Kowal v. *Ellis:* A Comment

In *Kowal* v. *Ellis*[1] the Manitoba Court of Appeal was called upon to deal with an unsettled area of the law; namely, the right of an occupier of land to claim a chattel found lying loose on his land as against one who claims the chattel as a finder.

Briefly, the facts were that the plaintiff took possession of a pump, valued at $450, that was lying unattached on the defendant's land. The defendant took the pump from the plaintiff and the plaintiff succeeded in the County Court and again in the Court of Appeal in asserting a superior claim to the chattel. The reasoning of the Court of Appeal raises several questions.

In delivering the judgement of the Court, O'Sullivan J. stated, "I start from the premise that a finder of a chattel, who takes it into his possession, becomes a bailee by finding . . . ."[2] The statement in itself is unassailable. What is questionable, however, is whether this should be the premise from which one starts. The premise presupposes that the plaintiff is a finder and this, it seems, finesses the fundamental question; namely, is the plaintiff a finder at all?

The defendant's claim rests on the fact that he is the occupier of the land on which the pump was found. Certainly there is authority for saying that ". . . if something is found on that land . . . the presumption is that the possession of that thing is in the owner of the locus in quo."[3]

Since the pump in question was an unattached chattel, a presumption in favour of possession by the defendant occupier is raised, and such a presumption is rebuttable. Failing rebuttal, the defendant can assert a claim anterior to that of the plaintiff. The occupier's claim is that because of his possession of the locus in quo he has possession of things thereon whether he knows of those things or not. As one learned author has put it:

> . . . I control some parts of my land; in doing so, I am presumed — unless there be evidence to the contrary — to intend to control all of it; my possession thus comes to pervade the whole of the land, extending to things in the area of my possession that I may not even know to exist.[4]

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[1](1977), 76 D.L.R. (3d) 546 (Man. C.A.).

[2]*Ibid.*, at 547.

[3]*South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q.B. 44, at 47 (per Lord Russell).

[4]A.E.S. Tay, *Possession and the Modern Law of Finding*, (1962-4) 4 Sydney L. R. 383, at 389.

The learned judge rejected the notion that there was any prior control in the defendant because he did not assert dominion and control over the pump itself.[5] It is, with deference, suggested that the occupier's claim does not rest on an assertion of control of the chattel, which would require knowledge of the pump, but rather it rests on control of the land. The intention is to control the land and indirectly the things on it whether known to him or not.

In canvassing a number of well-known authorities in support of his conclusions, O'Sullivan J. quoted from *Armory* v. *Delamirie*[6] where it was said:

> That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.[7]

The learned judge went on to say:

> If that proposition is understood as intended to cover the case, not of a mere finder but of a finder who has taken a chattel into his possession I think it expresses in a nutshell the law applicable to the facts of the case before us.[8]

With respect it is submitted that neither the facts, nor the reasoning, in *Armory* v. *Delamirie* throw light on the present controversy.

In *Armory* v. *Delamirie* a chimney sweep who had found a jewelled ring took it to a jeweller to have it valued; the jeweller's apprentice who received the ring for this purpose removed the jewel and refused to return it. In finding for the chimney sweep the Court recognized the rights of a possessor against anyone except a previous possessor.

The question in *Kowal* v. *Ellis* is whether the defendant's right to possession precedes any claim by the plaintiff.

To support the plaintiff's claim further, O'Sullivan J. relied on the celebrated case of *Bridges* v. *Hawksworth,*[9] where it was stated that as a general rule of law "... the finder of a lost article is entitled to it as against all parties except the real owner."[10]

There are two reasons why this proposition is inapplicable to the present case. First, unless the presumption in favour of the defendant

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[5] *Supra*, footnote 1, at 549.

[6] (1722), 93 E.R. 664.

[7] *Ibid.*

[8] *Supra*, footnote 1, at 548.

[9] (1851), 21 L.J. Q.B. 75.

[10] *Ibid.*, at 79.

is rebutted, the plaintiff is not a finder because there is no lack of *de facto* control at the moment of finding. Second, the chattel was not lost.

The learned judge acknowledged that "[t]he pump in question appears to have been cached rather than abandoned."[11] If indeed it was hidden on the defendant's property then two consequences may flow. The real owner of the chattel either still had an intention toward it and had not abandoned it, or the defendant had control over it because of his control of the land. On either analysis it is clear that the plaintiff could not have been a finder.

It is interesting that in *Bridges* v. *Hawksworth,* Patterson J., in discussing the notes found by the plaintiff on the floor of the defendant's shop said, "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. . . ."[12]

That statement implies that there is a difference between things hidden and things lost on the occupier's premises. In the former the occupier does have a responsibility; in the latter he does not. It is therefore submitted that as the pump was cached on the defendant's land he had it in his possession whether he knew of it or not.

The interesting argument in this case is whether the pump was already in the possession of the defendant because of his occupation and effective control of the land on which the pump was found. If it was, then the plaintiff is not a finder at all. Clearly, if the plaintiff was not a finder, then nor was he a bailee by finding.

It is disappointing that the Court did not approach the case as one raising the question of possession rather than dealing with the issue on the basis of rights and duties of bailees by finding.

Had the Court cut through the conceptual limitations of the earlier cases and followed the lead of Lord Russell in *South Staffordshire Water Co.* v. *Sharman,*[13] where a general conceptual framework for possession was established, its approach would have been more in line with the reasoning developed more recently.[14]

Unfortunately, two cases[15] which do attempt to place possession within a broad conceptual framework were not cited.

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[11] *Supra,* footnote 1, at 549.

[12] *Supra,* footnote 9, at 78.

[13] *Supra,* footnote 3.

[14] *I.e., Grafstein* v. *Holme & Freeman* (1958), 12 D.L.R. (2d) 727 (Ont. C.A.).

[15] *South Staffordshire Water Co.* v. *Sharman, supra,* footnote 3; *Grafstein* v. *Holme & Freeman, supra,* footnote 14.

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