Rights of Finders

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RIGHTS OF FINDERS.*

Much of the confusion and uncertainty in the law regarding the topic indicated above is due to a failure to distinguish between several types of situations and to appreciate the applicability of certain fundamental principles. The words "lost" and "find" are used in such widely varying senses that the all too common method of reaching a conclusion by first applying a name to a thing or situation has in this particular field led to special difficulty.¹

While the traveler who throws out of the car window a superfluous article of clothing has not "lost" anything, it would commonly be said that the person who picked up the discarded article had "found" something. The elusive collar-button is frequently "lost" and "found," though all the time it may have been precisely where its owner placed it. And of course we speak of finding an article which has casually and inadvertently come to the place where it is located. There are, then, at least three different types of situations in which possession, in the popular sense of the word,² has been parted with to all of which we more or less commonly apply the terms "lost" and "found." These may be designated as instances of: a. Abandoned property; b. Misplaced or forgotten property; c. Lost property. To these perhaps might be added a fourth class, namely, treasure trove, to which at least in England some special rules and considerations were applied.

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² In many states there are statutes dealing more or less comprehensively with the rights and duties of finders. These statutes in practice, of course, must not be ignored. The purpose of this paper, however, is to consider the problem as at common law unaffected by statutory provisions.

¹ This method has very aptly been referred to as "epithetical jurisprudence." See 18 Mich. L. Rev., 405.

² It should be observed that the word possession is here used in its popular rather than its legal sense. It will be seen later that, legally speaking, in some of these situations possession has been lost, while in some it has not.
The problem as to the position and rights of the finder arises in several ways. Classifying them with reference to the party with whom the finder clashes, we have 1. Finder v. Owner of found chattel; 2. Finder vs. Stranger; 3. Finder vs. Owner or occupant of premises on which article is found; 4. Finder vs. Landlord; 5. Finder vs. Master; 6. Finder vs. Other finders; 7. Finder vs. State.

Now of these in their order:

I. FINDER VS. OWNER OF FOUND CHATTEL.

In the case of abandoned property, the finder is preferred even as against the owner who, by hypothesis, has abandoned the goods. Unless the circumstances are such as to show a complete renunciation, there has been no abandonment. The only really difficult question here is the one of fact—has the former possessor really abandoned the property? In determining this question, the kind of property, the place where left, and the circumstances of the leaving are vitally important. Abandonment involves both the fact of relinquishment and the requisite intent. Abandoned property is deemed to have been returned, so to speak, to the common mass and to belong to the one who first assumes possession, as wild animals, birds, fish, etc., be-

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3 This is intended to cover the matter of criminal prosecution, which, however, will not be discussed in this paper. It is sufficient for an article by itself.

4 Naturally, this sort of contest seldom arises, for if there has been an abandonment in fact it would be quite an unusual case in which the abandoning owner would be sufficiently interested to dispute the matter.


6 Kansas City, etc., R. Co. v. Wagand, 134 Ala. 388 (1901); Brink's, etc., Co. v. Hunter, supra; Log-owners Booming Co. v. Hubbell, 135 Mich. 65 (1903); Dodge v. Marden, 7 Ore. 456; Promontory Ranch Co. v. Argile, 28 Ut. 407; Baglin v. Cuseniar Co., 221 U. S. 580, 597.

7 Kansas City, etc., R. Co. v. Wagand, 134 Ala. 388 (1901); Haslem v. Lockwood, 37 Conn. 500; Wyman v. Hulburt, 12 Ohio 81 (1843); Ferguson v. Ray, 44 Ore. 557 (1904); Tancil v. Seaton, 28 Gratt. 601 (1877); Kuykendall v. Fisher, 61 W. Va. 87, 96 (1906). In Foster v. Safe Deposit Co., 162 Mo. App. 165, 172 (1911), the court says: "Property may be
come the property of the one who reduces them to possession, and the former owner can assert no claims thereto.  

In the cases of mislaid or forgotten goods and of property lost in the strict sense, there can be no doubt of the true owner's rights. He can always recover providing he is not barred of his remedy by some good defense, as, for example, the statute of limitations. The only real difficulty here is the one of fact, the owner's ability to prove that the property is his.  

Even treasure trove which originally belonged to the finder and which was later declared to belong to the crown had to be yielded up to the owner when known or found out.  

II. FINDER VS. STRANGER.  

By stranger as used here it is intended to cover those separated from the owner by being abandoned, or lost, or mislaid. In the first instance, it goes back into a state of nature, or, as it is most commonly expressed, it returns to the common mass and belongs to the first finder occupier, or taker.  

What amounts to a sufficient taking of possession may be a question of no little difficulty. See, for example, Haslem v. Lockwood, supra, where one gathered together into piles manure dropped onto the street by animals using the street as such. The problem is similar to the one which not infrequently arises with reference to wild animals, birds, and fish, though there is even more chance for difficulty along this line in such cases than there is in the case of inanimate abandoned property.  


See the cases in the preceding note. The following language used by the court in Railroad Co. v. Haws, supra, is a good example of the sort of loose thinking and language found all too frequently which has tended to create confusion: "That the former owner has abandoned property which has been found is but a presumption in favor of the title of the finder, which may not only be repelled by direct proof, but which, from the character of the property and circumstances under which it is found, may not obtain at all in his favor; it is upon the latter ground that the finder may be convicted of larceny if he takes the property found with intent to deprive the owner thereof." See also Feronson v. Ray, 44 Ore. 557 (1904).  

"Formerly, all treasure trove belonged to the finder; as was also the rule of the civil law. Afterward it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king." 1 Bl. Comm. 296.  

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3 Inst. 182.
having, prior to the finding, no relationship whatever to the thing found or to the premises upon which it is found. The thief or bailee would be the most common example of stranger as here used.

In the leading case of Armory v. Delamirie, the reporter says: "These points were ruled: 1, that the finder of a jewel, though he does not by such acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." That this statement is too broad can readily be demonstrated. However, all that was really decided was that a bailee of the finder could not, on the facts, dispute the bailor's right to have the chattel returned. In Bridges v. Hawkesworth, Patteson, J., says: "The general right of the finder to any article which has been lost as against all the world except the true owner was established in Armory v. Delamirie, which has never been disputed." And in Loucks v. Gallogly, the same error of too broad statement is made: "The law is well settled that the finder of lost property has a valid claim to the same against all the world, except the true owner, and generally that the place in which it is found creates no exception to the rule." There seems to be no dissent from the doctrine established by the decision in the Armory case that a bailee of a finder cannot resist the demand of the bailor for the return of the found property on the ground that such bailor's interest is merely that of a finder. This being true as to a

13 1 Strange 505 (1722).
14 Italics the writer's.
15 Suppose, for example, the dispute had been between the boy, the finder, and the owner of the house in which the jewel was found. See infra.
16 In Lavelle v. Bellin, 121 Mo. App. 442, it was held a bailee was justified in refusing to return the article, since he knew the bailor was planning to commit a crime therewith. 17 21 L. J. (N. S.) 75 (1851).
19 Bridges v. Hawkesworth, supra; Brandon v. Huntsville Bank, 1 Stew. (Ala.) 320; Mathews v. Harsell, 1 E. D. Smith (N. Y.) 393 (1852); Hamaker v. Blanchard, 90 Pa. 379 (1879); Deaderick v. Oulds, 86 Tenn. 14 (1887); Bewen v. Sullivan, 62 Ind. 281; Danielson v. Roberts, 44 Ore. 108 (1904); Ellery v. Cunningham, 1 Metc. 112 (1840); Williams v. State, 165 Ind. 472; Agnew v. Baker, 204 Ill. App. 56.
RIGHTS OF FINDERS

bailee *a fortiori* the same rule should apply to one who unlawfully interferes with the finder’s possession. In this type of case no distinction is drawn between the various kinds of so-called “lost” property.

III. FINDER VS. OWNER OR OCCUPANT OF PREMISES ON WHICH ARTICLE IS FOUND.

a. Abandoned Property.

Since, as pointed out above, abandoned property belongs to the one who first takes possession thereof, the question under this head comes to an inquiry as to whether such owner or occupant of the premises has possession of the goods. Suppose, for example, a traveler along the highway throws into an adjoining field an article of wearing apparel with intent to abandon it, and such article is later picked up by X, who happens to be wandering across the field: if a dispute should arise between X and A, the owner or occupant as lessee or otherwise of the field, as to which one has the better right to the “found” article, could A show a possession prior to that of X? If the article had been discarded in A’s house and picked up by X, it is believed that there would be no serious doubt as to A’s better right, and his better right, it seems, must necessarily rest on prior possession. Should the case be any different when the property is found in the field? It may well be, however, that the case would stand differently if X had picked up the thing on the highway, even though the part of the highway were the article was picked up had been on land admittedly owned by A. The answers to these questions depend upon the view to be taken of a fundamental problem which lies back of the other types of lost property cases as well, and will be discussed presently.

b. Mislaid or Forgotten Property.

Determination as to whether a given “found” article has

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20 See Williams v. State, *supra*. 
been really lost or only mislaid or forgotten involves obvious difficulties of fact. The nature of the article and its location when discovered are, of course, vitally important facts; with these facts taken into account, the question is one largely of probabilities.

An article assumed, then, to have been mislaid or forgotten may be picked up on (a) the premises of the owner of the thing, (b) the private premises of X, a stranger, or (c) a public place the fee of which may conceivably be either in public or private ownership.

It would hardly be seriously contended that when the thing is "found" on premises of the unfortunate owner, for instance in his house, the so-called finder would have any rights; and the case seems the same when the article is in the other buildings or in open fields. The owner prevails over the finder because he is owner or, equally clearly, because the thing is taken from his possession.

When taken on the private premises of a stranger, such stranger can succeed the finder only on the theory of a possession prior to that of the finder. The sounder view and the one followed by most courts, it is believed, is in favor of ascribing possession of the mislaid or forgotten property under such circumstances to the owner or occupant of the premises. This view is expressed by Lurton, J., as follows: "If it was evidently laid where it was found, it then becomes the duty of the owner of the premises to keep the property for the owner, as in such cases he is treated as a quasi bailee, and he may maintain trover therefor against a finder."

21 A piece of money on the floor of a bank lobby almost certainly has been lost; a bag of golf-clubs on the same floor one would say with equal positiveness has not been lost. But the natural conclusion as to either article picked up on a highway would be that it had been lost, not mislaid or forgotten. A purse on the writing desk in the bank lobby has probably been merely forgotten. Whether a small parcel on a seat in a railroad coach has been lost or forgotten is a question on which opinions might well differ; the same parcel on the floor or in the baggage rack would not admit of so much doubt. Compare Batteiger v. Penna. Co., 64 Pa. Sup. Ct. 195 (1916), with Foulke v. R. Co., 228 N. Y. 269, 9 A. L. R. 1384 (1920).

In Foster v. Fidelity Safe Deposit Co.,24 where a patron of a safe deposit company picked up a valuable parcel on a desk in a private compartment kept for use of customers, the court said:

"Now, in whose possession was the money when discovered by plaintiff? It could scarcely have been more in defendant's possession, unless it had been in the pocket of one of its officers. It was not only in defendant's place of business, but was in a separate apartment, from which the public was excluded; and, more than that, it was on a desk in a little private compartment kept under the immediate and constant guard and supervision of one of the defendant's attendants. A roguish street urchin, if by possibility he had gained access to this place and discovered the envelope on the desk, would have had the same right to it that plaintiff had. Suppose the attendant had observed the boy as he found it; would he have been justified in letting him carry it off? Would it not have been his duty to assert defendant's right of possession and to take it from the boy? Would not the real owner, had he afterwards appeared, have had legal ground of complaint against defendant, as his bailee, for gross neglect in allowing the money to be carried off in full view? It is no answer to this suggestion, nor does it show any distinction between the supposed case and the real one, to say that in the former the owner appeared and in the latter he has not. For whatever legal right there was to possession of the money came into existence the moment plaintiff discovered it. If it was in defendant's possession then, it remained in its possession, and it should hold it for the owner, subject to such rights and duties as arise under the law of bailment or trusteeship."25

24 162 Mo. App. 165, 145 S. W. 139.
25 Adopted as part of opinion of Supreme Court in 264 Mo. 89, 174 S. W. 376, L. R. A. 1916 A, 655. See also Bank v. Pleasants, 6 Whart. (Pa.) 375; Merry v. Green, 7 M. & W. 623 (1841); Livermore v. White, 74 Me. 452 (1883); Ferguson v. Ray, 44 Ore. 557, 77 Pac. 600, 1 L. R. (N. S.) 477 (1904); Elwes v. Brigg Gas Co., 33 Ch. Div. 562; Burdick v. Chesebrough, 88 N. Y. Supp. 13; Goddard v. Winchell, 86 La. 71.
Although, as will appear from the cases referred to in the
notes, the authorities are not entirely in accord as to the
position of the finder being inferior to that of the owner or
occupant of private premises upon which the forgotten or
mislaid article is discovered, there is more difficulty in the
situation where the thing is found on premises from which
the public generally are not excluded. There are not a few
cases in which goods have been left on tables, desks, coun-
ters, seats, etc., in places to which the public is invited. As
pointed out above, the location of the article when discov-
ered may be of great importance in determining whether the
case presented is one of mislaid or forgotten property or,
on the other hand, lost property in the narrower sense.
Of course, if the two types of cases are to be treated alike in
law, the matter of location would be unimportant. But it is
believed that in the situation now under examination a dis-
tinction should be drawn between these two types. When

But this view seems disapproved by the decisions in Danielson v.
Roberts, 44 Ore. 108, 74 Pac. 913 (1904); Weeks v. Hackett, 104 Me.
264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201; Durfee v. Jones, 11 R. I. 588
(1877); Vickery v. Hardin (Ind. App.), 138 N. E. 922. In the Daniel-
son case, boys in cleaning out a hen-house on land in occupation of de-
fendant found $7,000 in gold coin buried a few inches below the sur-
face. It was held that the boys were entitled thereto as against defend-
ant. The case, however, was one which on its facts made a strong
human appeal for the boys, for the facts showed that the defendant dis-
honestly tried to deceive the boys and offered to buy their silence by a
five-cent bribe. It is almost impossible to reconcile the decision with
the later case of Ferguson v. Ray, supra, where the owner of the land
was held entitled to valuable gold quartz found buried in a sack on the
premises. In Roberson v. Ellis, supra, the Danielson case is followed and the Ferguson case
sought to be distinguished therefrom on the ground that the latter did
not present a case of treasure trove. But the court in the Danielson
case had stated specifically that in Oregon the law of treasure trove had
been merged with that of lost property generally. Weeks v. Hackett,
supra, and Vickery v. Hardin, supra, went off on the ground of treasure
trove. In Durfee v. Jones, supra, the decision goes on the ground that
the owner and possessor of a safe did not thereby have possession of
lost money concealed therein so as to recover as against his bailee of the
safe who found the money. This decision is believed to be utterly inde-
fensible.

In 26 Law Notes, 64, an interesting case said to be pending in New
Jersey is referred to. A domestic servant in preparing clams for the
household table found in one of them a valuable pearl, which was claimed
both by the servant and the employer.
a purse is placed on the writing desk in the lobby of a bank by the design of the owner who later goes away forgetting it, there is a much stronger case presented for ascribing possession of the purse to the bank than there would be if the purse had slipped through a hole in the owner's pocket onto the floor. While it cannot be said in either case that the bank has an actual intent to exclude the world at large from the purse, the first case comes much closer to presenting a bailment relationship than does the second. In the former there is at least an intentional deposit. If, for safekeeping while transacting his business, the customer had placed the purse through a window behind the glass partition separating the lobby from the working room of the bank's employees, it would hardly be doubted that the purse was within "the protection of the house" as bailee, so far at least as acts of third parties are concerned, even though it may have been pushed through the window without the knowledge of any representative of the bank. Should the bank be any the less the bailee of the purse when, as is the usual case, it is placed on the desk? In the case of the purse truly lost there is nothing even looking like an offer or acceptance of a bailment relationship.

That articles forgotten or mislaid in places owned priv-

26 It is familiar doctrine, frequently laid down as a principle of general application, that consent of the bailee must be had to the creation of a bailment relationship. 9 Am. & Eng. Law [Ed. 2], 283; Copelin v. Berlin Dye Works, etc., Co., 168 Cal. 715, 144 Pac. 961. (In California the Code, C. C., Secs. 1815, 1816, has somewhat modified the common law). This principle is declared, however, in cases in which liabilities are sought to be imposed upon the alleged bailee. See many cases collected in 1 A. L. R. 397, note. Without having done something expressly or impliedly accepting the custody of an article left on its premises, a bank, for example, may well not be liable for the loss thereof if taken away by a stranger; but if the bank seeks to enforce rights regarding the thing against such stranger, there seems no sufficient reason for denying the necessary element of acceptance. The case is not unlike the common situation in which a transferee of property may become entitled to all the rights, etc., of an owner on the theory of an implied or belated acceptance.

27 Whatever may be thought about there being an implied invitation by banks, barber shops, etc., to place articles temporarily on desks and tables while transacting business, surely one could hardly say that the bank impliedly invites people to lose things in its lobby.
ately but open to the public are within "the protection of the house," and that as between the owner of such premises and a finder the former is to be preferred because of prior possession, is, it is believed, only good sense. The great weight of authority supports this view.

In Foulke v. New York Consolidated R. Co., 28 a passenger in leaving a subway train picked up and took with him a parcel left on a seat of the car by a fellow passenger. The company had the "finder" arrested for such taking and refusal to yield up the parcel to representatives of the railroad. After discharge, action was brought for false imprisonment and malicious prosecution, and the court had to determine whether the facts were such as to warrant the charge of petit larceny made by the railroad company. In answering this question in the affirmative the court (Collin, J.) said:

"After the passenger owner had left the car, forgetting to take the package with him, the plaintiff knew the package was not lost property. It or the custody of it did not belong to him then any more than it did while its owner was in the car. He saw and knew the owner had forgotten it, had left it by mistake. It then had become in the custody and the potential actual possession of the defendant. It was the right of the defendant, and its duty, to become as to it and its owner a gratuitous bailee. It was its right and duty to possess and use the care of a gratuitous bailee for the safekeeping of the package until the owner should call for it. * * * The package having been left, though inadvertently, in the car of the defendant, while the owner was still constructively in possession of it, the defendant had the right to and did assert in it the special or actual possession of gratuitous bailee. Bailment does not necessarily and always, though generally, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for

the thing as the property of another, that creates
the bailment, regardless of whether such posses-
sion is based on contract in the ordinary sense or
not. * * * As to everybody except the true
owner of the package, the defendant had the right
of the owner to have and defend its custody."

In Heddle v. Bank of Hamilton, the plaintiff, a clerk in
defendant bank noticed a wallet lying on a writing desk in
the lobby; he took it up and left it with the bank’s officers;
the owner not appearing, the “finder” sued the bank,
claiming it was bailee, and that he as finder was entitled to
the wallet. The court concluded that the bank had a claim
superior to that of the clerk. Macdonald, C. J. A., said:

“"I think the fair presumption is that the wallet
was intentionally placed on the desk by the owner
of it while there on business with the bank; that he
forgot to pick it up; and while it is true, as evi-
denced by his not returning for it, that he appears
never afterward to have recollected where he
placed it, yet in the first instance the placing of it
upon the desk was his voluntary act, and anyone
seeing it there in a position which would rather
rebut than suggest loss ought to regard it as under
the protection of the house.""

See also State v. Courtsol, 89 Conn. 564, 94 Atl. 973, L. R. A. 1916
A, 465 (1915); Reg. v. Pierce, 6 Cox C. C. 117 (1852).

There are two lower court decisions in Pennsylvania that appear
to take the contrary view. Tatum v. Sharpless, 6 Phila. 18 (1865);
purses picked up from seats by an employee. Whether the purses were lost
or only forgotten was perhaps purely speculative, but the court in the
later case said such fact was entirely immaterial. In the earlier case the
court apparently regretfully arrived at its conclusion, for it said: "We
are strongly impressed with the utility of legislation requiring railway
companies to adopt measures by which, in every case of an article left
by a passenger in a car, the custody of it should be assumed by the
company, with a corresponding obligation promptly to deliver it to the
owner on satisfactory proof of his loss." That railroad companies have
assumed such responsibilities without legislation is probably a matter
of common knowledge, and the court in the Foulke case recognizes it.
The conclusion in the Batteiger case is not surprising in view of the
earlier decision.

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of common knowledge, and the court in the Foulke case recognizes it.
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earlier decision.
No cases have been found in which the mislaid or forgotten property was found in a public place owned by the public. Such cases, however, may well arise, and under varying circumstances.

A forgotten parcel in a municipally-owned street car would probably not stand any differently than one in a privately-owned car. But here the municipality is deemed to be acting in a private rather than a public capacity. Suppose one who has gone to the treasurer’s office in the county court house leaves a package on a desk or bench and X picks it up; could X prevail in a contest with the appropriate county officials? Is not such parcel as much within the “protection of the house,” in common understanding, as the purse on the desk in the bank lobby? But how about goods left on a seat in the court house park? or on a bench or table in any other park? In popular thought such goods would in all probability not be considered as within the “protection of the house,” and it is believed that the law would take the same view. Articles left on streets should not be considered as within the possession of the public, if the street is publicly owned.

c. Lost Property.

The element of intentional deposit is here missing, but that does not necessarily mean that the owner or occupant of the premises cannot make out a case of prior possession as against the finder.

to notes picked up from the floor of a shop by a stranger, Pattison, J., said: “The notes never were in the custody of the defendant (the shopkeeper) nor within the protection of his house before they were found, as they would have been had they been intentionally deposited there.”

In McAvoy v. Medina, 11 Allen, 548 (1866), the Massachusetts court held that the proprietor of a barber shop had a better right to a purse which had been left on the barber's table than the finder. See also Kincaid v. Eaton, 98 Mass. 139 (1867), a case of a parcel left on the writing desk in a bank lobby; Loucks v. Gallogly, 23 N. Y. Supp. 126 (1892); Lawrence v. State, 1 Humph. 228 (1839); State v. McCann, 19 Mo. 249 (1853). Contra, White v. Daniels, 30 N. Y. L. J., 1223 (N. Y. Munic. Ct.).

32 The maintenance and operation by park boards, etc., of lost and found offices would be some indication at least that the principle of the “protection of the house” should apply.
"To gain possession, then, a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent. These relations and this intent are the facts of which we are in search. The physical relation to others is simply a relation of manifested power co-extensive with the intent, and will need to have little said about it when the nature of the intent is settled." 33

We have here really three problems: (a) physical power of control by the person over the object, (b) physical power of control by the person over the object so far as interference by rest of the world is concerned, and (c) intent. The first is important and often difficult when animate things, such as wild animals, fish, and birds, are involved; if one has brought such thing within one's physical control, the remaining two questions would ordinarily be easy. If, however, inanimate things are involved, the first question is normally determined by the answers to the other two.

If X, in walking through a safety deposit vault on A's premises, should lose the diamond out of his ring, the stone lying on the floor is very effectively within the control of A so far as the rest of the world is concerned. 34 If the intent element is satisfied only when the claimed possessor has the conscious purpose to hold the thing for himself, there would be no possession by A of the diamond. However, the better view appears to be that the intent here involved does not need to be positive; as the law protects the admitted possessor in his use of the thing not affirmatively but negatively by refusing to allow others to interfere, so the law determines the element of intent in the acquisition of possession by looking to the existence of a purpose on the part of the

33 Holmes, The Common Law, 216. The best and soundest discussion of possession in the juristic sense to be found is believed to be in this book. See also Pollock and Wright on Possession, 26, et seq.; Salmond on Jurisprudence, Chaps. 13, 14.
34 See Bank v. Pleasants, 6 Whart. 375.
claimed possessor to exclude the world at large. In this view there is no reason to distinguish between articles lost or left upon premises depending upon whether the premises are then occupied by an owner in fee or a tenant. The latter has as much will and power to exclude the public from the premises during his term as has any owner.

This view of the law is well brought out in South Staffordshire Water Co. v. Sharman, where the contest was between the owner of premises on which was a pool and an employee who in cleaning the pool found some valuables, including two gold rings. In delivering the judgment of the court, Lord Russell of Killowen, C. J., said:

"The plaintiffs are the freeholders of the locus in quo, and as such they have the right to forbid anybody coming on their land or in any way interfering with it. They had the right to say that their

35 See the books cited in note 30, supra.

In McKee v. Gratz, — U. S. — (1922), the owner of land from which a trespasser had taken mussels sued for their value. After declaring that it was unnecessary to decide that the mussels were part of the realty so as to make plaintiff absolute owner, the court said: "It is enough that there is a plain distinction between such creatures and game birds or freely-moving fish, that may shift to another jurisdiction without regard to the will of the landowner or state. Such birds and fishes are not even in the possession of man. * * * On the other hand, it seems not unreasonable to say that mussels, having a practically fixed habitat and little ability to move, are as truly in the possession of the owner of the land in which they are sunk as would be a prehistoric boat discovered underground or unknown property at the bottom of a canal. * * * This is even more obvious as to the shells when left piled upon the bank, as they were, to await transportation."

Under the school of thought which considers possession as the subject of a thing to the will of the possessor, the gaining of possession by a person unconscious of the presence of the thing involved would seem impossible. But, as pointed out above, our law, generally speaking, does not approach the problem this way.

Whatever may be the difficulties in defining possession, at least it will probably be agreed that the term indicates a relationship between a person and a thing. To use the Holmes expression, possession denotes the facts and connotes the consequences. The determination of what facts will initiate that relationship (its continuation is a somewhat different problem) is often difficult, and popular ideas are frequently quite at variance with the legal view. However it may be viewed by the philosophers, juristically it is far from unusual to find possession ascribed to one who is ignorant even of the existence of the object.

36 [1896] 2 Q. B. 44.
pool should be cleaned out in any way that they thought fit, and to direct what should be done with anything found in the pool in the course of such cleaning out. 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 private property, although the owners of that property are ignorant that it is there. The principle on which this case must be decided, and the distinction which must be drawn between this case and that of Bridges v. Hawkesworth, 21 L. J. (Q. B.) 75, is to be found in a passage in Pollock and Wright's Essay on Possession in the Common Law, page 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 elsewhere, 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 anyone 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. There is a broad distinction between this case and those cited from Blackstone. Those were cases in which a thing was cast into a public place or into the sea—into a place, in fact, of which it could not be said that anyone had a real *de facto* possession, or a general power and intent to exclude unauthorized interference. * * *’

‘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 the land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo. * * * 37

If the premises on which the lost property is are open to the public, the whole basis for ascribing possession to the land possessor—the purpose to exclude—is missing, and the result should be the opposite. Thus such cases as Hoagland v. Forest Park Highlauds Amusement Co., 38 Hamaker v. Blanchard, 39 and Bridges v. Hawksworth 40 were correctly decided in favor of the finder.

IV. FINDER VS. LANDLORD.

Cases presenting the question as between these parties are rare; but the principle upon which they should be decided seems clear. If the landlord can be said to have had a possession of the property prior to that of the tenant-finder, the latter’s rights must be inferior. Assuming that the goods were on the demised premises when the lease was made, under the principles above discussed the lessor must be deemed to have been in possession, and it could hardly

37 See also Barker v. Bates, 13 Pick. 255 (1832); Proctor v. Adams, 113 Mass. 376; Goddard v. Winchell, 86 Ia. 71, 52 N. W. 1124, 41 Am. St. Rep. 481 (1892); Maas v. Amana Soc. (Ill.), 16 Alb. L. Jour. 76; Matthews v. Harsell, 1 E. D. Smith (N. Y.), 393 (1852); Regina v. Rowe, Bell C. C. 931 (1859); Elwes v. Brigg Gas Co., 33 Ch. Div. 562 (1886).

There are at least two cases that adopt the opposite view: Durfee v. Jones, 11 R. I. 588; Bowen v. Sullivan, 62 Ind. 281 (1878). These cases seem to be instances of application of the childish principle of “Finders—keepers.” The courts that prefer the finder as against the owner or occupant of the land in the case of mislaid or forgotten goods (see supra, note 25) would, of course, be expected to decide the same way in the case of property truly lost.

38 170 Mo. 335, 70 S. W. 878 (1902)—pocketbook found on ground in amusement park open to the public.

39 90 Pa. 379 (1879)—money found in hotel parlor.

40 15 Jur. 1079, 21 L. J. Q. B. (N. S.) 75 (1851)—money found on floor of shop.
be urged that under the ordinary lease such possessory rights have been yielded up to the lessee. As against a stranger who might come upon the premises and take possession of the lost property perhaps the lessee might make out a case of prior possession, but as against his landlord, it is submitted, the lessee would fail. If, on the other hand, the goods in question came upon the premises after the creation of the relation of the landlord and tenant, it would seem that the landlord must necessarily fail in his effort to show a prior possession.

In Elwes v. Brigg Gas Co. it was held that the landlord was entitled to a prehistoric boat uncovered by the tenant in making excavations. The court refused to decide whether the boat should be deemed mineral, or part of the soil within the maxim, Quicquid plantatur, or chattel, saying that the result would be the same in any case. If either of the first two, the boat was part of the inheritance and belonged to the landlord as owner thereof; if chattel, then the same result followed on the ground that the landlord had a possession prior to that of the tenant-finder. The same result was reached by the trial court in Burdick v. Cheeseborough, but on appeal the case was reversed on the insufficiency of the pleadings and the fact that the action was brought by the executors of the lessor. In Ferguson v. Ray a tenant found on the demised premises some valuable gold quartz, the surroundings indicating that some time, long before, it had been designedly buried at that spot. In action by the landlord to recover possession it was ruled that the finder's rights were subordinate to those of the plaintiff.

41 See Elwes v. Brigg Gas Co., 33 Ch. D. 562 (1886).
42 Supra.
43 7 Law Notes, 160.
44 88 N. Y. S. 13 (1904).
45 44 Ore. 557, 1 L. R. A. (N. S.) 477 (1904).
46 The court pointed out that all indications pointed to the quartz not having been abandoned or lost, and apparently was of opinion that if the contrary had been the case the finder could have withheld the property. This view is of dubious soundness. If the quartz had been
Things may come upon the premises after the lease is made and yet be considered the property of the landlord, not on the basis of a prior possession but because they may be deemed a part of the earth. An instance of this may be found in Goddard v. Winchell\(^47\) where an aerolite, weighing some sixty pounds, fell upon the earth and became buried in the soil to a depth of three feet. As between the landowner and a trespasser who dug it up, the thing was held the property of the former as being a part of the soil. The declared ground of the decision makes immaterial the fact that the tenancy in the case was designated as a lease of the grass privilege.\(^48\)

It may be suggested that on this basis of prior possession any earlier owner of the land upon which the property is discovered would be able to show a better right to possession, providing, of course, it can be made to appear that the property was on the premises during such earlier owner’s occupancy. The answer to this is that while the ordinary lease confers upon the lessee only the privileges of occupation and use for the time being, a conveyance in fee divests the grantor’s rights completely. A lessee, for example, would not be allowed to open mines, etc., or to cut timber, but there is no such restriction upon a grantee.

\(^{47}\) See also Maas v. Amana Soc. (Ill.), 16 Alb. L. Jour. 76, where it was considered that an aerolite which had fallen onto a highway belonged to the owner of the fee as against a traveler who picked it up. In Oregon Iron Co. v. Hughes, 47 Ore. 313, it was held that the fact that a meteorite was on the surface instead of buried in the soil did not distinguish the case from Goddard v. Winchell.
RIGHTS OF FINDERS

V. FINDER VS. MASTER.

If the master is entitled to the found article as against the servant-finder, it must be on the basis, assuming there is no special term in the hiring contract, of the finder in the very finding itself acting in his representative capacity. One hired to look for things would hold whatever he found for his employer. Such cases, however, must be rare. Ordinarily, such representation must depend upon inference from the nature of the relationship and services arranged for. The driver of an ice wagon, for instance, would not be deemed to be acting for his master in picking up a pail lost on the highway. On the other hand, a porter in a bank, by reason of the character of the master's business and the nature of the porter's duties, might well be held to be acting for the master in picking up valuables lying on the floor in the bank lobby. Other examples will be found in the note.

VI. FINDER VS. OTHER FINDERS.

This question may arise when two or more claim to have

49 In Brandon v. Bank, 1 Stew. (Ala.) 320, valuables found by a slave were held to be in possession of the master.
52 Tatum v. Sharpless, 6 Phila. 18—conductor on railway not acting as servant in finding purse on seat of car; Vickery v. Hardin (Ind. App.), 133 N. E. 922—workman engaged in wrecking old building not a servant in act of finding money; South Staffordshire Water Co. v. Sharman [1896], 2 Q. B. 44; Danielson v. Roberts, 44 Ore. 108—workmen engaged to clean premises not acting in representative capacity in finding valuables; Hamaker v. Blanchard, 90 Pa. 377. See also Burns v. Clark, 133 Cal. 634; Ellery v. Cunningham, 1 Metc. (Mass.) 112; Brandon v. Bank, 1 Stew. (Ala.) 320 (slave). Bower v. Sullivan, 62 Ind. 281, often cited as a master-servant case, was not really such. In Mathews v. Harsell, 1 E. D. Smith (N. Y.) 393, Woodruff, J., said: "I am by no means prepared to hold that a house servant who finds lost jewels, money, or chattels in the house of his or her employer acquires any title even to retain the possession, against the will of the employer. It will tend much 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."

In those cases where servants are hired to clean up premises it seems that it might well be held that in finding things in the course of such cleaning the found property should belong to the master on this ground alone.
found the property at the same time; also as between successive finders. The latter is easily solved. If it is to be determined that A was a finder, that very fact gives him an interest in the property sufficient to warrant his recovery as against a subsequent finder. As against the later finder, the earlier finder by reason of his possession is in as good position as an absolute owner.\textsuperscript{63}

The determination of the preference to be made between two or more who claim to be not successive but first finders involves the fundamental question as to how far a person must go to be considered in law as a finder. Finding is not the same as discovery. In looking out of the window of the tenth story one may see a purse lying on the street, but if before such observer gets down to the street the purse has been picked up by X, the latter is clearly the finder, and the former has no rights which X has encroached upon. Finding, in short, involves and necessitates possession.\textsuperscript{64}

Of course, such possession may be acquired by two or more concurrently, in which case they are tenants in common.\textsuperscript{65}

Summing up, it may be said that finding, in order to confer any rights upon the finder, necessitates taking possession; such possession, when once acquired, is normally protected as against all but those who can show a better right; and such better right rests either on ownership or a prior possession. In short, the rights of the finder are possessory and are protected in the same way and to the same extent as any other type of possession. To say that the place of finding is immaterial in one sense is true, but in another

\textsuperscript{63} Deaderick v. Oulds, 86 Tenn. 14; Laurence v. Buch, 62 Me. 275; Clarke v. Maloney, 3 Harr. (Del.) 62; Cummings v. Same, 3 Ga. 460. See supra, p. 667.

\textsuperscript{64} See Agnew v. Baker, 204 Ill. App. 56.

\textsuperscript{65} Cummings v. Stone, 13 Mich. 70; Keron v. Cashman (N. J. Ch.), 33 Atl. 1055; Weeks v. Hackett, 104 Me. 264.

In avoidance of the often difficult question of fact as to whether a given person has actually reduced a thing to his possession, a court may quite naturally tend to hold several intimately connected with the finding as joint finders. See Keron v. Cashman, supra.
it is not. It may be of vital importance in determining whether the finder’s contestant can make out a case of prior possession.

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