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.

ROBERT M. ANDERSON

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

judgment of the Municipal Court of Cleveland, held that absolute liability is imposed upon the owner of a dog for the injury inflicted under Ohio G.C. sec. 5838, which reads in part: "A dog that chases, worries, injures, or kills sheep . . . or person, can be killed at any time or place; . . . The owner or harborer of such dog shall be liable to a person damaged for the injury done." *Dragonette* v. *Brandes et al.*, 135 Ohio St. 223, 14 Ohio O. 61 (1939).

Where the action is brought under the common law, a majority of the cases impose absolute liability on the owner of the dog if *scienter* is proved, *i.e.*, that the owner had notice of the dog's vicious propensities. *Hicks* v. *Sullivan*, 122 Cal. App. 635, 10 Pac. (2d) 516 (1932); *Moore* v. *McKay*, 55 S.W. (2d) 865 (Texas, 1932); *Brewer* v. *Furtwangler*, 171 Wash. 617, 18 Pac. (2d) 837 (1933). Another group of cases in effect impose absolute liability when *scienter* is proved, but say that the gist of the action is the negligence which is presumed from the defendant having notice of the dog's vicious propensities. *Earl* v. *Van Alstine*, 8 Barb. 630 (N. Y., 1850); *Roettinger, Admr.* v. *Greser et al.*, 12 Ohio L. Abs. 157, 181 N.E. 926 (1931). This presumption of negligence can not be removed by proof of care on the part of the defendant in keeping the dog. *Muller* v. *McKesson et al.*, 73 N. Y. 195 (1878).

The leading Ohio case under the common law is *Hayes* v. *Smith*, 62 Ohio St. 161, 56 N.E. 879, 43 W.L.B. 265, 15 Ohio C.C. 300, 8 Ohio C.D. 92 (1900), in which the Ohio Supreme Court said that in addition to *scienter*, the plaintiff must prove that the defendant was negligent in the manner in which he restrained the dogs. In making the gist of the action the negligent manner in which the dogs are kept, it appears that the Court has misinterpreted the common law theory as represented by *Earl* v. *Van Alstine*, *supra*, where there is a conclusive presumption of negligence in the very fact that the dogs are kept after notice of their vicious propensities. Therefore, the *Hayes* case differs from the majority of the common law cases by saying that knowledge of the vicious nature of the dog does not attach absolute liability to the owner in the absence of negligence in the actual keeping of the dog. This departure from the prevailing common law doctrine was pointed out in *Thomas* v. *Boyson*, 63 Ohio St. 576, 21 Ohio C.C. 302, 11 Ohio C.D. 773, 60 N.E. 1134, 44 W.L.B. 223 (1901), although in arriving at the decision, the Court followed the doctrine of *Hayes* v. *Smith*. However, a more recent Ohio case followed the common law theory of the *Van Alstine* case when the Court held that knowledge of the dog being

vicious gives rise to a presumption of negligence and the owner keeps the dog at his own peril. *Roettinger, Admr.* v. *Greser et al., supra.*

In 1854, the Ohio General Assembly passed a statute which imposed absolute liability on the owners or harborers of dogs for injuries inflicted on sheep. Swan's Statutes of 1854, 328. In *Job* v. *Harlan,* 13 Ohio St. 485 (1862), it was held that this statute dispensed with the necessity of proving *scienter.* In an action brought under a statute passed in 1860, which extended the absolute liability to include injuries to persons, S. & C. St. 71, the Court declared that the statute abrogated the common law requirement of *scienter. Gries* v. *Zeck,* 24 Ohio St. 329 (1873). At the time of the decision in *Hayes* v. *Smith* the statute in effect did not extend liability to protect persons, and it was probably with this decision in mind that the Legislature one month later passed Ohio G.C. sec. 4212-2, 94 Ohio Laws 118 (1900), which was similar in nature to the present Code section 5838 by which it was repealed. Sec. 5838 has abolished negligence in the restraining of the dogs as a test of liability, *Kleybolte* v. *Buffon,* 89 Ohio St. 61, 105 N.E. 192, 58 W.L.B. 449; 11 Ohio Law Rep. 316, 14 Ohio C.C. (N.S.) 511, 23 Ohio C.D. 211 (1913); *Lisk, Admr.* v. *Hora,* 109 Ohio St. 519, 143 N.E. 545 (1924), as well as the test of *scienter. Hayes* v. *Guard et al.,* 9 Ohio App. 377 (1918); *Mehmert* v. *Kelso,* 6 Ohio App. 69, 26 Ohio C.C. (N.S.) 350, 28 Ohio C.D. 515, 61 W.L.B. 299 (1915).

In Ohio action may be brought either under the statute or at the common law. *Roettinger, Admr.* v. *Greser, supra; Lisk, Admr.* v. *Hora, supra.* In order to establish his case in an action brought under the statute, the plaintiff need only prove that the defendant was the owner or the harborer of the dog and that the injury was inflicted by the dog. *Sawrey* v. *Grant,* 31 Ohio App. 14, 165 N.E. 97, 7 Ohio L. Abs. 60 (1928); *Kingsley* v. *Yocom,* 34 Ohio App. 226, 170 N.E. 180, 31 Ohio Law Rep. 216, 8 Ohio L. Abs. 116 (1929); *Bevin* v. *Griffiths,* 44 Ohio App. 94, 184 N.E. 401, 37 Ohio Law Rep. 531, 13 Ohio L. Abs. 284 (1932). In the latter case, a large German Police dog owned by the defendant threw himself against the plaintiff, a servant in the defendant's home, and caused her to fall whereby she sustained the injuries for which the action was brought. The plaintiff was required only to show that the defendant owned or harbored the dog and that the dog injured her person. In *Kingsley* v. *Yocom,* a trespasser was allowed to recover for the injury sustained even though the defendant had placed warning signs about the premises and the dog was tied. Under the statute, contributory negligence is held to be no defense because the negligence of the defendant is immaterial. *Siegfried et al.* v. *Everhart,*

55 Ohio App. 351, 9 N.E. (2d) 891, 23 Ohio L. Abs. 361, 9 Ohio O. 85 (1936). This case involved a set of facts similar to the case at bar, the plaintiff having been bitten while attempting to separate two dogs. The Court held that contributory negligence was no defense since the liability was predicated upon the statute and not upon the negligence of the defendant.

The phrase often used in dealing with cases of this nature that "every dog is entitled to one bite" certainly needs to be qualified in Ohio. The prevailing common law theory would say that he is entitled to one bite; the *Hayes* case, that he is entitled to more than one bite; but under section 5838 of the General Code, the unfortunate canine is entitled to no bites at all.

DAVID A. WIBLE

WORKMEN'S COMPENSATION

WORKMEN'S COMPENSATION — AVAILABILITY OF COMMON LAW REMEDIES FOR NON-COMPENSABLE OCCUPATIONAL DISEASES

Smith brought an action in the Common Pleas Court of Marion County for damages for silicosis caused by the negligence of his employer, the Marion Brass & Bronze Foundry. In Cuyahoga County, on similar facts, the administratrix of the estate of one Triff, a deceased employee, filed an action for wrongful death against the National Bronze & Aluminum Foundry Co. Demurrers were sustained to each petition, which rulings were affirmed by the Courts of Appeal for the Third and Eighth Districts respectively. Motions to certify were allowed by the Supreme Court, which considered both cases in a single opinion. It was held that the common law remedy of an employee against his employer for occupational diseases, not compensable under the Workmen's Compensation Act, has not been taken away by the organic or statutory law of Ohio. *Triff* v. *National Bronze & Aluminum Foundry Co., Smith* v. *Lau,* 135 Ohio St. 191, 20 N.E. (2d) 232, 14 Ohio O. 48 (1939).

Thus, by a four to three decision, the court has directly reversed its former position, as set forth in *Zajachuck* v. *Willard Storage Battery* Co., 106 Ohio St. 538, 140 N.E. 405 (1919), and *Mabley and Carew* v. *Lee,* 129 Ohio St. 69, 193 N.E. 745, 100 A.L.R. 511 (1934). This may be attributed to the shifting personnel of the court, rather than to the inconstant attitude of any of the individual members. None of the majority group was on the court at the time of the *Zajachuck* case, and only Judge Zimmerman sat in the *Mabley and Carew* case,