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CHAPTER TWO

PERSONAL PROPERTY

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SECTION A. PROPERTY RIGHTS BASED ON POSSESSION

"Captured" property has no original owner. It typically consists of things found in nature, such as wild animals, minerals and other natural resources. In contrast, "found" property is assumed to have had a prior owner, who either lost, mislaid or abandoned the item. The underlying theme of cases involving captured and found property is the concept of *possession*. Possession determines who has the superior legal right to the captured or found property if the true owner does not claim it.

Possession has two required elements, both of which must be satisfied (to a greater or lesser degree, as we will see) before a court will conclude that a party has obtained possession of the property. For possession to occur, there must be: (1) a physical act of control over the object; and (2) the intent to control the object, or the intent to exclude possession of the object by others.

1. CAPTURED PROPERTY

Under the common law, captured property belongs to the first person to possess it. Judges may differ in their analysis of what constitutes first possession. For example, in the classic case of *Pierson v. Post*, 3 Cai. Rep. 175 (N.Y. Sup. 1885), the court had to determine who first "possessed" a fox. The competing claimants were a hunter, who spotted the fox and chased it in hot pursuit, and another person, who intervened at the last minute in the chase, killed the fox, and took the carcass. A majority of the court required a very strong physical act of control over the fox—killing it and "occupying" (holding) the carcass—to establish possession. A dissenting judge preferred to award the fox carcass to the initial "hot" pursuer instead. The dissent would have required a lesser degree of physical control over the fox carcass to establish "possession" due in part to the labor invested in spotting and chasing the fox, and in part due to the custom among hunters that the "hot" pursuer acquires the right to possession of the pursued animal.

In another classic case, *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881), the outcome was different. *Ghen v. Rich* was a dispute over who was entitled to a whale carcass. Should possession be awarded to the person who first

harpooned the whale, or to the person who later found the whale's carcass once it had washed ashore many miles away? The majority in *Ghen* determined that the harpooner of the whale was entitled to the value of the carcass based on the labor expended and industry custom. To rule against the harpooner would discourage an economic activity—the whaling industry—that was an important part of the local economy at the time of the court's decision.

As you read *Popov v. Hayashi*, notice how the court uses these prior precedents to attempt to determine who "owns" the record-setting baseball.

POPOV V. HAYASHI

Superior Court, San Francisco County, California, 2002
2002 WL 31833731

FACTS

MCCARTHY, JUDGE

In 1927, Babe Ruth hit sixty home runs. That record stood for thirty four years until Roger Maris broke it in 1961 with sixty one home runs. Mark McGwire hit seventy in 1998. On October 7, 2001, at PacBell Park in San Francisco, Barry Bonds hit number seventy three. That accomplishment set a record which, in all probability, will remain unbroken for years into the future.

The event was widely anticipated and received a great deal of attention.

The ball that found itself at the receiving end of Mr. Bond's bat garnered some of that attention. Baseball fans in general, and especially people at the game, understood the importance of the ball. It was worth a great deal of money and whoever caught it would bask, for a brief period of time, in the reflected fame of Mr. Bonds.

With that in mind, many people who attended the game came prepared for the possibility that a record setting ball would be hit in their direction. Among this group were plaintiff Alex Popov and defendant Patrick Hayashi. They were unacquainted at the time. Both men brought baseball gloves, which they anticipated using if the ball came within their reach.

They, along with a number of others, positioned themselves in the arcade section of the ballpark. This is a standing room only area located near right field. It is in this general area that Barry Bonds hits the greatest number of home runs. The area was crowded with people on October 7, 2001, and access was restricted to those who held tickets for that section.

Barry Bonds came to bat in the first inning. With nobody on base and a full count, Bonds swung at a slow knuckleball. He connected. The ball sailed over the right-field fence and into the arcade.

Josh Keppel, a cameraman who was positioned in the arcade, captured the event on videotape. Keppel filmed much of what occurred from the time Bonds hit the ball until the commotion in the arcade had subsided. He was standing very near the spot where the ball landed and he recorded a significant amount of information critical to the disposition of this case.

In addition to the Keppel tape, seventeen percipient witnesses testified as to what they saw after the ball came into the stands. * * *

The factual findings in this case are the result of an analysis of the testimony of all the witnesses as well as a detailed review of the Keppel tape. Those findings are as follows:

When the seventy-third home run ball went into the arcade, it landed in the upper portion of the webbing of a softball glove worn by Alex Popov. While the glove stopped the trajectory of the ball, it is not at all clear that the ball was secure. Popov had to reach for the ball and in doing so, may have lost his balance.

Even as the ball was going into his glove, a crowd of people began to engulf Mr. Popov. He was tackled and thrown to the ground while still in the process of attempting to complete the catch. Some people intentionally descended on him for the purpose of taking the ball away, while others were involuntarily forced to the ground by the momentum of the crowd.

Eventually, Mr. Popov was buried face down on the ground under several layers of people. At one point he had trouble breathing. Mr. Popov was grabbed, hit and kicked. People reached underneath him in the area of his glove. Neither the tape nor the testimony is sufficient to establish which individual members of the crowd were responsible for the assaults on Mr. Popov.

The videotape clearly establishes that this was an out of control mob, engaged in violent, illegal behavior. Although some witnesses testified in a manner inconsistent with this finding, their testimony is specifically rejected as being false on a material point.

Mr. Popov intended at all times to establish and maintain possession of the ball. At some point the ball left his glove and ended up on the ground. It is impossible to establish the exact point in time that this occurred or what caused it to occur.

Mr. Hayashi was standing near Mr. Popov when the ball came into the stands. He, like Mr. Popov, was involuntarily forced to the ground. He committed no wrongful act. While on the ground he saw the loose ball. He picked it up, rose to his feet and put it in his pocket.

Although the crowd was still on top of Mr. Popov, security guards had begun the process of physically pulling people off. Some people resisted those efforts. One person argued with an official and another had to be pulled off by his hair.

Mr. Hayashi kept the ball hidden. He asked Mr. Keppel to point the camera at him. At first, Mr. Keppel did not comply and Mr. Hayashi continued to hide the ball. Finally after someone else in the crowd asked Mr. Keppel to point the camera at Mr. Hayashi, Mr. Keppel complied. It was only at that point that Mr. Hayashi held the ball in the air for others to see. Someone made a motion for the ball and Mr. Hayashi put it back in his glove. It is clear that Mr. Hayashi was concerned that someone would take the ball away from him and that he was unwilling to show it until he was on videotape. * * *

Mr. Popov eventually got up from the ground. He made several statements while he was on the ground and shortly after he got up which are consistent with his claim that he had achieved some level of control over the ball and that he intended to keep it. Those statements can be heard on the audio portion of the tape. When he saw that Mr. Hayashi had the ball he expressed relief and grabbed for it. Mr. Hayashi pulled the ball away. Security guards then took Mr. Hayashi to a secure area of the stadium.

It is important to point out what the evidence did not and could not show. Neither the camera nor the percipient witnesses were able to establish whether Mr. Popov retained control of the ball as he descended into the crowd. Mr. Popov's testimony on this question is inconsistent on several important points, ambiguous on others and, on the whole, unconvincing. We do not know when or how Mr. Popov lost the ball.

Perhaps the most critical factual finding of all is one that cannot be made. We will never know if Mr. Popov would have been able to retain control of the ball had the crowd not interfered with his efforts to do so. Resolution of that question is the work of a psychic, not a judge.

LEGAL ANALYSIS

Conversion is the wrongful exercise of dominion over the personal property of another. There must be actual interference with the plaintiff's dominion. Wrongful withholding of property can constitute actual interference even where the defendant lawfully acquired the property. If a person entitled to possession of personal property demands its return, the unjustified refusal to give the property back is conversion.

The act constituting conversion must be intentionally done. There is no requirement, however, that the defendant know that the property belongs to another or that the defendant intends to dispossess the true owner of its use and enjoyment. Wrongful purpose is not a component of conversion. * * *

Conversion does not exist, however, unless the baseball rightfully belongs to Mr. Popov. One who has neither title nor possession, nor any right to possession, cannot sue for conversion. The deciding question in this case then, is whether Mr. Popov achieved possession or the right to possession as he attempted to catch and hold on to the ball.

The parties have agreed to a starting point for the legal analysis. Prior to the time the ball was hit, it was possessed and owned by Major League Baseball. At the time it was hit it became intentionally abandoned property. The first person who came in possession of the ball became its new owner.

The parties fundamentally disagree about the definition of possession. In order to assist the court in resolving this disagreement, four distinguished law professors participated in a forum to discuss the legal definition of possession.[17] The professors also disagreed.

The discussion was held during an official session of the court convened at The University of California, Hastings College of the Law. The session was attended by a number of students and professors including one first year property law class which used this case as vehicle to understand the law of possession.

While there is a degree of ambiguity built into the term possession, that ambiguity exists for a purpose. Courts are often called upon to resolve conflicting claims of possession in the context of commercial disputes. A stable economic environment requires rules of conduct which are understandable and consistent with the fundamental customs and practices of the industry they regulate. Without that, rules will be difficult to enforce and economic instability will result. Because each industry has different customs and practices, a single definition of possession cannot be applied to different industries without creating havoc.

This does not mean that there are no central principles governing the law of possession. It is possible to identify certain fundamental concepts that are common to every definition of possession.

Professor Roger Bernhardt has recognized that "[p]ossession requires both physical control over the item and an intent to control it or exclude others from it. But these generalizations function more as guidelines than as direct determinants of possession issues. Possession is a blurred question of law and fact."

Professor Brown argues that "[t]he orthodox view of possession regards it as a union of the two elements of the physical relation of the possessor to the thing, and of intent. This physical relation is the actual pow-

[17] They are Professor Brian E. Gray, University of California, Hastings College of the Law; Professor Roger Bernhardt, Golden Gate University School of Law; Professor Paul Finkelman, The Chapman Distinguished Professor of Law, The University of Tulsa School of Law; and Professor Jan Stiglitz, California Western School of Law.

er over the thing in question, the ability to hold and make use of it. But a mere physical relation of the possessor to the thing in question is not enough. There must also be manifested an intent to control it."

* * *

We start with the observation that possession is a process which culminates in an event. The event is the moment in time that possession is achieved. The process includes the acts and thoughts of the would be possessor which lead up to the moment of possession.

The focus of the analysis in this case is not on the thoughts or intent of the actor. Mr. Popov has clearly evidenced an intent to possess the baseball and has communicated that intent to the world. The question is whether he did enough to reduce the ball to his exclusive dominion and control. Were his acts sufficient to create a legally cognizable interest in the ball?

Mr. Hayashi argues that possession does not occur until the fan has complete control of the ball. Professor Brian Gray, suggests the following definition: "A person who catches a baseball that enters the stands is its owner. A ball is caught if the person has achieved complete control of the ball at the point in time that the momentum of the ball and the momentum of the fan while attempting to catch the ball ceases. A baseball, which is dislodged by incidental contact with an inanimate object or another person, before momentum has ceased, is not possessed. Incidental contact with another person is contact that is not intended by the other person. The first person to pick up a loose ball and secure it becomes its possessor."[24]

Mr. Popov argues that this definition requires that a person seeking to establish possession must show unequivocal dominion and control, a standard rejected by several leading cases.[25] Instead, he offers the perspectives of Professor Bernhardt and Professor Paul Finkelman[26] who suggest that possession occurs when an individual intends to take control of a ball and manifests that intent by stopping the forward momentum of the ball, whether or not complete control is achieved.

Professors Finkelman and Bernhardt have correctly pointed out that some cases recognize possession even before absolute dominion and control is achieved. Those cases require the actor to be actively and ably engaged in efforts to establish complete control.[27] Moreover, such efforts

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[24] This definition is hereinafter referred to as Gray's Rule.

[25] Pierson v. Post 3 Cai. R. (N.Y. 1805); Young v. Hitchens 6 Q.B. 606 (1844); *State v. Shaw* (1902) 67 Ohio St. 157, 65 N.E. 875.

[26] Professor Finkelman is the author of the definitive law review article on the central issue in this case, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?;* Cardozo Law Review, May 2002, Paul Finkelman, (Chapman Distinguished Professor of Law).

[27] The degree of control necessary to establish possession varies from circumstance to circumstance. "The law . . . does not always require that one who discovers lost or abandoned

must be significant and they must be reasonably calculated to result in unequivocal dominion and control at some point in the near future.[28]

This rule is applied in cases involving the hunting or fishing of wild animals[29] or the salvage of sunken vessels.[30] The hunting and fishing cases recognize that a mortally wounded animal may run for a distance before falling. The hunter acquires possession upon the act of wounding the animal, not the eventual capture. Similarly, whalers acquire possession by landing a harpoon, not by subduing the animal.[31]

In the salvage cases, an individual may take possession of a wreck by exerting as much control "as its nature and situation permit."[32] Inadequate efforts, however, will not support a claim of possession. Thus, a "sailor cannot assert a claim merely by boarding a vessel and publishing a notice, unless such acts are coupled with a then present intention of conducting salvage operations, and he immediately thereafter proceeds with activity in the form of constructive steps to aid the distressed party."[33]

These rules are contextual in nature. These are crafted in response to the unique nature of the conduct they seek to regulate. Moreover, they are influenced by the custom and practice of each industry. The reason that absolute dominion and control is not required to establish possession in the cases cited by Mr. Popov is that such a rule would be unworkable and unreasonable. The "nature and situation" of the property at issue does not immediately lend itself to unequivocal dominion and control. It is impossible to wrap ones arms around a whale, a fleeing fox or a sunken ship.

The opposite is true of a baseball hit into the stands of a stadium. Not only is it physically possible for a person to acquire unequivocal dominion and control of an abandoned baseball, but fans generally expect a claimant to have accomplished as much. The custom and practice of the

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property must actually have it in hand before he is vested with a legally protected interest. The law protects not only the title acquired by one who finds lost or abandoned property but also the right of the person who discovers such property, and is actively and ably engaged in reducing it to possession, to complete this process without interference from another. The courts have recognized that in order to acquire a legally cognizable interest in lost or abandoned property a finder need not always have manual possession of the thing. Rather, a finder may be protected by taking such constructive possession of the property as its nature and situation permit." Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 571.(1981).

[28] Brady v. S.S. African Queen, 179 F.Supp. 321 (E.D.Va. 1960); Eads v. Brazelton 22 Ark. 499 (1861); Treasure Salvors Inc., 640 F.2d at 571.

[29] Liesner v. Wanie, 156 Wis. 16, 145 N.W. 374 (1914); Ghen v. Rich, 8 F. 159 (D. Mass.1881); Pierson v. Post 3 Cai. R. (N.Y.1805); Young v. Hitchens 6 Q.B. 606 (1844); State v. Shaw, 67 Ohio St. 157, 65 N.E. 875 (1902). See also Herbert Hovenkamp and Sheldon Kurtz, The Law of Property 2 (5th ed. 2001).

[30] Indian River Recovery Company v. The China, 645 F.Supp. 141, 144 (D. Del.1986); Treasure Salvors Inc., 640 F.2d at 560; Richard v. Pringle, 293 F.Supp. 981 (S.D.N.Y.1968).

[31] Swift v. Gifford 23 F. Cas. 558 (D. Mass.1872).

[32] See supra note 27.

[33] Brady v. S.S. African Queen, 179 F. Supp. 321, 324 (E.D. Va., 1960).

stands creates a reasonable expectation that a person will achieve full control of a ball before claiming possession. There is no reason for the legal rule to be inconsistent with that expectation. Therefore Gray's Rule is adopted as the definition of possession in this case.

The central tenant of Gray's Rule is that the actor must retain control of the ball after incidental contact with people and things. Mr. Popov has not established by a preponderance of the evidence that he would have retained control of the ball after all momentum ceased and after any incidental contact with people or objects. Consequently, he did not achieve full possession.

That finding, however, does not resolve the case. The reason we do not know whether Mr. Popov would have retained control of the ball is not because of incidental contact. It is because he was attacked. His efforts to establish possession were interrupted by the collective assault of a band of wrongdoers.

A decision which ignored that fact would endorse the actions of the crowd by not repudiating them. Judicial rulings, particularly in cases that receive media attention, affect the way people conduct themselves. This case demands vindication of an important principle. We are a nation governed by law, not by brute force.

As a matter of fundamental fairness, Mr. Popov should have had the opportunity to try to complete his catch unimpeded by unlawful activity. To hold otherwise would be to allow the result in this case to be dictated by violence. * * *

For these reasons, the analysis cannot stop with the valid observation that Mr. Popov has not proved full possession.[36]

The legal question presented at this point is whether an action for conversion can proceed where the plaintiff has failed to establish possession or title. It can. An action for conversion may be brought where the plaintiff has title, possession or the right to possession. Here Mr. Popov seeks, in effect, a declaratory judgment that he has either possession or the right to possession. In addition he seeks the remedies of injunctive relief and a constructive trust. These are all actions in equity. A court sitting in equity has the authority to fashion rules and remedies designed to achieve fundamental fairness.

Consistent with this principle, the court adopts the following rule. Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest con-

[36] The court is indebted to Professor Jan Stiglitz of California Western School of Law for his valuable insights and suggestions on this issue.

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.

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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.