APP. 1967 VR. 231
1971 SR. 277
Cons. 18 NSWLR 738

[HIGH COURT OF AUSTRALIA.]

AKRON TYRE COMPANY PROPRIETARY LIMITED . . . . . DEFENDANT, } APPELLANT;

AND

KITTSON AND OTHERS . . . . PLAINTIFFS, RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 21, 22; *March* 16.

Latham C.J., Williams and Kitto JJ.

Personal Property—Assignment—Agreement to assign after-acquired chattels—Passing of property in chattels when acquired.

Hire-purchase—Motor vehicle—Accessories supplied with, or attached to, vehicle "shall become part of" vehicle—New tyres attached to vehicle by hirer—Passing of property in tyres to owner of vehicle.

Bill of Sale—Assurance of personal chattels—"Articles capable of complete transfer by delivery (either at the time of the making or giving of a bill of sale of the personal chattels specified in the bill or at any time thereafter)"—Instruments Acts 1928-1936 (*No.* 3706—*No.* 4370) (*Vict.*), *ss.* 27, 30*.

* The *Instruments Acts* 1928-1936 (Vict.) provides:—By s. 27: "'Bill of sale' includes . . . assignments . . . and other assurances of personal chattels". "'Personal chattels' include goods furniture fixtures and other articles capable of complete transfer by delivery (either at the time of the making or giving of a bill of sale of the personal chattels specified in the bill or at any time thereafter)". By s. 30: "No bill of sale . . . either absolutely or conditionally or subject or not subject to any trusts, and whereby the grantee or holder has power . . . to seize or take possession of any property and effects comprised in or made subject to such bill of sale, shall be operative or have any validity at law or in equity until the same has been or is filed in manner provided by . . . this Act".

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By a hire-purchase agreement relating to a motor vehicle the hirer agreed to maintain the vehicle in good order and condition and to pay when due all moneys payable to any person in respect of any accessories supplied with or for or attached to the vehicle. Clause 12 of the agreement provided: "Any accessories . . . supplied with or for or attached to" the vehicle "shall become part of the" vehicle.

Held that clause 12 applied to tyres attached to the wheels of the vehicle by the hirer in lieu of the tyres originally on the vehicle, so that the clause in conjunction with the hirer's substitution operated to pass the property in the substituted tyres to the other party to the agreement, the owner of the vehicle.

Reeves v. *Barlow*, (1884) 12 Q.B.D. 436, at p. 442, applied.

An agreement for the assignment of after-acquired chattels is not a bill of sale within the meaning of ss. 27, 30, of the *Instruments Act* 1928 (Vict.).

King v. *Greig*; *Rechner, Claimant*, (1931) V.L.R. 413, at pp. 440-442, approved.

Decision of the Supreme Court of Victoria (*Fullagar* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

The Economic Cash Buying Co. Pty. Ltd. (one of the plaintiffs in the action from which the appeal the subject of this report was brought) was the owner of certain motor vehicles. It let the vehicles on hire-purchase to one C. V. Vale under agreements the terms of which are hereinafter mentioned. There was a separate agreement as to each vehicle. Subsequently the agreements as to some of the vehicles were cancelled by mutual consent and fresh hire-purchase agreements with regard to these vehicles were entered into between the plaintiff company and R. W. N. Kittson, F. G. Marsh and J. Simmons (who joined as plaintiffs with the plaintiff company in the action above mentioned). The individual plaintiffs, however, were associated with Vale, and the vehicles were operated in accordance with his directions. So far as is here material all the agreements were in the same form, and for convenience the transactions above mentioned are treated—for the purpose of describing the contents of the agreements—as if they were the subject of one agreement, hereinafter referred to as the agreement. In the agreement the vehicle the subject thereof was referred to as "the goods". The agreement provided:—By clause 1 (*a*), that the hirer would maintain the goods in good order and condition. By clause 1 (*b*), that the hirer would pay when due all moneys payable to any person in respect of any accessories or chattels supplied with or for or attached to or in respect of any repairs

executed to the goods. By clause 7, that, if the hirer should sell or dispose of the goods, all his rights under the agreement should "automatically" determine, and, by clause 9, that on any such determination the owner might retake possession of the goods. By clause 12: "Any accessories or goods supplied with or for or attached to or repairs executed to the goods shall become part of the goods". The agreement was not under seal, and it was not registered as a bill of sale under Part VI. of the *Instruments Act* 1928 (Vict.). After having used the vehicles for some time Vale removed from the vehicles (both those then let to him and those let to the individual plaintiffs) the tyres then attached to them and sold those tyres to the Akron Tyre Co. Pty. Ltd. (the defendant in the action). It did not appear to the satisfaction of the trial judge whether these were the tyres originally attached to the vehicles or others which had been subsequently attached by Vale. Vale having made default, the plaintiff company seized the vehicles which had been left by Vale without any tyres attached to them. The plaintiffs demanded that the defendant deliver to them the tyres sold by Vale and on refusal claimed damages of the defendant in an action in the Supreme Court of Victoria. The action was tried before *Fullagar* J., who gave judgment for the plaintiff company for the value of all the tyres in question.

From this decision the defendant appealed to the High Court, joining the plaintiff company and the individual co-plaintiffs as respondents.

M. J. Ashkanasy K.C. (with him *A. H. Mann*), for the appellant. As the trial judge was not satisfied that the tyres taken off the vehicles and sold by Vale were the tyres on the vehicles at the time of the original hiring, the case was necessarily decided, and must still be decided, on the basis that other tyres had been attached to the vehicles at a date subsequent to the original hiring and those were the tyres sold by Vale. The plaintiff company (now respondent) could not, and cannot, succeed unless it is shown that in some way the property in these different tyres had passed to the plaintiff company. The plaintiffs relied on clause 12 of the agreement and, in the alternative, on the doctrine of *accessio*. The trial judge founded himself on clause 12 and did not find it necessary to deal with the doctrine of *accessio*. As to the latter, if it now arises for decision, it is submitted that motor tyres, having regard to the way in which they are attached to the motor vehicle, are not within the doctrine. As to clause 12, it is submitted that it is not

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apt as a matter of construction to apply to future accessories, and, in any event, it is ineffectual in law to pass the property in future accessories. The agreement is neither a contract of sale nor of exchange; otherwise, the only way in which the property in personal chattels can pass is by deed—which the present agreement was not—or by delivery, and there was none such here. Moreover, if clause 12 applies to future accessories, it is void under s. 30 of the *Instruments Act* 1928 because it is not registered as a bill of sale. It is a bill of sale within the definition in s. 27 of that Act because it is an assurance of personal chattels, and, in so far as it relates to future chattels, it is within the definition in s. 27 of "personal chattels" as including future chattels. [He referred to *Joseph* v. *Lyons* (1); *Hallas* v. *Robinson* (2); *Boucher* v. *Shire of Avon* (3); *Coppel's Bills of Sale* (1935), pp. 36, 74; *Bergougnan* v. *British Motors Ltd.* (4); *Colley* v. *Clements* (5).] The plaintiff company is in a dilemma as to clause 12 on the point as to bill of sale. It must contend, not only that the clause is not a bill of sale as to future chattels, but that it applies only to future chattels; that is, it does not include any chattels attached to the vehicle before delivery under the original agreement. It must, on its proper construction, include such chattels even if, as the appellant contends, it is not confined to them.

R. M. Eggleston K.C. (with him *C. I. Menhennitt*), for the respondent company. The meaning put by *Fullagar* J. on clause 12 is correct. The clause would have no point unless it related, and related only, to future accessories. It is, in effect, an agreement that the doctrine of *accesio* shall apply when the accessories are ascertained. There can be no separate enjoyment of a tyre except as an integral part of the vehicle, and the attaching of the tyre makes it an integral part of the vehicle. The same doctrine applies to chattels as to real estate. [He referred to *Anon.* (6); *Anon.* (7); *Seath & Co.* v. *Moore* (8).] The question whether the accessory is detachable is not material.

[KITTO J. referred to *In re Blyth Shipbuilding and Dry Docks Co. Ltd.*; *Forster* v. *Blyth Shipbuilding and Dry Docks Co. Ltd.* (9).]

(1) (1884) 15 Q.B.D. 280.
(2) (1885) 15 Q.B.D. 288.
(3) (1922) V.L.R. 767.
(4) (1929) 30 S.R. (N.S.W.) 61; 47 W.N. 10.
(5) (1936) 55 C.L.R. 697.
(6) (1559) Moo. K.B. 18. fol. 20, pl. 67 [72 E.R. 410].
(7) (1594) Pop. 38 [79 E.R. 1156].
(8) (1886) 11 App. Cas. 350, at pp. 380, 381.
(9) (1926) Ch. 494.

[Counsel referred to *Appleby* v. *Myers* (1).] The rule as to fixtures applies. The test is not whether the accessory can be removed without damage (*Reynolds* v. *Ashby & Son* (2); *Craven* v. *Geal* (3)). It is true that the property in a chattel cannot pass *by way of gift* unless by delivery or by deed (see *Cochrane* v. *Moore* (4)); but, apart from gift, there is no rule of law which prevents a contract from operating to pass the property in goods—at any rate, in events such as those which have happened in this case. As to the bill of sale point, an "assurance" means a document which of its own force passes the property: see *Bank of Victoria Ltd.* v. *Langlands Foundry Co. Ltd.* (*in Liquidation*) (5). There was no "assurance" here, because the document did not transfer any property; that was done by the putting of the tyres on the vehicle. Otherwise, such documents as leases requiring replacements might be bills of sale. There can be no assurance of unascertained goods. [He referred to *Benjamin* on *Laws of Sale of Personal Property*, 7th ed. (1931), pp. 317, 318, 346, 350.]

The individual respondents did not appear.

M. J. Ashkanasy K.C., in reply.

Cur. adv. vult.

March 16.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a judgment of the Supreme Court of Victoria (*Fullagar* J.) in an action in which the plaintiffs (three individuals and a company) claim damages for wrongful conversion of motor vehicle tyres. His Honour gave judgment for the plaintiffs for £716 11s. 3d., the estimated value of forty-six motor tyres.

The plaintiff company, The Economic Cash Buying Company Proprietary Limited, let to one C. V. Vale a number of motor trucks, equipped with tyres, under hire-purchase agreements. As the result of transactions between the parties the three individual plaintiffs later let certain of the trucks to Vale under hire-purchase agreements. The hire-purchase agreements (not under seal) were in the same form in all cases. They provided that the hirer should be at liberty at any time to determine the hiring by returning the goods in

(1) (1867) L.R. 2 C.P. 651, at p. 659.
(2) (1904) A.C. 466.
(3) (1932) V.L.R. 172, at p. 176.
(4) (1890) 25 Q.B.D. 57, at pp. 72, 74, 75.
(5) (1898) 24 V.L.R. 230, at p. 251.

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good order, repair and condition. The documents, therefore, did not require registration under the legislation relating to bills of sale (*Instruments Act* 1928, Part VI., ss. 27 to 55 ; *Helby* v. *Matthews* (1)). Vale took tyres off the vehicles and sold them (forty-six in number) to the defendant appellant company. The plaintiffs did not satisfy the learned trial judge that the tyres of which Vale so disposed were the tyres which were originally on the vehicles. The defendant contended, in the first place, that the plaintiffs had no property in substituted tyres and that the hire-purchase agreements did not apply to them. Secondly, the defendant contended that if any provision in the hire-purchase agreements is to be construed so as to give a title in those tyres to the plaintiffs, the agreements are assurances of personal chattels within the meaning of s. 30 of the *Instruments Act* 1928, and that, as the hire-purchase agreements were not filed as bills of sale under that Act, they are void, at least in so far as they might otherwise operate as an assurance of personal chattels which were not capable of identification at the time when the agreements were made.

There is no evidence as to Vale's title to the tyres which he put on the trucks. But he had possession of them. There is no evidence of title in any other person (for example, there is no evidence that he obtained them under a hire-purchase agreement) and therefore it is to be presumed that Vale had a title to the tyres which he placed on the trucks.

The hire-purchase agreements contained clause 12, which was in the following terms :—" Any accessories or goods supplied with or for or attached to or repairs executed to the goods shall become part of the goods." (" The goods " were the motor trucks with tyres on them to which the hire-purchase agreements applied.)

In an action of conversion the plaintiff must prove that he has an immediate right to possession of the goods in question. He must establish a legal right. An equitable right to the enforcement of a trust in respect of chattels will not support a claim for conversion. It is not disputed that Vale had made default under the hire-purchase agreement and that the bailment to him thereunder was determined. The plaintiffs were entitled to take possession of the trucks. They contend that the tyres which Vale had placed on the trucks and subsequently removed and sold to the defendant had become the property of the plaintiffs either by virtue of the terms of clause 12 of the agreement or by virtue of

(1) (1895) A.C. 471.

the doctrine of *accessio* at common law. If this is the case the tyres, when they were put on the trucks by Vale, became part of the trucks which were bailed to Vale and he had no right to dispose of them and the plaintiffs should succeed.

Fullagar J. held that though clause 12 could not affect the rights of any third party (in this case no rights of any third party were in question) it had the effect of passing the property in the substituted tyres to the owner of the vehicles as soon as they were attached to the trucks. His Honour therefore found it unnecessary to consider the argument that the tyres became part of the vehicles under the doctrine of *accessio*. I also find it unnecessary to consider that doctrine.

The appellant has contended that clause 12, upon its true construction, applies only to things which were supplied by the hirer with the vehicle or had been attached to the vehicle when the hire-purchase agreement was made and to repairs to the goods which had been executed at that time. In other words, the appellant contends that the clause has no reference to future attachments, &c. Under clause 1 (*a*) the hirer agrees to maintain the goods in good order, repair and condition. The hirer was therefore under an obligation to replace worn-out parts and accessories. Under clause 1 (*b*) the hirer agreed to pay when due all moneys payable by him to any person in respect of any accessories or chattels supplied with or for or attached to or in respect of any repairs executed to the goods. This clause uses the same words as are to be found in clause 12.

I agree with the construction of the clause adopted by *Fullagar* J. It would have hardly any operation in the case of attachments and repairs if it were limited to goods actually attached to the vehicles or incorporated in the vehicles in some way (as in the case of repairs) at the time when the hire-purchase agreement was made. Such things would have already become part of the goods hired and no special provision would be needed in order to bring about the result that they were subject to the terms of the hiring. There is no reason why the clause should not apply both to accessories supplied with the vehicles but not part of them, and to accessories afterwards attached to the vehicles. The object of clause 12 appears to me plainly to be to provide that replacements and attachment of accessories to the vehicle shall bring about the result that by the agreement of the parties the replacements and attachments become part of the vehicles themselves. The words " shall become " are capable of this meaning and they should, in my opinion, be so construed.

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A simple assignment of "future property", i.e., of property which does not exist or in which the assignor at the time of the assignment has no proprietary interest, is completely nugatory at law. At law it is an assignment of nothing. In equity also it is, at the time when it is made, completely ineffective as an assignment of anything. As *Jessel* M.R. said in *Collyer* v. *Isaacs* (1), "A man cannot in equity, any more than at law, assign what has no existence" or, I add, "anything which he does not own". But a man may bind himself by a contract for valuable consideration to assign goods which he may thereafter acquire. If he makes such a contract and subsequently delivers the goods to the "assignee" or does some other act which, having regard to the terms of the contract, plainly shows an intention to pass the property, then the property will pass at law by reason of such act: see *Lunn* v. *Thornton* (2). That case shows that, if there is an "assignment" of after-acquired goods, the mere acquisition of the goods by the assignors will not pass the property at law. But it is otherwise if there be "some new act" done by the assignor "in furtherance of the original disposition" (3). In the present case there was such a "new act", namely, the attachment of the tyres to the trucks, which were the subject matter of the hire-purchase agreements. Building contracts provide an example of the application of this principle. The property in things brought on to land for building purposes may, if the building contract so provides, pass to the building owner even before they are incorporated in the building: see *Reeves* v. *Barlow* (4), cited by my brother *Williams*, and other cases cited in *Halsbury's Laws of England*, 2nd ed., vol. III, pp. 298, 299, and in *Benjamin* on *Law of Sale of Personal Property*, 7th ed. (1931), pp. 140 et seq. It was argued for the appellant that property in personal chattels could be transferred only by deed, delivery of possession, or contract of sale or exchange. But the cases mentioned establish that the terms of a contract may be such that when a person acquires property and does "some new act" which the contract contemplates, the property in goods may be effectively transferred.

In the present case clause 12 is in the terms of the contract. It is not an assignment—it is an agreement, made for value, that the property in accessories &c. shall pass when they are attached to the trucks.

(1) (1881) 19 Ch. D. 342, at p. 351.
(2) (1845) 1 C.B. 379 [135 E.R. 587].
(3) (1845) 1 C.B., at p. 387 [135 E.R. 587].
(4) (1884) 12 Q.B.D. 436.

It is not necessary, therefore, for the plaintiffs to rely upon the equitable doctrine which interprets an "assignment" of future property when made for value as constituting in equity, though not at law, a contract to assign. In such a case the assignee will acquire an equitable interest in the property when it comes into the ownership of the assignor and a court of equity will treat his legal interest as subject to a trust for the assignee: *Holroyd* v. *Marshall* (1); *Tailby* v. *Official Receiver* (2), and see *Joseph* v. *Lyons* (3). As already stated, the application of such a doctrine would not give to the plaintiffs the right to immediate possession, which, as they were not in possession of the tyres at the time of the alleged conversion, they must establish in order to succeed in an action of conversion.

Thus, as between the parties, an agreement that property in chattels shall pass upon an act in pursuance of the intended disposition being done by the owner of the chattels, the chattels being then in existence, will give an immediate right to the possession of the property (subject to the terms of, e.g., any hire-purchase agreement between the parties) when that act is done. Accordingly, as an agreement, clause 12 was effective as between the parties to pass the property in the tyres in question unless it was rendered invalid by the legislation relating to bills of sale.

It was argued for the appellant that clause 12, if it operated, was an assurance of personal chattels within the meaning of s. 30 of the *Instruments Act* 1928, which provides (*inter alia*) that no bill of sale made either absolutely or conditionally whereby the grantee or holder has power to seize or take possession of any property and effects comprised in the bill of sale shall be operative or have any validity at law or in equity until it has been filed in the manner provided by the Act. Section 27 defines "bill of sale" as including, *inter alia*, assurances of personal chattels. The same section provides as follows:—"'Personal chattels' includes goods furniture fixtures and other articles capable of complete transfer by delivery (either at the time of the making or giving of a bill of sale of the personal chattels specified in the bill or at any time thereafter)". It is contended for the appellant that the result of these provisions is that any document which operates to give property in chattels, whether legal or equitable (*Bank of Victoria Ltd.* v. *Langlands Foundry Co. Ltd.* (4)), even

(1) (1862) 10 H.L.C. 191 [11 E.R 999].
(2) (1888) 13 App. Cas. 523.
(3) (1884) 15 Q.B.D. 280.
(4) (1898) 24 V.L.R 230.

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though there are no chattels at the time which answer the description contained in the document, is a bill of sale and must be registered in order to be valid; that is, that the definitions quoted show that what are known as assignments of future property and also agreements to assign such property fall within the provisions of the statute.

In my opinion there are several reasons which should lead to the rejection of this argument. In the first place, if the argument is good the Act applies to bills of sale which deal solely with chattels thereafter to be acquired. I call attention, however, to the words included in the phrase within brackets which I have quoted from the definition of "personal chattels" in s. 27—"either at the time of the making or giving of a bill of sale of the personal chattels specified in the bill or at any time thereafter". This provision assumes that there are personal chattels "specified" in the bill. It is impossible to "specify" chattels which are not yet in the ownership of the grantor of an alleged bill of sale and which may never come into his ownership or even into existence.

In the next place, s. 30 (2) provides that no bill of sale shall be filed or be operative or have any validity at law or in equity unless the same sets forth (*inter alia*) "(ii) a description of the property comprised in the bill of sale; (iii) the situation of such property". In my opinion a reference in a document to chattels which may thereafter be acquired by a party to the transaction which is embodied in the document cannot fairly be called a description of any property. These words, in my opinion, refer to a statement of the characteristics and attributes of actual objects which are then identifiable *in corpore* because they actually possess such characteristics and attributes.

Further, at the time of giving a bill of sale it is quite impossible to set forth in relation to after-acquired chattels "the situation of such property", that is, of those chattels. In the present case it would have been impossible to specify the situation of the tyres which, as it happened, were afterwards attached to the trucks. They may not have been in existence.

There are some more general considerations which support this conclusion. They are developed fully in the judgment of the Full Court of the Supreme Court of Victoria delivered by *Cussen* A.C.J. in *King* v. *Greig* (1). His Honour pointed out the difference between the English legislation and the Victorian legislation.

(1) (1931) V.L.R. 413, at pp. 439-442.

Under the English law a bill of sale which purports to assign future chattels by way of security will be completely void. This result follows from the failure of the bill to comply with the requisites of form which the law prescribes. But if the "future chattels" appear only in the schedule and not in the body of the bill, it may be valid in respect of such chattels against the grantee, though void against third parties: *Thomas* v. *Kelly* (1). The provisions upon which this latter decision is based are not included in the Victorian legislation. The addition of an invalid clause to a bill of sale does not, in Victoria, invalidate the whole bill. Other provisions in the bill may still be good: *Tidyman* v. *Collins* (2); *Re Isaacson*; *Ex parte Mason* (3). Caution must be observed in applying in Victoria English decisions on this and other points affecting bills of sale.

After referring to differences in English and Victorian legislation, *Cussen* A.C.J. in *King* v. *Greig* (4) held that a provision in a document providing for transfer of property in after-acquired goods was valid without registration under the Act. He pointed out that effect might be given to the words in s. 27 relating to delivery subsequent to the time of giving the bill of sale in cases where the contract between the parties provided for the property passing and delivery being given at a date later than the contract, and also where the contract dealt with specific chattels which were not in a deliverable state at the time of the contract. In my opinion this decision establishes the proposition that the inclusion of clause 12 in the hire-purchase agreement in the present case did not bring about the result that either the whole document or clause 12 failed to take effect by reason of failure to register under the *Instruments Act*.

I am therefore of opinion that by reason of clause 12 Vale agreed in relation to goods of which, according to the evidence, he had power to dispose, that if they were attached to the trucks which were the subject of the hire-purchase agreements they should be treated, as between the parties, as part of the trucks. This agreement was valid and the tyres in this case accordingly became part of the trucks. They were wrongly removed from the trucks and disposed of by Vale to the defendant company, which claims to treat them as its own property. In my opinion, therefore, the plaintiffs established their case, the judgment of *Fullagar* J. was right and the appeal should be dismissed.

(1) (1888) 13 App. Cas. 506.
(2) (1878) 4 V.L.R. (L) 478.
(3) (1895) 1 Q.B. 333.
(4) (1931) V.L.R. 413.

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WILLIAMS and KITTO JJ. This is an appeal by the defendant from a judgment of the Supreme Court of Victoria (*Fullagar* J.) ordering the defendant to pay the sum of £716 11s. 3d. to the respondent, The Economic Cash Buying Co. Pty. Ltd., one of the plaintiffs in the action. The subject matter of the action is a number of motor vehicle tyres which were purchased by the appellant from one, C. V. Vale. At the time of the purchase these tyres were attached to the wheels of motor vehicles, which were in the possession of Vale as hirer under hire-purchase agreements, all in the same form, entered into between him and the plaintiff company as owner. The defendant took possession of the tyres, sold a number of them and refused to deliver the balance to the plaintiff company on demand. The action is in form an action at common law seeking damages for the conversion of the tyres. His Honour was not satisfied that the tyres were the original tyres which were on the wheels of the vehicles at the time the hire-purchase agreements relating thereto were executed. Accordingly, in order to succeed, it was necessary for the plaintiffs to establish that the tyres, although only placed on the wheels of the vehicles after the commencement of the hiring, had, on the happening of that event, become in law the property of the plaintiffs or one or more of them so that the tyres were, at the date they were sold by Vale to the defendant, the property not of Vale but of the plaintiff company.

The hire-purchase agreements, which are not under seal, are agreements which provide for the hiring of the vehicles to the hirer with an option of purchase and provide that, until the option is exercised, the hirer shall be deemed not to have acquired any right of property in or interest in or to the goods and to be a bailee thereof only.

The agreements provide that the term of the hiring is to commence from the date of the agreement, which means apparently the date the document is signed by the hirer. They also provide that upon such signature they are to operate only as an irrevocable offer for fourteen days from the date thereof and shall not be binding until a memorandum of acceptance shall have been signed by the plaintiff company and that, *inter alia*, any delivery shall, pending acceptance, be conditional only. But it would appear that upon acceptance the agreement would operate from the date it was signed by the hirer.

The agreements provide that the hirer may at any time determine the hiring by returning the goods in good order, repair and con-

dition. They provide for the determination of the hiring by the plaintiff company in certain events and for its automatic determination if the hirer sells or disposes of the goods or enters into any agreement for the sale or disposal thereof, and that upon any such determination the plaintiff company may re-take possession of the goods and for that purpose enter and break into any premises in the occupation or under the control of the hirer.

By clause 1 (*a*) the hirer agrees to maintain the goods in good order and condition. By clause 1 (*b*) the hirer agrees to pay when due all moneys payable by it to any person in respect of any accessories or chattels supplied with or for or attached to or in respect of any repairs executed to the goods. Clause 12 provides that any accessories or goods supplied with or for or attached to or repairs executed to the goods shall become part of the goods.

The plaintiff company claims that the property in the tyres in dispute passed to it at the time that they were first placed on the wheels of the vehicles, either by virtue of the agreement contained in clause 12 of the hire-purchase agreements that any accessories or goods attached to the vehicles should become part of the vehicles or by virtue of the doctrine of accession. His Honour held that clause 12 had this operation and that it was therefore unnecessary to consider the alternative claim. Referring to clause 12 his Honour said : " Clause 12 is unskilfully drawn, and its exact scope may not be altogether clear. But it does say in terms that any accessories attached to the goods shall become part of the goods, and its obvious purpose seems to me to provide against such a contingency as that the chassis shall be found to belong to the owner but the tyres . . . to the hirer . . . In my opinion, clause 12 covers this case, with the result that the property in any tyres which may have been substituted by the hirer for the original tyres passed, on their being affixed to the vehicle, to the owner of the vehicle ".

Before us counsel for the appellant attacked the judgment below on a number of grounds. It was contended that clause 12 applied only to accessories or goods supplied &c. at the commencement of the hiring and not to accessories or goods supplied &c. after that date, and accordingly that the clause did not apply to the tyres in dispute. It was also contended that, if the clause was intended to apply to the latter goods, the plaintiff company was on the horns of a dilemma because either the clause was ineffective to pass the property at law in future goods and this is a common-law action or, if it was effective at common law, it

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was an assignment or other assurance of personal chattels and void because it was not registered as a bill of sale in accordance with Part VI. of the *Instruments Acts* 1928-1936 (Vict.). On the other hand, it was contended by counsel for the respondents that clause 12 only relates to accessories or goods supplied &c. after the commencement of the hiring, that under the clause the property in the tyres in dispute passed at law to the plaintiff company immediately they were placed on the wheels of the vehicles, and that the clause was not a bill of sale within the meaning of Part VI. of the *Instruments Act*.

We are not prepared to accept the construction of clause 12 contended for by either side. The schedules to the hire-purchase agreements would describe the chattels specifically hired, and the function of clause 12 is to include in the agreements accessories or goods which do not form part of the chattels included in this description. These accessories or goods are to be supplied &c. at the cost of the hirer. The clause refers to accessories or goods supplied with the vehicle so that it contemplates the supply of accessories or goods contemporaneous with the delivery of the vehicles. The vehicles would presumably not be delivered until after the agreements had been signed by the hirer, and the hirer would presumably not purchase the accessories or goods until after this time. No particular accessories or goods are specified, so that the accessories or goods might not be in existence or, if in existence, might not belong to the hirer at the date of the agreement. But it would not matter if the accessories or goods were then in existence and belonged to the hirer because the present agreements, unlike most agreements relating to future property, do not operate upon the property as soon as it is acquired by the hirer, but only upon the accessories or goods when they are supplied with or for or attached to the hired chattel. The futurity therefore relates, not to the future acquisition of the accessories or goods, but to future acts by the hirer. The word " shall " in the expression " shall become part of the goods " is a word of futurity, but it can be given its natural meaning if the clause is construed, as in our opinion it should be, as referring to accessories or goods which are intended to become part of the hired property by an act of the hirer done pursuant and therefore subsequently to entering into the agreement. The clause is intended to operate throughout the whole term of the hiring. It is wide enough to include accessories or goods supplied &c. by the hirer at the same time as the vehicle is delivered to the hirer or supplied &c. by the hirer at any future

time whilst it is in possession of the vehicle under the hiring. Clause 12 provides that upon being supplied &c. the accessories or goods shall become part of the goods hired and therefore the property of the plaintiff company but subject to the contractual rights of the hirer under the agreement. It might be difficult in some cases to ascertain what is meant by accessories or goods supplied with or for the hired goods, but no such difficulty arises in the present case because the tyres are plainly accessories or goods attached to the vehicles within the meaning of the clause.

Accordingly, if clause 12 is effective, the tyres, when they were attached to the wheels of the vehicles, became part of the hired property and therefore goods which were in the possession of Vale as bailee for the plaintiff company when he purported to sell them to the defendant. Clause 7 of the agreements provides that if the hirer shall sell or dispose of the goods or enter into any agreement for the sale and disposition thereof, all the rights of the hirer under the agreement, including all right of possession, shall immediately *ipso facto* automatically cease and determine. The sale, therefore, determined the bailment and the plaintiff company acquired the right to the immediate possession of the tyres and became entitled to sue for their conversion.

It is therefore necessary to consider whether clause 12 was effective to pass the legal ownership of the tyres to the plaintiff company and, in that event, whether it was a bill of sale within the meaning of Part VI. of the *Instruments Act*. There is no evidence that the tyres were in existence, or, if they were, that they were the property of Vale at the date of the agreement. Clause 12 provides that the accessories or goods shall, on the happening of any one of certain specified events, become part of the hired property. It was contended by counsel for the defendant that, while this provision was effectual at law to pass the property in chattels proved to belong to Vale at the date of the agreement, its only operation in respect of chattels of which Vale became the owner after that date was to make him a trustee of them for the plaintiff company and thus to give the plaintiff company not the legal, but only an equitable, title. It was therefore contended that the plaintiff company did not have the legal ownership and right of possession of the tyres necessary to maintain the action. It was submitted that the property in chattels may be transferred at law by delivery of possession, by deed, by contract of sale or exchange, and in equity by declaration of trust and not otherwise: *Halsbury's Laws of England*, 2nd ed., vol. 25, p. 212 et seq.

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Clause 12 is not a deed or a declaration of trust. It is a contract but not a contract of sale or exchange. In the case of a deed it is clear that at law no personal property can pass by grant other than property which belongs to the grantor at the date of the execution of the deed: *Lunn* v. *Thornton* (1); *Joseph* v. *Lyons* (2); *Hallas* v. *Robinson* (3). But we cannot accept the contention that at law a contract can only be effective to pass the property in future chattels where the contract is one of sale or exchange. Such a contention is opposed to the decision of the Court of Appeal in *Reeves* v. *Barlow* (4). There the contract provided that all building and other materials brought by the intended lessee upon the land should, whether affixed to the freehold or not, become the property of the intended lessor, and it was held that the property passed at law in all such materials when brought upon the land. The fact that the contract related to land appears to us to be immaterial. *Bowen* L.J., delivering the judgment of the Court, said (5): "The contract was only to apply to goods when brought upon the premises, and until this happened there was no right or interest in equity to any goods at all. Upon the other hand, the moment the goods were brought upon the premises the property in them passed in law, and nothing was left upon which any equity as distinct from law could attach. No further performance of the contract was necessary, nor could be enforced. The builder's agreement accordingly was at no time an equitable assignment of anything, but a mere legal contract that, upon the happening of a particular event, the property in law should pass in certain chattels which that event itself would identify without the necessity of any further act on the part of anybody, and which could not be identified before". See also *Hart* v. *Porthgain Harbour Co. Ltd.* (6); *Goodman* v. *Napier Harbour Board* (7). *Brett* M.R. was a member of the Court of Appeal in *Reeves Case* (4), and it is evident from his Lordship's remarks in *Joseph* v. *Lyons* (8) that he would have applied the same principles to the stock-in-trade of a jeweller if the deed there in question had not been an immediate assignment but a contract that stock-in-trade brought on the jeweller's premises in the future should, upon the happening of that event, pass to the plaintiff. But his Lordship said that the deed was not open to this construction. *Cotton* L.J. was more guarded, but he said (9)

(1) (1845) 1 C.B. 379 [135 E.R. 587].
(2) (1884) 15 Q.B.D. 280.
(3) (1885) 15 Q.B.D. 288.
(4) (1884) 12 Q.B.D. 436.
(5) (1884) 12 Q.B.D., at p. 442.
(6) (1903) 1 Ch. 690, at p. 695.
(7) (1939) N.Z.L.R. 97.
(8) (1884) 15 Q.B.D . at p. 284.
(9) (1884) 15 Q.B.D., at p. 286.

that it was a rule at common law that the property in future acquired goods should not pass, except, perhaps, where there was a contract that the property in them should pass.

In our opinion the passage cited from the judgment of *Bowen* L.J. exactly explains the legal effect of clause 12. The clause is not an agreement which invokes the equitable principle discussed in cases such as *Holroyd* v. *Marshall* (1); *Tailby* v. *Official Receiver* (2); and *In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (3) that an assignment of future property operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed on the principle that equity regards as done that which ought to be done. In *In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (4) *Swinfen Eady* L.J. said: "The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for." In the same case *Phillimore* L.J. said (5): "Either then no further act of assurance from the assignor is required, or if there be something necessary to be done by him to pass the legal estate or complete the title, he has to do it . . . because it is due from him as trustee for his assignee." This is another way of saying that where necessary equity acts *in personam* to compel the assignor to give complete effect to his promise. In the present case there is no need and no room for the application of this equitable principle. The agreement was that if and when any accessories or goods were supplied with or for or were attached to the vehicles, they should become part of the hired property. When Vale placed the tyres on the wheels of the vehicles the happening of this event operated in accordance with the agreement of the parties to pass the property at law and in equity from Vale to the plaintiff company. No intervention of a court of equity was required to give full effect to the bargain. Nothing was left upon which any equity as distinct from law could attach and no further performance of the contract was necessary or could be enforced.

Further, if, contrary to our opinion, delivery of the tyres by Vale to the plaintiff company was necessary to pass the property at law, we are prepared to hold that there was at least constructive

(1) (1862) 10 H.L.C., at p. 220 [11 E.R., at p. 1014].
(2) (1888) 13 App. Cas. 523.
(3) (1915) 2 Ch. 345.
(4) (1915) 2 Ch., at p. 360.
(5) (1915) 2 Ch., at p. 366.

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delivery which would be sufficient. It is well established that constructive delivery sufficient to pass the title in chattels may be effected by a change in the character of an uninterrupted custody: *Halsbury's Laws of England*, 2nd ed., vol. 25, p. 214; *Williams* on *Personal Property*, 18th ed. (1926), p. 74. When Vale, being the owner of the tyres, attached them to the vehicles, having agreed with the plaintiff company that thereupon they should become part of the vehicles and therefore included in the bailment of them, he ceased to have custody of the tyres in the character of owner, and his custody thereafter was that of a bailee from the plaintiff company. If, then, delivery was essential to the passing of the title, an effectual form of delivery was made: cf. *Elmore* v. *Stone* (1); *Marvin* v. *Wallace* (2); *Dublin City Distillery (Great Brunswick Street, Dublin) Ltd.* v. *Doherty* (3).

The final question is whether clause 12, so construed, is a bill of sale within the meaning of Part VI. of the *Instruments Act*. If it is, s. 30 is fatal to the action because it provides, so far as material, that no bill of sale whereby the grantee (in this case the plaintiff company) has power, either with or without notice, either immediately or at any future time, to seize or take possession of any property comprised in or made subject to the bill of sale, shall be operative or have any validity at law or in equity unless it is in the form prescribed by the Act and unless it is lodged for registration with the Registrar-General within fifteen days after the making or giving of the bill of sale. Bills of sale include assignments, transfers, declarations of trust without transfer and other assurances of personal chattels. They also include licences to take possession of personal chattels as security for any debt. The meaning of these expressions was discussed by *Holroyd* J. in *Bank of Victoria Ltd.* v. *Langlands Foundry Co. Ltd. (In Liquidation)* (4). It was held in *Brown* v. *Bateman* (5) that the words "other assurance of personal chattels" must be construed *ejusdem generis* with the preceding words. Personal chattels include goods, furniture,

(1) (1809) 1 Taunt. 458 [127 E.R. 912].
(2) (1856) 6 El. & Bl. 726 [119 E.R. 1035].
(3) (1914) A.C. 823, at pp. 843 et seq.
(4) (1898) 24 V.L.R. 230, at pp. 251, 252.
(5) (1867) L.R. 2 C.P. 272, at p. 281,

fixtures and other articles capable of complete transfer by delivery (either at the time of the making or giving of the bill of sale of the personal chattels specified in the bill or at any time thereafter). In *King* v. *Greig*; *Rechner, Claimant* (1) *Cussen* A.C.J., in a judgment with which *Mann* J., as he then was, agreed, held that an agreement for the assignment of after-acquired property was not an assignment or other assurance of personal chattels within the meaning of the Act. We entirely agree with this opinion. It was attacked because the Act defines personal chattels to include goods, furniture, fixtures and other articles capable of complete delivery at any time after the making or giving of the bill of sale as well as articles capable of complete delivery at the time the bill of sale is made or given. It was contended that this reference to future delivery indicates that the legislature must have intended to include assurances of future chattels in the definition of bills of sale. But it appears to us that the definition of personal chattels is intended to refer to the physical condition of the articles which can be the subject of a bill of sale: *In re W. F. Cornu Ltd.*; *The Liquidator* v. *Federal Traders Ltd.* (2); *Motor Credits Ltd.* v. *Wollaston Ltd.* (*in Liquidation*) (3), and that the words "at any time thereafter" do no more than make it clear that personal chattels include all chattels which are or can be rendered capable of complete delivery by transfer, even if at the time of the making or giving of the bill something still remains to be done to make them so deliverable, as, for instance, the severance of fixtures. Accordingly, on the authority of *King* v. *Greig* (4), clause 12, which is concerned with future property, is not a bill of sale within the meaning of Part VI. of the *Instruments Act*.

For these reasons we are of opinion that his Honour was right in saying that clause 12 covered the case, with the result that the property in any tyres which may have been substituted by the hirer for the original tyres passed on their being affixed to the vehicle to the owner of the vehicle.

(1) (1931) V.L.R. 413, at pp. 440 et seq.
(2) (1931) S.A.S.R. 425, at pp. 433, 434.
(3) (1929) 29 S.R. (N.S.W.) 227, at pp. 239-241; 46 W.N. 48.
(4) (1931) V.L.R. 413.

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It is therefore unnecessary to consider whether the tyres on attachment to the wheels became part of the vehicles by accession.

We would dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellant, *A. Sacks.*

Solicitors for the respondent company, *Corr & Corr.*

E. F. H.