holder of the bill of lading provided it had been suitably endorsed. This meant, for instance, that the seller could put goods on board the ship not yet having sold them and, while they were on the high seas, dispose of them. Buyers would often pay for the goods against the bill of lading and other documents knowing that when the ship arrived they would be able to get the cargo from the master. So, the bill of lading provided a means of disposal of the goods. The seller could have sold the goods and property could have passed to the buyer without any dealings with the bill of lading. The buyer would then, however, have had difficulty in getting the goods off the ship. In practice, a buyer who knows that the goods are on board the ship is very unlikely to want to pay in cash unless he or she receives the bill of lading or some other equivalent document. In some commodity trades, there may be several sales and sub-sales of the goods while they are on the high seas, each effected by transferring the bill of lading against payment. Section 19(1) expressly recognises this general possibility and s 19(2) expressly recognises the specific possibility that the seller will take the bill of lading to his or her own order and that this will normally show that he or she is reserving the right of disposal.[16] Because commercial custom recognises the effectiveness of transfers of bills of lading made in the proper form, the seller can dispose of the bill of lading and the goods by endorsing it to the buyer (that is, by writing across the face of the bill of lading an instruction to deliver to the buyer).

In the context of export/import sales, this has long been well **6–18**
recognised as standard practice. It has also, no doubt, long been standard practice for sellers supplying goods on credit in domestic sales to have simple clauses saying that the goods are theirs until they are paid. No problem arises with such clauses. This should always have been clear, but some deviant decisions in Scotland required it to be reaffirmed. In *Armour v Thyssen Edelstahlwerke AG* (1990),[17] the House of Lords overturned decisions of the Scottish courts treating a simple reservation of title as creating a charge. Lord Keith of Kinkel, delivering the principal speech, said:

> I am, however, unable to regard a provision reserving title to the seller until payment of all debts due to him by the buyer as amounting to the creation by the buyer of a right to security in favour of the seller. Such a provision does, in a sense, give the seller security for the unpaid debts of the buyer. But, it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the buyer.[18]

16 Even where the buyer has paid 80% of the price before shipment: *Mitsui & Co v Flota Mercante Grancolombiana* [1988] 1 WLR 1145.

17 [1990] 3 All ER 481; [1991] 2 AC 339.

18 In this case, the clause retaining property in the seller until money due was paid. This is very important where there was a series of transactions between seller and buyer. See discussion in 6–18 and 6–19.

However, in the last 20 years, much more elaborate and complex clauses have begun regularly to be used. The starting point of modern discussion is the decision of the Court of Appeal in *Aluminium Industrie v Romalpa* (1976).[19] This case has been so influential that the sort of complex clauses which are used are quite often referred to as Romalpa clauses (or alternatively as retention or reservation of title clauses). In the *Romalpa* case, the plaintiff was a Dutch company which sold aluminium foil to the defendant, an English company. The plaintiff had elaborate standard conditions of sale which provided, among other things:

(a) that ownership of the foil was to be transferred only when the buyer had met all that was owing to the seller;
(b) required the buyer to store the foil in such a way that it was clearly the property of the seller until it had been paid for;
(c) that articles manufactured from the foil were to become the property of the seller as security for payment and that until such payment had been made the buyer was to keep the articles manufactured as 'fiduciary owner' for the seller and if required to store them separately so that they could be recognised.

The buyer was permitted to sell finished products to third parties on condition that, if requested, he or she would hand over to the seller any claims which he or she might have against said buyers.

6–19 It is important to note the width of the basic clause about transfer of ownership. The goods were being supplied regularly on credit terms. In such a situation, it is perfectly possible, even though the goods are being punctiliously paid for on time, that there is always money outstanding to the seller so that property never passes at all. So, if the standard credit terms of the trade are to pay 28 days after delivery of the invoice and there are deliveries of goods every 21 days, there will nearly always be money owing to the seller, even though the buyer is paying on time. In the *Romalpa* case itself, the buyer eventually became insolvent, owing the plaintiff over £120,000. The buyer had some £50,000 worth of foil and also had, in a separate bank account, some £35,000 which represented the proceeds of foil which the plaintiff had supplied to the defendant and which the defendant had then sub-sold. The Court of Appeal held that the plaintiff was entitled both to recover the foil and also the £35,000 which was in the separate account.

This case illustrates in a dramatic way the practical importance of these retention of title clauses. They are basically a device to protect the seller against the buyer's insolvency. If the buyer remains solvent, the retention of title clause does little more than involve it in some tiresome

19 [1976] 2 All ER 552; [1976] 1 WLR 676.

extra paperwork. This is because, although the buyer may in theory be holding substantial quantities of goods which belong to the seller, it will not, so long as it is solvent, be liable to redeliver the goods to the seller, unless it commits some major breach of contract which entitles the seller to bring the contract to an end. However, if the buyer becomes insolvent, a seller who has a valid retention of title clause will be in a significantly improved position. Small businesses become insolvent every day and large businesses not infrequently. What usually happens in such cases is that nearly all of the assets fall into the hands of the Inland Revenue and Customs and Excise who have preferential claims and into the hands of the bank, which will have taken a mortgage over the company's premises and a floating charge over the company's other assets. Arguably, the English insolvency law regime favours the tax authorities and the banks too much at the expense of ordinary trade creditors. Retention of title clauses can be seen as an attempt to redress the balance.

Such a step is perfectly effective if all that is done is to use the power of s 19 to delay the passing of ownership from seller to buyer.

However, many sellers, like the one in *Romalpa,* have much more elaborate clauses. Since 1976, these clauses have been the subject of a number of litigated cases, and in many of them the courts have held that the clause is ineffective. This is partly because these decisions have turned on the particular wording of specific clauses and partly on a perception by the judges that the sellers, in seeking to do too much, have overreached themselves. The general problem which lies behind the cases is that, whatever the abstract legal analysis, the seller's practical objective is to create a form of security interest in the goods. The companies legislation provides a limited number of possibilities for the creation of security interests in the property of companies (in practice the buyer has always been a company in the litigated cases. If the buyer were not a company, these difficulties would disappear). In particular, in a number of cases, the other creditors of the buyer have successfully argued that the retention of title clause is invalid because it amounts to an unregistered charge over the company's assets. This argument does not succeed if all that the seller has done is to have a straightforward s 19 clause providing that ownership remains with it until it has been paid (*Clough Mill v Martin* (1984)).[20] This reasoning extends a step further where there are a series of sales and the seller has drafted the clause so as to retain ownership so long as any money is outstanding from any sale. This is permissible even if the seller retains ownership over goods which have been paid for, because such ownership would be subject to an implied term that the seller could only deal with the goods to the extent needed to discharge the balance of the outstanding debts. **16–20**

20 [1984] 3 All ER 982; [1985] 1 WLR 111.

So, retention of title clauses work perfectly satisfactorily if the buyer intends to keep the goods in its hands unaltered. However, buyers often intend either to resell the goods or to incorporate the goods in a larger product, or to use the goods as raw materials for the manufacture of goods. In an attempt to secure rights in cases of this kind, sellers have often adopted elaborate clauses of the kind mentioned in the discussion above of the *Romalpa* case. It is necessary, therefore, to say something about these more complex clauses.

6–21 In some cases, the contract has provided that the buyer is to have legal ownership of the goods but that 'equitable and beneficial' ownership is to remain in the seller. Such a clause was considered in *Re Bond Worth* (1979),[21] where the goods supplied were raw materials used by the buyer for the manufacture of carpets. Slade J held that the clause was invalid as being an attempt to create an unregistered charge. It seems, therefore, that in general the seller must attempt to retain legal ownership. However, this will not work where the goods are being incorporated into larger goods unless the goods remain identifiable. An interesting case in this respect is *Hendy Lennox v Grahame Puttick Ltd* (1984),[22] where the goods were diesel engines which were being used by the buyer for incorporation into diesel generating sets. The engines remained readily identifiable because all the engines were those provided by the seller and each engine had a serial number. Furthermore, the engines could, with relative ease, have been disconnected and removed from the generating sets. It was held that, in such a situation, the seller could continue to assert rights of ownership even after the engines had been incorporated into the generators.

In other cases, the goods are incorporated into finished products in a way in which it would be impossible to unscramble the omelette and separate out the constituent eggs. Sellers have sometimes sought to provide in this situation that they retain ownership in the raw materials or that the finished product is to be treated as theirs. This would probably present no problems if the seller had supplied all the ingredients for the finished products but in practice this has never been the facts of a reported case. One might envisage a case in which the finished product is made up partly of goods supplied by seller A and partly of goods supplied by seller B, each of whom has provided that the finished product is to belong to him. Such a case too has never been reported. The cases which have arisen have been those in which one of the ingredients in the finished product has been provided by a seller who employed a retention of title clause and the other ingredients by sellers who did not. In practice, in all of these cases the courts have held that the seller does

21 [1979] 3 All ER 919; [1980] Ch 228.
22 [1984] 2 All ER 152; [1984] 1 WLR 485.

not in fact retain a valid interest in the finished product. So, in *Borden v Scottish Timber Products* (1981),[23] a seller who supplied resin to a buyer who used it to manufacture chipboard obtained no property interest in the chipboard and, in *Re Peachdart* (1984),[24] a seller who supplied leather for the making of handbags failed successfully to assert a claim against the handbags. It is not clear whether the seller could improve on these cases by more sophisticated drafting. Suppose a seller on the facts of *Re Peachdart* had provided in the contract that the handbags were to be the joint property of the seller and the manufacturer. It is at least possible that this would create rights which the court would protect.[25] In New Zealand, it has been held that a seller of trees could retain ownership rights after the trees have been converted into logs by the buyer.[26]

The buyer may have bought the goods intending to resell them. Normally, the retention of title clause will not be effective to prevent the sub-buyer acquiring a good title for reasons which will become clearer after the reading of the next section (see *Four Point Garage v Carter* (1985)).[27] However, a seller may insert a clause in the contract providing that the buyer is to have permission to sub-sell the goods but that the proceeds of such sub-sale are to be put into a separate bank account which is to be held on trust for the seller. If the buyer in fact opens such an account and pays the proceeds into it, this would be an effective clause. In practice, a buyer who is having financial problems and is approaching insolvency is very likely to find ways of paying the proceeds of sub-sales into an account with which he or she can deal so that such a clause will not provide complete practical protection for the seller. **6–22**

TRANSFER OF TITLE WHERE THE SELLER IS NOT THE OWNER

In this section, we consider cases where the seller was not in fact the owner nor the authorised agent of the owner at the time of the sale. This situation may arise in a range of cases, running from the situation where the seller has stolen the goods all the way to a case where the seller honestly believes that he is the owner of the goods but has himself been misled by a previous seller. In this type of case, there is a conflict of interest between that of the original owner of the goods who is **6–23**

23 [1981] Ch 25.
24 [1984] Ch 131.
25 See *Coleman v Harvey* [1989] 1 NZLR 723; *Hudson* [1991] LMCLQ 23.
26 *New Zealand forest Products v Pongakawa Sawmill* [1991] 3 NZLR 112.
27 [1985] 3 All ER 12.

seeking to recover them or their value, and the ultimate buyer who has paid good money for goods which he believed the seller to be entitled to sell to him. In general, it is desirable to protect the interests both of the owners of property and of honest buyers who pay a fair price. In the case of transactions in land, the choice comes down unhesitatingly in favour of protecting the interests of owners. This is possible because transferring ownership of land is a highly formal act normally carried out by lawyers. In practice, therefore, it is extremely difficult for an honest buyer who employs a competent lawyer not to discover that the seller is not entitled to sell. In practice, it would be extremely difficult to apply this technique to transactions in goods. Some legal systems have therefore decided that the primary interest is to protect the honest buyer who pays a fair price and has no ground for suspecting that his seller is not the owner. English law has not chosen this option, however. Instead, it has started from the position that the seller cannot normally transfer any better rights than he himself has. This is often put in the form of the Latin maxim *nemo dat quod non habet* (roughly, no one can transfer what he does not have). Lawyers often talk in shorthand about the *nemo dat* rule. However, although it is clear that this is the basic rule, it is equally clear that it is subject to a substantial number of exceptions. Most of the exceptions are set out in ss 21–26 of the Sale of Goods Act 1979, and we will discuss each exception in turn.

Estoppel

6–24 Section 21(1) of the Act provides:

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

For present purposes, the sting of this section lies in its tail which is an application of the general legal doctrine of estoppel. The operation of the doctrine is to prevent (estop) a party from advancing an argument which he or she would otherwise be entitled to put forward. So, for instance, a party may be prevented from putting forward an argument because it has been the subject matter of a previous judicial decision on the same facts which is binding on him or her. An example of the operation of doctrine in the present context is *Eastern Distributors Ltd v Goldring* (1957).[28] In this case, the owner of a van wished to raise money on it and for this purpose

28 [1957] 2 QB 600.

entered into an arrangement with a car dealer which involved the deception of a finance company. The scheme was that the dealer would pretend to have bought the van and to be letting it to the owner on hire purchase terms. The owner signed in blank one of the finance company's hire purchase agreements, together with a delivery note stating that he had taken delivery of the van. The dealer then completed a further form purporting to offer to sell the van to the finance company. The result was that the finance company paid the dealer. On these facts, it could perhaps have been argued that the owner had actually authorised the dealer to sell his van to the finance company. However, the case was decided on the basis that the owner had not authorised the dealer to sell the van to the finance company but that he was estopped from so arguing. This was on the basis that, by signing the forms in the way he had, he had made it easy for the dealer to deceive the finance company as to who was the true owner of the van.

It is common in analysing the operation of estoppel in this area to distinguish between estoppel by representation, which arises where it could be said that the true owner has represented that someone else has authority to sell the goods, and estoppel by negligence which arises where the true owner has behaved carelessly in respect of the goods in such a way as to enable the goods to be dealt with in a way which causes loss to a third party. However, in practice, the courts have been very cautious in applying either limb of the doctrine. In particular, it is clear that it does not by the mere act of the owner putting his or her goods into the hands of someone else, represent that that person has authority to sell them, nor is it negligent to do so unless it is possible to analyse the transaction in such a way as to support the argument that the true owner owed a duty of care in respect of the goods to the party who has been deceived. **6–25**

The narrow scope of both estoppel by representation and estoppel by negligence is shown by *Moorgate Mercantile v Twitchings* (1977),[29] in which the majority of the House of Lords rejected the application of both doctrines. This case concerned a car which had been let on hire purchase terms. It is so common for parties who have taken cars on hire purchase to sell them for cash before they have completed the hire purchase contract that the hire purchase companies set up an organisation called Hire-Purchase Information (HPI) which acts as a central registry of hire purchase transactions in relation to motor cars. Membership of the organisation is not compulsory, but most finance companies belong to it and many car dealers are affiliated to it so that they are able to obtain information. The normal practice is for finance companies which are members to notify all credit transactions

29 [1977] AC 890.

involving cars. Then, if the car is offered to another dealer or finance company, they can check with HPI as to whether there is an existing credit agreement in relation to the car. This system obviously makes it much more difficult for a car subject to a credit agreement to be disposed of without the agreement being revealed. (Obviously, it does not prevent direct sale to another member of public.) In the present case, the plaintiff finance company let a car on hire purchase to A. The plaintiff was a member of HPI and normally registered all its agreements with it. For some reason, which was never explained, the particular transaction with A was not registered and a few months later he offered the car for sale to the defendant. A told the defendant he was the owner of the car and when the defendant contacted HPI he was told that the car was not registered with them. The defendant bought the car from A and, in due course, sold it to B. Later, the plaintiff discovered that the car had been sold and brought an action against the defendant. The defendant argued that there was estoppel both by representation and by negligence. These arguments, though successful in the Court of Appeal, were rejected by a majority of three to two in the House of Lords. The majority view was that there was no estoppel by representation since no representation had been made by the plaintiff; any representation which had been made had been made by HPI but it had simply said, which was true, that the car was not registered with it. HPI was not in any case the agent of the plaintiff for the purpose of making any representation about the car. One ground for rejecting arguments based on estoppel by negligence was that it had not been proved that failure to register was the plaintiff's fault. (It was never proved how the failure had taken place.) However, the majority in the House of Lords would have rejected the argument based on estoppel by negligence even if it could have been shown that the plaintiff had failed to register this particular transaction. This was on the basis that the plaintiff owed no duty of care to other finance companies or to dealers to register the transaction. In coming to this conclusion, great weight was attached to the fact that the whole scheme was voluntary and not mandatory. This case demonstrates very clearly the policy issues involved and the cautious way in which the courts have in practice decided to apply the doctrine of estoppel.

6-26 Another restriction of the scope of s 21(1) was revealed by the decision in *Shaw v Commissioner of Police* (1987).[30] In this case, the claimant, Mr Natalegawa, a student from Indonesia, owned a red Porsche. He advertised it for sale in a newspaper and received a call from a gentleman calling himself Jonathan London who said he was a car dealer and was interested in buying the car on behalf of a client.

30 [1987] 3 All ER 305; [1987] 1 WLR 1332.

The claimant allowed London to take delivery of the car and gave him a letter saying that he had sold the car to London and disclaiming further legal responsibility for it. In return, he received a cheque for £17,250 which in due course proved worthless. London agreed to sell the car to the plaintiff for £11,500, £10,000 to be paid by banker's draft. When London presented the draft, the bank refused to cash it and London disappeared. In due course, the police took possession of the car and both the plaintiff and the claimant sought possession of it. The Court of Appeal held that, as far as s 21 was concerned, the case would have fallen within its scope if the sale by London to the plaintiff had been completed. It was clear, however, that, as far as the contract between the plaintiff and London was concerned, property in the car (if London had had it) was only to pass when London was paid. Since London had never been paid, the transaction was an agreement to sell and not a sale. This is logical because on the facts the plaintiff would not have become the owner of the car even if London had been an owner or an authorised agent. It would be paradoxical if the plaintiff were to be in a better position because London was a dishonest man.

Sale in market overt

Section 22(1) of the Sale of Goods Act 1979 provided: **6–27**

> Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

As the language suggests, this was a very old, indeed the oldest, exception to the general rule. It started from the perception that a dishonest person is less likely to sell goods that he or she does not own in an open market than in a private sale. This rule reflects the supervision given to markets in the Middle Ages and may well have been historically true. This rationale has little place in modern business conditions and the exception has been removed by the Sale of Goods (Amendment) Act 1994.

Sale under a voidable title

Section 23 of the Sale of Goods Act 1979 provides: **6–28**

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

This exception is much more important in practice. It applies where the seller, instead of having no title at all, has a title which is liable to be avoided. The most obvious example would be where the seller had obtained possession of the goods by fraud. Where a contract is induced by one party's fraud, the result is not that the contract is void but that it is voidable, that is, liable to be set aside by the deceived party. Where an owner of goods has parted with them to a fraudulent buyer, he or she is entitled to set aside the contract and, if he or she acts in time, can recover the goods. However, if the fraudulent person has meanwhile sold the goods on to an innocent buyer, that innocent buyer will obtain a title which is better than that of the original owner. This is the point of s 23.

A critical question, therefore, is what does the original owner have to do to set the voidable contract aside? Telling the fraudulent person or taking the goods from him or her would certainly do but in practice the fraudulent person and the goods have usually disappeared. In *Car and Universal Finance Ltd v Caldwell* (1965),[31] the Court of Appeal held that it was possible to avoid the contract without either telling the fraudulent person or retaking possession of the goods. In that case, the owner had sold his car to a rogue and received a worthless cheque in return. The next morning, the owner presented the cheque at the bank and discovered that it was worthless. He immediately informed the police and the motoring organisations. It was held that the sale had been effectively avoided on the grounds that it is sufficient to do all that can in practice be done to set the transaction aside. Many commentators were surprised at this decision and indeed the opposing view was taken in Scotland on virtually identical facts in *McLeod v Kerr* (1965).[32]

In practice, however, whether right or wrong, the decision in the *Caldwell* case is not as important as it appears at first sight because similar facts will usually fall within the scope of another exception discussed below (buyer in possession after sale).

Seller in possession after sale

6–29 Section 24 of the Sale of Goods Act 1979 provides:

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

31 [1965] 1 QB 525.
32 [1965] SC 253.

It is easy to apply this section to the case where the seller simply sells goods to A and then, without ever having delivered them to A, sells the same goods to B.

Difficulties have arisen, however, because the section talks of the seller who continues or is in possession of the goods. Suppose that a car dealer sells a car to A who pays for it and takes it away, and then the following day brings it back for some small defect to be rectified. While the car is at the dealer's premises, the dealer sells it to B. It would be possible to read the section as giving B's rights precedence over those of A but it is quite clear that if A had taken his car to any other dealer who had sold it to B, A's rights would have prevailed over those of B. It would be very odd to make the positions of A and B depend on whether A takes his car for service to the person from whom he has bought it or to someone else. In fact, the courts have not read the section in this way but they have given different explanations for not doing so.

In *Staffordshire Motor Guarantee v British Wagon* (1934),[33] a dealer sold a lorry to a finance company who then hired it back to him under a hire purchase agreement. The dealer then, in breach of the hire purchase agreement, sold the lorry to another buyer. It was held that the rights of the finance company prevailed over those of the second buyer. The explanation given was that for s 24 to apply the seller must continue in possession 'as a seller'. However, this view was later rejected by the Privy Council on appeal from Australia in *Pacific Motor Auctions v Motor Credits* (1965)[34] and by the Court of Appeal in *Worcester Works Finance v Cooden Engineering* (1972).[35] In these cases, it was said that the crucial question was whether the seller's possession was physically continuous. If it was, as in the *Staffordshire Motor Guarantee* case, then s 24 applied. 6–30

If there has been a break in possession so that the buyer has, even for a short time, had the goods in his or her hands although he or she has later re-delivered them to the seller, then s 24 does not apply. This obviously covers the case of the buyer who takes the car back to be serviced the following day, but it means that s 24 also applies to the rather common commercial case where a motor dealer transfers ownership to a finance company or a bank but remains in possession. This is a common means of financing the stock which the dealer has on his or her floor and enables more stock to be carried than if the dealer had to carry the full cash cost of the cars. It is, in effect, a form of security for the lender against the dealer's stock. This form of transaction may well give the lender

33 [1934] 2 KB 304.
34 [1965] AC 867.
35 [1972] 1 QB 210.