

Chapter 1

PERSONAL PROPERTY: RIGHTS OF SOME POSSESSORS

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SUMMARY

§ 1.1 Introductory Principles

1. A legal determination that a person owns personal property is difficult to make because proof of ownership of personal property often is not evidenced by a writing. As a result, the law places great weight on the observable fact of possession.

2. To say that a person has "possession" of personal property is to state either an observable fact or a legal conclusion or both. A person can be deemed to have possession of property as a legal conclusion even though she does not have actual possession of the property as an observable fact. In such case the person is said to have "constructive possession."

3. To say that a person has "title" to or "owns" personal property is to state a legal conclusion. A person can be deemed to have title to property as a legal conclusion even though he or she does not have actual possession of the property as an observed fact. Conversely, to conclude that a person is entitled to possession of personal property does not necessarily mean that the person has title to or owns the property.

4. Title, as all property rights, is a relative concept. A person may have "title" to property as against one person (A) but not another person (B).

5. If it is determined that a person is entitled to the legal possession of personal property, that person has the right to:

- a. Continue the possession against everyone except those persons, if any, who have a better right to the property;
 - b. Recover possession of the property if it is wrongfully taken; and
 - c. Recover damages to the property from a wrongdoer.
6. To constitute possession, there must be:
- a. a certain amount of actual control over the property; and
 - b. an intent to possess the property and exclude others.

§ 1.2 Wild Animals and the Rule of Capture

Title to wild animals is initially acquired by taking possession of the wild animal.

- a. The mere chasing of an animal, although in hot pursuit, does not give the pursuer a right to possession against another who captures it by intervening.
- b. If an animal is mortally wounded, or caught in a trap so that its capture is certain, the hunter acquires a right to possession and title which may not be defeated by another's intervention.
- c. Title acquired by possession can be lost if the wild animal escapes and returns to its natural habitat.

§ 1.3 Finders

1. A finder is a person who rightfully acquires possession of the property of another that has been lost, misplaced, abandoned, or hidden so as to be classified as treasure trove.
2. Lost property consists of personal property whose possession has been parted with casually, involuntarily, or unconsciously.
3. Misplaced property refers to personal property which has been intentionally placed somewhere and then unintentionally left or forgotten.
4. Abandoned property consists of property that is no longer in the possession of the prior possessor who has intentionally relinquished, given up, or released the property.
5. Treasure trove consists of coin or money concealed in the earth or another private place, with the owner presently unknown.
6. Rights of a Finder at Common Law:
 - a. A finder of lost property acquires title to the property as against all but the true owner. The rights of the true owner, of course, are superior to the rights of the finder. Since the

concept of title is relative, for this purpose a true owner could include a prior possessor.

b. The prevailing rule is that if a person finds personal property on the land of another, the finder is entitled to the personal property unless the finder is a trespasser.

c. The finder is in a relationship with the true owner similar to that of bailor-bailee. Therefore, a finder can be guilty of conversion if the finder appropriates the property to his own use, or if he is reasonably able to discover the true owner and fails to do so.

d. The finder of misplaced property is not entitled to retain the possession of the property as against the owner of the land on which the property was found. Rather, the owner of the "locus in quo" is deemed to be the bailee of the goods for the true owner.

e. The finder of abandoned property generally is entitled not only to possession but also to ownership as against all others. In the case of abandoned shipwrecks within the territorial waters of a state, however, there is a conflict of authority—some states holding that such property belongs to the state, and the others holding that it belongs to the finder.

f. In England, treasure trove escheated to the crown. In the United States, it is treated as lost property and belongs to the finder.

7. Many states have enacted statutes which give the finder greater rights to found property than the finder had at common law. While these statutes differ widely, generally they eliminate the distinction between lost, misplaced and abandoned property and treasure trove, and award the found property to the finder in most cases. Frequently the statutes require the finder to deposit the found property with local authorities, post a notice attempting to advise the true owner the property has been found, and award ownership to the finder if the true owner does not claim the property after some period of time.

§ 1.4 Human Embryos

1. At common law, a person generally had no property right in the body or remains of himself or another and, as such, a person had no right to gift or bequeath his body. Actions for damages to one's body typically were managed through the tort system rather than the property law system. Thus, tort law rather than trespass law controlled the right to damages for either the intentional or negligent infliction of damages to a person's body.

2. Surviving family members had a limited right to direct how a decedent's body should be disposed of at death.

3. Under the National Organ Transplant Act, it is illegal to sell human organs such as kidneys, hearts and livers.

4. Under the Uniform Anatomical Gift Act which has been adopted throughout the United States, a person or the person's family following the person's death may donate his body for research purposes and gift organs for purposes of transplantation.

5. Human embryos that are in storage could be regarded either as property in the traditional sense, human life, or even quasi-property. The courts to date have tended to characterize human embryos as quasi-property.

§ 1.5 Human Likeness

1. Many states have adopted a so-called "right of publicity."

2. The "right of publicity" protects persons against the unauthorized use of their likeness or voice, typically for a commercial advantage.

3. This common-law right of publicity can be in addition to rights provided by statute.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 1.2 *Wild Animals and the Rule of Capture*

PROBLEM 1.1: A was engaged in hunting a fox with his dogs and hounds on state-owned land. While in hot pursuit of the fox but before A could capture it, B killed it and kept it for himself. A sued B for the value of the fox? What result?¹

Applicable Law: Title to wild animals can be acquired by reducing them to possession. Possession requires both an intent and a certain amount of physical control over the animal. Pursuit of the animal is not sufficient to constitute possession unless the animal is either mortally wounded or so spent that actual occupation is inevitable. Thus, a hunter in pursuit of a fox has no claim against a third person who interferes, shoots the fox, and actually captures it.

Answer and Analysis

B should win. Wild animals in a state of nature, like abandoned property, are owned by no one. The first person who takes possession or occupancy of them becomes the owner of that property. The

1. *Pierson v. Post*, 3 Caines 175 (N.Y.1805). See also, *Ghen v. Rich*, 8 F. 159 (D.Mass.1881) (fisherman gains property right in hunted whale through customary method of killing rather than by rule of capture).

mere chase of a wild animal will not give possessory rights to the hunter. However, actual possession or occupancy of the wild animal is not necessary to obtain title. It is sufficient if the animal be mortally wounded so that actual possession by the hunter is inevitable or that the animal be caught in a trap or net of the owner. Once this occurs the hunter has a property interest which cannot be wrongfully divested by another. Here, A was merely in pursuit of the fox and had not wounded it. Therefore, A's possession was not certain and B, even though perhaps acting in an unsportsmanlike manner, did not wrongfully obtain possession and, ultimately, title to the fox. While it could be argued that A should prevail if A had a reasonable likelihood of capturing the fox, the prevailing case law is to the contrary. The more stringent rule of capture is designed to assure greater certainty in establishing property rights by eliminating quarrels and litigation in which dubious claims of entitlement are made based on claimed facts of possession that, unlike actual possession, are difficult to prove.

The general proposition that title to personalty is established through possession is extremely useful because of the difficulties, administrative and otherwise, that would arise if proof of title by a writing, as typically the case for real property, were otherwise required. It is also consistent with the needs of modern commerce in which billions of transactions occur without written proof of title.

If A had been hunting on A's land but the facts were otherwise the same, A would prevail against B. Otherwise, B would be rewarded for B's wrongful trespass on A's land.

If A had captured the wild animal and B had wrongfully taken the animal from A's possession, or if the animal escaped and B, who later captured the animal, had reason to know the animal belonged to another, then, notwithstanding the general rule that an escaped wild animal that returns to the state of nature belongs to the next possessor, A could sue B and recover the animal or its value.

Note: Scarce Resources and the Rule of Capture

The rule of capture was originally applied to wild animals because they were "fugitive"—i.e., they moved about and ignored private property lines—and they were not owned by anyone, unless the sovereign itself. But in the nineteenth century the rule was expanded to include "fugitive" minerals, such as oil and natural gas. These minerals, like wild animals, move about but under the ground and without regard for property lines. Under the rule of capture, the property owner who drilled for and obtained, say, oil was entitled to keep it even if the oil flowed out from under the property of one or more nearby property owners.

But the rule of capture proved not to work very well for scarce resources, such as oil and gas. The cost of pumping the oil and gas was much less than its market value. Furthermore, if A's neighbor was pumping oil, that meant that A was facing "drainage"—that is, the oil was likely flowing out from under A's land, as well as the land of other neighbors, toward the working oil well. A would be obliged to drill a well too, and pump as rapidly as possible. Anything A did not get for herself today might go to someone else tomorrow.

It is easy to see that the rule of capture had a role in serious problems of overproduction of oil that plagued the industry in the United States around the turn of the century. Today, the rule of capture is seldom applied to fugitive minerals. Rather, their removal is subject to extensive state and federal regulation.

§ 1.3 Finders

PROBLEM 1.2: A found a diamond ring on a public street and takes it to a local jewelry store to be appraised. An employee of the store owner removed the diamond from the setting while pretending to weigh it. The employee then refused to return the diamond to A. A sues the store owner to recover the value of the diamond. May A recover?²

Applicable Law: The finder of lost property has the right to possess the property against all the world but the true owner. Thus, if a third party wrongfully converts the property, the finder may recover the property if it is still in the possession of the wrongdoer, or the finder may recover the full value of the property from the wrongdoer.

Answer and Analysis

As a general rule, a finder has good title against all the world but the true owner. As to the true owner (who could be a prior possessor), a finder is in a position, similar to that of a bailee, with all the rights and duties of a bailee. While a finder does not attain absolute ownership of the lost property, the finder does have the right of ownership against all other persons but the true owner. Thus, if the finder subsequently loses the found property, the finder may reclaim it from a subsequent finder.

Here, the finder of the diamond ring was entitled to its possession as against all the world but the true owner. Therefore, the finder has a superior claim as against another who wrongfully takes the diamond from the finder. An employer (store owner in this case) is responsible for the wrongful acts of its employees committed during the course of the employment. The store owner,

2. Cf. *Armory v. Delamire*, King's Bench, 1 Strange 505 (1722).

therefore, is liable to A for the full value of the diamond taken from the ring.

Suppose, after A recovers, O, the true owner, of the diamond ring sues the store owner to recover the value of the diamond. If the wrongdoer is liable to O, then effectively the wrongdoer pays twice, once to the finder and once to O. To avoid the wrongdoer having to pay twice, a court could hold that the wrongdoer, having paid the finder, has a defense as against the true owner and that the true owner should recover from the finder.³ This rule would penalize the true owner if the finder, who had been paid by the store owner, could not be found.

On the other hand, suppose O sues the store owner to recover possession of the diamond. Here again, if the store owner is liable, the store owner pays twice. But, if O wants the diamond rather than money damages, shouldn't O be permitted to sue the wrongdoer since pursuing the finder will not get O what O wants?

PROBLEM 1.3: A, a young child, picked up a stocking stuffed with soft material that was knotted at both ends. A and A's friends began playing with it. The stocking passed from friend to friend until, as one child was striking another with it, the stocking burst and a large amount of money fell out. A claims the money. Is A entitled to it?

Applicable Law: Physical control alone is not sufficient to constitute possession or a finding. Possession and finding both require a certain amount of intent, a conscious desire to control the object, to possess it, and to exclude others. Thus, if one child found a stuffed stocking and joined with friends in using it as a plaything until it burst open revealing a roll of money, all of the friends formulated the intent to possess the money at the same time. Since they had mutual control, they all were entitled to the money as co-finders.

Answer and Analysis

A is not entitled to the money exclusively. All of the friends are entitled to a *pro rata* share. A did not have exclusive possession and must share the money with the other children. A finder, subject to certain exceptions noted in the following problems, is entitled to possession as against all but the true owner who, in this case, is unknown. To become a finder, however, one must acquire possession. This requires more than physical control. Possession consists of physical control of property coupled with an intent to assume dominion over it. At the time of discovery, A lacked an intent to

3. Cf., *Berger v. 34th Street Garage Inc.*, 274 App.Div. 414, 84 N.Y.S.2d 348 (1st Dept. 1948).

take dominion over the stocking and its contents. A merely wanted to use it as a plaything with her friends. The other children had similar ideas. None of the children desired or attempted to exercise possession or exclusive control over the stocking until the money was discovered. When the stocking burst, all the children formulated the intent to possess the money at the same time, and since they were all collectively in physical control, they became co-finders. Other rationales, such as that A did take possession of the stocking but that she acquiesced in the co-possession of the friends, are possible.

PROBLEM 1.4: F, a prominent archaeologist, went on O's land, but without O's permission, to search for ancient lost artifacts. F dug up a valuable mask from O's land which F then sought to sell to the X Museum, subject to F having good title to the mask. F then instituted a suit against O to establish that as between them F has the better title. Who wins?

Applicable Law: Unless the trespass is trivial, a trespassing finder does not have good title against the owner of the locus in quo. Otherwise, the law favoring finders against all but the true owner would reward trespassers and perhaps even encourage trespassing.

Answer and Analysis

O wins. Because A was a trespasser when entering O's land and finding the mask, F's claim is inferior to that of O who prevails against the trespassing finder.⁴ O's claim can be based on the theory that O, the owner of the land on which goods were embedded, owns the land and all that is part of the land.⁵ If the law were otherwise, persons would be encouraged to trespass on the land of others.

F cannot prevail by alleging that he was motivated to trespass upon O's land in order to do historical research for a charitable institution. Even such a possibly worthwhile motive does not excuse F's unlawful act. F should have asked O for permission to enter O's land.

PROBLEM 1.5: A went into a barber shop owned by B to get a haircut. On the table next to the chair in which A sat A found a wallet containing \$500 in cash. B claimed that B was entitled

4. *Favorite v. Miller*, 176 Conn. 310, 407 A.2d 974 (1978).

5. See also, *Goodard v. Winchell*, 86 Iowa 71, 52 N.W. 1124 (1892) (An meteorite weighing 60 pounds, which falls

from the sky and is imbedded in the soil to a depth of three feet, is the property of the owner of the land on which it falls, rather than of the first person who finds it and digs it up).

to the money in the wallet even though A found the wallet. If B sues A to recover the money, can B win?⁶

Applicable Law: If a finder finds lost property on the land of another and the land is not generally open to the public, as between the owner of the land and the finder, the owner of the land prevails. Otherwise, the finder would be rewarded for trespassing on another's land. However, at common law if the finder finds lost property on land that is open to the public, such as a commercial establishment, the finder is entitled to the property as against the owner of the land unless the property is mislaid.

Answer and Analysis

A person loses property when the person parts with its possession involuntarily. Typically, in the case of lost property the possessor is unaware that he is parting with possession. Mislaid property, on the other hand, is property which has been intentionally placed somewhere and then its whereabouts forgotten. Here, the wallet found on the table beside the chair appears to have been placed there intentionally, in all likelihood by a customer who was previously in the shop to get a haircut. Thus, the money is classified as mislaid property and not as lost or abandoned property.

As a general proposition the finder of lost property has the right to retain possession as against everybody except the true owner. If the true owner never materializes, the finder keeps the property effectively as a reward for his efforts in taking possession of the property and caring for it. Absent this reward, the finder might not take the time to retrieve the property and care for it. This result generally is viewed as the best way to assure that the property will be reunited with its owner.

Generally, in the case of mislaid property, the owner of the locus in quo where the property is found is entitled to retain possession as against the finder. The rationale for this holding is that the owner of the mislaid property is likely to remember where he placed it and return for it. If a casual finder were entitled to keep it, so the argument goes, it would be more difficult for the owner to recover it. Alternatively, the owner of the locus in quo is likely to still be there when the owner of the mislaid property remembers where he placed it, and thus there is a greater likelihood that the property will be returned to its true owner.

This rationale favoring the owner of the locus in quo against the finder of mislaid property, however, is suspect. The apparent purpose of the rule is to protect the true owner. However, if finders believe that the rule unjustifiably rewards the owner of the locus in

⁶ *McAvoy v. Medina*, 93 Mass. 548, 11 Allen (Mass.) 548 (1866).

quo in the event the true owner never materializes, then to avoid that result, finders who are otherwise willing to recognize their claim as subservient to the true owner might be unwilling to tell the owner of the locus in quo that they found the mislaid property. This makes it more difficult for true owners to recover the property.

Furthermore, the characterization of found property as either lost or mislaid is dubious and thus suspect as a device to sort out the competing claims of the finder and the owner of the locus in quo. The characterization depends on the intent of the prior possessor and ascertaining that intent merely from the location of the property is highly suspect. For example, if the wallet had been found under the chair, it arguably was lost rather than mislaid because most people do not intentionally place their wallets under a chair. On the other hand, if the true owner's intent governs the characterization of property as either lost or mislaid, is it not possible that the true owner placed the wallet on the table, that another customer knocked it onto the floor and that a third customer unknowingly kicked it under the chair? If so, the property should be viewed more as mislaid rather than lost.

Many state statutes eliminate the distinction between lost and mislaid property and award possession to the finder who complies with the statute's notification requirements. During a defined period the true owner may appear and claim the mislaid property, but after the statutory period has passed, it belongs to the finder.

PROBLEM 1.6: A was employed as a room cleaner by B hotel to clean guest rooms. While cleaning one guest room, A discovered \$800 in cash concealed under the lining of a bureau drawer. A delivered the money to B's manager who attempted without success to find the owner. A claims to be entitled to the cash as against A's employer. Is A correct?⁷

Applicable Law: Certain employees, such as hotel room cleaners, are usually obligated as a part of their employment duties to deliver found articles to their employer. Accordingly, the possession of articles found during and within the scope of one's employment is generally awarded to the employer and not to the finder.

Answer and Analysis

A is not entitled to the money. B could prevail on the theory that the property was mislaid and therefore as between the finder and the owner of the locus in quo the owner wins.

7. Jackson v. Steinberg, 186 Or. 129, 200 P.2d 376 (1948).

Alternatively, the finder in this case is a hotel employee whose general duties include the obligation to deliver to the employer all articles left in the hotel rooms by its guests. The finding occurred in the course of this employment and the finder has a duty to surrender the money to the hotel. Thus, B could also argue that it has a better right to possess the found money than the finder, A, without regard to the characterization of the property as lost or mislaid.

Suppose A was employed by the hotel in a job which did not include, expressly or impliedly by virtue of the job description, a requirement of delivering found property to the employer. Would the result change? Probably not. There are at least two arguments to suggest B would be entitled to the money. First, A, as an employee, is an agent of B and thus acts for the benefit of B when finding the money. Second, if A's finding of the money is outside of the scope of A's employment, then A's possession on the property when finding the property might be viewed as a trespass. In this case, A loses under the general rule that the owner of the locus in quo prevails against a trespasser.

PROBLEM 1.7: A and B, ages eight and ten respectively, were employed by C to clean out C's henhouse. C's home and henhouse had changed hands frequently. A and B found a tin can full of gold buried in a corner of the henhouse in such a condition to suggest that it had been buried there for quite some time. C took the coins from the boys claiming them as hers because they were found in her henhouse. A and B file suit. May A and B recover the coins?⁸

Applicable Law: Treasure trove refers to gold and silver coins, bar, plate, or other valuable objects intentionally hidden or secreted, usually in the earth, but the concept is frequently applied to valuables wherever hidden. The owner is usually unknown and not likely to appear. Under the English common law treasure trove belonged to the Crown, but in the United States it belongs to the finder.

Answer and Analysis

Yes. At early common law lost articles found concealed in the earth or other private places were called treasure trove. Treasure trove usually consisted of coins or money intentionally hidden for safety and with the owner being either dead or unknown at the time of discovery. This is contrasted with lost property which is defined as chattels found on the surface of the earth the possession of which the owner had casually and involuntarily parted. Treasure

⁸ Danielson v. Roberts, 44 Or. 108, 74 P. 913 (1904).

treasure trove belonged to the Crown in England, but in the United States treasure trove merged with the law of lost property.

The general rule of lost property gives the finder the right to retain it against all persons except the true owner. If the true owner never claims it, as is most likely in the case of treasure trove, then the property becomes that of the finder. Under the doctrine of treasure trove, A and B are entitled to recover possession of the coins. The claim of A and B is fortified by the fact that they are not trespassers, although in some instances even technical trespassers have been allowed to retain treasure trove. Further, the master-servant relationship should not diminish the value of the finders' claim since they were only hired to clean the henhouse. It can hardly be expected that turning in discovered articles, as in the case of the hotel cleaning personnel, would be in the normal course of their employment.

Of course, there is a contrary argument. First, one might imply an obligation on the part of the hired servant to turn over found property to the master. Alternatively, one might characterize A and B as trespassers or wrongdoers with respect to their finding and retention of the gold. Here the argument would be that A and B were hired for a specific purpose—to clean the hen house—and that their presence on C's premises was limited solely to that purpose. Thus, to the extent they do things inconsistent with that purpose, they act outside of the scope of the permission granted to them and, as such, are wrongdoers. To further illustrate, suppose O invites F to her home for dinner and while F is sitting on the sofa puts her hand behind a cushion and finds a ring. Should F be entitled to retain the ring as against O who claims to be entitled to the ring because it was found in O's home. Arguably no on the grounds that F was invited to O's home to eat dinner not find lost property. Admittedly, however, this might be a close question.

PROBLEM 1.8: A trespassed on the land of O and cut ninety-three pine logs without the consent of the owner. A hauled these logs, marked with his initials to a mill, where B converted them to his own use. A now sues B for their market value. What result?⁹

Applicable Law: A possessor, even a wrongful possessor or thief, has the right to possession as against all but the true owner and is entitled to recover either the thing or its value from a converter.

Answer and Analysis

A should recover. It is a generally recognized rule that possession is a protected property right. Thus, a possessor, whether a

⁹ Anderson v. Gouldberg, 51 Minn. 294, 53 N.W. 636 (1892).

finder, a bailee, or a person who takes possession of previously unowned property or even a converter who had stolen the goods, may recover for their damage, conversion or theft while in her possession. As between a possessor and a wrongdoer, possession is a sufficient title, and only someone with a superior title may contest the possessor's right. The rationale behind the rule is the protection of property and the discouragement of breaches of the peace. B's conduct is wrongful and should be discouraged, not encouraged. B should not be allowed to raise the issue of lack of title in the possession as this would dilute the law's protection whenever goods were not in the immediate possession of their owner. The defendant can only raise the issue of title when the defendant has a superior title to that of the possessor or can connect herself to someone with a superior title. Here A was clearly the possessor of the logs, and although A acquired possession wrongfully, B is not able to raise the issue of A's lack of title. Therefore A should recover.

The rule that possession is good title against all but the true owner also resolves an administrative difficulty associated with the proof of the ownership of personal property. Since the fact of possession may be provable, rights in property not otherwise evidenced by a writing can be established if possession is the basis for establishing the title.

This example highlights the concept of the relatively of title. Here A's title based on possession is superior to that of B who wrongfully converted the goods to his own use. But, if O had sued A to recover the logs A wrongfully took from O's land, O, as the prior possessor, would prevail as against A who, as against O, was a trespasser.

PROBLEM 1.9: A owned a house which she had never occupied. The house was requisitioned for military use, and B, an enlisted man who was stationed in the house, found a brooch on the top of a window frame behind the blackout curtains and in a crevice. The brooch was unpackaged and covered with cobwebs. The owner of the brooch was not found, and it was turned over to A who sold it and kept the money. B now sues A for the value of the brooch. May B recover?¹⁰

Applicable Law: This problem can be used to summarize briefly the classification of found property, i.e., lost, mislaid, abandoned, and treasure trove, and gives the basic rules relating to the rights of the finder. A finder of lost articles on the land of another who is not a trespasser is entitled to possession of the article found as against everybody but the true owner of the article, including the owner of the land who never had been in possession of the land.

¹⁰ Hannah v. Peel, 1 K.B. 509 (1945).

Answer and Analysis

Yes, although the problem is attended by some difficulty. According to the traditional approach, the found property is first categorized as lost, mislaid, abandoned or treasure trove. Taking up the various categories in reverse order, the item is clearly not treasure trove. First, it is a single item of jewelry and the circumstances of finding preclude any inference that it was carefully secreted or hidden there. The item was not wrapped or enclosed in a container but instead it was uncovered and unprotected from dirt and filth. Although it is not necessary under some authorities that treasure trove be buried in the ground, it is necessary that it be intentionally hidden or secreted.

The brooch was not abandoned. The value of the item and its location refute any likelihood of abandonment. If a person were to abandon such a piece of jewelry, the person would likely throw it in the trash, not in a crevice on top of a window frame.

The two probable categories are those of mislaid or lost property and the two seem almost equally plausible. Someone wearing the pin could have been adjusting the curtains, cleaning the windows or performing some other chore at some distant time in the past. The pin could have fallen off a wearer's clothing without her noticing it, in which case it would be lost—the possession being casually and involuntarily parted. On the other hand, she could have voluntarily removed the pin and placed it on the frame until her task was completed, and then gone off and forgotten about it—in which case it would be mislaid property. Under the traditional rules, A would be entitled to the jewelry and the proceeds of the sale if it were mislaid, but if it were lost, then B would be entitled to the property.

Under the particular circumstances of this case where the owner of the pin is very unlikely to reclaim it, where the owner of the house had never lived there and knew nothing about it, where the finder is an honest serviceman whose conduct should be rewarded and encouraged, the better solution is to classify the jewelry as lost property and let B recover.

Once the item is classified as lost property, it is fairly easy to resolve the dispute—recite the general rule that the finder of lost property acquires rights superior to all except the true owner, and then assert that the place of finding makes no difference. Nevertheless, a few other matters and cases should be considered. Frequently when property is found imbedded in the soil, the owner of the locus in quo is preferred over the finder. In this case, it cannot be said that the pin became a part of the soil or even appurtenant to the house. It was found on a ledge in the building, not embedded in the soil. Similarly, the cases dealing with findings by employees should have no bearing. Although B was there as a special type of

employee of the government, B had no duties as to finding and surrendering items such as this in the usual course of his employment. Thus, B is not precluded from keeping the item as a result of the employee status. Additionally, B should not be precluded from keeping the item as a trespasser as his presence on the premises was lawful and B was not a trespasser.

Finally, although a possessor or owner of land may be regarded as in possession of everything attached to or under the land, that person is not necessarily in possession of everything lying unattached on its surface.¹¹ Further, A was not in possession at the time of finding, and in fact had never been in possession of this land. Thus, B is entitled to recover the value of the brooch.

PROBLEM 1.10: In the summer of 1622, a fleet of Spanish galleons, heavily laden with bullion exploited from the mines of the New World, set sail for Spain. As the fleet entered the straits of Florida, it was met by a hurricane which drove it into the reef-laced waters off the Florida Keys. A number of vessels went down, including the richest galleon in the fleet, Nuestra Senora de Atocha. Five hundred and fifty persons perished, and cargo with a contemporary value of perhaps \$250,000,000 was lost. A later hurricane shattered the Atocha and buried her beneath the sands.

For well over three centuries the wreck of the Atocha lay undisturbed beneath the wide shoal west of the Marquesas Keys. Then in 1971, after an arduous search aided by survivors' accounts of the 1622 wrecks, and an expenditure of more than \$2,000,000, P, a salvage corporation, located the Atocha.

P retrieved gold, silver, artifacts, and armament valued at \$6,000,000. P's costs have included four lives, among them, the son and daughter-in-law of P's president and leader of the expedition.

P filed suit to retain possession and confirm title in itself to the wrecked and abandoned vessel. The United States government also claimed title. Who has the superior title, P or the United States government?¹²

Applicable Law: Under the law of finders the title to the wreck of a vessel which rests on the continental shelf outside the territorial waters of the United States, where such vessel has been abandoned, vests in the person who reduces that

11. There is some authority for the proposition that personal property found on the real property of another belongs to the finder if it is on the surface, but to the owner of the real property if it is "embedded." *Chance v. Certain Arti-*

facts Salvaged from the Nashville, 606 F.Supp. 801 (S.D.Ga.1984).

12. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir.1978).

property to his or her possession. Where the wreck or abandoned property, however, rests within the territorial waters of a state, there is a conflict. Some jurisdictions hold that the property belongs to the sovereign state if it has not been reclaimed within a year and a day of its abandonment. Other jurisdictions follow the law of finders and allow the finder to keep it. Federal law may preempt state law on this question.

Answer and Analysis

Under finder's law, the vessel and its cargo belong to the finder rather than to the Government. Insofar as sovereignty claims are concerned, however, there is a conflict of authority, and when the treasure or abandoned ship is found in territorial waters, depending upon state law, it is sometimes awarded to the state. In some cases, ownership may be regulated by a federal statute that preempts conflicting state law.

The *Atocha* was clearly an abandoned vessel and the court applied the law of finders. The claim of the United States was based on either or both of the following: (1) the Antiquities Act;¹³ or (2) the right of the United States, as heir to the sovereign prerogative asserted by the Crown of England, to goods abandoned at sea and found by its citizens. The *Treasure Salvors'* court concluded that the Antiquities Act applies by its terms only to lands owned or controlled by the government of the United States, and since the wreck rested on the continental shelf beyond the territorial waters of the United States, that Act did not apply.

The right of sovereignty refers to the right of the sovereign under ancient Roman and early English law to wrecked and derelict property on the seas. Originally, the right was absolute, even to the exclusion of the original owner. However, by the time of Edward I, the rule had been softened so that the owner could reclaim such property within a year and a day of its abandonment. Thereafter, it belonged absolutely to the Crown. Thus, under such a rule of sovereignty, the wrecked vessel and its proceeds belong to the United States government since it was found beyond the territorial waters and after a year and one day of its abandonment. However, since there was no specific act of Congress declaring the right of the United States to such finds, the court decided to follow what it termed the American view and applied the law of finders. Therefore, the company which discovered the wreck and salvaged it was entitled to its contents and the proceeds thereof.

13. 16 U.S.C.A. § 431-433. The act is primarily concerned with designation of historic landmarks and related activity. The law of salvage was also discussed at length in *Treasure Salvors* case, *supra*.

There is some authority to the contrary. For example, in *State of Florida v. Massachusetts Company*,¹⁴ the "finder" salvage company discovered and removed from time to time various parts of a sunken and abandoned battleship within the territorial waters of the State of Florida. The court held that the State of Florida, which had adopted the English common law, in effect had succeeded to the sovereign rights of the Crown of England, and that the battleship and its contents belonged to the State rather than to the finder.

PROBLEM 1.11: F was employed by the L corporation to service airplanes. L was retained by O, the owner of a single engine plane, to service a plane. In the course of servicing the plane F found \$18,000 in cash hidden in one of the plane's wings 30 years ago. F, L and O are all residents of State B the laws of which provide that "lost property shall become the absolute property of the finder if the true owner does not claim the property within 1 year after the property is found" One year after F finds the cash, F, L and O each claim to be entitled to the cash? Who wins.

Applicable Law: At common law the competing rights of F, L and O could be determined by the characterization of the property as lost or mislaid or by whether F was a trespasser or an employee. The common law applies absent a superceding statute that governs the rights of the parties. Here, State B has a statute that purports to give the finder of lost property title to the property if the true owner does not claim the property within one year after it is found. If the statute applies F prevails. But the statute may not apply.

Answer and Analysis

F wins if the statute awarding title to lost property to the finder applies. On the face of the statute, the finder is only entitled to "lost property." Two questions arise: (1) Did the legislature, in enacting the statute, intend the phrase "lost property" to encompass both lost and mislaid property or only lost property? If the latter, is the property characterized as lost or mislaid property and if it is mislaid property, is the finder still entitled to the property?

If a legislature intended to abolish the common law distinctions between lost and mislaid property, a well drafted statute would have defined "lost property" to include both lost property and mislaid property. In the absence of such, there is an ambiguity regarding legislative intent, and courts are divided on whether the

14. 95 So.2d 902 (Fla.1956), cert. denied 355 U.S. 881, 78 S.Ct. 147, 2 L.Ed.2d 112 (1957).

legislature intended to include mislaid property as well as lost property within the statutory phrase "lost property." Most courts hold that absent an express rejection of the distinction between the two, the phrase "lost property" is limited to "lost property" and does not include "mislaid property."¹⁵ Under that rule, F would prevail under the statute only if the cash were characterized as lost property. However, the placement of the cash in the wing of the airplane suggests that the property was mislaid and not lost because money could not have casually dropped in an airplane wing but could only have been intentionally placed there. As mislaid property, the money would go to the owner of the "locus in quo." While the "locus in quo" ordinarily is land, it is not necessarily limited to land and it can include the owner of other personal property in which the mislaid property is found. Under this rationale, O is entitled to the money.

§ 1.4 Human Embryos

PROBLEM 1.12: H and W were married to each other. After repeatedly failing to conceive a child by coitus they consulted a fertility clinic and ultimately agreed to participate in an assisted reproduction program. H's sperm was injected into W's eggs and the resulting embryos were stored pending implantation into W's uterus. Prior to implantation H and W agreed to divorce. W now claims that she is entitled to the embryos and seeks to have them implanted in her. H objects and claims that the embryos are his property? Who is right?

Applicable Law: Human embryos are neither persons nor property but share some characteristics of each in that they are not yet human life but have the potential to become human life if implanted and carried to term. As such, rights to stored embryos cannot be determined under a family law standard such as best interest of the child or under a property law standard relating to either prior possession or acquisition of property rights through time and effort which would permit them to be equitably apportioned upon divorce in the same manner as real property or stocks and bonds might be.

Answer and Analysis

In the first reported case involving a dispute over embryos, a married couple brought an action to recover the possession of their embryos in the possession of a fertility clinic which refused to transfer the embryos to another clinic at the couple's request. The court, in *York v. Jones*¹⁶ appeared to treat the embryos as property

15. See *Benjamin v. Lindner Aviation, Inc.*, 534 N.W.2d 400 (1995).

16. 717 F.Supp. 421 (E.D. Va. 1989). But see, *Moore v. Regents of University*

by finding the couple had a cause of action in conversion. However the characterization of embryos as property was expressly rejected in the later case of *Davis v. Davis*¹⁷ on which the fact of this problem are based.

In *Davis* the court refused to characterize the embryos as either persons or property. However, they were entitled to "special respect" because they had the potential to become human life. Then, the court held that the embryos should be allocated in accordance to the terms of any contract the spouses signed before or after the embryos were created.¹⁸ Absent such a contract, the embryos should be allocated taking into account the relative interests of the spouses "in using or not using the . . . embryos."¹⁹ The court then adopted the rule that the interest of the spouse wishing to avoid procreation should trump the interest of the other spouse so long as the other spouse has a reasonable chance of parenting a child without the use of the embryo or does not wish to have a child. If the other spouse would need the embryo to have a child, then that spouse's wishes controls.

In *Davis*, the court observed that the parties were free to contract between themselves for the disposition of the embryos in the case of divorce. However, in a recent Massachusetts case²⁰ that court held such a contract void as a matter of public policy, at least where it was executed five years before the couple divorced. In doing so, the court indicated the importance of respecting a person's right to be, or not to be, a parent. Such respect did not warrant giving effect to a contract which would have awarded embryos to the wife who wanted to implant them to have a child when the contract was executed long before the parties even contemplated a divorce.

§ 1.5 Human Likeness

PROBLEM 1.13: Teen Idol was a famous rock-and-roll singer known not only for singing songs with seductive lyrics but also wearing flamboyant costumes that accentuated her physique. Over a ten-year period she cultivated her image by carefully selected endorsements of commercial products and through well-timed releases of her albums. By the time she was 30 she was simply known worldwide as "Teen." A major automobile

of California, 51 Cal.3d 120, 271 Cal. Rptr. 146, 793 P.2d 479 (1990) (patient has no property right in removed cancerous spleen).

17. 842 S.W.2d 588 (Tenn.1992).

18. For example, in *Kass v. Kass*, 91 N.Y.2d 554, 673 N.Y.S.2d 350, 696 N.E.2d 174 (1998) the court found that

the divorcing couple had agreed that in the event of their divorce the embryos be used for research and such agreement controlled the embryos' disposition.

19. *Id.* at 604.

20. *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000).

manufacturer began marketing a new car through advertisements placed on television and in magazines targeted at young buyers. These ads show the car being driven by a cartoonish character closely resembling Teen in dress and appearance singing a jingle in Teen's familiar vocal style. Teen sued to enjoin the use of the ad and for damages claiming that she had a property right in her likeness that the automobile company had misappropriated.

Applicable Law: In addition to statutes that may address this problem, courts in recent years have adopted as a new property right the so-called right of publicity—effectively a property right a person has in the person's likeness.

Answer and Analysis

Many stars in the sports and entertainment world have sought to capitalize on their likeness, voice, or mannerisms or upon the fictional character they have created. It is not uncommon for others, recognizing the financial worth of that likeness, to attempt, without permission, to copy it or to create alternative characters based upon it. While some protection might arguably be extended to protecting one's likeness under federal or state statutes, the focus of the courts has been on the recognition of a so-called common-law "right of publicity." This right recognizes that a "celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity."²¹ The right of publicity is a valuable property right that, according to some courts, is freely transferable and survives the death of the celebrity.²² Where the right is recognized the celebrity must establish that the defendant appropriated the celebrity's identity for the defendant's advantage, "commercial or otherwise" and without consent. Furthermore, the celebrity must establish injury.²³

However, to recognize a right of publicity does not mean that every appropriation of a likeness is actionable. The courts have not yet worked out all of the nuances of this right. For example, does the right apply to political commentary where arguably the right of publicity butts up against the First Amendment's protection of

21. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983).

22. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978).

23. See, *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992).

political speech? Does the fact that the right is descendible mean that the heirs of John Wilkes Booth could enjoin a handgun manufacture from using his image to promote its products?²⁴

24. Cf. *Maritote v. Desilu Productions, Inc.*, 345 F.2d 418, cert. denied, 382 U.S. 883, 86 S.Ct. 176, 15 L.Ed.2d 124 (1965) ("denying heirs of Al Capone a right to recover for an appropriation of this famous mobster's image.")