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The Legal Rights of a Finder: Challenges and Prospects

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Abstract

A person who finds goods belonging to another and takes them into his custody is in the same position as a bailee. He is obligated to all the responsibilities of a bailee including the duty to return the goods after the true owner is found. The research aimed at tracing the provenance and development of the rule that possession generates a general property right at common law, presenting a view that is slightly skeptical of the orthodoxy. Beyond simple moral considerations, the paper evaluated the legal principles of "lost and found" which govern this research and being ones which jurists have debated over the centuries. Hence this work assessed the historical overview of these issues and quite extensively analyzed some of the complexities associated with this field of personal property law. The adopted methodology is doctrinal with primary and secondary sources on law and possession aided by international intellections, textbooks, journal articles, newspapers and online materials. The discourse further examined enormously the challenges and prospects surrounding the concept of the finder's rights, the basis for enforcement in the event of breach on both parties as well as the effects of the principles governing the conception. The options open to the parties and the limitations were also critically appraised. The article finally considered the principles in other jurisdictions concluding with its findings that a finder has no right to sue the owner for compensation for the expenses incurred in keeping the goods but has the right to retain the goods until the compensation is paid.

Key Words: Legal, Rights, Finder, Possession, Orthodoxy, Lost, Mislaid, Found.

1. Introduction

Imagine John Bolton walking along a busy downtown street when a small object catches the corner of his eyes. Intrigued, he bends down to find a small pouch which upon further examination contains a gold bracelet. There is neither attached identification nor any sign of the owner. The question sprouts; to whom does this bracelet now belong? Does the well- known adage of "Finders keepers," the law of the elementary school playground apply in this case? Or are there actual formal laws at play that delineate specific rights of possession?

Are finders actually keepers? This simplest of questions has long evaded a satisfactory legal answer. Generally, it seems to have been accepted that a finder acquires a property right in the object of his/her find and can protect it from subsequent interferences, but even this turns out to be the baldest statement of principles resting on obscure and confused authority.

Property is generally deemed to have been lost if it is found in a place where the true owner likely did not intend to set it down, and where it is not likely to be found by the true owner. At

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common law, the finder of a lost item could claim the right to possess the item against any person except the true owner or any previous possessor.

The underlying policy goals to these distinctions are to (hopefully) see that the property is returned to its true original owner, or "title owner." Most jurisdictions have now enacted statutes requiring that the finder of lost property turn it in to the appropriate authorities; if the true owner does not arrive to claim the property within a specified period of time (this is defined by the Torts Acts 1977 as three months from the date of finding), the property is returned to the finder as his own, or is disposed of.

(i)Foundations of the Law of Lost and Found

The basic foundations of the law of lost and found are rooted in the legal codes of ancient Rome. In fact, the concept of finders' keepers derived from the work of the second century jurist Gaius, who suggested that unowned property (*res nullius*) becomes "the property of the first taker." (*Lueck*). The Roman Emperor Justinian further proposed that property which was intentionally abandoned by the owner (*res derelicto*) turned into a res nullius and could thereafter be claimed by any individual who found it (*known as occupatio.*) (Metzger)

The basic foundations of the law of lost and found are rooted in the legal codes of the ancient Rome. However, not all things seemingly left abandoned fell under this category. Objects could "drop out of moving vehicles without the owner's knowledge," Justinian surmised or thrown off a ship in a storm out of necessity. (Metzger) In these cases, the original owner retained his or her right of ownership and to take the property would be constituted as theft. (Melville) Roman law thus began to flesh out some formative distinctions about property ownership which would subsequently form the basis of the modern Western legal tradition.

(ii)Possession as a Source of Property Right

Possession is a property interest under which an individual to the exclusion of all others is able to exercise power over something. It is a basic property right that entitles the possessor to continue peaceful possession against everyone else except someone with a superior right. It also gives the possessor the right to recover personal property (often called chattel) that has been wrongfully taken and the right to recover damages against wrongdoers.

To have possession, an individual must have a degree of actual control over the object, coupled with intent to possess the object and exclude others from possessing it. The law recognizes two types of possession: actual and constructive.

In common law countries, possession is itself a property right. The owner of a property has the right of possession and may assign that right wholly or partially to another who may also reassign the right of possession to a third party.

(iii)Actual Possession: Actual Possession is commonly taken as "Possession", that is, having physical custody or control of an object (**United States v Nenadich**[1]). Actual Possession, also sometimes called Possession in Fact, is used to describe immediate physical contact. For example, a person wearing a wrist watch has actual possession of the watch. Likewise, if you

[1] 689 F. Supp. 285 [S.D. N.Y. 1988]

have your wallet in your jacket pocket, you have actual possession of your wallet. This type of possession, however, is by necessity very limited.

> Frequently, a set of facts clearly indicate that an individual has possession of an object but that he or she has no physical contact with it. To properly deal with these situations, courts have broadened the scope of possession beyond actual possession.
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> **Constructive Possession:** Constructive possession is a legal theory used to extend possession to situation where a person has no hands on custody of an object. Most courts say that constructive possession, also sometimes called "possession in law," exists where a person has knowledge of an object and the ability to control the object, even if the person has no physical contact with it (**United States v Derose[2])**. For example, people often keep important papers and other valuable items in a bank's safety deposit box. Although they do not have actual physical custody of these items, they do have knowledge of the items and the ability to exercise control over them. Thus, under the doctrine of constructive possession, they are still considered in possession of the contents of the safety deposit box. Constructive possession is frequently used in cases involving criminal possession.

2. The Extent of the Finder's Rights

The seminal case in the law of lost and found is **Armory v Delamirie[3].** A tort case tried in the Court of King's Bench, England. The plaintiff, a chimney-sweep's boy, found a jewel during the course of his work and sent it to a goldsmith (the defendant) for valuation. The defendant's apprentice removed the jewel and offered three half-pence as compensation. Instead, the plaintiff sued to recover the original jewel. Lord Chief Justice Pratt's ruling in this case established the key precept in the law of lost and found. He ruled that "the finder of a jewel, though he does not by such finding acquire an absolute property right of ownership but has such a property as will enable him to keep it against all but the rightful owner." In other words, the case established that a finder holds title to the property he or she finds against all other individuals except from the true owner.

This ruling influenced subsequent interpretations in the law of lost and found. In **Bridges v Hawkesworth[4]**, the plaintiff found some bank notes on the floor of a shop and handed them to Hawkesworth, the shopkeeper, asking him to return the money to the original owner. When, after three years the money remained unclaimed and Bridges sought to claim it as his own, Hawkesworth submitted to the courts that he had the better claim as the item was found on his property. Lord Patterson, however, dismissed this argument and upheld the principle established in **Armory v Delamirie.**

A similar case occurred in **Parker v British Airways Board[5]**, whereby Parker discovered a bracelet on the floor of British Airways executive lounge, submitted it to the B. A. authorities,

[2] 74 F.3d 1177 [11th Cir. 1996]
[3] (1722), 1 Strange 505, 9 ER 664
[4] (1851), 15 Jur. 1079, 21 LJQB 75
[5] (1982) QB 1004

and requested that he be contacted if the owner was not found. When British Airways instead sold the bracelet, Parker sued.

The courts reaffirmed that to establish possession, the owner's *aminuspossidendi*(intention to possess a chattel) must be clear. In Parker's case, though the British Airways lounge was restricted to a certain class of passengers, there was no manifest intent by the airline to exercise its control over lost property found in the lounge. Evidently, the common law has leaned heavily on the side of the finders over other potential competitors.

Additionally, at common law, title is relative[6] and finder's rights flow from possession,[7] which creates a rebuttable presumption of ownership as against a stranger irrespective of how it was acquired. This will prevail against all subsequent claims and will only be defeated by the true owner or a party enjoying superior title, being that which existed prior to the finding and its continuing.[8]

In determining disputes, the courts task is not to decide who the absolute owner is, but rather who has a better right to possession. In doing so, a subsequent claimant is precluded from using the right of a third party as a defence (*plead the jus tertii*). That is, they cannot rely on a finder's title being defective, but must rely on the strength of their own title.

A finder will be deemed to be in possession of property and thus having appropriated it if he or she satisfies possession in fact and an intention to posses

a. Physical Control (*Factum*) Possession in fact will be established if a finder had physical custody or constructive control of an item. In determining if the requisite degree of control existed, the courts will consider the circumstances of the finding.

b. Intent to Possess (*Animus Possidendi*) A finder must establish an intent to possess, that is, a manifest intent, express or implied by the circumstances, to exercise control over the item to the exclusion of all others. This may be inferred by the act itself.

Reasonable Steps to find the True Owner

Donald L J espoused a formula one of the rule, being, a finder of lost or abandoned goods acting honestly acquires a right to possession, as against all others, save for the true owner, or a party enjoying superior title, such as employers, land owners or occupiers.

Donaldson L J stressed an important qualification to the rule, that a finder must make reasonable efforts to find the true owner. Failing this, he or she may be guilty of theft. The policy here is to promote honesty, discourage dishonesty and wrongdoing and most importantly reunite owners of lost items.

A finder is a quasi-Bailee for the true owner and has a duty to take reasonable steps to restore the property to the true owner. Failing this, and subject to the true owner's title being abandoned or

[6] Asher v. Whitlock (1865) LR 1 QB 1; Perry v Clissold [1907] AC 73. See Premier Group Pty Ltd v Followmont Transport Pty Ltd [2000] 2 Q

[7] See Holmes The Common Law, L VI (l, le Brown, 1881)

[8] Wilbraham v Snow (1699) 2 WmsSaund 47a; 47f; 85 ER 624; Horsley v Phillips Fine Art Aucti'oneers Pty Ltd (1995) 7 BPR 14, 360.

otherwise extinguished at law, the finder will acquire absolute indefeasible title, enforceable against all subsequent claimants.

3. Distinction Between Lost, Mislaid and Abandoned Property

It is pertinent to distinguish between lost, mislaid and abandoned property to ascertain the rights and duties attached therein. Property may be lost, mislaid or abandoned. Property is lost if the owner involuntarily and unintentionally parted with it, mislaid if the owner voluntarily and intentionally put it down intending to recover it but forgot to or abandoned if the owner voluntarily and intentionally relinquished title.

In determining whether an item has been lost, mislaid or abandoned, the court will consider the circumstances in which the item was found so as to draw an inference on the facts as to the likelihood the true owner intended to abandon title. Facts that may indicate an intention to abandon title include the size and value of an item and the location in which it was found. Mere inactivity is unlikely to constitute abandonment.

The purpose of the law of finders is to reunite lost property with its true owner, whereas the purpose of the law pertaining to abandoned property is to assign full ownership rights to finders. The is because the law protects the honest mistakes of "losers" (true owners). This does not extend to abandoned items, as the owner cannot re-claim such items, having voluntarily and intentionally relinquished title at which point such items become ownerless. As such, a finder of abandoned goods becomes the owner by lawfully appropriating it, that is, by taking possession and forming intent to own it. If, however, it transpires that the owner did not abandon goods, he may be able to recover possession or sue for damages in conversion, detinue or trespass to goods.

(i) Exceptions to the Finder's Rights Rule

As espoused earlier, the finder does not acquire an absolute property right of ownership but has such a property as will enable him keep it against all but the rightful owner. However, the courts have established some limitations to the general rule set out by **Armory v Delamirie**. Hence there are limitations to the rights of a finder as same will be examined below.

(a) Owner or Occupier of Land

Trespass: Where property is found on another's land, a trespassing finder will acquire limited rights subordinate to the rights of the occupier or land owner. The public policy behind the laws position on trespassing finders is that wrongdoers should not benefit from their wrongdoing. It is also consistent with the doctrine of fixtures, whereby chattels brought unto land may become fixtures, with title passing to the land owner. **Hibbert v McKiernan**[9] demonstrated that the law does not look kindly on trespassers or wrongdoers. In this case, Hibbert trespassed on a fenced golf course and found a number of golden balls. Though the balls were abandoned, Hibbert's presence on the property was dishonest and taking the property constituted an act of larceny.

Items Found 'In or On' Land: The general rule that applies to items found in, attached to or under the land is that the land owner or occupier has a better claim to such items, irrespective of having knowledge of the existence of the items. This is because there is a presumption at law that the occupier or land owner's possession and control of the premises extends to things found

[9] (1948) 2 KB 142, 1 All ER 860

therein, and as such the land owner has a better claim based on prior possession, which defeats subsequent possession by a luckier finder who, depending on the circumstances, may be trespassing. The rationale underpinning this principle is that the law protects against wrongdoers, upholds interests in land as paramount and assigns rights based on possession. The thing is deemed to have been in the land owner's possession antecedent to the finding and as such was never lost.

Where an item is found unattached to the land or in a building, the occupier will have a superior claim only if he/she establishes a manifest intent to control the land[10] and anything found therein. In such a case, the locus of the finding and nature of the premises will determine who has better title. If the item is found on private property, the occupier will prevail,[11] if the place of finding is public, the finder will prevail.[12]

The policy justifications underlying the rebuttable presumption which favour landowners and occupiers in the first instance assists in the advancement of a cogent doctrine of possession and in the promotion of the primary objective of finder's law, in reuniting lost items with the true owner. It is thought that the true owner is most likely to make his/her way back to the place where the item was lost to recover it[13]. It is also considered to be more practically and economically efficient to have a rule that gives preference to an occupier over a finder as it promotes certainty, in that an occupier is readily identifiable, which in turn minimizes enforcement costs, and is thereby economically efficient. Such a rule is also consistent with the rights accorded to occupiers and land owners generally, the laws protection of the family home and its contents in preventing unauthorized interference. It also discourages finder trespassers, thereby adhering to social expectations and norms.

(a)Employers

If items are found during the course of employment, a finder's rights will be transferred to the employer,[14] unless the finding was incidental to the employment and not the effective cause, or if it is contractually excluded. In addition, if an item is found on an employer's land, the occupier's rule may be invoked[15]. Where however an item is found in a public place, the employee finder will prevail.

(c)Mislaid Property: The Extent of the Rights Attached

As earlier mentioned, not everything that is "found" has been "lost." Quite commonly, an article may have been laid down by its possessor and then forgotten. Such property is not really lost; it is "mislaid" or "forgotten." It is thus not always possible, when the presence of an article is discovered, to know whether it has been lost or mislaid. A hat hanging on a hook and a piece of

[10]Payne v Dwyer [2013] WASC 271; Petkov v Lucerne Nominees Pty Ltd (1992) 7 WAR 163; Tamworth Industries Ltd v A-G [1991] 3 NZLR 61

[11] Waverley Borough Council v Fletcher [1996] QB 334; Hibbert v McKiernan [1948] 2 KB 142

[12] Bridges v Hawkesworth (1851) 21 LJQB 75; Byrne v Hoare [1965] Qd R 135; Elwes v Brigg Gas Co (1886) 33 Ch D 562

[13] Tamworth Industries Ltd v Attorney-General [1993] 3 NZLR 61

[14] Wiley v Synan (1937) 57 CLR 200; M'Dowell v Ulster Bank (1899) 33 Ir L To 223; Haymen v Mundle (1902) 22 Can LT 152; Heddle v Bank of Hamilton (1912) 5 DLR 11; Grafstein v Holme& Freeman (1958) 12 DLR (2d) 727; Corpora on of London Corp v Appleyard [1963] 2 All ER 834

[15] Byrne v Hoarne [1965] Qd R 13

luggage in a baggage rack over the seat in a railway coach were undoubtedly put in their respective places intentionally. They were "left" there; and if the owner does not now remember them, they are not "lost" but "mislaid". A pocketbook on the floor of the car, on the other hand, unquestionably must have fallen there without the loser's notice. But a lady's handbag on the seat of the car presents quite a different problem. It may have been placed there intentionally and then forgotten, or it may have slipped there in the first place quite without the lady's knowledge. In spite of this difficulty of being sure whether an article has been lost or only misplaced. The courts have been lost or only misplaced, the courts have usually tried to maintain a distinction between the two.

Thus in **McAvoy v Medina,**[16] where the facts indicated that a pocketbook found on the table in defendant's barbershop must have been placed on the table intentionally by a previous customer, the plaintiff, a subsequent patron of the shop who picked it up, was held not to be a finder of "lost" property. He was thus denied finder's rights.[17] In State ex. rel. **Scott v Buzzard**[18] a metal box containing several thousand dollars, found in the wall of a building being torn down by a wrecking company, was held to have been placed there intentionally; and the workman who discovered the box was held not to be a finder of 'lost" property. Similarly, in **Flax v Monticello Realty Co.**[19] a diamond brooch found in a crevicein a mattress in a hotel was held to have been "mislaid" rather than "lost". Accordingly, the court held that the owner of the hotel was entitled to possession until the true owner might be found.

Although courts rather consistently make this distinction between lost and mislaid property, giving finder's rights only in the case of the former, one rarely finds advanced a theory to support such distinction. The notion seems to be that property voluntarily laid down is somehow placed within the "protection of the house", and comes into the possession of the owner of the premises; but any attempt at legal analysis of the problem along these lines surely must lead to confusion.

4. The Position of Finders Rights in Other Jurisdictions

(i)India

Responsibility of a finder of lost goods has been laid down by section 71 of the Indian Contract Act, 1872 which states that "a person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as bailee." A finder of the goods is subject to the same responsibilities and liabilities as those of the bailee's of goods. He has to take the same degree of care and caution in respect of the goods found as the bailee has in respect of the goods bailed to him. The person who finds goods belonging to another is entitled to retain the goods against the owner until he gets compensation from him. He can sue the owner for the reward where a specific reward has been offered. The finder of the goods is entitled to its possession as against everyone except the real owner.

[16] 11 Allen (Mass.) 548, 87 Am. Dec. 733 (1866)

[17]"Property voluntarily laid down is not in legal contemplation lost. The right of possession as against all except the true owner is in the owner or occupant of the premises where it is discovered, since he has custody of the property, and owes a duty to the owner as a gratuitous bailee with respect thereto." Norris v Camp, C.C.A. 1944, 144 F. (2d) 1.

[18] Mo. App. 1940, 144 S.W. (2d) 847.

[19] 185 Va. 474, 39 S.E. (2d) 308

Rights of the Finder of Lost Goods Under Indian Law

The following are the finder's rights as envisaged by sections 168 and 169 of the Indian Contract Act.

(a) A finder has the right to retain possession of the goods so long as it is not claimed by the true owner, since finder of lost goods is the best owner as against the rest of the world except the true owner.

(b)The finder is entitled to compensation for the trouble and expenses voluntarily incurred by him in preserving the goods and finding out the owner, for such expenses he has no right to sue the owner for compensation (section 168). He has a particular lien upon the goods for payment of these expenses, i.e.; he can refuse to return the goods until he is paid for the expenses and trouble.

(c)He can sue for any rewards if offered by the owner for the return of the lost goods. The finder of goods may retain the goods against the owner where the owner has offered a specific reward for the return of the goods lost, but it must be within his contemplation of offering the reward by the owner. The finder may sue for such reward, and may retain the goods until he receives the reward. If the goods found are commonly a subject matter of sale, and if the owner cannot with reasonable diligence be found, or if he refuses, on demand, pay the lawful charges of the finder, he may sell them when;

The goods are in danger of perishing or of losing the greater part of their value, or When the lawful charges of the finder amount to two- thirds of their value (Sec. 169).

(ii)Japan

The relevant "special law," the Law Concerning Lost Articles, was adopted in 1899 and is still in force. The Law Concerning Lost Articles provides a concrete set of rules from which to administer lost property. A person who finds lost property must return it to its owner or submit it to the chief of police within seven days of the find (articles1,9). Lost property includes articles left behind by other people and domestic animals that have run away (article 12). If a person finds lost property inside a private establishment (such as a departmental store, a ship or inside the turnstiles of a railway), he must submit it to the management of the establishment within twenty- four hours (article 10).

The Law establishes a reward system. Upon recovery, an owner "shall pay" the finder a sum of between five and twenty percent of the value of the lost property (article 4). A finder has a civil right to the reward (assuming the find was reported within the seven-day period), but non-payment is not a criminal infraction. If the property is found in a private establishment, one half of the reward goes to the establishment owner incentive to secure lost property (and less incentive for the individual finder in such establishment). If no one claims the property, and the finder waives his right to it or forfeits by;

(a)Not turning in within seven days, or

(b)Being an ex-convict for embezzlement of lost property, it escheats to the state (articles 9, 15)

In summary, a finder of lost property in Japan has three choices. Firstly, he may ignore it with no consequence. Secondly, he may turn in the property to the police or a private substitute. If he does so within seven days, he is entitled either to the property, after six months and fourteen days, or if recovered, a finder's fee of five to twenty percent. Thirdly, he may keep the property for himself, but if he does so, he may be punished by fine or by imprisonment.

(iii) United States

Compared to the Japanese system, the U.S. lost property legal regime is markedly more complex and less predictable. The doctrine of finders' law in the United States is conceptually difficult, making contradictory statements and arbitrary distinctions that are difficult for courts, not to mention laypersons, to follow and apply. When the facts are simple, there is little problem. In the paradigmatic case of **Armory v Delamirie** for instance, a chimney-sweep's boy found a jewel while sweeping a chimney. The court simply found that he was entitled to "keep it against all but the rightful owner". But as **R.H. Helmholz** has noted, "When the facts become more tangled the limitations of the hornbook rule appear". Helmholz finds that courts disallow possession in cases of wrongdoing on the part of the finder; a hint of dishonesty may cause the property right to transfer to a more honest finder **Neiderlehner v Weatherly; Willsmore v Township of Osecola.** Part of the complexity lies in the distinction made in the common law between lost property and property that is merely mislaid. Absent special circumstances, lost property goes to the locus finder, but mislaid property goes to the true owner.

5. Conclusion

From this research, one can see that the concept of "finders' keepers" does enjoy legitimacy in the law, albeit with some important qualifications. The rights to possession of found items are dependent upon the relative rights of the finder, the owner or occupier, employers and the distinct icon between abandoned, mislaid and lost property. The policy of the law is to discourage wrongdoing, encourage honesty by rewarding honest finders, promote certainty, stability and efficiency and most importantly to reunite owners with lost property. This is achieved through the provision of superior rights to landowners and occupiers, which is also consistent with the laws protection of land rights generally. Furthermore, rights to possession may be displaced or subjected to civil or criminal action if a finder fails to take reasonable steps to find the true owner or acts with dishonest intent or commits trespass.