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relationship to effect a reconciliation before they are legally separated.²⁷ While this view has been given scant consideration by the courts, it does seem to have some merit.

Cohabitation during the pendency of a divorce suit and the defense of condonation obviously raise different questions; and, therefore, they should be distinguished. The court in the *Seiferth* case failed to do so, and was led to a result contrary to the weight of authority. The court would have been on stronger ground if it had based the result on the policy favoring reconciliation of the spouses.

JAMES L. HOWE III

FINDERS' RIGHTS IN MISLAID PROPERTY

Legal controversies over the rights of contesting claimants to personalty discovered on premises not owned by the finder present particularly difficult problems. An excellent example is offered by the federal case of *Rofrano v. Duffy*,¹ which involved a tenant's action against his landlord for the recovery of \$10,500 cash the tenant found upon the leased premises. The tenant discovered the money in a lunch box hidden behind paint cans on a shelf in the basement. He turned the money over to the landlord who represented that he was the owner. At the trial the landlord admitted that he was not the owner, but claimed that the money belonged to his deceased brother-in-law.

The trial court gave judgment for the tenant, and the landlord appealed. The federal court, applying New York law, affirmed the lower court's decision stating that either as a finder or as the occupant of the premises, the tenant was entitled to the money.² Alternative rationales were invoked. As one basis, the court said that under common law principles the tenant as the person in possession of the premises was entitled to custody of "mislaid" property as against anyone but the true owner. Futhermore, as a second basis of decision, the court pointed out that New York has by statute abolished the distinction between mislaid and lost property and awards both to the finder.

There is conflict over whether the custody of goods found on the

²⁷But see *Szulc v. Szulc*, 96 N.H. 190, 72 A.2d 500 (1950).

¹291 F.2d 848 (2d Cir. 1961).

²*Id.* at 850.

premises of another should be given to the finder or to the owner of the premises.³ A distinction is often drawn between mislaid and lost goods.⁴ Mislaid goods are goods that are intentionally put aside and later forgotten.⁵ Lost goods are those which casually and involuntarily pass out of the possession of the owner.⁶ The element of intentional deposit, present with mislaid goods, is lacking in the case of lost goods.⁷ The owner of the chattel is said to retain constructive possession of the property though custody may be in another on whose premises it has been left.⁸

The general view in the United States is that the finder of lost property should prevail as against the whole world except the true owner,⁹ but the owner of the *locus in quo* should prevail over the finder of mislaid property.¹⁰

Since the circumstances under which the owner parts with possession are usually unknown, it is often difficult to decide whether the

³Compare *Pyle v. Springfield Marine Bank*, 330 Ill. App. 1, 70 N.E.2d 257 (1946); *Foster v. Fidelity Safe Deposit Co.*, 162 Mo. App. 165, 145 S.W. 139 (1912); *Cohen v. Mfrs. Safe Deposit Co.*, 271 App. Div. 428, 65 N.Y.S.2d 791 (1st Dep't 1946); with *In re Savarino*, 1 F. Supp. 331 (S.D.N.Y. 1932); *Vickery v. Hardin*, 77 Ind. App. 558, 133 N.E. 922 (1922); *Weeks v. Hackett*, 104 Me. 264, 71 Atl. 858 (1908); *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913 (1904). For a full discussion of this matter see *Aigler, Rights of Finders*, 21 Mich. L. Rev. 664 (1923); *Moreland, Does the Place Where a Lost Article Is Found Determine the Rights of the Finder?*, 15 Ky. L.J. 225 (1927). See also *Walsh, Law of Property*, 115 (2d ed. 1937).

⁴*Silcott v. Louisville Trust Co.*, 205 Ky. 234, 265 S.W. 612 (1924); *Foster v. Fidelity Safe Deposit Co.*, 264 Mo. 89, 174 S.W. 376 (1915); *Hill v. Schrunck*, 207 Ore. 71, 292 P.2d 141 (1956).

⁵*Ibid.*

⁶*Automobile Ins. Co. v. Kirby*, 25 Ala. App. 245, 144 So. 123 (1932); *McDonald v. Ry. Express Agency*, 89 Ga. App. 884, 81 S.E.2d 525 (1954); *Foulke v. New York Consol. R.R.*, 228 N.Y. 269, 127 N.E. 237 (1920); *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E.2d 661 (1935).

⁷*Cohen v. Mfrs. Safe Deposit Co.*, 271 App. Div. 428, 65 N.Y.S.2d 791 (1st Dep't 1946); *Jackson v. Steinberg*, 186 Ore. 129, 200 P.2d 376 (1948); *Schley v. Couch*, 155 Tex. 195, 284 S.W.2d 333 (1955); *Zech v. Accola*, 253 Wis. 80, 33 N.W.2d 232 (1948).

⁸*Silcott v. Louisville Trust Co.*, 205 Ky. 234, 265 S.W. 612 (1924); *J. G. McGroory Co. v. Hanley*, 37 Ohio App. 461, 175 N.E. 232 (1930).

⁹*In re Savarino*, 1 F. Supp. 331 (S.D.N.Y. 1932); *McDonald v. Ry. Express Agency*, 89 Ga. App. 884, 81 S.E.2d 525 (1954); *State v. Mitchell*, 150 Me. 396, 113 A.2d 618 (1955); *Erickson v. Sinykin*, 223 Minn. 232, 26 N.W.2d 172 (1947); *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E.2d 661 (1935); *Jackson v. Steinberg*, 186 Ore. 129, 200 F.2d 376 (1948).

¹⁰*Foster v. Fidelity Safe Deposit Co.*, 264 Mo. 89, 174 S.W. 376 (1915); *Foulke v. New York Consol. R.R.*, 228 N.Y. 269, 127 N.E. 237 (1920); *Jackson v. Steinberg*, 186 Ore. 129, 200 P.2d 376 (1948); *Flax v. Monticello Realty Co.*, 185 Va. 474, 39 S.E.2d 308 (1946). See 34 Am. Jur. *Lost Property* § 3 (1941); 36A C.J.S. *Finding Lost Goods* § 1 (1961).

goods are lost or merely misplaced.¹¹ Courts are often forced to base the classification upon the nature of the place where the goods are found.¹² If the place of finding is private, it is said that the owner of the premises has the intent to possess the place and whatever may be located there, but if the place where the goods are found is public, no such intent can be said to exist.¹³

Difficulties arise in determining whether the place of finding was private or public and distinctions are often attempted between quasi-private and quasi-public places of finding.¹⁴

In the *Rofrano* case, the Court of Appeals found that the money was mislaid rather than lost. "A lunch box containing \$10,500 is 'mislaid' rather than 'lost' within the above definitions if found behind paint cans on a shelf six feet above the ground."¹⁵ It is doubtful if there could be any serious question on this matter.

The classification of the property as "mislaid" adds little to the solution of disputes between landlords and tenants. If one starts with the premise that mislaid property should be placed in custody of the owner of the land, as against a finder,¹⁶ the question arises as to whether landlord or tenant should be considered the owner. Rightful occupancy of the premises on which mislaid property is discovered could satisfy the "ownership" requirement and give the tenant the right to custody of the mislaid property. This appears to be the reasoning of the court in the principal case.

Cases involving landlords and tenants are rare.¹⁷ However, analo-

¹¹How is one to tell whether a lady's handbag discovered on a streetcar seat has been casually dropped, or placed there and forgotten? Cf. *Foulke v. New York Consol. R.R.*, 228 N.Y. 269, 127 N.E. 237 (1920). It seems undoubtedly true that the owner of goods may, by placing them on a table or bench in a bank, public conveyance, or shop, constitute the owner of such place bailee thereof, but this isn't always true.

¹²In the following cases the custody of the property was awarded to the owner of the premises on the ground that the place of finding was private. *Pyle v. Springfield Marine Bank*, 330 Ill. App. 1, 70 N.E.2d 257 (1946); *Silcott v. Louisville Trust Co.*, 205 Ky. 234, 265 S.W. 612 (1924); *Hill v. Schrunck*, 207 Ore. 71, 292 P.2d 141 (1956). However, in *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E.2d 661 (1935) (found articles were awarded to the finder on the ground that the place was semi-public).

¹³*Ibid.*

¹⁴Compare *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E.2d 661 (1935) with *Pyle v. Springfield Marine Bank*, 330 Ill. App. 1, 70 N.E.2d 257 (1946); *Flax v. Montucello Realty Co.*, 185 Va. 474, 39 S.E.2d 308 (1946). See 36A C.J.S. *Finding Lost Goods* § 1 (1961).

¹⁵291 F.2d at 850.

¹⁶See note 10 *supra*.

¹⁷This writer has been unable to find a case presenting a fact situation similar to that involved in *Rofrano v. Duffy*. One explanation suggested for this is a lack

gous cases point to a result contra to *Rofrano v. Duffy*.¹⁸ The English case of *Elwes v. Brigg Gas Co.*¹⁹ was the first reported case to present a landlord-tenant dispute over discovered personalty. It held that the landlord was entitled to a two-thousand year old prehistoric boat uncovered by the tenant in making excavations. This principle was considered ten years later in *South Staffordshire Water Co. v. Sharman*.²⁰ The court approved the following statement of the applicable law:

"The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the [owner] is not aware of the things' existence. It is free to anyone who requires a specific intention as part of a de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession. . . ." ²¹

Up to the present time, this line of reasoning has generally been followed by American courts.²² These courts often go so far as to hold that any personalty found in a private place is to be considered mislaid property rather than legally lost.²³ As such it is awarded to the owner of the premises as against a finder either on the basis of a quasi-bailment relationship²⁴ or by virtue of the doctrine of construc-

of diligence on the part of tenant-finders in reporting discoveries of lost or mislaid property on the leased premises.

¹⁸*Pyle v. Springfield Marine Bank*, 330 Ill. App. 1, 70 N.E.2d 257 (1946); *Silcott v. Louisville Trust Co.*, 205 Ky. 234, 265 S.W. 612 (1924); *Dolitsky v. Dollar Sav. Bank*, 203 Misc. 262, 118 N.Y.S.2d 65 (N.Y. Munic. Ct. 1952) (money discovered lying on shelf adjacent to safe-deposit vault was held to be mislaid and custody was awarded to the owner of the premises).

¹⁹33 Ch. D. 562 (1886).

²⁰[1896] 2 Q.B. 44.

²¹*Id.* at 46-47. The quotation is from Pollock and Wright, *Essay on Possession in the Common Law* 41. The word "possessor" instead of "owner" is used in the original, but in context the word "possessor" is used to mean "owner," as distinguished from the "finder."

²²*Pyle v. Springfield Marine Bank*, 330 Ill. App. 1, 70 N.E.2d 257 (1946); *Silcott v. Louisville Trust Co.*, 205 Ky. 234, 265 S.W. 612 (1924); *Dolitsky v. Dollar Sav. Bank*, 203 Misc. 262, 118 N.Y.S.2d 65 (N.Y. Munic. Ct. 1952); *Hill v. Schrunck*, 207 Ore. 71, 292 P.2d 141 (1956); *Flax v. Monticello Realty Co.*, 185 Va. 474, 39 S.E.2d 308 (1946). See 34 Am. Jur. *Lost Property* § 3 (1941). This view is not accepted by all courts. For authority contra to the general rule see *In re Savarino*, 1 F. Supp. 331 (S.D.N.Y. 1932); *Spagnuolo v. Bonnet*, 16 N.J. 546, 109 A.2d 623 (1954).

²³*Hill v. Schrunck*, 207 Ore. 71, 292 P.2d 141 (1956).

²⁴*Flax v. Monticello Realty Co.*, 185 Va. 474, 39 S.E.2d 308 (1946) (innkeeper held to be custodian as to mislaid and forgotten property).

tive possession.²⁵ If the position of the article indicates that it was voluntarily placed where discovered, the principle seems to be that the owner of the chattel has designated the owner of the place as bailee.²⁶ If the position of the chattel when discovered indicates that the owner parted with it involuntarily, the doctrine of constructive possession is used.²⁷

New York has by statute abolished the distinction between lost and mislaid property.²⁸ Both *lost* and *mislaid* property are treated as *lost* property and awarded to the finder.²⁹ A finder is defined as the person who first takes possession of lost property.³⁰

The New York statute contains elaborate procedural provisions for the protection of the original owner's rights.³¹ The finder is required to notify the local authorities promptly, or turn the property over to the owner of the premises on which the personalty is found, who in turn has the responsibility of notifying local officials.³² The chattel must be retained a stipulated length of time by the authorities and an effort made to locate the owner.³³ However, the statute also creates and protects the rights of honest finders.³⁴ The most distinctive feature is that title vests in the finder which is good as against the owner himself if the property is not claimed within the time period. This is in marked contrast to statutes in several other states which only require that the finder must be reimbursed for the expenses he necessarily incurs in caring for the chattel.³⁵ Under this type of statute, if the owner cannot be found, the chattel is sold and the proceeds retained by the municipality, except for whatever amount may be deducted for reimbursement of the finder.³⁷

The New York statute contains at least one possible source of

²⁵*Silcott v. Louisville Trust Co.*, 205 Ky. 234, 265 S.W. 612 (1924) (where liberty bond was discovered by renter of safety vault box on the floor of a private room of safety vault department of a trust company, the company's right to custody was held superior to that of the finder on the basis of prior constructive possession).

²⁶See note 24 supra.

²⁷See note 25 supra.

²⁸N.Y. Pers. Prop. Law §§ 251-58.

²⁹*Id.* at § 251.

³⁰*Ibid.*

³¹N.Y. Pers. Prop. Law §§ 251-58.

³²*Ibid.*

³³N.Y. Pers. Prop. Law § 251.

³⁴*Id.* at § 254.

³⁵N.Y. Pers. Prop. Law §§ 254, 257.

³⁶Ala. Code tit. 47 §§ 155-60 (Recomp. 1958); Conn. Gen. Stat. §§ 50-1-50-14 (1958 Rev.); Vt. Stat. §§ 7632-7641 (1947); Wis. Stat. §§ 170.07-170.11 (1959).

³⁷*Ibid.*