THE LEGAL ASSIGNMENT OF FUTURE GOODS.

The legal ownership of corporeal chattels may be transferred by (*a*) actual or constructive delivery of possession with intent to transfer ownership, (*b*) deed of transfer, (*c*) contract of sale, (*d*) contract of exchange. This is usually regarded as being a complete list of the modes of direct and intentional alienation. Of course a change of ownership may also be effected by involuntary alienation, as on bankruptcy, and in consequence of acts not purporting to operate directly as transfers, as in the cases of *accessio* and *confusio*.

In *Akron Tyre Co.* v. *Kittson* (1951) (82 C.L.R. 477), however, the High Court denied the proposition that voluntary transfer is confined to the four modes listed above, and held that future goods may be transferred by contract other than contract of sale or exchange. The purpose of this article is to suggest that in deciding this the High Court misconceived the effect of the authorities, and that the facts of the *Akron* case, which involved the passing of property in future goods, were covered by the rules applicable to one of the well recognised modes by which property may pass.

It has long been settled that at common law a man cannot grant what he has not, so that in general a purported assignment of land or a chattel, not in existence, or not the property of the assignor, is merely void, and will not have a postponed operation when the thing is acquired by the assignor. To this general rule there are two exceptions. One is that the future product of existing property or rights may be assigned by the owner of the property or the rights: *Grantham* v. *Hawley* (1615) (Hob. 132). The other is that an act done after acquisition may be linked with something done before so as to make the whole dealing effective. It is this second exception that will be discussed here. The article will be concerned only with transactions that result in a legal title passing. Equitable assignment of future property, covered by the *Holroyd* v. *Marshall* (10 H.L.C. 191) line of cases, will not be dealt with.

The problem to be discussed is illustrated by such cases as the following, in each of which it was held that the legal title passed to the intended assignee:—

Reeves v. *Barlow* (1884) (12 Q.B.D. 436). In a building contract a builder agreed that all building and other materials brought by him on to the land should become the property of the landowner. *Blake* v. *Izard* (1867) (16 W.R. 108) is a similar case.

Hope v. *Hayley* (1856) (5 El. & Bl. 830). A mortgagor assigned as security the chattels used in connection with his business, with a power to take possession, and agreed that chattels substituted for those in existence at the time of the mortgage should belong to the mortgagee

and be included in the assignment. On default the mortgagee, in exercise of the power given by the deed, took possession of original and substituted chattels and sold them. Similar cases are *Congreve* v. *Evetts* (1854) (10 Exch. 298), *Carr* v. *Allatt* (1858) (27 L.J.Ex. 385), and *Chidell* v. *Galsworthy* (1859) (6 C.B.N.S. 471).

Akron Tyre Co. Pty. Ltd. v. *Kittson* (1951) (82 C.L.R. 477). In a hire-purchase agreement concerning motor trucks one term was that accessories or goods attached to the goods (*i.e.*, the trucks) should become part of the goods. Tyres were removed and sold by the hirer during the currency of the agreement, and as the evidence did not clearly show that these were the original tyres, they had to be treated as goods covered by the term referred to above.

In addition to these cases there are numerous cases of sales of future goods. One line of cases concerns the sale of a specific thing to be manufactured by the seller. It does not seem to have been doubted that a contract of this sort may have the effect of passing the property in the thing to be made, but, beginning with *Mucklow* v. *Mangles* (1803) (1 Taunt. 318) the cases establish the rule that the property does not pass until there is an act of appropriation with mutual assent. As to a sale of goods to be purchased later by the vendor Lord Tenterden held in *Bryan* v. *Lewis* (1826) (Ry. & Moo. 386) that the contract was invalid. However, in later cases this view was rejected and sales of this sort were upheld on the ground of mercantile convenience: it was said that to hold otherwise would put an end to half the contracts made in the course of trade. See *Hibblewhite* v. *M'Morine* (1839) (5 M. & W. 462) and *Mortimer* v. *M'Callan* (1840) (6 M. & W. 58). It is well known that the common law of sale rests mainly on mercantile convenience, and has been strongly influenced by the modern civil law rather than the older common law of personal property. Accordingly it would appear that cases of sales of future goods are on a different footing from that on which the other cases considered above stand, and do not call for consideration in connection with the problem discussed in this article. Transfer by exchange, which is regarded as analogous to sale, will also be excluded from the discussion.

The law on the subject of the assignment of future goods (apart from sale) is usually traced from the fourteenth rule of Bacon's Maxims, and the leading case cited is *Lunn* v. *Thornton* (1845) (1 C.B. 379). Bacon's maxim runs: *Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio praecedens, quae sortiatur effectum, interveniente novo actu.* Broom translates as follows: "Although the grant of a future interest is invalid, yet a declaration precedent may be made which will take effect on the intervention of some new act."

The question is what sort of new act, following a transferor's acquisition of goods, will give effect to a declaration made by him before he acquired them so as to pass the title to the goods to the intended transferee.

Lord Bacon says that there must be " some new act or conveyance to give life and vigour to the declaration precedent." He gives examples: a feoffment by a disseisee (who under the old law had no interest that he could assign) with a letter of attorney to enter and make livery of seisin, and subsequent livery accordingly; authority to an agent to demise land to be acquired, and subsequent demise by the agent; execution of an indenture to lead the uses of land to be purchased, and the subsequent levy of a fine to the uses thus declared.

Lord Bacon does not give the reason why in these cases the previous declaration takes effect, nor do the cases cited above put the matter beyond doubt. However, the true principle, it is submitted, is that a transaction is invalid only if the whole of it occurs before it has any object to operate on. But if some element of the transaction occurs after the object is acquired, the previous and subsequent elements, it is submitted, may combine to constitute an effective transaction. It may be reasonable to treat as invalid a completed conveyance of future goods; for the transaction, when carried through, spends its force on nothingness, and so is a nullity. But if some element of it, when performed, has something to operate on, it is not wasting its force, and can achieve some effect. Therefore it should be held valid.

Lord Bacon confines his exception to the case of a previous declaration; and, if we make the term declaration extend to contracts and deeds of conveyance, this appears to be the only element in a transfer of goods that can precede the acquisition of the goods and link up with a later act. If the type of conveyance in question is a conveyance by delivery with intent to pass ownership, obviously the only element that can precede the acquisition of the goods is the declaration of intention. If, on the other hand, the conveyance is by deed, the previous declaration is the whole transaction, and will be void as a transfer merely by deed, though the deed may perhaps operate as a declaration precedent for the purpose of Lord Bacon's exception (as was suggested by Lord Chelmsford in *Holroyd* v. *Marshall* (at p. 216)), and combine with a subsequent delivery to constitute a transfer by delivery.

Apart from sale, which is a special case, and apart from *Akron Tyre Co.* v. *Kittson* (*supra*), to be discussed later, the cases seem to show that the subsequent act is one which is a necessary element of an ordinary mode of transfer of existing goods as well as future goods. A brief examination of the earlier cases will show this.

In *Reeves* v. *Barlow* (1884) (12 Q.B.D. 436) the subsequent act was the bringing of materials on to the land of the intended transferee. This may very reasonably be treated as a delivery of possession to the transferee, combining with the previous agreement to constitute a transfer by delivery. The judgment does not in fact explain the basis on which ownership passed.

Some of the relevant cases are cases of assignment by deed (bill of sale in the pre-statutory sense of the term) by way of security. Three types are to be noted. One is where the assignment covers existing and future goods, but contains no power to seize the goods. The second is where the assignment covers only existing goods, but a power is included to take possession, on default, of substituted or other future goods as well as existing goods. The third is where there is both an assignment of and a power to seize future as well as existing goods.

Lunn v. *Thornton* (1845) (1 C.B. 379) is an example of the first class. In this case the bill of sale purported to cover future goods, but there was no express power of seizure. Tindal C.J., giving the judgment of the Court, said it was not a question whether a deed might not have been framed to give a power of seizure. Here the question was merely whether a deed could pass the property in goods not yet in existence. It was argued that the transferor's bringing the goods on to his premises was a sufficient subsequent act to bring the case within Lord Bacon's exception. This argument was rejected, and it was held that the property in the subsequently acquired goods was not affected by the deed.

The leading case in the second class is *Congreve* v. *Evetts* (1854) (10 Exch. 298). Goods were seized which included goods not in existence when the deed was made, and the question was whether the ownership of these passed when they were seized. It was held that it did; and Parke B., giving the judgment of the Court, said that the taking possession was the same as if the debtor had put the plaintiff in actual possession of these goods. The licence and subsequent seizure were thus considered to be equivalent to a transfer by delivery. *Chidell* v. *Galsworthy* (1859) (6 C.B.N.S. 472) is a similar case.

Hope v. *Hayley* (1856) (5 El. & Bl. 830) appears to be an example of the third class. The wording of the deed was peculiar, but it seems to have been intended to include after-acquired property in the transfer as well as in a licence to seize that was conferred. It was held that the property passed. On the whole the decision appears to have rested more on the effect of the licence to seize than on the transfer coupled with the subsequent act of seizure; but some of the judges considered that the case could be decided on either ground. In the similar case of *Carr* v. *Allatt* (1858) (27 L.J.Ex. 385) both the assignment and the licence to seize clearly covered after-acquired property, and it was the licence only, not the transfer, that was treated as passing the property on a subsequent seizure.

The result seems to be that where there is a transfer of future goods by deed, coupled with a licence or power to take possession, the simpler solution of the problem is not to treat the deed as a declaration precedent, but to rest the passing of the property on the licence alone. However, even on this basis the case comes within Lord Bacon's exception, for the words of licence are a previous declaration which links up

with the subsequent transfer of possession to take effect by what is really (*see* Parke B.'s judgment in *Congreve* v. *Evetts*) a transfer by delivery.

All the cases discussed above, it is submitted, can be explained as being cases of transfer by delivery, in which an agreement before acquisition indicates the effect that the subsequent delivery or quasi-delivery of possession is to have when it occurs. There is, it is true, a substantial separation of time between the delivery and the declaration of intent that is supposed to explain it. Indeed the separation in time and the mode of acquisition of possession in some cases are such that the intention may well have ceased in fact by the time the transferee acquires possession, *e.g.*, in cases like *Hope* v. *Hayley* where a mortgagee takes possession. However this may be, the cases show that the transferor is bound by his previous agreement; and it seems more reasonable to explain these cases as being transfers by delivery, in which the transferor is not allowed to recede from his previous declaration of intent, than to treat them as establishing a special mode of transfer peculiar to dealings with future goods.

The headnote to the report of *Lunn* v. *Thornton* (1 C.B. 379) reads: "A grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the property therein." If this is an exact statement the subsequent act need not be one necessary element of an ordinary conveyance, but any act which can be said to " ratify " the previous conveyance which otherwise would be void. However, the judgment of the Court, delivered by Tindall C.J., does not in terms support this mode of stating the rule. It was argued by counsel that the bringing of the goods on to the assignor's premises was a new act within Lord Bacon's exception. To this Tindal C.J. replied that " the new act which Bacon relies upon, appears, in all the instances which he puts, to be an act done by the grantor for the avowed object and with the view of carrying the former grant or disposition into effect." Later he refers to there being " no new act done by the grantor, indicating his intention that these goods should pass under the former bill of sale."

These dicta seem to contemplate something more than a mere ratification of the previous conveyance. The words first quoted contemplate an act which carries the disposition into effect, and this would seem to involve something equivalent to a delivery. The second dictum is less precise, but must be read, it is submitted, subject to the earlier more precise statement. Together the two dicta hardly justify the broad statement of the headnote.

On the other hand, the dicta appear to be too narrow to cover the other cases discussed above. These show that it is not necessary that the subsequent act should be an act done with the " avowed object

and with the view of carrying the former grant or disposition into effect." In *Reeves* v. *Barlow* (*supra*) materials were not brought on to the premises specifically in execution of the agreement, but rather for carrying on the building. Furthermore, the act need not be an act by the transferor, as is shown by the cases where the subsequent act was a seizure by the transferee under a licence given by the transferor. The dicta may have been adequate to deal with the argument the Court was concerned to dispose of, but they cannot be regarded as a full and accurate statement of the principle that covers all these cases.

In *Akron Tyre Co. Pty. Ltd.* v. *Kittson* (82 C.L.R. 477) the High Court broadened the statement of the relevant rule by extending it in the direction suggested by the headnote to *Lunn* v. *Thornton*. Latham C.J. said: "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 their joint judgment Williams and Kitto JJ. express a similar idea. It is submitted, however, that apart from sale, which stands on its own, the only new act recognised by the cases is an act equivalent to delivery of possession, *i.e.*, an act which is an element of one of the modes of transfer listed above. To these the High Court has added a fifth mode, transfer by simple contract, other than sale or exchange, taking effect on the occurrence of a future event specified by the contract. This extension of the principle, it is submitted, is not only unwarranted by the previous cases, but also was not necessary in order to arrive at the judgment given in the *Akron* case.

In this case a finance company let a number of motor trucks to Vale on hire purchase. Clause 12 of the agreement provided: "Any accessories or goods supplied with or for or attached to or repairs executed to the goods shall become part of the goods." After having used the trucks for some time Vale removed the tyres and sold them to the Akron Tyre Co. The evidence left it uncertain whether the tyres removed were original or substituted tyres. Vale having made default the finance company seized the trucks, which had been left without tyres, and then claimed the tyres from the Akron Tyre Co. Their claim being refused they brought an action for damages. The trial judge, Fullagar J., treating the tyres as substituted and not original tyres, held that clause 12 of the agreement passed the property in them to the plaintiffs as soon as they were attached to the vehicles; and he found it unnecessary to consider whether they became part of the vehicles under the doctrine of *accessio*.

In the High Court, Latham C.J. treated clause 12 as "an agreement, made for value, that the property in accessories, etc., shall pass when they are attached to the trucks"; and Williams and Kitto JJ. appear to have taken a similar view of the clause. As was indicated

above, they held that a contract that the property in goods should pass on the performance of some further act by the transferor is effective to pass the property on the event stipulated. It was submitted above that this carries the principle beyong the previous authorities, in so far as it allows the passing of property on some event other than an actual or constructive delivery of possession. On the other hand, in another respect it is too narrow a statement; for an act by the transferee, viz., seizure, may be the stipulated event as well as an act by the transferor.

The correct solution of the problem raised by this case, it is submitted, is to treat the case as one of *accessio*, in which the prior declaration shows the construction to be put on a later act of attachment, just as in the earlier cases the prior declaration showed the construction to be put on the act of seizing chattels or of bringing them on to premises.

In many cases where attachments are made to a chattel such as a motor vehicle it will be doubtful whether or not the thing attached becomes part of the chattel. In the case of a motor vehicle, tyres are an essential part of the vehicle, and it seems clear that tyres replacing the original tyres would become part of the vehicle independently of agreement. The same would be the case with replacements of other original and essential parts of the vehicle. But in the case of attachment of such things as a wireless set, or a spot-light, or loose covers to the seats, or a luggage carrier, it might be a question whether or not the thing was to be treated as part of the vehicle. This would appear to depend on the intention, as in the case of fixtures in relation to land; and if so, an agreement in a case of hire-purchase might well be regarded as a binding declaration of intention. The object of clause 12 in the agreement in the *Akron* case appears to have been to settle any doubt that might arise on this point.

It should be observed that clause 12 was not in fact an agreement that on attachment the property in the things attached should pass to the company. No doubt it was contemplated that this would be the result; but the agreement did not provide directly for this, and was not in itself a contract of conveyance. What clause 12 actually did was to provide that the attachment of things to the trucks should operate by way of *accessio*. This is a recognised mode by which the ownership of goods passes, the only special feature of the case under discussion being that the declaration of intention preceded the acquisition and the attachment of the goods. The case is thus clearly within Lord Bacon's exception, and within the explanation of his exception that is put forward above. It differs from earlier cases in being a case of *accessio* instead of a case of transfer by actual or constructive delivery, but otherwise it stands on the same footing with them.

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