Treasure Trove and Title to Discovered Antiquities

Norman E. Palmer*

1 Introduction

Few doctrines of English law have attracted greater disquiet than that of treasure trove. It is an archaic concept, rife with anomalies and unanswerable questions. It was evolved for a different purpose from that which it now serves, and it serves its present purpose dismally. And yet it is the primary modern vehicle by which terrestrial antiquarian finds are compulsorily acquired by the nation.[1]

Modern critics have been astute to recount its shortcomings. In 1988, Finlay CJ of the Supreme Court of Ireland called it '...an outmoded remnant.'[2] In 1982 Lord Abinger CBE, moving the second reading of his Antiquities Bill in the House of Lords, described it as an instrument of 'almost pitiable inadequacy for archaeological preservation', comparing it unfavourably to legal provision elsewhere.[3] In the same year, Lord Denning MR emphasised the desirability of reforming the law along the lines of an earlier version of Lord Abinger's Bill, presented in 1979.[4] In 1984 the Law Society, and in 1986 the Surrey Archaeological Society, felt sufficiently concerned to request the Law Commission to examine the law with a view to reform.[5] In response, the Law Commission listed no fewer than eight grounds on which the doctrine gave cause for concern.[6] These included the rule that to qualify as treasure trove an object must consist substantially of gold or silver, the method by which objects are identified as treasure trove, the machinery by which finders of treasure trove are rewarded, the fact that rewards are paid only to finders and the exclusion of objects lost or abandoned from the realm of treasure trove.[7]

The reason for these deficiencies is readily discoverable. Treasure trove represents an awkward adaptation of old doctrine for modern objectives. The point was forcefully made by the editor of the Juridical Review in 1903:

> 'The truth is that the object which the law of treasure trove is now invoked to aid is diametrically opposed to the object which

* Barrister, Rowe and Maw Professor of Commercial Law, University College London.

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

it was originally devised to subserve. Its original intention was to secure to the Crown a not inconsiderable source of income; it is now invoked, on the contrary, to ensure the preservation of objects of antiquarian value for the public benefit'.[8]

The idiosyncrasies of treasure trove would be less disquieting were the doctrine not entrusted with so important a function. But the growth of the metal detector industry, and the corresponding rise in both amateur and commercial prospecting, have caused a vast proliferation of finds.[9] They have precipitated tensions among landowners, finders, archaeologists, museums and government, and have mercilessly exposed the defects of the present system. Modern finds often command substantial values: the Middleham Jewel,[10] the Monkton Deverill torc,[11] the Snettisham 'F' hoard.[12] And yet the allocation of title to such finds still depends on an uneasy alliance between a limb of the Royal Prerogative (possibly dating from the time of Edward the Confessor (1043–1066) and the civil law of finders (a body of law of itself described as unsatisfactory by the Law Reform Committee in 1971,[13] a criticism endorsed by Auld J in *R* v *Hancock*).[14] Only in Ireland can the common law be said to be less satisfactory, and that is through a constitutional accident.[15] The subject cries aloud for reform.

2 The International Dimension of Treasure Trove Claims

The characterisation of objects as treasure trove has more than local significance. It can have a crucial impact on the effectiveness of cross-border transactions. Where, for example, buried artefacts are excavated and sold outside England, their identity as treasure trove can materially affect both the acquirer's title and the original owner's ability to retrieve them. Of course, where the original place of finding is unknown or the provenance of the find has been destroyed during excavation, it may be difficult in any event to establish that an object is treasure trove. As we shall see[16] the requirement of *animus recuperandi* (an ingredient in the characterisation of goods as treasure trove) can be vastly harder to establish where a hoard has been removed unscientifically from its resting place and the circumstances of its discovery are obliterated. Even so, the advantage which treasure trove possesses over the ordinary title to discovered objects asserted by landowners (or finders) is that the title which it confers is independent of any specific locus. Treasure trove is Crown property irrespective of the place in which it is found.[17] In the absence, therefore, of some overseas disposition which is capable of extinguishing pre-existing title under the law of the country where the goods are situated at the time,[18] the Crown's retrieval of its property may be a relatively simple matter. Where,

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

on the other hand, discovered antiquities are demonstrably not treasure trove (as where they are made of bronze rather than of gold or silver) a land-owner who seeks to recover them from an overseas buyer faces the immediate difficulty of proving that they came from his land. Upon such proof his assertion of a prior possessory title depends.[19] No modern case better demonstrates the formidable challenges confronting a land-owner in this position than that of the Roman bronzes allegedly abstracted from land in Suffolk owned and farmed by Mr John Browning.[20]

3 Proprietary Effect of Characterisation as Treasure Trove

Treasure trove belongs to the Crown.[21] Objects which satisfy the legal definition of treasure trove are the property of the Crown or its franchisee.[22] To remove treasure trove with the intention of permanently depriving the Crown or its franchisee of it constitutes the crime of theft and presumably (although there is no authority on the point) the tort of conversion.[23] It seems that conversion may also be committed by a bona fide third party who acquires treasure trove from the finder or from an intermediate party, unless the circumstances of the acquisition are an exception to the rule nemo dat quod non habet.[24] In an action for conversion the Crown is likely to be awarded an order for the specific restitution of the object under the Torts (Interference with Goods) Act 1977 ss.3 or 4, rather than damages. A party who is liable in conversion in this manner can proceed against his immediate vendor for the return of the price under s.12(1) Sale of Goods Act 1979, or for damages under s.12(2).[25]

4 Ingredients of Treasure Trove

Three cardinal elements are stressed by ancient and modern authority. First, the object must be of gold or silver. Second, it must have been concealed by someone who intended to return for it subsequently. Third, the original owner (or his successors in title) must be unknown.[26]

Thus, Coke says that:

> 'when any gold or silver, in coin, plate or bullion, hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property, it doth belong to the King, or to some lord or other by the King's grant, or prescription. The reason whereof it belongeth to the King, is a rule of the common law, That such goods whereof no man can claim property, belong to the King...'[27]

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

Similarly, according to Chitty:

> 'Treasure trove, is where any gold or silver in coin, plate, or bullion is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the King or his grantee, having the franchise of treasure trove; but if he that laid it be known or afterwards discovered, the owner and not the King is entitled to it; this prerogative right only applying in the absence of an owner to claim the property. If the owner, instead of hiding the treasure, casually lost it, or purposely parted with it, in such a manner that it is evident he intended to abandon the property altogether, and did not purpose to resume it on another occasion, as if he threw it on the ground, or other public place, or in the sea, the first finder is entitled to the property, as against every one but the owner, and the King's prerogative does not in this respect obtain. So that it is the hiding, and not the abandonment, of the property that entitles the King to it.'[28]

The first and second requirements exclude from national ownership a wide spectrum of antiquities. They confer almost unfettered powers of disposal on the land-owner or finder, as the case may be.

4.1 Gold and Silver

The 'gold and silver' rule was affirmed by the Court of Appeal in *AG of the Duchy of Lancaster v G E Overton (Farms) Ltd.*[29] There, a hoard of almost 8,000 antoniniani (Roman coins of the third century AD) were held not to qualify as treasure trove because they did not have a 'substantial' silver content. The find therefore belonged not to the Crown in right of the Duchy of Lancaster but to the land-owners. (The finder, a trespasser, was convicted of theft).[30] Lord Denning MR observed[31] that to satisfy this requirement a silver content of 50% or more was needed; the current content ranged from below 1% to a maximum of around 18%.

The disadvantages of the rule are obvious. Treasure trove does not include base metal objects,[32] objects of marginal or subordinate precious metal content, precious stones, statuary, glass, ceramics, amber, bone, ivory, wood, shell or stone artifacts, textiles, or human[33] or animal[34] remains.[35] Such objects fall to be allocated according to the ordinary civil law of finders, set out later in this paper. English law compares unfavourably with that of Scotland, where other metallic objects (for example, a bronze axe head) are treasure trove.[36]

Not the least unsatisfactory aspect of the rule is the way in which it can lead to a division of finds. A compound hoard containing objects of differential gold or silver constituency may fall to be

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

distributed among several claimants. The Crown will receive those which are substantially gold or silver, while objects of marginal or no precious metal content will go to the land-owner or finder. The result is to diminish the historical value of the collection as a whole.[37] A vivid example of this divided dominion is the Snettisham 'F' hoard, found by Mr Cecil Hodder while prospecting with a metal detector in a field at the Ken Hill Estate at Snettisham in Norfolk. The point is well made by Longworth:[38]

> What then of Snettisham? Here the torques, bracelets and ingots analysed by the British Museum's Department of Scientific research ranged across a spectrum of values from less than 1% to 97% gold, and from 2% to 98% silver. The jury on this occasion took the perfectly defensible view that any object which (collectively) contained 50% of gold and/or silver placed the object as potential treasure trove. Items with less were deemed to be excluded. The effect of this decision was to divide the scrap metal hoard (Hoard F) for example roughly 2:1 treasure trove to non-treasure trove items. It seems highly doubtful, however, that the Iron Age metal smith would have seen such a distinction as meaningful. To them, all these metals would have represented malleable wealth.
>
> For the archaeologist the type of arbitrary division imposed by the treasure trove system is not simply unhelpful but can present a very real threat. The value of any find is greatly enhanced if *all* the evidence can be assembled and preserved together for study and future re-analysis. The non-treasure trove items, however, will almost always belong to the land-owner and there is no compulsion to present or even sell such items to the institution which has acquired the treasure trove. We are fortunate, that in the vast majority of cases landowners have proved public spirited and have allowed the finds to be re-united but the outcome at present depends entirely on goodwill.
>
> A helpful reform would be to seek a definition of 'gold' and 'silver' which could be simply and rigorously applied. To have maximum benefit this might seek to include all objects to which gold or silver had been deliberately added but would need to exclude small values which could occur naturally. A content of 5% or more of either gold or silver might serve as a general definition, though coinage might need its own lower limit of 0.5%.[39]

4.2. Concealment with the Intention of Retrieval

Metallic constituency can at least be readily established. The same cannot be said of the second requirement, concealment animo recuperandi. And yet 'property is only capable of being treasure trove

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

if its last owner left it, intending to recover it'.[40] The evidential difficulties are especially pronounced where the object was covertly removed some time before the treasure trove inquest, impairing its provenance. In *R* v *Hancock*[41] (a prosecution for theft of treasure trove) the Crown failed to establish on the criminal standard of proof that Celtic silver coins taken from a site at Wanborough were treasure trove; the removal was clandestine, and evidence as to the position of the coins at the time of their discovery was deficient. But the problem exists even where the circumstances of the find are contemporaneously recorded. In *AG* v *Trustees of the British Museum*[42] Farwell J dismissed as fanciful a theory that Celtic artifacts discovered by ploughmen in a field adjoining Lough Foyle were originally cast into the sea as votive offerings to an Irish sea god and restored to dry land by natural forces when the water retreated. In his view, the fact that they were found close together some eighteen inches below the land surface, that certain chains were concealed inside a hollow collar, and that some but not all of the objects were mutilated showed a deliberate deposit and a clear animus recuperandi. This conclusion was fortified by evidence as to the civil condition of Ireland at the material time. Farwell J expressed the matter in terms of a presumption: the Crown 'must first establish a prima facie case, but when they have done so the defendants must defeat that title by producing a better title'.[43] Little (if any) reliance has been placed on such a presumption in later authority, and in *Hancock*[44] Auld J held that 'Whatever presumptions may be available in civil disputes as to treasure trove...or as to the Crown's entitlement to it..., do not apply to criminal proceedings'. At first instance in *Overton*[45] Dillon J said that (had he been wrong on the question of metallic content) he would have held that the coins were concealed animo recuperandi. Dillon J seems to have relied on the existence of a containing urn, the rural location of the find and the fact that the coins were buried below the level of an ordinary ploughshare: 'it is difficult to suppose that anyone would have placed such a large number of coins in an urn in what seems to be a rural locality rather than a town if he were not hiding them'.[46] No reference to these factors was made by the Court of Appeal,[47] which confined itself to the metal content of the hoard. As criteria for the national acquisition of antiquities they clearly leave much to be desired.[48]

The requirement of animus recuperandi (like that of gold or silver) removes a vast range of antiquarian finds from the realm of treasure trove. The rule excludes burial offerings such as the Sutton Hoo treasure, and articles deliberately abandoned or inadvertently lost by their owner.[49] A powerful example in the last category is the Middleham Jewel, evidently mislaid by its fourteenth-century owner alongside a bridle path near Middleham Castle, and thus incapable of constituting treasure trove.[50] In that case, the Jewel became the property of the finders. It was sold at auction for almost £1.4 million

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

and was only at the last moment saved from export, having since been revalued at £2.5 million.

Finally, the animus recuperandi rule probably also excludes from the category of treasure trove objects deposited or dispersed by way of sacrifice, and votive objects given to propitiate deities.[51] Time capsules (collections of objects buried in order to give a picture of contemporary life) present different problems, but again the prospect of their constituting treasure trove seems remote.[52]

5 Procedure in Cases of Suspected Treasure Trove

The tribunal of first instance is the coroner for the district in which the object was found. His obligations as regards the holding of an inquest are set out in s.30, Coroners Act 1988. The coroner's officer (usually a police officer) is empowered to take evidence on oath. Applications to review a verdict of treasure trove are rare, but one such application is currently being pursued on the question of the identity of the finder.[53]

A finder who suspects that an object may be treasure trove should deliver it to the appropriate coroner, either directly or by way of delivery to the police or the British Museum, as soon as possible after its discovery. There is no statute positively compelling such delivery, but failure to report a find may result in a prosecution for theft or (presumably) an action for conversion if the find turns out to be treasure trove. Moreover, in *Parker* v *British Airways Board*[54] Donaldson LJ remarked obiter that every finder owes a common law duty to take reasonable steps to seek out the owner and to reunite him with his chattel.[55]

As soon as a find which may constitute treasure trove is reported to him, the coroner must summon a jury and hold an inquest to determine the character of the object as treasure trove and the identity of the finder. There is no legal obligation to consult the British Museum at this stage and some coroners do not. Such consultation is considered helpful, however, because it enables the Museum to give an expert opinion as to the character and significance of the find. That opinion may include a research laboratory analysis of the gold or silver content and a conclusion as to whether, on the available evidence, the object was lost, abandoned or deposited animo recuperandi. The Museum may also be able to provide first aid for objects in a parlous condition. A member of the Museum staff may attend the inquest and speak to its evidence, but only at the invitation of the coroner. The British Museum generally lacks the resources to mount an investigation of the site but will try to ensure that, through the coroner, the local museum is persuaded to do so.

If the object is found to be treasure trove, it will be delivered either to the British Museum or to the National Museum of Wales,

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

depending on the location of the find. The Museum will make a valuation and submit that valuation to the Treasure Trove Reviewing Committee.[56] This is an independent body, appointed by the Treasury in 1977 with the function of deciding whether the Museum's valuation is correct. If confirmed, the Museum's valuation will form the basis of any reward paid to the finder. The reward is paid either by the British Museum, or by any other museum which wishes to acquire the object, from its existing funds.[57] It is understood that neither in this respect, nor in relation to its consultative services, does the Museum receive specific additional funding for cases of treasure trove.[58]

Special care is enjoined upon coroners when the inquest has declared the find not to be treasure trove. As the current Home Office Circular[59] points out, the true proprietor may be someone other than the finder; therefore, 'as it is not within the coroner's power to determine ownership, it may be necessary to retain [*the object*] until the disputed ownership is resolved.'

A coroner's inquest is not a necessary preliminary to a conviction for theft of treasure trove.[60] The reason, according to Auld J in *R* v *Hancock*, is that theft can be committed whenever goods are in the actual or constructive possession of the owner at the time of the appropriation. Moreover, any other rule would be absurd because the verdict of a coroner's jury on a question of treasure trove does not bind any other court in which the question might arise. The point is not settled, but it seems that an analogous principle should apply if the finder were sued by the Crown in conversion. Provided that the claimant can establish possession or the immediate right to possess at the time of the alleged conversion, the claim should succeed. An immediate right of possession should be capable of substantiation by showing, on a balance of probabilities, that the object was treasure trove, irrespective of an inquest verdict to that effect.

6 Rewards

If the British Museum or any other museum wishes to retain the object, that institution will pay a reward fixed in accordance with the foregoing procedure. The reward is paid only to the finder and not to the land-owner or occupier.[61] The policy of this rule is to encourage the prompt and proper disclosure of finds:[62] if the finder cannot expect to receive a reward representing the full market value of the find, he may be tempted to dispose of it more profitably elsewhere. The finder is clearly the preferable recipient under this policy because he alone has the ability to conceal the find.[63]

Rewards are ex gratia; the finder has no legal entitlement to a reward. He also has no legal right to the return of a treasure trove

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

object which no museum wishes to retain, although in practice such finds are returned to the finder.[64]

If the coroner decides that more than one person was concerned in the find, the reward may be divided.[65] But difficulty can arise in cases of collective or syndicated finding. In a recent case at Monkton Deverill, two men with metal detectors started an excavation. One of them found a bronze palstave before lunch. The other man returned after lunch and continued the excavation, finding a gold torc. The coroner's inquest found that the object was treasure trove and that both men were finders. The normal result would be a division of the reward between them. Proceedings are currently afoot to review the verdict on this point.[66]

A reduced reward may be paid (or no reward at all) if the finder has acted improperly. Decisions on this point are taken, not by the British Museum or the Treasure Trove Reviewing Committee, but by the Chief Secretary to the Treasury. Examples are set out below.

Restricting the reward to the finder excludes other interested parties who may feel entitled to share in the proceeds of the find. Examples are the owner of the land on which the find occurred; the landlord, where the land is tenanted; anyone else with a past or present interest in the land; or the finder's employer. The sense of injustice may be particularly marked where the finder was trespassing at the time and the land-owner or other party would probably have found the object for himself in due course. A few examples of finds in East Anglia may put this problem in perspective.

In 1980 six silver Anglo-Saxon brooches, unearthed in Pentney churchyard by the sexton, Mr William King, were held at a coroner's inquest to be treasure trove.[67] Mr King was declared entitled to a reward based on the commercial value of the brooches and finally quantified at £135,000. At the time of the discovery, Mr King was working in the course of his employment (viz., digging a grave) on land belonging to the church. If the brooches had been made of any substance other than gold or silver it is highly unlikely that Mr King would have had any right to them. They would not have been treasure trove, the Crown would have had no claim, and there would have been no reward. The right of possession in the brooches would have fallen to be decided according to the general civil law of finders, by which the rights of an employer are generally superior to those of an employee who finds goods in the course of his employment,[68] and the rights of the land-owner (at least in the case of goods buried beneath the surface) are generally superior to those of a finder, whether that finder is a trespasser or not.[69] Mr King was obviously not a trespasser; he behaved with complete honesty throughout and came to an amicable settlement on the division of the reward with the rector of Pentney, Rev. Wilson. Nevertheless, it seems strange that his entitlement to a reward of a £135,000 (and the correlative denial of any rights to the church) should have depended upon the relative accident of whether the goods were

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

treasure trove. To some, the position may appear unsatisfactory because the landowner or employer may have found the goods himself had the finder not deprived him of the opportunity. When vast rewards depend upon the obscurities of treasure trove and the almost negligible evidence on which inquest verdicts must be reached, the case for reform is compelling.

A more extreme and complicated case was reported to have occurred in 1980 at Stonham Aspal.[70] A dilapidated cottage, whose owner had died, was sold to a farmer at auction. Before the farmer acquired possession two passers-by, Mr and Mrs Trawford, noticed some silver coins in the garden and took them away. They returned later with a metal detector and discovered a substantial hoard of silver money, subsequently valued at over £4,000. This had obviously been concealed at some time in the thatched roof, which had begun to decay. The coins were held to be treasure trove and the Trawfords became entitled to the reward. Again, this might appear an unjust result because the finders were trespassers and the purchaser of the cottage would almost certainly have found the coins when he took possession. He was last reported to be taking legal advice, having rejected the finders' offer of a portion of the reward. But there is another party with a legitimate grievance, and that is the executor of the former owner. It could be said that his estate should also be entitled to consideration, on the ground that there was no intention to transfer property in the coins to the purchaser.

Perhaps ironically, it seems that if the coins had not been treasure trove and had had to be allocated according to the general law of finders, the farmer may have fared no better. *Moffat* v *Kazana*[71] suggests that ownership of the coins would probably not have passed from the deceased former owner's estate to the farmer under s.62 of the Law of Property Act, 1925. This is particularly so if, as seems probable, the former owner himself did not have ownership of them. The lack of ownership might not have been fatal to any claim to the goods by the farmer if he could show that he had possession. If so, that possession could prevail against a later dispossessor, and he would be entitled to recover or retain the goods. But in this case the farmer had not yet occupied the cottage and his claim to be in possession of the coins would be a highly precarious one. The position would be akin to that in *Hannah* v *Peel*[72], where a soldier billeted in a house which had been requisitioned by the War Office found a brooch in a crack in a wall of the house. He was held entitled to keep it (the true owner being unknown) because the house-owner had never occupied the house before it was requisitioned and had therefore never acquired possession of the brooch. There is, of course, a difference between *Hannah* v *Peel* and the facts of the discovery at Stonham Aspal, in that the Trawfords (unlike the soldier) were trespassers. According to *Parker*[73], an act of trespass on the part of a finder disentitles him to the find against the owner of the land on which it was found, although it is uncertain

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

whether this denial applies as against a land owner who was never in possession of the land. The dilemma, and the absence of clear legal rules, illustrate the inadequacy of the law of finders in general as well as that of treasure trove in particular.[73a]

Injustice can also occur to the non-finder when no reward is granted. The failure to grant a reward will generally be motivated by one of two reasons.[74] First, the finder may have behaved dishonestly or improperly. He may have concealed the find, or delayed reporting it for a substantial period, or even dissipated it (cases are rare: some five reported occasions from 1931 to 1981). We have a modern example of the *reduction* of a reward for misconduct in the case of Thetford hoard. There Mr Arthur Brooks, using a metal detector, discovered an important collection of Roman silver spoons and gold jewellery which had been hidden at about the time when the Romans vacated Britain. The find occurred on land belonging to Breckland District Council. Neither the Council, nor the police or the British Museum, became aware of the find until six months had elapsed and Mr Brooks declared it. During that time building work had taken place on the site, destroying the opportunity of further excavation. The find was held to be treasure trove and valued at c. £262,000, but the Treasury granted a reduced reward of £87,180. In a press release[75] the Treasury stated that the normal presumption in such a case is that no reward shall be paid, but that in this case Mr Brooks was seriously ill and subsequently died (the reward was paid to his personal representatives). The reduction in this case was no doubt justifiable as an example to other finders; but it may be questioned whether the Crown should have got the hoard for a third of its value when there was another party (the Council) with some moral claim to a share. In the Thetford case, it is believed that Mrs Brooks had signed a contract with the Council whereby the reward was to be divided equally between them. The reduction of the reward, through circumstances which were in no degree the fault of the Council, diminished its legitimate expectation in the proceeds from over £130,000 to less than £44,000. This might appear unfair in the case of a private landowner, and is arguably no more desirable when the proprietor is a public authority.

Other examples of potential injustice are not hard to imagine. Suppose, for example, that the coins in the *Overton*[76] case had contained sufficient silver to qualify as treasure trove. The finder in that case was later convicted of theft. It is unlikely that he would have received a reward and probably undesirable that he should have done so. But it seems harsh that the landowner should receive nothing in these circumstances.[77]

No occasion to grant a reward will arise where neither the British Museum nor any other museum to which it is offered wishes to retain the object. In this event, assuming that the objects have been declared treasure trove, they will be returned to the finder.[78] If he prefers, the British Museum will sell them for him at the best

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

obtainable price. A case in which objects were returned occurred in Somerset in January 1981, where the finders of gold sovereigns were told by the coroner, immediately after the verdict of treasure trove, that the British Museum did not require them and that they could therefore be retained.[79] Since treasure trove is the property of the Crown, it presumably follows that when the Crown declares its willingness to renounce its rights in treasure trove to a finder, ownership in the object is thereby conferred on the finder. Indeed, the most recent Home Office circular on the subject[80] states that the finder then has 'full liberty to do as he likes' with the object. Such a conclusion would of course conform with the policy of rewarding the finder; he is more likely to behave honestly if he can expect to receive not only whatever reward is paid but unencumbered title to the object itself when no reward is paid. Again, however, the result is to exclude third parties from participation in the fruits of the discovery, even where the finder was trespassing at the time of the find and the third party would have had an unanswerable civil claim against him had the object not been treasure trove.

There have, in the past, been criticisms of the time which it takes to pay rewards. An article in the tabloid press in 1981 instanced two cases where rewards had not been paid to the finders two years after the discovery, one of them being the case of Mr King the sexton.[81] At that time, new treasure trove finds were appearing at the rate of two per month; the current rate may be even higher. Special consideration was given to this problem by a recent interdepartmental committee, and recommendations were made.

It is open to the finder to make a special contract with the landowner (or the finder's employer) concerning the division of any reward or other proceeds of the find. This could extend to some form of co-ownership of treasure trove objects which the British Museum does not propose to retain. A clause dealing with the division of proceeds appears in a form of contract compiled and distributed by *Treasure Hunting* magazine. It provides for an agreed sharing of the proceeds of any find and is designed to be concluded prior to the commencement of any search on the proprietor's land.[82] Such contracts seem unexceptionable[83] and there is no reason in principle why they should not be legally effective.[84] The Treasury will not, however, accede to invitations to assist in enforcing them.[85]

Greater difficulty surrounds those contracts which are concluded after the find has occurred and after the finder's entitlement to a reward (or to the return of the goods) has become apparent. An informal arrangement to this effect occurred in the Pentney case, where Mr King eventually agreed to give the church £24,000. A more formal example occurred in the case of the Thetford hoard, where Mrs Brooks signed a contract awarding half of her reward to Breckland Council. Are such retrospective agreements binding on the finder? The principal difficulty concerns the requirement of consideration. The landowner has no right to the reward, so what

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

is he giving up in return for the finder's promise to give part of the reward to him? Without some contribution to the bargain he is unable to enforce it, unless, of course, the contract is under seal. There is a remote possibility that if the landowner honestly and reasonably believes he has a right to part of the reward, his surrender of that notional right will constitute consideration and enable him to enforce the contract.[86] But nowadays a belief of that kind would be hard to substantiate. A stronger argument may be that the landowner agrees to surrender his right (if any) to sue the finder in trespass in return for a share of the reward. This form of consideration might suffice even though the likely damages in trespass would be far below the value of the reward promised. But it cannot exist where there has been no trespass, as in a case like that of the Pentney find.

A second possibility lies in the landowner's bringing an action for trespass itself. But whether this will enable him to recover the value of the reward (or even a substantial part of it) seems doubtful. Trespass is a tort and damages in tort are normally compensatory; they are limited to the loss suffered.[87] A landowner who is deprived of treasure trove by the trespass of a finder arguably suffers no loss at all in relation to the find, because the goods belong to the Crown and he, as landowner, would not be entitled to a reward. If so, his damages for trespass would be limited to whatever damage had occurred to his land. The landowner would have to argue that his substantial loss consisted in the deprivation of his own opportunity to find the goods and recover the reward as finder. The law of contract has occasionally awarded damages for a loss of opportunity,[88] but whether the law of tort would be equally responsive to this form of 'expectation interest' is questionable.[89] Further difficulties of this device are those of assessing such damages, and of showing that the landowner's own opportunity was a realistic or serious one. The fact is that in many cases, without the intervention of the finder, the goods may never have been discovered at all. Again, this device cannot work where there has been no actionable wrong by the finder.

A third possibility would be to argue that, irrespective of whether he knew of their existence or would have found them himself, the landowner had *possession* of the goods prior to any possession gained by the finder and that, under the doctrine in *The Winkfield*[90], a possessor of goods who is wrongfully dispossessed of them by another can recover their full value in an action for conversion. This method would seem equally applicable whether the goods are found by a trespasser or by an employee (such as a tractor driver) working on the employer's land. In the latter case it might be reinforced by the argument that the employee's possession is that of his employer himself and that any later removal of the goods is a conversion against the employer. But the value of this device is greatly reduced by three factors: first, the evident rule that recovery

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

by the owner (as where the Crown retains treasure trove) debars any further recovery by the possessor;[91] secondly, the enactment of section 8 of the Torts (Interference with Goods) Act 1977, whereby, a defendant in proceedings for 'wrongful interference' with goods is entitled to show that anyone (viz, the Crown) other than the plaintiff (viz, the landowner) has a better right to the goods;[92] thirdly, s.7 of the same Act, which is directed towards preventing double recovery in an action for wrongful interference with goods.[93] It must now be regarded as highly improbable that a court would award an aggrieved landowner more than the nominal value of his possessory right.[94] Since the goods were not his and he stood no chance of a reward, his damages would probably be minimal.

Fourthly, the landowner may simply argue that to allow the trespassing finder to keep the reward would be to allow a man to profit from his own wrong.[95] Such an assertion suggests a novel and not, perhaps, unattractive application of the principle of unjust enrichment. But it seems unlikely that an argument based on this ground alone would succeed.

7 Protection: Criminal Law[96]

Enough has been said to demonstrate the ineffectiveness of treasure trove as a means of allocating title or of preserving objects of national importance. Regrettably, the position under criminal law is no more favourable to the proper safeguarding of valuable archaeological finds.

The common law recognised an offence of concealment of treasure trove. This was abolished by s.32(1)(a) of the Theft Act 1968. Dishonest appropriations of treasure trove now fall to be prosecuted under the law of theft. In theory, there is no reason why this assimilation into general law should not work satisfactorily. The Crown has property in treasure trove and can thus be regarded as the person to whom it 'belongs' for purposes of the Theft Act 1968 s.5(1). It follows that a person who removes and retains treasure trove can be guilty of dishonestly appropriating 'property belonging to another with the intention of permanently depriving the other of it' within the Theft Act 1968 s.1(1).

But in practice the criminal law works much less satisfactorily. The difficulty is the liminal one of identifying treasure trove when much of the available evidence has been dispersed. Appropriating treasure trove is theft, but what goods are treasure trove?

In *R* v *Hancock*[97] a collection of Celtic silver coins had been taken from a site at Wanborough. The appellant told the police that, when he unearthed them, the coins were scattered about over a wide area. He conceded, however, that this could have resulted from repeated ploughing and that they might originally have been left over a smaller area. Academic opinion was tentatively divided between a

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

deposit animo recuperandi and some form of votive offering. The trial judge directed the jury that it was unnecessary for the prosecution to prove that the coins were treasure trove; it sufficed to prove that they were capable of being found to be treasure trove, or that there was a real possibility that they might be found to be treasure trove. This was held to constitute a material misdirection and the appeal was allowed. The jury should have been directed that they could convict only if they were sure that the coins were treasure trove. Proving that the coins were deposited with the intention to retrieve them was an essential part of the prosecution case and must therefore be established according to the criminal standard of proof. The Court of Appeal left open the question whether the prosecution might alternatively have been framed in the form of a theft from the landowner, who had (even without his knowledge of the hoard) a possessory title to the coins.

This decision puts a premium on destruction. It shows that a defendant has a powerful interest in obliterating evidence of the find. The greater the muddying of the evidential waters, the greater are the defendant's prospects of an acquittal. A similar conclusion must follow where the successful concealment of a find makes it unavailable to be brought in evidence, thereby incapacitating the jury from deciding its metallic constituency. Problems of this kind may follow inevitably from the criminal nature of the proceedings, but they are hardly conducive to the protection of the past.

A number of criminal offences are created by the Ancient Monuments and Archaeological Areas Act 1979, but these do not directly affect the question of title. Section 42(1) renders it an offence to use a metal detector in a 'protected place' (as to which, see s.42(2)) without the written consent of the Secretary of State. By s.42(3) it is also an offence to remove an article discovered by means of a metal detector from a protected place, again without the consent of the Secretary of State. By s.42(5) it is an offence to contravene the terms of any consent given in accordance with the foregoing provisions.

It is believed that these provisions are less than completely effective, for two reasons. First, the scheduling of a site is not universally regarded as the most effective medium of archaeological conservation; in cases of development, this objective is sometimes achieved by the alternative route of conditions attached to planning consents. Secondly, it is not always possible to define with certainty the ambit of a scheduled monument or site or the location of an artefact within it prior to its removal. A recent consultation paper from the Department of the Environment and the Welsh Office (April 1991) proposes to expand s.42 of the 1979 Act by making it an offence to remove without consent *any* find from a scheduled site, irrespective of whether the find arose through the use of a metal detector. The same paper discloses that these bodies are also considering non-legislative measures to advise on the handling of casual archaeologi-

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

cal finds on unscheduled sites. It remains to be seen whether such proposals are acceptable, and how far they strengthen existing provision.

8 Reform Initiatives

In 1981, Lord Abinger CBE introduced in the House of Lords an Antiquities Bill which sought to reform the law of treasure trove in three principal respects: by abolishing the requirement that the object should have been hidden with view to its recovery, by extending the doctrine to objects made of any alloy containing gold and silver, and by extending it further to objects lying with or adjacent to a treasure trove object.[98] In addition, the Secretary of State would have been given the power to extend the doctrine to any object 'contained in any class of object specified by order'. The Bill sought also to impose an obligation to report treasure trove objects within forty eight hours of their being found, on pain of a fine not exceeding £500. The Bill received its second reading in the Lords in February 1982, but perished through lack of time and has not been revived.

Lord Abinger's proposals were well received. A note of reservation was, however, sounded by Lord Avon, who believed that the Bill would make 'a fundamental change in the laws of property and in citizens' rights of ownership'. Lord Avon saw the Bill as eroding the rights of landowners, because it diluted the principle that goods concealed on land belong, in the absence of the true owner, to the occupier. In a passage reminiscent of the policy dictating the finder's reward, he added:

> 'If the Bill is to secure its objective of getting more finds recorded and available for skilled investigation and display, then it needs to command the support of the people affected. We should not disguise the fact that the Bill proposes a curtailing of centuries-old rights of ownership. I am sure it is wise to acknowledge this fully and openly'.[99]

In September 1987, the Law Commission published a paper entitled Treasure Trove; Law Reform Issues. The Law Commission considered that the subject of treasure trove was so closely interrelated with other questions of private property and national acquisition that its reform could not usefully be approached in isolation. The Commission recommended the formation an interdepartmental committee, with non-Governmental representation, to consider the following issues and to formulate principles upon which the new law might be based:

(a) the definition of the class of objects to which protection is to be granted.
(b) the rights of landowners and occupiers.

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

(c) the rights of the finder and other persons interested in the objects to which protection is extended.
(d) provision for purchase or reward for the finding and handing in of objects.
(e) a simple procedure for the determination of the rights of interested parties in any purchase or reward.
(f) the extent of any duty to be placed on those who find the objects to report the find, and a procedure for doing so.
(g) whether concealment of objects found and failure to report them should be made criminal offences, thus obviating the need to charge the more serious offence of theft involving more complex and costly issues.

An inter-departmental Committee was in fact set up shortly afterwards,[100] which made the following recommendations concerning rewards,[101] but does not appear to have taken action on wider issues:

* the Home Office should draw the attention of coroners to the overall target time for handling finds and to the fact that a treasure trove inquest is only the first stage in the handling of a find.
* the British Museum, or other museums or experts consulted by coroners, should aim to submit their advice within 2 months of that advice being requested.
* the national museums should be invited to bring all finds declared treasure trove before the Treasure Trove Reviewing Committee for valuation within 3 months of the relevant inquest.
* the Committee's secretariat should liaise regularly with the national museums to ensure the most appropriate timing for meetings of the Committee. The British Museum should nominate a single focal point for that liaison.
* the British Museum should continue, and the National Museum of Wales should in future aim, to purchase treasure trove which they intend to acquire within 4 weeks of its valuation by the Treasure Trove Reviewing Committee.
* where a local authority museum intends to purchase treasure trove, it should aim to do so within 4 months of notifying that intention to the appropriate national museum. This target must, however, of course be dependent on the target for the length of time between inquest and valuation by the Treasure Trove Reviewing Committee being met in that particular case.
* in order to assist the museums to achieve that target, the Office of Arts and Libraries should consider with the Museums and Galleries Commission whether it would be appropriate to give priority in the handling of applications to its local museums acquisitions fund to applications for grants to purchase treasure trove.

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

Responses to the Department of the Environment's consultation paper on portable antiquities (issued jointly with the Welsh Office) indicated that the public interest in the knowledge represented by casual archaeological finds 'was not so great as to warrant a compulsory reporting system for finds in England and Wales'.[102]

The most recent initiative is a draft Bill sponsored by the Surrey Archaeological Society. At the time of writing, this draft Bill is expected to receive a first reading in the House of Lords in 1993. The document is still at the consultative stage and its provisions may change before it is presented.

The sponsors attempt to allay the concerns of landowners in several ways. First, the draft Bill requires every coroner who receives notification of a find to inform the occupier of the land where the object is found within fourteen days of the coroner's receipt of notification.[103] The aim of this provision is to enable occupiers to take preventative measures against a possible invasion of treasure hunters, as occurred at Wanborough. Secondly, any finder who has reasonable grounds to believe that a discovered object may be treasure within the statutory definition (and any other person who comes to know of the existence of an object which he has reason to believe to be treasure) is required to notify the coroner for the area in which the find occurred.[104] Notification must be made as soon as reasonably practicable, but in any event within four weeks of the date of the find, or within four weeks of the date on which a person comes to know of the existence of a find, as the case may be.[105] If the place of finding is unknown, notification may be made to any coroner.[106] Failure to comply with the duty to notify a find is to be a criminal offence.[107] Thirdly, the draft Bill seeks to create the further criminal offences of (i) searching for treasure on any land as a trespasser[108] and (ii) removing treasure trove from any land without lawful authority[109] other than for the purpose of delivering the object to a coroner.[110] It is suspected that the latter proviso may constitute something of a barrier to prosecutions for wrongful removal.

The principal change contemplated by the draft Bill lies, however, in the class of objects which may constitute treasure trove. The draft Bill both increases and diminishes the current grasp of the prerogative. Expansion occurs in two directions. First, treasure trove will no longer be confined to objects deposited and concealed animo recuperandi, but will extend to treasure which has been lost or abandoned, including treasure buried in a grave.[111] The draft Bill declares in this connection that the place of a find does not affect its characterisation as treasure trove,[112] and that the rights of owners of objects are to be unaffected by the foregoing extension.[113] Secondly, the rule that an object must consist substantially of gold or silver (or, presumably, must consist substantially of a combination of the two) will be abrogated by a set of provisions dealing with four specific categories of object.

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

The first category is coins and tokens.[114] Treasure trove will now extend to any coin or token having a gold or silver (or combined gold and silver) content of 0.5% or more, provided that the coin or token forms part of a connected series of objects.[115] Thus, the great preponderance of the Coleby hoard of antoniniani in the *Overton* case would qualify as treasure trove under this provision of the draft Bill.[116] Objects are deemed to form a connected series if they are either found together or are found in circumstances which may reasonably be taken to indicate that the objects were together immediately before being hidden, lost or abandoned.[117] It is immaterial for this purpose that the objects have been found by different people at different times, or that they are not all found in the same place.[118] It is also immaterial that the objects do not all comprise the same class of object.[119] These provisions clearly effect a substantial increase in the number of objects which will be treasure trove, but there is also a reduction: a single coin will no longer be treasure trove irrespective of its level of precious metal content.

The second category is plate, jewellery or any other objects not including coins or tokens. Such an object will constitute treasure trove if (i) at least 5% of its metallic content is precious metal and (ii) the object is or may reasonably be assumed to be at least one hundred and fifty years old when found.[120] Again, the abolition of the requirement of a substantial precious metal content would greatly expand the purview of treasure trove, but there is a slight complementary reduction in the shape of the 'one hundred and fifty years' requirement. Under existing law the antiquity of an object would appear immaterial to its characterisation as treasure trove.

The third category is a miscellaneous one, consisting of any class of object designated by order of the Secretary of State as one considered by him to be of historical or archaeological importance.[121] The power to extend the content of treasure trove by ministerial order is limited in two respects: it applies only to objects which, when found, are or may reasonably be assumed to be at least one hundred and fifty years old[122] and it applies only to artefacts.[123] Unworked natural objects (such as fossils or human remains) therefore fall beyond its scope. Orders made pursuant to this provision must be made by statutory instrument, and no such order shall be made unless a draft of the order has been laid before and approved by resolution of each House of Parliament.[124]

The fourth category comprises all those objects which form a connected series (in the sense defined above) if at least one object in the series is treasure.[125] Under this provision an object may constitute treasure trove without any precious metal content, so long as it is found as part of a series of objects, at least one of which does thus qualify. Examples would be bronze coins included in a hoard to protect gold or silver coins, an earthenware pot or other container in which precious metal objects have been deposited, precious stones forming (along with objects of precious metal)

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

part of a jeweller's stock in trade, or a bone-handled knife lost contemporaneously with a gold or silver locket. The application of the statutory notion of a 'series' to 'lost' goods (ie, objects found together unaccompanied by any evidence that they were deliberately placed together by a depositor or abandoner, or objects the circumstances of whose find indicate that they were together immediately before being lost) may generate lively controversy.

The draft Bill is expressed to apply only to objects found after the resultant Act comes into force.[126] It applies to franchises of treasure trove wherever granted[127] but will not extend to Scotland or Northern Ireland.[128]

Other provisions of the draft Bill empower the Secretary of State to publish both a Code of Practice relating to treasure trove and further information or guidance relating to the retention of finds by museums and the payment of rewards.[129] Such guidance may include (a) matters concerning the rights and duties of searchers for and finders of treasure trove, and of those on whose land treasure trove is found, (b) the provision of forms for the making of any necessary notifications, and (c) procedures for the recording of treasure trove finds.[130] Nothing in the draft Bill is intended to affect the current Treasury practice of making ex gratia rewards. The draft Bill also seeks to render a finding by a coroner or a coroner's jury on a matter of treasure trove conclusive for all purposes, including civil and criminal proceedings.[131] This provision is, however, heavily qualified. It does not apply to (i) proceedings on an application to review or quash a finding that an object is or is not treasure trove,[132] and (ii) any civil proceedings where the point at issue (or one of the points at issue) is the question whether one party to the proceedings (or a person through whom the party is claiming) was the rightful owner of the object at the time it was found.[133] In this context the phrase 'rightful owner' means someone who was the rightful owner otherwise than by virtue of his finding the object.[134] Under the draft Bill a coroner's inquest into whether an object is treasure trove may be held without a jury.[135] It is thought that the disappearance of the main factual question governing characterisation as treasure trove (viz, whether the object was deliberately hidden or merely lost or abandoned) will largely remove the need for a jury.

9 Buying Up the Land-Owner's Rights

An interesting dilemma is suggested by a recent decision of the Supreme Court of Ireland. To what extent is it legitimate and effective for a national museum, having been entrusted with discovered antiquities prior to a determination as to whether they are treasure trove, to seek to fortify its position by obtaining a transfer of the rights of the land-owner? In *Webb* v *Ireland and the Attorney General*[136] the Supreme Court of Ireland held that the museum's

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

estoppel as the finders' bailee did not preclude it from asserting a superior personal title, acquired in this manner, in response to the finders' claim to recover the goods.

The claimants in this case were a father and son. In February 1980 they discovered an exquisite silver chalice and other ecclesiastical treasures (dating from around the ninth century) while searching with a metal detector on land near Derrynaflan Church in Tipperary. The precise location of the find was a tract of land belonging to third parties named O'Leary and O'Brien. The Webbs delivered the articles into the possession of the National Museum of Ireland accompanied by a letter from their solicitor, which stated that the articles were being entrusted to the Museum's care 'for the present and pending determination of the legal ownership or status thereof'.

While still in possession of the articles, the Museum approached O'Leary and O'Brien and agreed to acquire their entire interest in the hoard for the sum of £25,000 apiece. When the Webbs eventually sued for the return of the treasures, the Republic of Ireland raised two defences: first, that the hoard was treasure trove and thus the property of the Republic, and secondly that the subsequent transaction with the landowners now gave the Republic a superior title to the hoard in any event.

At first instance, Blayney J rejected both defences. On the former point, he held the doctrine of treasure trove to be inapplicable in the Republic, because it represented an aspect of the Royal Prerogative which had not been expressly transferred to the Republic on the enactment of its Constitution.[137] On the latter point, he held that the terms of the letter on which the Museum accepted the hoard amounted to an acknowledgement by the Museum that it was to hold the hoard as the Webbs' bailee. As a bailee, the Museum was estopped from denying the title of its bailors and must be deemed to have undertaken to treat them as the true owners, irrespective of any later acquisition of title on its part.

Both aspects of the decision were varied on appeal. Finlay CJ (with whom Henchy and Griffin JJ concurred) agreed that the prerogative of treasure trove had become extinguished in its application to Ireland, but held that a form of state ownership equivalent to treasure trove could be justified by reference to the Irish Constitution.[138] Furthermore, the terms on which the Museum accepted delivery of the hoard did not preclude it from asserting a superior personal title by virtue of the later conveyance from O'Leary and O'Brien. The literal terms upon which the Webbs entrusted the hoard to the Museum were not such as to amount to an undertaking by the Museum to acknowledge title exclusively in them. Rather, the question of title was, by virtue of the phrase 'pending determination of the legal ownership', expressly left open. It followed that the implied term normal to most bailments, that the bailor enjoyed exclusive and unquestionable title, was displaced by the terms of this particular bailment. In any event, the bailee's conventional

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

estoppel did not apply to a case where the bailee defends the bailor's claim on the ground that title now vests in the bailee himself (as opposed to residing in some third party); when a bailee gets the title the bailment ends, and with it ends the estoppel. Finally, the Chief Justice held that the landowners' title was indeed superior to that of the finders and had been translated into a superior title on the part of the Museum itself. The fact that the goods had been buried in the ground conferred a prior possessory right upon O'Leary and O'Brien, which was violated when the Webbs removed the hoard; and the fact that the Webbs were trespassers meant that, independently of the issue of prior possession, they were disentitled from acquiring any rights superior to those against whom their trespass was committed.

Walsh J took a different view of the efficacy of the landowners' purported conveyance to the Museum. He considered that the landowners' interest, being merely possessory, expired with their possession: 'They could not assign a right to bare possession divorced from ownership when they had already lost possession.'[139] Walsh J agreed, however, that the bailee's conventional estoppel could in principle be extinguished by a later acquisition of property on his part; in such a case: '... he has ousted the title of the bailor and the matter ceases to be one of bailment.' Only McCarthy J was prepared to uphold Blayney J's decision that the Museum's estoppel extended to the point of debarring it from asserting a personal title; in his opinion the agreed terms of delivery, while recognising that actual ownership might reside elsewhere, did not affect the limited implication that, *as between bailors and bailee*, the bailors' title was the better. But McCarthy J, like Walsh J, did not consider that an effective title had been acquired by the State in any event.

Three points should be made about this decision. First (and most obviously) it shows that the ambit of a museum's estoppel as the bailee of the finder can sometimes be deduced from the express terms of the delivery. Secondly, it seems to follow that the terms accompanying the delivery can sometimes (contrary to the conclusion in *Webb* itself) indicate that the bailee *does* covenant to refrain from asserting any personal title superior to that of the bailor. Such a covenant may preclude not only the assertion by the bailee of some superior interest acquired after the bailment was created, but also his assertion of some superior interest existing before the goods were bailed: for example, where the occupier of land on which a chattel is found accepts possession from the finder on the understanding that he will return it to the finder if the true owner does not appear (such an argument might, perhaps, have been pursued in *Parker* v *British Airways Board*.)[140] The third point is that, in the absence of any express agreement, it remains uncertain whether the bailee's estoppel prohibits him from relying upon a personal title acquired from a third party. A refusal to extend the estoppel thus far would arguably conform with *Eastern Trust Co Ltd* v *National Trust Co Ltd*[141], where the acquisition of title by a third party

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

wrongdoer was held to debar any action by the claimant-bailee, notwithstanding the rule in *The Winkfield*.[142] But the analogy is not a complete one, because in cases where the bailee's possession is violated by a third party the defendant will normally lack any pre-existing consensual relationship with the claimant, whereas such a relationship naturally exists between bailor and bailee. On balance, however, it seems preferable to regard the bailee's estoppel as generally confined to the assertion of interests in third parties, while acknowledging that exceptional cases may occur in which the terms of the delivery, or other attendant circumstances, support a wider prohibition.[143]

Webb is an extreme example of the difficulties which may be encountered by a national authority seeking to assert a common law possessory title to discovered antiquities.[144] At first glance, it is hard to decide which aspect of the case is the more remarkable: the judicial invention which produced the doctrine of inherent state property or the woeful condition of the law that necessitated it. Nor is it easy to banish a lurking suspicion that the Webbs were treated austerely, both by the museum and by the court.

Had the facts arisen in England, the Derrynaflan hoard would almost certainly have been declared treasure trove. It had the required metallic constituency and was evidently deposited for safe-keeping.[145] The Crown would not have needed to invoke some wider doctrine of inherent sovereign ownership – a plea which would, in any event, be doomed to failure. But there remains scant cause for complacency. If the doctrine of treasure trove fails to apply in a given case, and the original owner or his successor remains untraced, title depends on the civil law of finders. This body of law is exclusively concerned with possessory title is and essentially egalitarian; it contains no material public interest ingredient capable of promoting the national conservation of antiquities. Having awarded the find to the individual who was first in possession, it allows that claimant virtually unfettered rights of detention, destruction, consumption, disposal and use. Just as Lady Churchill could destroy with impunity the Sutherland portrait of her husband, so the possessory owner of a silver chalice can melt it down, sell it to his dentist for tooth fillings, or use it to demonstrate the corrosive properties of nitric acid.[146] Sometimes the successful claimant will be a public body (such as a local authority occupying land on which an object was found or employing the finder) and the object will come into pubic ownership independently of the law of treasure trove. Even here, however, problems of proof and enforcement may frustrate the public interest.[147]

10 The Civil Law of Finders[148]

If the Crown cannot assert a title founded on treasure trove, the right to retain the goods will fall to be allocated according to the

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

private law of finders, as modified by any contract between the relevant parties. What follows does not purport to be an exhaustive account of the law in this field, but merely a summary for the sake of completeness.

Unless he has abandoned them,[149] an owner of lost goods remains their owner.[150] This proposition does not necessarily mean that the proprietor will always be able to vindicate his title, because the limitation period may have expired.[151] Subject to that, however, the owner can recover the goods from a finder or from an occupier on whose land they were lost. If the owner does not claim his property, the party who first reduced the goods into his possession will normally have the superior title. Frequently, this will be the finder himself. In *Armory* v *Delamirie*[152] a chimney sweep's boy who had found a jewel was held entitled to recover it (or damages for its value) from a jeweller who accepted it for valuation but then refused to return it. The finder's right was good against everyone except the true owner.

Often, however, someone other than the finder will already have gained a prior possession when the find is made. In such a case, it is that earlier possessor who is entitled to retain the goods against everyone except the true owner, and the finder (having taken them from his possession) must surrender the goods to him.[153] A pre-emptive possession of this type can arise in two main situations.

The first is where an employee finds goods in the course of his employment. If his employment is the cause (and not merely the occasion) of the finding, the employee's possession is deemed to be that of his employer and he gets no independent possessory right.[154] The test is somewhat difficult to apply; in the Queensland case of *Byrne* v *Hoare*[155], a policeman on points duty who found a gold ingot on land adjoining the road was held to have a possessory right superior to that of his employing authority. But it seems reasonably certain that workers who discover articles while carrying out excavation, pile-driving or demolition work on the instruction of their employers will take possession only on behalf of their employers and will get no independent possessory title. In *London Corpn* v *Appleyard*[156] McNair J stated obiter that employees of contractors, who had found a wall safe containing banknotes while working at their employers' instruction on the site of a demolished building, were accountable to the contractors in respect of these contents. The judge cited the decision of Palles CB in a case reported as *The Title of the Finder*.[157] There a porter employed by a bank found bank notes while sweeping out its premises. Deciding the case in favour of the bank, Palles CB held that it was 'by reason' of the relationship of master and servant, and 'in the performance of the duties of that service', that the porter acquired possession of the notes; therefore 'the possession of the servant of the bank was the possession of the bank itself.' This conclusion will be all the more

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

likely when an employee has actually been ordered to make a search for lost articles.[158]

The second situation is where the goods are found on land occupied by someone other than the finder or owner. Occupation of the land may have conferred on the occupier a possession over lost goods situated on that land which is prior to, and therefore stronger than, that of the finder or his employer. Such prior possession can exist even though the occupier was unaware that the goods were present on his land.[159]

Certainly, the occupier will have gained the necessary prior possession if the goods are buried on his land, or attached in a manner which suggests that he is asserting exclusive control over the place where they are situated. The courts will generally hold that possession of land entails possession of everything lying below the surface, down the centre of the earth.[160] In *Elwes* v *Brigg Gas Co*,[161] the application of this principle resulted in the award of a prehistoric boat, which was submerged beneath the land, to the tenant for life in possession as against a lessee for 99 years. Nothing in the lease could be regarded as granting permission to the lessees to remove the boat, and the long period which had elapsed since its deposit indicated that property as well as possession had vested in the tenant for life. In *South Staffordshire Water Co* v *Sharman*[162] workmen found two rings embedded in mud at the bottom of a pool on their employers' land. The find occurred while they were obeying an instruction to clean the pool. They were held not entitled to retain the rings as against their employers. Surprisingly, the decision proceeded not on the ground that the find occurred in the course of their employment,[163] but on the ground that occupation of the site gave their employers a concurrent possession of articles attached to it.

If the goods were merely lying on the land, the occupier will not necessarily gain a superior possession by virtue of his occupation alone. In order to do so, he must have 'manifested an intention to exercise control over the building and the things which may be in or on it'.[164] Such an intention may be especially elusive where the site is one to which the public (or many different entrants) have lawful access. In *Parker* v *British Airways Board*[165] a traveller who found a gold bracelet on the floor of an executive lounge at Heathrow Airport was held entitled to retain it as against the occupiers of the lounge. The nature of the premises, the degree of public access and the quality of the control over the area exerted by the occupiers were such that the court felt unable to conclude that the occupiers had asserted any superior possession over the article prior to that of the finder himself. A similar conclusion was reached in the Canadian case of *Kowal* v *Ellis*[166] where the finder was held entitled to retain a pump which he found lying close to the highway on the occupier's land. But it has been said that a finder who was trespassing at the time of the find acquires no

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

enforceable possessory rights against the occupier, because recognising such rights would enable him to profit from his own wrong.[167] Moreover, an owner or lessee who does not occupy the site personally before the discovery will not normally gain a superior possession of the articles themselves, whether these were buried in the land or merely lying on it.[168]

Many of the more important finds occur in the course of construction operations. Unattached goods are unlikely to produce problems for building employers and contractors; the very nature of building work suggests that the majority of finds will have been unearthed. Whereas this removes one difficult question, however, there continue to be other reasons why the general law of finders is an unsatisfactory vehicle for determing title to antiquities within the employer/contractor relationship. Identifying the possessor of the site can be a complex process, and the answer may vary according to the context in which the question is raised. The same is true of the relationship of employer and employee. The principle which equates a finding of goods in the course of employment with an assumption of possession on behalf of the employer is likely to appear simplistic when applied to the complicated but informal labour arrangements (including temporary transfers of service among contractors and sub-contractors, and notional self-employment) which obtain on building sites.

For such reasons, most standard building contracts deal expressly with discovered antiquities. An example is cl. 32 of the ICE (6th) conditions, by which: 'All fossils coins articles of value or antiquity and structures or other remains or things of geological or archaeological interest discovered on the Site shall as between the Employer and the Contractor be deemed to be the absolute property of the Employer...'. The clause also requires the contractor to 'take reasonable precautions to prevent his workmen or any other persons from removing or damaging any such article or thing', to acquaint the engineer of the discovery immediately it occurs, and to 'carry out at the expense of the Employer the Engineer's orders as to the disposal of the same'.[169]

In *London Corpn* v *Appleyard*[170] freeholders entered into a building lease whereby 'every relic or article of antiquity or value which may be found in or under any part of the site' was stated to belong to them. McNair J held that this provision entitled the freeholders to retain (as against the leaseholders and a sister company for whom the lease was held in trust) a box containing bank-notes which had been found by workmen in a disused wall-safe. The expression 'article of...value' extended to articles which were valuable not for their antiquity or rarity but for some other reason.[171]

Now this provision, being contractual, operated only between the contracting parties. The superior entitlement which it purported to confer on the freeholders was therefore viable only if the contracting party against whom it operated had an entitlement superior to that

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

of other potential claimants. McNair J held that this was the case. Since the wall safe formed part of the premises demised to the leaseholders and to their sister company, possession of it and its contents resided de facto in one or other of them (in the event, McNair J preferred to award possession to the sister company, on the ground inter alia that the lease was held on trust for them).[172] That possession was prior, and thus superior, to the control taken by the individual workmen who discovered the safe. Since the leaseholders and their sister company were the other parties to the contract with the freeholders, it was to the freeholders that the ultimate entitlement passed.

A further aspect of this decision deserves mention, for it illustrates the complications which can arise from labour arrangements in construction projects. The finders were employed by Wates, who were the contractors engaged by the sister company to work on the site. If no superior possession had resided in the leaseholders or their sister company by virtue of the lease alone, the court would have had to identify the party to whom the finders were accountable for the articles which they found in the course of their employment: was it their immediate employers Wates, or was it the party who engaged Wates? McNair J (speaking obiter) opted in favour of the former, on the ground that 'there is no general principle that for all purposes the servant of an independent contractor is to be regarded as the servant of the person by whom the independent contractor was engaged'.[173]

Appendix I
Finds Valued by the Treasure Trove Reviewing Committee 1979–1990

Year	*Place of find*		*Value of find*
1979	Otterbourn		2,320
	Kempstone		1,200
	Pennyrock Falls		525
	Much Wenlock		227
	Thetford		2,190
	Winsford		2,135
	Menai Bridge		100
	Bryn Maelgwyn		14,667
	Penybryn		4,450
	Barton-upon-Humber		3,580
	Epping Forest		21
		Total	**£31,415**
1980	Eddington Wood		393
	Roche Abbey		90
	Vindolanda		493

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

Year	*Place of find*		*Value of find*
	Maltby		4,059
	Cadeby		1,335
	Aylesbury		450
	Wragby		1,150
	Miscellaneous coins		1,110
	Ringwood		3,625
	Washbrook		4,875
	West Wycombe		1,020
	Cadeby		62
	Wheatley		650
	Mildenhall		7,250
	Taunton		3,335
	Osbournby		1,069
	Pentney		135,000
	Reculver		2,250
	Bedford		700
	Hovington Park		568
	Caer Rumney		742
		Total	**£170,226**
1981	Wenallt		103,040
	Thetford		262,540
	Bearpark		650
	Whippendell Woods		900
	Loxbeare		507
	Streatley		205
	Mildenhall		60
	Barway		1,134
	Bromham		7,246
	Barton-upon-Humber		100
	Otterbourne		1,250
	Osbournby		960
	Freckenham		917
		Total	**£379,509**
1982	Great Orme		225
	Dover		1,092
	Farnham		3,240
	Weston-sub-edge		5,926
	Ridgewell		410
	Glewstone		435
	Stainton		1,955
	Welsh Bicknor		2,730
	Stonea		840
	Monkton Farleigh		60
	Otterbourne II		60
	Middle Harling		51,500

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

Year	Place of find		Value of find
	Thetford (Addenda)		615
	Wheatley		110
	Maesmelan Farm		8,000
	Llanarmon-yn-ial		2,650
		Total	**£79,848**
1983	Howie		13,942
	Armthorpe (Addenda)		50
	Stonea		16,415
	Cadeby		2,000
	Bainton		1,120
	Finkley Down		2,950
	Blencowe Hal		950
	Palmers Green		1,702
	Wyke		7,505
	Harpsden Woods		3,150
	Akenham		1,155
	Westgage		125
	Chatteris		750
	Thetford		112
	Newton Mills		240
	Weston		156
	Wervin		42
	Stonea		1,925
	Phorslee		6,595
	Redditch		684
	Middle Harling		11,350
	Lawrence Weston		5,230
	Canterbury		8,535
	Brean Down		3,000
		Total	**£89,683**
1984	Corfe Common		2,650
	Cheriton		7,125
	Guildford		1,349
	Barway (Addenda)		230
	Burwell Farm		773
	Scole		470
	Osbournby		350
	Oliver's Orchard		2,203
	Pershore		622
		Total	**£15,772**
1985	Maen Cowyn		440
	Snelsmore Common		2,139
	Ashdon		3,141
	Dessingham		905

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

Year	*Place of find*		*Value of find*
	Middleton		
	Great Melton		445
	Chippenham near Ely		6,235
	Howe		1,600
	Aldworth		1,426
	Wanborough		2,200
	Moor Monkton		4,580
	Ashdon		2,099
	Blencogo		135
	Grimsby		220
	Southend-on-Sea		7,920
	Norton Subcourse		967
	Stonea		390
	Fincham		25,000
		Total	**£99,842**
1986	Breckenborough		11,797
	Barway		45
	Donhead St Mary		5,210
	Selsey		4,710
	Hindolveston		600
	Winterbourne		960
	Elmstone		2,000
	Colaton Raleigh Common		5,000
	Brough		1,200
	Chute		11,000
	Norton subcourse (Addenda)		180
	Cheriton		1,000
	Bassaleg		1,759
	Cefn Coed		235
		Total	**£43,796**
1987	Michaelston-Super-Ely		150
	Postwick		65
	Howe (Addenda)		161
	Chudleigh		1,620
	Morton		1,620
	Huntington		2,596
	Barsham		9,160
	Lawrence Weston		16,995
	Rockbourne		27,600
	Morton (Addenda)		148
	Fishpool (Addenda)		180
	Winterbourne Monckton		985
	Ironshill		1,710
	Nettisham		11,470
	Pinchbeck		11,680
		Total	**£86,140**

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

Year	*Place of find*		*Value of find*
1988	Brackley		50
	Wanborough		36,238
	Aldworth		2,210
	Ryhall		1,037
	Bletchley		13,775
	Stevenage		15,740
	Kingsclere		1,400
	Whitchurch		1,680
	Clapham		400
	Reeth		212
	Sutton		2,605
	Sandhills		1,078
	Pontypridd		100
	Stanwix		7,730
	Winterbourne Monkton		860
	Ollerton		1,090
	Sutton		200
	Thirsk		2,200
		Total	**£88,905**
1989	Rockbourne		1,600
	Snettisham		1,100
	Amble		975
	Bawsey		1
	Caunton		15,332
	Hastings		1,670
	Teynham		2,170
	Snettisham		140
	Bawsey		150
	South Shields		850
	Norton Subcourse		140
	Cheriton		4,475
	Honingham		60
		Total	**£28,663**
1990	Wicklewood		845
	Waddington		600
	Winterbourne Monkton		900
	Barrow Gurney		624
	Barway		125
	Fring		3,055
	Penrith		42,200
	Melbourn		295
	Chalfont St Peter		4,599
	Wroxeter		750
	Somerton		16,000
	Kirkby in Ashford		604

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

Year	Place of find		Value of find
	Much Hadham		3,221
	Boscombe Down		2,615
	Wingham		2,141
	Bawsey		10
	Hartlebury		1,219
		Total	**£107,803**

Appendix II
Annual Rate of Treasure Trove Inquests 1980–1991

Year	Inquests
1980	57
1981	59
1982	51
1983	38
1984	48
1985	46
1986	29
1987	46
1988	44
1989	54
1990	63
1991	60

Source: Home Office Statistical Bulletin for Inquests, Table 6.

Notes

1 Cf, as to maritime finds, the doctrine of wreck: Dromgoole and Gaskell, above, p. 217. In Canada, recently-proposed legislation sought to abolish any distinction between land-based and marine hoards and to treat both categories of find in the same manner for the purposes of national ownership and conservation: see the proposed Archaeological Heritage Preservation Act 1990; Haunton (1992) 2 IJCP 395. In the event, this proposed legislation failed to became law. For an account of new legislation amending the law of treasure trove in The Netherlands, see Forder (1992) 2 IJCP 396. The doctrine of treasure trove in the United States has a much wider scope than in England, and is not an instrument of state ownership; indeed it is contended that the law of treasure trove has become merged with the law on lost goods generally: Brown, *Personal Property* (3rd ed, 1975) 28; cf note 49 below).

2 *Webb* v *Ireland and the Attorney General* [1988] I.R. 353, at 386.

3 HL Deb, 8 Feb 1982, col 18, citing Palmer (1981) 44 MLR 178, at 183.

4 *A-G of the Duchy of Lancaster* v *G E Overton (Farms) Ltd* [1982] Ch 277, at 293; [1982] 1 All ER 524, at 531.

5 Law Commission *Treasure Trove, Law Reform Issues*, September 1987, pp. 1, 2. The Law Commission has done no further work on this subject and

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

produced no further law reform proposals: letter to the author, July 29th 1992. See further the *Report of a Review of Ex Gratia Awards to Finders of Treasure Trove* (henceforth referred to as the Treasury Review) published by HM Treasury in February 1988. The Surrey Archaeological Society has since produced a draft Bill to reform the law of treasure trove: see below p. 292 and Cookson and Ayres (1992) 66 Antiquity 399, 403.

6 Ibid. See further the criticisms advanced by Martin (1904) 20 LQR 27, Palmer (1981) 44 MLR 178, Longworth (1992) 2 IJCP 333, Cookson and Ayres (1992) 66 Antiquity 399, 403 and Viscountess Hanworth, President of the Surrey Archaeological Society, in a letter entitled 'Gaps in Law of Treasure Trove', (1989) *The Times*, October 28th.

7 One recent illustration among many was reported in (1990) *The Independent*, February 13th. A rare medieval solid gold ring, found by treasure hunters at Middleham, Yorkshire, was held not to be treasure trove because it had been lost rather than concealed. The more famous Middleham Jewel (see note 146 below) is a further example of the non-application of treasure trove to objects inadvertently discarded or mislaid.

8 (1903) 5 *Juridical Review*, p. 276, cited by Sir George Hill in *Treasure Trove in Law and Practice* (1936) pp. 202–203, n. 5. See also the Treasury Review of 1988 (above, note 5) para 2.4, and C.S. Emden (1926) 42 LQR 368, who describes the practical difficulties of the doctrine as arising less from the complexity of individual cases as from the 'haze' in which the origins of the law reside, and the 'casual' manner in which the rules have taken shape.

9 Palmer (1981) 44 MLR 178. There is now a National Council for Metal Detecting, which has published its own Code of Conduct (see (1993) 1 IJCP 159) and a position paper entitled *A Shared Heritage* (1992).

10 As to this, see (1988) *The Times*, October 13th, (1990) *The Times*, 9 August; note 146 below.

11 As to this, see *In Re Chaddock, The Times* 23 November, 1992; below note 53.

12 As to this, see Longworth (1992) 2 IJCP 333. Since this article was written, a further highly exceptional hoard has been discovered at a site near Eye in Suffolk: see *The Times*, 19 November 1992. It comprises Roman gold ornaments, coins, spoons and jewellery, and some contemporary reports suggest a value of several million pounds.

13 Law Reform Committee, Eighteenth Report, *Conversion and Detinue*, Cmnd 4774 (1971), Annex I pp. 48–50.

14 [1990] 2 QB 242, at 252; [1990] 3 All ER 183, at 189.

15 See *Webb* v *Ireland and the Attorney General* [1988] I.R. 353 (High Court) 373 (Supreme Court).

16 Below, p. 279.

17 Subject to the possibility of a Crown grant of franchise of treasure trove in the particular area: see below note 22.

18 *Winkworth* v *Christie Manson and Woods Ltd* [1980] Ch. 496.

19 Below, p. 284. This is broadly true across the common law world.

20 See note 32, below.

21 *R* v *Hancock* [1990] 2 QB 242, at 244; [1990] 3 All ER 183, at 184, per Auld J. The Crown's title thus exists even before discovery and excavation. Cf Hill, op cit supra, 216 whose opinion on the point is tentative, but who cites observations in *The King's Prerogative in Saltpetre* (1606) 12 Co. Rep. 12 that the King may dig for treasure trove in the land of the subject because he has property.

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

22 As to whether particular grant or franchise extends to treasure trove, see *A.G.* v *Trustees of the British Museum* [1903] 2 Ch 598; Hill, op cit supra, 208 – 215. Cf the *Webb* case, above, and the Treasury Review of 1988 (above, note 5) para 2.2.
23 This assumes that the Crown has an immediate right of possession arising (if that be necessary) from a proprietary interest in the object: see generally Palmer, *Bailment* (2nd ed) 209 et seq. Where excavation of an identified find is likely to cause substantial disruption to the landowner or occupier the exercise, and thus the immediacy, of the Crown's right of possession may itself be contentious.
24 It appears, however, that the doctrine of market overt does not apply to chattels belonging to the Crown: *Willion* v *Berkley* (1561) 1 Plowd 223, at 242 – 246 and, for further authority, Benjamin's *Sale of Goods* (3rd ed) para 468; Davenport and Ross (1993) 1 IJCP 25 at 30.
25 As to market overt generally, see Davenport and Ross (1993) 1 IJCP 25. As to s.12 Sale of Goods Act 1979, see Bridge in *Interests in Goods* (ed. Palmer and McKendrick, 1993, Lloyds of London Press) p. 133.
26 If the original owner or his descendants are known and can be traced, the object will belong to them, subject to the possibility of abandonment (as to which see Hudson, *Abandonment*, in *Interests in Goods* (ed. Palmer and McKendrick, 1993, Lloyd's of London Press) p. 424). Thus in an 1868 case, where eighty guineas were found in the wall of an old house near Christchurch, the descendants of the original owner successfully claimed them and were compensated at face value for eight of the pieces which had already been sold: Hill, op cit supra, 220. Cf *Moffat* v *Kazana* [1969] 2 WLR 71. When the foundation deposit under the old Blackfriars Bridge, dating from 1760, was unearthed in 1870, it was restored to the Corporation of London as the representatives of the depositor: Hill, ibid, who notes an opinion that such deposits become part of the building itself and as such might belong to the landlord.
27 3rd Inst, p 132. See generally as to Bona Vacantia, Bell in *Interests in Goods* (ed. Palmer and McKendrick, 1993, Lloyds of London Press) p. 401.
28 *Prerogatives* (1802), p 152.
29 [1982] Ch 277. Contrast a case of silver-washed copper coins found at Hull in 1868: Hill, op cit supra, 204 n.3. As to the decision of Dillon J at first instance in *Overton*, [1981] Ch 333; [1980] 3 All ER 503, see Palmer (1981) 44 MLR 178.
30 Palmer, op cit supra.
31 [1982] Ch 277, at 292.
32 For example, the Icklingham Bronzes, a collection of Roman bronze artefacts allegedly removed from a field belonging to a Mr Browning in Suffolk and later sold in New York. Proceedings were until recently afoot to determine the entitlement to the bronzes. See the letter by Viscountess Hanworth 'Gaps in Law of Treasure Trove' (1989) *The Times*, October 28th, and cf (1992) *The Independent on Sunday*, July 19th, p. 22. Since the foregoing was written, it is understood that an agreement has been reached whereby the bronzes will remain in the USA during the lifetime of the present holder and his wife, and thereafter be desposited at the British Museum: (1993) *The Times*, 29th January.
33 Cf the controversy as to the ownership of the recently-discovered Similaun man: (1991) *The Times* September 29th, (1992) *The Times* February 10th, (1992) *The Independent*, February 22nd. The question whether common law proprietary or possessory rights can subsist in human remains is a distinct

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

and controversial issue, beyond the scope of this paper. See Magnusson *Proprietary Rights in Human Tissue* in *Interests in Goods* (eds. Palmer and McKendrick, 1993, Lloyds of London Press) p. 237); Palmer, *Bailment* (2nd ed) 9 et seq; Matthews [1983] C.L.P. 193; Hubert (1992) 1 IJCP 105; Pinkerton (1992) 2 IJCP 297.

34 Cf the controversy as to the ownership of Sue, the world's best-preserved example of Tyrannosaurus Rex: (1992) *The Times*, May 20th and 22nd, (1992) *The Independent on Sunday*, May 24th.

35 There are numerous cases of finds which fall into private ownership for this reason. Two examples, cited by the Law Commission in its September 1987 paper *Treasure Trove, Law Reform Issues*, p. 3, are the 1983 discovery at Oliver's Orchard in Colchester of a large hoard of Roman coins of the third century AD, and the 1982 discovery of an Anglo-Saxon helmet at York. For further illustrations, see Palmer (1981) 44 MLR 178, at 180–181.

36 Hill, op cit supra, 202, 203; *Lord Advocate* v *Aberdeen University* 1963 SLT 361. For a recent example, see (1991) *The Times* June 1st. The position in the Isle of Man conforms in all material respects with that applying under English law: see Government Circular No 66/72 (G.O. Reference No. G5/189) issued by the Government Office at the Isle of Man, 23rd June 1972.

37 This is merely one of several situations where modern English law regulating transactions in cultural property arguably gives insufficient emphasis to the desirability of preserving the integrity of collections. A further example concerns the operation of the export licensing system on collections: see the Report of the Reviewing committee on the Export of Works of Art (1989–1990), paras 36–38; Maurice and Turnor (1992) 2 IJCP 273. Contrast the approach taken by the Court of Session towards the porpoise bone in *Lord Advocate* v *Aberdeen University* 1963 SLT 361, at 364 (Lord Patrick), 366 (Lord Mackintosh): 'it is enough to say that as all the objects were found together in one box the find should be regarded as a whole and that all of it should be held to be treasure trove if any of it is to be so regarded.'

38 (1992) 2 IJCP 333 at 335–336.

39 These proportions are adopted by the proposed Treasure Trove Bill 1992; see below, p. 292. Of course, even where the entirety of a find is declared treasure trove, the British Museum may select only part of the find for retention and may return the residue to the finder. See, for example, the discovery of 136 gold and 6,567 silver coins by Roger Mintey in a field near Reigate: (1992) *The Times*, 5 December. The hoard, dating from the 15th century AD, was declared treasure trove after a 90 minute hearing. The British Museum selected 300 pieces for retention and Mr Mintey was permitted to keep the remainder; in due course he consigned them for sale at Glendinnings. At least the British Museum has the opportunity to consider and preserve the value of the find as a collection in such circumstances. See further a case reported in (1993) *The Independent*, 8 April.

40 *R* v *Hancock* [1990] 2 QB 242, at 247; [1990] 3 All ER 183, at 186 per Auld J. It is commonly said that objects must have been 'concealed' or 'hidden' to constitute treasure trove (contrast *Lord Advocate* v *Aberdeen University* 1963 SLT 361, at 364 (Lord Patrick) and 366 (Lord Mackintosh) denying the existence of any such requirement in Scotland). Taken literally, this requirement might exclude from treasure trove those gold or silver articles which, while deliberately deposited by an owner who intended to return for them, were not hidden or secreted in the ordinary sense. Such a case might arise where sovereigns are kept in an office safe, and the premises are later demolished or built over in circumstances where the presence of the sover-

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

eigns becomes forgotten. In a note on *A-G* v *Trustees of the British Museum* [1903] 2 Ch 598 (see below) in (1904) 20 LQR 27, at p. 32, Martin contends that, where commentators have employed the word 'hide' in definitions of treasure trove, they have done so merely to express the antithesis of loss or abandonment, and not to impose an additional and independent requirement of covert concealment. In short, an object can be hidden for the purposes of the doctrine notwithstanding that there is public knowledge of the deposit. Emden (1926) 42 LQR 368, at p. 373, agrees that a deposit need not be secret in order to constitute treasure trove. He cites the Crediton find in 1896, where coins found in a pigeon-hole shelf within the beam of an office which had later been covered by plaster were declared treasure trove, even though apparently deposited in the ordinary course of business rather than from motives of secrecy. See further on this point Hill, op cit supra, 207, citing a similar 1886 case of coins found in a beam brought from an old house to a builder's yard at St Albans. The coins were held to be treasure trove, evidently on the ground that the beam had once been fixed in a house. Hill contrasts this with an 1875 case, where coins found in a cart among rubbish from the ruins of an old house at Dean in Bedfordshire escaped classification as treasure trove, there being no evidence of their situation in the house. Older authority appears further to limit treasure trove to objects concealed in or below the ground: see for example, the review of records up to the middle or end of the fifteenth century by Emden, op cit supra, at p. 376, showing that in thirty one of thirty six recorded instances the expression 'under' or 'in' the ground was used, and that most if not all of the decisions appearing to support a wider rule were unreliable. This limitation was reproduced by Blackstone, op cit supra. But Coke, op cit supra, spoke of treasure trove as capable of applying to any object of the appropriate constituency 'wheresoever it be found', and Martin, op cit supra, strongly supported this, arguing that it should make no difference whether the object was deposited in the ground or in a 'tangled thicket'. In any event, concealment within something attached to the ground may well suffice (Hill op cit supra, p 208 and cases cited by him at 205–207) and modern opinion certainly seems to favour the extension of the doctrine to things hidden in the walls or roofs of buildings: see the cases of coins found in thatched roofs cited by Palmer (1981) 78 MLR 178, at 183. Of course, it is much easier to classify objects found on the surface of soil as treasure trove where their current location occurred through erosion by natural forces, and evidence permits the inference that the object was originally concealed below the ground. An example is the 1927 case of the flint money box containing sixty five ancient British gold coins, found on a field by a boy at Chute in Wiltshire and declared to be treasure trove: Hill, op cit supra, 222. There is some doubt as to whether objects deposited under water, rather than buried on land, can qualify as treasure trove. Where goods are deposited in a river bed or a pond, the locality seems no bar to a decision that they are treasure trove. Indeed, one of the most renowned treasure trove hoards of all time (the Tutbury hoard) was found on the bed of the River Dove in Staffordshire in June 1881. The find, believed to have been deposited around 1324–1325 AD, consisted of some 20,000 silver coins dating from the reigns of Edward I and Edward II, and was once believed to be the largest hoard of coins ever found in the United Kingdom (contrast now the 1979 case of Mr Humphries and Mr Booth, reported in (1981) *Daily Express* 17 July, who found 56,000 Roman coins reportedly worth some £300,000). There seems no reason why goods deposited beneath coastal waters, or on land which

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

has since been submerged beneath the sea (as at Dunwich in Suffolk) should not also be capable of constituting treasure trove: contrast the *British Museum* case, below.

41 [1990] 2 QB 242; [1990] 3 All ER 183.

42 [1903] 2 Ch 598.

43 [1903] 2 Ch 598, at 609–610.

44 [1990] 2 QB 242 at 251; [1990] 3 All ER at 189.

45 [1981] Ch 333 at 340; [1980] 3 All ER 503 at 508.

46 [1981] Ch 333, at 343. C.S. Emden (1926) 42 LQR 368 at p. 375 relates that in proceedings arising from the Corbridge gold find in 1911, 'eminent authority' advanced the following factors as tending to show that gold coins found in a bronze jug at the site of a Roman military station had been concealed and were thus treasure trove: the upright position of the jug, the protection given to the gold coins by the inclusion among them of bronze coins; the fact that the coins were not of mixed metals; the original position of the hoard (a few inches below ground, under a room of a destroyed house); and the danger of hostile raids on the station at the probable time of the deposit.

47 [1982] Ch 277; [1982] 1 All ER 524.

48 A question on which modern authority appears to afford no guidance is the legal status of objects deposited animo revertendi by someone other than their owner without that owner's knowledge or consent. This might occur where a thief deposits, animo revertendi, treasure stolen from its owner, or where a finder of lost treasure, having failed to trace the owner, deposits it animo revertendi. Suppose then that the thief and the finder disappear, never returning to claim the hoard, and that the owner likewise remains untraced. Does the object belong to the Crown as treasure trove? Although it is unlikely that clear evidence of such a chain of events would be forthcoming in a case of antiquarian deposits, such evidence is not improbable in the case of plundered goods. It must, moreover, be recalled that there is no compelling reason of principle why treasure trove should be limited to antiquarian finds. Admittedly, at least one definition (that of Coke: see above, p. 277) requires the goods to have been hidden 'of ancient time', but it is submitted that the sole relevance of this lies in establishing the third ingredient of treasure trove (viz, the untraceability of the owner) and that the courts will not embark on inquiries as to the relative antiquity of deposits. Of course, the Crown is less likely to wish to retain modern objects, but it may be more attracted by ancient objects recently stolen and concealed. On balance, it is submitted that where there is a loss by the owner but deliberate deposit animo revertendi by a non-owner the object should be capable of classification as treasure trove, perhaps on the ground that it is 'ownerless' rather than 'lost' in the strict sense. Contrast the general doctrine of bona vacantia: Bell, *Bona Vacantia*, in *Interests in Goods* (eds. Palmer and McKendrick, 1993, Lloyds of London Press) p. 401.

49 The rule (like that relating to gold and silver) does not apply in Scotland: *Lord Advocate* v *Aberdeen University* 1963 SLT 361, at 364 (Lord Patrick) and 366 (Lord Mackintosh). But it seems that under Scottish law the principle *quod nullius est fit domini regis* now extends to treasure and objects of antiquity, making it no longer necessary to identify treasure trove as a separate medium of acquisition: Carey Miller, *Corporeal Moveables in Scots Law* (1991) 25–26.

50 See note 146, below, and Longworth (1992) 2 IJCP 333 at 337–340.

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

51 The point was left open in the *British Museum* case at 611, but in *Hancock* at pp. 247, 186 Auld J remarked that sacrifices or votive offerings were 'unlikely to be treasure trove'. Cf, however, Martin (1904) 20 LQR 27, at p. 32; Emden (1926) LQR 368 at 373.
52 Cf the case of the foundation deposit at the old Blackfriars Bridge, discussed by Hill, op cit supra, p. 220; above, note 26.
53 See now *In Re Chaddock*, *The Times*, 23 November 1992; Ward (1994) 1 IJCP (forthcoming). (section 13, Coroners Act 1988, relating to High Court's power to order the holding of an inquest or a fresh inquest, applies to an inquest to enquire into treasure trove).
54 [1982] QB 1004, at 1017; *Tamworth Industries Ltd* v *Attorney-General* [1991] 3 NZLR 616, at 621, 624, per Eichelbaum CJ.
55 Cf the position in Scotland, where there is a statutory duty to deliver lost chattels (including objects of antiquarian value) to the police: Civic Government (Scotland) Act 1982, s.67; Carey Miller, op cit supra.
56 See the Treasury Review of 1988 (above, note 5) 5.1 – 5.8 for a statement of the constitution of the Committee and recommendations for improvement. Chief among such recommendations was the proposal that the Committee henceforth be given formal terms of reference: ibid, para. 5.6.
57 The order of consideration is as follows. Where the British Museum does not wish to add the object to its collection, it will inquire among other museums to see whether any of them wishes to acquire it. Only after these possibilities have been exhausted will the object be returned to the finder or sold for his benefit. Money for rewards has to be found either by the British Museum or by whichever other museum wishes to acquire the object.
58 Treasury Review of 1988 (above note 5) para 3.19 which recommended the continuation of the existing self-financing practice.
59 No 10/1989, para 11.
60 *R* v *Hancock* [1990] 2 QB 242; [1990] 3 All ER 183. And see note 21 above.
61 Home Office Circular No 10/1989, para 6.
62 Treasury Review of 1988 (above note 5) para 3.5.
63 Cf the recent proposed Canadian legislation, where the legislature decided against a reward system: proposed Archaeological Heritage Preservation Act 1990; Haunton (1992) 2 IJCP 395; above, note 1.
64 See below. It is believed that such cases are rare: Treasury Review of 1988 (above, note 5) para 3.24, and cf the case of Mr Mintey, above note 34; (1992) *The Times* 5 December. The Review recommends, however (at para 3.25) that the British Museum and the National Museum of Wales should in future make annual returns to the Treasury of the numbers of finds declared treasure trove but returned to finders on the ground that no museum wishes to acquire them, together with brief particulars of such finds. See further paras 3.26 – 3.27.
65 Home Office Circular No 10/1989, para 6.
66 See now *In re Chaddock*, (1992) *The Times*, 23 November; above note 53. For this and much other information, the author is indebted to Dr Ian Longworth, FSA, Keeper of Prehistoric and Romano-British Antiquities at the British Museum. For a further case of a threatened review of a coroner's jury's verdict (which does not, in the event, appear to have materialised) see (1986) *The Times*, September 19th.
67 (1980) *The Times*, October 17th, (1980) *Sunday Express*, October 5th; discussed by Palmer (1981) 44 MLR 178, at 184 – 185, note 47.
68 Palmer, *Bailment* (2nd ed, 1991), pp 1439 et seq.
69 Palmer, op cit, pp 1442 et seq.

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

70 (1980) *The Times*, October 3rd; Palmer (1981) 44 MLR 178, at 183, note 37, 185, note 47.
71 [1969] 2 WLR 71. And see Hoath [1990] Conv. 348.
72 [1945] KB 509.
73 *Parker* v *British Airways Board* [1982] QB 1004, at 1009, per Donaldson LJ; and see *Webb* v *Ireland and the Attorney General* [1988] IR 353 at 379–380, per Finlay C.J. (cf at 396–397, per McCarthy J); *Tamworth Industries Ltd* v *Attorney General* [1991] 3 NZLR 616 at 621, 624 per Eichelbaum J. For criticism, see Palmer, *Bailment* (2nd ed) 1457–1459.
73a Kohler (1993) 1 IJCP 133.
74 Cf the rather fuller list of considerations set out by the Treasury Review of 1988 (above note 5) para 3.12 as justifying the abatement of rewards. See also paras 3.13 et seq. The Review lists: (a) evidence of illegal activity in relation to a find, in relation to which no prosecution has been instituted, (b) unreasonable delay between making and reporting a find, (c) failure to report all other circumstances surrounding a find, (d) evidence that only part of a find has been handed in, (e) reasonable grounds for believing that a find has been made elsewhere than on the alleged site, or (f) other factors which Ministers think it appropriate to take into account in individual cases. These factors are, of course, additional to any relevant criminal conviction. The Review contends that criminal prosecution should continue to be regarded as the main sanction against dishonest finders.
75 July 16th 1981.
76 *AG of the Duchy of Lancaster* v *G E Overton (Farms) Ltd* [1982] Ch 277; above, p. 278.
77 Notwithstanding the foregoing considerations, the Treasury Review of 1988 (above, note) concluded that the policy served by the reward system would be endangered by extending rewards to land-owners, employers or others, and recommended that rewards should continue to be paid only to finders themselves: ibid, paras 3.7–3.8.
78 See above, notes 39, 64.
79 It is believed that the coroner then bought two of the sovereigns from the finders.
80 No 10/1989, para 6.
81 (1981) *Daily Express*, July 17; (1980) *Sunday Express*, October 5th; see also (1989) *The Independent* Feb 25th, describing a 2 year-plus delay in rewarding the finder of Pinchbeck Hoard.
82 Cf the draft licence prepared by the Country Landowners Association, and reproduced by kind permission of that Association: (1993) 1 IJCP 160.
83 Except, perhaps, in so far as they may entitle the searcher to excavate without scientific supervision, thus arguably paying insufficient regard to archaeological interests. But cf clause 4.1 of the Country Landowners' Association draft licence which makes provision for the involvement of archaeological authorities where excavation is not limited to the disturbance of plough-soil: (1993) 1 IJCP 160.
84 Cf the case of the Middleham Jewel, below, note 146, and the Middleham Ring, above, note 7, in both of which reward-sharing agreements were in operation.
85 Treasury Review of 1988 (above, note 5) para 3.7.
86 *Callisher* v *Bischoffsheim* (1870) LR 5 QB 449.
87 *The Albazero* [1977] AC 774, at 841, 846, per Lord Diplock.
88 *Chaplin* v *Hicks* [1911] 2 KB 786; *Howe* v *Teefy* (1927) 27 SR (NSW) 301.

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

89 Cf, however, *Hardware Services Pty Ltd* v *Primac Association Ltd* [1988] 1 Qd R 393; and see Weir, Loss of a Chance – Compensable in Tort? in *Developpements Recents du Droit de la Responsabilite Civile* (Zurich, 1991), pp. 111–129.
90 [1902] P.42; Palmer, *Bailment* (2nd ed) Chapter 4.
91 *O'Sullivan* v *Williams* [1992] 3 All ER 385, CA.
92 In such a case, the court can require the other party to appear and can award damages according to their respective interests. If this were to happen, the landowner could again recover nothing because his interest in the goods (i. e. his possession) is financially worthless. Section 8, however, is designed to operate *before* any recovery of the goods by the owner. Thus it may not apply when the Crown has already retrieved treasure trove.
93 Palmer, op cit supra.
94 If that: cf *O'Sullivan* v *Williams*, above, note 89.
95 Cf the *Parker* case (above) per Donaldson LJ.
96 The Treasury Review of 1988 (above note 5) has recommended that the criminal law should continue to be seen as the main sanction in cases where there is evidence of illegal activity in relation to a find: ibid, para 3.10. See also (1992) *The Times*, 20 November, and the letter by Martin Beddoe, (1992) *The Times*, 3 December.
97 [1990] 2 QB 242; [1990] 3 All ER 184; Ward (1992) 1 IJCP 195.
98 The absurdity of excluding adjacent material (such as containers or contemporary written messages or catalogues) from the realm of treasure trove is scarcely less than the absurdity of excluding objects with merely secondary precious metal content. Again, the point is made by Longworth (1992) 2 IJCP 333, at 336–337, who observes that objects other than those made of precious metal 'can form part of a single deposit'. Longworth continues: 'This can often simply be a container, a pot for example, in which the hoard had been placed, or a minor component of the hoard, as at Thetford where a unique shale box formed part of the find. Such associations are often of great significance in relating the precious metalwork to the more mundane articles of everyday life. But the separation of a single find into treasure trove and non-treasure trove components can lead to total absurdity. In the case of a recent treasure trove again from Snettisham but from a different site, a hoard of Roman silver jewellery was discovered inside a pot. The hoard clearly belonged to a jeweller for it consisted of silver rings, coins, bracelets, necklaces, scrap metal and a collection of 110 loose carved carnelian gems destined to be set at some future date in the rings. From careful study of the metalwork and gems it became clear that they represent not a stock derived from here and there but the product of a single workshop providing a unique insight into the ways of a Roman jeweller at work in the mid-second century AD. Under present procedures the pot cannot be declared treasure trove, nor can the loose gems. If we are to continue to use the laws of treasure trove as a way of enabling the nation to preserve major discoveries like the Snettisham Jeweller's Hoard and the Snettisham treasure in their entirety, then some extension to the present definition of treasure trove is needed to embrace items found so closely associated with objects of precious metal that they can be construed to form an integral part of a single indivisible deposit.'
99 HL Deb 9 Feb 1982 col 31.
100 See Home Office Circular No 10/1989.
101 Contrast the earlier recommendations of the Treasury Review of 1988 (above, note 5), paras 6.1–6.14.

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

102 Consultation Paper: Ancient Monuments (April 1991) p. 2; reply by Lord Hesketh, House of Lords, 13th December 1989.
103 Clause 2(1).
104 Clause 4(1).
105 Ibid.
106 Clause 4(2).
107 Clause 4(3).
108 Clause 5(1).
109 Clause 5(2).
110 Clause 4(3).
111 Clause 1(1).
112 Ibid.
113 Clause 1(6).
114 Clause 1(2)(b). By cl 1(5) 'token' means a token used (or which may reasonably be assumed to have been used) in place of money.
115 Ibid.
116 The remainder of the hoard (ie that containing less than 0.5% silver) would qualify as treasure trove under cl 1(2)(a) of the draft Bill: see below.
117 Clause 1(3).
118 Ibid.
119 Ibid.
120 Clause 1(2)(c).
121 Clauses 1(2)(d), 1(4).
122 Clause 1(2)(d).
123 Clauses 1(4), 1(5).
124 Clause 1(8).
125 Clause 1(2)(a).
126 Clause 6(1).
127 Clause 6(2).
128 Clause 6(4).
129 Clause 2(2).
130 Clause 2(4).
131 Clause 3(1).
132 Cf *In re Chaddock*, (1992) *The Times*, 23 November; above, note 53.
133 Clause 3(2).
134 Ibid.
135 Clause 3(3).
136 [1988] IR 353.
137 Applying *Byrne* v *Ireland* [1972] IR 241, where Walsh J had reached a similar conclusion regarding the Royal prerogative of immunity from suit.
138 Finlay CJ (for the majority) described this pre-emptive national right of dominion and acquisition, equivalent to the normal prerogative-based doctrine of treasure trove, as an inherent attribute of the sovereignty of Ireland and a natural incident of Ireland's status as an independent sovereign state, rather than as a right derived from the Crown. The right was fortified, in his view, by Art 10 of the Constitution, notably Arts 10.1 (entitling the State inter alia to all natural resources, all forms of potential energy and all royalties and franchises) and 10.3 (empowering legislation for the management of State property and for control upon its alienation). In Finlay CJ's opinion [1988] IR 353, at 383, the phrase 'all royalties' in Art 10.1 was apt to include the right to preserve the national heritage by means of a pre-emptive property in material corresponding with treasure trove. Such material constituted a 'national asset' and its protective owner-

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

ship by the State was a necessary implication both for the common good and to realise the aspirations of the Constitution at large. Finlay CJ's judgment contains a resounding declaration of the importance to every civilised nation of an understanding of its heritage, and of the conviction common to Irish people that the 'keys to their ancient history' should be protected by State ownership rather than relinquished to the hazards to private dominion. Walsh J (at 390–391) accepted the legitimacy of a general right of national ownership of 'antiquities of importance', while excepting those cases where the original owners of an antiquity (or their successors in title) could still be identified and traced. In general, Walsh J agreed that it would be inconsistent with the Irish Constitution, and with the objectives of the society which it sought to create, to permit important historical objects to 'become the exclusive property of those who by design or by chance discover them and take possession of them'. This opinion applied 'to the owners of the land in or on which' antiquities are found as much as to 'any other persons who find them in or upon land' (at 931). Walsh J disagreed, however, with Finlay CJ's interpretation of the phrase 'all royalties' in Art 10.1 as meaning 'all attributes of sovereignty'. In Walsh J's view, such an interpretation would render Art 5 redundant; rather, the phrase must refer back to the term 'all natural resources' earlier in Art 10.1. A further point of divergence between Walsh J's judgment and that of Finlay CJ is that Walsh J was not prepared to restrict the inherent power of public ownership to objects which would have qualified as treasure trove within the Royal Prerogative. See ibid, at 391: 'I see no reason why it should be confined to such items as fall within the definition of treasure trove under the former law. In this country this definition would be of little benefit as so many of our antiquities in chattel form are not made of either gold or silver'.

139 Sed quaere; the fact that the finder's interest is purely possessory cannot mean that he is without a remedy where the defendant has wrongfully taken the goods out of his possession: cf Palmer, *Bailment* (2nd ed) pp. 1426–1427, notes 40, 41.

140 [1982] QB 1004; see Palmer, *Bailment* (2nd ed) Chapter 23. As to whether the conventional estoppel might preclude a bailee from pleading that the bailor has abandoned his property in the chattel, see Palmer [1987] 1 Lloyd's MCLQ 43, at 71–73, discussing *Moorhouse* v *Angus & Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700; Hudson, *Abandonment*, in *Interests in Goods* (eds Palmer and McKendrick, 1993, Lloyds of London Press) p. 424.

141 [1914] AC 197.

142 [1902] P 42.

143 It is to be noted that Lord Diplock, speaking of bailments by way of carriage, has said that at common law the carrier was 'estopped from denying his bailor's title to the goods *at the time when possession was delivered to him*': *The Albazero* [1977] AC 747 at 841 (emphasis added). A similar qualification, applied to bailments in general and to bailments by finders to museums in particular, would relieve the bailee of any prohibition upon pleading that he had, since delivery to him, become the owner of the goods.

144 Cf *Bumper Development Corpn Ltd* v *Commissioner of Police of the Metropolis* [1991] 4 All ER 638, CA; Ghandhi and James (1992) 2 IJCP 369.

145 [1988] IR 353, at 358, per Blayney J at first instance.

146 Practically the only effective restraint is the licensing control placed on the export of those artistic and antiquarian objects which satisfy the Waverley

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

criteria: see generally Maurice and Turnor (1992) 2 IJCP 273. Even this means of control is substantially blunted by the lack of sufficient public funds to enable objects threatened with export to be acquired by national museums and galleries. No case illustrates the problem more vividly than that of the Middleham Jewel. Found by amateur treasure hunters near Middleham Castle in North Yorkshire, this fifteenth century gold jewel, set with a sapphire, was described as the most important addition to the surviving body of English mediaeval jewellery since the last war. It failed to qualify as treasure trove because there was no evidence that it had been deliberately deposited or concealed; it seems simply to have been lost. It therefore fell into private ownership and the chance of compulsory acquisition for the nation was lost. In the event, however, the jewel did at least remain in England. Originally sold at Sotheby's in 1986 for £1.43 million against an estimate of £200,000-£300,000, it was resold in August 1991 for £2.5 million, being saved from export at the eleventh hour by a private offer sent via fax: (1991) *The Times* August 9th; (1991) *The Independent* August 9th. In a letter in (1991) *The Times* August 22nd, Mr R W Hamilton (a former keeper at the Ashmolean Museum) condemned the folly of making the retention of such objects dependent on the whims of the market and the ability of national museums or private UK buyers to raise such sums at short notice. He proposed a national law, enabling the state to declare appropriate objects part of the national heritage, and to prohibit their export outright. But the idea of a list of heritage items whose export is absolutely prohibited has since been rejected by the Minister for National Heritage.

147 An example is recounted in (1982) *Daily Telegraph*, April 2nd. The finder of a seven-inch lead cross, inscribed in Latin with the legend 'Here lies buried the famous King Arthur in the Isle of Avalon' and alleged by the finder to be the Glastonbury Cross, was sentenced to two years' imprisonment for contempt after failing to deliver it up to Enfield Borough Council, the owners of the land on which he had discovered it while using a metal detector. The metallic constituency of the find would, of course, have exempted it from the doctrine of treasure trove.

148 See generally *Webb* v *Ireland and the Attorney General* [1988] IR 353, 377–379, per Finlay CJ.

149 Cf *Moorhouse v Angus & Robertson (No 2) Pty Ltd* [1981] 1 NSWLR 700; *Pierce v Bemis, The Lusitania* [1986] QB 384, [1986] 1 All ER 1001; Hudson above note 140.

150 *Moffat* v *Kazana* [1969] 2 WLR 71.

151 See Limitation Act 1980, ss. 3, 4; *Bumper Development Corpn Ltd* v *Commissioner of Police for the Metropolis* [1991] 4 All ER 638; Ghandi and James (1992) 2 IJCP 369. As to the position where an incoming occupier has since built over the site of the goods, see *Moffatt v Kazana* ibid at 76, per Wrangham J; Palmer (1980) 9 Anglo-American Law Review 279.

152 (1721) 1 Stra 505.

153 The Torts (Interference with Goods) Act 1977, s 8, which enables a plea of jus tertii to be raised in certain circumstances in defence to an action for wrongful interference with goods, will be inoperative in this context because the defendant will by definition be unable to identify the real owner (tertius).'

154 *Willey* v *Synan* (1937) 57 CLR 200, at 216–217, per Dixon J; *White* v *Alton-Lewis Ltd* (1975) 49 DLR (3d) 189; *Hannah v Peel* [1945] 1 KB 509,

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press

at 519, per Birkett LJ; and see, for further authority, Palmer, *Bailment* (2nd ed, 1991) pp. 1439–1442.

155 [1965] Qd R 135; cf *Crinion* v *Minister for Justice* [1959] Ir Jur Rep 15.

156 [1963] 1 WLR 982 at 989; [1963] 2 All ER 834, at 839.

157 *McDowell* v *Ulster Bank Ltd* (1899) 33 ILT Jo 225.

158 Cf *Willey* v *Synan* above.

159 Palmer, *Bailment* (2nd ed, 1991) Chapter 6.

160 For an interesting modern example, see *Webb* v *Ireland and the A-G* [1988] IR 353 (High Ct), 373 (Sup Ct, Ireland).

161 (1886) 33 Ch D 562 at 568–569.

162 [1896] 2 QB 44; and see *Parker* v *British Airways Board* [1982] QB 1004 esp at 1017–1018, per Donaldson LJ.

163 Cf *Hannah* v *Peel* [1945] 1 KB 509 at 519, per Birkett LJ.

164 *Parker* v *British Airways Board* [1982] QB 1004, at 1018, per Donaldson LJ; and see *Tamworth Industries Ltd* v *Attorney-General* [1991] 3 NZLR 616, at 621–624, per Eichelbaum CJ; Kohler (1993) 1 IJCP 133.

165 [1982] QB 1004. Cf *Bridges* v *Hawkesworth* (1851) 21 LJQB 75, 15 Jur 1079.

166 (1977) 76 DLR (3d) 546, [1977] 2 WWR 761.

167 *Parker* v *British Airways Board* [1982] QB 1004 at 1017, per Donaldson LJ; and see *Webb* v *Ireland and the A-G* [1988] IR 353 at 372 (Sup Ct, Ireland); cf *Tamworth Industries Ltd* v *Attorney-General* [1991] 3 NZLR 616 at pp. 621–624, per Eichelbaum CJ; Kohler (1993) 1 IJCP 133.

168 *Hannah* v *Peel* [1945] 1 KB 509, [1945] 2 All ER 288.

169 See similarly, 1980 JCT contract, cl 34.1.

170 [1963] 1 WLR 982; [1963] 2 All ER 834.

171 Ibid at 989, 839–840.

172 Ibid, at 989, 837.

173 [1963] 1 WLR 982 at 988–989; [1963] 2 All ER 834 at 839.

This is a revised and updated version of a paper delivered at a meeting of Committee 20 of the International Bar Association at Montreal in June 1991, and published in *Interests in Goods* (eds Palmer and McKendrick, 1993) by Lloyd's of London Press, to whom grateful acknowledgement is given.

https://doi.org/10.1017/S0940739193000335 Published online by Cambridge University Press