his wife's, some being settled and some held in fee simple. He meant, I think, the estates over which he had the absolute power of disposal in fee-simple, because he makes a devise in fee, and he had not any such general power of disposing as regards the property in Mary Puleston's will. I think that construction is confirmed by what seems to be conceded, namely, that the testator intended that each of his younger children should take 1,000*l.* As to the effect of the execution of the power upon the term of 500 years in Mary Puleston's will, it is contended, on the one hand, that if the testator appointed the fee-simple, the term would be destroyed, and the provision for younger children defeated, but, on the other hand, that as the term was once recognized by the testator on the marriage of his daughter in 1818, it must be intended to exist for the benefit of the other younger children, and that the testator's will was an exercise of the power subject to the term of 500 years. But I should have expected to find the term mentioned in the will which intended to execute the power, and that after it the fee-simple would have been limited; and by holding that there is no appointment of the fee-simple, the term of 500 years remains a subsisting term, and the younger children would have a clear 1,000*l.* according to the declaration of the trusts in Mary Puleston's will.

A certificate was accordingly sent to the Vice-Chancellor that the term of 500 *years is a subsisting term, and that the plaintiff is tenant for life of the hereditaments devised by the will of M. Puleston.*

COUNTY COURT APPEAL.

Bridges v. Hawkesworth.[1]

June 19 and November 26.

Trover — Lost Property — Rights of Finder.

The place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner.

The plaintiff, having picked up from the floor of the shop of the defendant a parcel containing bank-notes, handed them over to the defendant to keep till the owner should claim them. They were advertised by the defendant, but no one appearing to claim them, and three years having elapsed, the plaintiff requested the defendant to return them, tendering the costs of the advertisements, and offering an indemnity. Upon the defendant's refusal, an action was brought in the county court, and judgment given for the defendant: —

Held, on appeal, reversing the judgment below, that the plaintiff was entitled to the notes as against the defendant.

This was an appeal against a decision of the judge of the County Court of Westminster. The following facts appeared upon the case stated and signed by the judge: — In October, 1847, the plaintiff, who was town traveller to Messrs. Rae & Co., called at Messrs. Byfield & Hawkesworth's on business, as he was in the habit of doing, and as

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[1] 15 Jur. 1079. *Coram* Patteson and Wightman, JJ.

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he was leaving the shop he picked up a small parcel which was lying upon the floor. He immediately shewed it to the shopman, and opened it in his presence, when it was found to consist of a quantity of Bank of England notes, to the amount of 65*l.* The defendant, who was a partner in the firm of Byfield & Hawkesworth, was then called, and the plaintiff told him he had found the notes, and asked the defendant to keep them until the owner appeared to claim them. The defendant caused advertisements to be inserted in *The Times* newspaper, to the effect that bank notes had been found, and the owner might have them on giving a proper description and paying the expenses. No person having appeared to claim them, and three years having elapsed since they were found, the plaintiff applied to the defendant to have the notes returned to him, and offered to pay the expenses of the advertisements, and to give an indemnity. The defendant had refused to deliver them up to the plaintiff, and an action had been brought in the County Court of Westminster in consequence of that refusal. The case also found that the plaintiff, at the time he delivered over the notes to the defendant, did not intend to divest himself of any title that he might have to them. The judge had, upon these facts, decided that the defendant was entitled to the custody of the notes as against the plaintiff, and gave judgment in his favor accordingly. It was to review this decision that the present appeal had been brought.

Gray, *Heath* with him, for the appellant. The plaintiff, by finding the notes in question, acquired a title to them against the whole world, except the true owner. *Amory* v. *Delamirie*, 1 Str. 504; 1 Smith's L. C. 151. Having found them, he delivered them to the defendant for a special purpose only, and never intended to part with his property therein. The judge appears to have decided the case upon the ground that they were found in the house of another; but that makes no difference. If they had been found in the highway, they would have been the property of the finder, except as against the true owner; and yet the highway is the private property of some one, subject to the right of the public to pass over it. Suppose they had been found in the yard of the defendant, then they could be lawfully retained as against him; he might have had an action of trespass for entering the yard, but not any action founded on the possession of the goods. How did the defendant acquire any property therein? The mere fact of the notes having been dropped on the floor of his shop did not give it to him.

[PATTESON, J. If one enters a cab, and takes away a parcel left there by a former passenger, the property might be laid in the cab-owner in an indictment for the felony.

WIGHTMAN, J. If the notes had been left on a chair, and the customer coming in had merely lifted them off, would they have become his property? They were not lost in the ordinary sense of the term, but were there in *conspectu omnium*. You say that any one taking possession of them, although they were, in one sense, in the possession of the shopkeeper, acquires a title to them, except as against the true owner.]

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Yes. Perhaps an indictment would lie for stealing the goods of a person unknown; but here the owner of the shop, not having taken possession, could not lay the property in himself.

[PATTESON, J. Is there any instance of indicting a person for stealing the goods of a person unknown? If the owner be unknown, could felony be committed in respect of the goods? There might probably be an indictment for a robbery of a person unknown.]

The man who first picked up the notes would be the finder, even although the owner of the shop should first see them. Puffendorf, (lib. 4, c. 6, s. 8,) shews that the bare seeing, or the knowing where lost goods are, is not sufficient.

[WIGHTMAN, J. You must go further, and shew that their being in the shop of the defendant makes no difference. Blackstone says, that whatever movables are found on the face of the earth belong to the first occupier.]

That would be so where no owner appears; it would be the same, as between the finder and the rest of the world, as if there were no owner. Blackstone, (1 Com. 296,) speaking of treasure-trove, says, "Such as is casually lost or unclaimed, still remains the right of the fortunate finder." That was an express authority for the general rule; and if the other side contended that the notes being found in a man's house made any difference, it lay upon them to establish that proposition.

[PATTESON, J. In Puffendorf, (lib. 4, c. 6, s. 13,) it is said, "He who hath hidden treasure in another's ground, without acquainting the lord of the soil, is judged to have slipped his opportunity; . . . but if the ground belongs to another, then the finder seems engaged by his conscience to inquire, at least indirectly, of him concerning the matter; because, without this, it cannot certainly be known but that the money was laid there by the master of the place only for the greater security, or by some person else with his privity and consent." From which it would appear, that if it were laid there without the consent or privity of the owner of the soil, he would not be entitled to it. These notes were certainly not intrusted to the defendant—they were lost.]

By the law of nature, a finder acquires property by taking possession of the goods found, and those cases in which the property is given to the state or to particular individuals are exceptions upon the law of nature. In *Reg.* v. *Kerr*, 8 Car. & P. 176, it was held, "that a servant who had found some bank notes in her master's house ought to have inquired of him whether they were his or not." Those were her master's notes, which brought the facts within the rule laid down by Pufendorf where the owner of property is known. It therefore does not apply to this case. But if the other side were right, the servant would be equally guilty of felony whether they were her master's notes or not. They must put it upon the ground of a special property in the owner of the house; and if so, the servant would be guilty of felony whether she made inquiry as to the true owner or not; but a finder is not guilty of larceny where he has no reasonable opportunity of knowing the owner, because the articles

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found belong to him, whatever may be his intention at the time of taking them.

[PATTESON, J. If goods were found in an inn, it would be different. There a special property is vested in the innkeeper by reason of his liability. In *Merry* v. *Green*, 7 M. & W. 623, it was held, that there might be property in a person of goods, although he did not know of its existence. There a bureau was bought at an auction, and a purse of money was found in a secret drawer therein; and it was held that it belonged to the seller although he knew nothing of it. That and *Cartwright* v. *Green*, 8 Ves. 405, appear to be the nearest to the present case.]

In *Merry* v. *Green* the money was not lost — it was entirely inclosed in a chattel belonging to the seller; here the loss and the finding are stated in the case. The defendant, to have any right, must have indicated his intention to take possession before the other did. If the shopkeeper had placed it on one side until he found the owner, it would have been different; but here the plaintiff is the finder. As to the notes being found in the shop, that reduces it merely to a question of degree; a shop is more private than a field, a field more private than a highway; but the fact of the articles found being upon the soil of another does not prevent them from becoming the property of the finder. The defendant had not made himself liable to the true owner. *Isaack* v. *Clark*, 2 Bulst. 312, shews, "that when a man doth find goods, he is bound to answer him that hath the property." The defendant received the notes only for the purpose of advertising them, and restoring them to the true owner, if he should appear. [He also cited *Sutton* v. *Moody*, 1 Ld. Raym. 250.]

Heath offered to address the court on the same side, but it was decided that only one counsel could be heard on each side.

Hake, for the respondent. The plaintiff could not acquire property in these notes by merely picking them up; and if he could, he had in this case divested himself of that property by handing them over to the defendant, thereby making him the principal in the matter, and investing him with the responsibility of a finder. The notes, if they were in truth the property of a customer, came into the shop by leave of the owner of the shop. Dig., lib. 41, De Acq. Re. Dom., tit. 1.

[PATTESON, J. That assumes that they are deposited intentionally; in which case there can be no doubt whatever.]

Savigny, in his celebrated treatise on the Law of Possession, translated by Sir Edward Perry, s. 18, states that the principle of the rule is easily to be discovered The maxim is, "Vacua est quam nemo detinet." Here the *jus detentionis* was in the defendant, and there was no vacancy of possession. If the goods had been of larger bulk, the owner of the house might have distrained them damage faisant, and no one could have taken them from his custody. If a scintilla of a dominion might be exercised by the shopkeeper, they could not vest in the finder.

[PATTESON, J. Savigny speaks of money buried in the land; but

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how is it if it be in my house? The expression, "If I know where it is, I possess it, without the act of taking it from its place of concealment," p. 163, note (*e*), seems to make the question of property turn upon a mere chance.]

That doubt is answered by the case of *Merry* v. *Green*. In many instances property is held to belong to the owner of the soil, though he does not know of it, as in the case in Lord Raymond. In *Toplady* v. *Stalye*, Sty. 165, ROLLE, C. J., says, "If cattle be stolen, and put into my ground, I may take them damage faisant." If the owner could not take them away, how could a stranger do so? Anon. 1 Bulst. 96. In the Year Book, 12 Hen. 8, 9, it is said, "that the owner of a forest is the owner of the wild creatures therein *ratione loci*." In *Reg*. v. *Kerr*, PARKE, B., asks, "What if I drop a ring, is my servant to take it away?" Suppose my guest loses his ring, is the servant finding it at liberty to keep it? Has not the owner of the house a right to take it from him?

[WIGHTMAN, J. In that case there would be no question about the property.]

If, in *Armory* v. *Delamirie*, the sweep had been employed to sweep a chimney, and having entered a house for that purpose, had picked up a jewel therein, he could not have claimed it. In the case of a wreck the lord, before seizure, has a constructive possession. In *Smith* v. *Milles*, 1 T. R. 480, ASHURST, J., says, "The right is in the lord, and a constructive possession, in respect of the thing being within the manor of which he is lord."

[PATTESON, J. That is a manorial right and does not apply to any other person.

WIGHTMAN, J. In the preface to Savigny a difficulty is suggested in the passage quoted from Mr. Bentham:—"A street porter enters an inn, puts down his bundle upon the table, and goes out; one person put his hand upon the bundle to examine it, another puts his to carry it away, saying, 'It is mine.' The innkeeper runs to claim it, in opposition to them both. The porter returns, or does not return. Of these four men, who is in possession of the bundle?"]

In that case the innkeeper has the property *ratione loci et impotentiæ*. The parcel cannot fly away. In *Isaack* v. *Clark*, Lord Coke says the finder has it in his election to take the goods or not into his custody. Did the plaintiff take to himself the charge of these notes, or make himself liable for the advertisements?

[WIGHTMAN, J. If the plaintiff had merely shewed them to the defendant, and said he would keep them, could the defendant have sued him for them?]

Yes; by reason of their being found in the house he had a constructive possession, and also something less than a possession—a *jus detentionis*. *Burn* v. *Morris*, 4 Tyr. 485, shews that the defendant was responsible to the true owner. In the case of *Swans*, 7 Rep. 17 b., Lord Coke says that a possessory right is obtained in wild animals *ratione loci et impotentiæ*—that is, so long as they do not or cannot fly away. The reason of these decisions is given by Savigny, p. 163, "A movable becomes connected with an immovable without, never-

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theless, being incorporated with it." *Semayne's case*, 5 Rep. 93, shews that a house protects all goods lawfully there; and it is to be inferred that it displaces all right in a finder. The maxim of the civil law is, "Si in meam potestatem pervenit, meus factus sit." Savigny, p. 169, comments upon it — "Possession of a thing may be acquired simply by the fact of its having been delivered at one's own residence, even though we are absent from the house at the time."

[WIGHTMAN, J. There they were directed to the house: here, if the finder had put the notes into his own pocket, the owner of the shop would not have known of them. If you can put any case where the goods came into the house without the knowledge of the owner of the house, it would be in point.]

[PATTESON, J. If property is intentionally in my house, it is certainly in my possession.]

There is a distinction between property obvious on the surface of the soil and what is buried. In the former case it is supposed that it will be seen by the owner or his servants; but if it is buried, the next owner is as likely to find it as the former one, Savigny, 169. The passages in Blackstone cited on the other side put the question upon the intention of the true owner to come back and claim the goods. By our old law goods were to be delivered to justices; and in Deut. c. 22, we read, "Goods found should be kept near where they are lost." In *Reg.* v. *Thurborn*, 2 Car. & K. 831, it was held, that to prevent the taking of goods from being larceny, it is essential that they should be taken in such a place and under such circumstances as that the owner would be reasonably presumed to have abandoned them. In 5 Rep. 109 a, it is said, "If one steal my goods and throw them into the house of another, they are not waifs." So in Com. Dig. "Waif." This case is undistinguishable from one where goods are left at an inn, and the relation of landlord and guest has ceased; if the goods are then stolen, the innkeeper is not liable. The act of taking possession of the notes by the plaintiff did not render him chargeable to the true owner, nor confer a property upon him. Dig., lib. 41, tit. 1, De Acq. Re. Dom.; *May* v. *Harvey*, 13 East, 197. If no engagement be exacted to redeliver, the party delivering cannot sue while the trust remains open. The defendant may set up a *jus tertii;* he is liable to the true owner, and ought not to be liable to two in respect of one interest. He advertised that the notes could be had at his shop, and incurred liability for the advertisements. [He also cited *Ogle* v. *Atkinson*, 5 Taunt. 759; and *Templeman* v. *Case*, 10 Mod. 24.]

Gray, in reply, cited Savigny, 170 — "Every case of possession is founded on the state of consciousness of unlimited physical power." *Cur. adv. vult.*

November 26. PATTESON, J., now delivered the following judgment: — The notes which are the subject of this action were incidentally dropped, by mere accident, in the shop of the defendant, by the owner of them. The facts do not warrant the supposition that they

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had been deposited there intentionally, nor has the case been put at all upon that ground. The plaintiff found them on the floor, they being manifestly lost by some one. The general right of the finder to any article which has been lost, as against all the world, except the true owner, was established in the case of *Armory* v. *Delamirie*, which has never been disputed. This right would clearly have accrued to the plaintiff had the notes been picked up by him outside the shop of the defendant; and if he once had the right, the case finds that he did not intend, by delivering the notes to the defendant, to waive the title (if any) which he had to them, but they were handed to the defendant merely for the purpose of delivering them to the owner, should he appear. Nothing that was done afterwards has altered the state of things; the advertisements inserted in the newspaper, referring to the defendant, had the same object; the plaintiff has tendered the expense of those advertisements to the defendant, and offered him an indemnity against any claim to be made by the real owner, and has demanded the notes. The case, therefore, resolves itself into the single point on which it appears that the learned judge decided it, namely, whether the circumstance of the notes being found inside the defendant's shop gives him, the defendant, the right to have them as against the plaintiff, who found them. There is no authority in our law to be found directly in point. Perhaps the nearest case is that of *Merry* v. *Green*, but it differs in many respects from the present. We were referred, in the course of the argument, to the learned works of Von Savigny, edited by Chief Justice Perry; but even this work, full as it is of subtle distinctions and nice reasonings, does not afford a solution of the present question. It was well asked, on the argument, if the defendant has the right, *when* did it accrue to him? If at all, it must have been antecedent to the finding by the plaintiff, for that finding could not give the defendant any right. If the notes had been accidentally kicked into the shop, and there found by some one passing by, could it be contended that the defendant was entitled to them from the mere fact of their being originally dropped in his shop? If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him because they were found in his house? Certainly not. The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there; and the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement These steps were really taken by the defendant as the agent of the plaintiff, and he has been offered an idemnity, the sufficiency of which is not disputed. We find, therefore, no circumstances in this case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons except the real owner, and we think that that rule must prevail, and that the learned judge was mistaken in holding that the place in which they were found makes any legal difference. Our judgment, therefore, is, that the plaintiff is entitled to these notes as against the defendant; that the judgment of

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the court below must be reversed, and judgment given for the plaintiff for 50*l.* Plaintiff to have the costs of appeal.[1]

Judgment accordingly.

Grange v. Trickett.[2]

November 14, 1851.

Insolvent Act, 1 & 2 Vict. c. 110 — Discharge out of Custody — Consent of Detaining Creditor — Operation of vesting Order — Title of Assignee — Revesting of Property in Insolvent — Pleading.

Declaration against the defendant as maker of a promissory note, payable to F. J., and by him indorsed to the plaintiff. Plea, that after the making of the note, and before the indorsement to the plaintiff, the said F. J., then being a prisoner for debt in Lancaster Castle Gaol, duly petitioned the Court for the Relief of Insolvent Debtors, under the 1 and 2 Vict. c. 110, for his discharge from custody, and that thereupon an order was made by the said court pursuant to the said statute for the vesting of F. J.'s estate and effects in the provisional assignee, by virtue of which order and the said statute the said promissory note and all right of action in respect thereof became vested in the said provisional assignee, &c. Replication, that before the indorsement, the said F. J. was discharged from custody by the detaining creditor in the plea mentioned, and with his consent, and without any adjudication by the said Court for the Relief of Insolvent Debtors having been made in that behalf:—

Held, upon demurrer, that under the 1 and 2 Vict. c. 110, the discharge out of custody of an insolvent with the consent of his detaining creditor, without any adjudication in that behalf, had the effect of putting a stop to the operation of the vesting order, and of divesting the insolvent's estate out of the assignee, and revesting it in the insolvent himself, and, therefore, that the replication was good.

This was an action against the defendant, as the maker of a promissory note for 61*l.* 17*s.* 7*d.*, payable to F. Johnson, and by him indorsed to the plaintiff.

Plea — that after the making the said note by the defendant, and before the indorsement to the plaintiff, and before the commencement of this suit, to wit, &c., the said Frederick Johnson then being a person in actual custody within the Lancaster Castle Gaol, upon process for or by reason of a certain debt and costs at the suit of J. B. did, within fourteen days next after the commencement of the actual custody of the said F. Johnson, to wit, &c., duly and according to the directions and provisions of the statute made and passed in the session of parliament holden in the first and second years of the reign of our Lady the now Queen, intituled "An Act for abolishing arrest on mesne process in civil actions, except in certain cases for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England," apply by petition in a summary way to the Court for the Relief of Insolvent Debtors in the said Act mentioned, for his discharge from

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[1] In a subsequent case in the Exchequer, it was said by Parke, B., that "all the Barons of the Exchequer and several other judges were agreed," that in cases of appeal from the County Court, the cost should, for the future, follow the result.

[2] 21 Law J. Rep. (N. S.) Q. B. 26.

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