



Finders May Not Necessarily Be Keepers

by Dennis M. Foerster

Most of us are familiar with the old expression, “Finders keepers, losers weepers”. Although generally accepted by people, this is not true under our legal system. In fact, the opposite is generally a correct statement of the law.

I loved law school and the study of various legal topics. One of the first areas that is studied in many law schools is the law of property. Property law is divided into two distinct areas; real property (generally land and interests in land) and personal property (basically your stuff and anything that is not land or an interest in land). The first topic that I recall

studying in the law of property dealt with finders of lost items, simply known as finders’ cases.

The basis of this principle of law dates back to a case in 1722 called *Armory v. Delmaire* which states that the finder has the best claim to any item found except the claim of the true owner. Although there were case reporting services at that time, cases were reported by private individuals rather than by recording the written reasons of the judge.

The very brief reasons of the case indicate that a child who was hired as a chimney-sweep found a gold ring in the fireplace of a home. Apparently, the

homeowner sought to keep the ring but, since he could not show that he was the owner of the ring, the child had the best claim to it and therefore got to keep it. There appears to be an even older rule of law which, known in 1722, is not referenced. There have been very few finders cases litigated in Canada, but I suspect that most lawyers would love to argue one of these types of cases.

Interestingly a Manitoba case, originally decided here in Brandon, has added to the limited case law on the subject. It is the decision by the Honourable Mr. Justice Kerr in the case of *Kowal v. Ellis*. Kowal found a pump on a

landowner's (Ellis) property. The pump however was not in plain sight but had been hidden and its existence and presence on the landowner's property was unknown. The issue was who had the better claim the finder or the landowner.

It is unclear what Kowal was doing on the property. He may have been a guest, a worker or perhaps even a trespasser. Knowing these facts may have impacted the decision. The trial judge, here in Brandon gave the pump to the finder on the basis of the established case law that the finder has a better claim than all except the true owner.

The Court of Appeal in Manitoba reached the same conclusion and dismissed the appeal, but analysed

the case differently. Reviewing earlier British decisions between landowners and those who find items on a person's land, the court concluded that in situations where a person abandons an item on a person's property and the landowner becomes the owner of the property. Therefore the in a contest between a landowner and a finder of an item located on the property, the landowner could win because he takes it as owner and his or her claim would be superior to that of the finder.

The Court took it as significant that the pump had been hidden on the landowner's property seems to infer that the item was not abandoned. The court considered that a person in possession of the item whether by finding it or otherwise was holding it

on behalf of the "true owner". If the true owner could not be found, then he or she would take the item in their capacity as a finder. The landowner, who, on these unique facts did not know of the existence of the pump and therefore could not have been the holder of the pump, could not be said to have been holding it on behalf of the true owner. The court considered it significant that the pump was hidden and not buried on the property. If it was somehow attached to the property presumably the pump would have been considered abandoned and considered part of the land. This would have given the landowner a superior claim as he would have had superior title and could claim to be the owner. The Manitoba Court of Appeal made the interesting inference that since it was

hidden, but not attached to the land in anyway, the landowner could not claim the item either as owner as it was not abandoned or holder for the true owner. The finder therefore had the superior claim.

The analysis of our Court

of Appeal is unique and has never been followed in another decision. Rather than clarifying the issues it may have made things more complicated as now the courts may have to determine whether or not an item has been lost or abandoned. This would

seem to be an even more difficult task as the motives of the true owner cannot be known. The moral is that the old adage of finders keepers losers weepers is not the law. An owner of personal property does not lose ownership when the item is lost.