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## FINDERS-RIGHTS AS AGAINST THE OWNER OF THE LOCUS IN QUO

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FINDERS—RIGHTS AS AGAINST THE OWNER OF THE LOCUS IN QUO—Two recent decisions, *Flax v. Monticello*<sup>1</sup> and *Hannah v. Peel*,<sup>2</sup> have again called attention to the problem of the rights of a land occupant to possession of an article found on his land. Typical of the conflicts which the finders cases as a group present, these courts reached opposite results on similar facts. In the *Flax* case, a guest found a diamond brooch on the dresser of his hotel room. The brooch had been placed there by a cleaning maid who was under the impression that it belonged to him. As between the guest, who claimed as finder, and the hotel, the latter was held to be entitled to the brooch on the basis of its prior possession. Yet in the *Hannah* case, a diamond brooch was found in a house temporarily requisitioned by the British Army, and the Court of King's Bench awarded possession to the finder as against the owner of the house.

The factual differences in the two cases do not explain the different results. The hotel, in the Virginia case, could predicate its claim only on its asserted prior possession established at the time the brooch was left by the previous occupant of the room. It was not a finder since an employer, merely as such, derives no rights through the act of finding by an employee.<sup>3</sup> Moreover, the maid herself, lacking the intent to take possession, could not qualify as a finder. Similarly, in the English case, the landowner's claim rested solely on a claim of prior possession based on ownership of the locus in quo. In neither case was the owner of the locus in quo aware of the brooch prior to its finding. Thus in both cases two issues were presented: (1) Is the owner of the locus in quo a possessor if he is unaware of the existence of the article; and if so (2) as between the prior possessor and the finder who is entitled to possession.

In this country the second question has generally been settled in favor of the prior possessor. While a substantial number of courts have disposed of the problem by the sweeping generalization that a finder is entitled to possession as against all but the true owner,<sup>4</sup> courts should and in most cases do approach the problem as one of possession.<sup>5</sup> It

<sup>1</sup> 185 Va. 474, 39 S.E. (2d) 308 (1946).

<sup>2</sup> [1945] K.B. 509; noted in 13 UNIV. CHI. L. REV. 500 (1946).

<sup>3</sup> *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E. (2d) 661 (1935); *In re Savarino*, (D.C. N.Y. 1932) 1 F. Supp. 331.

<sup>4</sup> *Vickery v. Hardin*, 77 Ind. App. 558, 133 N.E. 922 (1922); *In re Savarino*, (D.C. N.Y. 1932) 1 F. Supp. 331; *Groover v. Tippens*, 51 Ga. App. 47, 179 S.E. 634 (1935); *Zornes v. Bowen*, 223 Iowa 1141, 274 N.W. 877 (1937). Particularly striking in this respect is a recent Minnesota decision, *Erickson v. Sinykin*, (Minn. 1947) 26 N.W. (2d) 172. This case is noted *infra*, p. 266.

<sup>5</sup> For a thorough treatment of this entire problem see Aigler, "Rights of Finders," 21 MICH. L. REV. 664 (1922).

would seem that any right which the finder has to the lost article should be based on his possession of it, and the mere fact of finding should not add to his rights.<sup>6</sup> Since a claim founded on possession alone is inferior to the right not only of the true owner but also to that of a prior possessor, the inquiry takes on a double aspect: first, what effect does the interest of the true owner have in determining the award of possession between the land occupant and the finder; and second, who is the prior possessor. This latter of course depends on whether the owner of the locus in quo is in possession of the article prior to its discovery by the finder.<sup>7</sup>

It is our purpose here to point out those factors which in some recent cases have influenced the courts in deciding these questions: namely (1) the private or public character of the locus in quo; (2) the manner in which the true owner lost possession, that is, was the article "lost" or "mislaid"; and (3) the possibility that the land occupant occupied a fiduciary relationship toward the true owner.

## I

Considerable attention is given by the courts to the nature of the place where the article was found. The relationship between persons and things known as possession is generally said to be predicated upon some element of physical control plus a certain intent.<sup>8</sup> It is the nature of this intent which is at the center of the problem when we seek to determine the possessory interest of the land occupant. Clearly the intent need not always be directed toward the specific article in question; it is familiar doctrine that in many situations the intent to enjoy land and to exclude others will "carry with it" or "imply" the necessary intent in regard to specific articles attached to or located on the property, thus giving rise to what is known as "de facto" possession. Where the locus is private, the courts find no difficulty in implying that since the land occupant intended to exclude others from the use and occupation of the land he "intended" to possess the article. The basis for this implication, however, disappears when the location of the article is the lobby of a bank or the salesrooms of a store. This emphasis on the character of the locus in quo is noticeably recurrent in the series of safe deposit vault cases. The decisions there are uniform to the

<sup>6</sup> The frequent emphasis on the act of taking to the exclusion of other factors is analyzed and criticized in Shartel, "Meaning of Possession," 16 MINN. L. REV. 611 (1932).

<sup>7</sup> The locus in quo is in most cases realty, but it may be a chattel such as a taxi-cab, *In re Savarino*, (D.C. N.Y. 1932) 1 F. Supp. 331; or a streetcar, *Cleveland Ry. Co. v. Durschuk*, 31 Ohio App. 248, 166 N.E. 909 (1928).

<sup>8</sup> For an excellent analysis of this problem see HOLMES, *THE COMMON LAW* 216 (1881).

effect that the safe deposit department, which is under strict surveillance by the bank, is private and the bank is deemed in possession of any article picked up there.<sup>9</sup> Conversely, a common carrier which cannot exclude the public is not considered to have any rights to articles lost in its vehicles.<sup>10</sup>

However, as is so often true, the difficulty arises when an attempt is made to draw a line between what is public and what is private. While the distinction between a private home a hotel lobby is clear, the clarity disappears when it becomes necessary to classify a location open only to a limited group or a place easily accessible to technical trespassers. In the *Flax* case the line was drawn so as to include hotel rooms in the category of private locations, the court emphasizing the fact that access to a hotel room is available only with the permission of the hotel.<sup>11</sup>

The Court of King's Bench, on the other hand, avoided the difficulty by ignoring the distinction. Its decision is based squarely on the doubtful authority of the following language used by the same court in *Bridges v. Hawkesworth*.<sup>12</sup> "We find, therefore, no circumstances in this case to take it out of the general rule of law that the finder of a lost article is entitled to it against all parties except the real owner; and we think that rule must prevail, and that the learned Judge was mistaken in holding that the place in which they were found makes any legal difference." It is true that this court had distinguished the *Bridges* case in *South Staffordshire Water Co. v. Sharman*<sup>13</sup> on the ground of the nature of the locus in quo, but the statement quoted cannot be reconciled with the later decision in favor of the occupant. Thus in this latest English case, the court has apparently returned to the

<sup>9</sup> *Cohen v. Manufacturers Safe Deposit Co.*, 271 App. Div. 428, 65 N.Y.S. (2d) 791 (1946); *Pyle v. Springfield Marine Bank*, 330 Ill. App. 1, 70 N.E. (2d) 257 (1946); *Silcott v. Louisville Trust Co.*, 205 Ky. 234, 265 S.W. 612 (1924); holding that lobby leading to safe deposit box department used by other than bank customers was not private and finder was entitled to bond found there, *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E. (2d) 661 (1935).

<sup>10</sup> *In re Savarino*, (D.C. N.Y. 1932) 1 F. Supp. 331; *Cleveland Ry. Co. v. Durschuk*, 31 Ohio App. 248, 166 N.E. 909 (1928). The decision in this case was that railway company was liable for false imprisonment for detaining a finder of lost money who refused to turn it over to an employee. *Contra: Foulke v. N.Y. Consol. Ry. Co.*, 228 N.Y. 269, 127 N.E. 237 (1920).

<sup>11</sup> *Flax v. Monticello Realty Co.*, 185 Va. 474, 39 S.E. (2d) 308 at 311 (1946). The court stated: "Some of the cases have held that where money and bonds and packages have been found in such public places as lobbies, dining rooms, halls and the like, to which the public has access, the finder is entitled to the property found, as against everyone except the rightful owner, but a private room in a hotel or an inn is a very different locus in quo."

<sup>12</sup> 21 L.J. (N.S.) (Q.B.) 75 at 78 (1851).

<sup>13</sup> [1896] 2 Q.B. 44.

doctrine that the finder has good title against all but the true owner.

It is not entirely clear, however, whether the result in the *Hannah* case was based on a conviction that prior possession is immaterial or whether the court was merely of the opinion that the owner of the locus in quo was not in possession of the article. The court emphasized the fact that the building had never been in the physical possession of the owner. An attempt is also made to distinguish between cases in which the article is located "on" the property rather than "attached to" or "under" the land. In the latter situations it was recognized that the landowner is in de facto possession of the goods. So it is at least possible that the case merely stands for the proposition that the owner of the house was not, in this situation, a prior possessor.

## 2

Frequently the courts draw a distinction between articles intentionally deposited but forgotten and those parted with inadvertently.<sup>14</sup> In some decisions the land occupant is held, as a matter of course, to be entitled to possession of mislaid articles. Viewed as a problem of possession, it would be difficult to draw a valid distinction based on the manner in which the article was deposited unless one would be willing to imply to the occupant an intent to possess all mislaid articles but not those which are lost, a distinction which seems tenuous to say the least. But there is a valid argument which strengthens the claim of the land occupant where the article is mislaid. Admittedly the rights of the true owner are paramount, and where the owner intentionally deposited the article there is a much stronger possibility that he will return to that spot to reclaim it. His interests will be protected much more adequately by awarding possession to the occupant of the locus in quo. But, on the other hand, where the article is lost, the chances that the owner will return, while certainly not non-existent, are substantially lighter, and the claim of the land occupant must stand on its own feet. In other words, while the occupant's possessory claim is the same whether the article is mislaid or lost, the chances of protecting the owner's interests are much stronger where the article is mislaid and that protection can best be afforded by keeping the article easily accessible to the returning owner. It is this consideration which gives added weight to the occupant's claim and allows him to prevail despite the fact that the article was found in a public location.<sup>15</sup>

<sup>14</sup> *Cleveland Ry. Co. v. Durschuk*, 31 Ohio App. 248, 166 N.E. 909 (1928); *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E. (2d) 661 (1935).

<sup>15</sup> See Aigler, "Rights of Finders," 21 MICH. L. REV. 664 (1922). At p. 671 Prof Aigler states: "But it is believed that in the situation now under examination a distinction should be drawn between these two types. When a purse is placed on

## 3

The problem of the possible fiduciary relationship between the occupant and the true owner of the article arises most forcefully in the safe deposit cases. Here there is always the question whether the owner of the locus in quo was in fact a bailee of the article at some time in the past. Whether this gives the land occupant an independent basis on which to predicate his claim or merely categorizes the thing as mislaid is not clear and probably is not important. In either event, it is the true owner's interest on which the court is focusing, and the land occupant is given possession in order better to protect that interest. This approach was illustrated in *Silcott v. Louisville Trust Co.*<sup>16</sup> where a bond was found on the floor of the safety deposit department and possession was awarded to the bank. Here the court stated: "Therefore it must be true almost beyond peradventure that any chattel found in one of these private rooms, access to which was had only by persons renting boxes, must have been the property of one of the trust company's customers, and that any property, whether left in the customer's box or left in this private room, was in a true sense in the custody of the trust company as agent of its customer, or that at least it occupied toward its customer some fiduciary relationship which imposed upon it the duty of caring for his property whether the owner was known or unknown."<sup>17</sup> The same approach was taken by the Virginia court in the *Flax* case in which the hotel was referred to as "custodian" and "bailee" for its guest since it was in "direct and continued" control of its guest rooms and since any agreement to turn it over to the finder would have been unenforceable as constituting a breach of trust.<sup>18</sup>

It should, however, be mentioned that a substantial qualification to this line of reasoning exists. Treasure-trove, which is defined as money or coin, gold, silver, plate, or bullion found hidden in the earth or other private place, the owner thereof being unknown,<sup>19</sup> was not

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 has 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. . . . In the case of the purse truly lost, there is nothing even looking like an offer or acceptance of a bailment relationship."

<sup>16</sup> 205 Ky. 234, 265 S.W. 612 (1924).

<sup>17</sup> Id at 237. See also *Cohen v. Manufacturers Safe Deposit Co.*, 271 App. Div. 428, 65 N.Y.S. (2d) 791 (1946).

<sup>18</sup> This argument was rejected, however, in *Erickson v. Sinykin*, (Minn. 1947) 26 N.W. (2d) 172, with the observation that if it were true, the defendant hotel should have complied with the statute imposing a duty to find the owner.

<sup>19</sup> BLACK, LAW DICTIONARY, 2d ed. (1910).

treated as lost goods historically, but the absolute right to it was in the Crown. This rule was abandoned in the United States and treasure-trove is here considered merely a type of lost goods.<sup>20</sup> However, the decisions, with one exception,<sup>21</sup> prefer the finder to the occupier of the land regardless of the fact that it is obviously mislaid and even though the locus in quo is private.<sup>22</sup> The rule that the finder is entitled to possession as against all but the true owner is invoked, no reason being given for a result different from cases involving other types of lost goods.

#### 4. Conclusion

It is not surprising that the decisions in the finders cases are in conflict when the problem before the courts is one dealing with the elusive concept of possession and involving such a variety of interests. Clearly the interests of the true owner are primary and in the bailment cases and the cases involving mislaid goods, that interest determines the result. It is possible that the lapse of time between loss and finding may also influence the courts for the same reason. Where the time interval is short, the possibility of locating the true owner is correspondingly greater. Conversely, the longer the period, the less does the true owner's interest weigh in the balance. It is suggested that this may explain the apparent disregard for these interests in most of the treasure-trove cases.

Where, as in the case of lost articles or goods unclaimed for a substantial period of time, the courts feel that the true owner's interests can no longer determine the award of possession, the issue narrows to a consideration of the interests of the finder and the owner of the locus in quo. This in turn generally hinges on the question of prior possession. It is true, however, that substantial support largely in language, but some in decision, especially in the English courts, will be found for the proposition that the finder can claim against all but the true owner. But in the final analysis, since this is basically a question of policy, it is wise to recognize that the conduct of the parties may be the basis for the decision reached by the courts.<sup>23</sup>

The obviously confused state of the decisions dealing with the problem discussed in this note is due in large part to the varying weights given by the courts to the strict logic of the principles of

<sup>20</sup> *Vickery v. Hardin*, 77 Ind. App. 558, 133 N.E. 922 (1922).

<sup>21</sup> *State ex rel. Scott v. Buzard*, 235 Mo. App. 636, 144 S.W. (2d) 847 (1940).

<sup>22</sup> *Vickery v. Hardin*, 77 Ind. App. 558, 133 N.E. 922 (1922); *Groover v. Tippens*, 51 Ga. App. 47, 179 S.E. 634 (1935); *Zornes v. Bowen*, 223 Iowa 1141, 274 N.W. 877 (1937).

<sup>23</sup> Sympathies were undoubtedly with the finder in *Erickson v. Sinykin*, (Minn. 1947) 26 N.W. (2d) 172, in view of the fact that he was induced to surrender possession of the money to the hotel on its false representation of knowledge of the true owner. See also *Danielson v. Roberts*, 44 Ore. 108, 74 P. 913 (1901).

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. The finder by the act of finding becomes a possessor and as such is given protection as against all but those who can show a superior right. Such superior right clearly exists in the true owner of the article; logically it also exists in one whose possession preceded that of the finder. The possession concept is, of course, a slippery one,<sup>24</sup> and the intuitive feeling of many that a finder in finding has done a meritorious act deserving of reward has no doubt tended sometimes to deny a prior possession to such competing claimants as the possessor of the locus in quo.

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<sup>24</sup> In this connection it is interesting to observe the conflicting views expressed in such cases as *State v. Munson*, 111 Kan. 318, 206 P. 749 (1922) and *Harbin v. State*, 210 Ala. 55, 97 S. 426 (1923) both involving prosecutions for having "possession" of intoxicating liquor in the process of taking a drink from a container. In the former case the court concluded that the drinker did not have the "possession" forbidden by the statute largely because the statute showed no sufficient intent to "punish personal use of intoxicating liquor."