

doubt as to the named defendant's insolvency.²

[7] The plaintiff similarly failed to sustain its burden necessary for recovery by a motion for summary judgment on the theory of actual fraud. The defendant grantee's counter affidavit squarely put in issue both the question of the grantor's alleged fraudulent intent and the grantee's knowledge of her alleged improper motives. The determination of the question of fraudulent intent is clearly an issue of fact which must often be inferred from surrounding circumstances. *Knower v. Cadden Clothing Co.*, 57 Conn. 202, 221-22, 17 A. 580. Where, however, the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings, summary judgment procedure is particularly inappropriate. *White Motor Co. v. United States*, 372 U.S. 253, 259, 83 S.Ct. 696, 9 L.Ed.2d 738; *United Oil Co. v. Urban Redevelopment Commission*, supra, 158 Conn. 376, 260 A.2d 596. "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised." *Poller v. Columbia Broadcasting System, Inc.* [368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458]; *Fortner Enterprises, Inc. v. United States Steel Corporation*, 394 U.S. 495, 500, 89 S.Ct. 1252, 22 L.Ed.2d 495." *United Oil Co. v. Urban Redevelopment Commission*, supra, 158 Conn. 376, 260 A.2d 603.

[8] We conclude, therefore, that, viewing the pleadings and affidavits before the trial court in a light most favorable to the defendants, there were genuine issues as to material facts which should have been resolved in a trial. Accordingly, the trial court's decision that the conveyance be set aside and declared null and void as to the plaintiff was erroneous. Since the court subsequently tried to a conclusion the issue of damages and rendered judgment there-

2. In asserting the nonexistence of any genuine issue as to the named defendant's financial condition, the plaintiff points to Daniel A. Benson, Sr.'s own admission that his only current income was "Social Security which is com-

on, and since on this appeal there has been no claim of error in that proceeding or the judgment rendered on that issue, a retrial is unnecessary on the issue of damages in the event that on a trial limited to the question of the validity of the conveyance the plaintiff prevails. See *Spencer v. Good Earth Restaurant Corporation*, 164 Conn. 194, 199-200, 319 A.2d 403.

There is error in the judgment that the conveyance be set aside and declared null and void as to the plaintiff. That portion of the judgment is set aside and the case is remanded for a trial limited to that issue.

In this opinion the other judges concurred.



176 Conn. 310

Fred S. FAVORITE et al.

v.

Louis MILLER.

Supreme Court of Connecticut.

Argued Oct. 18, 1978.

Decided Dec. 12, 1978.

Property owners brought suit for an injunction ordering defendant to return to them a certain fragment of a valuable statute of King George III found by defendant on plaintiffs' property. The Fairfield County Superior Court, Testo, J., entered judgment for plaintiffs, and defendant appealed. The Supreme Court, Bogdanski, J., held that where defendant admittedly entered plaintiffs' property with the belief that a fragment of the statue might be located on the property and with the intent of remov-

bined with railroad retirement under total disability," and to the grantee's statement that he was unaware of any assets held by his parents at the present time.

ing same if located, and where defendant admitted that the piece of the statue which he found was embedded in the ground ten inches below the surface and that it was necessary for him to excavate in order to take possession of his find, defendant's trespass was neither technical nor trivial, and the fact that the property found was embedded in the earth and that defendant was a trespasser was sufficient to defeat any claim he might otherwise have had as a finder.

No error.

1. Abandoned and Lost Property ⇌1

"Lost property" has traditionally been defined as involving an involuntary parting, i. e., where there is no intent on the part of the loser to part with ownership of the property; "abandonment," in turn, has been defined as the voluntary relinquishment of ownership of property without reference to any particular person or purpose.

See publication Words and Phrases for other judicial constructions and definitions.

2. Abandoned and Lost Property ⇌1

"Mislaid property" is defined as that which is intentionally placed by the owner where he can obtain custody of it, but afterwards forgotten.

See publication Words and Phrases for other judicial constructions and definitions.

3. Abandoned and Lost Property ⇌2

Classification of property as "lost," "abandoned," or "mislaid" requires that court determine the intent or mental state of the unknown party who at some time in the past parted with the ownership or control of the property.

4. Abandoned and Lost Property ⇌4

In action by property owners for an injunction ordering defendant to return to plaintiffs a certain fragment of valuable statue of King George III found by defendant on plaintiffs' property, any conclusion as to the mental state of persons engaged in events which occurred over 200 years ago would be of a conjectural nature and as

such did not furnish an adequate basis for determining rights of twentieth century claimants to the statue.

5. Trespass ⇌23

Even assuming that historical research alone was the motive of defendant in entering upon plaintiffs' property and removing a statutory fragment found thereon, such motivation would not justify defendant's entering upon the property of another without permission.

6. Abandoned and Lost Property ⇌10

Where defendant admittedly entered plaintiffs' property with the belief that a fragment of the King George III statue might be located on the property and with the intent of removing same if located, and where defendant admitted that the piece of the statue which he found was embedded in the ground ten inches below the surface and that it was necessary for him to excavate in order to take possession of his find, defendant's trespass was neither technical nor trivial, and the fact that the property found was embedded in the earth and that defendant was a trespasser was sufficient to defeat any claim he might otherwise have had as a finder.

7. Appeal and Error ⇌854(2)

Where the trial court reaches a correct decision but on mistaken grounds, its action will be sustained on appeal if proper grounds exist to support it.

Harry M. Lessin, Norwalk, with whom, on the brief, was Abraham D. Slavitt, Norwalk, for appellant (defendant).

Walter Marcus, Norwalk, with whom, on the brief, were Andrew G. Brucker, Norwalk, Stephen N. Schaffer and Richard S. Weinstein, Ridgefield, for appellees (plaintiffs).

Before COTTER, C. J., and LOISELLE, BOGDANSKI, LONGO and PETERS, JJ.

BOGDANSKI, Associate Justice.

On July 9, 1776, a band of patriots, hearing news of the Declaration of Independ-

ence, toppled the equestrian statue of King George III, which was located in Bowling Green Park in lower Manhattan, New York. The statue, of gilded lead, was then hacked apart and the pieces ferried over Long Island Sound and loaded onto wagons at Norwalk, Connecticut, to be hauled some fifty miles northward to Oliver Wolcott's bullet-molding foundry in Litchfield, there to be cast into bullets. On the journey to Litchfield, the wagoners halted at Wilton, Connecticut, and while the patriots were imbibing, the loyalists managed to steal back pieces of the statue. The wagonload of the pieces lifted by the Tories was scattered about in the area of the Davis Swamp in Wilton and fragments of the statue have continued to turn up in that area since that time.¹

Although the above events have been dramatized in the intervening years, the unquestioned historical facts are: (1) the destruction of the statue; (2) cartage of the pieces to the Wolcott Foundry; (3) the pause at Wilton where part of the load was scattered over the Wilton area by loyalists; and (4) repeated discoveries of fragments over the last century.

In 1972, the defendant, Louis Miller, determined that a part of the statue might be located within property owned by the plaintiffs. On October 16 he entered the area of the Davis Swamp owned by the plaintiffs although he knew it to be private property. With the aid of a metal detector, he discovered a statuary fragment fifteen inches square and weighing twenty pounds which was embedded ten inches below the soil. He dug up this fragment and removed it from the plaintiffs' property. The plaintiffs did not learn that a piece of the statue of King George III had been found on their property until they read about it in the newspaper, long after it had been removed.

In due course, the piece of the statue made its way back to New York City, where the defendant agreed to sell it to the

Museum of the City of New York for \$5500. The museum continues to hold it pending resolution of this controversy.

In March of 1973, the plaintiffs instituted this action to have the fragment returned to them and the case was submitted to the court on a stipulation of facts. The trial court found the issues for the plaintiffs, from which judgment the defendant appealed to this court. The sole issue presented on appeal is whether the claim of the defendant, as finder, is superior to that of the plaintiffs, as owners of the land upon which the historic fragment was discovered.

Traditionally, when questions have arisen concerning the rights of the finder as against the person upon whose land the property was found, the resolution has turned upon the characterization given the property. Typically, if the property was found to be "lost" or "abandoned," the finder would prevail, whereas if the property was characterized as "mislaid," the owner or occupier of the land would prevail.

[1, 2] Lost property has traditionally been defined as involving an involuntary parting, i. e., where there is no intent on the part of the loser to part with the ownership of the property. *Foster v. Fidelity Safe Deposit Co.*, 264 Mo. 89, 174 S.W. 376 (1915); *Kuykendall v. Fisher*, 61 W.Va. 87, 56 S.E. 48 (1906); 1 Am.Jur.2d 4, Abandoned, Lost, and Unclaimed Property, § 2; annot., 170 A.L.R. 706. Abandonment, in turn, has been defined as the voluntary relinquishment of ownership of property without reference to any particular person or purpose; *Ellis v. Brown*, 177 F.2d 677 (6th Cir. 1949); *Jackson v. Steinberg*, 186 Or. 129, 200 P.2d 376 (1948), rehearing denied, 186 Or. 129, 205 P.2d 562 (1949); annot., 170 A.L.R. 708; i. e., a "throwing away" of the property concerned; *Foulke v. New York Consolidated R. Co.*, 228 N.Y. 269, 273, 127 N.E. 237 (1920); while mislaid property is defined as

Scribner's 1899); Andrist, "Alas, Poor George, Where Is Your Head?" *Smithsonian*, September, 1974, and in numerous books familiar to students of American history.

1. The fascinating story of the journey which these pieces of lead took following the revolution is fully narrated in the *New York Times* of February 4, 1973; *Nooks and Corners of Old New York* (American Heritage series, Charles

that which is intentionally placed by the owner where he can obtain custody of it, but afterwards forgotten. *Foster v. Fidelity Safe Deposit Co.*, supra; *Loucks v. Gallogly*, 1 Misc. 22, 23 N.Y.S. 126 (1892); annot., 9 A.L.R. 1388, 1390.

[3] It should be noted that the classification of property as "lost," "abandoned," or "misaid" requires that a court determine the intent or mental state of the unknown party who at some time in the past parted with the ownership or control of the property.

The trial court in this case applied the traditional approach and ruled in favor of the landowners on the ground that the piece of the statue found by Miller was "misaid." The factual basis for that conclusion is set out in the finding, where the court found that "the loyalists did not wish to have the pieces [in their possession] during the turmoil surrounding the Revolutionary War and hid them in a place where they could resort to them [after the war], but forgot where they put them."

[4] The defendant contends that the finding was made without evidence and that the court's conclusion "is legally impossible now after 200 years with no living claimants to the fragment and the secret of its burial having died with them." While we cannot agree that the court's conclusion was legally impossible, we do agree that any conclusion as to the mental state of persons engaged in events which occurred over two hundred years ago would be of a conjectural nature and as such does not furnish an adequate basis for determining rights of twentieth century claimants.

The defendant argues further that his rights in the statue are superior to those of anyone except the true owner (i. e., the British government). He presses this claim on the ground that the law has traditionally favored the finder as against all but the true owner, and that because his efforts brought the statue to light, he should be allowed to reap the benefits of his discovery. In his brief, he asserts: "As with archeologists forever probing and unearthing

the past, to guide man for the betterment of those to follow, explorers like Miller deserve encouragement, and reward, in their selfless pursuit of the hidden, the unknown."

There are, however, some difficulties with the defendant's position. The first concerns the defendant's characterization of himself as a selfless seeker after knowledge. The facts in the record do not support such a conclusion. The defendant admitted that he was in the business of selling metal detectors and that he has used his success in finding the statue as advertising to boost his sales of such metal detectors, and that the advertising has been financially rewarding. Further, there is the fact that he signed a contract with the City Museum of New York for the sale of the statuary piece and that he stands to profit thereby.

[5] Moreover, even if we assume his motive to be that of historical research alone, that fact will not justify his entering upon the property of another without permission. It is unquestioned that in today's world even archeologists must obtain permission from owners of property and the government of the country involved before they can conduct their explorations. Similarly, mountaineers must apply for permits, sometimes years in advance of their proposed expeditions. On a more familiar level, backpackers and hikers must often obtain permits before being allowed access to certain of our national parks and forests, even though that land is public and not private. Similarly, hunters and fishermen wishing to enter upon private property must first obtain the permission of the owner before they embark upon their respective pursuits.

Although few cases are to be found in this area of the law, one line of cases which have dealt with this issue has held that except where the trespass is trivial or merely technical, the fact that the finder is trespassing is sufficient to deprive him of his normal preference over the owner of the place where the property was found. *Barker v. Bates*, 30 Mass. (13 Pick.) 255, 23 Am.Dec. 678 (1832); *Brown*, Personal Prop-

erty (2d Ed.) § 12, p. 24, n.10; *Hibbert v. McKiernan*, 2 K.B. 142 (1948). The basis for the rule is that a wrongdoer should not be allowed to profit by his wrongdoing. Note, 21 Minn.L.Rev. 191 (1937); Morton, "Public Policy and the Finders Cases," 1 Wyo.L.J. 101, 105 (1947). Another line of cases holds that property, other than treasure trove,² which is found embedded in the earth is the property of the owner of the locus in quo. *Allred v. Biegel*, 240 Mo.App. 818, 219 S.W.2d 665 (1949) (prehistoric Indian canoe); *Ferguson v. Ray*, 44 Or. 557, 77 P. 600 (1904); *Schley v. Couch*, 155 Tex. 195, 284 S.W.2d 333 (1955); *South Staffordshire Water Co. v. Sharman*, 2 Q.B. 44 (1896); *Elwes v. Brigg Gas Co.*, 33 Ch. 562 (1886) (prehistoric boat); 1 Am.Jur.2d 20, Abandoned, Lost, and Unclaimed Property, § 21; 1 Am.Jur.2d 6, op. cit., § 4; annot., 170 A.L.R. 708; Brown, Personal Property (2d Ed.) § 12, pp. 26, 27. The presumption in such cases is that possession of the article found is in the owner of the land and that the finder acquires no rights to the article found. *Ferguson v. Ray*, supra; *Burdick v. Chesebrough*, 94 App.Div. 532, 88 N.Y.S. 13 (1904); *Groover v. Tippins*, 51 Ga.App. 47, 179 S.E. 634 (1935) (dictum).

The defendant, by his own admission, knew that he was trespassing when he entered upon the property of the plaintiffs. He admitted that he was told by Gertrude Merwyn, the librarian of the Wilton Historical Society, before he went into the Davis Swamp area, that the land was privately owned and that Mrs. Merwyn recommended that he call the owners, whom she named, and obtain permission before he began his explorations. He also admitted that when he later told Mrs. Merwyn about his discovery, she again suggested that he contact the owners of the property, but that he failed to do so.

2. Treasure trove has traditionally been strictly and narrowly defined as "any gold or silver in coin, plate, or bullion found concealed in the earth or in a house or other private place." 1 Am.Jur.2d 6, Abandoned, Lost, and Unclaimed Property, § 4. This strict definition is well established in American law. *Ferguson v. Ray*, 44 Or. 557, 77 P. 600 (1904); *Danielson v.*

In the stipulation of facts submitted to the court, the defendant admitted entering the Davis Swamp property "with the belief that part of the 'King George Statue' . . . might be located within said property and with the intention of removing [the] same if located." The defendant has also admitted that the piece of the statue which he found was embedded in the ground ten inches below the surface and that it was necessary for him to excavate in order to take possession of his find.

[6] In light of those undisputed facts the defendant's trespass was neither technical nor trivial. We conclude that the fact that the property found was embedded in the earth and the fact that the defendant was a trespasser are sufficient to defeat any claim to the property which the defendant might otherwise have had as a finder.

[7] Where the trial court reaches a correct decision but on mistaken grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. *Morris v. Costa*, 174 Conn. 592, 392 A.2d 468; *DiMaggio v. Cannon*, 165 Conn. 19, 24, 327 A.2d 561. The present case falls within the ambit of that principle of law and we affirm the decision of the court below.

There is no error.

In this opinion the other Judges concurred.



Roberts, 44 Or. 108, 74 P. 913 (1904) (gold coin); *Zech v. Accola*, 253 Wis. 80, 33 N.W.2d 232 (1948) (paper certificates); 1 Am.Jur.2d 6, op. cit., § 4; annot., 170 A.L.R. 707. Since the fragment of the statue recovered by the defendant was of gilded lead, he makes no claim that the fragment constituted treasure trove.