IMPLIED CONDITIONS IN HIRE

The modern institution of hire-purchase has thrown into relief the confusion in the common law authorities with regard to the implied conditions in that sub-division of bailment known as the law of hire. Hire-purchase has raised two questions: firstly, should we emphasise the element of hire or of sale so far as implied conditions are concerned; secondly, if the test is that of hire, what is the obligation on the bailor in this respect? The purpose of this article is not to discuss the first point in detail—it is mentioned only to introduce the second.

In 1936 the Court of Appeal emphasised the aspect of sale and held that the statutory warranties should therefore be implied — *Felston Tile Co. Ltd. v. Winget Ltd.* [1] Slessor, L.J., emphasised that, as the owner had irrevocably agreed to sell, if the purchaser called on him to do so, the conditions of the Sale of Goods Act applied. "The fact that there is associated here an agreement to hire as well as an agreement to sell does not alter the position." Scott, L.J., treated a hire-purchase agreement as a conditional agreement for sale within s. 1(2) of the Act. The learned Judge thought that it would be wrong, merely because the sale was not a present one, to refuse to apply the statutory conditions. Actually these remarks were *obiter* and the correspondence between the parties was held to lay down special conditions. This of course is the case in most hire-purchase agreements, as implied warranties are normally excluded by a special clause. It seems a fair inference from this case that the Court assumed that there is a real difference between sale and hire so far as the implied warranties are concerned.

But difficulties arise when three parties are involved, e.g., the motor car sales company, a finance company, and the customer. Thus in *Drury v. Victor Buckland Ltd.* [2] the plaintiff was approached by an agent of defendants with reference to the purchase of an ice-cream maker. After some negotiations, plaintiff paid a deposit to defendants and agreed to pay the balance to a finance company, with whom she subsequently signed a hire-purchase agreement. The machine proving unsatisfactory, plaintiff sued defendants for breach of implied warranty under the Sale of Goods Act. It was held on the facts of the case that the agreement was one of hire-

[1] (1936) 3 All E.R. 473. The purpose of this article is not to discuss the statutory law of hire-purchase. The English Hire-Purchase Act of 1938, s. 8, lays down special rules as to merchantable quality and reasonable fitness, but these throw no light on the common law of hire, which is the real subject of discussion.

[2] [1941] 1 All E.R. 269.

purchase—the other contracting party being the finance company. Defendants, therefore, were not liable on any contract of sale.

In *Wood's Radio Exchange v. Marriott,* [3] Lowe, J., rejected the view that a hire-purchase agreement was an agreement to sell within s. 6 of the Goods Act, 1928, refusing to follow the decision of the Court of Appeal in *Felston Tile Co. v. Winget.* [4] The facts were that a sleep-out was hired under an agreement containing an option to purchase, and when the structure proved not to be watertight, the hirer refused payment. Lowe, J., stated that ordinarily he would follow the Court of Appeal without hesitation, but in this case he found so many difficulties in working out the implications of the decision that he thought it inadvisable to accept its reasoning. The fundamental difficulty is that the hirer has not agreed to buy and the Act defines "buyer" as a "person who buys or agrees to buy the goods." There must be a consent to buy as well as a consent to sell. [5] It has been held by Lord Herschell [6] that a hire-purchaser is not a person who has agreed to buy, within the meaning of the Factors Acts.

Lowe, J., also asked, if the hire-purchase agreement is a contract of sale, is it so from the date of the agreement, or does it become so only when the hirer exercises his option to become a buyer? This affects the moment from which the implied agreements will operate. If the implied conditions apply from the first date, can the hirer plead breach of warranty of the implied conditions of a sale, and then refuse to exercise the option to buy? In a sale one can set off against the price the depreciated value owing to breach of warranty; but in hire-purchase "to set off against hire the amount of depreciated value arising from breach of warranty seems to me to be balancing things which are unlike in kind." [7] These points made by Lowe, J., have never been satisfactorily answered. [8]

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Most of the argument on this point begins with *Hyman v. Nye,* [9] decided in 1881. The plaintiff hired from the defendant, a jobmaster, for a specified journey, a carriage, a pair of horses, and a driver. During the journey a bolt in the under-part of the carriage broke, the horses became startled and the carriage was upset. In an action against the defendant for negligence, the jury were directed that, if the defendant took all reasonable care to provide a fit and proper carriage, the verdict should be for him. The jury found that the carriage was reasonably fit for the purpose for which it was hired and that the defect could not have been discovered by ordinary

[3] [1939] A.L.R. 409.
[4] *Supra,* Note 1.
[5] C.D.M., 12 *A.L.J.* (1938), pp. 13, 14.
[6] *Helby v. Matthews,* [1895] A.C. 471, at 475.
[7] per Lowe, J., *op. cit.*
[8] See A. Dean, *Hire Purchase Law in Australia,* pp. 106, 115.
[9] (1881) 6 Q.B.D. 685.

care and attention. It was held by Lindley and Mathew, J.J., that the direction was wrong, for it was the duty of the defendant to supply a carriage as fit for the purpose for which it was hired as care and skill could render it, and the evidence was not such as to show that the breakage could not have been prevented by any care or skill.

Lindley, J., agreed that the person who lets out carriages is not an insurer against all defects, but he is an insurer against all defects which care and skill can guard against. If a hired carriage breaks down while being properly used, it is incumbent on the person who let it to show that the breakdown was an accident not preventable by any care or skill; but no proof short of this will exonerate him. The learned Judge pointed out that the phrase "reasonably fit and proper" was ambiguous. If it is interpreted as above, it lays down a higher standard than that of reasonable care in the bailor. [10]

In the same year was decided *Robertson v. The Amazon Tug and Lighterage Company.* [11] The plaintiff, a master mariner, contracted with the defendants for a lump sum to take a certain specified steam tug of the defendants and tow six barges from Hull to the Brazils. The engines of the steam tug were damaged and out of repair at the time of the contract, but neither party was then aware of this. As a result, the time taken by the voyage was increased and the defendants' profit was less than it would otherwise have been.

Bramwell, L.J., dissenting, thought that the duty of care in hiring was the same as in other contracts when one man furnishes a specific thing to another which that other is to use. "The man so letting and furnishing the thing does not, except in some cases, undertake for its goodness or fitness, but he does undertake for the condition being such that it can do what its means enable it to do. Thus if a man hired a specific horse and said he intended to hunt with it next day, there would be no undertaking by the letter that it could leap or go fast: but there would be that it should have its shoes on, and that it should not have been excessively worked or unfed the day before." [12] Bramwell, L.J., frankly confessed that he could not find definite authorities for this rule, but that the case was one which "common sense alone enables us to decide." Where the article is specific, Bramwell, L.J., thought that the same test applied—"it must be supplied in a state as fit for the purpose for which it is supplied as care and skill can make it."

Brett and Cotton, L.JJ., disagreed with this view. Brett, L.J., thought that the implied condition was only an undertaking not to let the vessel get in a worse state of disrepair between the date of the contract and the commencement of its execution; there was no undertaking, as the contract related to a specific res, that it was

[10] As Lindley, J., pointed out, the practical difference between the standard laid down by the majority and an absolute standard is not very great.
[11] (1881) 7 Q.B.D. 598.
[12] *Robertson v. Amazon Tug and Lighterage Co.,* (1881) 7 Q.B.D. 598, at 603

reasonably fit for the purpose for which it was hired. He distinguished a contract to make a res from a contract to let a specific thing: in the first case the res must be reasonably fit for the purpose for which it is made: in the second the hirer takes the thing as it is. Cotton, L.J., thought that it was doubtful what warranty the law implies, from the relation of hirer and letter in hire of an ascertained chattel, but that the facts in this case raised a different issue.

These two cases establish that in an agreement for the hire of a specific res, the bailee may rely upon his own judgment: whereas when he relies on the bailor's judgment to furnish an article for a declared purpose, then there may be an implied warranty. The real conflict that has since arisen is as to the precise terms in which this warranty should be described. If we turn to the analogy of sale before the Sale of Goods Act, Mellor, J., in *Jones v. Just* [13] states (after dealing with various cases to which caveat emptor applies): "Fourthly—Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied . . . . In such a case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own. Fifthly—Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendor has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article."

Such a case as *White v. Steadman* [14] is not decisive, as it was found that the defendant was guilty of negligence. The facts were that the male plaintiff hired from the defendant, who was a livery stable keeper, a landau with a horse and driver for the purpose of taking a drive. He was accompanied by his wife. The horse became restive when passing a traction engine and shied with the result that the carriage was upset and both husband and wife were injured. The driver was not guilty of any negligence, but the jury found that the defendant ought to have known of the vicious propensity of the horse. The husband recovered for an injury caused by the upsetting of the carriage, liability being based on the contract of hiring. It was held that the defendant's lack of knowledge of the defect in the horse was irrelevant, since it had been found that he ought to have known of it. So far as the wife was concerned Lush, J., held that defendant owed a duty of care, independent of contract, to any person who he knows, or ought to know, will use it. "The duty is therefore owed not only to the person who contracts to hire it, but to all those persons for whose use it is supplied." This decision is in line with the current of authority since *Donoghue v. Stevenson.* [15]

[13] (1868) L.R. 3 Q.B. 197, at 202-3.
[14] [1913] 3 K.B. 340.
[15] [1932] A.C. 562.

The authorities are confused and there are three views as to the nature of the implied terms:—

(a) the owner is under a duty to take reasonable care to make the res reasonably safe for the purpose for which he knows that it has been hired;

(b) the owner is under a duty to supply a res that is reasonably safe, the only defence being that the defect is a latent one which could not be discovered by any care or skill;

(c) there is an absolute guarantee of fitness.

(It is assumed in each of these cases that the facts are such as to show that the bailee relied upon the bailor's judgment; e.g., that it was not a contract for the hire of a specific res examined and accepted by the bailee in reliance on his judgment.) [16]

We shall now glance at the authorities in favour of each of the conflicting views outlined.

(a) *The test of reasonable care.*

Greer, L.J., in *Felston Tile Co. v. Winget* [17] states: "An implied term in a bailment is that the article bailed is as fit for the purpose as reasonable care and skill can make it." However, not much reliance can be placed upon this as it is in any case an *obiter dictum,* and it occurs in a passage where the argument of counsel is being summarised.

Halsbury [18] states that the owner is under an obligation to "ascertain that the chattel so let out by him is reasonably fit and suitable for the purpose for which it is expressly let out, or for which, from its character, he must be aware that it is intended to be used: his delivery of it to the hirer amounts to an implied warranty that the chattel is in fact as fit and suitable for that purpose as reasonable care and skill can make it." The first proposition is supported by the authorities, but the concluding proposition is erroneous in so far as it implies that the owner may escape if he proves that he has used reasonable care. The doctrine that the res must be reasonably fit for the relevant purpose is much stricter than any theory that the owner escapes if he has used reasonable care. Halsbury cites six authorities which will be shortly discussed. So far as *Sutton v. Temple* [19] is concerned, the remark of Lord Abinger is a mere *obiter dictum* and supports a stricter view than that laid down by Halsbury. *MacCarthy v. Young* [20] deals with gratuitous

[16] A mere cursory inspection by the bailee does not prevent his showing that he relied upon the bailor's judgment—*Jones v. Page,* (1867) 15 L.T. 619.
[17] [1936] 3 All E.R. 473.
[18] i. 757.
[19] (1843) 12 M. & W. 52, at 60.
[20] (1861) 6 H. & N. 329.

loan and not hire and there is not even an *obiter dictum* dealing with hire.

In *Mowbray v. Merryweather,* [21] the facts do not raise a case of hire in the strict sense. Plaintiffs, a firm of stevedores, contracted to discharge a cargo from defendants' ship, the defendants supplying the cranes, chains and necessary gear. A defective chain was provided. Lord Esher, M.R., considered that the warranty was that the chain in question was so far sound as to be sufficient for the work which the plaintiffs had to do as stevedores. One of plaintiffs' workmen was injured by a breaking of the chain and plaintiffs paid compensation—this amount they successfully recovered from the defendants. Kay, L.J., suggests that the warranty is that the chain is reasonably fit for the purpose for which it is supplied. Rigby, L.J., gives the only dictum which affords any support to the doctrine of reasonable care. "It is admitted that in the circumstances in which this chain was supplied, there was a warranty at any rate to the extent that the defendant would use reasonable care that it should be fit and proper for the purpose for which it was to be used. It is clear that he used no care at all." This is merely a statement that, even if the minimum standard were adopted, defendant had not observed it. *Vogan v. Oulton* [22] was a case which the Court of Appeal described as on all fours with *Mowbray v. Merryweather.* Wright, J., laid down that there was an implied warranty that the bags hired were fit for the purpose for which they were supplied and the Court of Appeal dismissed an appeal from his decision.

Oliver v. Saddler & Co. [23] does not deal with hire. This case also concerned the discharge of a ship and a firm of stevedores gratuitously permitted the porterage company, in taking the cargo from the deck, to use the slings which had been used by the stevedores in raising the cargo from the hold. The House of Lords held that in the special circumstances of the case the firm of stevedores owed a duty to the porters to see that the sling was in a fit condition to take the load. Owing to the interest of both parties in securing expeditious unloading, their Lordships did not treat the case as a mere gratuitous loan, but laid down a duty binding those who supply a chattel for immediate use in a matter where their own interest is concerned. Certainly the test applied was that of reasonable care to see that the rope was safe. [24]

In *Dare v. Bognor Urban District Council,* [25] there was a finding by the jury that certain chairs hired were not reasonably fit for use. There is no discussion in the judgment in the Court of Appeal which bears on the precise nature of the implied condition.

[21] [1895] 2 Q.B. 640.
[22] (1899) 16 T.L.R. 37.
[23] [1929] A.C. 584.
[24] see Lord Atkin at 598.
[25] (1912) 28 T.L.R. 489.

These cases, then, provide no support for the proposition that the duty of one who lets chattels is confined to a standard of reasonable care.

(b) *The owner is under a duty to supply the res reasonably fit for the purpose for which it was hired, the only defence being that the defect was a latent one undiscoverable by any exercise of care or skill.*

That this formulation of the rule is not the same as that of negligence is seen from *Hyman v. Nye* [26] itself where on appeal it was held a misdirection to say that if the defendant took all reasonable care to provide a proper carriage, he should not be liable. The *West Cock* [27] was not a case of bailment (it concerned a contract for towage) but Farwell, L.J., approved of the judgment of Lindley, J., in *Hyman v. Nye* and Kennedy, L.J., cited it with apparent approval.

(c) *The owner is under an absolute warranty to provide a chattel reasonably fit for the purpose for which it is hired.*

In *Chew v. Jones* [28] Pollock, C.B., laid down at nisi prius that "if a horse and carriage be let out for hire for the purpose of completing a particular journey, the parties letting warrant that the horse or carriage as it may be, is fit and proper and competent for such journey." Lord Abinger in *Sutton v. Temple* [29] stated: "For instance, if a carriage be let for hire, and it breaks down on the journey, the letter of it is liable and not the party who hires it. So if a party hires anything else of the nature of goods and chattels, can it be said that he is not to be furnished with the proper goods —such as are fit to be used for the purpose intended? Undoubtedly the party furnishing the goods is bound to furnish that which is fit to be used. In every point of view the nature of the contract is such that an obligation is imposed upon the party letting for hire to furnish that which is proper for the hirer's accommodation."

Grove, J., in *Fowler v. Locke* [30] considered that in the case of hire there is an implied contract that the thing supplied is reasonably fit for the purpose for which it is hired. "Where there is a hiring of goods, not agreed to as specific chattels, and where, as here, the person hiring has no reasonable means of ascertaining their quality, the hirer is bound to supply such as are reasonably fit for the purpose." [31] The facts of this case were that the plaintiff, a cab driver, obtained from the defendant, a cab proprietor, a horse and cab on

[26] *Supra,* Note 9.
[27] [1911] P. 208. The contract concerned the supply of two tugs. Kennedy, L.J., approved of the distinction made in *Robertson v. Amazon Tug & Lighterage Co.,* (1881) 7 Q.B.D. 598, at 606, between the hire of a specific res and of a res not yet appropriated to the contract.
[28] (1847) 10 L.T. 231: Cf. *Dare v. Bognor Urban District Council,* (1912) 28 T.L.R. 489.
[29] 12 M. & W. 52, at 60.
[30] (1872) L.R. 7 C.P. 272, at 280.
[31] at 281.

the terms that the plaintiff should at the end of the day hand over 18/- to the defendant, but should keep all earnings above that sum. The horse bolted and the driver was injured. Byles and Grove, JJ., held that the relationship of the parties was that of bailor and bailee. Willes, J., held that the relationship was that of master and servant and added, "It is unnecessary to give an opinion, and I offer none, upon the question whether there is an absolute warranty of fitness as between letter and hirer, in the case of an ordinary bailment of hire." This indicates that Willes, J., at least felt some doubt upon the matter. [32]

Campbell, J., in *Criss v. Alexander* [33] considers that if a person desiring to hire an article for a certain purpose goes to another person whose business it is to supply such articles and makes known to him the purpose for which the article is required, so as to show that the person proposing to hire relies on the skill or judgment of the person proposing to let on hire, there is implied at common law a condition that the article hired is reasonably fit for the purpose for which it is required.

Jordan, C.J., states the general rule to be that where one person for value supplies a chattel to another for an agreed or stated purpose, he impliedly promises, in the absence of some provision to the contrary, [34] that it is reasonably fit for such purpose. [35] The learned Judge did not shrink from the practical results of this test: firstly that a latent defect, even if undiscoverable by any possible care or skill, would not be a defence: secondly, the implied condition in hire is broadly similar to that of sale. [36] *Robertson v. The Amazon Tug Co.* [37] was distinguished on the ground that the general rule enunciated may be excluded either by agreement of the parties or the facts of the particular case. Jordan, C.J., also cited the dictum of Wright, J., in *Vogan & Co. v. Oulton* [38] that there was an implied warranty that the chattel was reasonably fit for the purpose for which it was hired.

In a contract for work and labour, a Divisional Court in *Myers & Co. v. Brent Cross Service Co.* [39] held that with regard to the materials supplied there was an absolute warranty as to the fitness

[32] There were subsequent proceedings (see L.R. 10 C.P. 90) but the judgments do not touch on this point.

[33] (1928) 28 S.R. (N.S.W.) 297, at 300-1.

[34] Lowe, J., in *Woods Radio Exchange v. Marriott,* [1939] A.L.R. 409, accepts this dictum subject only to the qualification that a provision to the contrary might be implied in a proper case from the circumstances attending the hiring: see also *Roach v Roberts* (1924) 26 W.A.L.R. 110.

[35] *Gemmell Power Farming Co. Ltd., v. Nies,* (1935) 35 S.R. (N.S.W.) 469.

[36] There can only be a broad similarity for the conditions to be implied in sale are now statutory.

[37] supra, note 11.

[38] (1898) 79 L.T. 384.

[39] [1934] 1 K.B. 46.

of the articles, if it was not excluded by the express or implied terms

of the contract. This case, of course, is not precisely in point, as it did not deal with hire of chattels.

Bentley Bros. v. Metcalfe [40] is not strictly a case of hire of a chattel. Defendants let a room in their mill to plaintiffs and agreed to supply power for the working of the machine. The power was supplied by an engine on the premises, and, owing to a defect in the governor of this engine, it ran at an excessive speed and caused the drum of the machine in plaintiffs' room to revolve at such a speed that it burst and killed one of the plaintiffs' servants. Sir Gorell Barnes stated that the implication in such a case is similar to that which arises on the supply of any chattel, "which is that the chattel . . . . should be reasonably fit for the purpose for which it is supplied." On the other hand it is clear that this case could be regarded as analogous to sale of the power, rather than hire, as is shown by the judgment of Collins, M.R., and Cozens-Hardy, L.J.

The weight of authority seems to favour this last view, but in the present state of the authorities it is impossible to be dogmatic, as so much depends upon *dictum* rather than decision. There is not a great practical difference between an absolute condition and one subject to the exception of a latent defect undiscoverable by any care or skill. Again, *Hyman v. Nye* is usually accepted as good law, but it is frequently forgotten that this case did recognise the defence of the latent defect undiscoverable by care or skill. Moreover, many modern cases still assume that there is a difference between the implied conditions in sale and those applying in law, e.g., Bray and Bailhache, JJ., in *Geddling v. Marsh.* [41] If the strict view is adopted for hire, then the difference disappears.

G. W. PATON.

[40] [1906] 2 K.B. 548.
[41] (1920) 1 K. B. 668 at 672.