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FINDER VS. LOCUS IN QUO—AN OUTLINE

By John C. Paulus*

Introduction

Although the subject matter of a course exclusively devoted to personal property is not normally considered complex, there is at least one area in that field which has given teachers and writers, as well as practicing attorneys, much difficulty. This area involves the law of lost property, and more specifically the relative rights of finders and owners of the land when goods are found by one person on another's land. The difficulty referred to is not caused by the profoundness of the problem or the complexity of the fact situations involved, but seems to be attributable to the inability of the courts to satisfy themselves as to the most satisfactory course to follow in order to obtain a result which will best serve social needs.

Policy considerations favoring the finder of lost goods relate to the desire to encourage finding, while on the other hand, it is also considered good public policy to favor the owner of the land since his possession of the lost article increases the possibility of its return to the loser. These conflicting policy factors often cause the courts to tread a crooked path when considering the rights of a finder as against the owner of the locus in quo.

For what it is worth, the following summary or outline of the law regarding the relative rights of finders as against the owners of the locus in quo is submitted.

(1) The owner of the locus in quo prevails over the finder if the latter was a servant of such owner and had the duty to turn over found goods to him.

(2) Except as provided in paragraph (1), the finder prevails if the goods were abandoned.

(3) Except as provided in paragraph (2), the owner of the locus in quo prevails if he was in a fiduciary relationship with the probable loser at the time the goods were lost or misplaced.

(4) Except as provided in paragraphs (1), (2) and (3), the finder prevails if the goods were lost, and the owner of the locus in quo prevails if the goods were mislaid.

The balance of this article is devoted to an attempt to justify each para-

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1 For a general discussion of this problem see Angler, Rights of Finders, 21 Mich. L. Rev. 664 (1923), Moreland, The Rights of Finders of Lost Property, 16 Ky. L.J. 3 (1927), Morton, Public Policy and the Finder Cases, 1 Wyo. L.J. 101 (1947), see also Notes, 8 Ford. L. Rev. 222 (1939) and 21 Minn. L. Rev. 191 (1936).

2 E.g., compare Danielson v Roberts, 44 Or. 108, 74 Pac. 913, 65 L.R.A. 526 (1904) with Ferguson v Ray, 44 Or. 557, 77 Pac. 600 (1904).
graph of this outline in the order of its appearance, and an attempt to justify the omission from the outline of certain factors which seemingly, at least, have had great effect in finder vs. owner of locus in quo litigations.

**Master-Servant Relationship**

Although there is a paucity of authority supporting paragraph (1) of the outline, there can be little doubt but that the courts will recognize and enforce a duty created by contract, even though public policy might dictate that the finder be preferred. In those cases dealing with servants in which the owner of the locus prevailed, there were usually additional reasons for preferring the owner over and above the master-servant relationship. Probably the recent case of *Jackson v. Steinberg* supports paragraph (1) of the outline as strongly as any, and in this case the court relied heavily upon the fact that the goods were mislaid and that there was a fiduciary relationship between the probable loser and the owner of the locus.

Although it has been suggested that the duty to turn over found goods may be readily implied from the nature of the employment, the courts are very reluctant to imply the duty and in many instances have favored the finder even when such implication would appear to be appropriate. For instance, in cases in which the servant is hired to clean up the premises and finds goods during the cleaning operation, the courts have favored the servant, as well as in situations where the servant has a position of respon-

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3 *E.g.*, State v. Buzard, 235 Mo.App. 636, 144 S.W.2d 847 (1940) (owner-master preferred but goods found were considered mislaid), Heddle v. Bank of Hamilton, 17 B.C. 306 (1912) (mislaid goods found by servant and master given preference). *Cf.* Noble v. City of Palo Alto, 89 Cal.App. 47, 264 Pac. 529 (1928), in which a policeman was unable to prevail as against the city (his employer) in a litigation involving bicycles that he had found while on duty. In South Staffordshire Water Co. v. Sharman, 2 Q.B.D. 44 (1896), a leading English case, the master prevailed when his servant was cleaning out a pool and found two rings; however, the English court did not consider the effect of the master-servant relationship upon the rights of the parties and hinged the decision entirely upon the proposition that an owner possesses everything attached to or under his land. In Flax v. Monticello Realty Co., 185 Va. 474, 39 S.E.2d 308 (1946) the master was preferred over a third party claimant.


5 The court said in the *Jackson case*, supra note 4, that, "The decisive feature of the present case is the fact that plaintiff was an employee or servant of the owner or occupant of the premises, and that, in discovering the bills and turning them over to her employer, she was simply performing the duties of her employment. She was allowed to enter the guest room solely in order to do her work as chambermaid, and she was expressly instructed to take to the desk clerk any mislaid or forgotten property which she might discover."


7 Robertson v. Ellis, 58 Or. 219, 114 Pac. 100 (1911) (servant found gold coins while cleaning out a warehouse), Danielson v. Roberts, 44 Or. 108, 74 Pac. 913, 65 L.R.A. 526 (1904) (servants found gold coins while cleaning out a chicken house), Hamaker v. Blanchard. 90 Pa. 377 (1879) (domestic servant found money in public parlor of hotel).
sibility and the duty might easily be inferred. Therefore, in order to fall within paragraph (1) of the outline it appears that the owner of the *locus in quo* will probably be required to show that turning over found goods was an express duty of the servant.

**Abandoned Property—Treasure Trove**

The outline provides that the finder is preferred when the property is abandoned unless he is bound by contract to turn all goods over to the owner of the *locus in quo*. The reason for the exception, as explained above, is based upon the recognition of contractual obligations. The rule expressed in paragraph (2) of the outline is based upon the theory that the finder should prevail whenever possible in order to encourage finding and there is no reason for denying such preference in the abandoned property cases. Since the loser is no longer interested in the property, the reason for favoring the owner of the *locus* has been eliminated.

Property is considered abandoned when it is evident that all former owners have severed all relationship with it. Whether or not property is abandoned is a question of intent on the part of the former owner, and in determining such a question the courts look at the nature of the article and its location and conditions when found to determine whether or not the former owner has manifested an intent to divest himself of all of his interests in the chattel.

In their desire to prefer the finder in cases where the goods are mislaid, or where for some other reason the owner of the *locus* would otherwise prevail, the courts have found that the goods were abandoned under circumstances where the intent to abandon on the part of the former owner is doubtful. A recent case illustrating this fact is *Erickson v. Sinykin*.

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8 Erickson v. Sinykm, 223 Minn. 232, 26 N.W.2d 172, 170 A.L.R. 697 (1947) (redecorators found money under a rug in a hotel room they were redecorating), Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N.E.2d 661 (1935) (servant found money while operating an electric door in a bank), Tatum v. Sharpless, 6 Phila. 18 (1865) (conductor found pocket book on passenger car seat). In Bowen v. Sullivan, 62 Ind. 281 (1878), the finder was permitted to keep money found in waste paper in a paper mill, however, the finder was employed in the mill as a rag sorter rather than as a waste paper worker.

9 In Damelson v. Roberts, 44 Or. 108, 108 Pac. 913, 65 L.R.A. 526 (1904), the court said: "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."

10 *Supra* p. 181.


12 For a discussion of lost vs. mislaid see p. 190 infra.

13 See treasure trove cases, note 19 infra.

In this case $760 in paper currency was found by redecorators underneath a rug in a hotel room. The money was quite obviously mislaid rather than lost, and with that factor present courts would normally favor the owner of the locus. The Minnesota court found that the money was abandoned and permitted the finder to prevail notwithstanding the fact that the money had probably been placed under the rug a relatively short time before its recovery, and its nature would normally raise a presumption against abandonment. The court was influenced by the fact that there was some question concerning the good faith of the owner of the hotel, and the fact that the money found had been called in for redemption by the federal government.

In order to further discuss the problem of abandonment it is advisable to consider the treasure trove cases since in most situations in which goods have been found to have been abandoned, treasure trove was involved. Treasure trove was not included in the outline because of the confusion surrounding the question of what constitutes treasure trove and what law applies to it. Treasure trove has been defined as “money or coin found hidden or secreted in the earth or other private place; the owner being unknown.” This definition is unfortunate in that it does not include the element of abandonment which is usually present in the cases in which the court finds that treasure trove is involved. In those situations where the treasure was discovered under circumstances which indicated that it had been buried for a long period of time and the owner has given up all claim to it, the courts have considered the goods as treasure trove within the legal sense. On the other hand, the courts have refused to consider goods as
a treasure trove when the abandonment factor is missing, even though the definition that is used does not include the element of abandonment. In fact, in recent cases the courts have failed to go into the question of treasure trove when treasure was concealed, but merely considered the question of abandonment.

Over and above the fact that the definition of treasure trove leaves one in doubt as to when treasure trove is involved (that is, what types of goods are included within the definition, and whether or not the element of abandonment is required), the statements made concerning the law relating to treasure trove appear to be unfortunate and confusing. For instance, it is said that "in this country the law relating to treasure trove has gen-

exposed to air. In Weeks v. Hackett, 104 Me. 264, 71 Atl. 858 (1908), coins were found buried in the ground. In Danielson v. Roberts, 44 Or. 108, 74 Pac. 913, 65 L.R.A. 526 (1904), coins were found by children while cleaning out a chicken house; the dirt over the buried coins had been undisturbed for a long time and the sacks which contained the coins were musty and partially decayed. In Robertson v. Ellis, 58 Or. 219, 114 Pac. 100 (1911), the court said: "There is testimony in this case that the comb cases in which the money was found were mouldy and covered with dust, indicating that the money had been placed where found within no very recent period. We cannot say as a matter of law how ancient the deposit must be in order to include it within the rule of Danielson v. Roberts, or how recent it must be to take it out of the operation of that decision." See also Zech v Accola, 253 Wis. 80, 33 N.W.2d 232 (1948), in which money rolled up in rags was considered treasure trove and therefore excluded from statutes relating to lost property.

In Jackson v. Steinberg, 186 Or. 129, 200 P.2d 376, 205 P.2d 562 (1948), the court said: "The treasure must have been hidden or concealed so long as to indicate that its owner, in all probability, is dead or unknown. The recentness of the deposit justifies the inference that, at the time of the finding, the owner probably was still alive and would be discovered. These considerations further confirm our opinion that the bills were not treasure trove."

In Ferguson v. Ray, 44 Or. 557, 77 Pac. 600 (1904), the court found that gold-bearing quartz was not treasure trove, relying in part upon the argument that it was not the type of goods included in the definition.

In Erickson v. Sinykin, 223 Minn. 232, 26 N.W.2d 172, 170 A.L.R. 697 (1947), the court found that money had been abandoned and in Flax v. Monticello Realty Co., 185 Va. 474, 39 S.E.2d 308 (1946), the court held that a diamond brooch was not abandoned and ruled for the owner of the locus.

In their comments on what may be the subject matter of treasure trove the court in Ferguson v. Ray, 44 Or. 557, 77 Pac. 600 (1904) said: "Bouvier gives the same definition, except that he adds that it includes not only gold and silver, but whatever may constitute riches, as vases, urns, statutes, etc. BOUVIER, DICTIONARY. Mr. Chief Justice Appleton declares that 'nothing is treasure trove except gold and silver.' Livermore v. White, 74 Me. 452, 456, 43 Am Rep. 600. So, according to an article found in the Law Times (vol. 81, p.21), the prerogative of treasure trove is strictly limited, and touches only gold and silver plate and bullion, discarding the baser metals; and in Elwes v. Bragg Co., 33 Law Rep. (Ch. Div.) 562, it is said that Roman coins, not being gold or silver coins, did not fall within the royal prerogative of treasure trove. A case has come to our notice where it seems to have been conceded that certain cups, a chalice, pyxes, and a paten, all of silver, were treasure trove (Attorney General v. Moore, Law Rep. (1 Ch. Div.) 676), and another where solid gold rings and ornaments were so classed (Queen v Thomas, 33 Law Jour. (N.S.) p.22)."
erally been merged into the law of the finder of lost property." This statement is misleading since there is a distinction made between lost and mislaid property, and, if anything, treasure trove resembles mislaid property and should be considered as such. What is meant, of course, is that treasure trove does not have to be considered separately and its presence or absence in a given case is not important since the normal rules relating to finders will govern; hence, discovered treasure will be considered mislaid and be given to the owner of the locus unless it has been abandoned by former owners.

From the above discussion it can be seen that a person would be ill-advised to attempt to incorporate treasure trove as such into an outline of the rights of finders as against the owner of the locus in quo. It is better to assume that goods which might fall within that category are to be treated the same as other goods, and permit the finder to prevail if, and only if, such goods are abandoned, and if the finder is not bound by an employment contract to turn all goods he finds over to the owner of the locus in quo.

**Fiduciary Relationship—Private vs. Public Locus**

In order for the law of finders to conform with normal concepts of possession and rights of possession; in all cases (except in certain cases involving the master-servant relationship) where the owner of the locus in quo is given preference over the finder, it is necessary to find prior possession in the locus owner. Possession, of course, requires a physical and mental relationship to the thing possessed, and in the case of real property it is often difficult to be convinced that the owner of the realty does have the necessary relationship to chattels that are on his land without his knowledge. It is particularly difficult to find an "intent to control" under such circumstances.

*South Staffordshire Water Co. v. Sharman* is a leading English case which gave great weight to the following statement from Pollock and

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24 See p. 190 infra.
25 However, the courts have retained the distinction between treasure trove and lost property when dealing with statutes. See Sovern v. Yoran, 16 Or. 269, 20 Pac. 100 (1888), and Zech v. Accola, 253 Wis. 80, 33 N.W.2d 232 (1948).
26 The possibility of abandoned goods becoming part of the realty is considered at p. 193 infra.
27 Discussions on possession may be found in Holmes, Common Law, 206-246 (1881), Pollock and Wright, Essay on Possession in the Common Law (1888), Salmond, Jurisprudence (7th ed.), 293-328 (1924), Brown on Personal Property, pp. 18 to 21 (1936); Bingham, The Nature and Importance of Legal Possession, 13 Minn. L. Rev. 535 (1925), Francis, Three Cases on Possession—Some Further Observations, 14 St. Louis L. Rev. 11 (1928), Shartel, Meaning of Possession, 16 Minn. L. Rev. 611 (1932).
28 2 Q.B.D. 44 (1896).
Wright's treatise on possession: "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." (Italics added.)

The English court in the Sharman case placed great stress upon the words "attached to or under" since they had before them a case involving rings found embedded in a swimming pool, and they were distinguishing these facts from the case of Bridges v Hawkesworth in which a parcel was found in the public part of a shop. It was held that the owner of the realty possessed the rings in the swimming pool and, therefore, prevailed as against the finder, while in the Bridges case the court had favored the finder. The Sharman and Bridges cases establish the English rule that the important decision to be made is whether or not the premises upon which the property was found were open to the public or were private.

In the recent case of Hannah v Peel it is obvious that the English court is not concerned with the distinction between lost and mislaid goods and places the emphasis on the public or private nature of the locus. However, they choose to follow the Bridges case and favor the finder when the goods were found in a home being used as a soldier's barracks, which would appear to be a far cry from a place open to the public. In addition, the court indicates that the Sharman case should be limited to the "attached to or under" provision when it says, "It would appear to be the law from the authorities I have cited, and particularly from Bridges v Hawkesworth, that a man does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by someone else."

In view of the Hannah case, it would appear that the English authority considers the owner of the locus in possession of the chattel (and prefers the owner of the locus over the finder) only in those cases where the goods are attached to or under the land, and does not favor such owner where the chattel is discovered on that part of the locus from which the public is excluded.

29 Essay on Possession in the Common Law, p.41.
30 The statement continues, "And it makes no difference that the possessor is not aware of the thing's existence. 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."
31 21 L.J.Q.B. 75 (1851).
33 Ibid at 520.
The American courts have never given the great weight to the public or private nature of the *locus in quo* as the English courts have, although such factor may have some influence in determining whether goods are lost or mislaid.\(^3\) However, in this country the courts have generally concluded that under certain circumstances the owner of the *locus in quo* has prior possession based upon the privacy of the place where the chattel is discovered.\(^3\) The owner of the *locus* is considered a gratuitous bailee of the found goods if it is believed that he was in a fiduciary relationship with the probable loser, and was under an obligation to assume control over the chattel.

Cases falling into two groups furnish the authority for paragraph (3) of the outline. One line of cases deals with the customer and bank relationship, and the other with the relationship that exists between a hotel and its guest. In both groups it is required that the unclaimed goods be located in that part of the *locus in quo* which is not open to the general public.\(^3\)

The leading case supporting the proposition that a bank owes a fiduciary duty to its customers to take custody of all goods lost by customers in the private parts of the bank is *Silcott v. Louisville Trust Co.*\(^3\) In this case the goods were found on the floor in the safety deposit department of the bank. Since the goods were clearly lost rather than mislaid, the finder would normally prevail unless it was found that for some reason the owner of the *locus* had prior possession of the chattels. In referring to pleadings which indicated the extreme privacy of the safety deposit vault the court said: "From the allegations of the answer, 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 the agent of its cus-

\(^{35}\) Cases in which the finder prevailed even though the goods were discovered in a private place include: Groover v. Tippins, 51 Ga.App. 47, 179 S.E. 634 (1935), Bowen v. Sullivan, 62 Ind. 281 (1878), Zornes v. Bowen, 223 Ia. 1141, 274 N.W. 877 (1937), Weeks v. Hackett, 104 Me. 264, 71 Atl. 858 (1908), Robertson v. Ellis, 58 Or. 219, 114 Pac. 100 (1911), Danielson v. Roberts, 44 Or. 108, 74 Pac. 913, 65 L.R.A. 526 (1904) and Durfee v. Jones, 11 R.I. 588 (1877).

\(^{36}\) Of course, as will be seen in the discussion of mislaid property, *infra*, the owner of the *locus in quo* may have prior possession due to the intentional placement of the property on his realty; here, however, he has possession even though the goods are lost rather than mislaid.

\(^{37}\) Loucks v. Gallogly, 23 N.Y.Supp. 126 (1892) (money found on bank table in public part of bank given to finder), Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N.E.2d 661 (1935) (finder given money found on floor in bank), Hamaker v. Blanchard, 90 Pa. 377 (1879) (money discovered in public parlor of hotel awarded to finder).

tomers, or that at least it occupied toward its customer some fiducial relationship which imposed upon it the duty of caring for his property, whether the owner was known or unknown.\textsuperscript{38}

In \textit{Toledo Trust Co v Simmons}\textsuperscript{40} the rule of the Silcott case was restricted to the private areas of the safety deposit vault. In that case the finder was given a preference after discovering money in a lobby at the entrance of the vault. The court said in essence that the fiduciary relationship discussed in the Silcott case existed only when the place was something other than public or semipublic.\textsuperscript{41}

As stated above, there is a line of cases which finds a fiduciary relationship existing between a hotel and its guests in finder situations.\textsuperscript{42} This relationship exists only when the guest is in his room or in other private areas of the hotel, and when he leaves chattels in public parts of the hotel, the owner of the hotel does not acquire prior possession of the chattel based upon a fiduciary relationship.\textsuperscript{43}

\textit{Jackson v Steinberg}\textsuperscript{44} and \textit{Flax v Monticello Realty Co.}\textsuperscript{45} are recent cases which lend much support to paragraph (3) of the outline. However, in both of these cases there are additional factors upon which the court relies in holding for the owner of the \textit{locus in quo}. In the Jackson case there were two additional factors favoring the hotel owner. The master-servant relationship and the fact that the goods were quite clearly mislaid rather than lost. The mislaid argument was very forceful in the Flax case, and it would also have been possible to have used the master-servant argument

\textsuperscript{38} In Pyle v. Springfield Marine Bk., 330 Ill.App. 1, 70 N.E.2d 257 (1946), 17 \textit{Univ. of Cinn. L. Rev.} 83 (1948), currency was found on the floor of a safety deposit vault and the court favored the bank on the fiduciary relationship theory \textit{See also} Foster v. Fidelity Safe Deposit Co., 162 Mo.App. 165, 145 S.W 139 (1912), \textit{aff'd}, 264 Mo. 89, 174 S.W 376 (1915), in which the money was found on a desk in the safety deposit department and, therefore, was mislaid rather than lost; there was dictum in the case to the effect that there was a fiduciary relationship between the probable loser and the company.

\textsuperscript{40} 52 Ohio App. 373, 3 N.E.2d 661 (1933), 10 \textit{Cinn. L. Rev.} 500 (1936), 22 \textit{Corn. L.Q.} 263 (1937).


\textsuperscript{43} In Hamaker v. Blanchard, 90 Pa. 377 (1879), money was found in the public parlor of a hotel, and although the court recognized the fiduciary relationship that exists between a hotel and its guests, the finder prevailed since the goods were found in a public part of the hotel where the relationship did not exist.


to favor the hotel owner. Notwithstanding the additional elements present in these cases, the courts did, by their language, stress the fiduciary relationship existing between the hotel owner and his guests and the importance of that relationship in the determination of the respective rights of the finder and such owner.\textsuperscript{46}

A third factual situation in which a fiduciary relationship may exist between the probable loser and the owner of the \textit{locus in quo} is where property is left in private homes. The possibility of such a relationship was suggested by the court in \textit{Foster v. Fidelity Safe-Deposit Co.}\textsuperscript{47} when the court said by way of dictum: “The mind refuses consent to the proposition that one may go into another’s house, whether business or residence, and take away anything he discovers there which does not belong to the owner. If one visits an acquaintance socially at his home, and comes away leaving some article on a table, he has left it in the possession of such acquaintance, and it seems absurd to say that another visitor would have a right to take the property from the house under the claim that he had found it.”\textsuperscript{48}

As a parting note in a consideration of paragraph (3) of the outline, it might be well to consider the exception continued in that paragraph. If the evidence indicates that the goods have been abandoned, it would seem advisable to favor the finder since the reason for permitting the owner of the \textit{locus} to prevail (viz. the more probable return to the loser) does not exist. This, of course, would hold true regardless of whether or not the facts indicate that a fiduciary relationship exists between the probable loser and the owner of the \textit{locus}. Direct authority for the exception can be found in \textit{Erickson v. Sinykin}\textsuperscript{49} in which case the court held for a finder who discovered goods in a hotel room on the theory that the goods were abandoned.

\textsuperscript{46}In \textit{Flax v. Monticello Realty Co.}, \textit{supra} note 45, the court said: “In the adjudications which we have found a very controlling circumstance as to the rightful authority and custody of the article is the control over the \textit{locus in quo} in which the thing is found. The \textit{locus in quo} here is, of course, a private room in the hotel of the defendant. This court said in the case of \textit{Crosswhite v. Shelby Operating Corporation}, 182 Va. 713, 30 S.E.2d 673, 674, 153 A.L.R. 573 (1942) “An innkeeper (as distinguished from a landlord) is in direct and continued control of his guest rooms.” The court continued by citing \textit{Silcott v. Louisville Trust Co.}, 205 Ky. 234, 265 S.W 612, 43 A.L.R. 28 (1924), in which case the court held that a safety vault was the place of finding, as having facts analogous to the leaving of chattels in a hotel room.

\textsuperscript{47}162 Mo.App. 165, 145 S.W 139 (1912), \textit{aff’d}, 264 Mo. 89, 174 S.W 376 (1915).

\textsuperscript{48}In \textit{In re Savarino}, 1 Fed.Supp. 331 (1932), the court did not mention the possibility of a fiduciary relationship between the owner of a cab and the cab’s passengers. In that case money was found on the floor of the cab and the court seemed to stress the public nature of the place and the fact that the goods were probably lost rather than mislaid in holding for the finder.

Lost vs. Mislaid

More litigation involving the respective rights of finders and the owners of the locus in quo have been decided upon the distinction between lost and mislaid or misplaced property than upon all other grounds combined. Goods are considered lost when from their nature, the place in which they were found, and their condition upon finding, it is evident that they were inadvertently and unintentionally dropped where found. Mislaid goods are goods which have been intentionally placed where found. Although there has been some criticism of the great importance placed upon this distinction due to the difficulty of determining whether lost or mislaid goods are involved in a given case, the reason for the distinction appears to be sound, and the determination of fact is not unreasonably speculative since the law involved is well settled. The finders of fact should merely be instructed to determine whether the deposit of the chattel by its owner was intentional or unintentional and to consider in their deliberation the size and value of the chattel, the nature of the place where it was discovered, and its condition upon discovery.

The policy behind the rule is simply based upon the fact that in the case of mislaid goods the mislayer will probably know where the goods are and will return to the place where he misplaced them, while the owner of goods which were lost rather than mislaid will probably be unaware of the locus of the goods. Therefore, in order to insure the return of misplaced goods the owner of the locus is deemed to possess them before the finder reduces them to his physical possession, and is a gratuitous bailee for the loser. In the case of lost goods, the desire to encourage finding, according to the reasoning of the courts,\(^\text{50}\) outweighs all other considerations since the loser’s chances of recovering the lost goods will not be substantially affected by the decision to permit the finder to retain the goods.\(^\text{51}\)

The rights of a finder in relation to goods which he discovered was first recognized in the case of Armory v. Delamirie.\(^\text{52}\) In 1840 the Delaware court in Clark v. Maloney\(^\text{53}\) made the following statement: "It is for this reason, that the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property, as will enable him to keep it against all but the rightful owner."\(^\text{54}\)

\(^{50}\) It appears to be the consensus of opinion of writers on the subject that the owner of the locus should be preferred in most, if not all, situations. See e.g., 22 Corn. L.Q. 263 (1937).

\(^{51}\) There is a duty on the part of the finder and the locus in quo, if they have the goods, to make a reasonable effort to find the loser, and the failure to make such an effort might subject the possessor to criminal prosecution. See State v. Levy, 23 Minn. 104, 23 Am.Rep. 678 (1876), Burns v State, 145 Wis. 373, 128 N.W 987, 140 Am. St. Rep. 1081 (1910).

\(^{52}\) 1 Strange 505, 93 Eng. Reprint 664 (1722).

\(^{53}\) 3 Har. 68 (1840)

\(^{54}\) It would have been a more accurate statement if the court would have added: "or persons having prior possessory rights."
After it was well settled that a finder could keep the discovered chattels as against all claimants who are unable to show prior possessory rights, it was held in Lawrence v. State\textsuperscript{55} and McAvoy v. Medina\textsuperscript{56} that the owner of the locus in quo had prior possession of all goods intentionally placed upon his property\textsuperscript{57} Following these cases the American courts have, with few exceptions,\textsuperscript{58} followed the distinction between lost and mislaid property; and, with the exceptions mentioned in paragraphs (1) and (3) of the outline, have favored the finder when the goods were considered lost,\textsuperscript{59} and,

\textsuperscript{55}1 Humph. (Tenn.) 228, 34 Am.Dec. 644 (1839).
\textsuperscript{56}11 Allen (Mass.) 548, 87 Am.Dec. 733 (1866).
\textsuperscript{57}See p. 181 supra for another instance in which the owner of the locus was considered a prior possessor; viz. where a fiduciary relationship exists between the probable loser and such owner.
\textsuperscript{58}At least four cases might be cited as being contra to the general authority. In Tatum v. Sharpless, 6 Phila. 18 (1865) the court held for a finder when a pocket book was discovered on the seat of a passenger car; the date of the case and the fact that it could be argued that the pocket book was lost would indicate that the Tatum case is probably not contra to the normal rule. In Batteiger v. Penn. Co., 64 Pa. Sup. 195 (1916) the facts were similar to the Tatum case and the court found for the finder. In the Batteiger case as well as in Hamaker v. Blanchard, 90 Pa. 377 (1879), the Pennsylvania court recognized the lost vs. mislaid rule, although its reasoning in the Batteiger case appears questionable. See 49 Dick. L. Rev. 124 (1945) for comments on the Pennsylvania cases.

The early case of Barker v. Bates, 13 Pick. (Mass.) 255 (1832) may also be cited as contra to the general authority; however, the date of the case and the fact that the finder was a trespasser on the land when he found the goods (the affect of trespassing on the rights of the finder is considered at p. 193 infra), make the Barker case weak authority against the normal rule.

A fourth case which might be considered contra to the American rule is Ferguson v. Ray, 44 Or. 557, 77 Pac. 600 (1904), in which gold-bearing quartz was found on land. In that case the court recognized the rights of finders to lost goods, but their reasoning in holding for the owner of the locus in quo is not clear; they do not base their opinion upon the conclusion that the goods were mislaid, although they said that they might have been mislaid. The Oregon court on other occasions has followed the normal rule. In the Ferguson case the court relied to a great extent upon South Staffordshire Water Co. v. Sharman, 2 Q.B.D. 44 (1896) which holds that the owner of the locus always prevails, whether the goods were lost or mislaid, if the discovered chattels are "attached to or under" the ground. There affinity for the Sharman case might indicate that the Ferguson decision could be cited as an exception to normal lost vs. mislaid law. (See p. 194 infra for a discussion of the possibility of the gold bearing quartz being considered part of the realty). Oregon cases are discussed in Notes, 48 Mich. L. Rev. 352 (1950), 21 Ore. L. Rev. 85 (1941).

\textsuperscript{59}Bowen v. Sullivan, 62 Ind. 281 (1876) (money found in waste paper in paper mill), Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S.W 878 (1902) (pocket book found on the ground in an amusement park), Cleveland Ry. v. Durschuk, 31 Ohio App. 248, 166 N.E. 909 (1928) ($20 bill found on floor of street car), Hamaker v. Blanchard, 90 Pa. 377 (1879) (money found in public parlor of hotel), Durfee v. Jones, 11 R.I. 588 (1877) (money found in a crack in a safe; the court held that the money was originally intentionally placed in the safe, which would cause it to be treated as mislaid property, but was subsequently lost when it slipped into the crack), Deaderick v. Oulds, 86 Tenn. 14, 5 S.W 487 (1887) (logs found on land), In re Savorno, 1 Fed.Supp. 331 (1932) (money found on floor of a taxicab). See also the cases cited in relation to the materials on the master-servant and fiduciary relationships, supra, in which cases the right of the finder of lost property was recognized.

In several cases the courts have held that property was not "found" within the meaning
with the exception mentioned in paragraph (2) of the outline, have favored the owner of the *locus in quo* when the goods were deemed mislaid.60

As stated above, the English courts have given little or no attention to the question of whether or not the goods were lost or mislaid, and the English courts, for that reason, often reach a different result when considering a given set of facts than have been reached by American courts on similar facts.62

**An Alternative Outline**

It may be argued that the outline set out at the beginning of this article is not all inclusive and does not recognize certain authority that must be reflected in any statements purporting to state the entire law relating to the respective rights of finders as against the owners of the *locus* where the goods are found. In order to satisfy those who feel that the original statement is incomplete, the following alternative outline is suggested.

(1) The owner of the *locus in quo* prevails if: (a) the finder was a servant of such owner and had the duty to turn over found goods to him, (b) *The finder was a trespasser, or* (c) *The found goods have become part of the realty.*

(2) Except as provided in paragraph (1), the finder prevails if the goods were abandoned or intentionally concealed.

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61 Public v. private locus materials, p. 188 supra.

62 Hannah v. Peel, (1945) K.B.D. 509 (brooch found in crevice of a window frame given to finder; would appear to be mislaid goods), South Staffordshire Water Co. v. Sharman, 2 Q.B.D. 44 (1896) (rings found in bottom of pool given to landowner; goods would appear to be lost), Eldes v. Brigg Gas Co., 33 Chan. Div. 562 (1886) (boat found buried under land given to landowner; court either goes on theory of private property or the theory that the boat had become part of the realty), Bridges v. Hawkesworth, 21 L.J.Q.B. 75 (1851) (notes found on floor of shop given to finder; lost goods involved but court stressed the public nature of the place of discovery)
(3) Except as provided in paragraph (2), the owner of the *locus in quo* prevails if such owner was in a fiduciary relationship with the probable loser at the time the goods were lost or misplaced.

(4) Except as provided in paragraphs (1), (2) and (3), the finder prevails if the goods were lost, and the owner of the *locus in quo* prevails if the goods were mislaid.\(^6\)

Subparagraph (b) of paragraph (1) of the alternative outline has been accepted as good law ever since 1832 when the Massachusetts court in *Barker v. Bates*\(^6^4\) ruled for the owner of the *locus in quo* as against the finder when the latter was a trespasser. Three factors caused the omission of subparagraph (b) of paragraph (1) of the alternative outline from the original outline. In the first place there is little or no authority (outside of the *Barker* case) in point which supports the rule of *Barker v. Bates*, while in *Groover v. Tippins*\(^6^5\) the Georgia court indicated that the status of the finder while on the land was immaterial in the consideration of his rights to the lost property. Secondly, in a subsequent Massachusetts case\(^6^6\) the court said that a person who went on the land to rescue property of another was not a trespasser within the rule expounded in *Barker v. Bates*. This factor, if accepted as good law, makes subparagraph (b) of paragraph (1) of the alternative outline somewhat misleading. Thirdly, if it is accepted that the encouragement of finding is the strongest public policy factor in cases in which goods are lost, it would seem preferable to favor the finder regardless of his status in relation to the land.\(^6^7\)

The authority for the statement in subparagraph (c) of paragraph (1) seems to be vested solely in the recent case of *Allred v. Biegel*.\(^6^8\) In this case, which quite noticeably was the subject matter of much comment,\(^6^9\) the Missouri court held that an Indian canoe uncovered by eroding water and discovered by someone other than the owner of the land upon which it was located, was part of the realty. The court cited as authority for its holding *Goddard v. Winchell*,\(^7^0\) *Ferguson v. Ray*\(^7^1\) and *Elwes v. Brigg Gas Co.*\(^7^2\)

It is questionable whether any of these cases support the proposition that

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\(^{6^3}\) Except for the Latin phrases, italics denote an addition to the original outline.

\(^{6^4}\) 13 Pick. (Mass.) 285. The inclusion of the *Barker* case in casebooks has added to its recognition as a case expounding good law.

\(^{6^5}\) 51 Ga.App. 47, 179 S.E. 634 (1935).

\(^{6^6}\) Proctor v. Adams, 113 Mass. 376 (1873).

\(^{6^7}\) For instance, when a person discovers a ring lying on another's land while walking on a sidewalk or across a vacant lot, the finder should probably prevail.


\(^{6^9}\) See citations in note 68, supra.

\(^{7^0}\) 86 Iowa 71, 52 N.W. 1124 (1892).

\(^{7^1}\) 44 Or. 557, 77 Pac. 600 (1904).

\(^{7^2}\) 33 Chan. Div. 562 (1886).
a chattel becomes part of the realty after being buried in land for a long period of time. The court in the Allred case could possibly have used Burdick v. Chesebrough, 88 N.Y Supp. 13 (1904), as authority for its position. In the Burdick case the court held that earthenware which had been buried in the ground became part of the realty. However, in the Burdick case the contest was not between a finder and the owner of the locus in quo; in addition, the court relied heavily upon the Elwes case which is doubtful authority for such a conclusion.

74 86 Iowa 71, 52 N.W 1124 (1892).
75 44 Or. 557, 77 Pac. 600 (1904)
76 33 Chan. Div. 562 (1886).
77 In the Elwes case (note 76 supra) Judge Chitty said “The first question which does actually arise in this case is whether the boat belonged to the plaintiff at the time of the granting of the lease. I hold that it did, whether it ought to be regarded as a mineral, or as part of the soil within the maxim above cited, or as a chattel. If it was a mineral or part of the soil in the sense above indicated, then it clearly belonged to the owners of the inheritance as part of the inheritance itself. But if it ought to be regarded as a chattel, I hold the property in the chattel was vested in the plaintiff, for the following reasons. Being entitled to the inheritance under the settlement of 1856 and in lawful possession, he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat.”

78 The court in Ferguson v Ray, 44 Or. 557, 77 Pac. 600 (1904), concluded its opinion with the following statement: “Being in possession of the land, and exercising ownership over it, thus manifesting an intention to prevent unauthorized interference, we must conclude, as was announced by Lord Russell in South Staffordshire Waterworks v Sharman, supra, that ‘the presumption is that the possession of the article found is in the owner of the locus in quo.’”
as a good rule; but when a finder is preferred in cases dealing with concealed goods, the courts have always relied upon the abandonment features in the cases. The theory behind giving a preference to finders in concealment situations is centered upon the idea that the owner of the *locus in quo* would not acquire prior possession since the probable loser did not intend for him to take custody of the goods. However, concealed goods are also mislaid goods and the policy behind favoring the owner of the *locus in quo* when chattels are mislaid would seem to apply with equal force to the situation where the property is concealed as well as mislaid.

**Conclusion**

As has been noted throughout this article, its purpose is to state what the law relating to finders as against the owner of the *locus* is, in the absence of statute, and not what it should be. Probably the best solution to the problem would be to permit the owner of the *locus in quo* to hold the property for a given period, at the end of which period the property would be given to the finder. The courts' failure to follow this formula is probably based upon their desire, as has been seen in real property litigations, to settle the matter at once and not hold rights in abeyance.

Although it is rather difficult to adequately support some of the propositions stated in the original outline, it is believed that they are all supported by good reason and will be followed by the courts in the future. The master-servant and fiduciary relationship conclusions appear to be beyond doubt, although the extent to which the latter may be carried is questionable. There is little direct authority favoring the finder when the goods are abandoned outside of the Oregon cases and *Erickson v. Sinykin*; however, there is much language even in cases holding for the owner of the *locus in quo* which would indicate that the abandonment rule is sound.

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79 BROWN, PERSONAL PROPERTY, p.25.
80 See discussion on treasure trove, p. 182 supra. Notet in particular *Erickson v. Sinykin*, 223 Minn. 232, 26 N.W.2d 172, 170 A.L.R. 697 (1947), in which the court strained to find abandonment while they could have favored the finder on the basis of concealment if they recognized the concealment rule.
82 For instance, in the closing of classes the courts have refused to pay an aliquot share of the gift to those persons who have complied with all conditions precedent until the class has closed; hence, in order to not unduly injure the persons entitled to part of the class gift by a delay in payment, the courts have often closed the class prematurely. It would appear advisable, in such a situation, to permit those entitled to payment to take their share and to give a bond in case more people come into the class; but the courts want to have the matter settled ab initio, and hold to their policy of restricting payment until the class is closed.
84 223 Minn. 232, 26 N.W.2d 172, 170 A.L.R. 697 (1947).
In the making of any summary of the law a writer usually runs into many controversial areas. These areas were noticeably numerous in this field. Five factors are not expressly included in the outline, and it may be argued by many that they should have been included in some form or other. It was considered advisable to omit treasure trove because of the confusion surrounding its present status, and to have it treated as mislaid goods which has, or has not, been abandoned. The public vs. private land distinction gave way to the consideration of the existence of a fiduciary relationship, the latter appearing to be the factor upon which American courts rely when the case turns on the nature of the place where the chattel was found. The question of whether or not the finder as a trespasser was not reflected in the outline because there is little authority to the effect that being a trespasser influence the rights of the finder. The theory that a chattel may become part of the realty although it has never been the intent of any party to have it become a fixture, has been rejected in the outline for two reasons: the lack of authority supporting such a proposition and the ambiguity which such a concept would create in any summary. Finally, the concealment or lack of concealment of the goods was not considered in the outline because of the absence of authority to sustain a distinction based upon intentional concealment.

Although it is impossible to say unequivocally that the outline set out in this article is an accurate statement of the law, it is believed that it does give some order to the chaotic condition of one's mind after reading a selected group of cases on the subject. It is for this purpose that this article was written.