

“FINDERS KEEPERS, LOSERS WEEPERS”: THE LAW OF FINDING “LOST” PROPERTY IN MISSOURI

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INTRODUCTION

One would have thought that in the entire history of Missouri, there would be a great number of scholarly articles on lost property in Missouri. But, alas, such is not the case. There are a few, however, dealing with some aspects of this broad and confusing area of the law.¹ But research fails to find one article dealing solely with lost property in Missouri and its legal ramifications.

This small, simple article aims to fill that void. People find things every day and fall heir to their rights and duties when they do so. I dare say that the ordinary person—a finder of “lost” goods—knows little (except perhaps, “finders keepers, losers weepers”) about the obligation to notify the court, the duty to publish what has been found, or the right the finder has against third parties who claim the property. This article clarifies such rights and obligations.

While there are many general articles, notes, and comments dealing with the subject of finding lost chattels,² none, to the writer’s knowledge, deal

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1. See Joseph P. Giljum, *A Survey of State Abandoned or Unclaimed Property Statutes*, 9 ST. LOUIS U. L.J. 85, 108–09 (1964); Elmer M. Million, *Sawyer et al. v. Administrator of Injun Joe*, 16 MO. L. REV. 27, 31–32 (1951); Jo Beth Prewitt, *Unclaimed Property—A Potential Source of Non-Tax Revenue*, 45 MO. L. REV. 493, 497 (1980).

2. See, e.g., RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* 24 (3d ed. 1975); BARLOW BURKE, *PERSONAL PROPERTY IN A NUTSHELL* 158–95 (2d ed. 1993); WILLIAM L. PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* 88–90 (5th ed. 1984); Ralph W. Aigler, *Rights of Finders*, 21 MICH. L. REV. 664 (1923) [hereinafter Aigler, *Rights of Finders*]; Paul Finkleman, *Fugitive Baseballs and Abandoned Property: Who Owns a Home Run Ball?*, 23 CARDOZO L. REV. 1609 (2003); Roy Moreland, *Finders of Lost Property*, 16 KY. L.J. 3 (1927); David Reisman, Jr., *Possession and the Law of Finders*, 52 HARV. L. REV. 1105 (1939); Ralph W. Aigler, Note, *Personal Property—Finding Lost Goods—Rights of Finder and Owner of Locus in Quo in Lost and Mislaid Personal Property*, 21 MINN. L. REV. 191 (1937); Kimberly J. Winbush, Annotation, *Liability For Loss of Hat, Coat, or Other Property Deposited by Customer*

specifically with Missouri statutes and judicial decisions. Most of the classic articles cite and quote at length many of the leading Missouri decisions, but none are concerned primarily with them.

The purpose, therefore, of this article is to address lost property in Missouri. Section I provides general history on lost property. Section II discusses the debate on possession that occurs in the lost property context. Section III deals with case law on lost property in Missouri and in other state court cases. Section IV covers mislaid property in Missouri and in other jurisdictions.

I. A BIT OF HISTORY

It has been said that the topic of lost and found property (while seemingly simple) has provided some of the most difficult problems in the law of possession.³ The law of finding lost chattels developed out of the common law trover action. Now, trover is now enveloped into the present tort of conversion, but, originally, was the historical remedy to determine the rights of owners against finders.⁴ Trover (Fr. Trouver) means, of course, to find.⁵ It was one of the forms of action to recover damages for the detention of a chattel.⁶ Trover had its fictions because, under common law, the declaration required that the plaintiff aver he possessed the goods, the defendant found the same, and that the defendant converted the goods to his own use.⁷ A court even applied this fiction in one case, it is said, where a railroad sought to recover damages for the value of a locomotive engine wherein the owner alleged he possessed the engine, that he had lost it, and the defendant found it.⁸ This fiction lasted until abolished in England in 1852 by the Common Law Procedure Act.⁹

in Place of Business, 54 A.L.R.5th 393 (1997); Wanda E. Wakefield, Annotation, *Validity, Construction and Application of Lost or Abandoned Goods Statutes*, 23 A.L.R.4th 1025 (1983); J.A. Bock, Annotation, *Right to Reward of Furnishing Information Leading to Arrest and Conviction of Offender*, 100 A.L.R.2d 573 (1965); J.P. Ludington, Annotation, *Liability of Motor Carrier for Loss of Passenger's Baggage or Packages*, 68 A.L.R.2d 1350 (1959); J.E. Keefe, Jr., Annotation, *Rights in Respect of Lost, Mislaid, or Abandoned Property As Between Finder and Person Upon Whose Property it is Found*, 170 A.L.R. 706 (1947); Annotation, *Carrier—Right to Custody of Property Left by Passenger*, 9 A.L.R. 1384 (1920).

3. David C. Hoath, *Some Conveyancing Implications of "Finding" Disputes*, in THE CONVEYANCER AND PROPERTY LAWYER 348 (citing D.R. HARRIS, OXFORD ESSAYS IN JURISPRUDENCE 80 (A.G. Guest ed. (1961))).

4. William L. Prosser, *The Nature of Conversion*, 42 CORNELL L.Q. 168, 169 (1957).

5. *Trover*, in THE ENCYCLOPEDIA BRITANICA 314 (11th ed. 1910–11).

6. J.B. Ames, *The History of Trover*, 11 HARV. L. REV. 277, 286 (1897).

7. BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING 227 (3d ed. 1923).

8. *See generally* Peacock v. Pittsburg Locomotive & Car Works, 52 Ga. 417, 419 (1874).

9. *Trover*, supra note 5, at 314.

The Act invented a new writ to fill the gap left by the action of trespass, which required an unlawful taking.¹⁰ This action became the modern tort of conversion, which applies whenever the plaintiff is entitled to possession of goods and the defendant acts inconsistently with the rights of the owner or possessor to recover the value of the goods.¹¹

II. THE ULTIMATE PROBLEM

The fundamental problem in this area is the age-old debate over how to define "possession" and who is entitled to ultimate possession. The Missouri cases attempt to determine the priority of interest between the finder and the owner of the premises where the lost article is found.¹² The ultimate question, becomes then: who, as between the finder and the owner of the premises, is entitled to possession?¹³

Professor Warren addressed this question:

To understand the importance of possession we shall have to go back centuries. In the very early law great importance was attached to possession by a man who said to the world "Keep off; this is mine." The rudest people have some notion of ownership, but in the common law in medieval times the man in possession claiming to be owner was the owner. Seisen and possession were interchangeable terms.¹⁴

Possession was, and is, an interest to be protected. Possession under a claim of title was title against a wrongdoer.¹⁵ In time, possession became title against a wrongdoer.¹⁶ Hence, the basic question is: who, as between the finder and the owner of premises, is entitled to "possession?" The next section attempts to answer this question.

10. See *Fouldes v. Willoughby*, (1841) 151 Eng. Rep. 1153, 1155 (distinguishing between trover and trespass); JAMES BARR AMES, LECTURES ON LEGAL HISTORY 80 (1913); PROSSER & KEETON, *supra* note 4, at 89; Ames, *supra* note 6, at 286; A.W. Brian Simpson, *The Introduction of the Action on the Case for Conversion*, 75 L.Q. REV. 864, 871 (1959); see also *Johnson v. Weedman*, 5 Ill. (4 Scam.) 495, 496 (1843) (distinguishing the two remedies from conversion).

11. See RESTATEMENT (SECOND) OF TORTS § 228 (1965); PROSSER & KEETON, *supra* note 2, at 88; EDWARD H. WARREN, TROVER AND CONVERSION: AN ESSAY 2 (1936); Prosser, *supra* note 3, at 173-74; Edward H. Warren, *Qualifying as a Plaintiff in an Action for Conversion*, 49 HARV. L. REV. 1084, 1085 (1936) [hereinafter Warren, *Action for Conversion*].

12. See, e.g., *Foster v. Fidelity Safe Deposit Co.*, 174 S.W. 376 (Mo. 1915); *State ex rel. Scott v. Buzard*, 144 S.W.2d 847 (Mo. Ct. App. 1940).

13. See *Burke Shartel, Meanings of Possession*, 16 MINN. L. REV. 611, 611 (1932) (quoting *Reg v. Smith*, (1855) 6 Co. C. C. 554, 556).

14. Warren, *Action for Conversion*, *supra* note 11, at 1087.

15. *Jeffries v. Great W. R.R. Co.*, (1856) 119 Eng. Rep. 680, 680 (K.B.).

16. *The Winkfield*, (1901) 165 Eng. Rep. 42, 46-47 (P.); *Wilbraham v. Snow*, (1670) 85 Eng. Rep. 624 (K.B.); J.E. Macy, Annotation, *Mere Possession in Plaintiff as Basis for Wrongfully Taking or Damaging Personal Property*, 150 A.L.R. 163, 180 (1943).

III. DISTINCTIONS

The judicial decisions in Missouri may be few, but they are some of the leading cases in the country on lost property. From the first case¹⁷ to one of the later cases,¹⁸ Missouri has been fortunate to have well-written, thoughtful opinions on lost property.

It might seem strange that there are no decisions to determine the priority of right between the owner of lost property and the finder. This situation, however, likely exists because cases do not usually determine the right of ownership—the owner, of course, is always entitled to the lost property against the finder.¹⁹ The law does not sanction the childish rhyme—“finders keepers, losers weepers”—because property remains with the owner until he voluntarily disposes of his title to the property.²⁰

Take a typical but hypothetical situation: On a shopping trip to a prominent, downtown Saint Louis department store, a woman finds a roll of money (or a package) on the floor. She reports the find to the floor-manager, who politely takes her name and address and informs her that in the event they do not discover the owner, he will gladly get in touch with her. What is the legal relationship between the store owner and the finder? Who is entitled to the property? What policy considerations will the court follow to determine which of the two should be entitled to the ownership? Would the decision be the same if the property was found on the counter or in the private office of the manager rather than on the floor? These and many other considerations confront the courts, society, and the parties.

At the very outset, to provide any type of solution, one must analyze the concept of “lost” property. Judicial decisions and scholarly works distinguish between “abandoned property,” “treasure trove,” “misaid,” and truly “lost” property.²¹

17. *State v. McCann*, 19 Mo. 249 (Mo. 1853).

18. *Allred v. Biegel*, 219 S.W.2d 665 (Mo. Ct. App. 1949).

19. *Aigler, Rights of Finders*, *supra* note 2, at 666.

20. *Id.* at 666–67.

21. The concept of abandoned property, treasure trove, and unclaimed property is beyond the scope of this article and will not be dealt with in detail. *But see Bemis v. The RMS Lusitania*, 884 F. Supp. 1042, 1048–49 (E.D. Va. 1995) (holding that the salvager of the *Lusitania* was entitled to the cargo and personal effects of the passengers). For the concept of abandoned property, see *Morissette v. United States*, 342 U.S. 246, 270–71 (1951) (distinguishing the discovery of abandoned property and larceny); *Liscomb v. Goodyear Tire & Rubber Co.*, 199 F.2d 431, 435 (8th Cir. 1952) (addressing a conscious purpose to abandon); *State v. Chevalier*, 623 S.W.2d 42, 46 (Mo. Ct. App. 1981) (holding finders need an honest belief that the property was abandoned to take possession); *St. Louis Dairy Co. v. Nw. Bottle Co.*, 204 S.W. 281, 283 (Mo. Ct. App. 1918) (affirming the circuit court’s definition of “abandonment” as “a conscious purpose on the part of the owner of personal property to so treat the same as to manifest an intention to thereafter neither use nor re-take it into his possession”); *Garth v. Everett*, 16 Mo. 490, 492–93 (Mo. 1852) (discussing slaves as abandoned property); *BROWN*, *supra* note 2, at 24; Comment, *Lost, Misaid*,

Professor Aigler, in his classic article, distinguishes these concepts.²² Property can be abandoned by the owner, and when a finder locates it and takes possession, a "lost" article has been found.²³ Or an article may be intentionally placed by the owner in a certain place with the intention to resort to it as soon as his diversion permits, the finder would say that a "lost" object was found.²⁴ Or a chattel may be inadvertently lost by the owner and, again, the finder would claim to find a "lost" object.²⁵ Thus, the distinctions between "abandoned," "misaid," and truly "lost" property.²⁶

This distinction is clearly made in the Missouri Supreme Court case of *Foster v. Fidelity Safe Deposit Co.*:

Property may be separated from the owner by being abandoned, or lost, or mislaid. In the first instance, it goes back into a state of nature; or as is most commonly expressed, it returns to the common mass and belongs to the first finder, occupier, or taker. In the second instance, to be lost, it must have been unintentionally or involuntarily parted with, in which case it is also an object which may be found, and the finder is entitled to the possession against every one but the true owner. But, if it is intentionally put down, it is not lost in a legal sense, though the owner may not remember where he left it, and cannot find it; for the "loss of goods in legal and common intendment, depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner at any given moment."²⁷

and Abandoned Property, 8 FORDHAM L. REV. 222, 235–36 (1939); Aigler, *Rights of Finders*, *supra* note 2, at 668 (explaining that abandoned property belongs to the first person who takes possession); 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 3 (1994) (defining abandoned property); 1 MO. DIG., *Abandoned and Lost Goods* § 1 (1905) (defining abandonment as "the relinquishment or surrender of rights or property by one person to another"). As to unclaimed property, see Uniform Disposition of Unclaimed Property Act, MO. REV. STAT. §§ 447.500–447.595 (1994) (setting forth rules for unclaimed property); L.R. James, Annotation, *Uniform Disposition of Unclaimed Property Act*, 98 A.L.R.2d 304 (1964) (providing a method for disposition of unclaimed property). As to treasure trove, see BROWN, *supra* note 2, at 28 (defining treasure trove as "article of gold and silver, intentionally hidden for safety in the earth or in some secret place, the owner being unknown"); Note, *Treasure Trove—History and Development*, 22 TEMPLE L.Q. 326 (1949) (explaining that treasure trove typically goes to the finder); 1 AM. JUR. 2D *Abandoned, Lost and Unclaimed Property* § 39 (1994) (explaining the difference between American and English treasure trove laws); Annotation, *Modern Status of Rules as to Ownership of Treasure Trove as Between Finder and Owner of Property on Which Found*, 61 A.L.R.4th 1180 (1988) (analyzing state and federal cases where the courts considered ownership of treasure trove).

22. Aigler, *Rights of Finders*, *supra* note 2, at 664–66.

23. *Id.*

24. *Id.* at 666.

25. *Id.* at 664.

26. *Id.* at 664–66.

27. 174 S.W. 376, 378 (Mo. 1915) (quoting *Lawrence v. State*, 20 Tenn. (1 Hum.) 228 (1839)).

Therefore, simply put, “mislaid” property is that which the owner of the goods intentionally or negligently places the property where it can again be resorted to him, but then forgets it. “Lost” property is that which the owner or other possessor has involuntarily parted with it through inadvertence, negligence, or carelessness. Often, this is a difficult question to determine.

IV. MISLAID PROPERTY

The law seems well-settled, not only in Missouri, but also elsewhere, that mislaid property rests in the possession of the owner of the locus, not the finder who actually seized the object, and that the owner is entitled to recover or retain the object.²⁸

The Missouri case of *State v. McCann*²⁹ forcibly brought out this rule. The government charged and tried McCann for grand larceny for taking a wallet belonging to Eatherton.³⁰ While trading in a store in Saint Louis County and purchasing a few objects, Eatherton laid his wallet down on the counter and left the store, forgetting the wallet.³¹ McCann saw him place the object on the counter.³² After leaving the store, Eatherton realized that he “lost” the wallet and returned to the store to recover it.³³ Not finding it there, Eatherton overtook McCann and stopped him.³⁴ McCann asked Eatherton, “Are you the man who lost the purse?”³⁵ Eatherton replied, “Yes, I lost mine.”³⁶ With that, McCann turned over some of the money, but not all, and the government charged him with grand larceny.³⁷

28. See generally 1 AM. JUR. 2D, §§ 36–39 (2005) (presenting law of mislaid property as applicable to finders and owners).

29. 19 Mo. 249 (Mo. 1853). See also *Norris v. Camp*, 144 F.2d 1, 3 (10th Cir. 1944) (holding never-sold municipal bonds found in safe deposit box remained property of city, not finder); *McAvoy v. Medina*, 11 Mass. (1 Allen) 548, 549 (1866) (holding shopowner, not finder, was entitled to wallet found on store table); *Foster v. Fidelity Safe Deposit Co.*, 174 S.W. 376, 376 (Mo. 1915) (holding bank, not finder, was entitled to envelope of cash found in safe-deposit room); *Foulke v. N.Y. Consolidated R.R. Co.*, 127 N.E. 237, 238–39 (N.Y. 1920) (holding that a package containing a loaf of bread found on the seat of a railroad car was not “lost” and the Railroad was entitled to it rather than the passenger); *Jackson v. Steinberg*, 205 P.2d 562, 565 (Or. 1949) (holding hotel owner was entitled to found money over employee who made discovery); *Flax v. Monticello Realty Co.*, 39 S.E.2d 308, 311 (Va. 1946) (holding hotel owner, not finder, was entitled to diamond brooch found in room).

30. *McCann*, 19 Mo. at 249.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 250.

35. *McCann*, 19 Mo. at 252.

36. *Id.*

37. *Id.*

The defendant rested his defense on the words used in the basic question presented above.³⁸ He argued that "lost" meant actually and legally lost; thus he could not have been guilty of obtaining possession by trespass.³⁹ The court, in affirming the conviction, struck down this argument and, resting its decision on precedent, concluded that leaving the object on the counter did not result in lost property:

It was not, in reality, so lost, that larceny could not be charged against the finder, who saw the owner leave it.

. . . .

. . . The weight of authority is against considering property situated as the purse of Eatherton was, in this case, so lost that larceny could not be committed of it.⁴⁰

The two leading Missouri decisions dealing with mislaid property are *Foster v. Fidelity Safe Deposit Co.*⁴¹ and *State ex rel. Scott v. Buzard*,⁴² which held that as between the finder and the owner of the locus when the article was misplaced, the owner is entitled to the find.

In *Foster*, a bank customer brought an action to recover possession of an envelope containing \$180 "found" by Foster in the defendant company's place of business.⁴³ The defendant company maintained individual safes in a building in Kansas City, Missouri, which it rented to customers, and each of these compartments contained a safe-deposit box where the customers placed valuables and from which the customers could withdraw.⁴⁴ To open one of these boxes required two keys, one held by the customer, and one held by a company employee.⁴⁵ A customer, to get to his box, would enter from the street through the bank, then through a steel gate, and then into a vault, where he and the attendant would open his compartment, the customer would take out his box, and then proceed to a small room containing a desk and chair where he could examine his valuables.⁴⁶

The plaintiff followed this procedure and, after taking his box, entered the private room, and as he was about to leave, he noticed an envelope lying on the desk corner that seemed a "little puffy."⁴⁷ He opened it and found \$180.⁴⁸ The

38. *Id.*

39. *Id.*

40. McCann, 19 Mo. at 252–54.

41. 174 S.W. 376 (Mo. 1915).

42. 144 S.W.2d 847 (Mo. Ct. App. 1940).

43. *Foster*, 174 S.W. at 377.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Foster*, 174 S.W. at 377.

envelope lacked an identifying mark.⁴⁹ The plaintiff turned it over to the defendant, but after a period of time the owner was not found, and the plaintiff demanded the return of the money.⁵⁰ Upon the company's refusal to deliver it, the plaintiff sued the defendant company.⁵¹ The court concisely framed the issue as: "The question for decision, therefore, is not who owns the money, but which of the parties is entitled to possession of it, or, better stated, which is the proper custodian."⁵² Reasoning that the defendant bank was properly entitled to the money, the court said:

Now, in whose possession was the money when discovered by plaintiff? It could scarcely have been more in defendant's possession, unless it had been in the pocket of one of its officers. . . . A roguish street urchin, if by possibility he had gained access to this place and discovered the envelope on the desk, would have had the same right to it that the plaintiff had. Suppose the attendant had observed the boy as he found it; would he have been justified in letting him carry it off? Would it not have been his duty to assert defendant's right of possession and to take it from the boy? Would not the real owner, had he afterwards appeared, have had legal ground of complaint against defendant, as his bailee, for gross neglect in allowing the money to be carried off in full view?⁵³

The same legal principle, that mislaid property should be awarded to the owner of the locus, was used in *State ex. rel. Scott v. Buzard*.⁵⁴ In that case, the Bonded Wrecking and Lumber Company, engaged in the business of wrecking and salvaging old buildings in Kansas City, Missouri, purchased a residence in Kansas City and proceeded to remove the building.⁵⁵ The company employed Johnson as a common laborer and, while the work was in progress, a part of the wall fell, revealing a metal box that Johnson found while cleaning mortar from the bricks of the building.⁵⁶ The box contained gold, paper certificates, and money with a total value of \$12,700.⁵⁷ The court held that Johnson was not entitled to possession of the valuables as he did not have the right of possession of any part of the building or anything found inside.⁵⁸ Johnson had none of the rights of a finder since the court reasoned that this property was not lost:

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Foster*, 174 S.W. at 377.

54. 144 S.W.2d 847 (1940).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 849.

Now, the authorities, as a general rule, hold that money or other property voluntarily laid down is not, in legal contemplation, lost, and that the owner of the shop, bank, or other place where it is left is the proper custodian rather than the person who happens to discover it, as well, also, as to all other persons except the owner.⁵⁹

*Danielson v. Roberts*⁶⁰ is one of the few other cases besides *Buzard* that deals with property found in a building or receptacle. In *Danielson*, two young boys sued for the conversion of gold coins they found in an old chicken house while employed by the defendants.⁶¹ While so employed, they dug up an old rust-eaten half-gallon tin can containing a number of musty and partially decayed tobacco sacks filled with gold coins which they brought to the defendant.⁶² The defendant dismissed the boys summarily with "Here's five cents boys . . . Don't say anything about it, and the Lord will bless you."⁶³ The can contained over \$7,000.⁶⁴ The court, obviously impressed with the emotional appeal of the circumstances, awarded the money to the boys, stating that the fact that they found the money on the defendant's premises or that the plaintiffs were his employees at the time cannot affect the plaintiff's right to possession.⁶⁵

Why should courts, when mislaid property is involved, turn their favor to the owner of the premises and not the finder? What possible policy reason can be behind the award? Is there not an "intuitive sympathy" for the finder? The answer lies, it seems, in two basic considerations: 1) The owner of the locus has possession of the mislaid article prior to that of the finder, and 2) the true owner had possession before either the finder or the owner of the locus. *South Staffordshire Water Company v. Sharman*⁶⁶ expressed this principle: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under the land, and . . . the right to possess it also."⁶⁷

In the case of mislaid property, as in *Foster*, *McCann*, and *Buzard*, the property which is intentionally placed by the owner and then forgotten comes into the possession of the locus' owner. The owner, without even knowing of

59. *Buzard*, 144 S.W.2d at 849 (quoting *Hoagland v. Forest Park Highlands Amusement Co.*, 70 S.W. 878, 880 (Mo. 1902)).

60. 74 P. 913 (Or. 1904).

61. *Id.* at 913.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Danielson*, 74 P. at 914–15. *But cf.* *Ferguson v. Ray*, 77 P. 600, 603 (Or. 1904) (awarding a similarly unearthed discovery to the owner of the locus in quo).

66. (1896) 2 Q.B. 44.

67. *Id.* at 46 (quoting FREDERICK POLLOCK & ROBERT S. WRIGHT, *ESSAY ON POSSESSION IN THE COMMON LAW* 41 (1888)).

its existence, has intent to possess the mislaid article because he has expressed intent to possess the item through his general intent to possess all on his property.

Secondly, while there is an intuitive sympathy for a finder, the courts must somehow look to the interests of the true owner, and in doing so, must look to the place where the owner mislaid the article. In many cases, the owner mislaid the property on premises which were not open to the general public.⁶⁸ In *Foster*, the owner mislaid the envelope containing the money in a private vault room of the bank to which only few persons were admitted, and not in the bank lobby.⁶⁹

Therefore, the occupier is entitled to possession of the mislaid article, not because the article is mislaid, but because of the place where the article is found. If found in a place where the general public is not generally admitted, the interests of the owner should be protected and the occupier of the premises is under a duty to care for the goods mislaid by those who are entitled to use the private or semiprivate accommodations.

V. LOST PROPERTY

Ever since the early leading case of *Armory v. Delamirie*,⁷⁰ involving the chimney sweeper's boy who found a jewel in a chimney and was cheated by an avaricious goldsmith, was decided by Lord Chief Justice Pratt, the law has been settled that the finder of a chattel enables the finder to keep it against all the world except its rightful owner, and to defend it against all others with every remedy which is available to a bailee.⁷¹

This is and has been the general principle of the law of lost property throughout the centuries.⁷² One of the leading cases in the United States is the

68. See, e.g., *Foster v. Fidelity Safe Deposit Co.*, 174 S.W. 376 (Mo. 1915).

69. *Id.*

70. (1772) 93 Eng. Rep. 664.

71. *Id.* at 664. See generally 1 AM. JUR. 2D §§ 12-13 (2005) (discussing types of property commonly defined as lost). In *Durfee v. Jones*, a blacksmith found a roll of money secreted in an old safe which was left with him. 11 R.I. 588, 591 (1877). The Rhode Island Supreme Court held that the finder was entitled to the money as against the owner of the safe who did not know it was there. *Id.* In *State v. Conway*, a steamboat in Saint Louis blew up at the riverfront and threw a safe containing gold and silver into the river, which the defendant and others retrieved several months later. 18 Mo. 321 (Mo. 1853). The defendant was charged with larceny, but the court held they were finders and under proper instructions could not be guilty of larceny. *Id.* See also *Parker v. British Airways Bd.*, (1982) 1 Q.B. 1004 (finding that the finder of a gold bracelet, found in the executive lounge of Heathrow Airport, was entitled to recover damages against British Airways which sold the bracelet).

72. See, e.g., *In re Seizure of \$82,000 More or Less*, 119 F. Supp. 2d 1013, 1018 (W.D. Mo. 2000); *Flood v. City Nat'l Bank of Clinton*, 253 N.W. 509, 512 (Iowa 1934); *Foster v. Fidelity Safe Deposit Co.*, 174 S.W. 376, 378 (Mo. 1915); *State v. Montgomery*, 79 S.W. 673, 695-96

Missouri decision of *Hoagland v. Forest Park Highlands Amusement Co.*⁷³ The defendant, Forest Park Highlands, was an amusement park in Saint Louis.⁷⁴ In the summer of 1898, the plaintiff attended an open air performance at the park, and after the performance, sat down at one of the tables and found a pocketbook lying on the ground under the table.⁷⁵ He attracted the attention of several persons, including the head waiter, a private watchman, and the manager of the premises.⁷⁶ Each in turn asked that the pocketbook be turned over to him, but Hoagland refused, saying that he would deliver the purse only to a uniformed policeman or the ticket office.⁷⁷ Scherf (the manager) became angry, and ordered the other employee to arrest the plaintiff.⁷⁸ In doing so, the employees disarranged the plaintiff's clothing, and roughly handled him.⁷⁹ They did succeed, however, in arresting him.⁸⁰ The trial court denied compensatory damages and awarded one cent in punitive damages; he then appealed to the Missouri Supreme Court urging error in the giving of the following instruction:

The court instructs the jury that the defendant Forest Park Highlands Amusement Company not only had the right, but was in duty bound, to exercise reasonable care to protect, for the true owner, all valuables inadvertently mislaid or lost upon its premises; and if the jury find that the defendant company and Henry Scherf, its manager, only endeavored to obtain from the plaintiff valuables so found for the purpose of keeping the same safe for the true owner, then their request was not unreasonable, and the defendants had the lawful right to eject the plaintiff from said premises upon his refusal to comply with their request, and in doing so the defendants could use such force as was necessary.⁸¹

The Missouri Supreme Court, speaking through Judge Burgess, held this instruction incorrect, and reversed for a new trial, stating: “All of the authorities hold that the finder of a lost chattel is entitled to its possession as against all other persons except the true owner.”⁸² The finder, the court said,

(Mo. 1904); Million, *supra* note 1, at 32; Eldon R. James, *Notes on Recent Missouri Cases*, 10 U. MO. BULL. L. SERIES 1, 52 (1916).

73. 70 S.W. 878 (Mo. 1902).

74. *Id.* at 879.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Hoagland*, 70 S.W. at 879.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

“has a special property in the chattel found, sufficient to maintain trover against every person except the true owner.”⁸³

Why should the courts protect the finder when property is found on the ground in *Hoagland* and at the same time protect the occupier of premises when property is mislaid? Should the outcome of a decision be based upon the slim distinction between lost and mislaid property? Suppose, in *Hoagland*, the pocketbook was found on the table, instead of on the ground. Suppose that the owner placed it on the table, and then a passerby, without knowledge, pushed it off onto the ground. Should the decision be determined on the sole basis of where the article is found? Besides this distinction between lost and mislaid property, there are more fundamental reasons why the court should award the pocketbook to the plaintiff. The pocketbook was found in an open amusement park to which the public was invited under circumstances which would justify the court to be sympathetic toward the finder.⁸⁴ The Forest Park Highlands did not intend to exclude persons from its premises.⁸⁵ It was he who restored the article to circulation, and it was his sharp eyes that permitted the object to be returned to the “mass of usable things.”⁸⁶ It was he toward whom the court was intuitively sympathetic.⁸⁷

In examining the decisions in which the finder is entitled to the object, it is surprising to note that the goods were found on public premises, where not only the public traveled, but where the public was invited. It seems correct, then, to award the object to the finder, under circumstances that the owner’s interests will be as well protected if the object is awarded to the finder rather than the occupier of the premises.

VI. PROPERTY EMBEDDED IN THE SOIL

For this writer, it seems that a distinction must be made between money or other articles found embedded in the soil. Where the object has become a part of the realty, the owner of the realty should be awarded the object, over the finder, as he not only owns the realty, but has possession prior to the finder. This principle should apply whether the finder is a tenant⁸⁸ or a licensee.⁸⁹ The

83. *Hoagland*, 70 S.W. at 880. Compare with *Armory v. Delamirie*, (1772) 93 Eng. Rep. 664, 664 (“[T]he finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.”). In this author’s opinion, the Missouri court’s language is obviously too broad.

84. See *Hoagland*, 70 S.W. at 879.

85. See *id.* at 879.

86. *Id.*

87. See *id.* at 881.

88. *Elwes v. Brigg Gas Co.*, (1886) 33 Ch. D. 562, 567; *Goodard v. Winchell*, 52 N.W. 1124, 1126 (Iowa 1892) (holding that a meteorite embedded in the soil should be awarded to the landowner).

leading case in this area in Missouri is *Allred v. Beigel*.⁹⁰ In *Beigel*, the plaintiffs went swimming in the Chariton River at a point where a new channel of the river ran through land originally owned by Haney.⁹¹ Haney devised the land to his wife for life, and then in fee to his daughter, Mrs. Evans.⁹² This was the status of the property at the time the find was made.⁹³

The plaintiff, while swimming, found an old Indian canoe, one third of which was embedded in the soil, fifteen to twenty-five feet below the surface of the land.⁹⁴ It extended about six inches above the water, and the remainder was submerged in the water.⁹⁵ The Osage Indians at one time inhabited the area where the plaintiffs found the canoe.⁹⁶ The Kansas City Court of Appeals denied the plaintiffs' contentions that they should be entitled to the canoe on the basis of being finders.⁹⁷ The court held that the canoe became a part of the realty, and was "property embedded in the soil."⁹⁸ In such a case, the court said, "it is held that the presumption is that the finder has no rights therein, the presumption being the possession is in the owner of the locus in quo."⁹⁹

The court relied on *Elwes v. Brigg Gas Company*¹⁰⁰ and *Goddard v. Winchell*¹⁰¹ in reaching a conclusion. In *Brigg*, the plaintiff leased a portion of his land to the Brigg Gas Company, and in the course of certain excavations by the Gas Company, they discovered, embedded in the clay, some feet below the surface, an ancient prehistoric ship or boat hallowed out of a large oak tree and measuring about forty-five feet in length.¹⁰² When discovered, it was lying embedded in the clay at a depth from the surface, of four feet at one end and

89. *Allred v. Biegel*, 219 S.W.2d 665, 666 (Mo. Ct. App. 1949); see also Ralph W. Aigler, Note, *Finding Lost Goods—Ancient Indian Canoe*, 48 MICH. L. REV. 368, 369 (1950) (reviewing basis for plaintiff's claim); David W. Dardano, Note, *Personal Property—Chattels Embedded in the Soil*, 29 OR. L. REV. 157, 157 (1950) (comparing embedded property to property found on the soil's surface); Frank M. Mayfield, Jr., Note, *Personal Property—Finder v. Life Tenant, Life Tenant v. Remainderman*, WASH. U. L.Q. 272, 273 (1950) (explaining why canoe was not personal property); Gibson Gayle, Note, *Property—Rights of Finders of Lost Canoe Embedded in Realty*, 2 BAYLOR L. REV. 110, 110 (1949) (noting respective rights of landowner and remainderman).

90. 219 S.W.2d 665 (Mo. Ct. App. 1949).

91. *Id.* at 665.

92. *Id.*

93. *Id.*

94. *Id.* at 666.

95. *Allred*, 219 S.W.2d at 666.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. (1886) 33 Ch.D. 562 (U.K.).

101. 52 N.W. 1124 (Iowa 1892).

102. *Elwes*, 33 Ch.D. at 563.

six feet at the other.¹⁰³ The boat was not petrified or fossilized.¹⁰⁴ The court decided that the plaintiff, as the owner of the land at the time of the lease agreement, was entitled to the boat.¹⁰⁵ Even if the boat can be regarded as a chattel, the property interest should be vested in the plaintiff and thus the defendants were accordingly ordered to deliver the boat to the plaintiff.¹⁰⁶

How a Missouri court would decide a case involving money or coin buried in the earth is difficult to say. On the basis of *Allred v. Beigel* and *State ex rel Scott v. Buzard*, it should seem that such property being “intentionally placed,” and hence “misplaced,” should be awarded to the owner of the locus.¹⁰⁷

VII. THE APPLICABLE MISSOURI STATUTORY PROVISIONS

There are several statutes in Missouri which must be followed before the finder of lost property is entitled to absolute ownership of the objects found. I dare say that not many persons know of these statutes, and there are little, if any, judicial decisions giving guidance to the general public and the courts. Sections 447.010 through 447.110 of the Missouri statutes deal specifically with the duties of a finder under Missouri law.¹⁰⁸

How many people know what their duties are under the Missouri statutes to become the final owner of “lost” property? While people could research these statutes, in reality, the statutes are largely unknown to the general population. Yet it is incumbent on the finder to follow the statutes passed by the General Assembly to become the true and final owner of “lost” property. Section 447.010 provides that finders have certain duties:

If any person finds any money, goods, rights in action, or other personal property, or valuable thing whatever, of the value of ten dollars or more, the owner of which is unknown, he *shall* within ten days, make an affidavit before some judge of the circuit court of the county, other than a municipal judge, stating when and where he found the same, that the owner is unknown to him, and that he has not secreted, withheld or disposed of any part thereof.¹⁰⁹

After the affidavit is filed, the circuit judge “*shall* summon three disinterested householders to appraise” the property, make an oath, and deliver the report to the finder.¹¹⁰ Section 447.030 then provides that the judge shall file this list, and the finder shall transmit a copy to the clerk of the “county

103. *Id.* at 566.

104. *Id.*

105. *Id.* at 570.

106. *Id.*

107. *See supra* notes 41–42, 90–99 and accompanying text.

108. MO. REV. STAT. §§ 447.010–447.110 (2000).

109. *Id.* § 447.010 (emphasis added).

110. *Id.* § 447.020 (emphasis added).

commission" and publicize on the courthouse door and four other public places a copy of such evaluation.¹¹¹

Section 447.040 provides that if no owner appears within forty days, the finder shall, within thirty days, cause a copy of the description of the property to be inserted in some newspaper for three weeks, and if no owner appears within one year after the publication, the "same" shall vest in the finder.¹¹² Section 447.050, however, provides that if the owner appears within one year and proves the property and pays all reasonable charges, the finder *shall* restore the same to him.¹¹³

The harsh section is 447.060. If any person finds any money, property, or other valuable thing, and fails to make discovery as required by Chapter 447, he must forfeit to the owner double the value thereof.¹¹⁴

These statutes have been on the books for decades. But there are no judicial decisions interpreting them. How many persons follow these procedures? No one knows. It seems that the statutory provisions apply only to truly "lost" property and not "mislaid" property.¹¹⁵ The General Assembly should reexamine these statutes and determine whether they are realistic and whether they comply with the judicial decisions relating to the common law of finding lost articles.

VIII. FINDER'S STANDING TO BRING ACTION

One of the most difficult and controversial questions in this area of the law is the question of who may maintain an action in "trover and conversion" against a subsequent third party.¹¹⁶ Most of the decisions deal with bailments but the same principles would apply in the case of finders.

The medieval doctrine, as Professor Warren points out in *Qualifying as Plaintiff in an Action for Conversion*,¹¹⁷ was that possession under a claim of ownership was title against a wrongdoer.¹¹⁸ But under the classic cases in the

111. *Id.* § 447.030.

112. *Id.* § 447.040.

113. MO. REV. STAT. § 447.050 (2000) (emphasis added).

114. *Id.* § 447.060.

115. *Id.* § 447.010 (failing to provide differential definitions for "lost" as opposed to "mislaid" property).

116. See, e.g., BROWN, *supra* note 2, at 311; BURKE, *supra* note 2, at 118; PROSSER & KEETON, *supra* note 2, at 102; WARREN, *supra* note 11, at 1098; Annotation, Macy, *supra* note 16, at 180; W.W. Allen, *Right of Action for Conversion as Affected by Assertion of Rights or Pursuit of Remedies Founded on Continued Ownership of the Property*, Annotation, 3 A.L.R.2d 218 (1949).

117. See Warren, *Action for Conversion*, *supra* note 11, at 1098 (discussing the possessor's ability to maintain trover against a wrongdoer).

118. See also Jeffries v. Great W. R.R. Co., (1856) 119 Eng. Rep. 680, 680 (K.B.) (holding that "mere possession is sufficient title as against a wrongdoer").

English law of possession, a title against any wrongdoer and any possessor *including the finder* has sufficient interest to sue in trover and conversion and recover the actual value of the chattel.¹¹⁹

Possession is title against the whole world except the real owner. In *Armory*, damages were awarded in the value of the jewel which the chimney-sweep boy found to the tune of the “finest water.”¹²⁰ The action of trover and conversion in the early law, and the present, is that of a forced sale. The plaintiff obtains the value of the goods and the defendant obtains title.¹²¹

But *Armory* and the finding cases do not deal with the situation as between the *owner* of the article after the finder or bailee has sued for and recovers the actual value of the article and a judgment is satisfied. What if the owner appears after the finder sues and recovers the value of the chattel? Is the owner entitled to recover his property from the defendant who has paid the actual value to the finder who has brought suit against the third party, or must he look to the finder? The doctrine is that once the bailee (finder) has recovered the actual value of the property from a subsequent wrongdoer, the owner is barred from maintaining a separate action against the third party.¹²²

Title in a third party (*jus tertii*) is no defense in an action of conversion, unlike a replevin action.¹²³ This area of the law of finding has not yet been fully developed in Missouri—i.e., to determine the interests of the true owner and a third party who has paid a judgment to the finder, brought suit, and recovered the full value of the chattel. But it is clear that since the classic case of *Armory v. Delamirie*, all the decisions hold that possession without more is title against the whole world except the true owner.

119. See *The Winkfield*, (1901) 165 Eng. Rep. 42, 46–47 (explaining that a bailee has the right to bring an action against the wrongdoer); *Wilbraham v. Snow*, (1670) 85 Eng. Rep. 624, 624 (K.B.) (holding that a possessor “may maintain trover for a conversion by a stranger”); *Armory v. Delamirie*, (1772) 93 Eng. Rep. 664, 664 (K.B.) (holding that a finder may maintain a trover action against anyone but the true owner). See also *State ex rel. Lipic v. Flynn*, 215 S.W.2d 446, 451 (Mo. 1948) (en banc) (explaining that a plaintiff must “have had or been entitled to immediate possession at the time of the conversion and thereafter” to bring an action for trover and conversion).

120. 93 Eng. Rep. at 664.

121. *Id.*

122. See *Winkfield*, 165 Eng. Rep. at 42.

123. See *Jackson v. City of Columbia*, 217 S.W. 869, 870 (Mo. Ct. App. 1920) (explaining that “it is a good defense to a replevin suit to show that general ownership is in someone other than the plaintiff”); *Strothkamp v. St. John’s Cmty. Bank, Inc.*, 329 S.W.2d 718, 721 (Mo. 1959) (explaining that “the damages allowed for a wrongful detention not involving a taking or deprivation of ownership are only such as are appropriate for the deprivation of possession” in a replevin lawsuit).

IX. RECENT COMPARABLE DECISIONS RELYING ON MISSOURI DECISIONS

Although there are not as many Missouri decisions on the law of finding as there are in other areas of the law, Missouri's decisions are comparable to other state court decisions in that they have laid out extensive groundwork and have been influential in more recent decisions.

One Illinois case which relied on *Foster* is *Paset v. Old Orchard Bank and Trust Co.*¹²⁴ There, the plaintiff found money in the defendant bank's safety deposit box area and a dispute arose between the "finder" and the bank.¹²⁵ The Illinois Court, relying, in part, on *Foster*, held that the bank had a priority interest in the find because this effectuates the goal of restoring the property to the true owner.¹²⁶

The distinction between "misaid" and "lost" property, as recognized in *Foster*, was interestingly brought out in *Benjamin v. Lindner Aviation, Inc.*¹²⁷ In that case, Mr. Heath Benjamin found \$18,000 in currency located in the wing of an airplane owned by a bank.¹²⁸ A dispute arose between Linder Aviation Co., which was servicing the plane for the bank-owner, and Benjamin, a Linder employee.¹²⁹ In servicing the plane, Benjamin removed some panels from the sign's underside.¹³⁰ Inside the left wing, Benjamin discovered two packets wrapped in foil containing money.¹³¹ Benjamin filed an affidavit claiming he was the finder and entitled to the money.¹³²

In ruling on Benjamin's claim, the court distinguished between lost, misaid, and abandoned property and held that the money was misaid:

We think there was substantial evidence to find that the currency discovered by Benjamin was misaid property. . . .

The place where Benjamin found the money and the manner in which it was hidden are also important here. The bills were carefully tied and wrapped and then concealed in a location that was accessible only by removing screws and a panel.¹³³

124. 378 N.E.2d 1264, 1271 (Ill. App. Ct. 1978) (citing *Foster v. Fidelity Safe Deposit Co.*, 174 S.W. 376, 376 (Mo. 1915)); see also *Dennis v. Nw. Nat'l. Bank*, 81 N.W.2d 254 (Minn. 1957) (similarly dealing with a finding involving an employee of a bank).

125. *Paset*, 378 N.E.2d at 1266–67.

126. *Id.* at 1271.

127. 534 N.W.2d 400 (Iowa 1995).

128. *Id.* at 403.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Benjamin*, 534 N.W.2d at 403.

133. *Id.* at 406.

The court went on to hold that the “premises” on which the money was found was the airplane and not Linder’s premises; thus awarding the money to the plane owner—the bank.¹³⁴

Several other cases have dealt with the law of lost property. In *Powell v. Four Thousand Six Hundred Dollars, U.S. Currency*,¹³⁵ certain individuals found \$4,600 along a road and notified the county sheriff of the find.¹³⁶ After several months, the sheriff commenced an action to obtain permission to deposit the money in the sheriff’s training fund and the finders objected.¹³⁷ The Oklahoma court held that the finders were entitled to the find and not the sheriff.¹³⁸ The finder of lost property, the court held, acquired rights superior to the sheriff’s rights.¹³⁹

Several recent cases, however, held the finder was not entitled to the find. In *Commonwealth of Pennsylvania v. \$7,000 in U.S. Currency*,¹⁴⁰ and in *In re Funds in the Possession of Conemaugh Township Supervisors*,¹⁴¹ police officers who found property in the course of their duties were not entitled to the find because the public faith in law enforcement would be undermined by permitting the officer to assert a claim against the property.¹⁴²

A case similar to the Missouri *Allred v. Biegel* is *In the Matter of the Search and Seizure of Shivers*,¹⁴³ decided by a Texas district court. A metal detectorist in the Angelina National Forest, pursuant to a search warrant, found certain property.¹⁴⁴ In determining who had rights to the property, the court concluded that property embedded in the soil did not belong to the finder.¹⁴⁵

In *Elridge v. Herman*,¹⁴⁶ conflicting claims by two tenants to property found in the basement by one of the tenants confronted the Iowa Supreme Court (the building owner claimed no interest in the money).¹⁴⁷ The defendant found approximately \$70,000 in the basement of the rented home while

134. *Id.* at 408.

135. 904 P.2d 153 (Ok. App. 1995); *compare with* *Hoagland v. Forest Park Highlands Amusement Co.*, 70 S.W. 878, 878 (Mo. 1902) (plaintiff found a pocketbook at an amusement park).

136. *Powell*, 904 P.2d at 153–54.

137. *Id.* at 154.

138. *Id.* at 155.

139. *Id.*

140. 742 A.2d 711 (Pa. Commw. Ct. 1999).

141. 753 A.2d 788, 791 (Pa. 2000).

142. *\$7,000 in U.S. Currency*, 742 A.2d at 713–14; *Funds in the Possession*, 753 A.2d at 791.

143. 890 F. Supp. 613 (E.D. Tex. 1995); *reh’g denied*, 900 F. Supp. 60 (E.D. Tex. 1995), *aff’d*, *United States v. Shivers*, 96 F.3d 120 (1996).

144. *Shivers*, 890 F. Supp. at 614.

145. *Id.* at 616; *compare with* *Allred v. Biegel*, 219 S.W.2d 665, 665 (Mo. Ct. App. 1949) (finding that an embedded canoe belonged to the owner of the land, not the finder).

146. 291 N.W.2d 319 (Iowa 1980).

147. *Id.* at 321–22.

working on his motorcycle.¹⁴⁸ Another tenant, the plaintiff, claimed the money was his and that he obtained it through the sale of "illicit commodities."¹⁴⁹ On cross-examination, the plaintiff repeatedly exercised his privilege against self-incrimination.¹⁵⁰ The court held that the plaintiff's claim of privilege created an inference to reject his testimony and, therefore, that the money was "lost" and belonged to the finder.¹⁵¹

CONCLUSION

The Missouri cases in found, lost, and mislaid property are sound. Recent cases from other jurisdictions cite them for their sound legal analysis. Property which has been mislaid in a private or semiprivate place should, in all fairness, be held by the occupier of the locus so that the article's owner may expeditiously have the property returned. Property which is technically lost, especially in a public or semipublic place, should be awarded to the finder until the true owner shows himself. This, *Hoagland* decides.¹⁵² The fine distinction between lost property and mislaid property, made in many of the decisions in other jurisdictions is highly artificial and arbitrary, and provides no logical basis for awarding the article found to either the finder or the occupier. The Missouri decisions seem to break through this artificial distinction, and award the articles to the one who would most likely protect it for the true owner, or at least be in the best position to do so.

The statutory provisions are overly burdensome on a person who voluntarily takes possession of lost goods. Instead, what is required is a swift, streamlined procedure that any person not familiar with the law could easily understand. The statutory enactments, originally passed in 1817,¹⁵³ have not been radically amended since that time, and should be updated and modernized.

On the whole, Missouri has rendered sound and logical decisions in the small, but fascinating, segment of the law on lost property.

148. *Id.* at 320, 321.

149. *Id.* at 322.

150. *Id.*

151. *Elridge*, 291 N.W.2d at 322.

152. *Hoagland v. Forest Park Highlands Amusement Co.*, 70 S.W. 878, 880 (Mo. 1902).

153. LAWS OF THE STRAYS, 1 TERR. LAWS § 205-58-378 (1817).

