

the dissent in the *Longstreth* case is *Opinion of the Justices*.<sup>11</sup> This is an advisory opinion given by the Alabama Supreme Court at the request of the legislature on the question of whether a proposed statute legalizing the bookmaking and pari-mutuel system of betting on horse races and dog races would be constitutional. In a four-to-three decision, the court advised the legislature that such a statute would violate the constitution's anti-lottery clause. The reasoning employed by the majority was that, although skill and judgment might go into the determination of the winner, the fact that the amount to be won is unknown makes it a lottery. The dissent in the advisory opinion, while giving a detailed resume of the Alabama and United States decisions generally, maintained that since skill and judgment did go into the determination of the winner, that is sufficient to take it out of the anti-lottery clause.

In conclusion, it is submitted that however sound may seem the argument of the dissent in the *Longstreth* case it is for the legislatures and not the courts to judge the relative merits and evils of such gambling legislation. A careful study of the decided cases indicates that the principal case is in accord with the weight of authority in the United States today.<sup>12</sup>

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PERSONAL PROPERTY—FINDER V. LIFE TENANT, LIFE TENANT V. REMAINDERMAN—Plaintiffs, while swimming in a newly dug canal of the Chariton River in Missouri, discovered an ancient Indian canoe. One end was imbedded nine feet in the bank, the other rose six inches above the water. One Nina Haney held a life estate in the river bank, and Ella Evans held the remainder in fee. Biegel, one of the defendants, aided the plaintiffs in removing the canoe from the bank; when he refused to give up the find, the plaintiffs began this action of replevin. Prior to the bringing of the action, the plaintiffs had purchased all of the rights which the life tenant of the real estate had in the canoe. The remainderman intervened.

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11. 248 Ala. 516, 31 So.2d 753 (1947).

12. *People v. Monroe*, 349 Ill. 270, 182 N.E. 439 (1932); *Commonwealth v. Ky. Jockey Club*, 238 Ky. 739, 38 S.W.2d 987 (1931); *Roban v. Detroit Racing Ass'n*, 314 Mich. 326, 22 N.W.2d 433 (1946); *Utah State Fair Ass'n v. Green*, 68 Utah 251, 249 Pac. 1016 (1926).

From a judgment in her favor, plaintiffs appealed.<sup>1</sup> The Kansas City Court of Appeals affirmed the decision of the lower court, and stated that the canoe was property embedded in the soil, and, therefore, had become part of the realty. The court denied plaintiffs' contention that it was personal property belonging to the life tenant, and said that real property wrongfully severed from the land becomes personalty, but descends to the next vested estate of freehold. Two cases, *Williamson v. Jones et al.*<sup>2</sup> and *Miller v. Bower Coal and Mining Co.*,<sup>3</sup> were cited and relied upon by the court in the instant case. In both these cases the life tenant removed coal or oil from the earth. It was held that wealth derived from the tortious acts of the life tenant may not be retained by him but descends to the remainderman.

Plaintiffs' contention that they were entitled to the property as finders was denied,<sup>4</sup> the court citing several cases bearing on the rights of finders.<sup>5</sup> *Elwes v. Briggs Gas Co.*<sup>6</sup> was most heavily relied upon. In the *Elwes* case the lessee-finder dug up a 2000 year old canoe while building upon the leased land. The lessee was not permitted to retain the canoe either as lessee or as finder because the lessor, through his acts of ownership over the land, had possession of the boat when the lease was made.

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1. Allred *et al.* v. Biegel *et. al.*, 219 S.W.2d 665 (Mo.App. 1949).

2. 43 W. Va. 562, 27 S.E. 411 (1897).

3. 40 S.W.2d 485 (Mo. 1931).

4. Plaintiffs waived their rights as finders, but the court discusses them at length. See Appellant's Brief, p. 7, Allred *et al.*, v. Biegel *et al.*, 219 S.W.2d. 665, 666 (Mo. App. 1949).

5. Ferguson v. Ray, 44 Ore. 557, 77 Pac. 600 (1904); Sovern v. Yoran, 16 Ore. 269, 20 Pac. 100 (1888); Kuykendall v. Fisher, 61 W.Va. 87, 56 S.E. 48 (1906); Goddard v. Winchell, 86 Iowa 71, 52 N.W. 1124 (1892); Burdick v. Cheesebrough, 94 App. Div. 552, 88 N.Y. Supp. 13 (1904); Foster v. Fidelity Safe Deposit Co., 162 Mo. App. 165, 145 S.W. 139 (1912). Preceding these citations the court talked of "lost property," and afterwards that it was not interested in that theory. We may infer that "that theory" means the application of the "unattached article" concept of "lost," "misaid" and "abandoned" property (READINGS ON PERSONAL PROPERTY, 342 [Fryer's 3d ed. 1938]) to goods buried beneath the soil. This doctrine is discussed in these cases. It represents the one exception to the principles of *Elwes v. Briggs*, 33 Ch. D. 562 (1886). When that doctrine is used, the finder takes the goods, the landowner not being the custodian for the true owner. (See Note 14, *infra*).

6. 33 Ch. D. 562 (1886). To support the force of the prior possession of the landowner in the *Elwes* case the court cites Reg. v. Rowe, 32 L.T. 339 (1859). In that case, Rowe took iron from the bottom of a recently drained canal. The owners of the canal, although totally ignorant of the presence

The court seems to have felt that the Missouri case involved two separate branches of the law: First, the interest of the life tenant as opposed to that of the remainderman; and Second, the interest of the finder as opposed to that of the land owner, whether life tenant or remainderman.

It is beyond the scope of this comment to discuss extensively the real property aspects of the case, *i.e.*, the first division the court makes. Summarily, it would seem that the court is on solid legal ground in awarding the canoe to the intervener-remainderman.<sup>7</sup> Removing the canoe from the ground would probably be sufficiently prejudicial to the remainderman's interests so as to nullify the rights of the life tenant.

The law in regard to finders, *i.e.*, the second division the court makes, is more complex.<sup>8</sup> This is due to the fact that possession is a prerequisite to finding.<sup>9</sup> The facts in the instant case may be described as "the finder v. the land owners." The area thus restricted may be divided into two factual situations. One occurs when the *locus in quo* is open to the general public.<sup>10</sup> Amusement parks and stores are places which fall into this category.<sup>11</sup> Here, since the force of the owner's authority over the land is diminished by public entry, courts

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of the iron, were held to have sufficient possession to support a criminal suit by the state.

7. TIFFANY, REAL PROPERTY, §§ 59, 427, 435, 436 (2d Abr. ed. 1940).

8. Statutes in many states require the finder to follow a specified procedure in order to secure the true owner's interest. This purpose could not be served in this case. Generally, the finder is required to turn the goods over to a magistrate court for a certain period, during which time advertisement is made for the true owner. See: MO. REV. STAT. §§ 15317, 15318, 15319, 15320, 15321, 15322 (1939).

9. Shartel, *Meanings of Possession*, 16 MINN. L. REV. 611 (1931). Aigler, *Rights of Finders*, 21 MICH. L. REV. 664 (1922) developed the following classifications:

- (1) Finder v. the owner of the chattel found; (2) Finder v. stranger;
- (3) Finder v. the owner or occupant of the premises; (4) Finder v. the landlord; (5) Finder v. the master; (6) Finder v. another finder; and (7) Finder v. the state.

It will be seen that the present case comes under number (3) while the *Elves* case falls under number (4).

10. Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S.W. 878 (1902). Here the court considered a purse under a table as "lost property." The finder was arrested when he refused to give up the purse. He recovered damages in an action for false arrest.

11. Bridges v. Hawkesworth, 18 L.T. (o. s.) 154 (1851). Bills were found on the floor of a shop. The court gave the goods to the finder, saying that the shopkeeper never had possession of them. See discussion on this and the *Elves* case in Goodhart, *Three Cases on Possession*, 3 CAMB. L. J. 195 (1928); and criticism thereof in Francis, *Three Cases on Possession—Some Further Observations*, 14 ST. LOUIS L. REV. 11 (1928).

are more willing to favor the finder in cases where the goods are not described as "mislaid."

The present case falls into the second factual situation, *i.e.*, where the general public has only restricted entry. This situation itself is capable of another dual separation on the basis of whether the property is unattached or attached to the land. Where the property is unattached, the owner of the land is given "custody" of the goods for the true owner.<sup>12</sup> Where the article is embedded in the soil, the doctrine of *Elwes v. Briggs* (that the landowner takes by prior possession) has received general acceptance in this country.<sup>13</sup> In this situation we are not technically correct in the heading of finder *v.* the landowner. No finder can possibly exist. The landowner, through his control over the surface, has control of that which lies beneath. Since possession (at least constructive possession, as it is termed by some courts) is vested in the owner of the land, it cannot be acquired by a finder. Actually, the finder is a discoverer. If we say that a finder is the first person to take possession of an article severed from its true owner, we may conclude that the owner of the land is a finder. It follows that the land owner has a right by prior possession that he may assert against any one who gains subsequent possession of the land except the true owner of the chattel.

When we apply these concepts to the present case, a conflict

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12. *Foster v. Fidelity Safe Deposit Co.*, 264 Mo. 89, 174 S.W. 376 (1915).

13. The idea of giving the land owner possession of things beneath the soil is ancient in origin. In English common law its most honored exposition occurs in POLLOCK AND WRIGHT, *ESSAYS ON POSSESSION* 26 (1888). The gist of the theory is the land owner's control over the land, the keystone of his right is his prior possession derived from the general authority over the property. When the property bears the characteristics of the English doctrine of *treasure trove*, some courts have given the goods to the finder. *Weeks v. Hackett*, 104 Me. 264, 71 Atl. 858 (1908); *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913 (1904); *Vickery v. Hardin*, 77 Ind. App. 558, 133 N.E. 922 (1922). Although the concept has meant different things at different times (note excellent summary, Emden, *The Law of Treasure Trove—Past and Present*, 42 L. Q. REV. 368 [1926], the doctrine in England crystallized into a limited sphere covering gold or silver plate. It must be hidden in the earth. Courts in this country have not recognized the doctrine expressly. They have achieved the same results by removing the prior possession of the landowner, and considering the goods as lost property. The doctrine is not recognized in Missouri. Cases following the *Elwes* case are: *Burdick v. Cheesebrough*, 94 App. Div. 552, 88 N.Y. Supp. 13 (1904); *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44; *Goddard v. Winchell*, 86 Iowa 71, 52 N.W. 1124 (1892); *Livermore v. White*, 74 Me. 452 (1883).

appears between the law of real property and the law of personal property. The law of finders requires the land owner to take through his prior possession of the chattel. The intervener-remainderman was never in possession of the Haney farm; and, consequently, could never have had prior possession of the canoe. Under the doctrine of *Elwes v. Briggs*, as it is normally applied by the courts, the plaintiffs, as assignees of the life tenant, should recover. However, if the principles applicable to the life tenant-remainderman relationship are used, an opposite result would be reached.

The practical results in the instant case are not unfair. The important relationship of life tenant-remainderman may have been preferred to the special rules of the law of finders. Also the court may have wished to settle the conflict between finder and landowner, whether life tenant or remainderman, in accord with the concepts of personal property; and then, with these claims quieted, proceed to settle the interests between life tenant and remainderman on the basis of real property law. However, it did not mark this approach with sufficient clarity<sup>14</sup> to avoid the confusion arising from the fact that the *Elwes* case contained a basic element (prior possession) which was not present in the instant case.

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TORTS—APPLICABILITY OF CRIMINAL STATUTE IN CIVIL CASE—WHAT CONSTITUTES BREACH OF STATUTE. In a recent Minnesota case,<sup>1</sup> a mining company was held liable for injuries sustained in an accident occurring on the highway below its railroad bridge. Ore falling from the railroad cars had partially obscured a sign warning of the bridge. The bridge, used exclusively by the mining company for transportation of its ore, was supported by a pier, in the middle of the highway. Signs had been erected on the bridge itself to warn of the pier, but in the use of the bridge, ore had fallen out of the cars onto the bridge and the rain had caused a mud-like mixture

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14. "We have found no case wherein the doctrine announced in *Elwes v. Briggs* has been criticized. It rests upon sound principles, is logical, and should be the law in this jurisdiction." *Alfred v. Biegel*, 219 S.W.2d 665, 666 (Mo. App. 1949).

1. *Robinson et al. v. Duluth, M. & I. R. Ry.*, 38 N.W.2d 183 (Minn. 1949).