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Finders Keepers Losers Weepers?

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We find and lose things all the time. 'Finders' are those who find and take possession of something which does not belong to them. 'Losers' are the true owners of the lost things. You may have come across the cliché "finders keepers losers weepers". But to what extent is this cliché true?

Imagine that you notice something sparkling underneath your seat while you are dining with your boss and your client in a restaurant. You bend over and discover a huge diamond ring lying on the floor. Being an honest and reasonable person, you hand over the ring to the waitress. You ask the waitress to find the true owner but return the ring to you if they cannot find the true owner.

Unfortunately no one can resist a huge and sparkling diamond ring. This includes yourself, the waitress, your boss and even your client! What happens if these people want the diamond ring at the same time? This will give rise to a priority dispute over found things, where two or more persons claim property rights to the same thing. The 'finders law' will then determine who has the relatively better right to the diamond ring.

Let's start by looking at the 'usual competitors' in priority disputes over found things.

- The finder (ie yourself) may wish to retain the found thing especially when it is very valuable.
- Understandably, the true owner (ie owner of the diamond ring) may wish to re-claim his/her lost property unless s/he no longer wants it.
- The finder's employer (ie your boss) may wish to claim the diamond ring by arguing that you have found the diamond ring during the course of your employment (ie business dinner with your boss and client).
- Subsequent possessor such as the waitress may wish to keep the diamond ring that she currently possesses.
- The restaurant owner may argue that s/he has a better claim by being the owner or occupier of the premises where the diamond ring is found.

Proof of possession is critical for all competitors, except for the true owner and the finder's employer. They must show that they have exercised control over the diamond ring to the exclusion of others. This is because possession has two elements - the physical element requires physical control over the found thing whereas the mental element requires the intention to possess the found thing or to exclude others.¹

Since the finder is a party to most (if not all) of the priority disputes, we will look at the finder's legal position vis-à-vis each of the remaining competitors.

Finder vs True Owner

Since the main objective of finders law is to reunite the lost property with its true owner,² the true owner has priority over the finder.³ However, this general rule will not apply if the true owner has abandoned the found thing. Abandonment requires the intention to relinquish all proprietary interests in a thing.⁴ This means that you no longer wish to own the thing, and you don't seek it out after throw-

ing it away or otherwise parting with it. Things which are not abandoned may be lost, misplaced, hidden or even stolen.

The true owner will cease to be the true owner of a thing that s/he abandons. This is because the law treats abandoned things as ownerless. The next person who finds and takes possession of this abandoned (and therefore ownerless) thing may then become the new owner.

Let's recap the rules that govern priority disputes between finders and true owners:

- If the found thing has not been abandoned, then the true owner wins.
- If the found thing has been abandoned, then the finder wins.

In our hypothetical scenario, the true owner seems to have merely dropped his/her diamond ring without any intention to abandon it. If the waitress or other people in the restaurant manage to find that true owner, then the true owner's claim will trump your claim as a finder.

But what happens if the true owner is unknown or cannot be found? This means that the true owner is not a party to the priority dispute. According to the finders law:⁵

- As a general rule, the finder has a better claim than everyone else.
- However, the finder may lose such priority if s/he is guilty of dishonest intent or wrongful conduct. For example, if the finder unlawfully enters someone else's land in order to take possession of the found thing (and is therefore guilty of trespass), or if the finder takes possession of the thing by theft instead of by finding.
- Thus the finder should take reasonable steps to contact the true owner. Failure to do so may indicate dishonesty which will weaken the finder's claim.

In our scenario, you have done the right thing by passing the ring to the waitress with instructions to find the true owner. You are also lawfully dining in the restaurant when you find the ring. Your position appears strong so far.

Let's now look closely at the priority disputes which do not involve the true owner.

Finder vs Subsequent Possessor

Not all finders retain their possession of the found things. In our hypothetical scenario, you have given the diamond ring to the waitress for the purpose of searching the true owner. Therefore the waitress has present possession of the ring while you had prior possession of ring. What happens if the waitress wants to keep the ring and you want it back? Will the waitress (as the subsequent possessor) prevail over you (as the prior possessor)?

Two cases confirm the general rule that prior possession defeats subsequent possession.

- In *Armory v Delamirie*,⁶ a little boy found a jewel while he was chimney sweeping. He then took the ring to a jeweller for valuation. The jeweler refused to return the ring to the boy. The court held that the boy was entitled to the jewel as his prior possession prevailed over the jeweller's subsequent possession.

- In *Bird v The Town of Fort Frances*,⁷ another little boy crawled under a building and found a tin of money on a ledge. The police then took the money away from the boy. The money was never claimed and the boy's mother sued to recover the money. Again the court held that the boy had a better claim as a prior possessor.

Although prior possession generally defeats subsequent possession, however this does not apply if the prior possession has been abandoned, transferred or otherwise extinguished by law. So in our scenario, you will have a better claim than the waitress (who is the subsequent possessor), unless you subsequently sell or gift the ring to someone else, or you do something unlawful, or (touch wood), you pass away.

Finder vs Finder's Employer

After successfully retrieving the diamond ring from the waitress, your boss approaches you and asks for the ring. Your boss raises the general rule that people who find something as servants/employers find them for their masters/employers.⁸ What's left for you?

Your boss will only have a better claim in two circumstances:

- If the employment contract between yourself and your boss requires you to hand over anything that you find during the course of your employment; or
- If your employment provides the 'effective cause' of your finding.

In *Byrne v Hoare*,⁹ an on duty policeman found a gold ingot near the public exit of a drive-in cinema. His employer (the Crown) tried to claim the ingot. In giving priority to the policeman, the court said:

"[The policeman] was not conducting a search when he found it, and he had not been allowed access to a private place for the purpose of performing his duties, but was walking where any member of the public coming from the theatre might have walked. The fact that he was on duty when he happened to see the gold was merely incidental."

As you can see, it is difficult to determine whether the employment provides the effective cause of the finding or whether it merely provides the incidental occasion for the finding. The critical factors are the nature and scope of the employee's duties. So in our hypothetical scenario, your boss will only have a better claim if you are both on duty and performing your duty when you find the ring. Does your duty as an employee extend to business dinners and other social functions?

Finder vs Occupier/Owner of Land

Here comes the final competitor. After being informed by the waitress, the restaurant owner may also wish to claim the ring on the basis that the ring is found within his/her premises. Like the finder and the subsequent possessor, the restaurant owner's claim also depends on proof of possession.

- If the ring is found in or attached to the premises, then the restaurant owner will have a better claim irrespective of whether s/he is aware of the existence of the ring.
- If the ring is found unattached on the premises, then the restaurant owner will only have a better claim if s/he can show a manifested intention to exercise control over his/her premises and anything that might be found on it.

This is known as the "in or on" distinction.¹⁰ The greater

the degree of attachment, the easier it is to prove possession. This is because the stronger the attachment between the thing and the premises, the easier for the land owner to show that his/her possession of the premises extends to possession of things that are found within the premises. The land owner has a better claim based on prior possession - the thing is already within his/her possession before the finder finds it. In this context, the land owner is the 'prior possessor' whereas the finder is the 'subsequent possessor' of the found thing. You will recall the general rule that prior possession defeats subsequent possession unless it has been abandoned, transferred or otherwise extinguished by law.

Let's look at a few case examples.

Things found on the land

Things found in the land

- Parcel of money found on shop floor - finder prevailed over shop owner.¹¹
- Gold bracelet found on the floor of executive club lounge in an airport - finder prevailed over occupier of that area.¹²
- Prehistoric boat embedded in clay several feet below land surface - land owner prevailed over finder.¹³
- Gold rings embedded in mud at the bottom of swimming pool - land owner prevailed over finder.¹⁴

In our hypothetical scenario, the ring is found lying on the floor. Therefore, you will have a better claim unless the restaurant owner can show his/her manifested intent to exercise control over the ring.



Conclusion

This brings us back to the cliché - are finders keepers and are losers weepers? Let's revise the rules that you have learned so far.

- Except for abandonment, the finder has superior rights over the found thing against everyone except the true owner.
- However, a dishonest or trespassing finder will acquire very limited rights.
- The finder's employer may have a better claim under the employment contract, or if the finder's employment is the effective cause of the finding.
- All possessors (finder, land owner and subsequent possessor) must prove possession. They should also take reasonable steps to acquaint the true owner with the found thing.

Found things can be either lost or abandoned. The true owners will become weepers only if they have abandoned their things (as opposed to losing the things). Finders may be able to keep the things they find if these things are not abandoned.

Remember - one of the main objectives of the finders law is to return the lost things to their true owners. However, true owners cannot re-claim things which they have abandoned as these things have become ownerless. The law protects the "losers" - ie true owners who have lost, but who have not abandoned their things.

Discussion Points

1. *What are the reasonable steps that you can take to contact the true owner? Report to the police?*

Advertise?

2. *Many things are lost on land. How can land owners show their manifested intent to exercise control over things which are found on their land? Fencing, locked gate or otherwise limiting access by other people?*

3. *There is another potential competitor that this article has not mentioned - the Crown or the State may also have a claim if the found thing is gold or silver. The law of the treasure trove is one of the oldest laws of our legal system. Why don't you find out more about it?*

1 Button v Cooper (1947) SASR 286 at 292.

2 Tooher J & Dwyer B, Introduction to Property Law (4th ed, 2002) LexisNexis Butterworths, Chatswood at para [3.5].

3 Armory v Delamirie 93 ER 664.

4 Re Jigrose Pty Ltd (1994) 1 Qd 382 at 385.

5 Armory v Delamirie 93 ER 664; Hanna v Peel [1945] 1 KB 509; Parker v British Airways Board (1982) 1 QB 1044.

6 93 ER 664.

7 [1949] OR 292.

8 Hanna v Peel [1945] 1 KB 509.

9 [1965] Qd R 135.

10 Parker v British Airways Board (1982) 1 QB 1004; Waverley Borough Council v Fletcher [1995] 4 All ER 756.

11 Bridges v Hawkesworth (1851) 21 LJQB 75.

12 Parker v British Airways Board (1982) 1 QB 1004.

13 Elwes v Brigg Gas Co (1886) 33 Ch D 562.

14 South Staffordshire Water Co v Sharman (1896) 2 QB 44.