a judgment, which may be greater than the amount of the insurance carried. Until the Supreme Court in the case of *Rothman* v. *Metropolitan Ins. Co.*, 134 Ohio St. 241, 12 Ohio O. 50, 16 N.E. (2d) 417, 117 A.L.R. 1169 (1938), settled the question and held that wanton misconduct could result in accidental injuries, the insured defendant was in danger of losing his insurance because of wanton misconduct, and therefore be liable for the full amount of the judgment recovered against him.

From the foregoing considerations it may be concluded that the insured cannot be too diligent in fulfilling conditions vital to his recovery on the policy. Too often, as in the principal case, the insured believes that payment of premiums is all that is required of him.

THOMAS W. APPLEGATE

SALES

THE "FLOOR PLAN RULE" IN OHIO

Plaintiff brought action for conversion of an automobile, claiming title by virtue of a chattel mortgage executed to it by a retail dealer. Defendant, another retail dealer, claiming that he had purchased the car from the retail dealer who had previously executed the mortgage in question to the plaintiff, contended that the so-called *Floor Plan Rule* operated to protect his purchase, which was made subsequent to the execution of the mortgage in question. The mortgage had been properly recorded but the defendant had purchased in good faith with no actual knowledge of the encumbrance. The trial court, upon submission of the issue, found for the defendant. Upon appeal, the finding was reversed and judgment was entered for the plaintiff, the Court of Appeals holding that the rule does not operate to protect a retail dealer against a chattel mortgagee when the purchase is made from another retail dealer at wholesale. *The Colonial Finance Co.* v. *McCrate*, 60 Ohio App. 68, 19 N.E. (2d) 527, 27 Ohio L. Abs. 673, 13 Ohio O. 307 (1938).

At the common law, the generally pronounced rule of chattel property was that a seller could convey no greater title than he himself possessed even to a *bona fide* purchaser without notice of the defect in the seller's title.[1] The rigors of the application of the rule engendered a number of exceptions. Thus, in England, it was early held that no such claim could be countenanced against the buyer at sale in the market

[1] 2 Kent's Com. 262; *Roland* v. *Gundy*, 5 Ohio, 202 (1831); *Sanders* v. *Keber et al.*, 28 Ohio St. 630 (1876).

overt.[2] And in line with the general rule of the law of agency, when the agent was given actual authority to make sale of property, the purchaser took good title even though there was some deviation from the scope of the agent's authority.[3] But the power of the agent to sell did not include therewith the power to barter, exchange or mortgage in a contest between the owner and the good-faith purchaser.[4]

A corollary to the exception to the general rule based upon this rule of agency was developed in the form of the doctrine of apparent authority. The language of the courts in many instances so seldom distinguishes this ground from that of fraud that the two *rationes decidendi* may frequently appear to be one and the same.[5] However, some few decisions have expressly set up apparent authority as a definite statement of the justification of the rule.[6]

Searching further, it was discovered that the ground of fraud would function as another judicial adhesive with which to engraft a new structural branch of the law upon the already atrophied stump of the general rule. The English courts early held that retention of the possession of the property by the mortgagor was fraudulent *per se*,[7] and several American courts followed this precedent.[8] But on reconsideration, the English absolute rule of law was converted into a presumptive rule of evidence.[9] Ohio, along with the majority of jurisdictions in the United States,[10] has accepted the rule that such a transaction is *prima facie* void, but that its ultimate validity is merely ". . . a question of fact for the jury. Unexplained, the retaining of possession after sale would be held fraudulent, but such possession is not regarded as conclusive evidence of fraud in itself . . ."[11] Under the Ohio holdings, it is essential to determine whether the opposing parties are contesting buyers, in

[2] Kent's Com. 324.

[3] *Arnold* v. *First National Bank*, 96 Colo. 104, 39 Pac. (2d) 791, 97 A.L.R. 643 (1936). See also 10 American Jurisprudence 843.

[4] *Wright* v. *Solomon*, 16 Cal. 64, 79 Am. Dec. 196 (1861); *Davidson* v. *Parks*, 79 N.H. 262, 108 Atl. 288 (1919); 21 R.C.L. p. 886, sec. 58; 2 C.J. p. 650, Agency, Sec. 295, note 68.

[5] See note 28 *infra*.

[6] *Cincinnati Finance Co.* v. *First Discount Corp., et al.*, 59 Ohio App. 131, 136, 17 N.E. (2d) 383, 27 Ohio L. Abs. 11, 12 Ohio O. 42 (1938).

[7] *Edwards* v. *Harben*, 2 D. & E. 587 (1788); *Twyne's Case*, 3 Coke 80 *b*, 76 Eng. Reprint 809, 5 Eng. Rul. Cas. 2 (1601).

[8] See 12 R.C.L. p. 555, Fraudulent Conveyances, sec. 77, note 1; 27 C.J. p. 578, Fraudulent Conveyances, sec. 298, note 65 for numerous authorities sustaining this minority position.

[9] *Martindale* v. *Booth*, 3 B. & A. 498 (1832).

[10] See 12 R.C.L. p. 556, Fraudulent Conveyances, sec. 77, note 5; 27 C.J. p. 574, Fraudulent Conveyances, sec. 294, note 29 for lengthy lists of cases following the majority view.

[11] *Hombeck* v. *Vanmetre*, 9 Ohio 153 (1839), at page 155.

which case, the vendee who first takes possession will prevail,[12] or creditors of the seller, in which situation, the rule of presumption is unchanged, even under the statutes.[13] But the delegation of the power of disposition to the mortgagor is held to be fraudulent in law as to third parties, whether by express terms of the contract,[14] by implication from the tenor of the provisions thereof[15] or by the conduct of the parties thereto.[16]

The legislature, in enacting the *Uniform Sales Act*, clarified the issue which the courts had beclouded by stating that a sale or other disposition of goods previously sold to another by one who is permitted by the first grantee to keep possession thereof shall have the same effect as if express authority to do so had been vested in the grantor.[17] Even execution creditors were accorded favor by allowing them to disregard the sale, if it were fraudulent in fact or by rule of law.[18] The *Factors Act*[19] further entrenches the legislative reversal of the common law gen-

[12] Ohio G.C. sec. 8405; *Hallet & Davis Piano Co.* v. *Starr Piano Co.*, 85 Ohio St. 196, 97 N.E. 377, 9 Ohio L. Rep. 527 (1911). See also, for a more careful analysis of this situation in Ohio, 35 Ohio Jur. 800, Sales, Sec. 83.

[13] *Burbridge* v. *Seely*, Wright 359 (Ohio 1833); *Hooban* v. *Bidwell*, 16 Ohio 509, 47 Am. Dec. 386 (1848); notes 17, 18 and 19 *infra*.

[14] *Collins et al.* v. *Myers*, 16 Ohio 547 (1847). Read, J., at p. 553 "The object of a mortgage is to obtain a security beyond a simple reliance upon the honesty and ability of the debtor to pay, and to guard against the risk of all the property of the debtor being swept away by other creditors by fastening a specific lien upon that covered by the mortgage.

"But a mortgage with possession and power of disposition in the mortgagor is nothing at last but a reliance upon the honesty of the mortgagor and in fact is no security as it is within the power of the mortgagor at any moment to defeat the mortgage lien by an entire disposition of the whole property covered by the mortgage. Such a mortgage then is no security, so far as the debtor is concerned and is of no benefit except as a *ward* to keep off other creditors . . ." (Italics were inserted by the court.)

See also, in this connection, *Brown* v. *Webb*, 20 Ohio 389 (1851); sc. 3 Ohio St. 246 (1859) and *Francisco et al.* v. *Ryan*, 54 Ohio St. 307, 43 N.E. 1045, 56 A.S.R. 711 (1896).

[15] *Freeman* v. *Rawson*, 5 Ohio St. 1 (1855).

[16] *Franklin Bond and Investment Co.* v. *Long*, 18 Ohio App. 235, 2 Ohio L. Abs. 205, 21 Ohio L. Rep. 507 (1923).

[17] Ohio G.C. sec. 8405 "When a person having sold goods, continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value therefor in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make it."

[18] Ohio G.C. sec. 8406 "When a person having sold goods continues in possession of the goods or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void." See also Ohio G.C. sec. 8617 allowing creditors to take advantage of reservation by grantor of trust of power to revoke the conveyance.

[19] Ohio G.C. sec. 8360 "Every factor or other agent intrusted with the possession of a bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title, intrusted with the possession of merchandise for the purpose of sale, or as a security for advances to be made or obtained thereon shall be deemed to be the true owner thereof,

eral rule (note 1, *supra*) where the property is entrusted to an agent for a course of dealing for the purpose of obtaining a buyer or advances in reliance upon it as security.

To encourage the conduct of business upon credit, and to protect the lender where he takes security for his loans, the *Chattel Mortgage Recording Acts* were devised.[20] To a similar effect, and of like nature, is the *Conditional Sales Act*.[21] Under these statutes, the filing of a copy of the instrument in the office of the County Recorder will constitute notice so as to foreclose the possibility of legal purchase without notice of the defect in the title to chattels, thereby forcing the result that such subsequent parties take subject to the rights of the mortgagee.[22]

A novel phase of the problem arose for judicial appraisal with the advent of the automobile and the attendant financing arrangements. Where a member of the general buying public unwittingly purchased an automobile from a dealer, on which automobile there had been previously executed a chattel mortgage, which in turn had been properly recorded so as to constitute constructive notice under the statutes, one of the parties would be necessarily favored as against the very tenable and forceful objections of the other. Challenged with two persuasive contentions as to which had the superior right, the courts of various states and even those within the same state, quite understandingly reached varying results in their choice between the horns of the dilemma.

Illustrative of the one line of authorities which appeared is a case decided by the Court of Appeals of New York, where, in reversing a decision of the Appellate Division of the Supreme Court,[23] it was held that the entrusting to the dealer by the mortgagee did not work an estoppel, even though possession was given for the purpose of obtaining offers of purchase.[24] The court argued in support of its holding that, if the rule were otherwise, "no automobile owner could safely leave his car in a garage where the business of selling cars is conducted for the purpose of storing the same or having it repaired . . ."[25]

so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced or negotiable instrument, or other obligation in writing, given by such person upon the faith thereof."

[20] Ohio G.C. sec. 8560 *et seq.*

[21] Ohio G.C. sec. 8568 *et seq.* See also Ohio G.C. sec. 8619, providing that a loan of chattels shall vest title in the borrower when the possession has remained in the borrower for five years, unless reservation of right thereto is written (as in the Statute of Frauds) and the document recorded according to mandate of the referred-to section.

[22] *Day* v. *Munson*, 14 Ohio St. 488 (1863).

[23] *Utica Trust and Deposit Co.* v. *Decker*, 217 App. Div. 137, 215 N.Y.S. 669 (1926).

[24] *Utica Trust and Deposit Co.* v. *Decker*, 244 N.Y. 340, 155 N.E. 665 (1927). The case cites, explains or otherwise comments upon a wealth of other authority, but significantly ignores the decision of the previous *Boice* case, (*infra* note 26).

[25] 155 N.E. at p. 667. Ohio has answered this argument by refusing to apply the rule to the case of a bailment for repairs. See *Fitzgerald* v. *National Bond & Investment Co.*, (*infra* note 41).

At an earlier time, when confronted with a similar fact situation, likewise in reversing a lower court decision, the Supreme Court of Appeals of Virginia had held that a duly recorded chattel mortgage upon an automobile forming part of the stock of a retail dealer was ineffectual to defeat the rights of a *bona fide* purchaser without notice of the encumbrance.[26] "The reason for the rule is that it . . . [would work] a fraud upon third persons. To uphold such a mortgage would give to the mortgagor a fictitious credit and allow him to pose before the world as the owner of the goods when such is not the fact. Purchasers from him and those who extend him credit[27] on the faith of the ostensible ownership of the goods will not be subjected to loss on that account . . ."[28]

The cases decided by the Ohio courts have etched an interesting pattern of considerable incongruity. The earliest[29] presented the problem in veiled forms and the court, failing to perceive and pierce the disguises, disposed of them on the basis of statutory interpretation.[30] *Obiter*

[26] *Boice* v. *Finance and Guaranty Corp.*, 127 Va. 563, 102 S.E. 591, 10 A.L.R. 654 (1920). The case expressly followed earlier cases holding to the same general effect as to general retail merchandise sales by merchants to the public. Included within the contents of the discursive opinion is a substantial number of illuminating precedents cited and with some discussion. The step was reaffirmed and followed in *Gump Investment Company* v. *Jackson*, 142 Va. 190, 128 S.E. 506 (1925).
No attempt has been made in the confines of this note to collate the authorities from other jurisdictions beyond indicating the fundamentals of the two schools of legal thinking on the subject. The ramifications of the labyrinth conceived by the Ohio Courts are complex enough to occupy this *Theseus* in attempting to tread their mazes, bearing in mind the limitations of space and the needs of the practitioner.

[27] Compare the holdings of the Ohio courts (note 36 *infra*) and as to the contrary *dicta* in some Ohio cases (note 30 *infra*) as to this position.

[28] 102 S.E. at p. 592. Note the curious and unselective admixture of the language of fraud and of estoppel in this passage. This may be attributed to the generally indiscriminate use of the words "fraud" and "estoppel" with their resultant obscurity of connotation. At a later point in the opinion (page 593) the doctrine of estoppel is advanced specifically and explained by saying that "The act of knowingly permitting the goods to be so handled and used by the seller in the ordinary and usual conduct of his business is just as destructive of the rights of the creditor as if such permission had been expressly granted in the mortgage . . ." See notes 14, 15 and 16 (*supra*) and test thereto.
At page 593 appears a further interesting and cogent passage in support of the decision. ". . . it would be unreasonable to require a purchaser to determine what could be mortgaged and what could not. To require an examination of the records for liens in such cases would break up the business and indeed be an embargo on legitimate trade. Capital must seek a more substantial security for its protection. Otherwise it would be better that the few should suffer than the general public, who have been lured into purchasing from a dealer who has been intrusted with the *indicia* of ownership. A purchaser in such case is not bound to see to the application of the purchase money . . ."

[29] *Commercial Credit Co.* v. *Schreyer*, 120 Ohio St. 568, 166 N.E. 808, 63 A.L.R. 674 (1929); *Metropolitan Securities Co.* v. *Warren State Bank*, 117 Ohio St. 69, 158 N.E. 81 (1927); *Helwig* v. *Warren State Bank*, 115 Ohio St. 182, 152 N.E. 298 (1926) and *Ohio Farmers Insurance Co.* v. *Todino*, 111 Ohio St. 274, 145 N.E. 25 (1924). See in this connection the note by Lieberman, *"Transfer of Title to Automobiles under New Certificate of Title Act," supra* page 255.

[30] The *Chattel Mortgage Recording Statutes* (note 18, *supra*) and the *Motor Vehicle Bill of Sale Act.* (G.C. sec. 6310-3 *et seq.* This section was repealed by the *Certificate of Title Act, infra,* note 44.) The former requires mortgages of chattel property to be filed

dicta and the ultimate result reached seem to warrant the conclusion that it was thought that the second transferee, in spite of his good faith, could not defeat the rights of a prior mortgagee; the constructive notice created by compliance with the recording statute was not overcome by the showing of innocence. It will be seen that, implicitly, the court reached the result that would be expected under the terms of Ohio G.C. sec. 8560.

When the problem, reduced to its lowest terms, was presented to the Court of Appeals in 1930, the rule, without being given its convenient appellation, was applied so as to favor the innocent purchaser[31] with the same holding as that of the Virginia Court.[32] The opinion does not cite a single precedent, thus justifying the inference that the conclusion was arrived at independently of the two indicated lines of authority and of the seemingly controlling decision of the Supreme Court of Ohio.[33] In the well-reasoned opinion, the argument was made that "To permit the mortgagee to assert its mortgage . . . would be a fraud . . . and would permit the one who made the fraud possible to take advantage of its own wrong . . ."[34]

By *dictum* of such strength that no doubt concerning its meaning can be entertained, the *Floor Plan Rule* was finally accepted by the Supreme Court thus impliedly overruling at least as to outright purchases, the doctrine of the *Schreyer* case (note 29, *supra*). The conclu-

with the office of the County Recorder, the latter requires automobile bills of sale to be deposited with the Clerk of Courts. *Quaere*, why the different place of deposit for the two types of instruments? See Marshall, C. J., 117 Ohio St. at p. 76.

In the *Schreyer* case (*loc. cit.*), Marshall, C. J., notwithstanding a vigorous dissent, belabors himself in impressive fashion to discover the true legislative intention expressed in the Bill of Sale Act, even to the extent of expressly disowning prior abortive attempts (see note 29 *supra* and Lieberman, page 255 *supra* at page 257), to define the import of the statute. No consideration other than a few isolated passages is given to the problems discussed in this note.

In the syllabus (paragraph 4), it is said ". . . if and when said mortgage is filed with the County Recorder of the County where the mortgagor resides, it has priority over subsequent *purchasers* and *mortgagees* in good faith." In the opinion (p. 568) it is further remarked that "A record of that mortgage would be constructive notice to all subsequent *purchasers* and *mortgagees*." See notes 27 (*supra*) and 35 and 36 (*infra*). (Italics in these quotations have been furnished by the writer.)

[31] *Hostetler* v. *National Acceptance Co.*, 36 Ohio App. 141, 172 N.E. 851 (1930); m.c.o. 10-15-1930. This case was expressly followed in *General Motors Acceptance Corporation* v. *Ferguson et al.*, 47 Ohio App. 251, 191 N.E. 834, 16 Ohio L. Abs. 248, 40 Ohio L. Rep. 256 (1933).

[32] Note 26 (*supra*).

[33] Notes 24, 26 and 29 (*supra*). Nor is this the only Ohio case which has ignored the precedent of the two lines of authority. The *Pfaff* case (note 35 *infra*) does not take cognizance of either, nor of the *Schreyer* case (note 29 *supra*), which it implicitly overrules as to this point, although it does cite and proceed on the basis of some other cases of questionable applicability. Neither does the *Hostetler* case (note 31 *supra*) receive consideration by the Supreme Court in its opinion.

[34] Note the similarity in language here to that of the Virginia Court (*supra* note 28) and text thereto. This quotation can be found in 36 Ohio App. at p. 145.

sion was expressly based upon the doctrine of estoppel.[35] But the same case delimited the scope of the operation of the rule by denying the contention that it applied with equal force to protect another and subsequent mortgagee.[36] So also, and perhaps with better reason, its application to an execution sale by a judgment creditor was denied.[37]

But, in a case arising before the doctrine had been recognized by an Ohio decision, it was held that a chattel mortgage executed and recorded before the delivery of a bill of sale for the property was not notice to a subsequent mortgagee, since it was outside the chain of title.[38] The fact that the negotiations were made with a salesman of the dealer, and that the automobile was not located upon the floor of the dealer will not prevent the acquisition of a clear title by the purchaser;[39] but where the chain of title is through the medium of a salesman who had knowledge of the prior mortgage, although otherwise within the rule, such party gets no greater right than the salesman, whose knowledge of the defect is fatal to the priorities of derivative claimants.[40]

[35] *National Guarantee and Finance Co.* v. *Pfaff Motor Car Co.*, 124 Ohio St. 34, 176 N.E. 678 (1931). A similar result was reached in the same year by the Court of Appeals in *National Guarantee and Finance Co.* v. *Commercial Credit Co.*, 10 Ohio L. Abs. 658 (1931) with no consideration of the superior authority.

[36] *Cf.* the language of the Virginia court in the *Boice* case (*supra* note 27 and text thereto) as to this point. It may be forcefully maintained that the distinction between sale and mortgage is tenuous, since the elements of estoppel are present no matter what the type transaction may be. Nor is any indication given by the court that it considered the interpretation section of the *Sales Act*, and especially Ohio G.C. sec. 8456-1 (*qua vide*), where purchase is said to include the case of a mortgage or pledge as being on the same plane with the more exact connotation of purchase.
In justification of the court's holding, it is suggested that the distinction may be maintained on the basis of the differences in the activities of the parties who are customarily engaged in the two types of dealings. Since the public in general is not engaged in the practice of making loans upon chattels, but rather, only those who make it a business, and who are consequently more informed as to business practices and familiar with the operation of the recording acts, the element of reliance upon appearances prerequisite to estoppel may be missing; however, no such reasoning appears in any of the Ohio cases in this note.

[37] *Davis* v. *First Central Trust Co.*, 15 Ohio L. Abs. 3 (1933).

[38] *Ohio Finance Co.* v. *McReynolds, et al.*, 27 Ohio App. 42, 160 N.E. 727, 6 Ohio L. Abs. 265 (1927). The *Todino* case (*supra* note 29) is one of the authorities relied upon, which holds that a sale of an automobile without the statutory formalities is void. The *McReynolds* case may or may not have been outmoded by the change of face as to this point in the *Schreyer* decision (*supra* notes 29 and 30). The reasoning based upon the chain of title may still be conclusive in the matter, and certainly should be as to chattels not under some regulatory statute like the Automobile Bill of Sale Act (see Lieberman *supra* page 255).

[39] *General Motors Acceptance Corporation* v. *Ferguson et al.* (*supra* note 31) "In principle, we can see no difference between a case where the mortgagee permits the dealer to maintain a car upon its floors for sale and one in which the dealer is permitted to place it in the possession of its employees for demonstrating purposes. In each case, the purchaser is led into the belief that the automobile is in the possession of the dealer for sale, and he has nothing to warn him of an encumbrance thereon . . ."

[40] *Cincinnati Finance Co.* v. *First Discount Corp.*, (*supra* note 6). In this case it appears that the dealer held possession under the *Floor Plan* arrangement, having given a mortgage to the plaintiff. A salesman of the dealer knew of the arrangement, but not-

When the property is delivered to the vendor for repairs, a subsequent purchaser cannot defeat the right of the bailor, even though the repairman is the same person by whom it was sold in the first instance, for the reason that this conduct is not enough to constitute an estoppel.[41]

The application of the doctrine disowned in its first appearance before the Supreme Court in the *Schreyer* case (note 29, *supra*), but later accepted in the implied limitation of the original holding on the subject is still further limited by the *McCrate* case[42] refusing to allow an automobile dealer to buy from another at wholesale free of a prior recorded mortgage. Even the confusing state of the law has led the courts into what appears to be error.[43]

withstanding, purchased the automobile in his own name, giving another mortgage for the purchase price thereof, which mortgage was purchased by the defendant. The knowledge of the salesman as to the prior encumbrance was held to be fatal to the interest of the defendant, since "the assignee of the subsequent mortgage . . . [could take] no better title than the assignor." The court said that "the conduct of the mortgagor . . . [must have] clothed him with an apparent authority. The liability . . . is based on estoppel . . . [hence] knowledge of the existence of the mortgage will defeat the purchaser's claim, because he was not misled by the appearance of authority . . ."

It might be contended that the result of the case is not in accord with the *dictum* quoted, since the defendant involved was not the one who had knowledge of the prior lien, but was a *derivative party* who was presumably acting in good faith. The rationale advanced to support the estoppel type case can be as forcefully argued to extend to the case involved. See *apropos* this matter the confusion of the court in the *Greenwald* case (note 43 *infra*). However, since the actual ultimate question was between mortgagees, the doctrine of the *Pfaff* case (note 35 *supra*) should have been decisive of the issue.

It was urged that the Factors Act(not 19 *supra*) controlled the case, and well it might have, but the court almost summarily dismissed the contention (page 137 of 59 Ohio App.) "for the reason that the dealer was not 'intrusted' with the possession of these automobiles 'for the purpose of sale.' The dealer had title, subject to the mortgages, and it was by virtue of that title that he was in possession, and it was his title that he was seeking to sell—not that of the mortgagee." Cf. *General Motors Acceptance Corporation* v. *Ferguson et al.*, (*supra* note 31).

[41] *Fitzgerald et al.* v. *National Bond & Investment Co.*, 10 Ohio L. Abs. 181 (1931). The case is still stronger against the bailor because of the fact that no bill of sale had ever been executed and placed on record. "Mere possession of a chattel is not an *indicia* of title" (p. 183). Curiously enough, the result reached is in accord with that of the *Pfaff* case (note 35 *supra*), although the decision is on the authority of the *Schreyer* case (note 29 *supra*) which as pointed out heretofore (notes 29 and 30 *supra* and text thereto) is considered to be a rejection of the *Floor Plan Rule*. Compare the argument of the New York Court in discountenancing the *Floor Plan Rule* quoted in the text to note 25 (*supra*).

[42] *The Colonial Finance Co.* v. *McCrate*, 60 Ohio App. 68, 19 N.E. (2d) 527, 27 Ohio L. Abs. 673, 13 Ohio O. 307 (1938). Here again appears what seems to be a distinction without a difference, just as some criticism may be made of the differentiation between the case of a sale and that of a mortgage established by the *Pfaff* case (notes 35 and 36 *supra*). But for a suggested justification, see note 36 (*supra*).

[43] Cf. *Greenwald's Auto Co.* v. *Hower et al.*, 24 Ohio L. Abs. 421 (1938), and *National Guarantee and Finance Co.* v. *Schenke*, 24 Ohio L. Abs. 236, 8 Ohio O. 36 (1937), and the difficulty of the court in the *First Discount* case, (*supra* note 40).

In the *nisi prius Schenke* case, an individual entrusted his automobile for sale to a dealer who then fraudulently mortgaged it. At the instance and through the procurement of the dealer, the automobile was conveyed by bill of sale directly by the owner to another dealer who was unaware of the previous mortgage. In deciding for the second dealer, the court followed the *Pfaff* case (note 35 *supra*) saying that "if the mortgage of the [mortgagee] is unavailing against the owner, it is likewise unavailing as against the vendee of such owner, where the vendee has purchased the property in question without knowledge of the

In consideration of this state of affairs, it is with little wonder that we note that the automobile and finance interests secured the passage of the *Certificate of Title Act*, which was enacted by the legislature in 1937[44] to be effective as to transfers made subsequent to January 1, 1938. The constitutional validity of this statute was recently upheld by the Supreme Court.[45] Many of the problems herein presented will be cured;[46] however, the specific exemptions in the act are so broad and

mortgage." The rule of the *Factors Act* (note 19 *supra*) was denied as "not applicable." *Quaere* whether this case is not reversed by the *McCrate* case (*supra*, note 42) as being in effect a sale at wholesale by one dealer to another.

The *Greenwald* problem involved a contest between the rights of the assignee of a duly recorded mortgage executed by a purchaser and the mortgagee of one who subsequently bought the car from the same dealer who had made the sale in the first place to the first mortgagor. The dealer, it was said, "as against the . . . [first mortgagee], had no title to said car, and at the time of the sale, . . . the said [first mortgagee] had done everything which the law required of it . . ." Since no title was had by the dealer, and since "a seller of property can convey no better title than he himself possesses," the second grantee of the dealer got no title; likewise, the (second) mortgagee had no property upon which its security would operate. The court cites only the authority of the *Schreyer* case (*supra*, note 29), which as has been pointed out (text to note 35 *supra*) has been partially bastardized *sub rosa*. This was not a contest between mortgagees as such under the *Pfaff* case (note 35 *supra*), because the title, if it passed at all, went to a *purchaser* who in turn mortgaged the property to secure the purchase price. The fact that the litigant was a second mortgagee should not control, but the rights of the second purchaser under the general *Floor Plan Rule* by *sale* (note 31 *et seq.*) should determine the rights of the mortgagee of the second purchaser.

It will be seen that the court in its decision, not only relied upon authority of doubtful efficacy, but also failed properly to distinguish between the situation before it and that in the *Pfaff* case, which is not considered in the opinion. Furthermore, the common law rule quoted has been so generally confined by exceptions and limitations as to have been, to all intents and purposes, emasculated.

[44] Ohio G.C. secs. 6290-1 *ff.*, Vol. 117, Ohio Laws, pages 373 and 726. Section 6290-4 dealing with the problem herein presented provides that "No person acquiring a motor vehicle from the owner thereof, whether such owner be a manufacturer, importer, dealer or otherwise, hereafter shall acquire any right, title, claim or interest in or to said motor vehicle until he shall have had issued to him a certificate of title to said motor vehicle, or delivered to him a manufacturers or importers certificate for the same; nor shall any waiver or estoppel operate in favor of such person against a person having possession of such certificate of title . . . for a valuable consideration. No court in any case at law or in equity shall recognize the right . . . of any person in or to any motor vehicle hereafter sold, or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title . . . duly issued in accordance with the provisions of this chapter."

[45] *State ex rel. The City Loan & Savings Co.* v. *Taggart, Recorder*, 134 Ohio St. 374, 17 N.E. (2d) 758, 12 Ohio O. 517., annotated by Lieberman, *supra*, page 255. See this citation for a more exhaustive treatment of the statute involved.

[46] One problem which may arise under a "gap" left in the statute is found in the provision in the act that in the case where there was no previous certificate of title representing the ownership of the automobile, a bill of sale may be converted into a certificate of ownership when application therefor is presented, supported by a bill of sale and a sworn statement of ownership. Further, "the Clerk of Courts shall use reasonable diligence in ascertaining whether or not the facts in said application are true by checking the same . . . with the records of motor vehicles in his office . . ."

Sometime before the changeover to the new system is complete, the case will likely arise where a certificate is issued upon the basis of bill of sale and sworn statement of ownership under the statute where there is still a prior mortgage recorded in the Recorder's office under G.C. 8560, but not noted as a lien upon the certificate because of the false affidavit. Is the clerk bound to check the mortgage records in the Recorder's office or is the mortgagee, at his peril, required to see that the liens are noted properly, and do the words "his

inclusive[47] 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'etre* 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.

THEODORE BOEHM
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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 apatr from the mortgages (see note 28 *supra* concerning the divergent places of filing the two types of instruments).

[47] Included in the exceptions are such major items of interest as construction work, equipment, farm machinery, tractors and other production machinery.