetables supplied by the numerous farmers had been so mixed together that the crops of any particular farmer or farmers were no longer identifiable.¹⁶³ Furthermore, it held that the interests of the bank and National Can Corp. had attached to crops supplied by various farmers and that these interests continued in the commingled mass of vegetables or any proceeds thereof under the terms of section 9-315(1)(a).¹⁶⁴ Thus, because there were two interests attached and perfected in one mass of commingled goods, section 9-315(2) applied, and the two interests would "rank equally according to the ratio that the cost of the goods to which each interest originally attached [bore] to the cost of the total product or mass."¹⁶⁵

In some sense, there is nothing too surprising in this result—it accords with basic notions of fairness. Both parties had interests in the commingled mass of vegetables, so it seems only fair that they divide the mass between themselves in proportion to the size of their contributions to the whole. However, were the same case to arise under English law, the outcome would be radically different. If the bank had an enlarged RT clause over the crops of the farmers, any retained title would have been lost when the crops were sold to the food processor. If the farmers had somehow attempted to secure the delivered crops with a lien over

162. 696 F.2d 707 (9th Cir. 1981).

163. *Id.* at 710.

164. *Id.* at 711.

165. U.C.C. § 9-315(2) (1991).

the goods produced by San Juan, they would have encountered the prior floating lien placed over all of San Juan's assets by National Can Corp. Had they nevertheless delivered the crops to San Juan under enlarged RT clauses, they would have encountered all the difficulties of establishing that the processor held the crops for them as their fiduciary.¹⁶⁶ Thus, whereas both parties were treated quite fairly in *San Juan Packers* under the U.C.C., the farmers and the bank would undoubtedly have been left empty-handed under English law. A seller who attempts to enlarge an RT clause to cover the mixing or commingling of her goods by the buyer stands a good chance of success under the U.C.C. and is therefore in a better position under U.S. law than under English law.

D. All-Monies Retention of Title

All-monies RT clauses fall under section 9-204 of the U.C.C.¹⁶⁷ This section is somewhat shorter than other Article 9 sections, so it will be quoted in full:

- (1) Except as provided in subsection (2), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.
- (2) No security interest attaches under an after-acquired property clause to consumer goods other than accessions (section 9-314) when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.
- (3) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment (subsection (k) of section 9-105).¹⁶⁸

The effect of these provisions is that "parties are given great flexibility to agree about what collateral (any combination of now-owned and after-acquired property) will secure what obligations (any combination of now-existing or later-arising debt)."¹⁶⁹ Taken together, subsections (1) and (3) should make an all-monies clause valid under the U.C.C. Unfortunately, no case has tested the validity of an all-monies RT clause under the U.C.C.¹⁷⁰ This is probably because the U.C.C. provisions give sellers sufficient flexibility to accomplish the purposes of an all-monies RT clause by other means. For example, a seller can create a purchase money security interest (PMSI) over goods supplied to a buyer. If the PMSI is duly perfected, thus notifying other creditors of the seller's security interest, the seller's interest in the goods supplied will have priority over other security interests. Similarly, a seller might design an after-acquired property clause per the terms of section 9-204 which would serve the same function as an all-monies RT clause. However, as with the other forms of RT clauses, an all-monies clause is probably valid under the U.C.C. Like the other U.C.C. security interests, the requirements of attachment and perfection

166. See *supra* text accompanying note 95.

167. See HONNOLD ET AL., *supra* note 110, at 556-58.

168. U.C.C. § 9-204 (1990).

169. HONNOLD ET AL., *supra* note 114, at 724.

170. As of March 1994.

must be complied with, but if they are, such an all-monies clause should hold up in court. There is then, in some sense, a similarity between U.S. and English law regarding all-monies RT clauses in that under either system, the status of this clause is not absolutely certain. However, while it is most likely that an all-monies clause would be struck down in England, it would probably be upheld under U.S. law.

VI.

CONCLUSION

The preceding discussion illustrates the aptness of Judge Staughton's characterization of RT clauses under English law, namely that "this area of the law is presently a maze if not a minefield, and one has to proceed with caution every step of the way."¹⁷¹ The validity of simple RT clauses is well established, but the utility of such clauses is limited. Attempts to adapt simple RT clauses to meet the needs of commerce seem most often doomed to failure. An extended or enlarged RT clause will probably be interpreted as a charge and will, therefore, most likely be held invalid for lack of registration. The status of all-monies clauses is at best uncertain. To some extent, these results might be viewed as indicating that English law is gravitating towards a registration requirement for complex RT clauses and therefore, is beginning to approximate the U.C.C.'s solution. However, in contrast to the U.C.C., under English law, "registration [of an RT clause] will not generally be practicable nor commercially feasible."¹⁷² Thus, secured supplier financing is effectively not possible at this time in England.

To quote Professor Davies again, "the very profusion of [RT] clauses is a symptom of the law's inability to protect trade creditors."¹⁷³ That it should require such a tangled web of rules to achieve this result is but a further reproach to the English law's treatment of these clauses. In light of such failures and of the relative simplicity and effectiveness of the approach taken by the U.C.C., it is no surprise that perennial calls for reform consistently cite the U.C.C. as the model to be adopted.¹⁷⁴ Similarly, it will be no surprise if until such reform is accomplished, RT clauses continue both to command the attention of the English legal community and to provide England's commercial courts with a steady source of litigation.

171. *Hendy Lennox (Indus. Engines) Ltd. v. Grahame Puttick Ltd.*, [1984] 1 W.L.R. 485, 491 (Eng. Q.B. 1983).

172. Hicks, *supra* note 1, at 414.

173. DAVIES, *supra* note 6, at 1.

174. See generally Diamond *supra* note 13.