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Property--Money Left on Shelf in Bank Vault--Mislaid Not Lost (Dolitsky v. Dollar Sav. Bank, 118 N.Y.S.2d 65 (N.Y. Munic. Ct. 1952))

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only when he has gone into possession or taken title.[11] The provisions of this statute were construed so as to deny the purchaser any rights to the vendor's policy, unless expressly so provided.[12]

In applying the rule, the New York courts recognize the basic principles of insurance law which limit recovery on the policy to those in privity or named as beneficiaries therein.[13] In addition, the courts apparently reason that where the risk of loss falls upon the purchaser, he has an insurable interest,[14] and should not depend on the vendor's policy for indemnification. Thus the equitable concept of the vendor holding the proceeds of his policy as trustee for the benefit of the purchaser, as recognized by the majority of American jurisdictions,[15] is rejected in New York.[16]

The instant case presented the courts of New York with an opportunity to restrict the harsh application of the rule, to cases where the purchaser is in possession but has not paid the premiums. A rule which would, in such a case, allow the purchaser a proportionate share of the insurance proceeds would achieve substantial justice. It is submitted that the court's failure to seize upon this opportunity to limit an inequitable rule was unfortunate. It would seem that if a change is to be effected it is more likely to be brought about by legislation than by judicial decision.

PROPERTY—MONEY LEFT ON SHELF IN BANK VAULT—MISLAID NOT LOST.—Plaintiff sought to recover a $100 bill delivered by her to an employee of defendant bank after she had discovered it lying on the shelf of a writing booth adjacent to the safe-deposit vault, in

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[11] *See* Rosenbloom v. Maryland Ins. Co., 258 App. Div. 14, 16, 15 N. Y. S. 2d 304, 306 (4th Dep't 1939); New York Medical College v. 15-21 East 111th Street Corp., 90 N. Y. S. 2d 591, 592 (Sup. Ct. 1949); see World Exhibit Corp. v. City Bank Farmers Trust Co., 270 App. Div. 654, 658, 61 N. Y. S. 2d 889, 893 (2d Dep't), *aff'd mem.*, 296 N. Y. 586, 68 N. E. 2d 876 (1946).

[12] Matter of Bond & Mortgage Guarantee Co., 63 N. Y. S. 2d 120 (Sup. Ct. 1946).

[13] *See* Brownell v. Board of Education, *supra* note 9, at 374, 146 N. E. at 632. *But see* Persico v. Guernsey, 129 Misc. 190, 194, 220 N. Y. Supp. 689, 693 (Sup. Ct.), *aff'd mem.*, 222 App. Div. 719, 225 N. Y. Supp. 890 (4th Dep't 1927).

[14] See Carpenter v. German American Ins. Co., 135 N. Y. 298, 31 N. E. 1015 (1892); Brooks v. Erie Fire Ins. Co., 76 App. Div. 275, 78 N. Y. Supp. 748 (3d Dep't 1902), *aff'd mem.*, 177 N. Y. 572, 69 N. E. 1120 (1904); N. Y. INSURANCE LAW § 148.

[15] See Note, 37 A. L. R. 1324 (1925), and cases collected therein.

[16] *See* Brownell v. Board of Education, 239 N. Y. 369, 372-74, 146 N. E. 630, 632 (1925). *But see* Persico v. Guernsey, *supra* note 13.

an area restricted to defendant's employees, box lessees or their legal representatives, and authorized public officers. The complaint was dismissed. *Held:* The money, being mislaid and discovered in a restricted area, should remain in the custody of the defendant, owner of the *locus in quo*. *Dolitsky v. Dollar Sav. Bank,* 118 N. Y. S. 2d 65 (N. Y. Munic. Ct. 1952).

To determine the rights of the finder as against those of the owner of the place where the property is found, the principle set forth in *Armory v. Delamirie,*[1] that the finder has possession against all but the true owner, must be qualified by the distinction that the owner of the *locus in quo* has the right of possession[2] to property found in a private place.[3] The reason advanced for this is that the owner's general physical control and intent to keep others from his property implies a similar control and intent over everything in and on his property.[4] On the other hand, areas into which the public is invited or permitted are classified as public,[5] and the finder may be entitled to the possession of property found in these places.

If the finder satisfies this public-private test, he must further contend with the distinction between lost and mislaid goods: the former resulting from an accidental and involuntary loss of possession,[6] and the latter from a forgetful loss of possession—as where one voluntarily places a purse on a table and leaves, forgetting to pick it up.[7] Some courts make this distinction on the theory that at the moment the property was deliberately deposited—with the intent to pick it up later—it was placed in the possession or custody of the

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[1] 1 Str. 505, 93 Eng. Rep. 664 (1722).

[2] Possession is defined as ". . . a union of a physical control over the goods in question, and of an intent to assume dominion over them." BROWN, LAW OF PERSONAL PROPERTY 22 (1936).

[3] However, treasure trove [". . . any gold or silver in coin, plate, or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground . . . ." 36 C. J. S. 770 (1943)] is an exception, and when found on private property it is awarded to the finder. Groover v. Tippins, 51 Ga. App. 47, 179 S. E. 634 (1935); Vickery v. Hardin, 77 Ind. App. 558, 133 N. E. 922 (1922); Weeks v. Hackett, 104 Me. 264, 71 Atl. 858 (1908).

[4] South Staffordshire Water Co. v. Sharman, [1896] 2 Q. B. 44; see HOLMES, THE COMMON LAW 222-24 (1946); POLLOCK & WRIGHT, POSSESSION IN THE COMMON LAW 41 (1888).

[5] See Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N. E. 2d 661 (1935) (caged-in area of bank as passageway for business visitors); Hamaker v. Blanchard, 90 Pa. (9 Norris) 377 (1879) (hotel parlor); Bridges v. Hawkesworth, 21 L. J. Q. B. 75 (1851) (store).

[6] See Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878 (1902) (purse on floor of restaurant adjoining theater); Cleveland Ry. v. Durschuk. 31 Ohio App. 248, 166 N. E. 909 (1928) ($20 on floor of street car); Durfee v. Jones, 11 R. I. 588 (1877) (money in crevice of old safe).

[7] See McAvoy v. Medina, 11 Allen 548 (Mass. 1866) (purse on table); Foulke v. N. Y. Cons. R. R., 228 N. Y. 269, 127 N. E. 237 (1920) (package on subway seat).

"house," so that as to a subsequent finder, the owner of the place would be entitled to the property on the theory of prior possession.[8] Another motive for making the lost-mislaid distinction rests on the belief of the courts that the best interests of the true owner are served by giving possession to the owner of the *locus in quo,* who is less likely to abscond, will spend more effort and time to locate the true owner, and is more easily found if the true owner remembers or retraces his steps.[9] Therefore, for the finder to gain possession, the disputed property must be legally lost in a public place.[10]

In New York, the courts have strictly adhered to the foregoing distinctions. In *Loucks v. Gallogly* [11] the court, emphasizing the importance of the distinction between lost and mislaid goods, held that money found on a desk in the public part of a bank was mislaid and belonged in the bank's possession. In *Cohen v. Manufacturers Safe Deposit Company,*[12] the Court of Appeals, holding for the plaintiff-finder, illustrated the fine points of the public-private distinction, and demonstrated how a seemingly controlled place, such as a safe-deposit area,[13] cannot be considered private unless there is evidence that only

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[8] See WALSH, LAW OF PROPERTY 115 (2d ed. 1937). Attached to the prior possession of the mislaid property by the owner of the *locus in quo* is a duty of care owed to the true owner. *See* Pyle v. Springfield Marine Bank, 330 Ill. App. 1, 70 N. E. 2d 257, 260 (1946) (trustee for true owner); Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S. W. 612, 614 (1924) (fiduciary custody owing "some duty"); Foster v. Fidelity Safe Deposit Co., 264 Mo. 89, 174 S. W. 376, 379 (1915) (a ". . . trust it cannot repudiate, and it should exercise *due* care . . . .").

[9] *See* Loucks v. Gallogly, 1 Misc. 22, 26, 23 N. Y. Supp. 126, 129 (Albany City Ct. 1892) (*locus in quo* is where true owner would most likely apply upon missing his property); Silcott v. Louisville Trust Co., *supra* note 8, 265 S. W. at 615.

[10] The distinction between lost and mislaid goods plays an important role in other actions besides replevin and conversion. See Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878 (1902) (assault and battery); Foulke v. N. Y. Cons. R. R., *supra* note 7 (malicious prosecution); Cleveland Ry. v. Durschuk, 31 Ohio App. 248, 166 N. E. 909 (1928) (false imprisonment). In these cases the owner of the *locus in quo* resisted the departure of the finder with the discovered property. The finder-plaintiff's success in such litigation usually depends upon his right to the disputed property, and this in turn depends upon whether it was lost or mislaid. If mislaid, the owner of the premises, having the right to possession, would be justified in resisting the claims of a "finder" who illegally sought to deprive him of his possession. In another case, a larceny conviction depended on this distinction. See Lawrence v. State, 1 Humph. 228 (Tenn. 1839); see also Kincaid v. Eaton, 98 Mass. 139 (1867) (where plaintiff was denied a reward offered for "lost" money, the reason being that the money was really mislaid, not "lost").

[11] *Supra* note 9.

[12] 297 N. Y. 266, 78 N. E. 2d 604 (1948).

[13] See Comment, 10 CORNELL L. Q. 255, 257 n. 8 (1925) (discussion on the practice of various safe-deposit companies in admitting friends and relatives of box lessees and even non-customers into the vault areas).

box lessees and bank employees were admitted into this area.[14] The instant case is distinguishable from the *Cohen* case, since here the defendant-bank presented evidence which showed that the safe-deposit area was exclusively restricted, thus proving its private character; moreover, in the *Cohen* case the money was on the floor of the safe-deposit booth (and thus *lost*), while in the present case the money was on the shelf of the booth (and therefore *mislaid*).

While there is little dispute over the applicability of the private-public distinction, the lost-mislaid criterion for determining the rights of finders is open to criticism.[15] To say that the true owner entrusted the misplaced article to the possession of the owner of a public place, avoids the real test of possession, namely, physical control and intent to exclude. Inasmuch as there is no real possession, to hold that the owner of the public place is in possession, and therefore a bailee of mislaid but not lost goods, is unsound.[16] Consequently, the only proper justification for the distinction is that the owner of the *locus in quo* will best serve the interests of the true owner. If this be true, it would logically follow that finders of articles *lost* in public places should also be required to deliver them to the owners of such places. However, a policy favoring the owner of the place may induce the finder to secrete his finding lest the owner of the premises receive the fruits of his discovery. It is submitted that the better rule is to require the finder to deliver *mislaid*, as well as lost articles, to the police department for a reasonable period, after which the finder would be entitled to possession.[17]

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[14] When the *Cohen* case, *supra* note 12, was retried, the evidence showed that on the day the money was found, the caged area was used as an interviewing room for prospective box lessees and possible new accounts. *See* Manufacturers Safe Deposit Co. v. Cohen, 200 Misc. 334, 336, 101 N. Y. S. 2d 820, 822 (Sup. Ct. 1950).

[15] See WALSH, LAW OF PROPERTY 116 (2d ed. 1937); Morton, *Public Policy and the Finders Cases*, 1 WYO. L. J. 101, 108 (1947); Riesman, *Possession and the Law of Finders*, 52 HARV. L. REV. 1105, 1117-23 (1939).

[16] Bailment is defined as ". . . the rightful *possession* of goods by one who is not the owner." 4 WILLISTON, CONTRACTS 2888 (Rev. ed. 1936) (emphasis added).

[17] The Administrative Code, City of New York, Section 435-4.1, does not decide the question of possession; it merely requires "lost" property to be turned over to the police property clerk; after three months the property is returned to the finder, if not previously claimed by the true owner. Mislaid as well as lost goods must be turned over to the property clerk. *See* Manufacturers Safe Deposit Co. v. Cohen, 193 Misc. 900, 902, 85 N. Y. S. 2d 650, 653 (Sup. Ct. 1948), *rev'd mem. on other grounds*, 277 App. Div. 854, 98 N. Y. S. 2d 197 (1st Dep't 1950).