HIRE-PURCHASE LEGISLATION IN QUEENSLAND

The inexhaustible appetite of the public for consumer goods, and the necessity for satisfying that appetite by credit financing, have led in Queensland, as elsewhere, to an enormous growth in "cash order" transactions and sales of chattels by instalments. Both these means of credit financing have been subjected to legislative intervention, the former by the Cash Orders and Hire-Purchase Agreements Regulation Act of 1946, and the latter by the Hire-Purchase Agreement Acts 1933 to 1946. Yet despite the volume of hire-purchase transactions, judicial exposition of the hire-purchase legislation in Queensland is very scanty. The purpose of this paper is to examine this legislation, and to proffer some comments on its more distinctive features. The paper is not concerned with the general law affecting hire-purchase agreements, nor even with the Queensland legislation in so far as it is common to that obtaining in England or in the other States.

1. *The definition of a Hire-Purchase Agreement.*

The Act particularises four types of agreements as hire-purchase agreements:

(a) A letting of goods or chattels with an option to purchase. This clause simply formulates the essential conception of a hire-purchase agreement in the strict sense, the *Helby v. Matthews*[1] type of agreement, in which there is a combination of a bailment *locatio rei* with a binding offer to sell by the bailor, dependent on payment of the total amount of instalments of hire and on the fulfilment of other conditions imposed by the bailor; and in which the bailee is granted a correlative option to purchase by fulfilling the imposed conditions, or the right to return the object to the bailor.

(b) An agreement for the payment of goods or chattels by instalments. This provision is *prima facie* wide enough to cover the case where the property passes to the purchaser absolutely at the time of the agreement, as well as situations in which the passing of the property is deferred. In particular it seems capable of covering lay-by transactions, in which the property in the goods passes to the purchaser while the possession remains with the vendor. Indeed the use of the word "payment" instead of "purchase" might suggest that the only agreements intended to be affected were those where the property was to be regarded as having passed. It is submitted, however, that the *prima facie* effect of the provision must be cut down by

1. [1895] A.C. 471.

a consideration of the purpose and scope of the Act itself so as to cover only contracts of sale of goods or chattels on terms that the possession shall pass immediately, whilst the property in the goods shall not pass until all instalments have been paid. The following considerations may be raised in support of this view:

(i) The Act grants a right in equity to the hirer in or in respect of the goods and chattels or the value thereof comprised in the hire-purchase agreement based on the payments and/or instalments made by the hirer thereunder. (S. 3 (3)). In a case where the property in the goods passes immediately to the purchaser, it seems unnecessary to give him the limited interest in the goods contemplated by this section.

(ii) The stringent limitations on the powers of the owner on default by the hirer imposed by S. 4 are all directed to the adjustment of rights upon the retaking of possession of the goods. They seem clearly to envisage only a situation in which the hirer has originally taken possession of the goods.

(iii) Where at least fifty per cent. of the purchase price has been paid in the case of an agreement or agreements covering more than one article, provision is made that certain chattels shall become the property of the hirer either as a result of an arrangement between the owner and the hirer or as a result of a court order. It seems plain that the legislative intent was that until such arrangement or order the property in the goods could not have passed to the hirer.

(iv) Similarly, the provision in S.4(4)(b) for the application of the proceeds of any sale or re-hiring of chattels seized by the owner in payment of the unpaid balance of the moneys which would have been payable under the hire-purchase agreement by the hirer *to entitle him to the full ownership of the chattel* seems to contemplate that the full ownership of the chattels could not have passed to the hirer prior to the payment of all the instalments.

If the provision is read down in the manner suggested, it will be found that it still covers such agreements as those in *Lee v. Butler*[2] and *McEntire v. Crossley Brothers*[3], to which the term "hire purchase agreement" has been traditionally, though loosely, applied.[4]

(c) Any agreement for the hiring of goods and chattels with or without expressly giving the hirer an option of purchase of such goods

2. [1893] 2 Q.B. 318.
3. [1895] A.C. 457.
4. Halsbury, 2nd ed., Vol. 16, p. 506.

and chattels whereby the owner agrees to let to the hirer such goods and chattels for a defined period as set forth in the agreement during which period prescribed instalments are therein payable by the hirer (the total of which including any deposit amounts approximately to the value of the goods and chattels so hired) and at the termination of which period such agreement allows the hirer of such goods and chattels to continue the hiring thereof subject to the payment of a nominal rent only.

It may be said of traders, as of taxpayers, that they are free, if they can, to make their own arrangements, so that their cases may fall outside the scope of the hire-purchase Acts. The above-quoted definition was designed to deal with one such arrangement, whereby the hirer acquired, not an option to purchase, but a right to a perpetual hiring upon payment of a nominal annual rental if demanded—which presumably it never would be. In *Walsh v. Industrial Acceptance Corporation Ltd.*[5] this extension of the definition of hire purchase agreements was applied to an agreement which obviously fell squarely within its provisions. But the ingenuity of draftsmen is inexhaustible: and it was obviously thought necessary to provide some blanket clause by which all attempts to evade the Act would be blocked. Hence the enactment of the following definition.

(d) Any scheme or device wholly or partly in writing on or in connection with the sale or agreement for sale of goods and chattels or with the intended or future sale thereof which in the opinion of the Court is intended to give to the owner security for the payment of the purchase money or any part or instalment thereof and whether referred to as rent or hire or otherwise by retaining or attempting to retain the property in such goods and chattels in the owner until due and full payment of such purchase money or part or instalment thereof or until any later time.

A learned author has expressed a doubt whether, as a matter of law, this definition can extend the scope of transactions affected by the legislation.[6] Would it cover, for example, a sale of the goods with a bill of sale back to the vendor to secure payment of the price? Presumably not, since in that case there would be no retention of the property in the owner nor attempt thereat. Again, it is submitted that it would not cover the case where an option to purchase is given by a distinct document from that recording the hiring agreement, since here there is no agreement for sale, nor any intended or future sale.[7]

5. [1936] St.R.Qd. 275.
6. Else-Mitchell: Hire-Purchase Law, 2nd ed., p. 116. The Queensland definition has been adopted in the part of the New South Wales Hire-Purchase Agreements Act 1941-55 relating to Minimum Deposits.
7. Such an arrangement would not fall within category (a), since the letting is not *with* an option to purchase.

2. *Hire-Purchase Agreements and Bills of Sale.*

Since *McEntire v. Crossley Brothers*[8] it has been settled law that a hire-purchase agreement, under which the property in the goods does not pass until final payment and the seller has a right to retake possession on default in payment, is not a bill of sale. There are, however, cases in which transactions couched in the form of hire purchase agreements have been held to be in substance assurances of chattels by way of security for the payment of money, and hence to be caught by the bills of sale legislation. In Queensland the question whether or not a hire purchase agreement constitutes a bill of sale depends upon the interpretation of the term "Bill of Sale" contained in the Bills of Sale and Other Instruments Act 1955[9] S.6(5) provides:

> Every hire-purchase agreement with respect to any chattels (excepting every hire-purchase agreement where the owner is a person who ordinarily sells, or hires under hire-purchase agreements, chattels of the same class and the agreement is made in the ordinary course of his business) shall be deemed to be a bill of sale within the meaning and for the purposes of this Act.

This provision divides hire-purchase agreements into two classes: those where the owner is a person who ordinarily sells, or hires under hire-purchase agreements, chattels of the same class and the agreement is made in the ordinary course of his business; and those where the owner is not such a person, or the agreement is not made in the ordinary course of his business. With respect to this latter class, hire-purchase agreements are deemed to be bills of sale. It is trite law that one of the major factors leading to the development of the modern hire-purchase system was the desire to avoid the registration provisions of the bills of sale legislation, with its adverse effect on the credit of the grantor. The seller of goods on time payment who transferred the property in the goods to the buyer by a contract of sale, and received back a bill of sale by way of security, had a security over the goods for payment of the price which was just as effective as the rights possessed by the owner in a hire-purchase agreement; whilst the position of the buyer, who had the use of the goods before paying the full price, was no different under either transaction, except so far as the question of publicity was concerned. The effect of this provision equating private hire-purchase agreements with bills of sale will doubtless be that private time-payment transactions will not be entered into

8. *Supra.*
9. For a general discussion of this Act, see Cross: *Bills of Sale and Other Instruments Act*, 2 U.Q.L.J. 304.

through hire-purchase agreements at all, but only through bills of sale, since the limitations on the rights of the grantee of a bill of sale to seize and sell upon default (S.45) are not nearly so drastic as those imposed by the Hire-Purchase Agreements Acts on the owner.

It is a nice question whether the exception of what might be termed traders' and financiers' hire-purchase agreements means that they are to be deemed, not to be bills of sale, or simply that no presumption in relation to them is asserted. In either case, if the definition of hire-purchase agreements is read in the manner already suggested, it seems clear that such agreements *without more* will not be classified as bills of sale. In none of the four categories is the property conveyed to the person in possession of the chattel during the term of the agreement, and the licence to seize can only operate so as to empower the owner to resume possession of his own chattels; whilst "the Bills of Sale Act relates to assurances or assignments or rights to seize given or conferred by the person who owns the property".[10]

There are, however, several transactions which take the form of hire-purchase agreements to which the bills of sale legislation has been held applicable, as in *Maas v. Pepper*[11] and *Price v. Parsons*.[12] There seems no reason to suppose that the position would be any different under the Queensland legislation.[13]

3. *The Interest of the Hirer.*

Prior to the exercise by the hirer of the option to purchase, or the payment of all the instalments in the case of agreements for the payment of goods by instalments, does the contract create merely a bailment for reward, or does it also confer on the hirer an interest in the goods? And if the latter, what is the nature of this interest? *Belsize Motor Supply Co. v. Cox*[14] and *Whiteley Ltd. v. Hilt*[15] are authorities for the view that the hirer acquires an interest in the goods themselves, which may be passed on to a third party, so that credit must be given to him for the amounts paid to the owner by the hirer when the owner sues the third party in conversion. On the other hand authorities exist which assert that the agreement in itself does not confer any property or interest upon the hirer.[16] Dean's view[17] is that

10. *McEntire v. Crossley Brothers* (*supra*), per Lord Herschell at p. 462.
11. [1905] A.C. 102.
12. 54 C.L.R. 332.
13. For a careful examination of several typical transactions see Dean: *Hire-Purchase Law in Australia*, pp. 34-51.
14. [1914] 1 K.B. 224.
15. [1918] 2 K.B. 808.
16. For example, *Australian Guarantee Corporation Ltd. v. Balding*, 43 C.L.R. 140 at 152.
17. *Supra* at p. 5.

the hirer takes no interest of any kind in the goods, but merely a contractual right against the owner, for breach of which he may recover damages. Until he elects to exercise his option he is a bailee paying an agreed sum as hire for specified periods, and may never elect to become anything more.

In Queensland, the question is complicated by what was doubtless intended to be a key provision of the Act, whereby a right in equity was conferred on the hirer. The provision reads:

Subject to this Act, the provisions of this Act shall, notwithstanding any law to the contrary, be read and construed as granting a right in equity to the hirer in or in respect of the goods and chattels or the value thereof comprised in the hire-purchase agreement based on the payments and/or instalments made by the hirer thereunder, and a right of relief to the hirer in accordance with this Act.

Apart from the Act, a hirer obtained no right in equity in respect of the goods. It may be that in certain circumstances he would obtain equitable relief from forfeiture upon breach of the terms of the agreement. If it is assumed that the decision in *Stockloser v. Johnson*[18] is applicable to hire purchase agreements, then the court would have power to give relief against the enforcement of forfeiture provisions, although there was no sharp practice by the owner, and although the hirer was not able to find the balance. It would, however, have to be shown that the retention of the instalments was unconscionable, and as Somewell L.J. pointed out, where instalments are to be paid over a period in which the hirer has the use or the benefit of the subject matter, the burden of showing unconscionability is not a light one.[19]

In *E. G. Eager & Sons Ltd. v. Grant* [20] it was argued that S.3 (3) created a continuing right of redemption in the hirer, so that redelivery to the hirer could be ordered in circumstances which fell outside the particular provisions enacted to deal with the question of the right to redelivery. The Full Court rejected this contention. Graham A.J. stated:

"It is also to be noted in this connection . . . that S.3 (3) of the Act is enacted subject to a double limitation—in its opening words "Subject to the Act", and in its closing provision for a "right of relief to the hirer in accordance with this Act",—thus, in my opinion, limiting the equity of redemption created by that subsection to the terms provided in S.4 (2) of the Act."

18. [1954] 1 Q.B. 476.
19. See Diamond: *Equitable Relief for Hire-Purchaser,* 19 M.L.R. 498.
20. [1938] St.R.Qd. 13.

It is somewhat difficult grammatically to read this closing provision as a limitation on the grant of a right in equity; nevertheless it seems tolerably clear that the nature and effects of this right in equity and of the right to relief must be found within the words of the Act itself. We may then regard the rights afforded as the following:

(a) A right in the hirer after default and repossession by the owner to tender the amount owing to the owner or to tender performance of any other promise for the breach of which the chattels were retaken, and thereupon to *redeem* the chattels and become entitled to take possession of them and/or to continue in the performance of the hire-purchase agreement as if no default had occurred. (S.4(2)).

(b) A right to be paid part of the proceeds of any sale or of rehiring of any chattels seized, in accordance with the formula M-(P-V), where M represents the total amount of the moneys paid and the value of any other consideration provided by the hirer, P represents the purchase price (as defined in S.2), and V represents the value of the goods as shown by their sale or rehiring, less the expenses of repossession and re-sale or re-hiring.[21] (S.4(4)).

It is important to notice that these provisions only cover the case where the hirer has made default, and the owner has consequently made use of the procedure laid down in S.4. What, then, is the position where the agreement is terminated by the hirer without default? It seems anomalous that the hirer should be afforded certain rights when he makes default under an agreement, and have no rights when he observes his agreement; yet so it appears to be.

4. *Control by the Court over Hire-Purchase Agreements.*

The extensive control of the court[22] over hire-purchase agreements arises from three sources:

(a) *The Mortgagors and Other Persons Relief Acts*, 1931 to 1943, which provide relief for hirers from the terms and conditions of their agreements in circumstances of economic hardship.

(b) *The Money Lenders Acts*, 1916 to 1946. The object of this legislation is "to confer a remedy where through oppression, abuse of power or the unfair taking advantage of the necessities of another, that other has entered into an agreement the terms of which are harsh and such as would be an affront to the conscience of an honest and

21. This is the notation used by Dean and Else-Mitchell for the calculation of the purchaser's equity. It gives the same result mathematically as a calculation according to the terms of S.4(4).

22. The demarcation of jurisdiction between the Supreme Court and the Magistrates Court varies with each of the three Acts considered.

right-thinking person".[23] It is designed to do what the Chancery refused to do—to mend a man's bargains.[24] Hence it is appropriate where complaint is directed at the terms of the agreement, since it enables the court *inter alia* to reopen the transaction and take an account between the parties thereto; though it is not appropriate where the complaint is directed at the conduct of the owner antecedent to the making of the agreement.[25]

It should be observed that the definition of "hire-purchase agreements" for the purposes of these two Acts is not so extensive as in the Hire Purchase Agreement Acts.

(c) *The Hire-Purchase Agreements Act.* The terms in which the power of review is granted seem to confer a very far reaching degree of control upon the Court. By S.4(8) the hirer may appeal to the court for an order in respect of *any* of the matters hereinbefore mentioned relating to the hire-purchase agreement; and by S.4(9) the Court has power to review the account rendered by the owner after the sale or re-hiring of chattels seized, or *any other matter* being the subject of appeal to the court, in favour of or against either party and to decide the questions at issue and to give judgment for either party for such amount or otherwise make such order as it shall think fair and equitable under the circumstances. Nevertheless the Court has given a restricted interpretation to them. In *E. G. Eager and Sons Ltd. v. Grant*[26] it was held that the power given to the Court under S.4(9) does not authorise the making of an order which permits a hirer of a re-possessed chattel to redeem it on terms more favourable than those specifically provided by S.4(2) of the Act; and in *O'Brien v. Budds*[27] Webb C.J. stated:

"If chaos is to be avoided in the administration of this Act, I think we must hold that the Legislature did not intend that when the owner proceeds under one provision which amply safeguards the hirer's interest, the latter should be at liberty to proceed under another independent provision for a different remedy. Like other Acts speedily enacted to meet emergency conditions, the full scope and consequences of which cannot be foreseen, this Act contains a number of provisions in wide general language designed, no doubt, to cover every possible contingency. Such provisions are sometimes difficult to reconcile with other more specific provisions in the Act. On some such general pro-

23. *Bigeni v. Drummond* (1955) 71 W.N. (N.S.W.) 242 per Maguire A.J.
24. "The Chancery mends no man's bargains": Lord Nottingham in *Maynard v. Moseley* (1676) 3 Sw. 655.
25. *Bigeni v. Drummond, supra.*
26. *Supra.*
27. [1942] St.R.Qd. 243.

visions reliance is placed by the respondent in this case. These general provisions, however, do not derogate from the special provisions such as S.4(1)(e)".

The Full Court accordingly held that a Magistrate had no jurisdiction to order the return of a motor car to the hirer after it had been duly repossessed by the owner, and the owner had proceeded by way of valuation to enforce his rights under S.4(1)(e).

Since the grant of a power of review is contained in the section regulating the power of the owner on default by the hirer, it may be argued that the Court's power only extends to a review of the manner in which the owner exercises the rights conferred on him. Some of these rights are obviously given in terms which are absolute and permit no review, such as the power to enter upon any land; the power to seize and take possession of the chattels; and the power to remove them. But the exercise of other powers can be scrutinised by the court, and if necessary reviewed. Such are the question of the *reasonableness* of the terms and conditions of the sale or re-hiring; of the *reasonableness* of the sum representing the price which the goods might be expected to have realised (in the case where the owner does not sell or re-hire); whether expenses incurred for the purpose of making the chattels saleable have been *reasonably* incurred; and whether the valuation of the chattels has been *fairly* made by the owner. In these cases it is specifically provided that an appeal may be made to the court, and the purpose and limits of the court's intervention can be readily seen. Beyond this, however, the court's power does not seem to extend; and it may be suggested that the general language used in S.4(8) and S.4(9) is only employed *ex majori cautela* to cover similar questions which may arise and be readily susceptible to a review by the court.

5. *Conditions Warranties and Representations.*

In *Felston Tile Co. Ltd. v. Winget Ltd.*[28] it was stated, *obiter*, that a hire-purchase agreement was a contract of sale under the *Sale of Goods Act*, and that therefore the implied conditions and warranties laid down in that Act applied unless excluded by the contract. Lowe J. refused to follow this view in *Wood's Radio Exchange v. Marriott*[29] since although the owner agreed to sell in a strict hire-purchase agreement, the hirer did not agree to buy. It is only on the exercise of the hirer's option to purchase that the contract of hire becomes a contract of sale, and therefore the provisions of the *Sale of Goods Act* do not apply until that option is exercised. The opinion

28. [1936] 3 All E.R. 473.
29. [1939] A.L.R. 409.

of Lowe J. seems to be more in accord with the decision in *Helby v. Matthews*[30] and has been generally approved.

In the case of agreements for the payment of goods or chattels by instalments, there seems to be no reason why they should not be classified as "agreements to sell" under the *Sale of Goods Act* 1896, S.4(3), so that the implied conditions and warranties of that Act become applicable unless excluded.[31] If, then, the implied conditions and warranties are different in the case of a contract of sale from those in a contract of hire, it would seem that one set of implied conditions and warranties is applicable in the case of an agreement for the payment of goods and chattels by instalments, and another set in the case of a strict hire-purchase agreement; and even in this latter case, that the implied conditions and warranties will be of one form whilst the hire continues and of a different form when the option to purchase is exercised.[32]

If *Karflex Ltd. v. Poole*[33] is correctly decided[34] (it has been followed in *Warman v. Southern Counties Car Finance Corpn. Ltd.*[35]), then at least so far as the implied condition as to title is concerned there is a difference in the case of a strict hire purchase agreement from that of a contract of sale of goods. In those cases it was held that it is an implied condition of a hire-purchase agreement, that the persons letting the chattel are the owners of it at the date when the agreement is entered into, and not merely that they will become the owners before the option to purchase is exercised: whereas in the case of an agreement to sell, the implied condition is that the seller will have a right to sell the goods at the time when the property is to pass.[36]

Perhaps the most confused question is as to the nature of the implied term of fitness, where the hirer relies upon the owner's judgment. In the case of a sale of goods, there is an implied condition that the goods shall be reasonably fit for the particular purpose for which the buyer makes it known to the seller that they are required.[37] In the case of hire, Paton[38] distinguishes three views as to the nature of the implied term:

30 *Supra* at p. 477.
31. Unless perhaps S. 61 (4) of the *Sale of Goods Act* excludes such transactions, or certain types of them.
32. See Paton: *Bailment in the Common Law*, at p. 321.
33. [1933] 2 K.B. 251.
34. It has been strongly criticised by Dean, at p. 115.
35. [1949] 2 K.B. 576.
36. *Sale of Goods Act*, 1896, S.15 (1).
37. *Sale of Goods Act*, S.17 (1).
38. *Op. cit.* at p. 292 ff.

(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.

Paton leans in favour of this third view. The question is however now set at rest in Queensland so far as hire-purchase agreements made after 1st March, 1947, are concerned, by the provision in S.7A that an absolute condition is implied, provided the goods are of a description which it is in the course of the owner's business to supply. This implied condition is therefore the same as the implied condition of fitness under the *Sale of Goods Act*.

Under S.7B, in the case of hire-purchase agreements made after 1st March, 1947, the breach of any condition by the owner must be treated by the hirer as a breach of warranty only, after six months from delivery of the goods, unless it is otherwise agreed.

The question of contracting out of the implied conditions and warranties is bound up with the matter of representations, to which attention may now be directed. Two questions seem to arise. First, there is the question of the circumstances in which liability is imposed for misrepresentations; and secondly there is the question of the efficacy of attempts to avoid this liability.

(a) The imposition of liability. Where only two parties are concerned in a hire-purchase transaction, their rights and liabilities for misrepresentations will depend upon whether the representation formed a term of the agreement, and whether it was made innocently or fraudulently, in accordance with the settled law on this subject. But in the common situation where a trader does not hire or sell the goods directly, but makes use of the services of a finance company, the matter becomes more complex. Any representations or warranties made or given by the trader or his agents, so long as they are not inserted in the final contract, will not bind the finance company at all, unless the hirer can discharge the difficult task of proving that the trader was himself the agent of the finance company. Has the hirer, then any remedy against the trader for breach of warranty? In *Brown v. Sheen & Richmond Car Sales Ltd.*[39] the defendant car dealers represented to the plaintiff that a car was in perfect condition. The defendant sold the car to a finance company, and that company let it to

39. [1950] 1 All E.R. 1102.

the plaintiff under a hire-purchase agreement. Since the plaintiff was induced by the warranty to enter into the hire purchase agreement, and he paid a larger sum under the hire purchase agreement for the car than it was worth and he would have paid if the warranty had not been given, Jones J. gave judgment in his favour for the difference between the value of the car at the date of the hire-purchase agreement, and the value it would have had if it had answered to the warranty.[40]

By S.7(1) of the Act, a statutory liability is imposed on the owner for representations made by persons other than his agents. The owner is made "legally liable" for every representation, promise, or term made or offered to the hirer at any time within six months prior to the making of the hire purchase agreement by any person who shall have offered or agreed to let or sell to the hirer, or obtained or received from the hirer an application or order for the letting or sale to the hirer. Every such representation etc. is made binding in law as well upon the representor as upon the owner. What the effect of being so made "legally liable" may be is nowhere indicated; presumably the owner is made vicariously liable as if he had made the representations himself, and the consequences are left to the operation of the general law as to representations. A defence is provided if the owner and the representor can satisfy the court that they were not at any time during the period acting in concert either in relaion to the making or offering of any such representation, promise, or term or in relation to the letting or sale; though why the representor should be excused in such circumstances it is somewhat difficult to see.

(b) Contracting out of liability. S.7C of the Act avoids three types of agreements between the owner and the hirer.

(i) An agreement that any condition or warranty expressed or implied by law upon the letting or sale of the chattel concerned shall not be legally binding as against the owner.

What is meant here by the words "implied by law"? If they mean "implied by the Hire-Purchase Agreement Acts", then the only implied condition is as to fitness.[41] If they mean, "implied by the common law and any applicable statute law", then the power of the owner to contract out of liability seems to be very seriously curtailed; he would not be able even by express agreement to modify or extin-

40. This decision was followed in *Shanklin Pier Ltd. v. Detel Products Ltd.* [1951] 2 K.B. 854 *Irwin v. Poole* (1953) 70 W.N. (N.S.W.) 186.

41. Even this particular condition would not be implied when the transaction was effected through a finance company. The knowledge imparted to the trader of the particular purpose for which the chattel was required would not be imputed to the finance company.

guish the implied conditions or warranties. It is suggested, however, that the provision should be read in a quite different manner. The first task is to determine in any particular case what are the conditions and warranties expressed or implied by the agreement of the parties. Then the provision merely avoids any attempt to exempt the owner from any liability which may arise from the existence of these conditions or warranties.

(ii) An agreement that any condition agreed upon verbally or in writing, or warranty given verbally or in writing by the owner or his agent in the course or for the purpose of bringing about the sale or letting of the chattel concerned shall not be legally binding as against the owner.

(iii) An agreement that any representations, promises or terms made or offered to the hirer concerned for which representations, promises or terms the owner shall by law be declared to be legally liable, shall not be legally binding as against the owner.

Provision (iii) clearly is to be read with S.7(1). The combined effect of provisions (ii) and (iii) therefore is that terms exempting the owner from liability are avoided whether the representations were made by the owner or his agent, or whether they were made by a third person in such circumstances that the owner is made vicariously responsible for them.

Finally, it is provided in S.8 that no term of any agreement shall prevent a hirer from claiming or being awarded damages or any other relief for fraud or misrepresentation of the owner or any person acting or purporting to act on behalf of the owner in connection with any transaction of hire purchase.

The legislature has obviously attempted to cast the net widely, but some doubts may be felt as to the complete efficacy of these provisions. In particular it may be questioned whether S.7, which was inserted shortly after the decision in *Australian Machinery Co. Pty. Ltd. v. Hudson*[42] has remedied the defect disclosed thereby. In that case an agreement relating to the hiring of a tractor contained acknowledgments by the hirer that he had thoroughly examined the goods: that he depended entirely on his own judgment; that he had not been induced to sign the agreement by any representations of the owner or his agents; and that the agreement embodied the entire terms, inducements and representations. The Full Court held (Webb J. dissent-

42. [1939] St.R.Qd. 168.

ing) that these clauses excluded any verbal collateral warranty that the tractor would do all classes of logging in any country about Innisfail. The reasons for the court's decision are not clearly expressed, but the relevant principles are well settled. Where the parties to a contract have not expressed all the terms of their agreement in writing, parol evidence may be admitted to complete the written contract. But parol evidence is not admissible to contradict, alter or vary a written instrument; and hence if parties expressly stipulate that the written agreement embodies the entire terms and representations, this will exclude everything extraneous to the written agreement (though not of course implications arising on the construction of the agreement itself).[43]

There seems to be nothing in Ss.7 and 8 to affect these principles. Those sections are directed at avoiding agreements exempting the owner from liability for representations made by him in the hire purchase agreement itself or in the course of bringing about the sale or letting of the chattel, and representations for which he is made responsible; but they do not touch acknowledgments contained in hire purchase agreements that no representations were made to bring about the agreement; and that all conditions and warranties are embodied in the agreement. It seems therefore, that the owner can still contract out of liability, not directly by exemption clauses, but indirectly by clauses containing acknowledgments so expressed as in effect to exempt the owner from liability for misrepresentations.

The Assignment of Rights.

There seems to be no reason to suppose that the general rules as to the assignability of rights under hire purchase agreements are any different in Queensland. The owner's right to receive the hire payments may be assigned in the same manner as any other chose in action; and there is nothing to prevent the assignment by the owner of the property in the goods, though it seems that such an assignment would come within the purview of the *Bills of Sale Act*.[44] The owner's right to enter and repossess is however a personal right and hence not assignable, in the absence of an agreement to the contrary. Again, it is clear from *Whiteley Ltd. v. Hilt*[45] and *Carter v. Hyde*[46] that the hirer is free, in the absence of a clause negativing power to

43. *Hart v. MacDonald* 10 C.L.R. 417; *Criss v. Alexander* (1928) 28 S.R. (N.S.W.) 297; *Hope v. R.C.A. Photophone of Australia Pty. Ltd*, 59 C.L.R. 348.

44. Re Isaacson [1895] 1 Q.B. 333.

45. *Supra.*

46. 33 C.L.R. 115.

assign, to transfer his right to possession and his option to purchase. The effect of a clause negativing the power to assign need not be considered here.

The only question peculiar to Queensland in this connection is whether the statutory rights afforded to the hirer are assignable. Does the assignee of the hirer acquire the hirer's right in equity in respect of the goods? Is he entitled to the statutory relief in case of default in observance of the terms of the agreement? Is he entitled to seek a review by the Court?

The first point to notice in answer to these questions is that the statutory definitions of "owner" and "hirer" cover only the person letting or selling a chattel to another under a hire purchase agreement, and the person to whom the chattel is so let or sold; whereas in England and in other States the statutory definition expressly includes their assigns.[47] Despite this omission, however, it is suggested that these rights of the hirer are assignable. Adapting the language of Swinfen Eady M.R. in *Whitely Ltd. v. Hilt*,[48] it may be said that there is no reason whatever for supposing that there is any personal element in such rights, or that it would make any difference to the owner by whom the statutory rights were enforced. The various rights afforded to the hirer by statute are superimposed on those created by the agreement, and if the rights under the agreement itself are assignable, it seems that the additional statutory rights are likewise assignable.

KEVIN RYAN*

47. (Eng.) *Hire Purchase Act*, 1938 (as amended by *Hire-Purchase Act*, 1954) S.21; (N.S.W.) *Hire-Purchase Agreements Act*, 1941-1955, S.2.

48. *Supra*, at p. 818.

* B.A., LL.B. (Queensland); Lecturer in Law in the University of Queensland.