Michigan Law Review

Volume 48 | Issue 3

1950

RIGHTS OF FINDERS

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RIGHTS OF FINDERS—Because the deeply important jurisprudential concept of possession is involved, cases dealing with the problem of finders assume an importance far beyond their practical significance. The recent decision by the Oregon Supreme Court in *Jackson v. Steinburg*[1] suggests further discussion of the problem, with particular reference to the cases in that state.

More than twenty-five years ago the writer of this comment published an article[2] in which it was suggested that the rights of a finder are in truth the rights of a possessor, the chief problem being the determination of the vexing question, found in many situations other than that of finding, as to who is the possessor of a thing. To become a "finder" one must be more than a discoverer; one must take possession.[3] If *F* is a finder by having acquired possession of a "lost"[4] article, he is entitled to protection of his possession against anyone not able to show a better right to that article. Owners and prior possessors typify those able to show a better right.[5]

Students of possession, of course, have noticed that courts are influenced in determining possession *vel non* by the results that will flow from such determination.[6] For example, a court may be more inclined to attribute possession of a thing to a land occupant as against a trespasser than as against one not wrongfully on the land.

A not uncommon notion is that a finder by the very act of finding—restoring the subject matter to the mass of usable things—has rendered meritorious service entitling him to sympathetic consideration. To the extent to which courts yield to this notion results may be reached difficult to understand and reconcile with generally accepted views as to possession and the rights of possessors. In a recent comment in this

[1] 200 P. (2d) 376 (1948), rehearing, 205 P. (2d) 562 (1949).

[2] Aigler, "Rights of Finders," 21 MICH. L. REV. 664 (1923).

[3] Such cases as Eads v. Brazelton, 22 Ark. 499, 79 Am. Dec. 88 (1861) and Keron v. Cashman, 33 A. 1055 (1896) are examples of this.

[4] As the word "lost" is used in this connection, it should make no difference whether the thing in question was parted with inadvertently or was intentionally placed where "found."

[5] The possible rights of officers, etc. need not be mentioned here.

[6] See the illuminating discussion by Shartel, "Meanings of Possession," in 16 MINN. L. Rev. 611 (1932). In this respect it is interesting to note such cases as State v. Munson, 111 Kan. 318, 206 P. 749 (1922), where it was held that one who held in his hands a container for the purpose of taking a drink therefrom did not have possession of the intoxicating liquor in the container. The court observed that if such facts constituted possession, it would mean that almost always the taking of a drink in Kansas would be a criminal act. If that had been the legislative intent, presumably the legislature would have said so in more direct terms.

Review,[7] supplementing the discussion in the article mentioned above,[8] it was said: "The obviously confused state of the decisions dealing with the problem . . . [the rights of finders as against the occupant of the place where the thing is found] is due in large part to the varying weights given by the courts to the strict logic of the principles of possession, on the one side, and the more or less instinctive, emotional appeal presented by the finder's part in the transaction, on the other."[9]

Such elements in the problem multiply the difficulties of anyone attempting to formulate a statement of the law, also of the lawyer in making up his mind how to advise a client. In this respect it is peculiarly interesting to review the decisions of one court.

Thousands of students in Personal Property, to say nothing of numerous professors, have been puzzled by the decisions of the Oregon court in *Danielson v. Roberts*[10] and *Ferguson v. Ray*,[11] particularly when noticing that the two cases were decided only a few months apart and are reported in the same volume. In the former case, in which boys were hired by a farmer to clean out his henhouse and in so doing dug up a can containing gold coins, it was concluded that the farmer could not establish a better right to the money than the boys who had delivered it to him. The court declared: "The fact that the money was found on the premises of the defendants [the farmer], or that the plaintiffs were in their service at the time, can in no way affect the plaintiffs' right to possession, or their duty in reference to the lost treasure."[12] Since the farmer made no claim as owner of the gold, his only grounds for a claim of better right than that of the boys were (1) prior possession of the gold as it lay there in his henhouse, and (2) employer of the boys. Both contentions, assuming they were made, were rejected in the sentence just quoted.

In the *Ferguson* case, some valuable gold quartz, buried in a sack at the foot of a tree for a long time, was "found" by a tenant of the land. The court concluded that the lessor had a better right to the

[7] 46 MICH. L. REV. 235 (1947). That comment was prompted by two recent decisions: Hannah v. Peel, [1945] K.B. 509, and Flax v. Monticello, 185 Va. 474, 39 S.E. (2d) 308 (1946). See also 46 MICH. L. REV. 266 (1947) noting Erickson v. Sinykin, 223 Minn. 232, 26 N.W. (2d) 172 (1947).

[8] Note 2, supra.

[9] 46 MICH. L. REV. 235 at 240-241 (1947).

[10] 44 Ore. 108, 74 P. 913, 65 L.R.A. 526, 102 Am. St. Rep. 627 (1904).

[11] 44 Ore. 557, 77 P. 600, 1 L.R.A. (n.s.) 477, 102 Am. St. Rep. 648 (1904).

[12] Danielson v. Roberts, 44 Ore. 108 at 115, 74 P. 913 (1904).

quartz than the finder-tenant. Evidently, the quartz was deemed to have been buried by some unknown person before the leasing of the premises to the finder. A ruling by the trial court in favor of the finder was sought to be sustained upon the theory that the quartz was "either lost or abandoned property" and that in either event the finder was entitled to possession as against all but the true owner.

After pointing out that the quartz had been neither "lost" nor "abandoned" and that the case, therefore, should not be left to a jury on any such theory, the court declared that the case fell within the principle of such cases as *South Staffordshire Waterworks v. Sharman*.[13] The principle of that case, taken from the well-known essay on possession by Pollock and Wright,[14] is that possession of land carries with it the possession of things in and on the land.[15] The lessor thus having been in possession of the land on which the quartz was buried was also in possession of the quartz before the tenant-finder acquired possession; hence the former showed a better right than did the finder.

Both of these cases came up from the same county, the same trial judge sitting in both. In the earlier case, the *Danielson* one, the court had nonsuited the boys. In the *Ferguson* case the landowner, as defendant, asked that the "finder" be nonsuited. The trial judge must have felt no little surprise, if not chagrin, when he found that he was wrong both times!

In the *Ferguson* case the court stresses the fact that the quartz must have been intentionally placed where it later was found as distinguished from an inadvertent parting with possession. Precisely the same observations might well have been made regarding the money in the *Danielson* case. Indeed, the doctrine on which the *Staffordshire Waterworks* case was decided, approved and applied in the *Ferguson* case, seems just as applicable to things truly "lost" on the premises of

[13] [1896] 2 Q.B. 44.

[14] POLLOCK AND WRIGHT, POSSESSION IN THE COMMON LAW 41 (1888).

[15] The quotation from Pollock and Wright is: "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." That the words "attached to or under" are not to be taken literally is shown by the added observations of Lord Russell in the Staffordshire case that ". . . 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 that thing is in the owner of the locus in quo." [1896] 2 Q.B. 44 at 47 (Italics added.)

that claimant as to things intentionally placed there and then forgotten. At any rate, it seems clear that if the principle on which the *Ferguson* case was rested was properly applicable there, it was equally applicable to the facts of the *Danielson* case.[16]

The earlier Oregon case of *Sovern v. Yoran*[17] was cited in both cases. In that case hidden money concealed in defendant's barn was found by X. Defendant had disposed of the money by following the provisions of the statute regarding finding of lost things. The plaintiff, who seems to have established ownership of the money, sued in trover. While the court said that the money had not been "lost" in the sense that term was used in the statute, and therefore the defendant should not have acted under it, the only thing decided was that such disposition was not under the circumstances a conversion. The court noticed the language found in the report of *Armory v. Delamirie*[18] that the finder has "such a property as will enable him to keep" the found article as against all but the rightful owner.[19] Since the money in question had been intentionally placed where it was later discovered by X, the court seemed to think the doctrine of the *Armory* case inapplicable.[20] It goes on to observe that it may well be that "the defendant, being the owner of the property in which the money was deposited, was entitled to the possession as against the finders, and their delivery to him did not make him a bailee for them," etc. This viewpoint foreshadowed the conclusion in the *Ferguson* case but was ignored in the *Danielson* case.

Seven years after the *Danielson* and *Ferguson* cases were decided, the Oregon court had to consider *Roberson v. Ellis*.[21] The defendant therein, in possession of a warehouse, employed the plaintiff to remove certain goods therefrom. In the process plaintiff "found" some gold coins, which he turned over to the defendant. No owner-claimant

[16] Of course, questions may be raised as to the weight of the Staffordshire case in view of the recent case of Hannah v. Peel, [1945] K.B. 509. Students of the problem have been disappointed that this case was never presented to the Court of Appeal.

[17] 16 Ore. 269, 20 P. 100, 8 Am. St. Rep. 293 (1888).

[18] 1 Strange 505, 93 Eng. Rep. 664 (1722).

[19] Too often there has been a failure to note that this language taken from the report of the case is at most a dictum. The correct statement would seem to be that the finder as possessor has a right to the possession of the thing found as against all persons except those *who can show a better right.* Starting with the language of the report, attention is directed to the narrow inquiry whether the person competing with the finder was really the owner or his representative.

[20] That is, the money was not "lost."

[21] 58 Ore. 219, 114 P. 100, 35 L.R.A. (n.s.) 979 (1911).

having shown up, the action was brought based upon the defendant's refusal to return the money to the plaintiff. The decision was for the plaintiff, the court rejecting the contentions of the defendant that he was entitled to the money (1) as employer and (2) as possessor of the warehouse. The *Ferguson* case was said to be distinguishable in that it did not involve "treasure trove."[22] The *Danielson* case was deemed applicable because, at least in part, the money in the current case had been placed in the warehouse long enough before its discovery to fall within the *Danielson* decision.[23]

This, then, was the status of the Oregon case law when the court came to the consideration of the very recent case of *Jackson v. Steinberg.* It was an action by a chambermaid in defendant's hotel to recover eight hundred dollars "found" by the plaintiff, while performing the usual maid service in a hotel room, concealed underneath a paper lining of a dresser drawer. The case was twice considered by the Supreme Court. On the initial hearing the ruling was in favor of the defendant on the ground that the maid in the act of finding and turning over to defendant was acting in her capacity of employee.[24] On rehearing the same conclusion was reached, but, interestingly, on the ground on which *Ferguson v. Ray* was decided, namely, the prior possession of the land occupant, as stated by Pollock and Wright and then applied by the English court in the *Staffordshire Waterworks* case. The court obviously was troubled by the *Danielson* decision as affirmed by the *Roberson* case, saying that the latter case fails to discuss at all "the effect of possession of the premises by someone other than the finder" and "undertakes to distinguish *Ferguson v. Ray* on the mere ground that it was not a treasure trove case." The court added: "It is not necessary to a decision of the present case that we should attempt to reconcile the doctrine of *Danielson v. Roberts* and *Roberson*

[22] This observation is surprising, not because it was erroneous, but because the Oregon court had theretofore clearly taken the position that the law of treasure trove, as it existed in England, had no operation in Oregon; money was to be treated like any other article. See Danielson v. Roberts, 44 Ore. 108, 74 P. 913 (1904).

[23] This, too, was amazing so far as it was intended as a reason for applying the Danielson decision rather than that in Ferguson v. Ray.

[24] Considering the nature of a hotel chambermaid's duties, this would seem to have been a perfectly satisfactory basis for the decision. If the employee who found the money had been, for instance, the hotel carpenter or plumber, the employer-employee basis would not support such conclusion. On this point see Erickson v. Sinykin, 223 Minn. 232, 26 N.W. (2d) 172 (1947).

v. Ellis, supra, with that of *Ferguson v. Ray*."[25] A possible explanation for the decision in the *Danielson* case, also the *Roberson* conclusion, is the influence mentioned at the beginning of this note, of that intuitive sympathy for a finder. Noticing, as one must, the strange sequence of decisions in a single jurisdiction, it is easily understood why students, teachers, and lawyers hestitate to prophesy what a court will decide in a finder case.

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[25] Nothing in the report of the Danielson case indicates that the Staffordshire Waterworks case was brought to the court's attention. It is interesing to speculate as to what the Oregon court would have done in the Danielson case if it had known of the English decision. Its full acceptance of the doctrine of that decision when considering the Ferguson case warrants more than a little doubt as to the Danielson conclusion.

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