

inclusive<sup>47</sup> as to leave the quandries of the automobile dealers still upon a large number of merchandise manufacturers and chattel mortgage loan companies. Such fields as furniture, electrical equipment, farm machinery, processing machinery and other types of relatively high unit-value chattels are still unprotected from the viewpoint of both purchaser and mortgagee; but clearly, under the *Floor Plan Rule* an ordinary citizen is buying under the protection of the law when the sale is outright from the dealer at retail and not through some intermediary. This after all, was the original purpose and rationale of the rule in its inception, and its spirit should be advanced to protect those within the strict operation of the rule; by the same token, its application should be refused as to the cases where the spirit does not follow it, since this removes the *raison d'être* of the judicial limitations to the *Recording Acts*. It is submitted that, notwithstanding that some of the exceptions to the distinctions within the rule may seem tenuous, on the whole, overlooking the isolated cases discussed where the courts were led astray by inadequate presentation and consideration of the problem, the rule has worked to further the wholesome policy of protecting the buying public with its desirable concomitant encouragement of business.

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## TORTS

### TORTS — CONVERSION

A motor car company agreed to sell a truck to a purchaser, and to accept the purchaser's old truck as part payment. The seller appraised the old truck, accepted a down payment on the new, and agreed further that the old truck should remain in possession of the purchaser until delivery of the new truck, at which time a re-appraisal (presumably by the seller) would be made. Before the delivery date arrived (it having been postponed by reason of a flood which inundated the purchaser's place of business) the seller, seeing the old truck parked on a side street, apparently deteriorating from the effects of thieves and bad weather,

[clerk's] office" operate to absolve him of responsibility under the Act. The fact that the affiant may be imprisoned for perjury will be of small comfort to the mortgagee; observation in the offices of at least three counties has led to the belief that as a general rule, the clerks do not, in fact, search the records of the Recorder. The practice is to rely upon the affidavit and the bill of sale, which latter it will be remembered, are recorded entirely apart from the mortgages (see note 28 *supra* concerning the divergent places of filing the two types of instruments).

<sup>47</sup>Included in the exceptions are such major items of interest as construction work, equipment, farm machinery, tractors and other production machinery.

took the truck to his (the seller's) garage and attempted by use of labor and materials to repair it. The purchaser, being informed of the seller's action, refused to submit to a re-appraisal of the truck at a lower figure, refused to accept a return of the truck, and elected to treat the seller's action as a conversion. Verdict was for the purchaser for the value of the old truck at the first appraisal. The Court of Appeals of Hamilton County held: "When the plaintiff (seller) took the truck from the street and worked on it for one-half day making changes and repairs, and later re-took it from the premises, thereupon it exercised such domination over the same as to convert it to its own use." *Avondale Motor Car Co. v. Donovan*, 60 Ohio App. 78, 19 N.E. (2d) 521 (1938).

The leading case in Ohio on the subject of conversion is *B. & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N.E. 476, 21 L.R.A. 117, 34 Am. St. 579 (1892). This court held that any wrongful exercise of dominion over chattels in exclusion of the rights of the owner, or inconsistent with his rights constitute a conversion. The problem is to determine what constitutes an act of dominion over the chattels of another. In *B. & O. R. Co. v. O'Donnell*, *supra*, it was held that a deliberate misdirection of a bill of goods was a sufficient act to render the railroad liable for their conversion. In the principal case, a truck was taken from the street to the repair shop of the seller. In view of the *O'Donnell* holding, it might be argued that this initial taking was sufficient to constitute an act of dominion. But there is authority for saying that a simple trespass is not a conversion. *Fouldes v. Willoughby*, 8 M. & W. 540 (1841). The doctrine of the *O'Donnell* case has been refined by subsequent holdings. In *Sammis v. Sly*, 54 Ohio St. 511, 44 N.E. 508, 56 Am. St. 731 (1896), it was held that the mere intermeddling with the personal property of another did not automatically divest title. Some courts have said that a taking of property for no other purpose than that of preserving it for the owner's use is not an act which will subject the taker to an action of trover. *Clark v. Whitaker*, 19 Conn. 319 (1848). The majority view does not regard intent to deprive the owner as an essential element in a cause of action for a conversion. *State v. Omaha National Bank*, 59 Neb. 483, 81 N.W. 319 (1899); *Waverly Timber and Iron Co. v. St. Louis Cooperage Co.*, 112 Mo. 383, 20 S.W. 566 (1892). But there is some support for the view that there can be no action for conversion in such cases unless the chattel is injured in the misappropriation. Cases holding this opinion, however, have dealt with takings under some color of authority from the owner. BIGELOW, TORTS, p. 403. It would seem that the court in

the principal case was not willing to construe the mere unauthorized taking as an act of dominion sufficient to complete a conversion.

After taking the truck to its garage, the seller, by the application of labor and materials, attempted to repair it. This act of repairing was apparently not intended as a gift to the owner. It was done wholly without the owner's sanction or request, and seems difficult to justify on any other basis than the seller's claim to some interest in the truck. Any interest so claimed would necessarily be inconsistent with the owner's undivided interest. This is more than a mere moving of the chattels of another for the benefit of the owner. *Whitaker v. Clark, supra*. It indicates some claim inconsistent with the owner's right, and may strictly be called an act of dominion. The conversion seems clear at this point. *Gillespie v. Holland*, 3 Ohio App. 116, 20 Ohio C.C. (N.S.) 17, 26 Ohio C.D. 220 (1914); *Great American Mutual Indemnity Co. v. Meyer*, 18 Ohio App. 97 (1924); *Miller v. Uhl*, 37 Ohio App. 276, 174 N.E. 591, 33 Ohio Law Rep. 294 (1924).

The final act of retaking from the owner's premises is said, by the court, to complete the cause of action. Even after the repairing of the truck had supplied the element of dominion, essential to the act of conversion, the owner could elect to waive the tort and accept the return of the chattel, or to treat the acts as conversion and sue for the value of the chattel converted. *Sammis v. Sly, supra*; BIGELOW, TORTS, p. 404. The retaking was with the expressed permission of the owner, and such a taking (of itself) could not be a conversion. A taking, to be a conversion, must be wholly without the owner's assent, expressed or implied. *Mann v. Lamb*, 83 Minn. 14, 85 N.W. 827 (1901). The refusal of the owner to accept the return of the chattel indicated his election to treat the acts of the seller as constituting a conversion. The retaking made the cause of action complete.

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#### DOGS — LIABILITY FOR INJURY BY

The plaintiff had a portion of his thumb bitten off in endeavoring to separate two fighting dogs. The defendant had stepped out of a store when the dog owned by the son of the plaintiff attacked the defendant's dog which was in harness. The defendant attempted to pull her dog back and the plaintiff took hold of the collar of his son's dog in an effort to part them. It was at this time that a portion of the plaintiff's thumb was bitten off, and there was no question but that it was the defendant's dog which did the biting. The Supreme Court of Ohio affirming the