CONDITIONS AND WARRANTIES.

By E. F. HILL.

SECTION 59 of the Goods Act confers on the parties to a contract of sale of goods the power to negative, if they so desire, the conditions and warranties implied by that Act into such contracts. Clauses purporting to put this power into operation have from time to time come up for judicial consideration. Most notable are the cases of *Wallis* v. *Pratt*,[1] *Andrews* v. *Singer*,[2] and *L'Estrange* v. *Graucob*.[3] Each of these cases will be discussed in turn.

The facts in *Wallis* v. *Pratt* are well known: The contract was for the sale of seed described in the contract as "common English sainfoin." In fact, however, an inferior grade of seed was supplied. This was a contract of sale of goods by description within the meaning of the Goods Act.[4] As such, the condition implied by Section 18 in the following words: "When there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description," was applicable. But the buyers in *Wallis* v. *Pratt* had accepted the goods, and so, under Section 16(3), the breach of the condition could only be treated as a breach of warranty. But a clause in the contract of sale read: "Sellers give no warranty, express or implied as to .... description...."

The sellers argued that they were excused liability by this clause, as it negatived implied warranties. Their contention was upheld by the Court of Appeal,[5] but the dissent of Moulton L.J. is the most notable feature in the case. Briefly Moulton L.J. was of opinion that the effect of Section 16(3) was not to convert conditions into warranties for all purposes; it was simply to alter the remedy; the breach was still that of a condition, but as far as the injured party's remedy was concerned, it could only be treated as a breach of warranty. The negativing clause only negatived warranties; conditions were outside it, and therefore the buyer could recover damages. This reasoning was adopted by the House of Lords.[6]

Before proceeding further, it is necessary to point out that the judgment of Moulton L.J., despite a certain confusion in the use of the term "condition," for the most part[7] clearly treats the delivery of seed which was not common English sainfoin as a breach of the implied statutory condition as to correspondence of the goods with their contract description. Acceptance of the goods meant the application of Section 16(3) and it seems clear that, had the negativing clause included implied conditions, he would have thought the seller able to escape liability. In view of the later case of *Andrews* v. *Singer*, it becomes necessary to quote from his judgment[8]: "It is admitted that the language of the contract creates the ogligation to deliver common English sainfoin, and that this has the status of a condition. It can-

1. [1911] A.C. 394.
2. [1934] 1 K.B. 17.
3. [1934] 2 K.B. 394.
4. *Varley* v. *Whipp* [1900] 1 Q.B. 513.
5. [1910] 2 K.B. 1003.
6. [1911] A.C. 394.
7. See, however, the final paragraph.
8. [1910] 2 K.B. 1003 at 1016.

not, therefore, be affected or limited by a clause which only negatives the existence of warranties. . . . Since the language of the contract is admittedly adequate to create the obligation to deliver common English sainfoin, it follows of necessity that it brings with it the legal consequences that if it is not performed, the purchaser has a right of action for damages for such non-performance."

In *Andrews* v. *Singer*, the contract was for the sale of "new Singer cars." In fact, what was supplied was not a new Singer car, but a used Singer car. Here, it might be thought, was another contract of sale by description, and a breach of the implied condition that the goods should correspond with the description. The buyer accepted the goods, and so was forced to claim only damages. The seller relied on the following clause: "All cars sold by the company are subject to the terms of the warranty set out. . . . in this agreement, and all conditions, warranties and liabilities implied by Statute, common law or otherwise are excluded."

Applying the reasoning of Moulton L.J., approved as it was by the House of Lords, the following position is reached: Here is the breach of an implied condition as to correspondence of goods with their description; the buyer, for the purpose of his remedy, can treat it only as a warranty; that does not affect its inherent nature as a condition; there is a clause in this contract which negatives implied conditions; therefore the buyer is denied any claim. But the Court of Appeal came to a different conclusion. Scrutton L.J., with whom the other members of the Court agreed, reasoned thus: that the subject matter of this contract should be new Singer cars is not an implied condition; it is an express term of the contract; a clause merely negativing *implied* conditions and warranties is insufficient to exclude liability for the breach of an express term of the contract; therefore the buyer's claim is not excluded. He pointed out that apparently the term "conditions" had been inserted to fill the gap left by *Wallis* v. *Pratt*. He said[9]: "Where goods are expressly described in the contract, and do not comply with that description, it is quite inaccurate to say that there is an implied term; the term is expressed in the contract. In my view there has been in this case a breach of an express term of the contract."

To Scrutton L.J. the obligation to deliver new Singer cars arises apart from implication by Statute. Portion of Moulton L.J.'s judgment in *Wallis* v. *Pratt* is consistent with this view, but his ultimate opinion did not rest on it. And if the reasoning of Scrutton L.J. had been applied to the facts in *Wallis* v. *Pratt*, there would have been no need to consider the question of negativing of *both* conditions and warranties and the effect of Section 16(3). The short answer to the sellers in *Wallis* v. *Pratt* would have been that there was a breach of an express term of the contract, namely, that the goods supplied were expressly to be common English sainfoin. At this stage, it may be noted that Moulton L.J. almost reached this position when he said that, on its true construction, the contract established the liability to deliver common English sainfoin.

9. [1934] 1 K.B. 17 at 23.

Returning, however, to *Andrews* v. *Singer,* Scrutton L.J. continued the statement set out above by saying[10]: "If a vendor desires to protect himself from liability in such a case he must do so by much clearer language than this." The implication from this, from the actual decision in *Andrews* v. *Singer,* and from the subsequent decision in *L'Estrange* v. *Graucob,* seems to be that in future exclusion clauses, not only should *implied* conditions and warranties be negatived, but so also should *express* conditions and warranties. In this connection, it is interesting to note the remarks of Greer L.J., who, in comparing the clause with that in *Wallis* v. *Pratt,* said[11]: "In one respect that clause was wider than that in the present case, because there the sellers protected themselves against any express warranty that there might be in the contract, while those responsible for the wording of the clause in this contract, though they inserted the word 'condition,' left out the word 'express.'"

Then followed *L'Estrange* v. *Graucob.* The plaintiff purchased from the defendant a cigarette slot machine which, a few days later, through some defect in its mechanism, became unworkable. The pleadings in the case are very unsatisfactory, but substantially the plaintiff's rights, if any, depended on the breach of the condition implied by Section 19(1) of the Act, which provides that where goods are purchased from a seller who deals in that class of goods, if the purchaser makes known the purpose for which he requires them, so as to show that he relies on the seller's skill, then "there is an implied condition that the goods shall be reasonably fit for such purpose."

The seller relied on the following clause:—"This agreement contains all the terms and conditions under which I agree to purchase the machine specified above, and any express or implied condition, statement or warranty, statutory or otherwise, *not stated* herein, is hereby excluded."

Scrutton L.J. said[12]: "A clause of that sort has been before the Courts for some time. The first reported case in which it made its appearance seems to be *Wallis* v. *Pratt,* where the exclusion clause mentioned only 'warranty,' and it was held that it did not exclude conditions. In the more recent case of *Andrews* v. *Singer,* where the draftsman had put into the contract of sale a clause which excluded only implied conditions, warranties and liabilities, it was held that the clause did not apply to an express term describing the article, and did not exempt the seller where he delivered an article of a different description. The clause here in question would seem to have been intended to go further than any of the previous clauses, and to include all terms denoting collateral stipulations, in order to avoid the results of these decisions." It was held that the seller had successfully negatived his liability.

It is submitted that the clause in question does not avoid the results of these decisions. If the reasoning of Moulton L.J. is applied, the mere negativing of implied conditions and warranties will exempt the seller in the event of breach. If the clause used in *Andrews* v.

10. [1934] 1 K.B. 17, at 23.
11. [1934] 1 K.B. 17, at 24 and 25.
12. [1934] 2 K.B. 394, at 401-402.

Singer had been used in *L'Estrange* v. *Graucob, mutatis mutandis,* it is submitted that the seller could still have escaped liability in respect of the breach complained of. In fact, it is probably the simplest case illustrating the effect of such an exclusion clause, and it is suggested that the draftsman of it, if directing his mind to any previous case, was so directing it, not to *Andrews* v. *Singer,* but rather to *Baldry* v. *Marshall,*[13] where the decision in *Wallis* v. *Pratt* was expressly followed, and the omission of the word "condition" from the exclusion clause was held not to exempt the seller from liability for breach of the condition implied by Section 19(1) (the condition in question in *L'Estrange* v. *Graucob*). The only distinctive feature in *L'Estrange* v. *Graucob* seems to be in the addition of the word "express." A brief examination of the clause casts considerable doubt on the proposition that it goes further than previous cases. It will be noted that the clause excludes "any express or implied condition, statement or warranty *not stated* herein." Implied terms apart, if a document contains all the terms, as was the agreed case in *L'Estrange* v. *Graucob,* then it contains all the express terms. Assuming that there is only one document, as was also agreed, the insertion therein of a clause saying that any express condition or warranty not stated herein is hereby excluded, would seem to be meaningless. It seems wrong to say that the clause goes further than those previously; it simply seems an emphatic way of making the document the sole repository of the agreement.

If, for purposes of illustration, the case of *L'Estrange* v. *Graucob* is considered, and it is assumed that a chocolate slot machine had been supplied, instead of the contract description, "cigarette slot machine," then the issue raised in *Wallis* v. *Pratt* and *Andrews* v. *Singer* would have arisen again. In other words, the problem is the effect of an exclusion clause on the implied condition as to description: the problem of the different article.[14] In the circumstances assumed, had the exclusion clause said "any express or implied condition or warranty in this contract is negatived," the solution of the problem may have presented extraordinary difficulties to Scrutton L.J. Such a position was present to the mind of counsel in *Wallis* v. *Pratt* when he said[15]: "In a case where something of a different kind from the description of the article contracted for is delivered to and retained by the purchaser, as for instance, if peas were delivered when beans were contracted for, it might be a question of fact whether such delivery and acceptance must be referred to some new implied contract, and not to the original contract, because it would be impossible to suppose that the parties were acting under that contract."[16] It will be seen later that this is not entirely accurate.

We are left then with the case where a different article from that described in the contract is delivered. *Wallis* v. *Pratt* seems to decide that this implied condition as to the correspondence of goods with their description may be negatived if sufficiently apt words are used,[17]

13. [1925] 1 K.B. 260.
14. For this term I am indebted to Mr. Geoffrey Sawer.
15. [1910] 2 K.B., at 1006: See also Scrutton L.J. [1934] 1 K.B., at 23.
16. Cf. *Chanter* v. *Hopkins,* 4 M. & W., 399, at 404, *per* Lord Abinger.
17. See *per* Bankes L.J. in *Baldry* v. *Marshall* [1925] 1 K.B., at 266.

and hence, if a different article is delivered, liability will then be excluded. *Andrews* v. *Singer* decides that where the subject matter is described in the contract there is no question of implied condition; it is an express term; if a different article is delivered it is a breach of an express term. *L'Estrange* v. *Graucob* gets the matter no further.

It is submitted that the explanation of the inconsistency lies in the section of the Act. As a code, the Goods Act was intended to reduce to logical form the common law principles. A brief examination of the common law rules, prior to the Act, may supply the explanation of the inconsistency between the cases.

In *Shepherd* v. *Kain*[18] the contract was for the sale of a "copper-fastened vessel," with all faults. It was held that the fact that the vessel was not copper-fastened was a breach of the contract. *Bridge* v. *Wain*[19] was to the like effect. In *Barr* v. *Gibson*[20] Parke B. said: "But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description." He continued: ". . . . the sale in this case of a ship implies a contract that the subject of the transfer did exist in the character of a ship." Similar words were spoken by Lord Abinger in *Chanter* v. *Hopkins*.[21] Benjamin, in his treatise on sale, says[22]: "When the seller sells an article by a particular description, it is a condition precedent to his right of action that the thing which he offers to deliver, or has delivered, should answer the description. . . . If a specific existing chattel is sold by description, and does not correspond with that description, the seller fails to comply, not with a mere collateral warranty, *but with the contract itself,* by breach of a condition precedent." Further on, he says[23]: "If the sale be of a described article, the tender of an article answering the description is a *condition precedent* to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, or if he has paid for it, to recover the price *as money had and received for his use.*" In other words, at common law, there was a total failure to perform the contract if goods other than those described were delivered.[24]

This, then, is the principle that the code should take up: that the delivery of goods answering the contract description is a condition precedent to the purchaser's liability. But the code *implies* this condition of correspondence into all contracts of sale by description, which includes all sales of goods other than the sale of specific goods as such.[25] Hence in all contracts save these it is an implied condition that the goods shall correspond with the description. As such implied condition, conferring, before acceptance, the right of rejection, it may be excluded from the contract by virtue of the power in Section 59, with resulting loss of the right of rejection. It may also sink—apart from the question of exclusion clauses—as far as remedy is con-

18. 5 B. & Ald. 340.
19. 1 Stark 504.
20. 3 M. & W. 390.
21. 4 M & W. 399.
22. Benjamin on *Sale*, 7th Edn., 694.
23. *Op. cit.* 635.
24. *Cf. per* Channell J. in *Howcroft* v. *Perkins*, 16 T.L.R. 227, in speaking of a contract for celery seed: "If instead of celery coming up, something absolutely different, as an oak tree, had grown up, the contract would not have been performed at all."
25. Benjamin *Op. Cit.* 641.

cerned, to a warranty after acceptance. Hence, if a seller avails himself of all these powers, he may deliver a different article and escape liability. This seems very different from the common law position that in such a case there was a total failure to perform the contract, and that, if the buyer had paid for the goods, he could recover the price as money had and received. It is submitted that the framers of the code made a mistake; a correspondence with description is a condition, but in a different sense from that of the implied conditions in the code. Since in all contracts, save the few mentioned above, the goods must be described, the description is virtually the contract. Section 59, then, confers a power to wipe the contract out.

By way of conclusion, it is proposed to test *Wallis* v. *Pratt* and *Andrews* v. *Singer* in this new light. Portions of Moulton L.J.'s judgment are consistent with the common law position, that is, where he indicated that, on its true construction, the contract imposed the obligation to deliver common English sainfoin. Without any intermediate steps, this obligation became an implied condition. How the term became implied is a mystery. A similar confusion is very noticeable in the judgment of Greer L.J. in *Andrews* v. *Singer*. *Andrews* v. *Singer* is consistent with common law principles; the contract imposed the obligation to deliver new Singer cars (called in that case "express term"). The failure to deliver the goods, as described, would have been at common law, the failure of a condition precedent, and it is submitted that in *Andrews* v. *Singer* at least the buyer could have recovered the purchase price as money had and received. It is submitted that the true test is whether the contract, on its correct construction, imposes the obligation to deliver an article of a particular description. If so, then no exclusion clause can affect it. Since all contracts are contracts of sale by description save those for specific goods as such, the first limb of Section 18, at least as interpreted, would seem to be rendered useless. The mistake may have arisen from the inaccuracy in the terminology of the common lawyers, such as shown in the statement of Parke B., cited above. Or it may be (though this is almost inconceivable) that "description" was only meant to apply to collateral terms in the description. The test, then, is to determine what essential obligation the contract imposes: collateral description may then be within the meaning of Section 18.

Hence the cases seem to be left in this position: on a narrow view of the *ratio decidendi* in *Wallis v. Pratt,* there may be no conflict between it and *Andrews* v. *Singer*. *Andrews* v. *Singer* is a correct decision. Insofar as it suggests that the problem of the different article may be escaped, it is submitted that it is wrong.[26] And insofar as *L'Estrange* v. *Graucob* was thought to solve the problem, it is submitted that it is wrong. One difficulty remains, and that is: what is to be done with Section 18?

[*I am greatly indebted to Mr. Geoffrey Sawer for many valuable suggestions in the writing of the above.*]

26. It is admitted, however, that the parties might have inserted a term in the clause in *Andrews* v. *Singer* to the following effect: "If a Ford Model T is delivered, the seller shall be under no liability." It is submitted that the difficulties of concluding such a contract would be great.