

Charles BAKER, Plaintiff-Appellant,

v.

**CITY OF WEST CARROLLTON,
Defendant-Appellee.**

No. 9904.

86-LW-1839 (2nd)

**Court of Appeals of Ohio, Second District,
Montgomery**

August 7, 1986

Don A. Little, Dayton, for plaintiff-appellant.

Patrick G. Carney, West Carrollton, for
defendant-appellee.

OPINION

WILSON, Judge.

The plaintiff, Charles Baker, is a police officer employee of the defendant, City of West Carrollton. While on patrol at approximately 4:00 a.m. on March 29, 1984, Officer Baker discovered a large number of gold and silver coins scattered on or about a West Carrollton public street. The plaintiff immediately notified the police department of his discovery. Thereafter the plaintiff and several other on duty city employees picked up 6,871 gold and silver coins which were placed in the property room of the defendant's police department.

On January 11, 1985, the plaintiff filed a complaint seeking to enforce his claim to the coins. In its answer and counterclaim the city contends that no valid claim has been made to the coins and that the coins should be the defendant's property.

On May 20, 1985, the city filed a motion for summary judgment supported by affidavits which established many of the material facts not in dispute. The plaintiff in his opposing affidavit stated that he was the sole person who found the coins; otherwise, the material facts set forth above are not in dispute.

On April 16, 1986, the trial court filed an entry finding the defendant's motion to be well taken and ordered defendant's counsel to prepare and submit a judgment entry; however, no final order was filed in this case.

On May 15, 1986, a notice of appeal was filed from the entry of April 16, 1986. There is one assignment of error:

THE TRIAL COURT COMMITTED PREJUDICIAL

ERROR IN GRANTING THE DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT WHERE THE UNCONTROVERTED EVIDENCE ESTABLISHED THAT THE PLAINTIFF-APPELLANT, AS THE LAWFUL FINDER OF THE LOST OR ABANDONED COINS WHICH HE DELIVERED TO AND WHICH WERE HELD BY THE DEFENDANT-APPELLEE, HAD A SUPERIOR CLAIM AGAINST ALL EXCEPT THE TRUE OWNER THEREOF, THUS ENTITLING HIM TO THEIR RETURN UNDER BOTH R.C. 2933.41 AND THE COMMON LAW.

For the purposes of the summary judgment motion it has been established that under the common law the coins are either "abandoned property" or "lost property" and not "mislaid property". *Ray v. Flower Hospital* (1981), 1 Ohio App.3d 127. *Toledo Trust Co. v. Simmons* (1935), 52 Ohio App. 373. 23 A.L.R. 4th 1025.

A finder who takes possession of "abandoned property" acquires absolute title at common law. "A finder of a lost article, although he does not by such finding acquire an absolute property or ownership, has a prior claim thereto as against everyone except the actual owner. This is the common law rule which applies in Ohio, since there is no Ohio statute specifically dealing with the rights of owners and finders of treasure trove. This rule is practically absolute and is not affected by special circumstances of the character of the thing found, the place of finding, or the relation of the finder to the third person." 1 Ohio Jurisprudence 3d (1977) 25, Abandoned Property, Section 15. "and this is the law even though the finder is an employee of the owner or proprietor of the premises wherein or wherever the property is found." 1 Ohio Jurisprudence 3d (1977) 27, Abandoned Property, Section 17.

At common law a finder who takes possession of lost property has a duty to protect the property; to seek the true owner, and to return the property to the true owner on demand. "The state had no right to found property as against finder." *Campbell v. Cochran* (1980), Del.Supr., 416 A.2d 208.

Ohio's criminal code includes R.C. 2933.41, "Disposition of property held by law enforcement agency." Subsection (A) of this section is:

(A) Property that has been lost, abandoned, stolen, or lawfully seized or forfeited, and that is in the custody of a law enforcement agency, shall be safely kept pending the time it is no longer needed as evidence, and shall be disposed of pursuant to this section.

The evidentiary materials in this case established the fact that the lost or abandoned coins are in the custody of the defendant's law enforcement agency. For

the purposes of the motion we are required to view the coins to be either not stolen or that there is a material fact in dispute on this possibility. The evidentiary materials did not speak to this issue.

Subsection B of R.C. 2933.41 provides in part as follows:

(B) *The law enforcement agency shall make a reasonable effort to locate the persons entitled to possession of property in its custody, and to notify them when and where it may be claimed.* (Emphasis added).

Subsection (C) provides that a person may lose his right to possession if the property was used to commit a non-traffic offense or if a court determines that the property should be forfeited because it is unlawful for him to acquire or possess the property.

Subsection (D) provides that "Unclaimed or forfeited property in the custody of a law enforcement agency, shall be disposed of" by court order. Subsection (7) would require "Unclaimed or forfeited" coins to be either sold at public auction or disposed of in another manner that the court considers proper. Ultimately the proceeds from "unclaimed" disposed of coins would be placed in West Carrollton's general fund by virtue of the provisions of R.C. 2933.41(E).

We have in effect held that a finder of lost property which is unclaimed by the true owner is a person "entitled to possession of property" under R.C. 2933.41(B). *Rempe v. City of Tipp City* (Mar. 16, 1979), Miami App. No. 78CA44, unreported. In this case Rempe found tools which he thought were stolen. He turned the tools over to the Tipp City Police who were unable to find the true owner of the tools.

The trial court found in favor of Rempe's claim for the tools and we affirmed applying common law principles. We further said:

"Under the evidence, the title of Rempe, however shaky and uncertain, was superior to that of Tipp City, and as a matter of public policy, any adherence to the comprehensive view of the appellant would not only discourage the finders of lost or misplaced property from attempting to discover rightful owners, but it would also hamper the police in the investigation of crime."

West Carrollton also contends that since Charles Baker is a police officer he should not receive a reward for performing his duty. We agree with the appellee that an offer of a "reward" which is accepted by a police officer by performance of his duty is a contract against public policy. 18 Ohio Jurisprudence 3d 346, Contracts, Section 403. However, we fail to see the "reward" analogy to the facts here. Baker's primary duty was to the true owner of the coins. We fail to see how R.C. 2933.41 alters this common law principle.

It is our view that the appellant's assignment of error should be sustained; however, since we lack jurisdiction we will dismiss the appeal and request the trial court to reconsider its decision of April 16, 1986.

KERNS and WOLFF, JJ., concur.