Chapter 8
PERSONAL PROPERTY: OWNERSHIP, TRANSFER, AND MISAPPROPRIATION

§ 8.01 What This Chapter Is About: A Starting Point for the Property Course or, Alternatively, a Chapter Containing Principles Regarding Personalty (as Opposed to Realty)

INTRODUCTORY NOTE

(1) What to Look For. You should be looking for more than mere rules about personal property. Your professor will be developing your understanding of even more basic concepts. Where does the law come from? How does it change? How is it applied to individual situations? This chapter is designed to facilitate discussion of these questions, as well as to explore the possible meanings of property ownership.

(2) An Introduction to Personalty (as Opposed to Realty). This chapter will help you to develop the distinction between real property and personalty. Owing to their differing characteristics, the law applies different principles to realty and personalty in some instances. This chapter covers some of those differences, in contexts as diverse as internet domain names, promissory notes, stolen art works, found money, and human body extracts.

(3) Personal Property: The Significance of Possession. We begin our coverage with the concept of possession and its relationship to rights in personal property. There is an old saying: “Possession is ninety percent of the law.” Although the quantitative aspect of this maxim cannot be taken literally, we shall see that it contains a great deal of truth.

§ 8.02 The Significance of Possession

ARMORY v. DELAMIRIE, 93 Eng. Rep. 664 (King’s Bench 1722). This venerable English case, decided before the United States existed, often is the beginning point in discussions
of property rights based on possession. The plaintiff, Armory, was a humble “chimney sweeper’s boy.” Apparently in the course of his work, he found what the court describes only as a “jewel.” He took it to a goldsmith, the defendant Delamirie, “to know what it was,” or in other words, to have it appraised. Delamirie gave back the socket but refused to return the jewel. Armory therefore filed an action in “trover,” which was a claim for damages for interference with personal property. The court held in favor of the plaintiff, Armory, and rejected Delamirie’s arguments that Armory was not the true owner.

The court’s reasoning was simple (but perhaps deceptively so). Possession is a powerful indicator of property rights. By finding the jewel and reducing it to possession, the court said, Armory had gained a “property” in it. Specifically, the court said: “And now in trover against the [goldsmith], these points were ruled”:

1. That the 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.
2. That the action well lay against the [goldsmith] . . . .
3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice . . . directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

[A] Finders’ Cases: Finders versus Landowners

NOTE ON MISLAID, LOST, AND ABANDONED PROPERTY

(1) Categorizing Property as (a) Mislaid, (b) Lost, or (c) Abandoned: A Means of Deciding Whether to Award Possession to the Finder or to the Landowner. Unlike Armory v. Delamirie, above, in which Delamirie clearly had no valid claim, most of the finders’ cases involve multiple parties with serious arguments about entitlement. For example, imagine that while a person is on the land of another person, she finds a “jewel” and claims it, but the landowner also claims it, because it was found on his land. The law that resolves this kind of dispute might not resemble what you would expect. It is the product of historical evolution, not logical planning. The common law resolves these disputes by categorizing the ways in which the found property ostensibly came to be where it was found. Over time, the common law invented three pigeonholes: (a) “mislaid” property, (b) “lost” property, and (c) “abandoned” property. It then awarded the property to either the finder or the landowner, according to rules that defined each category.

(2) “Mislaid” Property: Intentionally Placed, but Forgotten; Possession Awarded to the Landowner. From the circumstances of its finding, a court can infer that an item of property was placed there intentionally by the owner, who intended to return and recover it but later forgot it. This kind of property is labeled “mislaid.” The court might find that the property is mislaid, for example, if it is carefully bundled and found inside a receptacle. The common law awards possession of mislaid property to the landowner. The true owner might remember where he put
the property and so return to where he intentionally put it, and in that event, the landowner is the best person to retain it. The landowner therefore has a possessory right in the mislaid article superior to that of the finder, and subject only to that of the true owner.

(3) “Lost” Property: Inadvertently Dispossessed; Possession Awarded to the Finder. If the circumstances indicate that the property was parted with by mistake or carelessness, it is not mislaid, but rather “lost.” The inference is that the true owner probably does not know where it is and is less likely to return to the location where it was lost to claim it. Therefore, possession is rightful in the finder, who holds the property with a claim superior to everyone except the true owner.

(4) “Abandoned” Property: Haslem v. Lockwood, 37 Conn. 500 (1871). Then, there is the category of “abandoned” property, to which the original owner has intentionally relinquished title. This category of property belongs to the first person who takes possession. Haslem v. Lockwood provides an unusual example. Plaintiff exercised possession of manure dropped on public streets by passing animals by raking the manure into piles, and he thereby acquired ownership of this “abandoned” property.

(5) A Fourth Category: Treasure Trove. Some jurisdictions recognize a fourth category: buried (or hidden) treasure. This category cuts across the others in a confusing way, and it has not been adopted in all jurisdictions. As one of the principal cases below observes, treasure trove “carries with it the thought of antiquity,” and it consists of precious metals, currency, or similar valuables intentionally concealed in the distant past, by someone who intended to return for it but did not. Treasure trove is awarded to the finder.

(6) Does this Approach to the Problem Make Sense? The following cases concern disputes between landowners and finders. In some, the court categorizes the property as lost; in others, as mislaid. As you read these cases, you should form a sense of the function of these rules, their evolution, and their policy justifications. You also should consider whether the results in the cases are “consistent”: whether the opinions logically could sit side by side if decided by the same court. Then, there is the question: Are these rules, based upon categorizing property, soundly based? In each case, the property could be placed into any of the four categories. You may emerge with a sense that the rules are arbitrary—that is, that they do not reflect a coherent public policy or rationale. But if you reach that conclusion, there is a final question: Can you think of a better set of rules to resolve disputes between finders and landowners?

**TERRY v. LOCK**
343 Ark. 452, 37 S.W.3d 202 (Arkansas Supreme Court 2001)

RAY THORNTON, JUSTICE.

On February 1, 1999, appellants, Joe Terry and David Stocks [“the finders”], were preparing the Best Western motel in Conway for renovation. The motel was owned by appellee, Lock Hospitality Inc. [“the landowner”], a corporation wholly owned by appellee, A.D. Lock and his
wife. The appellants were removing the ceiling tiles in room 118, with Mr. Lock also present in the room. As the ceiling tiles were removed, a cardboard box was noticed near the heating and air supply vent where it had been concealed. Appellant Terry [one of the finders] climbed a ladder to reach the box, opened it, and handed it to appellant Stocks [the other finder]. The box was filled with old, dry and dusty currency in varying denominations. Mr. Lock took the box and its contents to his office. . . . The face value of the currency was determined to be $38,310.00.

Appellants [the finders] filed a complaint [claiming the money and asking the court to hold that Lock, the landowner, held it in trust for them].

The . . . issue for our review is whether the chancellor was clearly erroneous in characterizing the found money as “mislaid” property and consequently that the interest of Lock Hospitality, Inc., as the owner of the premises, is superior to the interest of appellants as finders of the money. We conclude that the chancellor was not clearly erroneous in finding that the money was mislaid property, and we affirm [the judgment in favor of the landowner].

. . . Specifically, the trial court found “that the money in question was intentionally placed where it was found” and that when “money is mislaid, the finders would acquire no rights.” The trial court then concluded that “Lock Hospitality, Inc., as the owner of the premises, is entitled to possession.” Appellants argue that the found property was not “mislaid property” but instead was “lost property,” “abandoned property,” or “treasure trove,” and that the trial court’s finding that the money was “mislaid property” is clearly erroneous. We disagree.

We [the Arkansas Supreme Court] have not previously analyzed the various distinctions between different kinds of found property, but those distinctions have been made in the common law and have been analyzed in decisions from other jurisdictions. The Supreme Court of Iowa has explained that “under the common law, there are four categories of found property: (1) abandoned property, (2) lost property, (3) mislaid property, and (4) treasure trove.” Benjamin v. Lindner Aviation, Inc., 534 N.W.2d 400 (Iowa 1995); see also Jackson v. Steinberg, 186 Or. 129, 200 P.2d 376 (1948). “The rights of a finder of property depend on how the found property is classified.” The character of the property should be determined by evaluating all the facts and circumstances present in the particular case. See Schley v. Couch, 155 Tex. 195, 284 S.W.2d 333 (1955). . . .

A. Abandoned property. Property is said to be “abandoned” when it is thrown away, or its possession is voluntarily forsaken by the owner, in which case it will become the property of the first occupant; or when it is involuntarily lost or left without the hope and expectation of again acquiring it, and then it becomes the property of the finder, subject to the superior claim of the owner. Eads v. Brazelton, 22 Ark. 499 (1861).

B. Lost property. “Lost property” is property which the owner has involuntarily parted with through neglect, carelessness, or inadvertence, that is, property which the owner has unwittingly suffered to pass out of his possession, and of whose whereabouts he has no knowledge. . . . Poplarly, property is lost when the owner does not know, and cannot ascertain, where it is. . . . A loss is always involuntary; there can be no intent to part with the ownership of lost property. . . .
“The finder of lost property does not acquire absolute ownership, but acquires such property interest or right as will enable him to keep it against all the world but the rightful owner. . . .” 1 AM.JUR.2d Abandoned, Lost, Etc., Property § [4], 18 (1994).

C. Mislaid property. “Mislaid property” is that which is intentionally put into a certain place and later forgotten. The place where money or property claimed as lost is found is an important factor in the determination of the question of whether it was lost or only mislaid. . . .

“A finder of mislaid property acquires no ownership rights in it, and, where such property is found upon another’s premises, he has no right to its possession, but is required to turn it over to the owner of the premises. . . .

“The right of possession, as against all except the true owner, is in the owner or occupant of the premises where the property is discovered, for mislaid property is presumed to have been left in the custody of the owner or occupier of the premises upon which it is found. The result is that the proprietor of the premises is entitled to retain possession of the thing, pending a search by him to discover the owner, or during such time as the owner may be considered to be engaged in trying to recover his property. . . .” 1 AM.JUR.2d Abandoned, Lost, Etc., Property § [b,] 24 (1994).

D. Treasure trove. “According to the common law, treasure trove is any gold or silver in coin, plate, or bullion, whose owner is unknown, found concealed in the earth or in a house or other private place, but not lying on the ground. . . . It is not essential to its character as treasure trove that the thing shall have been hidden in the ground; it is sufficient if it is found concealed in other articles, such as bureaus, safes, or machinery. While, strictly speaking, treasure trove is gold or silver, it has been held to include the paper representatives thereof, especially where found hidden with those precious metals.” 1 AM.JUR.2d Abandoned, Lost, Etc., Property § 7 (1994).

“Treasure trove carries with it the thought of antiquity; to be classed as treasure trove, the treasure must have been hidden or concealed so long as to indicate that the owner is probably dead or unknown.” 1 AM.JUR.2d Abandoned, Lost, Etc., Property § 8 (1994). “Title to treasure trove belongs to the finder, against all the world except the true owner.” 1 AM.JUR.2d Abandoned, Lost, Etc., Property § 26 (1994).

. . . [W]e turn now to the case before us on review. . . . It is apparent that the box [of money] was not lost. The circumstances suggest that it was either abandoned property, mislaid property, or treasure trove. Considering all of the facts as presented, we cannot say that the trial court’s finding that the property was mislaid property was clearly erroneous. Specifically, we hold that the trial court’s findings that “the money in controversy was intentionally placed where it was found for its security, in order to shield it from unwelcome eyes . . .” and that the “money was mislaid [property]” were not clearly erroneous.

. . . The Iowa Supreme Court addressed this issue in Benjamin, supra. In that case, a bank hired Benjamin to perform a routine service inspection on an airplane which it owned. During the inspection, Benjamin removed a panel from the wing. . . . Upon removal of the panel, Benjamin discovered packets of currency totaling $18,000. Both Benjamin and the bank, as the owner of the plane, claimed ownership of the money. The court . . . determined that the money was
“mislaid” property. The court explained that “the place where Benjamin found the money and the manner in which it was hidden are also important”:

the bills were carefully tied and wrapped and then concealed in a location that was accessible only by removing screws and a panel. These circumstances support an inference that the money was placed there intentionally. This inference supports the conclusion that the money was mislaid.

After reaching this conclusion, the court held “because the money discovered by Benjamin was properly found to be mislaid property, it belongs to the owner of the premises where it was found.” The circumstances in Benjamin are similar to those now before us, and we are persuaded that the reasoning of the Iowa court was sound. . . . We hold that the trial court did not err when it found that the property in the present case was mislaid property and as such belongs to the owner of the premises in which the money was found. Accordingly, we affirm the trial court.

HENDLE v. STEVENS
224 Ill. App.3d 1046, 586 N.E.2d 826 (Illinois Court of Appeal, 2d Dist., 1992)

[This case reached a result opposite from that of Terry v. Lock, above, with the court here holding in favor of the finders. Jennifer Moore and several other teenagers were the finders. They were playing in an unimproved, wooded lot owned by the Stevenses (the landowners), when Jennifer Moore kicked a mound of earth, near two holes or burrows in the ground, and some loose paper money became visible. The total amount later was determined as $6,061. The trial court held that the money was lost, not mislaid. It applied a “presumption” in favor of characterizing property as lost, when it is found in ambiguous circumstances. The court of appeal agreed and affirmed the judgment in favor of the teenagers (the finders) for the following reasons.]

. . . Property is mislaid when it is intentionally put in a certain place and later forgotten; property is lost when it is unintentionally separated from the dominion of its owner; and property is abandoned when the owner, intending to relinquish all rights to the property, leaves it free to be appropriated by any other person. (Michael v. First Chicago Corp. (1985), 139 Ill.App.3d 374, 382, 487 N.E.2d 403.) A finder of property acquires no rights to mislaid property, is entitled to possession of lost property against everyone except the true owner, and is entitled to keep abandoned property. It is the . . . position [of the Stevenses, the landowners in this case,] that the money was not lost or abandoned but “probably mislaid” because it was buried in the soil in a stacked or organized fashion.

Contrary to the [landowners’] contention . . . , the evidence did not establish that the money was buried in a hole or that its location was marked by two holes in the ground. Rather, the evidence indicated that the money was found in a mound of dirt near the two holes when Jennifer Moore kicked it. . . . [T]he holes appeared to have been burrowed into the ground by some sort of animal.

The minors differed in their recollection of the condition of the money at the time of discovery. Jennifer, who actually discovered the money and picked it up, stated it was loose. Thomas Farrell,
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Jr., who was walking with Jennifer at the time of the discovery, was less certain regarding the state of the money. He testified that it was not “really loose” and that he was “pretty sure it was organized by string or rubber band or just stacked together.” . . . All the minors testified that they grabbed or took some money out of Jennifer’s hands. This fact and the fact that the children ended up with varying and unequal amounts of money imply that the money was not fastened in one stack by a rubber band. Nevertheless, even if the money was in such a state, that state does not establish that it was mislaid. It could just have easily been abandoned or lost in that condition.

At any rate, it is unclear from the circumstances of the discovery of the money in a mound of loose dirt how the money got there or what the intent of the true owner was. . . .

We conclude that the trial court did not err in finding that the evidence was ambiguous as to whether the money constituted lost, mislaid, or abandoned property and that any ambiguity, as a matter of public policy, should be resolved in favor of the presumption that the money was lost. (See Paset v. Old Orchard Bank & Trust Co. (1978), 62 Ill.App.3d 534, 538, 378 N.E.2d 1264.) As “lost” property the minors were entitled to possession of the money against everyone except the true owner. [Judgment in favor of the finders affirmed.]

NOTES AND QUESTIONS

(1) Are the Finders’ Cases Arbitrarily Decided, Because of Indeterminacy in the Four Categories?: Helmholz, Equitable Division and the Law of Finders, 52 Fordham L. Rev. 313, 316 (1983). Many commentators agree that the cataloguing of lost, mislaid, or abandoned property is an indeterminate basis for decision. Inferring the owner’s intent is difficult in real-world cases. Circumstantial evidence gleaned from the item itself and the location of its finding is really all the court has, and often it produces only wide-open ambiguity. Thus, in Hendle v. Stevens, above, the court rejects the landowner’s argument that the property was mislaid only by observing, “[I]t could just as easily have been abandoned or lost,” and by deferring to the trial court’s findings because “the trial court did not err.” Do you think that the common law principles governing finders’ cases are arbitrary?

In considering your answer to that question, consider Franks v. Pritchett, 197 S.W.3d 5 (Ct. Ark. App. 2004). In that case, Franks found $14,200 in bills wrapped tightly with masking tape, like a brick, in a drawer of the desk in his hotel room, which had a history of being a site for drug trafficking. The trial court relied on Terry v. Lock and held that because the money had been placed in the drawer, it had been mislaid and forgotten. It thus awarded the property to the hotel owners. Franks appealed, arguing that the location equally supported a finding that the money had been lost, abandoned or treasure trove. The majority affirmed the trial court:

[T]he place where money or property is found is an important factor in determining whether it was lost or mislaid. . . . [I]f one leaves a wallet in a drawer, there is no greater reason to believe it was lost rather than intentionally placed there and forgotten. Similarly, here . . . the fact that the money was placed in the drawer supports a finding that the property was not abandoned or lost, but was mislaid.
Because the trial court’s determination of the category can be reversed only if “clearly erroneous,” the appellate court affirmed.

Two judges dissented. They argued that the majority gave too much weight to the location of the property and instead emphasized that all of the facts mattered under Terry v. Lock. “I cannot agree with the majority that leaving a wallet in a drawer is in any way analogous to leaving a $14,200 block of cash in the same drawer. Unless those in the majority customarily travel with significantly larger amounts of cash in their wallets than I, there is no validity in the comparison. The nature of the property is itself insufficient to refute the notion that it was intentionally placed in the drawer and forgotten.” The dissent concluded that the facts “lead logically to only one conclusion: that regardless of whether the money was placed in the motel room drawer intentionally, the true owner has abandoned his interest in it.” Now do you think the rules are arbitrary? (But can you think of a better way?)

(2) Helmholz’s Proposal, Which Actually Was Adopted in Popov v. Hayashi, Below: “Equitable Division,” or Awarding Equal Undivided Interests to Multiple Claimants With Claims of Equal Quality. In addition to this critique of the law of finders, Professor Helmholz provided an alternative solution. When there are multiple claimants whose arguable rights to possession are of equal quality, the court can make an “equitable division” by awarding undivided equal interests to each. For example, in Terry v. Lock, the first case above, half the money presumably would be awarded to the landowner and half to the finder(s). Is this equitable-division principle a superior way of resolving finders’ cases? The court in Popov v. Hayashi, which appears in a later section of this chapter below, adopted Professor Helmholz’s proposal in an unusual case. The court awarded equal undivided interests to each of two fans who claimed ownership of a record-breaking home-run baseball hit by Barry Bonds.

(3) But Is Equitable Division Really a Superior Approach? To apply equitable division, a court must identify all arguable claimants and compare their entitlements to determine the split that is equitable. In Terry v. Lock, should the property be divided two ways, between the landowner and both of the finders, or three ways, with one share each for each of the finders and one for the landowner? And how does the court decide whether Terry, as a finder, has an “equal” claim to that of Lock, the landowner? One can argue that characterizing the claims as “equal” is as arbitrary as the categories of lost, mislaid, and abandoned property. Presumably, the circumstances in which the property is found will still influence the strength of the claimant’s “equal” entitlement, so that the three categories will influence the decision anyway. Furthermore, perhaps it is an overstatement to call the categorization approach “arbitrary.” Certainly, there will be cases in which it is difficult to categorize the property as lost or mislaid. But there also will be some cases in which the categorization of the property as mislaid will be relatively clear (such as the Benjamin case, in which the property was found in an airplane wing). Notice that the court in Hendle v. Stevens applies a “presumption” in favor of characterizing property as lost, so that there is a kind of “tie-breaker” for close cases. Is equitable division, then, really superior to the common law approach based upon categorization?

(4) The Policy Basis for the Common Law Categorization Approach: McAvoy v. Medina, 93 Mass. (11 Allen) 548 (1866). In any event, it is usually unwise to underestimate the efficiency of
the common law. Even when its principles seem “arbitrary” and are expressed as archaic formalisms, the common law often proves itself, upon examination, to have settled upon a superior approach, chosen from many arguable alternatives. Is it possible that the common law response to the finders’ cases is an example?

In *McAvoy v. Medina*, a barbershop customer picked up a “pocket-book” of money left on a table. The court held that the pocket-book was mislaid, not lost, and it awarded possession to the barbershop owner on the ground that this disposition would make its return to the true owner most likely. In such a case, isn’t the categorization of the property justifiable, rather than arbitrary? Furthermore, the adoption of a presumption that the property is lost creates a clear rule for otherwise ambiguous cases, meaning that the category of mislaid property is reserved for cases such as *McAvoy* in which return to the true owner is probable, whereas the general result is that the finder prevails in most cases. Clarity of title is always a good thing in property law. Does it help to justify the common law?

(5) A Clear Case of Mislaid Property: Shamrock Hilton Hotel v. Caranas (Discussed below as a Finders’ Case). *Shamrock Hilton* furnishes an even clearer case. The plaintiff was a guest who left her purse in the defendant hotel’s dining room. The hotel took custody. The plaintiff returned to get her purse only to find that the defendant had erroneously given it to an impostor. The plaintiff successfully sued the hotel. The categorization of the property as “mislaid” was easy in this case, and safekeeping by the landowner obviously was a better way to return it to the true owner than awarding it to the finder. Does this case help to justify the common law category approach?

(6) The Wide Variety of Different Legal Principles in the Finders’ Cases—and the Exuberant Variety of the Common Law: Morgan v. Wiser, 711 S.W.2d 220 (Tenn. App. 1985). In fact, the categories of lost, mislaid, and abandoned property provide only a beginning point in understanding the law of finders. There are many other principles that some courts have used. In the *Morgan* case, for example, the finder unearthed gold coins while trespassing on property of the landowner. In spite of possible arguments that the coins were lost, abandoned, or treasure trove (as opposed to mislaid), the court awarded the coins to the landowner. In doing so, the court could rely upon two principles established in different lines of common law decisions. First, when property is found inside a residence, or embedded in the soil, many courts have awarded it to the landowner, not the finder. Second, some cases disfavor finders who are wrongfully present on the land. Thus, the *Morgan* court justified its result in part on the ground of “the discouragement of trespassers.” The common law is an evolutionary thing, analogous to a living organism, and an unexpected factual situation periodically causes it to grow, change, or put out new branches.