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The Rights of Finders of Lost Property

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THE RIGHTS OF FINDERS OF LOST PROPERTY

Goods or chattels are lost within the legal intendment of that term when their possession was involuntarily parted with. That the owner does not know of their location at any particular, subsequent moment is not the fact constituting them lost property. Was the owner’s will employed in placing the property where it was found? That is the important question.

On the other hand, property, which the owner has voluntarily or intentionally laid down and for the time forgotten where, is not considered as lost. It is misplaced.

The distinction is well illustrated in Lawrence v. State\(^1\) where the court said, “The loss of goods, in legal and common intendment, depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner as to their locality at any given moment. If I place my watch or pocket-book under my pillow in a bed-chamber, or upon a table or bureau, I may leave them behind me, indeed, but, if that be all, I cannot be said with propriety to have lost them. To lose is not to place or put anything carefully and voluntarily in the place you intend, and then forget it, it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner’s will was not employed in placing it there. To place a pocket-book, therefore, upon a table, and to omit or forget to take it away, is not to lose it in the sense in which the authorities referred to speak of lost property.”

In addition to property being lost or misplaced, using the terms in their legal meaning, it may be abandoned. Let us suppose that A throws away an old inner tube on the public highway. Later he returns and wishes to retake it. In the meantime

\(^1\) Humphreys (Tenn.) 228 (1839).
a stranger has taken possession of it and refuses to surrender it upon demand. A cannot force the stranger to give it up. All his possessory rights were surrendered when he cast it away. It became abandoned property, subject to the first taker of possession.

A. The distinction between lost and misplaced property becomes very important in determining the right to possession. Generally, the finder of lost property has the right to possession as against all the world but the true owner. The owner of the premises where it is placed is entitled to the possession of misplaced property.

To decide whether property was lost or misplaced constitutes the first problem in a given case.

Importance of the Locus. The place in which the property is discovered is a potent factor in determining whether it was lost or misplaced. The nature of the chattel and its location when discovered present certain inferences as to how it was parted with, which are most material. For example, a pocketbook on the floor was obviously parted with without the knowledge or volition of the owner and was therefore lost; a pocketbook on a desk in a bank lobby was inferentially voluntarily placed there, while the owner indorsed some checks or attended to other minuta, and forgotten. It then became misplaced. Such reasonable inferences flowing from the locus in quo have been much relied on by the courts and consistently followed as precedents. In a doubtful case the judge should submit the question, whether the property was lost or misplaced to the jury for it is one of fact.

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2 Armory v. Delamirie, 1 Strange, 505 (1722).

4 This is illustrated by the cases where property is picked up on the seat of a street car or railway coach. In State v. Courtso7, 94 Atl. (Conn.) 973 (1919) and Foulke v. New York Consolidated R. Co., 127 N. E. (N. Y.) 237 (1920) such property was held to be misplaced. In Tatum v. Sharpless, 6 Phila. (Pa.) 13 (1865) and in Batteiger v. Pennsylvania Co., 64 Pa. Super. Ct. 135 (1916) property found in a similar place was held to be lost. As a fact, it is often impossible to tell whether property discovered on the seat of a street car or railway coach was lost or misplaced because the nature of the article and its location are not sufficient in themselves to be decisive. Such a matter is a question for the jury.
The courts have developed a broad distinction between property found on the floor or ground and that found on a table, desk, or chair, or other elevated receptacle. In the former case it is generally held to be lost; in the latter case it is mislaid and the owner of the premises is entitled to the custody of it. This distinction is well illustrated in Loucks v. Gallogly. The place of finding is of importance as bearing on the question whether the property was really lost or merely left. In the case last cited, where the money or property was found on the table of a barber shop, on the desk of the banking house, on the counter of a store, the property was not considered lost, on the ground that the place where it was found indicated that the owner had put it there purposely and voluntarily. Therefore it was not lost, and could not be found, in the legal sense. As to the roll of bills in question found by the plaintiff on the banking-house desk (one at which persons stand to write) what, in the absence of any direct proof, are we to conclude, as an inference of fact, from the situation of the money when found by him? Is not the inference stronger and more reasonable than any other that it was consciously and voluntarily placed there by the owner, while temporarily engaged, writing or otherwise, at the desk, and then inadvertently or thoughtlessly left? Does not the fact that the money was discovered on the desk, and not on the floor, indicate that it had been voluntarily placed there, with the intention of retaking it, rather than that it had unconsciously and accidentally fallen from the person of the owner? If it had been found on the floor, as in the cases referred to, where the customer found a purse on the shop floor, and where the servant in the hotel found a roll of bank notes on the floor of the public parlor, that fact would lead to the conclusion that it had been involuntarily dropped by the owner, and hence lost.

The cases are illustrative of this rule that property found on the floor or ground is legally lost. In Bridges v. Hawkesworth the plaintiff was a traveling salesman and picked up from the defendant's shop floor a small parcel containing bank notes. He delivered them to the owner of the shop, who subsequently re-

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1 Misc. 22, 23 N. Y. Supp. 126 (1892).
fused to re-deliver when the owner of the money could not be found. The court held that he was a finder and entitled to the possession of the notes.

The cases are also illustrative of the rule that property found in an elevated place, where it was reasonably placed voluntarily is misplaced and not lost. In *McAvoy v. Medina* the plaintiff was a customer in defendant’s barber shop. He picked up a pocketbook lying upon a table. In disposing of the case Mr. Justice Dewey says, “This property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant’s shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safekeeping of the same until the owner should call for it.”

In *Kinkead v. Eaton* the plaintiff, a depositor, discovered a pocket-book lying upon a desk in the lobby of a bank. The court held that he was not a finder, saying, “To discover an article voluntarily laid down by the owner within a banking house, and upon a desk provided for the use of such persons having business there, is not the finding of a lost article. The occupants of the banking house, and not the plaintiff were the proper depositaries of an article so left.”

These distinctions between lost and mislaid property and the inferences and presumptions developed by the cases for determining under which classification an article which has been “found” should be placed, may be criticised. But taking the law as we find it, it seems that courts have taken this distinction, generally, as a starting point and working from it have proceeded toward the solution of the cases.

B. Having decided in a particular case that property is lost or mislaid, the court must meet an additional problem: Has

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1. See note 3, supra.
2. See note 3, supra.
the owner or occupant of the premises or some other person a better claim to the chattel than the finder? Several difficult situations are presented in considering this question. (a) The finder may be a trespasser. (b) The article may be found in a private place by one who has a right to be on the premises. (c) The finder in either a public or private place may be a servant and the further question arises as to whether he has not contracted away his right to become a finder. It seems to be clear that in these situations the proprietor of the premises should be entitled to possession if the property is found to be misplaced. It is with lost property that the real difficulty occurs.

(a) The Trespasser. If the finder is a trespasser, it would seem that the owner of the premises should prevail in a contest for the possession of the property. In *Barker v. Bates* it was so held. In that case a trespasser discovered a stick of timber cast up upon the plaintiff’s land. The court held that the owner of the land was entitled to the possession as against the finder, saying, “Considering it as thus established, that the place upon which this timber was thrown up and had lodged, was the soil and freehold of the plaintiff, that the defendants cannot justify their entry, for the purpose of taking away or marking the timber, we are of opinion that such entry was a trespass, and that as between the plaintiff and the defendants, neither of whom had or claimed any title except by mere possession, the plaintiff had, in virtue of his title to the soil, the preferable right of possession, and therefore that the plaintiff has a right to recover the agreed value of the timber, in his claim of damages.”

It might be argued that the trespass and the finding can be separated, but the writer considers that the one in rightful possession of the premises has the “preferable right of possession” of anything which may be found thereon as against a trespasser, and that any argument to the contrary is unsound.

(b) Distinction Between Public and Private Place. Where articles are found in a public place the usual rules of lost and found property apply, the only question to arise being the proper custodian, if the property is found to be misplaced. But they are not always applied if the property is found in a private

* 13 Pickering (Mass.) 255 (1832).
place. It is true that there are statements in the books that the finder has a right to the possession as against all the world except the true owner and that the place where the property is found does not affect the right. Stated thus broadly the rule is inaccurate. The public or private nature of the locus in quo may vitally affect the finder’s right to possession as against the owner or occupier of the premises.

The courts uniformly award the possession of lost property to the finder when found in a public place. Thus, in Ellery v. Cunningham, bales of cotton found floating in a seaport were held to be lost property and the finder entitled to possession. Where the lost property is found in a private place to which the public is invited, the courts just as uniformly award possession to the finder. Such, for instance, as amusement parks, theaters, stores and barber shops. These are quasi-public in nature, since the public enter by invitation, and so, the proprietor should not object to the application of the usual rules applicable when property is found in a public place. He has dedicated his property, in a sense, to the public. Thus, in Hoagland v. Forest Park Highlands Amusement Co., where the plaintiff picked up a pocket-book on the grounds of an amusement park and was assaulted because he would not surrender it to certain employees of the proprietor, it was held that the finder was entitled to possession of it as against the owner of the premises and that the assault was unlawful.

Where the property is found under the soil in a private place, with the exception of treasure trove, possession is awarded to the owner of the premises. The finder loses in those cases because of a prior possession in the owner of the premises. Nor does such possession by the owner need to be with his actual knowledge; he has a de facto possession of everthing in the soil. This is well illustrated in the leading case of South Staffordshire Water Company v. Sharman, where the defendant, while cleaning out a pool belonging to the plaintiff, found two rings in the mud at the bottom. The court in awarding possession to

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10 See, for example, 2 Parsons on Contracts, p. 97.
11 1 Metc. (Mass.) 112 (1940); See Hume v. Elder, 165 N. Y. Supp. 849 (1917).
12 70 S. W. (Mo.) 878 (1903). See Bridges v. Hawkesworth, supra, note 6, and Hamaker v. Blanchard, same note, supra.
13 (1896) 2 Q. B. 44.
the owner of the premises, said, "It is no doubt right, as the
counsel for the defendant contended, to say that the plaintiffs
must show that they had actual control over the *locus in quo* and
the things in it; but under the circumstances, can it be said that
the Minster Pool and whatever might be in that pool were not
under the control of the plaintiffs? In my opinion, they were.
The case is like the case, of which several illustrations were put
in the course of the argument, where an article is found on pri-

cate property, although the owners of that property are ignorant
that it is there. The principle on which this case must be de-
cided, and the distinction which must be drawn between this
case and that of *Bridges v. Hawkesworth*, is to be found in
a passage in Pollock and Wright's Essay on Possession in the
Common Law, p. 41: 'The possession of land carries with it, in
general, by our law, possession of everything which is attached
to or under that land, and, in the absence of a better title else-
where, the right to possess it also. And it makes no difference
that the possessor is not aware of the thing's existence. . . .
It is free to any one who requires a specific intention as part of
a *de facto* possession to treat this as a positive rule of law. But
it seems preferable to say that the legal possession rests on a
real *de facto* possession constituted by the occupier's general
power and intent to exclude unauthorized interference.'

"That is the ground on which I prefer to base my judgment.
. . . . It is somewhat strange that there is no more direct
authority on the question; but the general principle seems to me
to be that where a person has possession of house or land, with
a manifest intention to exercise control over it and the things
which may be upon or in it, then, if something is found on that
land, whether by an employee of the owner or by a stranger, the
presumption is that the possession of the thing is in the owner
of the *locus in quo.*"

In *Ferguson v. Ray*14 gold-bearing quartz rock was found
buried in the ground. The court expressly held that it did not
come within the rather narrow definition of treasure trove and
awarded possession to the owner of the premises. The quartz had
evidently been placed voluntarily in the ground but the language

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of the court is strongly in accord with the principle enunciated in the South Staffordshire Water Company case. The court said, "Now, we have here property not treasure trove, found imbedded in the soil under circumstances repelling the idea that it has been lost . . . . ; the ownership of the land where found is in the defendant. Being in the possession of the land and exercising ownership over it, thus manifesting an intention to prevent unauthorized interference, we must conclude, . . . that the possession is in the owner of the locus in quo."

These cases and similar ones holding that the owner has possession prior to the finder to articles found in the soil are correctly decided. They are in full accord with the fundamental principle that one has a de facto possession of all below or upon his soil. But, although this principle is recognized in the cases, where property is found beneath the surface of the soil, it is not recognized where lost property is picked up upon the surface of the soil or floor in a private place.

The finder is generally held entitled to lost property found upon the surface of the ground or upon the floor. In Bowen v. Sullivan an employee working as a rag sorter was allowed to recover the value of bank-notes, which she found on the shop floor as against the shopkeeper. The following instruction was sustained, "The burden of proof is upon the plaintiff. In order to entitle her to recover, she must prove the material allegations of her complaint by a preponderance of the testimony; that is, by a fair weight of the testimony. The finder of lost property is the owner of it as against every person except the loser, or real owner. If you believe from the evidence, that the plaintiff’s ward found the said bank-notes in the defendant’s paper-mill, and if you believe said bank-notes were lost property, you should find for the plaintiff. The primary question is, were the notes lost property? If they were, it can make no difference whether they were found upon the highway, in the defendants’ paper-mill, or in their dwelling-house; the difference between the highway, the place of business or the dwelling-house (so far as this case is concerned), is the difference only as to the degree of privacy; the place of business is more private than the highway, and the dwelling-house is more private than the place of business.

15 62 Ind. 281 (1878).
"But, if the bank-notes were lost property and the plaintiff's ward found them, it does not matter where she found them; they belong to her as against every person but the loser, or real owner." 16

It is submitted that the same rule should be applied to lost property found upon the surface of the ground or upon the floor in a private place as where the property is found under the surface of the ground and that the holding in Bowen v. Sullivan is incorrect. One has just as much prior possession to an article found on the surface of his land as under the surface.17

(1) Treasure Trove. A second exception to the rule that property found in a private place is awarded to the owner of the premises occurs in the case of treasure trove. "Treasure trove . . . . (is) money or coin found hidden or secreted in the earth or other private place; the owner being unknown. It originally belonged to the finder if the owner was not discovered; but Blackstone says that it was afterwards judged expedient, for the purposes of State and particularly for the coinage, that it should go to the king; and so the rule was promulgated that property found on the surface of the earth belonged to the finder until the owner appeared, but that found hidden in the earth belonged to the king. 1 Bl. Com. *295.

"In this country the law relating to treasure trove has generally been merged into the law of finder of lost property."18 But the owner of the soil in which treasure trove is found acquires no right to its possession by virtue of his ownership of

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16 In Durfee v. Jones, 11 R. I. 588 (1877), the finder had custody of an old safe as bailee. He found secreted in the lining a roll of bills. It is likely that the bills were not misplaced property, since one would not presumptively place bills behind the lining of a safe. Possibly they slipped into the crevice. The court at least considers they were not placed in the crevice designedly. Considering that the money was lost the court refused to award it to the owner of the safe claiming he did not have prior possession. On this point the court said, "The plaintiff claims that he is entitled to have the money by the right of prior possession. But the plaintiff never had any possession of the money, except unwittingly, by having possession of the safe which contained it. Such possession, if possession it can be called, does not of itself confer a right." It is submitted that this case is wrongly decided in that the owner of the safe had a prior possession of property found in a private place.


18 Danielson v. Roberts, 74 Pac. (Ore.) 913 (1904).
We have here a strange anomaly. For if the rules of lost property found under the surface in a private place were in fact applied to treasure trove, it should be awarded to the owner of the premises. So the so-called “merger” of treasure trove and lost property rules in this country is in fact not a merger at all but a strange rule partaking of the good properties of neither. It is submitted that such rule violates the principle of prior possession in the owner of the premises and that it is unsupportable. A fortiori it should be abolished, although it has gained a strong foothold in legal precedent in this country.

(2) Goods Found “Under the Protection of the House.” Quite an interesting question has been raised by a couple of recent cases where property was picked up from the floor or discovered on a table of the safety vault department of banks or trust companies. In Foster v. Fidelity Safe Deposit Co., a roll of bills was discovered lying upon a desk in such a department. The court properly held the money to be misplaced and that the bank was the proper custodian for the owner. That case was followed by Silcott v. Louisville Trust Co., decided in 1924. In the Silcott case a Liberty bond was found by the renter of a safety vault box on the floor of the safety vault department of a trust company. The Kentucky Court of Appeals held that the bond was within the protection of the house. A note written in the Cornell Law Quarterly criticises the case and suggests that the real relation between the trust company and the customer who lost the bond was not one of bailment but one of landlord and tenant. Such a holding would have awarded the bond to the finder. The writer has criticised the case in a note on the theory that the bond was lost property found in a semi-public place. The case seems to violate the usual rules of lost property and it is contra to dicta in the Foster case, but there are certain considerations which favor the result achieved. It will be interesting to see how subsequent cases in point deal with the situation.

19 Weeks v. Hackett, 71 Atl. (Me.) 368 (1908); Vickery v. Hardin, 133 N. E. (Ind.) 922 (1922); Roberson v. Ellis, 114 Pac. (Ore.) 100 (1911).
20 174 S. W. (Mo.) 376 (1915).
21 265 S. W. (Ky.) 612 (1924).
22 Henry S. Fraser in 10 Cornell Law Quarterly 255.
23 15 Kentucky Law Journal 225.
(c) Where Property Is Found By A Servant. There
should be no question about misplaced property picked up by
a servant. The owner of the premises is entitled to its possession
or if found in a public place it should be turned over to the
proper public official. But when the property is lost in a legal
sense a more serious problem is presented. Here the servant is
entitled to no more rights and is subject to the same limitations
that the locus in quo imposes upon others, who are not tres-
passers. And furthermore, he must hurdle any additional limita-
tions imposed by his contract.

Where the servant finds property in a public place he should
be entitled to retain custody of it, unless bound to surrender
it to his master under the contract of employment. Such might
be the case. For example, suppose his contract provided that
he should turn over all lost articles found on the premises. Then
the master would be entitled to the possession of any articles
found. But such cases are the exception and generally the
servant should prevail. Thus, in Hume v. Elder, the
driver of an ice wagon picked up a pail in the public street, it
was held that he obtained thereby a property right good as
against his master and every one but the owner. He had been
hired to deliver ice and not to pick up pails.

If the servant finds property in a private place under the
surface of the ground, the owner of the premises should be
awarded the custody. And if the servant finds an article upon
the floor or upon the surface of the ground, the owner of the
premises, under the principle of priority of possession, discussed
supra, should be given the custody. The following statement
in Mathews v. Harsell is in accord with awarding custody to
the master or owner of the premises in such a case: "I am by
no means prepared to hold that a house servant, who finds lost
jewels, money, or chattels in the home of his or her employer,
acquires any title even to retain possession as against the will

(1849).
25 South Staffordshire Water Co. v. Sharman, supra, note 13. Daniel-
son v. Roberts, supra, note 18, and cases in note 19, supra, are contra.
But these are treasure trove cases.
27 1 E. D. Smith (N. Y.) 393 (1852).
of the employer. It will tend more to promote honesty and justice to require servants in such cases, to deliver the property so found to the employer for the benefit of the true owner.'

The servant, in any case, as suggested supra, is limited in his rights as a finder by his contract of employment. He may be under a contractual obligation to pick up objects such as the one found by him and to hand them over to his master. This is well illustrated by the case of McDowell v. Ulster Bank. In that case the plaintiff, "as porter to the defendant, was sweeping out the bank after four o'clock in the afternoon, subsequent to the time at which the bank was open for the purposes of exchange, and at a time when the public had no admittance to it. He found under one of the tables used by persons signing checks a parcel containing 25 pounds in notes. He handed them over to the manager of the bank, telling him how he had found them, and asking him to try and find the owner. The owner was not found, and the plaintiff claimed the notes. The court decided for the defendant, saying: 'I do not decide this case on the ground laid down by Lord Russell in Suhman's Case. I decide it on the ground of the relation of master and servant, and that it was by reason of the existence of that relationship and in the performance of the duties of that service that the plaintiff acquired possession of this property. I conceive that it is the duty of the porter of the bank, who acts as caretaker, to pick up matters of this description, and to hand them over to the bank. I hold that the possession of the servant of the bank was the possession of the bank itself, and that, therefore, the element is wanting which would give the title to the servant as against the master. He relies as against his master on the possession. In this case it was the possession of the bank, and the servant held the notes as servant.'"

But the mere fact that the servant is working under a contract of employment does not, of itself, prevent him from being entitled, as finder, to retain custody of an article found. This is illustrated by Burns v. Clark, where an employee, who was hired to grade public lands was held to be entitled to the rights of a finder of gold found thereon as against his master, the court

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28 33 Irish law Times, 225 (1899).
29 See Warren's Cases on Property, at page 93:
30 66 Pac. (Cal.) 12 (1901).
holding that there was no contractural duty in the servant to surrender the gold to the master. The court said, "Had the object of the grading been the acquisition of the ores to be extracted, the provision would no doubt apply; but the casual finding of gold by an employee in the course of an employment in no way related to such employment, though doubtless an acquisition made by reason or cause of the employment, cannot with propriety be said to have been made by virtue of it."

So, it may be concluded, that a servant is precluded from the rights of a finder only when there is such a connection between the nature of the article found and the nature of the employment as to indicate a duty on his part by contract to surrender.

Conclusion. It is submitted that the *locus in quo* is usually the decisive factor in a "finder" case, where the contest is between the finder and another than the true owner. First, it determines, usually, whether the article was lost or only misplaced. Second, the locus may determine whether there was a prior possession in another than the finder in property presumptively lost. Upon these two determinations, generally, rests the ultimate decision.

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