stitutes a qualified right to possession which can support a cause of action for conversion.

Possession can be likened to a journey down a path. Mr. Popov began his journey unimpeded. He was fast approaching a fork in the road. A turn in one direction would lead to possession of the ball he would complete the catch. A turn in the other direction would result in a failure to achieve possession he would drop the ball. Our problem is that before Mr. Popov got to the point where the road forked, he was set upon by a gang of bandits, who dislodged the ball from his grasp.

Recognition of a legally protected pre-possessory interest, vests Mr. Popov with a qualified right to possession and enables him to advance a legitimate claim to the baseball based on a conversion theory. Moreover it addresses the harm done by the unlawful actions of the crowd.

It does not, however, address the interests of Mr. Hayashi. The court is required to balance the interests of all parties.

Mr. Hayashi was not a wrongdoer. He was a victim of the same bandits that attacked Mr. Popov. The difference is that he was able to extract himself from their assault and move to the side of the road. It was there that he discovered the loose ball. When he picked up and put it in his pocket he attained unequivocal dominion and control.

If Mr. Popov had achieved complete possession before Mr. Hayashi got the ball, those actions would not have divested Mr. Popov of any rights, nor would they have created any rights to which Mr. Hayashi could lay claim. Mr. Popov, however, was able to establish only a qualified pre-possessory interest in the ball. That interest does not establish a full right to possession that is protected from a subsequent legitimate claim.

On the other hand, while Mr. Hayashi appears on the surface to have done everything necessary to claim full possession of the ball, the ball itself is encumbered by the qualified pre-possessory interest of Mr. Popov. At the time Mr. Hayashi came into possession of the ball, it had, in effect, a cloud on its title.

An award of the ball to Mr. Popov would be unfair to Mr. Hayashi. It would be premised on the assumption that Mr. Popov would have caught the ball. That assumption is not supported by the facts. An award of the ball to Mr. Hayashi would unfairly penalize Mr. Popov. It would be based on the assumption that Mr. Popov would have dropped the ball. That conclusion is also unsupported by the facts.

Both men have a superior claim to the ball as against all the world. Each man has a claim of equal dignity as to the other. We are, therefore, left with something of a dilemma.

Thankfully, there is a middle ground.

The concept of equitable division was fully explored in a law review article authored by Professor R.H. Helmholz in the December 1983 edition of the Fordham Law Review.[38] Professor Helmholz addressed the problems associated with rules governing finders of lost and mislaid property. For a variety of reasons not directly relevant to the issues raised in this case, Helmholz suggested employing the equitable remedy of division to resolve competing claims between finders of lost or mislaid property and the owners of land on which the property was found.

There is no reason, however, that the same remedy cannot be applied in a case such as this, where issues of property, tort and equity intersect.

The concept of equitable division has its roots in ancient Roman law.[39] As Helmholz points out, it is useful in that it "provides an equitable way to resolve competing claims which are equally strong." Moreover, "[i]t comports with what one instinctively feels to be fair."[40]

* * *

Application of the principle of equitable division is illustrated in the case of *Keron v. Cashman*, 33 A. 1055 (1896). In that case, five boys were walking home along a railroad track in the city of Elizabeth, New Jersey. The youngest of the boys came upon an old sock that was tied shut and contained something heavy. He picked it up and swung it. The oldest boy took it away from him and beat the others with it. The sock passed from boy to boy. Each controlled it for a short time. At some point in the course of play, the sock broke open and out spilled $775 as well as some rags, cloths and ribbons.

The court noted that possession requires both physical control and the intent to reduce the property to one's possession. Control and intent must be concurrent. None of the boys intended to take possession until it became apparent that the sock contained money. Each boy had physical control of the sock at some point before that discovery was made.

Because none could present a superior claim of concurrent control and intent, the court held that each boy was entitled to an equal share of the money. Their legal claims to the property were of equal quality, therefore their entitlement to the property was also equal.

Here, the issue is not intent, or concurrence. Both men intended to possess the ball at the time they were in physical contact with it. The issue, instead, is the legal quality of the claim. With respect to that, neither can present a superior argument as against the other.

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[38] R. H. Helmholz, Equitable Division and the Law of Finders, 52 Fordham L. R., 313 (1983). This article built on a student comment published in 1939. See Lost, Mislaid and Abandoned Property 8 Fordham L. R. 222 (1939).

[39] Helmholz supra, at 315 n. 14.

[40] Id. at 315.

Mr. Hayashi's claim is compromised by Mr. Popov's pre-possessory interest. Mr. Popov cannot demonstrate full control. Albeit for different reasons, they stand before the court in exactly the same legal position as did the five boys. Their legal claims are of equal quality and they are equally entitled to the ball.

The court therefore declares that both plaintiff and defendant have an equal and undivided interest in the ball. Plaintiff's cause of action for conversion is sustained only as to his equal and undivided interest. In order to effectuate this ruling, the ball must be sold and the proceeds divided equally between the parties.

NOTES

1. *The Importance of Possession.* Possession is one of the most primitive concepts in the law of property. In the beginning, it was hardly distinguishable from ownership. Only the needs of a more sophisticated society forced the separation of the concepts of possession and ownership. You may have assumed that so primitive a concept as possession is relatively simple. In fact, however, possession is itself a very subtle concept that has received much attention down through the centuries from Roman jurists to medieval and modern philosophers. In modern times, commentaries on the concept of possession have sought to escape the dogmatic and abstract approach of the older writers and to concentrate on how the courts have, or should have, applied the possession concept to resolve legal problems. The analysis of possession by Oliver Wendell Holmes in his famous book, *The Common Law*, is a good example of this approach. Holmes asserted that possession requires "a relation of manifested power" in relation to the object in question and "an intent to exclude others" from interfering with the object. In *Popov*, as in *Pierson v. Post* (the dispute over possession of the fox), the second requirement for possession as stated by Holmes is clear. The real issue is which of the competing claimants first established "a relation of manifested power" in relation to the object or animal in question. See generally Oliver Wendell Holmes, The Common Law, Lecture VI (1881, 1946 ed.).

2. *The Aftermath of Popov.* Several months after the *Popov* decision, the baseball was sold for $450,000 in a nationally televised auction. The auction price was less than half of what the parties expected. As a result, Hayashi expected that most of his share would be eaten up by attorneys' fees. But his lawyers proved to be generous and waived most of their fees. As one newspaper account described:

> They behaved nobly, looking out for someone's interests ahead of their own, and in a case that took greed and whininess in sports to a new level, who saw that coming? Hayashi and [his] lawyers both wanted to keep the final details of the fee private, but Hayashi said he kept enough money to pay his tuition for a master's degree in business administration, plus other bills from a year and a half of living crazily.

Finally, In Bonds Ball Case, Someone Show Some Class, San Francisco Chronicle, December 30, 2003. What about the other side? "Last we heard, Popov had acrimoniously parted ways with his attorney, * * * disputing his legal fees of $473,500. [His attorney] sued him." Id.

3. Applications of the Rule of Capture. The rule of capture from *Pierson v. Post*, supra, also applies to other common natural resources, such as oil and natural gas. Given the value of the resources involved, and the practical difficulties with application of the common law rule, state legislators have responded with state-specific statutory schemes to regulate ownership of these natural resources. But in the absence of a superseding statute, the common law rule of capture governs.

The rule of capture can arise in surprising contexts. For example, the rule can be seen in the practice of "marriage by capture," also known as "bride kidnapping," which is still recognized by some cultures. See R.H. Barnes, Marriage by Capture, The Journal of the Royal Anthropological Institute, Vol. 5, No. 1 (March 1999), pp. 57-73. See also Deirdre Evans-Pritchard & Alison Dundes Renteln, The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California, 4 S. Cal. Interdisc. L.J. 1 (1995) (focusing on the case of People v. Moua, No. 315972-0 (Cal. Super. Ct. Feb. 17, 1985) in which a Hmong man was accused of raping a Hmong woman and used "marriage by capture" as a cultural defense).

2. LOST AND FOUND PROPERTY

In capture cases, the rule of first possession determines who has the superior legal right to the disputed property. In found property cases, however, three additional factors potentially complicate the court's analysis of which claimant should be awarded the superior legal right to possession of the found property. First, a found item may have had a prior true owner, whose rights must be considered and protected if possible. Second, the item may have been found on privately owned land, in which case the rights of the landowner must be considered as a prior possessor under the concept of constructive possession. Third, the status or conduct of the finder may affect whether the court will reward the finder with the superior legal right to the found item. Which of these three factors is paramount in *Ganter v. Kapiloff*?

GANTER v. KAPILOFF

Court of Special Appeals of Maryland, 1986
69 Md. App. 97, 516 A.2d 611

GILBERT, CHIEF JUDGE

Preface

This appeal tests the truthfulness of the old saw "Finders keepers, losers weepers." Our essay reveals the saw to be toothless, its mettle an alloy of "hot air, folklore, and wishful thinking."

The Facts

The brothers Leonard and Bernard Kapiloff are philatelists. In approximately 1976 they purchased two sets of stamps from Robert A. Siegel, Inc., a New York corporation dealing in postage stamps. That the stamps are of considerable value is reflected by their advertised price, $150,400.00. As far as the brothers knew, those stamps remained in their possession until February 1, 1983. On that date Bernard Kapiloff saw an advertisement, in a nationally circulated catalogue, offering the stamps for sale. He contacted the alleged owner, Robert L. Ganter, and demanded return of the stamps. The demand was refused. The Kapiloffs notified the Federal Bureau of Investigation, and that agency took physical possession of the stamps from J. & H. Stolow, another New York stamp dealer. The stamps had been consigned to Stolow by Ganter, who asserted that they were his property.

Ganter related in a deposition that he acquired the stamps by finding them in a dresser he had purchased for thirty dollars in a used furniture store. The purchase was made, according to Ganter, in "the spring or summer of 1979 or 1980." When he "took the drawers out and started spraying [them] for roaches," Ganter "found a bunch of newspapers, magazines and the stamps." The stamps were in a glassine envelope and "looked very official" because they were accompanied by a certificate with "maybe a gold label on it." No appraisal of the stamps was sought by Ganter at that time because he had "no particular interest in the stamps." Subsequently, he visited someone in New York City who suggested the stamps be appraised. At Thanksgiving time in 1982, Ganter took the stamps to the Stolow Auction House and was told that they were "a rather sensational find."

When Ganter refused the Kapiloffs' demand that he return the stamps to them, they sued him and J. & H. Stolow, Inc., in replevin in the District Court of Maryland for Baltimore City. The action was removed by Ganter to the Circuit Court for Baltimore City, where it was amended to include a count seeking a declaratory judgment that the Kapiloffs were "the true owners of the stamps."

Following a hearing, Judge Robert I. H. Hammerman entered summary judgment in favor of the Kapiloffs on both counts.[1]

The Replevin Action

An action of replevin is designed to obtain possession of personal property that is wrongfully detained by the defendant. Indubitably, the Kapiloffs had the right to assert an action in replevin since they averred that they owned the stamps and that Ganter and Stolow had unauthorized possession of the stamps when the action was filed.

* * *

"Finders Keepers"

Having determined that the Kapiloffs could maintain an action of replevin * * * we turn now to Ganter's "Finders–Keepers Theory" of ownership.

The first reference that we have discovered to the adage about "finders keepers" appears in the writings of Plautus who penned in *Trinummis* 1. 63 (c. 194 B.C.), "*Habeas ut nanctus:* He keeps that finds." In Charles Reade's *It is Never Too Late to Mend,* Ch. 65 (1856), the saying was reported as "Losers seekers, finders keepers." That expression has evolved into the more familiar "Finders keepers, losers weepers." Whatever its origin, the maxim is legally unsound.

Historically, since at least March 25, 1634, the law of Maryland has been that he who finds lost personal property holds it against all the world except the rightful owner.

Chief Justice Coke in *Isaack v. Clark,* 2 Bylstrode 306 (1615), wrote:

> [W]hen a man doth finde goods, it hath been said, and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged, but this is not so * * * for he which finds goods, if bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody, but when he hath them, one onely hath then right unto them, and therefore he ought to keep them safely; if a man therefore which finds goods, if he be wise, he will then search out the right owner of them, and so deliver them unto him * * *.

Isaack, however, is not generally recognized as the premier authority dealing with ownership of lost property. Usually that status is afforded to

[1] How one in a declaratory judgment action enters a summary judgment without declaring any rights or findings is not explained. In any event, that procedural aspect of this case is not an issue on appeal. We shall treat the matter as the parties seem to have done—a declaration by the trial court that the ownership of the stamps is in the Kapiloffs.

England's Chief Justice Pratt for his opinion in *Armory v. Delamirie,* 1 Strange 505 (1722). There a chimney sweep found a jewel and took it to a goldsmith. The jewel was delivered into the hands of an apprentice who took out the stones. The chimney sweep was offered a pittance for the socket minus the stones. The sweep sued the goldsmith. In allowing recovery from the goldsmith of the value of the gems, the court articulated the legal precept that the finder of lost property, while not acquiring an absolute ownership in it, does, nevertheless, hold the property "against all but the rightful owner * * *."

Even though Maryland was not settled at the time of the *Isaack* decision, it was the law of the proprietory province from the time of its founding. *Armory,* likewise, was binding in the courts of Maryland. With the advent of the Revolutionary War and subsequent adoption of a State constitution, Maryland carried into its State law those laws of England which existed on July 4, 1776. There they remain except where they have been changed by the Legislature. Md. Declaration of Rights Art. 5.[2] To date the General Assembly has not overruled, amended, altered, or changed, by one iota, the holdings of *Isaack* and *Armory.* Those decisions remain the law of this State.

Maryland is not alone in following *Armory.* Our sister states that have considered the issue also follow *Armory.* See, e.g., Tatum v. Sharpless, 6 Philadelphia Reports 18 (1865); Sovern v. Yoran, 16 Or. 269, 20 P. 100 (1888); Favorite v. Miller, 176 Conn. 310, 407 A.2d 974 (1978); Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172 (1878); Durfee v. Jones, 11 R.I. 588, 23 Am. Rep. 528 (1877); Deaderick v. Oulds, 86 Tenn. 14, 5 S.W. 487 (1887). See also Preston Coal & Improv. Co. v. Raven Run Coal Co., 200 F. 465, 468 (3d Cir.1912); 1 Am. Jur. 2d, Abandoned, Lost & Unclaimed Property, § 19; R. Brown, The Law of Personal Property § 3.1 (Raushenbush, 3rd Ed. 1975).

Generally, it may be said that the finder of lost property holds it as a bailee for the true owner. As to all others, the finder's rights are tantamount to ownership, giving him the right to possess and hold the found goods.

In the matter sub judice, Ganter, having found the stamps, had the right to exercise ownership over them against the whole world except the

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[2] Art. 5 of the Maryland Constitution, Declaration of Rights provided in pertinent part:

That the Inhabitants of Maryland are entitled to the Common Law of England, * * * according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; * * * except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State * * *.

true owners, who were determined by Judge Hammerman to be the brothers Kapiloff. Once the true owners were determined, Ganter's possessory interest ceased.

* * *

Judgment Affirmed.

NOTES AND QUESTIONS

1. *Finder Versus True Owner.* Although "finders keepers, losers weepers" is part of American folklore, it is, as *Ganter* illustrates, not the law. As against the true owner, a finder of lost goods does not acquire ownership. As to the true owner (or one with a superior legal right to possession), the finder is often said to be a "bailee" or "quasi-bailee." The implications of bailee status are addressed later in Section D of Chapter Two. If a finder knows or has a reasonable means of discovering the identity of the owner, but nevertheless appropriates the lost goods to his own use, the finder is guilty both of the tort of conversion and the crime of larceny. See generally, R. Brown, Personal Property, Ch. 3 (3d ed. 1975).

2. *Successive Finders.* The rule of *Armory v. Delamirie*, that a finder prevails against everyone but the true owner, is an oversimplification of the law. For example, is the rule useful in deciding cases involving competing finders? Assume that Jones loses a Rolex watch that he had earlier found and that Smith subsequently finds it. Here, the *Armory* rule gives ground to a second legal principle that a prior possessor's claim to a chattel is superior to that of a subsequent possessor. Indeed, as you will see later in Chapter Two, Jones may prevail as a prior possessor even though he may have obtained the Rolex by shoplifting. What is the underlying rationale for this preference for prior possessors?

3. *Finder Versus Landowner.* By discovering a chattel and taking possession of it, a finder acquires rights that are superior to those of most other persons. The finder's rights, however, are subject to the rights of the true owner and to the rights of prior possessors. Moreover, a finder's rights also may be subject to the claims of the owner of the land upon which the chattel was found. Depending upon the classification of the item found, the landowner may be treated as a prior possessor based upon the concept of constructive possession. In fact, most finders cases involve contests between finders and landowners.

To illustrate, consider *South Staffordshire Water Co. v. Sharman*, 2 Q.B. 44 (1896), a classic English decision. The plaintiff in that case hired the defendant to clean out a pool located on the plaintiff's land. In the course of this employment, the defendant found two gold rings mired in mud on the bottom of the pool. When the defendant refused to relinquish the rings, the plaintiff sued in detinue for their possession. In holding for the plaintiff-landowner, the court relied upon the following language from Pollock & Wright, Essay on Possession in the Common Law:

> The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. 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.

Id. at 41.

An Idaho decision articulates this preference for the landowner as follows:

> Land ownership includes control over crops on the land, buildings and appurtenances, soils, and minerals buried under those soils. The average landowner would expect to have a possessory interest in any object uncovered on his or her property. And certainly the notion that a trespassing treasure hunter, or a hired handyman or employee, could or might have greater possessory rights than a landowner in objects uncovered on his or her property runs counter to the reasonable expectations of present-day land ownership.

Corliss v. Wenner, 136 Idaho 417, 34 P.3d 1100 (Idaho App. 2001).

Another way a landowner often prevails over a finder is through the "lost-mislaid" distinction. Under this theory, "mislaid" property is assumed to have been intentionally placed by the chattel's true owner in a specific location. Thereafter, the owner forgets where the item was placed. In contrast, for "lost" property it is assumed that the owner loses possession inadvertently or unconsciously. Courts usually hold that the owner of the land where the item is found is entitled to possession of a mislaid chattel, but the finder prevails as to a lost chattel. See, e.g., Franks v. Pritchett, 88 Ark. App. 243, 197 S.W.3d 5 (Ark. App. 2004) (cash found by guest in hotel room drawer was "mislaid" and should be held in trust by hotel owner until retrieved by true owner); Terry v. Lock, 343 Ark. 452, 37 S.W.3d 202 (Ark. 2001) (money found by motel renovator in motel wall was "mislaid" so as to give the motel owner a superior interest in the money over the renovator-finder). Why should the courts award possession of "mislaid" property to the landowner over the finder? How does a court determine if a chattel is "lost" or "mislaid"?

Should it make a difference whether the chattel is found in a public rather than a private place? According to Professor Burke, when a chattel is found in a place that is public (e.g., a department store aisle), the finder has a right prior to that of the landowner because the landowner would have no expectation of constructive possession and would not have any duty to safeguard the chattel for the true owner. B. Burke, Personal Property 164 (2nd

ed. 1993). Do you agree? Should it matter whether the finder is a trespasser? Many courts rule in favor of the landowner on the theory that the trespasser, as a wrongdoer, should not profit from his or her wrong. See, e.g., Favorite v. Miller, 176 Conn. 310, 407 A.2d 974 (1978).

4. *Finders' Statutes.* A number of states have statutes dealing with lost and found property. Although these statutes generally do not impose an affirmative duty on a finder to attempt to locate the true owner of the item, many finders' statutes provide an incentive for the finder to do so. Finders' statutes often specify procedures for identifying the true owner, such as using newspaper advertisements, posting notices on the property where the article was found, and reporting the find to the police or delivering the item to them for temporary custody. If the true owner does not appear to claim the item within some fixed time (commonly 90 days to one year), then the finder becomes the owner. If the true owner does appear, the finder must relinquish the item, but may be entitled to a reward calculated as a percentage of the item's value or based on the level of the finder's effort to locate the true owner. See B. Burke, Personal Property 182 (2d ed. 1993). In some states similar statutes, called "estray statutes," govern the finding of domestic or farm animals.

The language of some finders' statutes appears to make the duty to report or advertise the find mandatory. Indeed, state law may make the failure to report the find to the police a misdemeanor or even a felony. See McKinney's New York Personal Property Law § 252(3) (misdemeanor); Neb. Rev. Stat. § 28–518 (felony if value of item exceeds $1,500). The finder's noncompliance with the statute, however, is likely to have no practical effect on the right to retain the property (subject, of course, to the true owner's ultimate claim). For example, in *Hendle v. Stevens*, 224 Ill. App. 3d 1046, 166 Ill. Dec. 868, 586 N.E.2d 826 (1992), a group of teenagers who found money partly buried in the ground on a vacant lot were permitted to retain it, as against the landowner, despite their noncompliance with the statute. The landowner was held to have no standing to assert the statutory violation.

5. *Finder Versus Employer.* Of what significance is the fact that a finder may have found a chattel in the course of his or her employment? Keep this question in mind as you read the next principal case.

Simply because a state enacts legislation governing the rights of finders of lost property does not mean that the preexisting case law or common law governing lost or abandoned property is suddenly supplanted. To what extent do prior common law decisions remain viable as the governing law? *Benjamin v. Lindner Aviation, Inc.* addresses this question.