The offerer will best serve his interest by making the distinction with proper foundation and qualification of his witness. By requiring that distinction before exercising discretion as to the admissibility of the offered testimony, the trial court will avoid the exceptions frequently taken and sustained in the cases. It follows that such procedure, both by the court and the offerer, will make a record which upon appeal will seldom disclose grounds for remanding the case for want of discriminating inquiry and supporting facts revealing the use made by the witness of the aid relied upon to refresh his memory.

WILLIAM E. PARTEE

PERSONAL PROPERTY — RIGHTS OF FINDER VERSUS OWNER OF LOCUS IN QUO — BILLS SECRETED IN HOTEL ROOM

A painter found $760 secreted under a rug in a hotel room. The find consisted of a number of large-size bills of a type withdrawn from circulation more than fifteen years before, wrapped in a new-style $100 bill. The facts do not disclose whether the painter who was redecorating the room was an employee or an independent contractor, but the latter would seem the case. Plaintiff painter apprised the defendants-hotel owners of his find and upon their representation that they knew the owner and would restore it to him, he turned the money over to them. A period of more than two years had elapsed and the defendants had made no effort to locate the owners. Plaintiff brought suit to recover the money. The court found the money to have been abandoned and awarded it to the plaintiff.[1]

It is submitted that the question as to the rights to personal property as between the owner of the *locus in quo* and the finder should be considered in the light of: 1) Who should hold the property so that the true owner may most easily recover his property? and 2) Who should get ultimate title in the event the true owner is not found within a reasonable time?[2]

1. Erickson v. Sinykin, 223 Minn. 172, 26 S. W. 2d 172 (1947).

2. In many states this problem has been dealt with by statute. For example, MO. REV. STAT. § 15317 (1939) provides: "If any person finds any money, goods, right in action, or other personal property, or valuable thing whatever, of the value of ten dollars or more, the owner of which is unknown, he shall within ten days, make an affidavit before some justice of the county, stating when and where he found the same, that the owner is unknown to him, and that he has not secreted, withheld or disposed of any part thereof." MO. REV. STAT. § 15320 (1939) provides: "If no owner appear and prove the money or property within forty days, and the value

In some instances, the courts seem to have looked at the question from the standpoint of who should ultimately get title when the more pressing problem of who should hold the property for the true owner should have been of controlling consideration.[3]

Some courts have made a distinction between personal property found in a public place and that found in a private place.[4] In general, the holdings have been that property found in a safe deposit room or similar private places should be held by the owner of the *locus in quo* for the true owner. Most of the decisions have been based on the theory that there exists a special relationship between the owner of the *locus in quo* and the true owner by reason of the restricted class of persons having access to such rooms.

It is submitted that the distinction made in some cases between the public and private place is of doubtful validity. It would seem that whenever property is found in a building, whether in a public or private place, safekeeping should vest in the owner of the *locus in quo* if there is a likelihood of the owner being found.

It is also thought that the distinction made between lost and mislaid property should in no way be controlling in circum-

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exceed twenty dollars, the finder shall within thirty days thereafter cause a copy of the description to be inserted in some newspaper in this state for three weeks; and if no owner prove the property within one year after such publication, the same shall vest in the finder." Since many states have enacted statutes which are controlling in cases of this sort, reference to the applicable state statute and its annotations should always be made. These statutes can usually be located in the index to the local statutes under headings of "Lost Property," "Finders," etc.

3. This seems to have been recognized in those cases making a distinction between lost and abandoned property; see Livermore v. White, 74 Me. 452 (1883) (hides left in tannery vats held not abandoned); Foulke v. New York Consolidated R. R., 228 N. Y. 269, 127 N. E. 237 (1920) (package left on seat of subway train held lost and not abandoned); Ferguson v. Ray, 44 Ore. 557, 77 P. 600 (1904) (gold bearing quartz imbedded in ground not abandoned but was treasure trove); Roberson v. Ellis, 58 Ore. 219, 114 Pac. 100 (1911) (money in box in warehouse used by seafaring people held to have been abandoned); Pearson v. Black, 120 S. W. 2d 1075 (Tex. 1938) (oil drilling rig left on land by lessors held not to have been abandoned).

4. Re Savarino, 1 F. Supp. 331 (S. D. N. Y. 1932) (taxicab); Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N. E. 2d 661 (1935) (lobby leading to safe deposit vaults and bank offices); Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S. W. 613 (1924) (safety deposit room); Pyle v. Springfield Marine Bank, 330 Ill. App. 1, 70 N. E. 2d 257 (1946) (safety deposit room); Cohen v. Manufacturer's Safe Deposit Co., 271 App. Div. 428, 65 N. Y. S. 2d 791, *appeal granted* 272 App. Div. 765, 70 N. Y. S. 2d 569 (1946) (safety deposit room); Flax v. Monticello Realty Co., 185 Va. 474, 39 S. E. 2d 308 (1946) (bureau in hotel room).

stances of this sort. It has been said that mislaid property is property which the owner intentionally places where he can resort to it and then forgets it and that lost property is that which unwittingly passes out of the possession of its owner, the whereabouts of which he does not at any time thereafter know.[5] What difference does it make whether the property is lost[6] or mislaid?[7] In either case, whether the true owner remembers the fact or place of mislaying his property or merely retraces his steps, his resort to the various buildings he has visited would be likely. Thus, to accomplish the prime objective in those cases where the owner is likely to be found, the logical one to retain the property for safekeeping is the owner of the *locus in quo*.

Consideration as to how finders can best be encouraged to turn in property merits attention. Certainly, if the finder knows that not only safekeeping but also ultimate title will be vested in the owner of the *locus in quo* he may be reluctant to turn it in. Thus, it might be well, as a matter of public policy, to require the party holding the property for the true owner to give some assurance[8] to the finder that in the event the true owner was not found within a certain time the property would be turned over to the finder.

In a case such as that at bar, where the circumstances of finding indicate abandonment, the probability of the owner's being located seems remote and it would seem the court was influenced by this in reaching its decision.

The court does not seem to have considered to any great extent the relationship of the parties in the instant case, but this matter can be considered in at least two ways. The facts are not clear whether the plaintiff was an employee regularly

5. 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).

6. Re Savarino, 1 F. Supp. 331 (S. D. N. Y. 1932) (money found on floor of cab by federal narcotics officer held to be lost); Cleveland Railroad Co. v. Durschuk, 31 Ohio App. 248, 166 N. E. 909 (1928) (twenty dollar bill found on floor of street car held to be lost); Toledo Trust Co. v. Simmons, 52 Ohio App. 273, 3 N. E. 2d 661 (1935) (money found by employee in bank lobby leading to both safe-deposit department and other offices held to be lost).

7. State *ex rel.* Scott v. Buzzard, 144 S. W. 2d 847 (Mo. 1940) (metal box discovered hidden in wall by crew wrecking house held mislaid); Flax v. Monticello Realty Co., 185 Va. 474, 39 S. E. 2d 308 (1946) (broach found by maid while cleaning up, laid on bureau and removed by guest not the owner of the broach held mislaid).

8. Possibly a contract in the nature of a cognovit note.

engaged in painting and redecorating defendants' hotels or an independent contractor, but by inference it would seem to be the latter. Looking at the situation from the standpoint of an employer-employee relationship, the rights of the finder would appear to be less than if he were an independent contractor, although a number of cases have held that the fact of the employment has no bearing on the question.[9] In one case[10] a hotel maid found a valuable broach while cleaning up the room and thought the present guest had mislaid it. She placed it carefully on the bureau in the room from which it was removed by another guest. The court in a subsequent suit by the hotel-owner against the guest held the finding by the maid gave possession of the article to the hotel by reason of the maid's duty to turn in property found by her in the course of her duties and the duty of the hotel to hold articles of guests for safekeeping. The instant case may be distinguished, however, in that even assuming the painter to have been an employee rather than an independent contractor, there would not be the same duty to turn in lost property found in the course of his employment as there would be for a maid, one of whose duties is to search for articles left by guests and turn them in. However, it might be contended that the hotel had a duty toward its guests to hold property found by employees for safekeeping and such a duty would develop on any employee of the hotel.

The instant case may also be distinguished in that the property was manifestly secreted and showed fairly conclusively that it had rested in its hiding place for a considerable time. In the broach case, no such facts appear and it is submitted that the prime consideration of the court was as to who should hold the property for the owner rather than who should get ultimate title. In the instant case, there seems to be little likelihood of the owner being found and certainly the court was influenced by this fact.

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9. Bowen v. Sullivan, 62 Ind. 281 (1878) (bank bills found in unmarked envelope by employee in paper she was employed to sort); Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N. E. 2d 661 (1935); Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913 (1904) (gold coin found by employees in tin vessel in building they were employed to clean out); Roberson v. Ellis, 58 Ore. 219, 114 Pac. 100 (1911) (employee found gold coins while cleaning out warehouse); Hamaker v. Blanchard, 90 Pa. 377 (1879) (hotel employee found large roll of bills in hotel parlor).

10. Flax v. Monticello Realty Co., 185 Va. 474, 39 S. E. 2d 308 (1946).

Assuming that the painter was an independent contractor, it is not difficult to discern a marked difference between the duty of a regular employee to turn in found property to the employer and the duty of an independent contractor to do so. It is thought that if there is a likelihood that the owner will be found, it should still be the plaintiff's duty to turn the property over to the hotel for safekeeping; by so doing, there would be more chance of recovery by the owner. If, as in this case, the owner is not likely to be found, it would seem that the finder should prevail since the adjudication is likely to determine ultimate title and it seems unreasonable to put the finder to another suit to recover the property.

A further factor influencing the court was undoubtedly the fact that the hotel proprietor had misrepresented that he knew the true owner when such was not so. It might be contended that he misrepresented the situation in order to obtain custody of the property for the purpose of holding it for the true owner, and that in order to do so it was necessary to misrepresent the situation. However, considering the fact that he exerted no efforts to locate the owner, as manifested by his failure to allege or prove such efforts at the trial, it is pretty clear such was not his intent. Probably, the court felt that even though he might originally have had a right of custody, his failure to exercise even taken diligence in attempting to locate the true owner was such a breach of trust as to cut off any right he might otherwise have had.

Considering that the find was manifestly secreted and showed evidence of having been hidden for a long period of time, there was good reason to believe that the true owner would never be found and that the ultimate question for decision was not *Who should hold the property for the true owner?* but rather *Who as between the parties had the better right to the money?* Taken together with the fact of the questionable conduct of the defendant, it is believed that the court correctly decided the case.

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