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Lost, Mislaid, and Abandoned Property

COMMENTS

LOST, MISLAID, AND ABANDONED PROPERTY

The right to acquire and enjoy personal property is deeply imbedded in the common law tradition. "The sense of property is inherent in the human breast. . . . Man was fitted and intended by the Author of his being for . . . the acquisition and enjoyment of property," says Kent.[1] Closely related to man's right to discover and appropriate property to his use and enjoyment is the right to pursue and reclaim such property when it is temporarily lost or mislaid. Such loss or misplacement is a prolific source of difficult questions of law which continue to baffle the courts. It is the purpose of this paper to discover the origin of the problems and to discuss the rights and liabilities of the parties in some of the situations which arise when property is lost, mislaid, or abandoned.[2]

Among the early writers[3] on this subject, the chief topic considered is the rights of those who discover chattels that are *res nullius*. This is readily understandable because of the great amount of natural wealth and the sparsity of the population during the early centuries. The Emperor Hadrian[4] laid down a rule that treasure found on land belonging to the emperor should be shared—half to the finder and half to the emperor. Very reasonably, this ruler also decreed that one who found treasure on his own land owned the treasure, and one who found treasure on the land of another "by accident and without especially searching for it" must share it equally with the owner of the land.[5] Thus the law of finding began to take definite form.

On the subject of abandonment, Justinian laid down a definition which has withstood the flux of time. A thing is said to be abandoned, says Justinian, "which its owner throws away with the deliberate intention that it shall no longer be part of his property, and of which, consequently, he immediately ceases to be owner."[6] This ancient jurist enunciated a duty of returning lost

1. 2 KENT, COMM. *319. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 87; POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 192; Connor, *The Nature of Succession*, p. 151, *supra*.

2. For purposes of clarity, this paper omits the problems of salvage and other maritime situations. A separate system of law governs these problems. For a discussion thereof see ABBOTT, SHIPPING (12th ed. 1881) 536 *et seq.*; HUGHES, ADMIRALTY LAW (1901) 125 *et seq.*

3. JUSTINIAN, INSTITUTES (Moyle's 4th ed. 1906) 38; TACITUS, ANNALES XVI, 1-3; see RADIN, ROMAN LAW (1927) 385 *et seq.* for a discussion of the Roman concept of possession.

4. JUSTINIAN, *op. cit. supra*, 44.

5. *Ibid.* For the modern authority on the status of treasure trove see notes *infra*.

6. JUSTINIAN, *op. cit. supra*, 44. As far as rights of the recent owner are concerned this language is correct. But one who abandons may be liable to injuries done to third parties due to the manner or place of the abandonment. See Parnell v. Holland Furnace Co., 260 N. Y. 604, 184 N. E. 112 (1932), *affirming*, 234 App. Div. 567 (4th Dep't), where the defendant was held to be liable to the plaintiff for injuries caused by the explosion of gasoline in an abandoned and dismantled car used in defendant's business and left by defendant's employee in a vacant lot.

property to its owner and asserted that one who keeps found property with an intent to profit thereby commits a theft.[7] Possibly this is a forerunner of modern statutes which render a finder guilty of larceny for fraudulent concealment of lost goods.[8]

Thus, it may be seen, that the legal problems presented by the loss or abandonment of property are not new. By the third century the concept of lost goods and abandoned goods was known to the Romans.[9] The classification—mislaid property—however, is comparatively modern and its genesis is not ascertainable.[10]

A chronological development of the problems presented under these three topics would no doubt be interesting, but clarity and brevity demand a systematic discussion of the present day ramifications of the situation. This can best be accomplished by treating separately the elements which go to make up lost goods, mislaid goods and abandoned goods. The rights and liabilities of the parties involved will be discussed in each instance.

Before discussing the rights of the parties under each category, it is necessary to establish distinctions which will permit the courts to classify correctly property as lost, mislaid or abandoned.[11] This may be done by discussing the tests employed in determining whether the property falls under one or the other of the classifications.

Property is lost when it is unintentionally separated from the dominion of its owner.[12] For example, a coin which has fallen through a hole in one's pocket is lost. On the other hand, mislaid property is property which has been intentionally put in a certain place and has been forgotten by its owner.[13] A brief case, placed on a desk while the owner does business with the occupant of the premises and forgotten by the owner when he leaves, is mislaid. Abandonment combines the element of physical separation, characteristic of lost and mislaid property, with the element of intentional placement, essential in mislaid prop-

7. *Ibid.*

8. See note 87, *infra.*

9. Some writers attribute to Julius Paulus, writing about 200 A. D., the origin of certain phases of the law of lost property, particularly treasure trove. HILL, TREASURE TROVE IN LAW AND PRACTICE (1936) 5.

10. It is possible that this concept arose from the fact that the retention of lost property could not constitute a larceny at common law. To get around this, in cases where the owner forgot his goods, the courts held that they were not lost but still in the constructive possession of the owner. Lawrence v. State, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644 (1839). Carried into the non-criminal law, this situation has all the elements of mislaid property.

11. As the rights of the finder vary with the status of the goods, this distinction is essential. See notes 33-35, 95, 100 *infra* and text discussion.

12. See Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913, 914 (1904). Lost property may be defined as property which the owner has involuntarily parted with and does not know where to find it. Loucks v. Gallogly, 1 Misc. 22, 23 N. Y. Supp. 126 (Sup. Ct. 1892).

13. See Lawrence v. State, 1 Humph. (Tenn.) 288, 34 Am. Dec. 644 (1839) and the discussion of this case at p. 233.

erty, but adds to it the intention of relinquishing all rights to the object.[14]

The next question which presents itself is how can the courts ascertain whether an object is lost, mislaid or abandoned. This problem, while fraught with difficulty,[15] must be solved by the courts in order to determine the rights of all claimants.[16] Unfortunately, no set formula has been discovered that will supply the proper answer to every set of circumstances. It is submitted that the best approach to the solution of the difficulty is this question: Would the object ordinarily be voluntarily placed in this position? In answering this query it is essential that the place of the finding, the value and the nature of the goods as well as every surrounding circumstance be analyzed. If, on careful analysis, an affirmative answer is reached, the goods are probably mislaid;[17] if negative, the object probably falls into the category of lost goods.[18] That an owner does not intentionally give up all rights in his property is strongly presumed by the courts.[19] It is to be noted, that due to the presence of the element of undisclosed intent on the part of the "loser", certainty of rule is almost impossible to attain. However, reasonable probability may be reached in almost every case.

I. Lost Goods

Although lost goods may be simply defined as goods physically separated from their owner without his knowing of the separation,[20] many knotty problems arise in determining the rights of third persons. Who has the right of possession? Whether the goods are found in a public or private place, on the surface or beneath it, by one who is working for another or by one in his individual capacity are among the factors which aid in formulating an answer to this question.

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14. See Wilson v. Colorado Mining Co., 227 Fed. 721, 725 (C. C. A. 8th, 1915); Livermore v. White, 72 Me. 452, 455 (1883).

15. Where money was found in the crevices of an old safe, it might have been intentionally placed there and forgotten (being mislaid property) or it might have fallen there after having been placed on a shelf in the safe (being lost property). Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528 (1877). This exemplifies but one of the very nice questions that have arisen.

16. Generally speaking, the finder of lost or mislaid property acquires only a possessory right. Armory v. Delamirie, 1 Str. 505, 93 Eng. Reprint 664 (1722). The finder of abandoned property acquires title. Pollock & Wright, Possession (1888) 124 *et seq.*

17. The essence of the concept of mislaid property is a voluntary placing and a forgetting. State v. Courtsol, 89 Conn. 564, 94 Atl. 973 (1915). See p. 233 *infra.*

18. Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913 (1904).

19. In Foulke v. N. Y. Consol. Ry., 228 N. Y. 269, 273, 127 N. E. 237, 238 (1920), it was said: "The abandonment of property is the relinquishing of all title, possession or claim to or of it—a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away. Abandoned property is owned by him who takes it into his ownership."

20. Loucks v. Gallogly, 1 Misc. 22, 23 N. Y. Supp. 126 (Sup. Ct. 1892); Sovern v Yoran, 16 Ore. 269, 20 Pac. 100 (1888).

A. *Public and Private Place*

Probably the most important single factor in determining who has the right to possess a lost chattel is the place of the finding.[21] The reason for this is that the usual litigation involving lost goods is based upon the fact that some person claims a right to the possession of the goods superior and prior to that of the actual finder, his contention generally being that the goods were found in a place over which he exercises dominion.[22] The courts have answered this problem by determining which of the claimants was the first to obtain possession of the goods.[23] To him is given the right to remain in possession against the world excepting one claiming with or under title. A brief discussion of the concept of possession, in relation to lost property, will aid in this determination.

One of the fundamental principles of possession is that a person, once in rightful possession of a chattel, remains in possession until someone else takes possession.[24] In the lost property cases, the question is—when does possession shift from the loser to the one next acquiring it? It might shift at the time of the losing to him who has possession of the *locus in quo*.[25] It might shift at the moment some person other than the loser actually reduces it to his physical control.[26] The answer to these hypotheses will be found in the cases in point.

Where the place of the finding is public, such as a highway,[27] the lost object cannot be said to be in the possession of anyone[28] with the possible exception

21. In speaking of lost goods it has been said that "ordinarily the place where it is found does not make any difference." Durfee v. Jones, 11 R. I. 588, 590, 23 Am. Rep. 528, 530 (1877). However, the discussion of the problem of goods found on private property disproves this. Also, in determining whether goods are lost or mislaid, the place of the finding is often indicative of the voluntary or involuntary separation from their owner.

22. Hamaker v. Blanchard, 90 Pa. St. 377, 35 Am. Rep. 664 (1879); Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528 (1877); compare South Staffordshire Water Co. v. Sharman, [1896] 2 Q. B. 44 with Foster v. Fidelity Safety Deposit Co., 264 Mo. 89, 174 S. W. 376 (1915). See, also, Note (1927) 15 Ky. L. J. 225.

23. The decisions are in conflict as to who is in possession first. South Staffordshire Water Co. v. Sharman, [1896] 2 Q. B. 44, is probably the leading case in favor of the owner of the *locus in quo*. *Contra*: Weeks v. Hackett, 104 Me. 264, 71 Atl. 858 (1908).

24. Merry v. Green, 7 M. & W. 623, 151 Eng. Reprint 916 (1841); POLLOCK & WRIGHT, POSSESSION (1888) 127 *et seq.*; 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (3d ed. 1923) 42.

25. This seems to be the basis of the receptacle theory of possession as applied to lost goods. See discussion of the Sharman case, p. 227 *infra*.

26. In opposition to the receptacle theory, this seems to be the general American rule. See discussion of the Weeks case and the Ellis case, p. 228 *infra*.

27. Williams v. State, 165 Ind. 472, 75 N. E. 875 (1905); see Hume v. Elder, 178 App. Div. 652, 653, 165 N. Y. Supp. 849 (2d Dep't 1917).

28. Possession may be defined as that condition of facts under which one can exercise his power over a corporeal thing to the exclusion of others. One cannot be said to be exercising such a power when he has no title to the object and has not reduced it to his physical control. See Starits v. Avery, 204 Iowa 401, 405, 213 N. W. 769, 771 (1927); Slater v. Rawson, 6 Metc. (Mass.) 439, 444 (1843); Churchill v. Onderdonk, 59 N. Y. 134, 136 (1874).

of the state. As for the state, although a different rule has sometimes been applied in cases of treasure trove wherever found,[29] from the earliest times it exercised no right against the finder of other kinds of lost property.[30] Under an absolute monarchy, where the king is considered the fountainhead of all rights, a claim by him might be tenable, but in this country such a claim would be vacuous.[31] From the fact that the rights of the state originate from the people, and no such power has been delegated, this is self evident. Thus, where goods are lost in a public place, it has been held that the loser retains possession of the goods until a finder actually places the object under his control with an intent to acquire possession thereof.[32]

As far as the problem of goods found on private property is concerned, conflicting theories have arisen. In the first place, the degree of control the occupant exercises over the *locus* is of great importance.[33] In fact, the courts have distinguished between places under private control but open to the public[34] (such as banks, shops, and other quasi-public places) and places from which the public is excluded[35] (such as a home).

Probably the best known case concerning the finding of property on the premises of another to which the public is invited is *Bridges v. Hawkesworth*.[36] In that case, the plaintiff, a salesman, found a parcel of banknotes in the defendant's shop. The important fact was that the parcel was on the floor in the public part of the shop. Apparently believing that the property was in the possession of the shopkeeper, the lower court awarded the property to him rather than to the plaintiff. But this decision was reversed on the ground that the notes were not in the possession of the shopkeeper, that he had, with regards thereto, no responsibilities and that the notes were not "within the protection

29. In England treasure trove belongs to the Crown. Attorney General v. British Museum, [1903] 2 Ch. 598. In the United States, the rule is to the contrary. 2 KENT, COMMENTARIES ON AMERICAN LAW *357 *et seq.* For a definition and brief discussion of treasure trove see p. 228, *infra.*

30. There seems to be no report of litigation in which the sovereign has asserted such a claim. See BL. COMM. *285.

31. See notes 29 and 30, *supra;* WARREN, CASES ON PROPERTY (1938) 100.

32. POLLOCK & WRIGHT, POSSESSION (1888) 38, 40 *et seq.*

33. Bridges v. Hawkesworth, [1851] 21 L. J. (N. S.) 75 (owner of premises inviting public to enter—held, finder has right superior to right of owner of locus); Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S. W. 612 (1924) (owner kept public out of this part of bank by stationing guards—held, owner of *locus* prevails over finder).

34. Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S. W. 612 (1924); Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 2 N. E. (2d) 661 (1935). Both of these cases are discussed in Law Review articles; for the former see: (1925) MINN. L. REV. 390 and Note (1927) 15 KY. L. REV. 225; for the latter see (1936) 22 CORN. L. Q. 263.

35. State v. Cummings, 33 Conn. 260 (1866); *cf.* Commercial Bk. v. Pleasants, 6 Whar. (Pa.) 375 (1841).

36. [1851] 21 L. J. (N. S.) 75, 15 Jur. 1079. For an excellent discussion of this case see, GOODHART, ESSAYS ON JURISPRUDENCE (1931) c. IV [originally published as *Three Cases on Possession,* (1928) 3 CAMB. L. J. 195]. For a criticism of GOODHART see Francis, *Three Cases on Possession—Some Further Observations,* (1928) 14 ST. LOUIS L. REV. 11.

of his house".[37] The conclusion to be drawn from this case is that a third party must have possession to the exclusion of others in order to have a claim superior to that of the actual finder. In brief, the courts apply the same rules in controversies arising out of a finding in a quasi-public place that are used in the public-place situation.[38] This is proper in view of the fact that the occupant of the quasi-public place invites the public to enter.[39] While it is true that he does not expressly invite them "to find", they are free in many cases to make almost any use of the premises within the bounds of propriety.

The real conflict in authorities arises out of the cases in which the finding is in a private place. Probably the best exposition of the contrasting theories is a comparison of *South Staffordshire Water Co. v. Sharman*,[40] on the one hand, and *Weeks v. Hackett*[41] and *Robertson v. Ellis*,[42] on the other. In the *Sharman* case, the plaintiff owned and was in possession of certain realty which was covered by a pond. The defendant, employed to clean the pool, found two rings at the bottom of it and refused to turn them over to the plaintiff. The trial judge, applying the rule of *Armory v. Delamirie*[43] and of the *Hawkesworth* case held that the defendant had good title. The higher court overruled this decision saying:

"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, 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 elsewhere, the right to possess it also. And it makes no difference

37. Bridges v. Hawkesworth, [1851] 21 L. J. (N. S.) 75, 78. 15 Jur. 1079, 1081.

38. Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878 (1902) (purse found under table in amusement park, *held*, finder has right to possession as against the owner of the *locus in quo*). See Loucks v. Gallogly, 1 Misc. 22, 23 N. Y. Supp. 126 (1892); *cf.* Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S. W. 612 (1924). See also Note (1927) 15 Ky. L. J. 225.

39. If the finder is not on the premises as an invitee or licensee, should the owner of the *locus* prevail? Barker v. Bates, 13 Pick. (Mass.) 255 (1832), answers this query in the affirmative. It is elementary that a trespasser should not profit by his wrongdoing. In Isle Royale v. Hertin, 37 Mich. 332, 334 (1877), the following language was used: "It is conceded that at the common law when one thus goes on the land of another on the assumption of ownership, though in perfect good faith . . . he may be held responsible as a trespasser . . ."; he cannot ". . . establish in himself any affirmative rights, based on his unlawful, though unintentional encroachment upon the right of another." In Elwes v. Brigg Gas Co., (1886) 33 Ch. D. 562, 568, the court said: ". . . a mere trespasser could not have taken possession of it, he could only have come at it by further acts of trespass involving spoil and waste of the inheritance. . . ." See SALMOND, JURISPRUDENCE (9th ed. 1937) 380 *et seq.*; *cf.* GOODHART, *op. cit. supra*, note 36, at 86; for a criticism of Goodhart, see Francis, *Three Cases on Possession—Some Further Observations*, (1928) 14 ST. LOUIS L. REV. 11 [reprinted in FRYER, READINGS ON PERSONAL PROPERTY (3d ed. 1938) 85].

40. [1896] 2 Q. B. D. 44.

41. 104 Me. 264, 71 Atl. 858 (1908).

42. 58 Ore. 219, 114 Pac. 100 (1911).

43. 1 Strange 505, 93 Eng. Reprints 664 (1722).

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."[44]

This decision is an excellent example of the receptacle theory and runs counter to the *Hawkesworth* case which has been often cited as holding that the place of the finding is unimportant. Whether the *Hawkesworth* case lays this down as a general rule or whether the learned judge made the statement in relation to the particular case has been argued by many writers.[45]

In the *Weeks* case, the plaintiff found some gold coins buried on land owned by the defendant's brother. The defendant refused to return the coins to the plaintiff claiming that he had purchased them from his brother who, as owner of the *locus in quo,* had a right to them. In this case, the court states that in the United States the rights of finders of treasure trove are similar to those of finders of lost goods[46] and holds that the owner of land on which treasure is found is not entitled to it by virtue of his ownership of the land.[47] The *Ellis* case is somewhat analogous. The plaintiff found some gold coins in some trash in a warehouse that he was cleaning. The defendant, the owner of the premises, refused to return the coins to the plaintiff. The court, distinguishing this case from cases in which property is *mislaid* in a shop or bank, holds that the plaintiff, as finder, has a right superior to that of the defendant. Thus, it is seen that the place of the finding is an important factor in determining the rights of the parties.

Whether the receptacle theory or the "finder's-keepers" view should be followed is doubtful. Since the purpose of the law of lost property is to protect the rights of the owner,[48] it seems reasonable that the owner of the goods is more likely to retrieve them if the owner of the *locus* is given possession of the goods rather than an itinerant stranger who happens to find. The merits of this argument are discussed later.

B. Treasure Trove

Although it has been indicated that treasure trove[49] is generally considered

44. [1896] 2 Q. B. D. 44, 47.

45. GOODHART, *loc. cit. supra,* contains an excellent criticism of the Hawkesworth case and the Sharman case. A discrepancy in the language of the Sharman case as reported in 15 Jur. 1079 and as in 21 L. J. Q. 75 is mentioned. Possibly this is an explanation of the difficulties which this case has caused. According to Goodhart's explanation of the Hawkesworth case Judge Patterson apparently overlooked the place of the finding theory. So also, Lord Russell, in speaking of that case, says, in the Sharman case, "the learned judge was mistaken in holding that the place in which they were found makes any legal difference." 15 Jur. 1079, 1082 (1896). See also HOLMES, COMMON LAW (1888) 221 *et seq.*

46. See 104 Me. 264, 266, 71 Atl. 858, 860 (1908).

47. Weeks v. Hackett, 104 Me. 264, 71 Atl. 858 (1908); Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913 (1904). See discussion of treasure trove, p. 229, *infra.*

48. See WARREN, CASES ON PROPERTY (1938) 116, quoted *infra,* p. 234.

49. Coke defines treasure trove ". . . when any gold or silver, in coin, plate or bullion,

in the same light as lost property in this country,[50] this was not always the case.[51] In Rome,[52] England[53] and many other countries,[54] the sovereign was given the right to any treasure found in the earth. That the gold or silver, for these were the only elements which constituted treasure trove in early times,[55] must be buried is indicated by Blackstone who repeats the rule that the king is entitled to treasure trove but adds that if the same articles were found upon the surface they would belong, not to the king, but to the finder.[56] Thus a definite distinction between lost goods and treasure trove was enunciated in England.[57]

In the United States, where no claim has been made by the state to goods found on the surface, the general rule is that the state is not entitled to treasure trove unless there is state legislation to the contrary.[58] Whether the finder or the owner of the *locus in quo* has the right to the treasure depends upon whether the particular state applies the receptacle theory.[59] Louisiana, following the Napoleonic Code,[60] requires that the finder and the owner of the *locus in quo* share the treasure.[61]

An excellent example of the American rule is seen in the case of *Danielson v. Roberts*.[62] There two boys found a quantity of gold coins buried on another's

hath been of ancient times hidden, wheresoever it be found, whereof no person can prove any property . . ." 3 INST. 132. See also 1 BL. COMM. *285. An interesting discussion of what constitutes treasure trove is found in Att'y General v. British Museum Trustees [1903] 2 Ch. Rep. 598.

50. See notes 46 and 47, *supra*.

51. In ancient Rome, the emperor was entitled to one-half of all treasure trove. JUSTINIAN, INSTITUTES (Moyles, 4th ed. 1906) 38. In England, the crown was given all. BL. COMM. *285. An early N. Y. statute read "A person who fraudulently conceals or appropriates to his own use any lost treasure . . . belonging to this state by virtue of its sovereignty is guilty of a misdemeanor." N. Y. PENAL CODE (1881) § 482. This language has been reenacted into N. Y. PENAL LAW § 942; however, no case under it has been found.

52. See note 4, *supra*.

53. Before 1066, the following passage appeared in the Laws of Edward the Confessor: "Treasures from the earth belong to the King, unless they be found in a church or in a cemetery. And if they be found there, the gold belongs to the King, and half the silver, and half to the church, where it shall have been found, whoever he be, rich or poor, [that found it?]." Quoted from HILL, TREASURE TROVE (1936) 137.

54. See HILL, TREASURE TROVE (1936) for a full discussion of this subject.

55. See note 53 *infra*.

56. BL. COMM. *285.

57. Since only gold and silver were considered treasure trove, a different rule applied in England to other buried chattels. 3 Co., INST. *132 defines treasure trove as "any gold or silver, in coin, plate or bullyon . . . if it be any other metall, it is no treasure."

58. See N. Y. PENAL CODE (1881) § 482.

59. See p. 227, *supra*.

60. FUQUA, CIVIL CODE OF THE STATE OF LOUISIANA (1867) art. 3386.

61. *Ibid.*

62. 44 Ore. 108, 74 Pac. 913 (1904) (here the court relies on the Armory case); *cf.* Ferguson v. Ray, 44 Ore. 557, 77 Pac. 600 (1904) (the court relied on the Sharman case as a basis for its decision).

land. In holding that the boys had a superior right to the coins, the court said that that rule "applies with equal force and reason to money hidden or secreted in the earth as to property found on the surface."[63] It is thus seen that the early distinctions between lost property and treasure trove has been completely abrogated in this country.

C. *The Master-Servant Relationship*

Another incident causing confusion in determining who has the right to the possession of lost goods arises out of the master-servant relationship. In cases of this type, the nature of the employment is the chief factor in determining the rights of the parties.[64] That this is so becomes apparent when it is seen that statements have been made to the effect that the finder must have been acting in his representative capacity in the *very finding itself* in order for the master to have a right superior to that of his servant.[65] This does not mean that a person must be hired for the sole purpose of looking for lost goods but, rather, that his relationship with the master implies that he will turn anything he finds over to his master.[66] A floorman in a bank[67] and a servant[68] have been included within this classification. On the other hand, a person employed to clean out a henhouse[69] or to dig a cellar[70] has been accorded the right to possess lost goods, found while working and on the employer's premises, as against his employer.[71]

An interesting case which brings out the necessity for some special relationship or regulation between the parties in order to give the employer a superior right is *Majewski v. Farley*.[72] Here the plaintiff, a police officer, found some Liberty Bonds while off duty. Departmental regulations[73] required that all officers turn over property which they found to the property clerk. If the property was unclaimed for a certain length of time, it was to be sold, the proceeds going to the pension fund. In the instant case, the plaintiff endeavored to

63. Danielson v. Roberts, 44 Ore. 108, 111, 74 Pac. 913, 914 (1904).

64. "The confidential relationship between the employer and employee may be such that, without proof of any special agreement, the law will impose upon the employee the duty to return the property found to the employer." KENNEDY, CASES ON THE LAW OF PERSONAL PROPERTY (1932) 155. Foster v. Fidelity Safe Deposit Co., 162 Mo. App. 165, 145 S. W. 139 (1912); *cf.* Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913 (1904).

65. See note 73, *infra*. Hanmaker v. Blanchard, 90 Pa. 377 (1879).

66. Obviously a guard in a bank is employed to protect the property of the employer and the employer's customers. It necessarily follows that he is obliged to turn over to the bank anything that he finds. See note 64, *infra*.

67. Kincaid v. Eaton, 98 Mass. 139 (1867); Loucks v. Gallogly, 1 Misc. 22, 23 N. Y. Supp. 126 (Sup. Ct., 1892).

68. State v. Cummings, 33 Conn. 260 (1866); see Mathews v. Hassell, 1 E. D. Smith (N. Y.) 393, 394 (1852).

69. Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913 (1903).

70. Vickery v. Hardin, 77 Ind. App. 558, 133 N. E. 922 (1922).

71. See quotation from Danielson Case, p. 231 *infra*.

72. 203 App. Div. 77, 196 N. Y. Supp. 508 (1st Dep't 1922).

73. N. Y. City Charter (as amended 1917) §§ 300, 327, 329, 330, 333-335, 353.

recover the bonds when they were not claimed. The court held that he was completely barred from any interest in them. It further stated that by joining the police force he relinquished all claim to any lost property found by him. Thus, it is seen, some relationship or regulation over and above the mere status of master-servant is necessary if the master is to prevail. *Danielson v. Roberts*[74] further brings this out by the statement:

"The fact that the money was found on the premises of the defendants, *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."[75]

D. Rights and Duties of Finders of Lost Property

It is well to note at this time that no one is obliged to assume the obligation of a finder. A person may pass by a chattel which is obviously lost without any duty to reduce it to his possession and conserve it for its owner.[76] But if a person does elect to find, what duties does he incur?

In answering this question, the courts, as early as 1591, distinguished between misfeasance and nonfeasance.[77] Where an owner sued a finder for keeping butter so negligently that it became worthless, the court said that "no law compelleth him that finds a thing to keep [it] safely . . . but if a man find a thing and useth it, he is answerable for it is conversion".[78] That the latter half of this statement is incontestible is apparent;[79] but the former half must be closely scrutinized before being accepted. In order to protect the owner, the election to find should carry with it a duty to use reasonable care to protect the goods. Under the instant case, if the defendant had not reduced the butter to his custody, it is highly possible that someone else would—someone who would probably care for the goods. Writing of gratuitous bailees, Story[80] asks "why should he be permitted to separate the parts of the obligation, or disjoin those which were entered into as a whole?" This language is particu-

74. 44 Ore. 108, 111, 74 Pac. 913, 914 (1904).

75. Italics supplied. The Shulhan Arukh (1555) § 401 succinctly indicates the Hebraic Law on this subject. "If workmen find a treasure it belongs to them. But if the employer has hired the workmen to collect loose objects for him, and they while doing the work find a treasure, it belongs to the employer." In short, something more than the bare employer-employee relation was required.

76. In logic, no obligation can be imposed upon a person to burden himself with duties towards the property of a stranger. In law, this is equally recognized. See note 74-77, *infra.*

77. Mulgrave v. Ogden, [1591] Cro. Eliz. 219, 78 Eng. Reprints 475.

78. *Ibid.*

79. It is fundamental that a person who uses found property is liable to the owner for any damages caused by such use. In Watts v. Ward, 1 Ore. 86, 62 Am. Dec. 299, 301 (1854) the court, while recognizing that the plaintiffs had a right to recompense for expenses in keeping the defendant's horses which they had found, said that the property should be returned and then the "compensation, if any, can be determined. Plaintiffs having treated and used the horses . . . for their own benefit and gain, defendant had a right to charge them with a conversion of the property and maintain his suit for its value."

80. STORY, BAILMENTS (9th ed. 1878) § 150 *et seq.*

larly applicable to the finder of lost goods. If he elects to find he should be obliged to conserve. Whether he is so obliged may be deduced from a study of the question: May a person recover for monies expended in conserving chattels he has found?

The authorities are divided on this question. In *Amory v. Flyn*[81] it is said, by way of dictum, that a finder should receive recompense for necessary expenses in caring for geese that had been found. Going further, the court, in *Chase v. Corcoran*,[82] gave the finder a right to recover for monies expended in repairing a boat he had found. On the other hand, in *Nicholson v. Chapman*[83] it was held that voluntary acts "which are . . . moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude." Chief Justice Shaw uses similar language in *Wentworth v. Day*.[84]

It is submitted that the *Amory* case probably lays down the better rule. This case gives the finder a right to recover *necessary* expenses. If the owner has a right to recover his geese, he should have a right to get back live, healthy ones, not starved carcasses; and, likewise, the finder should receive his recompense. The *Chase* case goes a bit too far; for to allow recovery for monies expended not in conserving but in repairing is dangerous. It might well be that under this rule an owner would find his lost automobile repainted and thoroughly overhauled—and an awesome bill from the finder. The cases which give the finder no right to recover expenses are probably strict logical results of the doctrine of lost goods.[85] However, in justice a person should be allowed to recover provided the monies expended were reasonable in view of the perishable nature of the goods.[86]

That a failure to return lost goods to their owner after a demand by him, constitutes a conversion on the part of the finder is too well established to require discussion.[87] However, a word must be said concerning the criminal liability of a finder for his refusal to return.

At early common law, lost goods could not be the subject of larceny; for the element of actual or constructive possession by the owner was not present.[88] This technical requisite of a trespass against the owner was gradually circum-

81. 10 Johns. (N. Y.) 102, 6 Am. Dec. 316 (1813).

82. 106 Mass. 286 (1871).

83. 2 H. Blackst. 254, 259, 126 Eng. Reprints 536, 539 (1793).

84. 3 Metc. (Mass.) 352, 37 Am. Dec. 145 (1841).

85. Speaking in an absolute sense, the finder has no power to impose a claim for expenses on the goods of another without any acquiescence or knowledge thereof on the part of the owner.

86. Reeder v. Anderson Administrators, 34 Ky. 193 (1836); STORY, BAILMENTS (9th ed. 1878) § 150 *et seq.* and cases cited in notes 78 and 79, *supra*.

87. As early as 1540, the English courts considered a refusal to return a conversion. In Wilbraham v. Snow, 2 Wms. Saunders 47, 85 Eng. Reprint 624 it was said that "where goods came into the defendant's possession by delivery or finding, the plaintiff must demand them, and the defendant refuse to deliver them up, in order to constitute a conversion. See also Agar v. Lisle, 2 Hob. 187, 80 Eng. Reprints 334 (1724). In America, Watts v. Ward, 1 Ore. 86, 62 Am. Dec. 299 (1854), lays down the same rule.

88. Lawrence v. State, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644 (1839).

vented. Connecticut[89] adopted the view that when a finder knows or could readily ascertain who owned the goods but failed to do so was guilty of a larceny. This view was adopted by statute in many states.[90] However, cases of this nature are very few.[91] Probably, this is due to the difficulties of proving the intentional wrongdoing and the unusualness of the situation. Suffice it to say that efforts are being made to protect the owner's interest in lost property both civilly and criminally.

II. Mislaid Property

Mislaid property is distinguishable from lost property in that the owner intentionally removed the property from his actual possession but unintentionally forgot it.[92] That "forgetting" is of the essence of the distinction is further brought out by the fact that some writers choose to call it "forgotten property" rather than mislaid.[93] The question at hand is whether the rights of the finder are in any way effected by this refinement.

One of the earliest cases recognizing a third classification is the case of *Lawrence v. State*,[94] a criminal prosecution brought against a barber for stealing a pocketbook left on the table in his shop. The court held that the property was not lost. To constitute larceny, according to the opinion, it was necessary that the owner have at least constructive possession of the article. Therefore, in upholding the conviction, the court impliedly gives to the owner of the goods a constructive possession of the property.[95] This suggests a further problem. If the goods are "forgotten" who would best be able to protect the owner's rights therein, the finder or the owner of the *locus in quo*? The courts are of

89. State v. Weston, 9 Conn. 527 (1833).

90. Ariz. Rev. Code (Struckmeyer, 1928) § 4756; Cal. Penal Code (Deering, 1935) § 485; Idaho Code Ann. (1932) § 17-3502; Iowa Code (1935) § 13018; Minn. Stat. (Mason, 1927) § 10367; Mo. Rev. Stat. (1929) § 4074; N. Y. Penal Law (1909) § 1300; N. D. Comp. Laws Ann. (1913) § 9914; S. D. Comp. Laws (1929) § 4211; Tenn. Code (Will, Shan & Harsh, 1932) § 10930; Wash. Rev. Stat. Ann. (Remington, 1932) § 2601; Wis. Stat. (1933) § 170; Wyo. Rev. Stat. Ann. (Courtright, 1931) § 32-315.

91. State v. Brewer, 93 Ark. 479, 125 S. W. 127 (1910); Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182 (1876); State v. Hayes, 98 Iowa 619, 67 N. W. 673 (1896); Commonwealth v. Titus, 116 Mass. 42, 17 Am. Rep. 138 (1874); Reed v. State, 8 Tex. Ct. App. 40, 34 Am. Rep. 732 (1880).

92. State v. Courtsol, 89 Conn. 564 (1915); McAvoy v. Medina, 93 Mass. 548 (1866); Foster v. Fidelity Safe Deposit Co., 162 Mo. App. 165, 145 S. E. 139 (1912); Foulke v. N. Y. Consol. Ry., 228 N. Y. 269, 127 N. E. 237 (1920).

93. Lawrence v. State, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644 (1839); Aigler, *Rights of Finders* (1923) 21 Mich. L. Rev. 664.

94. 1 Humph. (Tenn.) 228, 34 Am. Dec. 644 (1839). The court states that the pocketbook was "left, not lost."

95. *Ibid.* Without this constructive possession, the thief would not have committed a trespass which this case requires as an element of larceny. See notes 85-87 *supra*. In State v. Courtsol, 89 Conn. 564, 568, 94 Atl. 973, 975 (1915), it was said: "The owner is treated as still constructively in possession of it, although its custody may be in another, in whose shop or car it had been left."

the opinion that the owner of the *locus* is the proper custodian of the property. A discussion of the cases will bring this out.

McAvoy v. Medina[96] involves the above mentioned question. In this case the plaintiff found a pocketbook on a table in a barber shop. The question is whether the shopkeeper has a right superior to his. Once again the court states that the property is not lost but was voluntarily placed there and forgotten. Citing the *Hawkesworth* case for the proposition that the place of the finding of lost goods does not effect the finder's rights, the court holds that the pocketbook was not lost but states that the present case resembles the *Lawrence* case. It gave the custody of the purse to the shopkeeper who was under a duty to use care in safekeeping the property until the owner should call for it.[97] In *Foster v. Fidelity Safe Deposit Co.*,[98] the plaintiff found money on a desk in a private booth kept for the convenience of patrons of safe deposit boxes. He turned it over to the custody of the defendant. This court held that the bank had possession of the money and, hence, it could not be "found". Since the money was found on the desk, it was evidently mislaid so that the bank would have custody thereof. That it could not be "found" as lost property is found is true; however, the term "found" is likewise applied to the discovery of mislaid or abandoned property. Apparently, the court was using the term "found" in its narrower sense.[99]

Whether the property be "forgotten" in a shop, a bank or a railway car,[100] the principles are the same. The owner of the *locus in quo* has, at least, a temporary right to the possession of the goods as against a finder. Whether the finder or the owner of the *locus* should be entitled to the goods ultimately in the event that the owner does not appear is another question. The *McAvoy* case states that the finder of mislaid property acquires no right by his finding and the subsequent act of turning it over to the shopkeeper "does not create any".[101] This seems to be the opinion of the courts, when the question of possessory rights is discussed. Professor Warren ably defends the other alternative when he says:

"The rules of law should be so moulded as to guard the interests of the owner of the chattel. If it will be of probable advantage to the owner of the chattel that A, the person owning, or in possession of, the *locus* where the thing was found, should keep the possession of the chattel for a time, then of course that should be done. The finder, B, in *Bridges v. Hawkesworth* . . . recognized that it was his duty to

96. 93 Mass. 548, 87 Am. Dec. 733 (1866).

97. The courts are not clear in stating when the duty arises or when the goods come within the protection of the house. Until the owner of the *locus* has knowledge of the presence of the goods, he should have no duty.

98. 162 Mo. App. 165, 145 S. W. 139 (1912).

99. Much of the difficulty in the law of lost, mislaid and abandoned property is caused by the various uses of this word. Sometimes, it is employed to express the coming upon lost property only; sometimes, more broadly, to denote the coming upon any property physically separated from its owner.

100. Foulke v. N. Y. Consol. Ry., 228 N. Y. 269, 127 N. E. 237 (1920).

101. See McAvoy v. Medina, 93 Mass. 548, 87 Am. Dec. 733 (1866).

leave the notes found with the shopkeeper for a time. Where a chattel has been 'left' it may be that such time should be longer than when it is 'lost.' But if so long a time has elapsed after the finding that it is no longer of any probable advantage to the owner of the chattel that A should keep it, then, in such case, should, or should not B become entitled? If the 'discoverer' is not to be ultimately entitled, may there not be a temptation to him not to reveal his 'discovery'?"[102]

It is submitted, in partial agreement with Professor Warren, that the interests of the owner would be protected if the "discoverer" was given some right in the object after the passage of a definite period of time. But just as the "discoverer" may be tempted not to reveal his "discovery" is it not likely that the owner of the *locus* might refuse to take custody of the goods if he was to be given nothing for his troubles? The solution seems to lie in taking a middle course: an equitable distribution of the proceeds from a sale of the goods between the "discoverer" and the owner of the *locus in quo.*

III. ABANDONMENT

One of the methods of obtaining original title as distinguished from derivative title is the finding of abandoned goods.[103] To understand this statement it is necessary to have a clear concept of abandoned goods. In order for goods to be abandoned it is necessary for the owner (1) to have a positive intent to relinquish all rights to the specific object and (2) to further this intent by some external act.[104] The mere intent to abandon is not abandonment[105] nor is the external fact of separation of the object from its owner.

The case of *Livermore v. White*[106] is an excellent example of the need of intent plus some external act. In this case the owner of a tannery sold his plant to the plaintiff. Years later, the plaintiff discovered a quantity of skins in a buried vat. In an action between the plaintiff and a representative of the former owner, the court held that the goods were not abandoned. In speaking of the burying of the hides the following language was used:

"Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect. Here the act was one of preservation—the proprietor expending labor upon his property thereby to enhance its value. It was an act which excludes the very idea of abandonment."[107]

Here there is no right in the finder to exclude the representative of the former

102. See WARREN, CASES ON PROPERTY (1938) 116.

103. Property which has been abandoned becomes a part of the common stock and belongs to the first one who finds it and takes it into his possession. Robertson v. Ellis, 58 Ore. 219, 223, 114 Pac. 100, 102 (1911). Title by abandonment is not derivative, for a party cannot "abandon" to another as that would be equivalent to a sale or a gift. Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059 (1905).

104. See note 106, *infra.*

105. Worsham v. State, 56 Tex. Cr. Rep. 253, 120 S. W. 439 (1909). See Livermore v. White, 74 Me. 452, 455, 43 Am. Rep. 600 (1883).

106. 74 Me. 452 (1883).

107. *Id.* at 455.

owner—for there being no intent to abandon and the owner being known the goods belong to him.[108] In the nature of things, the probability of a rational person abandoning a thing of value is very slight. Taking this fact into consideration the courts are hesitant in declaring property abandoned.[109] This is especially true where the conflict is between the "owner" and the finder. That this type of situation is rare is self evident. But, if, in fact, the goods were abandoned, the finder would acquire a right thereto superior to that of the "owner". In speaking of this cautious attitude the court, in *Wilson v. Colorado Mining Co.*,[110] said,

"The test of abandonment of property is the existence or the non-existence of the intent to abandon. . . . The presumption is that the owner of property or of rights to property intends to preserve them, because this is the customary purpose of such owners and the burden is on him who alleges abandonment clearly to establish the intent to abandon."

It is submitted that, when a person divests himself of property, it becomes *res nullius*. He retains nothing.[111] Therefore, he and strangers to the property are in an equal position. The one who first reduces it to his possession should win out[112]—be he "owner" or finder.

CONCLUSION

In conclusion, it may be said that for the most part the law governing property in these categories is well adapted for the ultimate return of lost or mislaid goods to the owner. However, the rule giving the finder possession as against the owner of the *locus in quo* in the cases involving goods found on the land of another might lead to a different result. The danger of the disappearance of a stranger who happened to find appears to be greater than the danger of the owner of the *locus* disappearing.

Where the owner is not ultimately found the finder[113] should be given a right in the goods found on land occupied by another. To preclude the finder

108. Whenever the owner is known, whether the goods be lost, mislaid or allegedly abandoned, the courts are particularly determined to protect his rights.

109. Where a lunatic threw away money, a constable was convicted of larceny for not turning it all over to the sheriff. If the money had been abandoned, the finder could have acquired title thereto. Burns v. State, 145 Wis. 373, 128 N. W. 987 (1910). To prove abandonment, the evidence must "reasonably beget the exclusive inference of the throwing away." Foulke v. N. Y. Consol. Ry., 228 N. Y. 269, 273, 127 N. E. 237, 238 (1920). See also, note 19, *supra*.

110. 227 Fed. 721 (C. C. A. 8th, 1915).

111. In conflict wth the statement that the finder of abandoned goods has superior rights to those of the recent owner is language in the case of Forster v. Juniata Bridge Co., 16 Pa. St. 393, 55 Am. Dec. 506 (1851). It was said in that case "that a man who has abandoned his property may at any time resume ownership of it." As authority, the court cites DOCTOR AND STUDENT c. 51. But that is a discussion of the right of a mariner to reclaim his property after a wreck. Obviously a mariner does not intend to abandon; he merely separates himself from his property in order to save his life.

112. See notes 5 and 100, *supra*.

113. Whether a trespasser should have this right is discussed in note 38, *supra*.

from any right therein might lead to his unwillingness to disclose his discovery. To avoid this, the owner of the *locus in quo* should be given the custody of the goods for a period determined by statute, after which he and the finder should share in the goods equitably.

Whether the distinction between lost and mislaid goods should be maintained is a serious question. From the practical difficulties arising in determining, in a specific case, into which of these categories a particular object falls, a negative answer is supportable. Then too, the possibility of a mislaid article slipping to the floor and becoming lost also argues against this distinction. But if the itinerant finder of goods, mislaid in a quasi-public place, is to be given the right to possession, rather than the owner of the *locus in quo*, the distinction should be maintained. For then the owner of the *locus in quo*, who is more likely to protect the interests of the owner, would retain possession under the established rules of mislaid property. It is submitted that, unless the receptacle theory is followed, the distinction between lost and mislaid property should be maintained but modified to give both the finder and the owner of the *locus in quo* equitable protection where the owner of the chattel does not ultimately claim the property.

INJUNCTION VERSUS INDICTMENT

I. Introduction

In the formative years of the English common law,[1] there were many gaps in the remedies necessary for a complete code of justice. These gaps were caused by the rigid adherence of the common law judges to precedents to the extent that in many instances even if the precedent were clearly wrong, it was followed.[2] Such an inflexible conservatism perpetuated error and unjust law. Litigants were forced to appeal to the king who in turn referred them to his chancellor,[3] the "keeper of his conscience." The chancellor was invariably a clergyman, and a student of Roman and Canon law.[4] When he

1. To properly evaluate the nature of the problem involved, the history of equity in general is a necessary adjunct. *Cf.* 1 Story, Commentaries on Equity Jurisprudence (13th ed. 1886) 51.

2. 1 Pomeroy, Equity Jurisprudence (4th ed. 1918) § 16. This rigidity prevented the English common law from developing along the line of natural justice as did the law in ancient Rome. The Roman law was aided in its development toward natural justice because of the willingness of the praetors to administer both law and equity. In England, however, the common law judges were not disposed to so adapt themselves. This situation necessitated the establishment of the two rival systems of common law and equity. 1 Holdsworth, History of English Law (3d ed. 1922) 449. When Lord Mansfield attempted to emulate the Roman praetors, he was accused of being ignorant of the English law. 1 Pomeroy, *op. cit. supra* § 18; *cf.* 1 Holdsworth, *op. cit. supra* at 77, 78.

3. 1 Holdsworth, *op, cit. supra* note 2, at 449.

4. 5 Holdsworth, *op. cit. supra* note 2, at 218.