Conversion of Choses in Action

Recommended Citation
Conversion of Choses in Action, 10 Fordham L. Rev. 415 (1941).
Available at: https://ir.lawnet.fordham.edu/flr/vol10/iss3/3
COMMENTS

CONVERSION OF CHOSES IN ACTION†

Introduction

To those whose lives were spent in "the days of chivalry", horses, castles, and suits of armor—things that they could feel and actually touch—represented wealth and value and were exclusively the subject of a law which concerned itself with the tort of conversion. Then it was supposed that there could be no conversion of an intangible property right. But in this era when credit has become one of the instrumentalities of business to which men pay homage, new intangible property rights unknown to common law must be considered when conversion is discussed. Stocks, bonds, evidences of debt, insurance policies, contracts and other choses in action play a prominent rôle in present day credit economy. As a result of this expansion of intangibles the question arises: Is there any relaxation in the classic rules regarding conversion of choses in action? What is their status in the action of trover for conversion?

The attempt is made here to determine the possibility of conversion of various classes of choses in action.

At the outset it is necessary to make some attempt to define the key-words, "conversion" and "choses in action" which appear in the title. Conversion has been defined as a "wrongful interference over personal property, inconsistent with or in denial of the dominion of the person entitled to possession thereof." It is "any dealing with the property of another which excludes the owner's dominion." The gist of conversion is the unauthorized assumption of the

This comment was prepared, in principal part, by Lester Rubin, member of the Board of Editors, 1940-1941.

1. On the origin and history of trover, see Ames, History of Trover (1898) 11 HARV. L. REV. 374.

2. For an excellent case showing the change from the old to the new view regarding conversions of intangibles, see Ayers v. French, 41 Conn. 142, 149-152 (1874); Kuhn v. McAllister, 1 Utah 273 (1875). See also Note (1928) 12 MINN. L. REV. 552; AMES, LECTURES ON LEGAL HISTORY (1913) 80.

3. Despite the fact that the trend in the field of property rights has been in the direction of intangibles and choses in action, it is odd to find that some of the so-called "realists" and "semanticists" are arguing for an elimination of "legal concepts," and the substitution of "functional methods" on the ground that the only "things" that should count in the law are those which have concrete existence or cubical size. In this area, our reformers seem to be progressing backwards. CHASE, TYRANNY OF WORDS (1938); Cohen, TRANSCENDENTAL NONSENSE AND THE FUNCTIONAL APPROACH , 35 COL. L. REV. 809.


5. Our stated problem whether conversion extends to intangible as well as tangible personal property appears in the different definitions of conversion set forth by the courts. Some courts use restrictive definitions of conversion which limit the cause of action to the "taking of a personal chattel" or "goods" (terms which clearly exclude intangible property)
powers of the true owner. A "chose in action" is a personal right not reduced to possession. For example, shares of stock, and debts represented by negotiable instruments and savings bankbooks are all choses in action. They are personal property rights, not reducible to immediate tangible possession, not capable of physical delivery; but recoverable only in an action at law.

In view of the expansion of choses in action and their many classifications, it is necessary to limit the problem of conversion. The objective approach will generally be invoked and in each case the question is asked: May this specific chose in action be converted? Having in mind that our main problem is to determine whether the given chose in action may be converted, collateral questions pertaining to the legal status of the litigants and the rules of damages applicable, will generally be omitted.

For purposes of this discussion, choses in action will be divided into the following classes: (a) stocks, (b) bonds, checks, notes and bills of exchange, (c) insurance policies, (d) judgments, (e) accounts, debts and contracts, (f) good will, (g) membership and club privileges, (h) cause of action, (i) ideas, and (j) common law and statutory copyrights.

**Stocks**

A distinction has always been recognized between a stock certificate and the share of stock itself. A stock certificate is but an evidence of title to the property right which its owner has in the corporate stock. As such, the certificate symbolizes or represents a fractional proportion of the corporate ownership known as a share of stock. Except in very rare instances, the thing of value

---


7. “Another very leading distinction in respect to goods and chattels, is the distribution of them into things in possession and things in action. The latter are personal rights not reduced to possession, but recoverable by suit of law. Money due on bond, note, or other contract, damages due for breech of covenant, for the detention of chattels or for torts, are included under this general head or title of things in action. It embraces the most diffusive, and, in this commercial age, the most useful learning in the law. By far the greatest part of the questions arising in the intercourse of social life, or which are litigated in the courts of justice, are to be referred to this head of personal rights in action.” 2 Kerr’s Commentaries (1855) 449.

is the share of stock not the certificate. Most persons suing for the conversion of stock desire to have their damages measured by the value of the share of stock. Thus two questions immediately arise: (1) Are both the certificate and the share of stock the subject of conversion? and (2) Will the conversion of the stock certificate automatically constitute a conversion of the share of stock? If such an automatic conversion results, damages may then be assessed using the value of the share as a basis.

There was a time when, in common with other choses in action, stock certificates were not the subject of conversion. Although "formerly, a negligible number of courts held to the view that because shares of stock are intangible, trover would not lie for their conversion . . . this doctrine has by most courts long been discarded, and the overwhelming weight of authority now is that trover will lie for the conversion, . . . of the stock itself. . . ." This seems to be well settled law at the present time, and so it is possible to bring an action in trover for conversion of the intangible share of stock as well as the tangible stock certificate.

Thus an action in trover may be brought against a corporation when its secretary refuses to transfer stock on the books of the corporation, or to issue stock to a stockholder. In such instances the corporation is clearly exercising dominion over the share of stock itself by effectively preventing the true owner from exercising his rights of ownership.

There may now be a conversion of an indorsed negotiable certificate of stock and the measure of the damages will be the value of the share of the stock. The theory of the action is that the value of the stock has become merged with the negotiable stock certificate. The certificate is the effective instrument for the exercise of dominion over the stock itself. Conversion also lies where a forged certificate is negotiated, and where the corporation transfers stock on...

9. The viewpoint, that there is a distinction between the paper symbolizing the chose in action and the right itself, is generally recognized by the courts. E.g. bonds, Blodgett v. Silberman, 277 U. S. 1 (1928). Cf. Blackstone v. Miller, 188 U. S. 189 (1903) overruled in Farmer's Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930).
10. See note 2, supra.
14. Defendant stockbroker tendered plaintiff a different certificate from the one that plaintiff gave him, although of the identical stock and number of shares. Nevertheless defendant was held liable for conversion of the original certificate which he had contracted to return but had disposed of. Cartwright & Crickmore v. Machnes, S. C. R. 425 (Can. 1931); see also McAllister v. Kuhn, 96 U. S. 87 (1877).
its books on the basis of a forged instrument or refuses to issue certificates to a transferor of stock upon his application.\footnote{16}

However, when an unindorsed certificate of stock is wrongfully withheld, or otherwise unlawfully dealt with, according to a long line of decisions, there has been no conversion of the share of stock. The unindorsed certificate not being negotiable, mere possession thereof does not give dominion over the stock.\footnote{17} A typical statement is: "It is an utter perversion of the term 'conversion' to hold that a party has converted property when he stands powerless to deprive the owner of it or to appropriate it to his own use or to the use of another."\footnote{18}

This viewpoint stood unchallenged until 1932 when the New York Court of Appeals, reversing the Appellate Division,\footnote{19} held that conversion of an unindorsed certificate of stock also constituted a conversion of the share of stock, and damages were to be measured by the value of the share.\footnote{20} Although the \textit{Pierpoint} case is not the only case on this point,\footnote{21} it is significant and warrants further analysis. The court reasoned that a stock certificate is but an evidence of title to the property right which its owner has in the corporate stock. Wrongful acts affecting property rights in corporate stock can ordinarily be committed only through the medium of the certificates which evidence those rights. For the purpose of redressing such wrongs, the law must and does treat the symbol as though it were the thing symbolized. A conversion of the certificate of stock, whether or not indorsed, is therefore a conversion of the stock itself.\footnote{22}

The court goes on to say that "it is elementary that the law of conversion is . . . concerned with possession, not with title. . . . The right to possession, broadly speaking, may be infringed by a wrongful taking; or by a wrongful detention; or by a wrongful disposal."\footnote{23} Thus the court seems to have had in mind the fact that adverse possession was exercised in defiance of the plaintiff's right of dominion.\footnote{24}

\begin{quote}
21. In Minchew v. West, 78 Col. 254, 241 Pac. 541 (1925) the court held that the cancelling by an officer of the corporation of stock certificates issued to plaintiff, constituted a conversion, notwithstanding that stockholder had not indorsed nor signed the certificate. It is to be noted that the only difference between the \textit{Pierpoint} case and this case, is that in the former the convertor was an outsider, while in the latter the convertor was an officer of the corporation.
23. \textit{Ibid}.
24. It could not be said that \textit{actual} dominion was acquired by the converter because the
There is another practical reason why detention of the stock certificate, even though no title is passed, should spell out a conversion. Under the Uniform Stock Transfer Act, the owner of shares represented by a lost or stolen certificate must apply to the court for relief. After due notice and hearing and upon filing of a bond and payment of costs, a new certificate may be issued. Considerable delay is inevitable, all of which works to the disadvantage of the stock owner. In stock transactions time is usually of the essence. Thus a very real deprivation of dominion over the stock results from the act of the tort-feasor. A court is certainly justified in such circumstances in allowing a trover action to be successfully maintained against one who withholds an unindorsed certificate.

The general concept of conversion has progressed to the extent that no longer must actual physical domination over the subject matter be shown in order to maintain an action of trover with regard to stock. Both the certificate and the intangible share of stock may be the subject of conversion. A conversion of an indorsed stock certificate constitutes a simultaneous conversion of the share of stock and damages are awarded for the value of the share. But, except in New York, the conversion of an unindorsed or forged certificate of stock is usually not considered a conversion of the share, and the damages are measured by the value of the loss of possession of the certificate rather than by the value of the share. However, the New York rule holding that conversion of an unindorsed certificate constitutes a conversion of the share is sound and may well indicate the course that will be followed in the future by other jurisdictions.

_Notes, Checks, Notes, and Bills of Exchange_

Negotiable instruments are evidence of an obligation to pay money. However, the law considers them to be more than merely evidence of debt. For title to an unindorsed certificate does not pass title to a converter. N. Y. Pers. Prop. Law §§ 162, 168, 170. Turnbull v. Longacre Bank, 249 N.Y. 159, 163 N.E. 135 (1928).


26. As the court in the _Pierpoint_ case points out, if necessary, the court can effectually have the title to the converted stock transferred to the converter upon his satisfaction of the judgment. This seems to effectively answer the fears of those who thought that the plaintiff would be keeping the ownership of the stock and also recovering its value. Pierpoint v. Hoyt, 260 N.Y. 26, 30, 182 N.E. 235, 236 (1932).

27. It is to be noted that although the Colorado case of Minchew v. West, note 21 _supra_, held that an unindorsed certificate of stock is the subject of conversion, it did not hold that it constituted a conversion of the _shares_ of stock. It is significant, however, that the result was the same in that the court awarded damages for the full value of the shares.

28. See Notes (1932) 81 U. of Pa. L. Rev. 217; (1932) 2 Brooklyn L. Rev. 120; (1932) 18 Cornell L. Q. 93; (1932) St. Johns L. Rev. 102; (1932) 17 Minnesota L. Rev. 230; (1933) 31 Michigan L. Rev. 569, all justifying the holding of the _Pierpoint_ case.

29. “For certain purposes, a bill of exchange or a promissory note is regarded in this Commonwealth not merely as evidence of a debt, but as the debt itself.” Slade v. Mutrie, 156 Mass. 19, 21, 30 N.E. 168 (1892).
many purposes the debt is merged with the instrument. In the case of non-negotiable instruments a conflict is present on the question of whether the debt is merged in the instrument. When one leaves the realm of pure theory, and delves into the practical business world, he agrees quite readily with those text and law review authors who have stated that for most purposes in cases of both negotiable and non-negotiable instruments the debt should be considered merged in the instrument. The instrument, whether negotiable or not, is often the only memorandum that the creditor has of the transaction involved and is thus his only means of proving the obligation. Exercise of dominion over such a non-negotiable note is in such a situation also exercise of dominion over the debt itself. Recovery, it would seem, should be for the face amount of the instrument. A common statement is: "Trover will lie for the wrongful conversion of bonds, or other securities for the payment of money." This is true with regard to both negotiable and non-negotiable bonds. Even where bonds have been stolen, and a forged indorsement used to obtain new bonds from the corporation, the owner was allowed to recover the bonds from an innocent third party into whose hands the bonds had come. A bond being evidenced by a tangible writing, the courts have no trouble in finding the necessary dominion to allow an action for conversion. The underlying debt is immediately converted on the wrongful taking of a negotiable bond, and may be generally assumed to be converted in the case of a non-negotiable bond.

Other types of commercial paper may be grouped together since they partake of common general characteristics. Thus checks, promissory notes, bills

31. For an excellent discussion of the problem here posed see Goodrich, Negotiable Bills and Notes (1920) 5 Iowa L. Bull. 65, 70-72.
34. "It is, moreover, well settled that trover will lie for a bond, or note, although the former be not the subject of transfer at all." Brickhouse v. Brickhouse, 33 N. C. 404 (1850); Blackman v. Lehman, 63 Ala. 547, 35 Am. Rep. 57 (1879).
36. Chew v. Louchheim, 80 Fed. 500 (C. C. A. 3rd, 1897); Smith v. Robertson, 4 Harris & J. 30 (Md. 1815); Carver v. Creque, 46 Barb. 507 (N. Y. 1866).
of exchange,\textsuperscript{39} and drafts\textsuperscript{40} are all subject to conversion. Although the great majority of cases are concerned with negotiable instruments, this conclusion has been upheld in the case of a non-negotiable bond.\textsuperscript{41}

It has been held that trover will not lie for a paid bond, or note, the reasoning being that a paid instrument has no value.\textsuperscript{42} Somewhat similarly, it has also been decided that no recovery will be allowed for the conversion of an instrument which is void in the hands of any holder.\textsuperscript{43} But the majority of jurisdictions\textsuperscript{44} however, follow the reasoning of the Maine court which finds value for a paid note: "The maker of a note has a right to its possession upon payment. . . . In the hands of a stranger it is \textit{prima facie} evidence of indebtedness. . . . The possession of it by the maker is of importance to him. The conversion of it by another may become a source of indefinite injury."\textsuperscript{45}

Thus, it appears that the conversion of negotiable evidences of debt clearly carries with it the conversion of the debt underlying the instrument. Conversion of a non-negotiable instrument implies the conversion of the underlying debt where a wrongful exercise of dominion over the debt itself is present. But it can not be said that in all cases conversion of a non-negotiable instrument will give the innocent party the full amount of the debt. The law is still somewhat uncertain on this point. It is interesting to note the trend shown rather clearly in \textit{Pierpoint v. Hoyt}\textsuperscript{46} and in the following sections, toward eliminating the necessity of reducing the fund or debt to possession in order to have a conversion of that fund. The Restatement of the Law of Torts also lends its


\textsuperscript{40} Hooten v. State, 119 Ark. 334, 178 S. W. 310 (1915); Schmidt v. Garfield Nat'l Bank, 64 Hun 298, 19 N. Y. Supp. 252 (1892).

\textsuperscript{41} Hicks v. Lyle, 46 Mich. 488, 9 N. W. 529 (1881) (promissory note, not negotiable because it was payable in a commodity).

\textsuperscript{42} "If the note in truth was paid before the conversion . . . then we admit that trover will not lie to recover the value of it, for in fact it has no value; . . ." Lowermore v. Berry, 19 Ala. 130 (1851).

\textsuperscript{43} Morrill v. Goodenow, 65 Me. 178 (1876); Miller v. Lamery, 62 Vt. 116, 20 Atl. 199 (1890) (illegal note, no value, no damage); Hollehan v. Roughan, 62 Wis. 64, 22 N. W. 163 (1885) (in which the fact that the note was past due and had been obtained by fraud made it unenforceable against the maker).

\textsuperscript{44} Stone v. Clough, 41 N. H. 290 (1860); Stewart v. Martin, 49 Vt. 266 (1877); Long v. McIntosh, 129 Ga. 660, 59 S. E. 779 (1907); Vaughn v. Wright, 139 Ga. 736, 78 S. E. 123 (1913).

\textsuperscript{45} Otisfield v. Mayberry, 63 Me. 197, 199 (1874). The court also states that "the damages to which the plaintiff would be entitled would depend upon the injuries sustained." \textit{Id.} at 200.

In Stove v. Clough, 41 N. H. 290 (1860), nominal damages were awarded in return for the paid note by the defendant, while in the Otisfield case the defendant was liable for the whole amount of the note and interest since he fraudulently put it back into circulation after it had once been paid, and the plaintiff had to pay it a second time.

\textsuperscript{46} Pierpoint v. Hoyt, 260 N. Y. 26, 182 N. E. 235 (1932).
authority to this trend by stating that the amount of recovery for conversion of notes, bonds, and bills of exchange, negotiable or non-negotiable, is the value of the obligation which is merged therein.\footnote{47}

\textbf{Insurance Policies}

Two questions arise when consideration is given to the possibility of conversion of insurance policies. They will be recognized as similar to the dual questions arising upon the conversion of any written evidence of a chose in action. (1) May the printed contract between the insured and the insurer be converted? (2) May the intangible right to recover against the insurance company be converted?

One court says: "Unquestionably written instruments such as insurance policies are subject to conversion."\footnote{48} The policy (this term will be used herein to refer to the printed contract) being tangible, and certainly of value as evidence of a contractual right, may be converted.\footnote{49} However, destruction of this evidence does not automatically destroy the contract right. Clearly, then, a distinction must be made between those cases where the conversion of the policy results only in the inconvenience due to its loss of possession, and where the conversion of the policy results in losing all rights thereunder. It is under the latter hypothesis that the question arises as to whether the intangible right against the insurance company may be converted.

It has been held that where a conversion of the policy divests a person of all rights under the policy, the measure of damages was the face amount of the policy;\footnote{50} in other words unlawful dominion had been exercised over the contract rights accruing under the policy. Such cases of total loss generally arise out of the detention or cancellation of the policy by the insurance company itself,\footnote{51} although damages of the face amount of the policy have been granted.

\footnote{47. \textit{Restatement Torts} (1934) § 242: "(1) A document in which a personal obligation or the title to a chattel is merged may be the subject of a conversion under the rules stated in §§ 223 to 241. (2) The amount of recovery for the conversion of such a document is the value of the obligation or the chattel title to which is so merged." Comment "b" under said section reads:

"The rule stated in the Section is applicable to promissory notes, bonds, bills of exchange, shares certificates and warehouse receipts, whether negotiable or non-negotiable. It is also applicable to insurance policies and to savings bank books. Such documents do not constitute an all-inclusive catalogue of those to which the rule stated in this Section is applicable. The rule is not applicable however, to documents representing an executory contract for the sale of land or chattels or contracts for the performance of personal services" at page 617. See interpretation in \textit{Latimer v. Stubbs}, 173 Miss. 436, 159 So. 857, 859 (1935).


51. \textit{Brockington v. Central Life Ins. Co.}, 173 So. 908 (Fla. 1937); \textit{Handley v. Home...}
to a plaintiff against a replaced beneficiary who wrongfully obtained the
proceeds.52

It appears, then, that in the abstract both the insurance policy and the
contract right to recover from the insurance company may be the subject of
conversion. To this statement of theory must be added the practical notation
that every conversion of the policy is not automatically a conversion of the
contract right. It is only when some dominion over the contract right of
recovery has been exercised that this becomes a factor in assessing damages.

Judgments

A split in the meager authority available confronts us in the subject of
judgments. In one state the written document evidencing the judgment has
been held convertible since trover will lie for either a general or special
property;53 and it was later held in the same state not to be convertible since
it was not such a thing that could be recovered in trover.54 A more recent case
in point, however, allows an action in conversion for a judgment. One partner
without authority settled a judgment with the debtor for less than the full
amount and executed a satisfaction piece. The other partner recovered from
the offending partner the difference between the full amount of the judgment
and the amount of the settlement.55 This decision is to be noted especially,
since it recognized the conversion of an intangible right where no unlawful
dominion was exercised over tangible evidence.

Thus a decided trend is visible away from the former necessity of reducing
the fund to possession before conversion is allowed. In stocks and in non-
negotiable bonds, notes and drafts, and in judgments it has been held that
conversion will lie for the face value of the fund represented. In many of the
cases cited it was not legally possible for the converter to obtain possession of
or to transfer these funds. Yet the credit economy was impeded by the acts
of the converter, and the recovery allowed was the “value of the obligation.”56

Accounts, Debts, and Contracts

Books of account are tangible and may be physically seized, but such a con-
version does not necessarily convert the accounts receivable evidenced therein.

Chief Justice stated here that “the amount which she receives is the measure of damages,
because, if the plaintiffs had had the instrument, they would have had no difficulty in
obtaining that amount.” His language indicates that the award of damages equal to the
face value of the policy was reasonable for the conversion of the instrument itself.”

54. Platt v. Potts, 33 N. C. 266 (1830).
56. RESTATEMENT TORTS (1934) § 242 (2).
amount of indebtedness, and does not represent a merger of the stated debt, as does, for example, a promissory note. If the accounts are actually collected, dominion has been exercised over them and trover will lie for the full amount collected. Copies of the book account wrongfully withheld and of a receipted account are convertible. Accounts are useful as evidence that the debt exists, but it is only in cases where a further dominion has been exercised than that over the books themselves that the debt is considered converted.

Written contracts have not been the subject of much litigation in the field of conversion; consequently, conclusions that are drawn must be founded somewhat on analogy rather than upon actually decided cases. In the case of specialized contracts such as insurance policies conversion of the contract right may follow conversion of the formal paper evidencing the contract. Trover has been held proper where a written executory contract has been converted. But it seems clear that the measure of damages should not be the value of the obligation or debt represented by such ordinary contract. Where a contract right may be considered merged in the document, recovery should be given for the value of the rights when the document is converted; where the obligation is not merged in a document, the wrongful taking of such a document is not the subject of a conversion.

A debt has been judicially defined as something owed from one person to another such as money, goods, or services. As such it is a right that is intangible. Can this purely intangible right without documentary symbol be the subject of an action in trover for conversion? The statement "that the action of trover does not lie for the recovery of a debt, or for damages arising from breach of contract" is followed by the weight of authority. It has been shown that most evidences of indebtedness are subject to conversion, and that when such tangible evidence is converted the conversion of the underlying

57. Vogedes v. Beakes, 38 App. Div. 380, 56 N. Y. Supp. 662 (2nd Dep't 1899), held, that a sheriff levying on books of account, and notifying debtors to pay him converted only those accounts that were actually paid to him. Plaintiff still had title to other accounts and mere taking of the books, which were a record of the accounts, was not a conversion of them.

58. Fullam v. Cummings, 16 Vt. 697 (1844).

59. Moody v. Drown, 58 N. H. 45 (1876). See, O'Donoghue v. Corby, 22 Mo. 393 (1856), which allowed damages to the unpaid face value of an "account" which had been converted by the defendant. However, the discussion in the case leads one to believe that a non-negotiable instrument was in question.

60. See discussion in the text relating to Insurance Policies. See supra pp. 000-000.


62. RESTATEMENT TORTS § 242, Comment (b): "The rule is not applicable however, to documents representing an executory contract for the sale of land or chattels or contracts for the performance of personal services."


64. Davis v. Thompson, 10 Sadler 563, 14 Atl. 169 (Pa. 1888).

debt is concurrently accomplished. In a proper case, it would seem that a sound rule would permit an action for conversion of a debt.

At least there is evidence that the pendulum is swinging away from the necessity for tangible evidence of a chose in action. In Englehart v. Sage, a sheriff wrongfully levied on a debt due to the plaintiff, and he was held to have converted the debt. True, this result followed from the applicable Montana statute which permitted attachment of debts. If debts may be attached, it is not difficult to imagine a wrongful attachment, and it is a short step to a realization that this wrongful exercise of dominion over intangible personal property comes within the definition of conversion.

This decision is logical and in accord with principle, if one recognizes that dominion may be exercised over intangible property quite as effectively as over tangible property. Contrary decisions were reached where such a concept was not recognized. It must be remembered that the Englehart case is a minority decision and that it is based on statutory enactments involving the intermeddling by a sheriff in the execution of an official attachment. Its doctrine might well be limited to its exact facts.

Good Will

Good will has been defined as something in the business which "gives a reasonable expectancy of preference in the race of competition," "all that good disposition which customers entertain toward a house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it"—all soothingly vague terms to define a correspondingly vague concept. The prolific use of generalities in connection with the term good will gives one pause. Is this chose in action different from others? If so, what is there in its nature that makes it different? In addition, how does this affect the possibility of its conversion?

An analysis of other choses in action will disclose that their value may be ascertained within fairly definite limits. Stocks, commercial paper, debts, contracts, accounts and judgments are rights or representations of rights that may be determined and are generally liquidated in amount. But good will, besides being intangible, is indefinite in value. The difficulty, both legally and practically, of determining what good will really exists in any given case, and what it is worth are questions that have taxed the best minds of the legal and accounting professions. It is small wonder, then, that the problem of whether such a vague value can be converted has been decided in the negative.

68. See note 65, supra.
Not only good will but kindred rights, such as the right to do business on a laundry route\(^7\) are not the subject of conversion. On the basis that good will and the right to do business are vague and indefinite rights and that to determine the exercise of wrongful dominion over them is practically impossible, the court decisions seem justified.\(^7\)

**Membership and Club Privileges**

Membership and club privileges form a classification which is different from other choses in action, which are enjoyed after their satisfaction and payment. In these cases there is a continuous enjoyment from the time of creation.\(^7\) A split is to be found on the basic proposition of whether a membership can be considered property. Many courts agree that there is a valuable property right in these privileges of membership.\(^7\) However, Illinois courts have consistently denied this.\(^7\) One case holds squarely that there may be a conversion of the membership certificate but not of the intangible right of membership, despite the fact that the damages awarded consisted of the full value of the membership, indicating that the court was concerned, not with the value of the piece of paper called the membership certificate but with the value that it represented, the right of membership.\(^7\) In *Genslinger v. Ill. Athletic Club*,\(^7\) on an interpretation of the documents involved, an illegal cancellation of “membership certificates” was held to be merely a denial of a contract right. Most of the other actions affecting membership privileges are brought to recover assets of a bankrupt estate and as such concern themselves with the question of whether membership is a property right but not directly with the possibility of their conversion.

**Causes of Action**

The question of whether an intangible right, not evidenced by a writing, may

---

\(^7\) In *Olschewski v. Hudson*, 87 Cal. App. 282, 286, 262 Pac. 43, 45 (1928) the court dismissed a suit for conversion of the right to do business. In an action by the owner of a laundry route against a former employee who kept the lists of customers and continued to solicit their patronage, the court stated: “Unlawful interference with property rights in the good will of a business, or the benefits of trade and patronage of a specific list of customers in a definite route, may be protected by injunctive relief,” but not by an action in trover. *Adkins v. Model Laundry Co.*, 92 Cal. App. 575, 268 Pac. 939 (1928).

\(^7\) Yet a statement in the holding of *Powers v. Fisher*, 279 Mich. 442, 272 N. W. 737 (1937) “that trover lies only for tangible property” may certainly be questioned.

\(^7\) *Chicago Board of Trade v. Johnson*, 264 U. S. 1 (1923).


\(^7\) *Olds v. Open Board of Trade*, 33 Ill. App. 445 (1889); *Barclay v. Smith*, 107 Ill. 349, 47 Am. Rep. 437 (1883); *Genslinger v. Ill. Athletic Club*, 339 Ill. 426, 171 N. E. 514 (1930). But see *Press & Co. v. Fahy*, 313 Ill. 262, 145 N. E. 103 (1924) which gives a qualified assent to the theory that memberships are property.

\(^7\) *Olds v. Open Board of Trade*, 33 Ill. App. 445 (1889).

\(^7\) 339 Ill. 426, 171 N. E. 514 (1930).
be converted is certainly not judicially answered by a hearty “yes.” Intangible
rights evidenced by shares of stock, formal debts, and judgments have been held
to be convertible, whereas good will, the right to do business, membership
privileges, and other intangible rights separated from written evidence, if any,
are not generally the subject of conversion. So a stray decision holding that
there may be a conversion of a cause of action is doubly interesting.79 The
plaintiff had the right to reform a note given to the defendant, who with intent
to defeat that right, negotiated the note to a bona fide purchaser. He was held
to have converted the plaintiff’s right to reform the note. Dominion was cer-
tainly exercised over the right to reform but a decision recognizing this as a
conversion is unusual enough to be noted. It is another indication that the
concept that trover is limited to actions affecting documented choses in action
is disintegrating.

Ideas

Copinger asserts: “Nothing can with greater propriety be called a man’s
property than the fruit of his brain.”80 Is it such personal property as to be
subject to the wrongful exercise of dominion without the consent of the owner?
This question takes on added importance in view of the prominent part that
ideas play in such fields as advertising and entertainment, to say nothing of
industrial production. Advertising expenditures have averaged more than one
billion dollars annually during the last ten years.81 The cinema is one of the
country’s leading industries. Both fields depend for their success largely upon
ideas. In the constant struggle to scoop the field, to capitalize on a novel idea,
to capture the imagination of the public, some treading on the toes of others is
to be expected. What are the rights of the originator of a novel plan which can
be exploited for profit? Before proceeding to answer these questions some
clarification of the term “idea” as protected by the courts is necessary.

If a person moulds a beautiful statute with his hands the statute is his
property. If a person, through a mental process, moulds a novel idea for an
advertising stunt, there seems to be no doubt that he has also created property,
although it is of an intangible nature. That reasoning is accepted by some
courts.82 But a social question of great importance is also involved and must
be considered by the courts in determining the extent of protection that they
will give to the originator of an idea. If no one could use any idea or discovery
of another’s without his permission, the progress of mankind would be snail-
like. The discoverer of electricity could have prevented its use by any but a
privileged few; so with mathematical formulae, chemical combinations and all

Misc. 606, 183 N. Y. Supp. 582 (1921).
81. PRINTER’S INK, March 1, 1940, pp. 13-16.
Dep’t 1937) aff’d 277 N. Y. 681, 14 N. E. (2d) 388 (1938).
of man’s discoveries and inventions. Yet to foster progress, it is deemed wise
to give the inventor an opportunity to reap some of the rewards of his
initiative.83

Where no protection is available under the patent or copyright laws, the
question arises whether the originator of an idea should be granted complete
protection or none at all. A middle road has been chosen by the courts. Pro-
tection will be granted, but not for a “mere idea.” An abstract idea, as such,
may not be the subject of legal protection, yet when it is presented in a well-
developed form it then becomes a property right subject to legal protection.
Of course, it must be something novel and new. One cannot claim any right in
the multiplication table.84 When the term “idea” is used hereafter in this
article, it will be considered as sufficiently concrete or physically developed to
be considered a property right. While there is a vast shadowy area surrounding
the term concrete, the use of ordinary judgment will solve most of the problems
arising in this connection.

The courts do recognize some right of property in an idea.85 However,
knowing the reluctance with which pure intangibles have been held to be the
subject of an action of trover for conversion, one is not surprised to find that
the same hesitation appears in this regard in the field of ideas. Thus it has
been held that using an architect’s plans for a hotel is not a conversion, where
the actual blueprints are not taken, because there is no conversion for “some-
thing as entirely intangible as an idea”,86 and that the unauthorized divulgence
of a secret formula, the actual paper on which it was written not being taken,
gives no remedy in trover for conversion.87 In the past a person with an idea,
who was unlucky enough to put it before an unscrupulous entrepreneur, was
accorded little satisfaction on his day in court. But the court’s unwillingness to
grant protection to most intangibles is breaking down. Recent cases are pointing
the way.

In a good many of the cases, quasi-contract seems to be the basis of recovery
for the unlawful appropriation of an idea. The plaintiff submits an idea for
an advertising scheme; it is used by the defendant without remunerating the
plaintiff; it is quite easy for a court to grant recovery on the basis of quasi-
contract.88 In the case of Ryan v. Century Brewing Ass’n,89 the plaintiff, an
advertising agency, by invitation, submitted the slogan “The Beer of the

Dept. 1937) aff’d 277 N. Y. 681, 14 N. E. (2d) 388 (1938); Ryan & Associates Inc. v.
Century Brewing Ass’n, 185 Wash. 600, 55 P. (2d) 1053 (1936).
86. Mackay v. Benjamin Franklin Realty, 288 Pa. 207, 135 Atl. 613 (1927); Larkin v.
88. Liggett & Myers Tobacco Co. v. Meyer, 101 Ind. App. 420, 194 N. E. 206 (1935);
Ryan & Associates Inc. v. Century Brewing Ass’n, 185 Wash. 600, 55 P. (2d) 1053 (1936).
89. 185 Wash. 600, 55 P. (2d) 1053 (1936).
Century" along with other suggestions for a campaign. The plaintiff was not employed to handle the campaign, but the slogan was used. Suit was brought to recover for services rendered. Recovery was granted. The court, quoting the case of Liggett & Myers Tobacco Co. v. Meyer, asserted that a novel and new idea is the subject of a property right.

These cases are to be sustained mainly upon the theory of quasi-contract. The plaintiffs in each instance submitted to the defendants the fruits of their intellectual labor which were used without compensation. The plaintiffs were held to be entitled to recover the reasonable value of the services which they rendered. The plans submitted in each instance were necessarily held to be a sufficient property to support a contract. Thus, the protection of law is given to ideas in these instances. Further, the indication is that the protection given will be extended beyond situations where a contract, express or implied, can be spelled out of the transaction between the parties, to situations where the defendants conduct is tortious and the plaintiff's only rights are those which are incident to property generally, namely, a right to exclude interference therewith. In the Ryan case the court stated: "So far as the appellant is concerned, we see no difference between a suit such as this for services rendered and a suit based upon the originator's property right in his own idea."

However, in actual decision no court has gone so far as to allow a recovery in an action based upon a tortious use of another's idea. In the case of Healey v. R. H. Macy, the Appellate Division in New York allowed a recovery to the plaintiff as a result of the use of a slogan for a Christmas campaign which was submitted to Macy's. The court failed to indicate upon what theory it allowed a recovery. However, in subsequent cases the same court refused to allow actions in tort for the appropriation of ideas. Therefore, it appears that the recovery in the Healey case was upon a contractual theory.

The courts are endeavoring to find remedies for the new wrongs which have been made possible as a result of the development of new business and new business methods; the law of unfair competition has been expanded to meet some situations, the law of quasi-contract to meet others. There seems to be a field for the expansion of the law of conversion to meet situations which properly call for relief and which have not heretofore been accorded the protection of the courts.

91. 185 Wash. 600, 55 P. (2d) 1053, 1054 (1936).
95. See note 85, supra.
The same evolution of doctrine observable in the matter of shares of stock and other choses in action is present with respect to the conversion of ideas. First, no recovery for the appropriation of an idea in any form was allowed. Then an action was allowed for the use of the plan or drawings embodying the idea. Finally, conversion of the idea itself seems to be on its way.

The inventor can now take his idea to a prospective purchaser and, with the proper precautions, he can be reasonably sure of protection.6 An idea-man can contact an advertising agency and try to sell a good advertising stunt without too great fear of its being misappropriated. But certain caution must be observed. The idea must be more than a mere idea. It must be developed far enough to come within the court's definition of a concrete idea.7 It must be novel and original. The seller should make it clear that he expects compensation for the idea.

In view of the definite trend allowing conversion of intangibles which are not evidenced by a writing it is to be expected that conversion will be recognized in the future as applying to ideas. Previous remedies have concerned themselves mostly with the protection of the idea tangibly reproduced.8 But with modern advertising playing a prominent part in business success, with the growth of motion pictures into a major industry, and with radio programs a "must" in the time tables of most families, the theory on which the vitality of all the foregoing is based assumes new and greater importance. The law has the happy faculty of expanding to meet new needs.9 It is not too much to predict, especially when a developing trend is to be noted, that the obvious remedy of conversion will be extended to the point where the possibility of conversion of an idea will be generally recognized.

Common Law and Statutory Copyright

The field of copyright law is a prolific source of litigation. It has its own rules and its own remedies. "The author of an unpublished work, by the act of reducing the product of his thought to concrete form, . . . obtains rights in the composition, conceived to be property rights. These rights are essentially rights of exclusion."10 If the work is not published its author has a common law copyright which gives him the right only of first publication. And he may have the work copyrighted, a statutory privilege which protects him from the unauthorized duplication of his work.

The author of a work, be it art, music or literature, has a twofold right. He has tangible property consisting of a canvas with paint, or paper with notes or

96. An action for infringement of common law copyright, or in quasi-contract for breach of contract, or possibly conversion, can be brought, depending on the circumstances.
98. Common law and statutory copyright actions, conversion of tangible evidences of ideas as models, plans, etc.
99. One need only look at the history of trover as proof.
100. (1939) 8 FORDHAM L. REV. 400.
writing on it, and he has the incorporeal right to make copies of it. If the book were taken, a conversion action would be proper as it would be wherever any tangible personal property was unlawfully taken. But where the intangible right to duplicate or to first publish is violated conversion does not lie. Specific remedies are provided for in such cases for infringement of copyright, or injunction to prevent publication.

So in this specialized field a special remedy is provided for the infringement of the incorporeal right involved. It is a tort action, as is conversion, but it is not the action of conversion.

Conclusion

At present it may be stated as a general rule that all choses in action which are evidenced by a writing are subject to an action for conversion. Some courts have reasoned, that the unlawful exercise of dominion over the written evidence does not deprive the plaintiff of his rights in the chose in action itself, and they have refused relief. However, an important wedge has been driven into this theory by the case of Pierpoint v. Hoyt, which allowed a suit for conversion of an unindorsed stock certificate. Future decisions must be watched to determine whether the Pierpoint case will be followed in other jurisdictions.

In the field of choses in action which are not evidenced by any writing, one must proceed with care. The path has not yet been levelled off and the direction signs are not so well marked. Plainly it will not do to accept the statement made in some of the earlier writings on the subject that conversion will lie only for choses in action that are evidenced by a writing. The upholding of actions for conversion of shares of stock not yet issued, for debts, causes of action and perhaps for ideas when unlawfully appropriated (all without any tangible writing to represent the choses in action) has reached the stage where it is no longer entirely a series of exceptions to a general rule. Such important departures call attention to the necessity for re-examining the rule rather than to attempt a weak reconciliation of the troublesome elements.

It has been pointed out that many courts which deny an action in conversion for choses in action which are not evidenced by a writing do so on the notion that conversion will lie for tangible property only, thus limiting the action to situations involving physical force. The new test is: Has dominion been exercised inconsistent with the rights of the owner? Such a test applies equally well to those choses in action which are evidenced by a writing as those which

are not, and today this affords a much more satisfactory standard than that based on the concept of physical force.

Certain it is that the expansion of conversion to choses in action represented by a writing and the further extension of conversion where no writing has been physically taken—all these changes conform with the shift of wealth from tangible to intangible personal property. Thus a procedural change parallels a similar one in the economic order, and is both desirable and defensible.