duct may be. Further, the difficulties already existing with regard to proof in sexual crimes should make courts wary in extending the ambit of the offence lest too much come to depend on the possibly uncorroborated evidence of the prosecutrix as to the representations of the accused—

> 'Heav'n has no rage, like love to hatred turn'd,
> Nor Hell a fury, like a woman scorn'd.'[8]

J. K. CONNOR

RENDELL v. ASSOCIATED FINANCE PTY LTD[1]

Conversion—hire purchase—accession—accessory attached to motor vehicle—whether property passes to owner of vehicle

In August 1955 one Pell took a 1942 Chevrolet utility truck from the defendant finance company under a hire-purchase agreement containing a clause 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 trader who introduced this business to the finance company was the defendant Connley, who gave a written guarantee to the company for the due performance by Pell of all his obligations under the agreement. In September Pell bought under a normal hire-purchase agreement from the complainant, Rendell, a Chevrolet 'short motor', which he subsequently installed in the truck in place of the engine then in it. Rendell shortly afterwards learnt of this substitution. Pell defaulted in his payments to the defendant company, and in February 1956 Connley, acting as the latter's authorized agent, repossessed the truck in accordance with the terms of the hire-purchase agreement. Neither defendant was at the time aware that Pell had installed another engine. In March the company called on Connley, as Pell's guarantor, to pay the balance owing and this he did in May, when the two defendants agreed that in consideration of such payment Connley was to hold the truck in his own right. Rendell subsequently demanded £53 under a contract alleged to have been made between him and the defendants or one of them, and alternatively as damages for conversion or detention of the engine. In the Court of Petty Sessions he obtained an order on the ground of conversion against both defendants for £53 with costs. In addition the magistrate stated that in any case he would have made an order against Connley on the contract. The defendants obtained an order *nisi* to review, which the Full Court discharged in a written judgment delivered by O'Bryan J.

[8] William Congreve, 'The Mourning Bride'.

[1] [1957] V.R. 604; [1958] Argus L.R. 30. Supreme Court of Victoria; Lowe, O'Bryan, and Barry JJ.

To succeed in his action for conversion—and this was really the main ground of the complaint—Rendell had here to establish an immediate right at law to possession[2] of the engine and an asportation by the defendants with the intention, even though based on an innocent mistake as to where the title to the engine lay, to assert a right inconsistent with that of the complainant by converting the engine to their own or a third party's use.[3]

The first and main ground of the order *nisi* was that by installation in the truck the engine had become the property of the defendant company and had thus ceased to be the complainant's property prior to any act of conversion.[4] In effect the defendants alleged that the complainant had not established the necessary immediate right to possession. The court thus had to consider the law relating to the passing of property in chattels in the two ways here relevant—under the rather limited doctrine of accession or by virtue of the 'contractual accession' clause in Pell's agreement with the defendant company. This latter was the first and, it is submitted, biggest obstacle in the way of the complainant's case, though it was not relied on by the defence. For in *Akron Tyre Co. Pty Ltd v. Kittson*[5] the High Court had held that, though such a clause was ineffective as a present assignment of future property and though the equitable doctrine interpreting such a purported assignment when made for value as a contract to assign would not assist the plaintiffs,[6] yet, by the doctrine in *Lunn v. Thornton*,[7] if a person makes a contract for value to assign goods which he may afterwards acquire and if he subsequently does acquire the goods and delivers them 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 property will pass at law by reason of such act.[8] Latham C.J. said:

> *As between the parties* an agreement that property in the 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 possession of the property (subject to the terms of, *e.g.*, any hire-purchase agreement between the parties) when that act is done.[9]

[2] *Akron Tyre Co. Pty Ltd v. Kittson* (1951) 82 C.L.R. 477, 482, *per* Latham C.J.

[3] Fleming, *The Law of Torts* (1957) 60; *Fouldes v. Willoughby* (1841) 8 M. and W. 540; *Fowler v. Hollins* (1875) L.R. 7 H.L. 757; *cf. Winfield on Tort* (6th ed. 1954) 417-418.

[4] The present case is clearly not one where the act which is alleged to have caused an accession of title *(viz,* the installing of the engine by Pell is *itself* argued by the other party to be an act of conversion.

[5] (1951) 82 C.L.R. 477.

[6] *Ibid.*, 485, *per* Latham C.J.; 493, *per* Williams and Kitto JJ.

[7] (1845) 1 C.B. 379, especially 387, *per* Tindal C.J.

[8] (1951) 82 C.L.R. 477, 484, *per* Latham C.J.; *cf. ibid.*, 493, *per* Williams and Kitto JJ.

[9] *Ibid.*, 485 (italics added). The High Court stressed that [*sc.*, at the time of its operation] the clause only affected the rights of the parties: *ibid.*, 483, *per* Latham C.J., approving Fullagar J.; 489, *per* Williams and Kitto JJ., approving Fullagar J. as to the purpose of the clause.

This clearly shows that the intention and the act which takes the place of a normal delivery must be the owner's. The Full Court in *Rendell v. Associated Finance Pty Ltd* distinguished the *Akron Tyre Co.* case on the ground that in the latter Vale had attached his own tyres, while in the former Pell had installed Rendell's engine. This is a valid distinction, but it is with respect submitted that it might have been elaborated so as to show more readily that the distinction was not an *ad hoc* one of fact, but one based soundly on legal principle. As already stated, for property to pass under the rule in *Lunn v. Thornton*[10] the intention and the act pursuant thereto must, as in the *Akron Tyre Co.* case, be the owner's, or, to put the proposition negatively, property cannot pass where, as in *Rendell's* case, the goods in question are not owned by the person attaching them: *nemo dat quod non habet.*[11] In the *Akron Tyre Co.* case the passing of property between the parties occurred before any alleged third party rights arose in relation to the goods, so that it was perfectly reasonable to hold the defendants, who became involved in the situation after the tyres had been fitted, to be affected by the clause, whereas in the instant case the proprietary rights of Rendell, the third party, were involved from the beginning and it would have been manifestly unfair if these could have been prejudiced by the contractual promise of one who had no title to the goods.[12] With regard to 'contractual accession' clauses, then, the law is that when the hirer attaches his own goods they become the hire-purchase company's property for rights against third parties as well as against the hirer, but when the hirer attaches goods not his own the company acquires rights against him only.

Having held the special clause ineffectual to pass property, the Full Court in *Rendell's* case, unlike the High Court in the *Akron Tyre Co.* case, had to consider whether property passed to the defendant company by operation of law under the doctrine of accession of title. After examining the tests propounded in the cases it had little difficulty in deciding this point in the complainant's favour. Though the doctrine derives from Roman law,[13] the court began by indicating that, as the common law approached the problems of *accessio, specificatio,* and *confusio* from the point of view of the law of tort *(i.e.,* of the remedy of the person deprived) while the Roman lawyers' treatment was from the point of view of the law of property *(i.e.,* of

[10] *Supra,* n. 6.

[11] None of the recognized exceptions is applicable to prevent the rule of law embodied in the maxim from operating. Estoppel, *e.g.,* is negatived on the evidence: [1958] Argus L.R. 30, 37. *Semble,* however, it may not be difficult to raise estoppel or waiver of proprietary rights in similar cases: A. Dean: *Law Relating to Hire Purchase in Australia* (2nd ed. 1938), 99.

[12] In the result, 'persons dealing with property in chattels or exercising acts of ownership over them do so at their peril': *Fowler v. Hollins* (1872) L.R. 7 Q.B. 616, 639, *per* Cleasby B.

[13] *Blackstone's Commentaries on the Laws of England,* ii, 404.

ownership of the new *res)* resulting in much subtle reasoning and some over-refined distinctions, Roman law principles did not necessarily provide a reliable guide.[14]

Their Honours followed the two New South Wales Full Court decisions of *Bergougnan v. British Motors Ltd*[15] and *Lewis v. Andrews and Rowley Pty Ltd*[16] and held the proper test in cases where accessories in the nature of spare parts are attached to a motor vehicle to be ultimately one of detachability:

> *Prima facie* the property in the accessory does not pass to the owner of the vehicle if the owner of the accessory did not intend it to pass. It is for the defendant by proper evidence to show that the necessity of the case requires the application of principles whereby the property is deemed to have passed by operation of law. The accessories continue to belong to their original owner unless it is shown that as a matter of practicability they cannot be identified, or, if identified, they have been incorporated to such an extent that they cannot be detached.[17]

The court held that the defendants had not discharged the onus on them and that, even if the onus were on the complainant, the evidence available showed that the engine was detachable.[18] Therefore, there being no estoppel,[19] the engine remained the property of the complainant, and consequently, the first ground of the order *nisi* failed.

In reaching their conclusion on the test applicable Their Honours received little help from American decisions.[20] They rejected the test

[14] *Cf.* Holdsworth, *History of English Law,* vii, 501-503. It is to be noted that in support of its view that the doctrine of *accessio* operated in cases of necessity only *(vide infra)* the court cited cases which on a strict Roman law classification were concerned with questions of *confusio* and *specificatio, viz, Sanderman and Sons v. Tyzack and Branfoot Steamship Co. Ltd* [1913] A.C. 680; *Re Oatway* [1903] 2 Ch. 356. Their Honours also stated that there was little English case law on *accessio* and that the Roman law rules were sometimes obscure.

[15] (1929) 30 S.R. (N.S.W.) 61, referred to in (1942) 16 *Australian Law Journal* 239. In that case there was no clause like the one in the *Akron Tyre Co.* case (where, however, the goods attached were not the subject of a hire-purchase agreement) and the goods in question were tyres; in other material respects the facts were the same as in *Rendell's* case. The brief judgment proceeds on the finding that the tyres were detachable without damage.

[16] (1956) 56 S.R. (N.S.W.) 439; (1956) 73 W.N. (N.S.W.) 670. The judgment of Ferguson J. is a very useful review of the authorities.

[17] [1958] Argus L.R. 30, 36, *cf.* 33-34. The court rejected the defendant's argument that severability without damage was merely a useful, not a conclusive, criterion. Severance being usually possible, the law appears to be strongly inclined against acquisition of title by accession (as, it is submitted, is correct). Indeed, the test actually adopted is the narrowest of all those discussed *(vide infra). Quaere,* whether the reference to identification (which is different from the text of separate *entity*) represents a conflation of the test of *accessio* with that of *specificatio* and, perhaps, that of *confusio.*

[18] Judicial notice was taken of the common practice of removing engines without damage: [1958] Argus L.R. 30, 37. [19] *Supra,* n. 10.

[20] For accession in United States law reference may be made to: S. McCarthy: (1930) 8 *New York University Law Quarterly Review* 122-126, approving the test of severability and discussing 'contractual accession'; and R. Rejent: (1940) 16 *Notre Dame Lawyer* 61-63, approving the same test and referring to Continental code provisions.

of Manning J., dissenting, in *Lewis v. Andrews and Rowley Pty Ltd,*[21] *viz,* whether the chattel has ceased to exist as a separate chattel, as leading to absurd results, and also the test propounded by the Saskatchewan Court of Appeal in *Regina Chevrolet Sales Ltd v. Riddell,*[22] *viz,* whether the goods are an integral part of the chattel to which they are added, necessary for its proper working. In that case the court had refused to follow an earlier Canadian decision, *Goodrich Silvertown Stores v. McGuire Motors Ltd,*[23] where the test of detachability was adopted.

As to the second ground of the order *nisi,* which was that the magistrate erred in holding that the doctrine of accession had no application on the ground of Pell's having no title, the court did say that the fundamental notion of the doctrine was that property might be passed by an act of a stranger and without the consent of the original owner. However, having already decided the doctrine to be inapplicable on the wider issue raised by the first ground, the court here held the magistrate's decision to be right for the wrong reason.

Their Honours found it unnecessary to consider the third ground of the order *nisi, viz,* that the magistrate could not make an order against Connley in contract because the only contract was conditional on an event which never occurred, the decision on conversion being sufficient.

In order to show that no injustice had been done to the defendants Their Honours also considered a matter which was not a ground of the order *nisi* and which was therefore not before them. The defendants argued that, on the magistrate's finding of a contract by which Connley was to sell the truck with the engine and pay Rendell £53 after the sale, Rendell had impliedly consented to Connley's acquiring title from the company in May, and that this latter transaction was therefore not an act of conversion. The court held that, even on the assumption that such were the true facts, the repossessing of the truck by Connley in February was an act of conversion occurring before any possible consent: though he was mistaken as to the ownership or identity of the engine then in the truck, Connley in-

[21] (1956) W.N. 670, 677. This test seems to be the model of that urged by the defence in the instant case ([1958] Argus L.R. 30, 33). Each puts the onus on the plaintiff. Manning J. appears to have adopted the classification of cases involving attachment of chattels which is to be found in G. Sawer: 'Accession in English Law' (1935) 9 *Australian Law Journal* 50.

[22] [1942] 3 D.L.R. 159, noted in (1942) 16 *Australian Law Journal* 239. The editorial note to the case doubts its persuasive force even in other Canadian jurisdictions.

[23] [1936] 4 D.L.R. 519 (Judge Field), evidently the first Canadian case on this point. The case contains useful summaries of the early English decisions on incorporation of chattels, of the effect of Canadian conditional sales legislation on title, and of the principles emerging from the relevant U.S. decisions.

tended to exercise dominion over it on the company's behalf, and this was sufficient.[24]

In concluding, Their Honours drew attention to the scantiness of the evidence due to the way in which the case had been argued below.

This decision on a question which, with variations on the basic factual framework, will arise with increasing frequency, definitively settles the law for Victoria regarding accession of title, giving a reasonable adjustment of the competing rights of two innocent owners dealing here with a hirer who defaults, without involving the application of rigid, over-refined, and eventually unrealistic, criteria.[25]

J. M. BATT

TRANSPORT PUBLISHING CO. PTY LTD v. THE LITERATURE BOARD OF REVIEW[1]

Interpretation of Objectionable Literature Act 1954 (Queensland)—'objectionable'—undue emphasis on sex—admissibility of evidence concerning effect of publications on abnormal persons

In *Transport Publishing Co. Pty Ltd v. The Literature Board of Review* it was held by the Full High Court, McTiernan and Webb JJ. dissenting, that certain publications were not 'objectionable' within the meaning of section 5 (1) of the Objectionable Literature Act 1954 (Queensland). These publications were distributed by the three defendant companies, Transport Publishing Company Proprietary Limited, the Action Comics Proprietary Limited and the Popular Publications Proprietary Limited. On 20 December 1954, their distribution in Queensland was prohibited by the Literature Board of Review on

[24] *Supra*, n. 3.

[25] The varying results possible from the operation or non-operation of 'contractual accession' clauses and from the application or non-application of the doctrine of accession are quite logical, but may occasionally lead to curious results: *e.g.*, a buyer in possession under the Goods Act 1928 can pass property in an article selling it outright, but not by affixing it to a chattel bought under a hire-purchase agreement containing a 'contractual accession' clause.

Dean, *op. cit.*, 98-99, somewhat reluctantly approves the kind of decision reached in *Rendell's* case, but it seems that he would give a wide operation to the doctrine of estoppel against a plaintiff owner of attached accessories. Formerly he had considered that the property would pass by accession *(op. cit.* (1st ed. 1929) 96); but this view had been investigated and criticized in the useful article by Sawer, *loc. cit.*, where the writer showed that the statement in *Halsbury's Laws of England* (1st ed.) xxii, 401, was based on a false analogy with the land law. (In the second ed. (1937) xxv, 208, the rule is modified, but is still over-stated and inaccurate). Sawer considers the *dicta* of Blackburn J. in *Appleby v. Myers* (1867) L.R. 2 C.P. 651, 659-660, *obiter* and distinguishes the case. The doctrine of accession in Roman law, as stated by him, is very similar to the rule laid down in *Rendell's* case (strange though this may seem in view of the court's remarks there on Roman law) and in urging the adoption of the former Sawer would clearly approve the type of decision reached in the instant case.

[1] [1958] Argus L.R. 177. High Court of Australia; Dixon C.J., Kitto, Taylor, McTiernan and Webb JJ.