Case Note

American legal scholarship suffered a devastating blow in the mid-1930's with the abolition of the Case Notes from the major law reviews. These Notes distilled into two (or on rare occasions three) tightly packed paragraphs the facts and holding of a contemporary decision, together with a terse evaluation of its "correctness" as examined against the immutable fabric of the common law. The Note of the pre-Realist days is more like the comments of a professor on a court's examination blue-book than the lengthy rationalizations, predictions, and exhortations of the modern legal observer. The dogmatism and confidence of the Case Note, encountered in an age of relativism and nihilism, are nothing short of refreshing; wherefore we include as an occasional feature of the Journal specimens of these judicial report cards, these forgotten stanzas of the lost Langdellian idyll.

--The Editorial Board

PERSONALTY--LARCENY--TITLE--TWO JUSTICES INTIMATE THAT A THIEF BECOMES OWNER OF STOLEN CHATTEL.--Robert Rivera was indicted and convicted of receiving stolen property. Two weeks after his conviction, a second indictment was returned, charging Rivera with, inter alia, aggravated robbery; both indictments were "based upon the same theft" on August 13, 1980 of money and a motorcycle owned by Francis J. Kelly. Rivera moved to dismiss the second bill on the basis of the double jeopardy clause, U.S. CONST. amend. V, as applied to the states. The Ohio trial and appellate courts refused to dismiss the indictment, whereupon Rivera petitioned the United States Supreme Court for a writ of certiorari. Held, the petition is denied. Mr. Justice Brennan's dissent to the denial, which Mr. Justice Marshall joined, is nonetheless of great interest to students of the law of personal

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property. The bulk of the dissent concerns Justice Brennan's interpretation of the "same offense" requirement in double jeopardy jurisprudence, compare North Carolina v. Pearce, 395 U.S. 711, 717 (1969) with Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring), and is here irrelevant. The critical language occurs in Justice Brennan's statement of the facts: "Petitioner was arrested on August 13, 1980, after one Francis J. Kelly reported that petitioner had taken his motorcycle from him at knife point earlier that day, along with title to the motorcycle and some cash." Rivera v. Ohio, 103 S. Ct. 271, 272 (1982) (Brennan, J., dissenting from denial of certiorari) (emphasis supplied).

The interpretation of the consequences of theft upon title embodied in this statement of facts is clearly contrary to venerated and established principles of the law of personalty. Few tenets of the law are cherished more dearly than the proposition that a thief takes, and in general may pass, no title in the stolen property. See R.A. BROWN, LAW OF PERSONAL PROPERTY § 67 (2d ed. 1955); see also 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 354 (1923); 2 W. BLACKSTONE, COMMENTARIES *449 (English common law heritage). The state courts consistently so hold, see 63 AM. JUR. 2D Property § 46; cf. U.C.C. § 2-403; the federal courts honor this position, see, e.g., Dennis v. United States, 372 F. Supp. 563, 567 (E.D. Va. 1974) (construing Virginia law). Most important, the Supreme Court itself has expressly held that title may not be taken from the owner of personal property except voluntarily and according to law. See The Idaho, 93 U.S. 575, 583 (1876) (general common law) ("the title of the true owner of personalty cannot be impaired by the unauthorized acts of one not the owner"); cf. Stoddard v. Chambers, 43 U.S. (2 How.) 284, 318 (1844) (real property context) ("[n]o title can be held valid which has been acquired against law"). The revelation that two Justices of the Supreme Court apparently think otherwise may indicate a new and ugly trend in Anglo-American legal thought, a trend with unconscionable implications for the incentives for thievery and profound consequences for the future of private property.