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Sawyer et al. v. Administrator of Injun Joe

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SAWYER et al. v. ADMINISTRATOR OF INJUN JOE*

(Finn, Intervenor)

Supreme Court of Missouri, circa 1841. 1 Clem. Lit. 1 (Annotated ed. 1950)

DOAKES, J:

The trial judge,[1] a jury being waived, made the findings of fact recounted herein. With one exception,[a] these findings are accepted by this court as the true facts.

Thomas Sawyer and Huckleberry Finn (hereinafter called Tom and Huck, respectively), minors residing in St. Petersburg (also known as Hannibal), Missouri, are in possession of $12,000 in gold coins which they claim to have found in a cavern in this State.

The public administrator of Marion County, appointed pursuant to statute,[2] seeks to recover these coins as belonging, half to the estate of the late Injun Joe, who died intestate and without known heirs, and half to the estate of another intestate decedent having no known heirs, and herein referred to as a ragged man.[3]

The public administrator appeals from the lower court judgment

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*This material is intended primarily for students. The device of an annotated report is used to permit citation of cases and statutes subsequent to the assumed date of the above opinions. Footnotes by the judges are numbered; footnotes by the annotator (Elmer M. Million, Associate Professor of Law, New York University School of Law) are indicated by letters. The assumed date of the trial, 1841, is based on Mark Twain's statement in 1876 that the events in TOM SAWYER took place "30 or 40 years ago." Thirty five years before 1876 would be 1841, hence the *Missouri Revised Statutes* of 1835 are deemed to have applied at the time of the trial and at the rendition of the above opinions. Unless otherwise stated, footnote references to pages are to the "record," alias Mark Twain's THE ADVENTURES OF TOM SAWYER (The Modern Library edition). For a more prosaic account of Tom's and Huck's treasure hunt, see "Tom Sawyer And His Band" by Albert Bigelow Paine, reprinted in THE ST. NICHOLAS ANTHOLOGY, pp. 97-101 (1948).

1. The circuit court of Marion county. See MO. REV. STAT. p. 155 § 8(2) (1835) *id.* p. 156 § 15; *id.* p. 348.

2. MO. REV. STAT. (1835) p. 64, §§ 1 (each county court may appoint a public administrator), 8 ("the public administrator to take into his charge . . . the estate . . . when a stranger dies intestate in the county without relations or confidential friends . . . [or] when persons die intestate, without any known heirs, and administration is not undertaken by some other responsible person; . . .").

3. P. 182. The ragged man drowned (p. 226). As he may have left a widow and children (185) they would be entitled to his share, if any, but their existence has not been proved. Guardians were appointed by the court for the infant defendants. See MO. REV. STAT. p. 456, § 24 (1835).

a. See opinions of Moakes and Oakes, JJ.

awarding the disputed coins to Tom and Huck. Finn, the intervenor, appealed from the refusal of the trial court to order Mrs. Douglas, Huck's guardian, to turn over to Finn the portion of the coins being held by Mrs. Douglas for Finn's son Huck.[4]

No one knows the identity of the last previous lawful owner of any of these coins.[5] The coins formerly belonged to a person or persons now unknown and, although this is merely conjecture, may have been stolen from them by Murrell's gang. The coins were buried beneath the fireplace of the "haunted house" on Cardiff Hill near Hannibal. Whether the person secreting the coins beneath the fireplace intended to come back for them cannot be positively known, but presumably he did so intend, since otherwise an open field or the forest or a deep stream would probably have been used as a more convenient place to get rid of incriminating evidence. The inference seems clear, therefore, that the unknown person hid the coins and intended to return for them, not abandon them.[6]

If the unknown lawful owner hereafter appears, he may obtain his coins upon proving his title to them, provided he brings his action within the period fixed by law,[7] that period being measured from the date of Tom and Huck's discovery and removal of the coins from the cave.[d] The statute

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4. P. 242.

5. For that matter, no one knows the identity of *any* former lawful owner of the money, last or otherwise. But, even if a former owner other than the *last* were known, such owner could assert no rights here, once it was conceded that he finally and validly passed the ownership of the money on to someone else. Although it is said that, as between successive possessors, the one prior in time prevails, this does not alter the rule that once a person has irrevocably divested himself of all interest in a *res,* he is thereafter a total stranger to it, insofar as concerns any attempt by him to claim any right in it by virtue of that former ownership.[b]

6. *Cf.* Kershaw's Ex'rs. v. Boykin, 1 Brev. 301 (S. C. Law, 1803) (abandonment by a state of rights in slave not presumed from mere lapse of time).[c]

7. Mo. Rev. Stat. p. 397 (1835).

b. Accord: Enno-Sander Mineral Water Co. v. Fishman, 127 Mo. App. 207, 104 S.W. 1156 (1907) (*semble*); Wyman v. Hurlburt, 12 Ohio 81, 40 Am. Dec. 461 (1843); Davis v. Butler, 6 Calif. 510 (1856); Fidelity-Philadelphia Trust Co. v. Lehigh Valley Coal Co., 294 Pa., 47, 143 Atl. 474 (1928), noted 77 U. Pa. L. Rev. 549 (1929).

c. Burden of proving abandonment is upon him who asserts it. Tayon v. Ladew, 33 Mo. 205 (1862) (abandonment of land, under Spanish law). But see New York, etc. R. Co. v. Haws, 56 N. Y. 175 (1874), criticized in Aigler, *Rights of Finders,* 21 Mich. L. Rev. 664, 666 n. 10 (1923).

d. Whatever the rule as to finders of "lost" goods, the limitation statute clearly should run in favor of Tom and Huck, as they held openly and as owners, not tentatively. Riesman, *Possession and the Law of Finders* 52 Harv. L. Rev. 1105, 1108 (1939) declares: "Since the finder ordinarily holds tentatively rather than adversely, it would seem the statute of limitations would never run." One of the cases cited, Meekins v. Simpson, 176 N. C. 130, 96 S.E. 894 (1918), held that the Statute did not start in favor of one who openly held a strayed dog,

of limitations would never have run against the true owner while the coins remained hidden and the whereabouts of the thief remained unknown.[8] The present decision does not bar the unknown former owner (technically, the unknown present owner).

Murrell is not shown to have had any connection with the coins.[9] But, if he or his representative appeared and proved that Murrell had hidden them in the haunted house, this court would have to decide whether an outlaw may recover possession of loot he had hidden, as against another

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8. Mo. REV. STAT. p. 396 (1835).

9. Injun Joe agreed when his companion suggested Murrell hypothetically (p. 185), but this was mere speculation, neither having any actual knowledge nor any basis for an admissible opinion.[e] Moreover, the statements were unsworn and, the parties being dead, were available to the court only as hearsay.

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until either a demand and refusal or unequivocal acts of ownership by the finder inconsistent with the rights of the true owner. The case is weakened as precedent by the finder's testimony that he was holding in subordination to the true owner, and the court distinguished with approval an earlier decision, Blount v. Parker, 78 N. C. 128 (1878), as having held that the Statute *did* begin from the time the finder sold the found goods, such sale being "an undoubted conversion." Under these decisions, Tom and Huck deserved the benefit of the Statute, since their find was immediately "put out at interest" by Judge Thatcher and Widow Douglas, this in effect being a sale to each borrower. Tom and Huck would have taken comfort from Baugh v. Williams Adm'r, 264 Ky. 167, 94 S.W. 2d 330 (1936), which involved the purchaser of a decedent's traveling bag who, five years after buying it, found money concealed under its lining. The purchaser-finder spent part of the money and banked the rest. At the trial, he vainly relied on the Statute. In affirming, the court stated that actionable conversion occurred when he *found and used* the money.

As to whether the Statute runs for a finder who fails to comply with the estray statute (or lost goods statute) the cases disagree. Non-compliance has been held an insufficient conversion to start the Statute. Andrews v. Carl, 77 Vt. 172, 59 Atl. 167 (1904). *Contra*: Havird v. Lung 19 Idaho 790, 115 Pac. 930 (1911) (added dictum: finder's concealment of chattel, and owner's ignorance of its location, would not toll Statute. *Quaere.*) The better view seems to be that successful concealment by the finder prevents the Statute running. Quimby v. Blackey 63 N. H. 77 (1884) (finder hid lost purse; Statute tolled); Note, 43 HARV. L. REV. 471 (1930); Gatlin v. Vaut, 6 Ind. T. 254, 91 S.W. 38 (1906); Chilton v. Carpenter, 78 Okla., 210, 189 Pac. 747 (1920) (and cases cited); Commercial Union Ins. Co. v. Connolly, 183 Minn. 1,235 N.W. 634 (1931); *cf.* Woodcliff Gin Co. v. Kittles, 173 Ga. 661, 161 S.E. 119 (1931) and Watts v. Millikin's Estate, 95 Vt. 335, 115 Atl. 150 (1921). *Contra*: 1 WALSH, COMMENTARIES ON PROPERTY § 27 n. 7 (and cases cited).

e. John A. Murrell (also spelled Murrel or Murel), born in 1804, a notorious murderer, outlaw, gang leader and conspirator, operated in eastern Arkansas, Tennessee, and reputedly from New York to Texas, was convicted and branded at Nashville in 1832 as a horse thief, later organized a projected Negro Rebellion, and disappeared shortly before the Civil War. See "John A. Murrell's Own Story," in WALTON, AUGUSTUS Q., A HISTORY OF THE DETECTION, CONVICTION, LIFE AND DESIGNS OF JOHN A. MUREL, THE GREAT WESTERN LAND PIRATE (Athens, Tenn., republished by G. White, 1835) as quoted in BOTKIN, A TREASURY OF SOUTHERN FOLKLORE, 221 *et seq.* (New York, Crown Publishers, 1949); COATES, ROBERT M., THE OUTLAW YEARS 169-302 (1930) *Cf.* MARK TWAIN, LIFE ON THE MISSISSIPPI p. 311 (1883) ("Jesse James was a retail rascal; Murel, wholesale.").

person who found it without violence or breach of peace and without being, as against the outlaw, a trespasser on the premises while finding it.[10] This question is not before the court in the present suit.

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10. It is generally stated that even a thief has title as against strangers. In so far as this means that a thief may defend his continued possession against subsequent stranger-trespassers seeking to wrest the *res* from him, it is unquestionably correct, this rule being adopted not out of consideration for the thief, but in the public interest, to discourage pillage and avoid bloodshed; as otherwise each successive taker from the thief would in turn have become a fair target tempting the violent and crafty, and a misapplication of the general rule that a bona fide *purchaser* from a thief gets only the title the thief had, might have similarly exposed such purchasers. Where, however, the thief hides his loot, on premises to which he has neither title nor possession, and thereafter remains out of possession of the locus, the law need not require that one peaceably finding the loot and carrying it off must surrender it to the thief upon later demand. Although the peaceable finder be a trespasser, he is not trespassing against the thief, as the latter has no possession to be invaded.[f] Concededly, termination of a finder's possession does not necessarily mean abandonment. A finder who thereafter loses the article may thus recover it from a still later finder although the latter's taking possession involved no trespass.[g]

f. In Rexroth v. Coon, 15 R. I. 35, 23 Atl. 37 (1885), *A* without permission placed *A's* empty bee box on *B's* land, intending to return for future honey from bees not *A's*. *C*, also without permission, opened the box and took the honey. *A* vainly brought trover against *C* for the honey. *Accord*: State v. Repp, 104 Iowa 305, 73 N.W. 829 (1898) (larceny prosecution). *Cf.* Lawrence v. Buck, 62 Me. 275 (1874). That title to animals ferae naturae cannot be gained by a trespasser reducing them to possession, as against the owner of the land where found and taken, see Gratz v. McKee, 270 Fed. 713, 719 (C. C. A. 8th 1921) (case arising in Missouri), *reversed on another ground,* McKee v. Gratz, 260 U. S. 127 (1922). *Accord*: Goff v. Kilts, 15 Wend. 550, 552 (N. Y. 1836) (dictum). As to whether trespasser starting an animal on *A's* land but killing it on *B's* land would get title, compare Blades v. Higgs, 11 H. of L. Cas. 621, 3 Eng. Rul. Cas. 76 (1865) with Sutton v. Moody, 1 Ld. Raym. 250, 91 Eng. Rep. 1063 (1697). But the foregoing cases did not involve a *res* which the trespasser had brought with him to another's land. See Francis, *Three Cases on Possession —Some Further Observations,* 14 ST. LOUIS L. REV. 11, 21 (1928), reprinted in FRYER, READINGS ON PERSONAL PROPERTY, 85, 93 (3d Ed. 1938): "Suppose a thief steals my silver and buries it in your land. As between the thief and the finder the thief has possession." See Comm. v. Rourke, 64 Mass. 397 (1852).

In Carden v. Swagger, 158 Ark. 640, 238 S.W. 31 (1922) the administrator of a deceased convicted bank robber was denied recovery against a hunter who picked up the loot in the forest where the robber had thrown it while fleeing from arresting officers. That the finder of stolen loot is guilty of larceny if, although ignorant of the identity of both the true owner and the thief, he takes such loot with the intent of converting it to his own use and depriving the unknown owner of it, Commonwealth v. Dearolf, 1 Pa. Dist. 543 (1892) is entirely consistent with cases denying civil redress to the thief against the later *finder.* The larcenous finder of previously stolen goods intends to deprive the true owner of his property; but finders who, like Tom and Huck, publicly announce their discovery, are not guilty of such intent. Moreover, the goods were not in the possession of the absconded thief, which distinguishes such cases of theft from the first thief's possessions as Ward v. Peo., 3 Hill 395 (N. Y. 1842), *aff'd,* 6 Hill 144 (Ct. of Errors, 1843).

g. Deaderick v. Oulds, 86 Tenn. 14, 5 S.W. 487 (1887); Clark v. Maloney, 3 Harr. 68 (Del. circa 1839); Cummings v. Stone, 13 Mich. 70 (1864); Lawrence v. Buck, 62 Me. 275 (1874) (alternative holding).

Tom and Huck entered the haunted house in search of buried treasure. This, in itself, gave Tom and Huck no property rights, nor did their subsequent eye-witnessing of the finding of the buried coins by Injun Joe and the ragged man. Injun Joe and his companion, in digging a hole to bury certain silver coins[11] they had stolen, fortuitously struck the buried chest. They exhumed it, discovered that it was filled with gold coins, and took it and its contents with them. Injun Joe and the ragged man were thus joint finders and were, as against others having neither better nor equal right, entitled to the gold coins unless the English doctrine of treasure trove applies.

The buried gold coins, having been found concealed beneath the hearth, come within the accepted definitions of treasure trove.[12] Under the English law, treasure trove belonged to the Crown, not to the finder nor to the owner of the locus in quo.[h] This State has received such of the English

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11. $650 (p. 184). These silver coins are not involved in this suit. They were in a bag. The gold was in a box or chest. It is not stated that the silver was put inside the box, nor that silver was found in the cave.

12. Treasure trove consisted of gold or silver coin, plate or bullion, (and probably, gold or silver metal other than unmined ore) concealed in the earth, or within the walls of a building or other structure, and later found, the owner being unknown. See 3 COKE, INST. 132. The requirement that the finding be in a private place, sometimes mentioned, seems merely to have distinguished the *basis* of the Crown's claim. Similarly, gold and silver ore *in situ* belonged to the Crown. 3 COKE, INST. 132.

h. In the Roman law, treasure trove found by the landowner was awarded entirely to him; if accidentally found in private land by another person, half was awarded to the finder, half to the landowner; if similarly found in public land, half went to the public treasury, half to the finder. If, however, the finder was intentionally searching for treasure trove without the permission of the landowner, or if, after finding, the finder concealed all or part of his find, the entire treasure went to the landowner. JUSTINIAN, INSTITUTES, lib. II, tit. I (39) (Moyle translation, 5th ed. 1913); 2 SCOTT, THE CIVIL LAW 40 (*Inst.* II, tit. I (30)) (1932); 15 *id.* p. 100 (*Codex*, lib. X, tit. XV); 17 id. p. 251 (Emperor Leo, New Constitution LI). *Cf.* Emden, *The Law of Treasure Trove, Past and Present*, 42 L. Q. REV. 368 (1926).

Whether or not, as declared by some writers, the English law originally awarded treasure trove to the finder, 3 COKE, INST. 132; 2 HOLDSWORTH, HIST. ENG. LAW p. 273 (3d ed. 1927) (citing Bracton); Emden, *The Law of Treasure Trove, Past and Present*, 42 L. Q. REV. 368, 375 (quoting the Laws of Henry I, circa 1118), from very early times treasure trove was held to belong to the king. BRITTON pp. 14, 56 (Nichols trans. 1901 ed.); 3 COKE, INST. 132; 2 HOLDSWORTH, HIST. ENG. LAW p. 273 (3d ed. 1927); 2 KENT, COMM. *357. In the middle of the eighteenth century the hereditary treasures of the Crown, including treasure trove, were surrendered by the King to public purposes in return for a fixed annual income. Emden, *The Law of Treasure Trove, Past and Present*, 42 L. Q. REV. 368, 38 (1926).

As Missouri received only such of the English law as was made "prior to the Fourth year of the reign of James the First" [MO. REV. STAT. 378 (1835)], English laws enacted subsequent to March 24, 1606 were not received, hence the surrender of the Crown prerogative would have no effect in Missouri in any event.

See Foster v. Fidelity Safe Deposit Co., 162 Mo. App. 165, 169, 145 S.W.

common law, including statutes of general application, existing before March 24, 1606, as are not repugnant to nor inconsistent with the Missouri and Federal constitutions and applicable statutes thereunder.[13] No express abolition of the doctrine of treasure trove appears in our law, but it is so inconsistent with the spirit of our free institutions that it has no proper application here.[14] [i]

Next, the question arises whether the finder is entitled to these gold coins as against the owner of the haunted house. The house owner has not appeared nor made claim, but the applicable rule seems clear. Under one view, the owner of land is entitled to things found therein or thereon[j]

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13. Mo. REV. STAT. p. 378 (1835).

14. Or, put another way, since we have no king, the State of Missouri succeeds to the rights of the sovereign. No case has been called to our attention where any American state has asserted a right to treasure trove. In 1801 the State of New York re-enacted the statute of 4 EDW. I, directing the coroner to inquire by coroner's jury as to any such treasure reported found, and to ascertain the finders and bind them to appear in court. N. Y. Laws, 24th Sess. c. 43, reprinted in N. Y. REV. LAWS p. 150 (1813). No cases have been found applying this Act, and the New York Revised Statutes of 1829 omitted it entirely.

139, 141 (1912), *aff'd* 264 Mo. 89, 174 S.W. 376 (1915), where the court, after citing two cases from other states that the finder of treasure trove prevails as against the owner of the locus, distinguishes those cases on their facts, the Missouri case not involving *concealed* goods.

i. Gillilan v. Gillilan, 278 Mo. 99, 212 S.W. 348, 350 (1919) ("Primogeniture is contrary to the theory upon which this and other commonwealths were built"). And see Hawkinson v. Johnston, 122 F. 2d 724, 728 (C.C.A. 8th, 1941), *cert. denied,* 314 U. S. 365 (1941).

j. In Missouri a non-trespassing finder of truly *lost* goods prevails over the landowner, where finding is in a place open to the public. Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S.W. 878, 94 Am. St. Rep. 740 (1902). *Accord*: Bridges v. Hawkesworth, 21 L.J.Q.B. 75 (1851). Several courts, including those of Missouri, give the landowner a superior right to possession of *mislaid* property, as against the finder, even though the latter is a non-trespasser. Foster v. Fidelity Safe Deposit Co., 162 Mo. App. 165, 145 S.W. 139 (1912), *affirmed* 264 Mo. 89, 174 S.W. 376 (1915); State *ex rel.* Scott v. Buzzard, 235 Mo. App. 636, 144 S.W. 2d 847 (1940) (employee finding money concealed within wall, *held* not entitled thereto; mislaid rather than lost). See also Elwes v. Brigg Gas Co., 33 Ch.D. 562 (1886) (lessor prevailed against lessee-finder who uncovered an ancient embedded boat), expressly followed in Allred v. Biegel, 219 S.W. 665 (Mo. App. 1949) (reversioner of land entitled to ancient Indian boat exposed by erosion of river bank, as against "finder" and life tenant and termor; boat held to be part of the realty) and in Ferguson v. Ray, 44 Ore. 557, 77 Pac. 600 (1904). The latter holding is approved in Jackson v. Steinberg, 186 Ore. 129, 200 p. 2d 376 (1948), *rehearing denied,* 186 Ore. 129, 205 P. 2d. 562 (1949). See also Goddard v. Winchell, 86 Iowa 71, 52 N.W. 1124, 17 L.R.A. 788 (1892) (meteorite); Oregon Iron Co. v. Hughes, 47 Ore. 313, 81 Pac. 572 (1905).

With the exception of Jackson v. Steinberg, all of the last six cited cases could have been rested on the ground that the thing "found" was an unsevered portion of the realty. Jackson v. Steinberg rested in part on the fact that the finder was an employee of the land occupier and was acting in the course of employment when finding the money, and in part on the reserved or private nature of the portion of the hotel premises in which the thing was found.

by trespassers,[15] but some courts might except from this doctrine situations in which the landowner was not in possession of the premises either in person or through another. Other courts might distinguish cases in which, by reason of persons customarily resorting to the particular unoccupied land without consent being sought or given and without objection raised, an implied license could be inferred.[k] A special exception is sometimes made as to things answering the description of treasure trove.[l] Injun Joe was a murderer, ghoul, perjurer, robber, conspirator, and fugitive but his trespass against the haunted house was peaceable; he did not enter violently nor prevent the landowner from exercising possession over the house. As the landowner was ignorant of the hidden treasure and was not exercising any factual control over the premises nor seeking to exclude persons therefrom, he cannot assert a claim superior to that which Injun Joe and the ragged man have as finders. The finder should be protected under these circumstances, thus encouraging him to disclose his find to the appropriate authorities as required by law.[16] Possibly Injun Joe and the ragged man removed

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15. Barker v. Bates, 13 Pick 255 (Mass. 1832).

16. Mo. REV. STAT. p. 397 (1835). Person finding money worth more than $10, the owner being unknown, shall within ten days make affidavit thereof before a justice of the peace. It was not suggested by any of the parties that this statute applied only to lost property other than treasure trove.[m]

k. *Cf.* McKee v. Gratz, 260 U. S. 127 (1922), holding that a license may be implied by the jury where there is a *general* custom of hunting on wild unenclosed land.

l. Some jurisdictions hold that the law of treasure trove has been merged with the law of lost goods, and others continue to distinguish between them for some purposes, but the later cases favor the finder of lost goods and, irrespective of whether the two doctrines have been merged, are at least equally favorable toward the finder as to "treasure trove," as against the landowner. Vickery v. Hardin, 77 Ind. App. 558, 133 N.E. 922, 923 (1922) (finder of treasure vs. former owner of locus); Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634 (1935) (finder versus owner of locus); Weeks v. Hackett, 104 Me. 264, 71 Atl. 858 (1908) (Suit between two finders); Gaither v. Jones [Circuit Court of Baltimore, Md. 1935, as quoted in WARREN, CASES ON PROPERTY 130-131 (2d ed. 1938)]; Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913 (1904); Roberson v. Ellis, 58 Ore. 219, 114 Pac. 110 (1911); Zornes v. Bowen, 223 Iowa 1141, 274 N.W. 877 (1937) (lessee's minor child finding buried money, prevailed against lessor); Zech v. Accola, 253 Wis. 80, 253 Wis. 80 33 N.W. 2d 232 (1948) (treasure trove concealed in chattel bailed to finder; finder prevailed over bailor); Note, 22 CORN. L. Q. 263 (1936). See Notes, 6 MINN. L. REV. 527 (1922) and 21 MICH. L. REV. 102 (1922), both objecting to distinction whereby treasure trove went to the finder but other buried property went to the owner of the locus.

Except for Groover v. Tippins and a dictum in the trial court decision of Gaither v. Jones, the foregoing cases were not dealing with *trespassing* finders. Might a distinction be taken between the innocent trespassing of a child and an adult's wilful trespass? The latter would normally lose to the landowner. SALMOND, JURISPRUDENCE 307 (7th ed. 1924).

m. A lost-property statute requiring persons "finding any money" to advertise for the owner, and awarding half the find to the county treasury if the owner

these gold coins to the room near the temperance bar, but this is not proved and is not material. Whether or not they first put the coins in the room, the finders, or possibly Injun Joe alone, moved them to the cave where Tom and Huck later found the coins buried.[17]

Tom and Huck did not find "treasure trove." The coins, if treasure trove when found by Injun Joe, have been held to have become Injun Joe's and the ragged man's as against persons having no better right. From that time on, the coins were not treasure trove. Injun Joe's burial of them did not restore that status, for the owner (*i.e.* the person entitled to possession as against strangers) was not unknown. That Injun Joe died intestate without heirs, before Tom and Huck found the coins, is insufficient to reconstitute the coins treasure trove.[18]

Finally, the question arises whether Injun Joe and the ragged man abandoned the coins. The ragged man died first, drowning while trying to escape capture. Obviously, Injun Joe did not intend to abandon the coins when he buried them, or he would have spared himself the trouble. Later, however,

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17. Having heard Injun Joe say he would take the treasure to "my den Number Two—under the cross. Number One is too common" (p. 186), Tom and Huck decided that "Number Two" meant the tavern room (p. 190). Injun Joe did use the room as a hideout (p. 193), and the room bore the number two (p.190), but this seems sheer coincidence. As the room cached illicit liquor it was of more "common" resort than the remote recess of the cave where Tom later saw Injun Joe and finally located the treasure *under the sign of the cross.* Having concluded that the cave was "Number Two" (p. 234), Tom and Huck presumably agree now that the money was never in the tavern room (pp. 200, 208).

18. Moreover, if Injun Joe was entitled to the same rights as an ordinary finder, the mere fact that he died intestate without heirs would not entitle subsequent finders to keep the coins as against the public administrator. *"He to whom the property is,* shall have treasure trove; and *if he dies before it be found, his executors shall have it;* for nothing accrues to the king unless when no one knows who hid that treasure." 20 VINER'S ABRIDGMENT p. 414, para. 4 (2d ed. 1793), citing BRACTON 120a, lib. 3, cap. 3, f. 4. Conceivably, goods might be treasure trove[n] where demonstrably hidden by a named person centuries earlier who was otherwise unknown to history and unconnected with any living person.[o]

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did not appear, was held *not* to apply to treasure trove, it being hidden rather than lost. Sovern v. Yoran, 16 Ore. 269, 20 Pac. 100 (1888). *Accord*: Zech v. Accola, 253 Wis. 80, 33 N.W. 2d 232 (1948) (concurring opinion dissents hereon), Noted (1949) WIS. L. REV. 393; Foster v. Fidelity Safe Deposit Co., 162 Mo. App. 165, 145 S.W. 139, 141 (1912) stated that Missouri lost property statute did not apply to *mislaid* goods. In affirming, the Missouri Supreme Court reiterated this. *Id,* 264 Mo. 89 at 102, 174 S.W. 376 at 379 (1915).

n. *Accord*: Livermore v. White, 74 Me. 452, 456, 43 Am. Rep. 600 (1883).

o. "Doubtless extreme cases may be put. If treasure were dug up in a field, so placed that it had been manifestly the property of the unknown man with whose body it had been buried two centuries before, the public administrator might not be entitled to the property. . . ." Gardner v. Ninety-Nine Gold Coins, 111 Fed. 552, 554 (D. Mass. 1899). But *cf.* 25 A.B.A.J. 871 (1939) boat thought to be tomb of Kind Redwald, dead a thousand years).

when he found his exit boarded up, and thereafter as he worked vainly and until death in an effort to get out of the cave, he certainly did give up all intention of returning for the coins. Accordingly, Tom and Huck later became entitled as joint finders,[19] and nothing that happened subsequently has reduced or defeated their rights.[20] Judgment affirmed.

MOAKES, J (concurring specially): I agree with my brother Doakes that the judgment must be affirmed, but I prefer to rely on the broader proposition that the only facts actually established are that Tom and Huck found

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19. As between Tom and Huck, they were clearly co-finders. They were together when they first learned of the gold, and were at all times intending to share it when they should acquire it. Thus, Huck's vigil outside the mysterious tavern room was on behalf of himself and Tom. Tom discovered the mark of the cross but did not see the gold or know its exact location before bringing Huck into the cave with him. Tom, digging into the cavern floor, struck boards which Huck then helped uncover. Tom was first to enter the aperture disclosed by the raising of the boards, and first saw the chest, but Huck was an equal participant and may, indeed, have been the first to touch the coins themselves. Regardless of his last point, they were co-finders.[p] Huck need not rely on any contractual arrangement, so Tom's ability to disaffirm contracts would be of no avail. Nor can Tom's guardian by asserting Tom's disability, deprive Huck of the latter's status as co-finder. McDougal, assuming that he is still the owner of the cave's mouth, has thereby no ownership of the gold. First of all, the gold was probably found under another's land[q] (as Tom's secret entrance was 5 miles from the valley containing the cave mouth). If so, Tom in finding the gold, was not trespassing on McDougal's land as Tom used a secret entrance near the cache (p. 232).[r]

20. Tom "hooked" Benny Taylor's little wagon to carry the bags of coin (p. 237). This gave Benny no rights in the coins. As owner of the wagon he remained entitled to its possession, but he never had possession of the coins nor did they become a part of his wagon by accession or otherwise.

As Tom and Huck neared the village, a Mr. Jones took the wagon (p. 237) and pulled it the rest of the way into town, leaving it outside Mrs. Douglas' house (p. 238) where a surprise reception awaited Tom. As Mr. Jones was merely helping the boys with their heavy load, and as he did not take the wagon out of their presence, he was not even a bailee of the wagon, but merely had custody of it. As he did not have possession of the wagon, he did not have possession of the coins, independently of his lack of knowledge that the coins existed. Therefore, the question of where one may be a bailee of chattels of whose presence in a given receptacle he is unaware, does not arise. Tom and Huck as finders would have prevailed over Mr. Jones *even if* the latter *had* wrested the coins from them with intent ot keep them for himself, or even *if*, having become their bailee of the coins, Jones had thereafter misappropriated the coins. Armory v. Delamirie, 1 Strange 505 (1722).

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p. Cummings v. Stone, 13 Mich. 70 (1864), reprinted in FRYER, READINGS ON PERSONAL PROPERTY 71 (3d ed. 1938); Weeks v. Hackett, 104 Me. 264, 71 Atl. 858 (1908); Keron v. Cashman, 33 Atl. 1055 (N. J. Chancery, 1896); Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913 (1904). Flood v. City National Bank, 220 Iowa 935, 263 N.W. 321 (1935) is clearly distinguishable, as it involved two persons acting independently.

q. *Cf.* Marengo Cave Co. v. Ross, 7 N.E. 2d 59 (Ind. App. 1937), superseded by *id.*, 212 Ind. 624, 10 N.E. 2d 917 (1937).

r. Not being buried in the cave by an *unknown* person, the coins were not treasure trove as regards that deposit. See note 18, *supra.*

the coins buried in a cave in this State; that no lawful owner, and no other person having rights equal or superior to those of Tom or Huck in such coins, has appeared or been established; and that the evidence was insufficient to prove that Injun Joe ever had these coins in his possession, lawful or otherwise.[21] Many of the foregoing statements by my brother Doakes are, therefore, dicta. In addition, he seems to have misinterpreted the facts in one particular. A person trying desperately to claw through a barred door and thus escape starvation probably reaches the point where his only mental attitude is the desire to escape. To this extent, he may have "no intention to return." On the other hand, he does not affirmatively intend "not to return," and the court cannot know that Injun Joe intended not to return for the coins. Rather, the intent to return was merely dwarfed or overshadowed by the frantic urge to escape. Even if, in his dying moments, Injun Joe resolved never to return (a fact not shown), there might be a question whether he was rational enough to have the requisite animus. Although he never left the cave, Injun Joe reached a point several miles from his cache, and would effectually have abandoned the coins if possessing the necessary intention.

OAKES, J: I concur with my brother Doakes in his result, and with my brother Moakes in part of his reasoning, but am not entirely agreed with either one. Regarding the question of whether Injun Joe abandoned the coins, I agree with my brother Moakes that he did not. Moreover, the ragged man was not imprisoned in the cave and did not intend to give up his share.[22] On the other hand, even though the evidence does not compel

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21. Tom and Huck saw Injun Joe take a chest out of the fireplace of the haunted house, but they do not know that this is the same chest they found or that Injun Joe put it in the cave. The supposition that Injun Joe put this chest in the cave is insufficiently supported by proved facts to be compelling.

22. Although Injun Joe and the ragged man were "joint finders," this does not mean they were joint tenants.[s] That the ragged man pre-deceased Injun Joe gave the latter no additional rights, the doctrine of survivorship (*jus accrescendi*) being inapplicable. That the ragged man fled to avoid capture does not establish that he intended to abandon all claim to the gold coins.

s. See Sovern v. Yoran, 16 Ore. 269, 20 Pac. 100 (1888); Weeks v. Hackett, *supra*, note *p*, holding parties were "joint finders and therefore tenants in common" of coins; and other cases cited in note *p*. Very little attention has been given to the precise type of co-ownership involved, the actual problem having been co-ownership versus sole ownershop. Thus, Aigler, *Rights of Finders*, 21 MICH. L. REV. 664 (1923), says "such possession may be acquired by two or more concurrently, in which case they are tenants in common" and cites in support Keron v. Cashman as illustrating a judicial tendency to avoid difficult fact questions as to which person reduced the res to possession, by holding them to be "joint finders."

The common law presumption favoring joint tenancy, applied not only to

a finding that the gold coins Tom and Huck found were those Injun Joe had found at the haunted house, it unquestionably is sufficient to support that finding of the trial court. Not being clearly unreasonable or contrary to the evidence, that finding is binding upon this court. Moreover, Tom and Huck saw Injun Joe find a chest containing gold coins; heard him say he would take it "to my den . . . at Number Two—Under the cross"; dug for it in a hideout where Tom had seen Injun Joe and which answered the description; and found a chest of gold coins there. It seems certain that Injun Joe buried the latter chest there. Probably it was the same chest Injun Joe found in the haunted house, but whether they are identical is immaterial.

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transfers of real property, but also to transfers of chattels real or chattels personal. Littleton illustrated this rule by stating that a horse given to many would become the sole property of the survivor. LITT. LIB. 3, cap. 3, § 281. Later authorities are in accord. 1 COKE, INST. *736 (15th ed. 1794); 2 BL. COMM. *399 (Cooley, 1871). Moreover, the rule that co-disseisors would acquire title as joint tenants, 1 COKE, INST. *730, should apply to chattels adversely co-held. But the common law preference for joint tenancy has been widely reversed by statutes substituting a preference for tenancy in common. In this State, the Statute now and at the time of the instant suit, provided, "Every interest in real estate, granted or devised to two or more persons other than to executors and trustees as such, shall be a tendency in common, unless expressly declared in such grant, or devise, to be in joint tenancy." MO. REV. STAT. p. 119 (1835). Another section defines "real estate" as meaning "land—and embracing all chattels real." *Id.* p. 124, § 39. In Diehm v. Northwestern Mutual Life Insurance Company, 129 Mo. App. 256, 108 S.W. 139 (1908), it was stated that this statute dealt only with grants and devises of real property, hence did not regulate interests in life insurance policies, but the court, largely in reliance on the equally inapplicable statute preventing lapse of devises to children of the testator who predecease him and leave issue surviving, applied as the presumed intent of the contracting parties a rule that no lapse or jus accrescendi were to arise. If the statutory reversal of the common law preference for joint tenancies is not applicable to chattels [See WALSH, COMMENTARIES, p. 6 favoring contra view] and, in addition, is not applied to them by analogy, Injun Joe and the ragged man would have been joint tenants, and the prior death of the ragged man would have left Injun Joe the exclusive holder of whatever rights the two had formerly held together. *Cf.* Act of January 19, 1816, 1 Mo. Terr. Laws, p. 436 § 2 "The doctrine of survivorship in cases of joint tenants shall never be allowed in this territory."

The common law rule that joint disseisors acquired their adverse possession title as joint tenants is presumably the rule even today. "A statutory provision that a conveyance or devise to two or more persons shall prima facie create tenancy in common can obviously have no application" [to title acquired by adverse possession]. 2 TIFFANY, REAL PROPERTY § 422 (3d ed. 1939). This would seem to have made Injun Joe a sole possessor *if* he and the ragged man *had* acquired adverse possession title before the ragged man died. Intuitively, such result seems wrong. *Quaere*: Did the common law preference for joint tenancy, even though applied to chattels real and ordinary chattels personal, extend to money and *fungible* chattels which (unlike a horse, cow or wagon) were readily partible. Chattels personal were relatively unimportant in mediaeval English law, and the incidental extension of joint tenancy to them need not require its further extension to fungibles. That a joint tenancy can readily be created where a third person holds fungibles for two or more beneficiaries, or expressly transfers to them as joint tenants, is not decisive.

I would award the coins to Tom and Huck because they found them when they were not in the possession of any one else. Neither Injun Joe nor the ragged man remained in possession of the coins, nor in actual nor constructive possession of the premises. As to the cave, Injun Joe was as much a trespasser as Tom and Huck were, if, indeed, they were not all implied licensees.

PER CURIAM. We are agreed that the objection raised by the intervenor, Finn, does not require modification of the judgment below. As Finn was Huck's lawful father, he would normally be Huck's natural guardian entitled to the custody of Huck and Huck's estate.[23] The county court, however, has jurisdiction to appoint a guardian for a minor whose parent is adjudged incompetent or unfit for the duties of guardian.[24] Widow Douglas and Judge Thatcher petitioned to replace Finn as Huck's guardian. Although an unfamiliar judge at first denied the application[25] he became better acquainted with Finn later.[26] Intervenor Finn brought an action to recover the money[27] and was defeated.[28] The record indicates that Finn has been displaced as guardian. Moreover, Finn did not prosecute his appeal and it appears that he is dead.[29] This renders moot the question of Finn's rights, not only because Huck is Finn's sole heir, but because a guardian's right to control assets is not inheritable through him *qua* guardian nor succeeded to by his own administrator.

23. MO. REV. STAT. p. 293, § 1 (1835).
24. *Id.*, § 2.
25. TWAIN, ADVENTURES OF HUCKLEBERRY FINN (Modern Library Ed.) p. 278.
26. *Id.*, p. 279.
27. *Id.*, p. 280.
28. *Id.*, p. 284.
29. *Id.*, pp. 312, 591.