



Kentucky Law Journal

Volume 36 | Issue 2

Article 2

1948

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Recommended Citation

Howe, John E. (1948) "Bona Fide Purchaser--Without Title," *Kentucky Law Journal*: Vol. 36 : Iss. 2 , Article 2.
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BONA FIDE PURCHASER—WITHOUT TITLE¹

By JOHN E. HOWE*

The legal mind in time of confusion resorts to the use of ancient maxims and Latin phrases in an effort to bring order from chaos. Unless that mind has a fundamental training in Latin and Legal History—and few minds have such training—the use of such material tends to further mire the person in the depths of misunderstanding. Judicial decisions based on such reasoning are entirely worthless, as the propounders themselves fail to have a basic concept of the idea or thought that is being advanced.

If we seek further we will find that it is not uncommon for the teacher, attorney and student of law to justify decisions of the courts through the use of these phrases. If the legally trained are given a hypothetical case wherein Jones purchases a wagon from Smith, the true owner being Green, a diversity of opinion will arise as to the outcome of the case wherein Green brings an action to forecast the result from the facts that have been given, but many persons would hold that Green should be allowed to recover the wagon. When asked the reason for their decision they would reply that the doctrine of caveat emptor applies, and therefore Jones is not protected. Another segment of the questioned persons would hold that Jones has a right to retain the wagon, and they in turn would reason that this result was proper for the simple reason that Jones was a bona fide purchaser, and that the bona fide purchaser is always permitted to keep the subject matter of the sale.

The thought that the bona fide purchaser should be protected and the doctrine of caveat emptor are basically divergent. In fact, the words, bona fide purchaser, have caused no end of confusion in the study of the law. Possibly much of this con-

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¹ Cases involving the bona fide purchaser may be divided into three main classes; cases wherein the vendor has legal title, cases in which the vendor has an equitable title, and those instances wherein the vendor has no title to pass to the vendee. Each class presents its own problem, and the result in any given case depends on the type of title which the vendor possessed.

fusion results from the fact that these words are employed as a descriptive term, and also as an absolute rule of law. Essentially the naked term is merely descriptive of a certain type of purchaser, and if the words are used to indicate a rule of law then the entire rule should be stated, no attempt at brevity being made by resort to the descriptive phrase itself. Such a procedure will be followed in this discussion, the phrase, bona fide purchaser, being used to designate a purchaser in good faith for value. With this definition in mind it will then be possible to discuss the primary problem of the bona fide purchaser from the vendor who has neither equitable nor legal title. From that discussion it should then be possible to formulate certain rules which will show the protection afforded such a purchaser by the courts.

CHARACTERISTICS OF THE BONA FIDE PURCHASER

Accepting the statement that the term, bona fide purchaser, refers to a type of purchaser, it then becomes necessary to discover the actual elements that must be present in order for the purchaser to come within the category. An analysis of the cases will reveal that there are two prime requisites needed in order for one to be a bona fide purchaser, the purchase must be made in good faith and value must be given the vendor.²

From a practical standpoint the element of good faith will give little trouble. The question is one that is primarily for the jury, and they must decide the issue from the evidence which is presented to them on the trial of the case.

Conceding the point that the jury must determine whether or not the purchase was made in good faith, there is some dispute concerning the question of whether good faith is a lack of bad faith or a lack of negligence on the part of the purchaser. Under the former view the requirements of good faith are somewhat liberalized inasmuch as the purchaser must actually act in bad faith to except himself from the classification.

The attitude of finding actual bad faith has met with favor in cases involving negotiable instruments.³ In the early English cases dealing with negotiable instruments the courts were in-

² There are statements to the effect that a bona fide purchaser must also have title to the article. If such a requirement is essential the term is under consideration as a rule of law and not as a descriptive term.

³ NEGOTIABLE INSTRUMENTS LAW § 56.

clined to hold that the purchase was made in good faith if there was an absence of bad faith.⁴ Then, for some unexplained reason, there was a strong condemnation of the existing law, and the court went to the opposite extreme, decreeing that a purchase under suspicious circumstances prevented the purchase from being one that was made in good faith.⁵ Evidently this narrow idea of absence of negligence met with disfavor, because the rule soon changed, and the courts adopted the view that the purchase was made in good faith as long as there was an absence of gross negligence in the purchase.⁶ Thus in the space of a few years the English courts ran the gamut of possible decisions, and upon completing the circle, they arrived at their original view—a purchase was made in good faith as long as it was made without actual bad faith or without gross negligence on the part of the purchaser.

In the United States the common law decisions regarding purchase of negotiable instruments show that the various courts adopted one or the other of the English views, some of the states adopting the original bad faith rule, while in other jurisdictions the suspicious circumstance thought prevailed. This conflict in the decisions was resolved in favor of the bad faith rule upon the adoption of the Negotiable Instruments Law. Section 56 of the law provides "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The cases which have been decided since the adoption of the uniform law conclusively prove that the suspicious circumstance test has been abolished, and that we now use the more lenient bad faith test. Even though the cases follow the rule that good faith is a lack of bad faith it is interesting to note that the quoted section provides that there is a lack of good faith if the purchaser has "knowledge of such facts that his action in taking the instrument amounted to bad faith." It can thus be seen that the

⁴ *Lawson v Weston*, 4 Esp. 56 (1801), *Peacock v. Rhodes*, 2 Doug. 633 (1781).

⁵ *Slater v. West*, 3 Car. & P. 325 (1828) *Gill v. Cubit*, 3 B. & C. 466 (1824)

⁶ *Uther v. Rich*, 10 Ad. & El. 784 (1839), *Goodman v. Harvey*, 4 Ad. & El. 870 (1836) *Backhouse v. Harrison*, 5 B. & A. 1098 (1834).

jury can find that certain suspicious circumstances in a given case amount to notice of such facts as to make the purchase one that is made in bad faith. For this reason it might be possible to find that a purchase was not made in good faith even though bad faith was not shown in the transaction.

The discussion regarding the element of good faith as applied to negotiable instruments may also be said to state the law regarding purchases of other forms of personalty. The question of good faith in those cases must be determined by the jury,⁷ but in those states that have adopted the Uniform Sales Act there is little question but that good faith is shown by proving absence of actual bad faith. Section 76 of the act provides that a thing is done in good faith when it is done honestly, irrespective of the fact that it may have been done negligently.⁸ There is also evidence that this same result is reached in the absence of the specific statutory provision.⁹

The question of value is a topic which could be discussed endlessly if one desired to investigate the historical development of the problem. At the present time it will suffice to say that value is any consideration which would support a simple contract.¹⁰ However, it is well to note that the stated rule regarding value has particular application to cases involving negotiable instruments. In regard to other forms of personalty the rule will be essentially the same, but it has been held that a pre-existing debt is not sufficient consideration to support the contention that the vendee was a bona fide purchaser.¹¹

⁷ WILLISTON, SALES § 621.

⁸ The statutory provision would only apply to those cases which would come under the act, but this would control in many of the cases involving the bona fide purchaser.

⁹ *Hoham v Aukerman-Tuesburg Motors*, 17 Ind. App. 316, 133 N.E. 507 (1922). The court found that a purchase was made in good faith even though the vendee questioned the vendor concerning the title, and the vendor answered that he could not remember where he had purchased the article.

¹⁰ Section 25 of the Negotiable Instruments Law provides: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." Even though negotiable instrument law is applicable to a limited group of cases, nevertheless it will be found that it is in this one field where the bona fide purchaser without title is protected. For this reason the tests used in the negotiable instrument field are of importance.

¹¹ *Schloss v Feltus*, 103 Mich. 525, 61 N.W. 797 (1895)

In certain instances there are statutory rules for determining whether or not a purchaser is a bona fide purchaser. One illustration is in the field of negotiable instruments. The Negotiable Instruments Law provides that in order to be a bona fide purchaser (actually called a holder in due course) the purchaser must—in addition to fulfilling the requirements as to value and good faith—have purchased an instrument which is complete and regular on its face, must have become the holder of the instrument before the same was overdue, and without notice that it had been previously dishonored, if such was a fact, and at the time the instrument was given to the purchaser he must have had no notice of any infirmity in the instrument or defect in the title of the person that negotiated the same to him.¹²

The legislative additions add little to the ordinary tests for a bona fide purchaser which have been set forth. If the purchaser fails to fulfill any of the additional tests that are set up in the enactment it will be found that the purchase was not made in good faith. The only advantage of the additional statutory requirements is to standardize the determination of good faith.

From this surface examination it can be seen that one will become a bona fide purchaser by giving value to the vendor and purchasing the article in good faith.

PROTECTION OF THE BONA FIDE PURCHASER WITHOUT TITLE

As a general rule the bona fide purchaser is afforded protection in those cases wherein the vendor has the legal or equitable title to the article that is purchased. However, our discussion is limited to instances wherein the vendor has no title to pass to his vendee. This particular problem will arise in two types of cases, one case deals with sales by a bailee,¹³ and the other case involves sales by a thief. It is in these two types of transactions that the vendor has no title, in all other cases it will be found that the vendor has either the legal or the equitable title, and those cases are not within the scope of this discussion.

At the present time there is little need to differentiate between cases wherein the sale is by a thief and the cases wherein the sale is by a bailee. In the latter type of case the vendor is

¹² NEGOTIABLE INSTRUMENTS LAW § 52.

¹³ Bailee is used in this instance in its broader sense so as to include sales by a pledgee, etc.

lawfully in possession, but has no title, while the thief has neither title nor lawful possession. At one time the distinction was of great importance as purchasers from those who did not have lawful possession were not protected. However, the law today does not make a distinction between the two types of sales.

At first the policy of the English Common Law was to protect the bona fide purchaser in cases where the vendor had possession of the article with the consent of the true owner.¹⁴ Their reason for this holding was based on the thought that in any case where it is necessary to have one of two innocent persons suffer for the wrong of another, the one who has been the occasion of the loss should sustain it. In those cases where the true owner voluntarily gives possession of the article to another, he is the one who occasions the loss if there is a subsequent sale, and he should be the one to bear the loss. This principle would seem to be just and the results reached would appear to be logical from a practical standpoint. In fact it would seem that there is no justification for reaching any other result when that factual situation is present.

This rule, affording protection to the innocent purchaser, was followed by the courts until the early part of the fourteenth century. At that time the courts allowed themselves to become influenced by the thought that title is the main concern of the law. With this idea in mind, it would naturally follow that a sale by a bailee is void as the bailee does not have title to the bailed goods. Since there was no title in the bailee none could pass to the purchaser, and therefore the purchaser would not be protected in an action by the true owner. The courts, except in a few cases, adopted this view and since that time have refused to protect the bona fide purchaser if he does not have title to the article.¹⁵

In the United States the general rule involving purchases by innocent vendees is the same as that adopted by the English Courts. It is to be regretted that the English Courts were refusing protection to the bona fide purchaser at the time our courts were developing the law in this country. If this had not

¹⁴ 2 BLACKSTONE, COMMENTARIES (7th ed. 1775) 449; 5 HOLDSWORTH, HISTORY OF THE ENGLISH LAW (3rd ed. rewritten 1923) 98.

¹⁵ 5 Holdsworth, *op. cit. supra* note 14, at 99.

been the fact it is possible that our courts would have adopted the preferable earlier English view which did afford protection to the bona fide purchaser.

In some of the jurisdictions of the United States there is statutory authority for refusing to protect the interests of the bona fide purchaser.¹⁶ However, the same result is reached in the absence of a statute,¹⁷ and with the exception of a few cases the innocent purchaser in the United States is not protected unless the true owner is estopped to assert his title.¹⁸

There is little explanation as to the factors which would give rise to an estoppel. In some of the reports there is an indication that the true owner will be estopped to assert his title if the vendor had something in addition to possession of the article. However, no case sets forth a yardstick by which one might measure and analyze those additional items. An examination will show that there are many cases which would seem to give rise to an estoppel, but the results do not reach a logical conclusion nor follow a definite pattern.

In an English case the evidence proved that a coachbuilder had let a brougham for a year. The hirer, according to the custom, painted his coat of arms on the bailed article, and then later sold same at a public auction. The coachbuilder then brought an action against the purchaser to recover the brougham and the court held that it could be recovered.¹⁹ The decision was based on the fact that the purchaser should have known that it was the custom for the hirers to paint their coat of arms on the bailed broughams, and that the purchaser should have therefore been more cautious in making the purchase.

¹⁶ UNIFORM SALES ACT § 23. For a somewhat different type of statute see *Holloway v. A. J. Ingersoll Co., Inc.*, 16 La. App. 494, 133 So. 819 (1931).

¹⁷ *Williams et al. v. Clement*, 189 Ark. 406, 72 S.W. (2d) 529 (1934), *Hart and another v. Carpenter*, 24 Conn. 427 (1856), *Fawcett v. Osborne*, 32 Ill. 411, 83 Am. Dec. 278 (1863), *Cadwallader v. Clifton R. Shaw, Inc.*, 127 Me. 172, 142 Atl. 580 (1928), *Yorkman et al. v. Harvey*, 133 Okla. 252, 271 Pac. 839 (1928), *Cooperider et al. v. Myre*, 37 Ohio App. 502, 175 N.E. 235 (1930), *Anchor Concrete Machinery Co. v. Pennsylvania Brick & Tile Co.*, 292 Pa. 86, 140 Atl. 766 (1928).

¹⁸ *Hart and another v. Carpenter*, 24 Conn. 427 (1856), *Fawcett v. Osborne*, 32 Ill. 411, 83 Am. Dec. 278 (1863).

¹⁹ *Marner v. Banks*, 17 L.T. 147 (1867).

In *Dodd v. Edwards*²⁰ an auto was rented to a bailee at a stipulated rental per week. This rental contract was made and entered into in North Carolina, and subsequently the bailee took the automobile to South Carolina and sold same to the defendant. The court allowed the plaintiff to recover the automobile even though there was some dispute as to whether or not the contract should have been recorded. If the contract should have been recorded it would seem that the bailor's failure to record would work as an estoppel against him to later assert his title, but the court indicated that the bailor would not have been estopped under any circumstance.

It is true that there are some instances wherein bona fide purchasers are protected.²¹ The facts of the cases wherein protection is afforded seem to differ little from the facts wherein they do not protect the innocent purchaser. In the case of *Heath v. Stoddard*²² the owner of a piano gave same to a dealer so that it might be delivered to a third person. The dealer did deliver the piano to that person, but at the same time he sold it as his property. The court held in that case that there was evidence from which the jury might find that the true owner was estopped to assert his title against the purchaser.

The case of *Williams et al. v. Clement*²³ is comparable to the *Heath Case* in all respects except the result. In that case a piano was delivered to a dealer so that it might be stored. The owner did agree that the dealer might use the piano for demonstration purposes. The piano was sold and the court refused to protect the purchaser. They believed that the purchaser should only be protected when the true owner did some act, or failed to speak, and the act or refusal to speak misled the purchaser. Despite the act of allowing the dealer to use the piano for demonstration purposes the court could find nothing which would serve as a basis for an estoppel.

The Connecticut court has followed the majority and refused to protect the bona fide purchaser in a case wherein the

²⁰ 172 S.C. 213, 173 S.E. 633 (1934)

²¹ *Heath v. Stoddard*, 91 Me. 499, 40 Atl. 547 (1898) *Commercial Motors Mortgage Corporation v. Waters*, 280 Pa. 177, 124 Atl. 327 (1924), *Pickering v. Busk*, 15 East 38 (1812).

²² 91 Me. 499, 40 Atl. 547 (1898).

²³ 189 Ark. 406, 72 S.W. (2d) 529 (1934)

circumstances would seem to justify application of the doctrine of estoppel.²⁴ It appears from the facts of that case that the plaintiff boarded a cow with another person, and gave that person an option to purchase the animal. Without bothering to exercise the option the person boarding the cow sold her to the defendant. The court refused to protect this purchaser, although the court did agree that one cannot reclaim property where he places another in such a position that the other appears to be the owner of the property. However, the court said that in this case the vendor was a mere bailee and that it was never possible for a mere bailee to appear to be the owner of the bailed article.

From the cases discussed it can readily be seen that there is no unanimity regarding the doctrine of estoppel to assert title against a bona fide purchaser. Even though most of the courts hold that there may be an estoppel in certain cases their application of the doctrine is limited to a few rare cases.

In the absence of a statute the courts reach the same results with unlawful pledges that they reach in the case of an unlawful sale, the pledgee is simply not afforded any protection.²⁵ The reasoning in the pledge cases is analogous to the reasoning in the sales cases, the possessor of the article has no right to pledge that article, inasmuch as there is no right to pledge there can be no right transferred to the pledgee, and since the pledgee acquires no right to the article there is no reason why he should be afforded protection. Basically the reasoning is fallacious, but it is the type of reasoning that is advanced by the courts in the cases of unlawful pledges.

We have already mentioned that there are certain instances wherein the bona fide purchaser will be protected even though the general rule is in favor of the true owner. In England the innocent purchaser was given protection where the sale was consummated in the open market even after the bona fide purchaser had been refused blanket protection by the court.²⁶ At first the market overt exception applied to all sales in open

²⁴ Hart and another v Carpenter, 24 Conn. 427 (1856).

²⁵ Ann. Cases 1913C, page 1290.

²⁶ 2 BLACKSTONE, COMMENTARIES (7th ed. 1775) 449; 5 HOLDSWORTH, HISTORY OF THE ENGLISH LAW (3rd ed. rewritten 1923) 99.

market, but eventually the doctrine was limited to the protection of the purchaser in good faith. The market overt in England was an open or public market where goods were sold on certain designated days or other specified times.²⁷ As a general rule a specified area was set aside in each town for use as a market place, but in London it was said that all shops were market overts for the goods that were customarily sold there, and such shops were open markets during the usual sale hours on all days except Sunday²⁸

The reasoning behind the open market sales seems to lie in the fact that anyone could search the markets and discover his goods if they were unlawfully placed in that market for sale. Thus it would be possible for a man to recover his property before the rights of an innocent third party complicated the picture. This reasoning is further substantiated by the holding that the shops of London were only market overts for the goods that were customarily sold there. It would be unnatural for a person to seek his silverware in a harness shop. Therefore, the purchaser of silverware in a harness shop would not come under the protection of the market overt exception to the general rule. The only inconsistency in the reasoning would seem to lie in the holding that the shops in other towns were not open markets. It would seem logical that even in the other towns a man might look for his goods in the shops where such goods were ordinarily sold.

It would be well to note that not all sales in open market were valid. The purchaser of a horse would not be protected even though the sale took place in an open market. The court reasoned that in the case of horses it was possible for the thief or wrongdoer to drive the horse to a distant market and that the true owner would not then have an opportunity to find the horse before it was sold.²⁹ There were also other cases where the market overt exception was not applicable. The courts refused to protect the purchaser if the goods were the property of the king, and the same result was reached where the vendee was a

²⁷ 2 BOUV. LAW DICT. (Rawle's 3rd Rev.) 2095.

²⁸ The Case of Market Overt, 5 Co. Rep. 83b, 77 Eng. Rep. 180 (1595).

²⁹ 2 BLACKSTONE, COMMENTARIES (7th ed. 1775) 499; 5 HOLDSWORTH, HISTORY OF THE ENGLISH LAW (3d ed. rewritten 1923) 99.

pawnbroker. This latter exception resulted from the idea that the pawnbrokers were engaged in a clandestine trade and were therefore unworthy of the protection of the courts.³⁰

The law as thus developed in England was later codified in the Sale of Goods Act.³¹ Thus it is probable that the same results will be reached today under the statutory provisions as were reached under the fifteenth century common law.

The courts of the United States have consistently held that there are no market overts in this country.³² In one of the leading cases,³³ the defendant had purchased butter at a market place. The butter was not the property of the vendor and the court found that the purchaser was not protected. In the decision the court pointed out that a market overt was a place established in a town, under the supervision or authority of the supreme power, for buying and selling. The evidence proved that no place had been thus established in the Commonwealth, and consequently there were no market overts in the jurisdiction. That decision, and others, overlook the fact that the market overt in England is comparable to the markets and shops of this country. The comparison becomes even more clear when one stops to consider that all of the shops of London are market overts for the goods that are customarily sold there, and that those shops are the same as our own shops. If the courts had used this comparison rather than an adherence to a strict definition they would have established an exception in this country similar to the market overt exception in England.

The English courts and the courts of the United States have also made an exception to the general rule, and have protected the bona fide purchaser in cases involving money or negotiable instruments.³⁴ Many reasons have been advanced for allowing

³⁰ 2 BLACKSTONE, *loc. cit. supra* note 29.

³¹ Chapter 71 of 56 & 57 Victoria, 1894, Section 22, subs. 1.

³² *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382 (1836) *Newkirk v. Dalton*, 17 Ill. 413 (1856), *Coombs v. Garden*, 59 Me. 111 (1871) *Dame v. Baldwin*, 8 Mass. 518 (1812) *Wheelwright v. Depyster*, 1 Johns (N.Y.) 471, 3 Am. Dec. 345 (1806) *Roland v. Gundy* 5 Ohio 202 (1831) *Easton v. Worthington*, 5 Serg. & R. (Pa.) 130 (1819) *De Bates v. Searls*, 52 S.D. 603, 219 N.W. 559 (1928) *Heacock v. Walker*, 1 Tyler (Vt.) 341 (1802).

³³ *Dame v. Baldwin*, 8 Mass. 518 (1812)

³⁴ *Miller v. Race*, 1 Burr. 452 (1758) BRITTON, BILLS & NOTES (1943) § 87.

the purchaser to be protected in this instance. It has been contended that money has no special characteristic and that it can therefore pass free from the claims of the true owner; others have contended that the title to money and bearer negotiable instruments is in the thing itself and that the possessor therefore has title to the article, still another argument has been based on the fact that it is a commercial necessity to protect persons that take money or other negotiable instruments. While all of the arguments have merit, it would seem that the main reason for affording protection to the purchaser is based on the idea of commercial necessity. It is comparatively simple to comprehend the business stagnation that would result if all persons were allowed to bring actions for the recovery of stolen money or negotiable instruments. If this were permitted no person would be willing to accept money or a negotiable instrument, because it would subject him to a possible future suit to recover the money or damages for the conversion.

The protection afforded the purchaser of money is limited to those cases in which the money has passed as currency. In any case where the money passes as a chattel or keepsake it is treated as any other chattel and the court will allow the true owner to recover same in an action of trover.³⁵ The refusal to protect the purchaser when the money is actually a keepsake or souvenir is based on the thought that when money reaches this stage it has in reality lost all of the characteristics of money, and the rules regarding ordinary chattels should be applied to it.

It is interesting to note the analogies that may be built up around any rule of law. In one instance a purchaser of gram from a bailee contended that he should be allowed to retain the gram when sued by the true owner. The argument advanced was based on the thought that the gram was similar to money, i.e., it had no special characteristics which would enable a person to tell that gram from any other gram of like grade and type. The court held that this comparison was not justified, and they allowed the true owner to recover the value of the gram in his action against the purchaser.³⁶

³⁵ Moss v. Hancock, 2 Q.B. 111 (1899).

³⁶ Leslie v. Wm. Kelley Milling Co., 109 Kan. 146, 197 Pac. 1094 (1921).

The court's refusal to protect the bona fide purchaser without title can be justified only if we adopt the theory that title is paramount. In other words it is necessary for us to depart from the idea that possession is nine points of the law, and adopt a course whereby we consider title without regard to the element of possession. However, even though we adopt this policy, it is not unjust to hold that in many of the cases the true owner should be estopped to assert his title. We have consistently allowed, in the absence of statute, the innkeeper's lien on the baggage of the guest regardless of whether or not title to the baggage was in the guest.³⁷ If this departure from the title theory is made in that instance there seems to be no justifiable reason why it should not be extended to protect the purchasers from vendors without title.

In the one instance wherein the purchaser is protected in the United States—in cases of money and negotiable instruments—the reason given for the exception seems to be based on the commercial necessity of the proposition. Is it not also true that commercial necessity demands that protection be given in other cases?

The law at the present time is only correct if one is laboring under the theory that title is paramount. However, even then the courts should, by an estoppel, protect the purchaser unless there is recorded evidence of title. In *Roland v. Gundy*³⁸ the court points out that public policy brought about protection of the true owner, but the opinion justly concludes "I do not readily comprehend how it ever can be consistent with public policy to adopt any principle which operates unjustly"

³⁷ *Thoma v Remington Typewriter Co.*, 11 Ohio Cir. Ct. R. (N.S.) 174.

³⁸ 5 Ohio 202 (1831)

KENTUCKY LAW JOURNAL

Volume XXXVI

January, 1948

Number 2

Published in November, January, March and May by the College of Law, University of Kentucky, Lexington, Kentucky. Entered as second-class matter October 12, 1927, at the post office, at Lexington, Kentucky, under the act of March 3, 1879.

Subscription Price: \$2.50 per year

\$1.00 per number

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