The Treasure Bill 1995/96 [Bill 21]

Research Paper 96/36

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This paper describes the background to the proposals for reform of the common law of treasure trove in the Treasure Bill, 1995-96 [Bill 21]. The Bill is to be debated on second reading on 8 March 1996.

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Summary

The common law of treasure trove is the only legal protection currently afforded to portable antiquities found in England and Wales. It applies only to articles containing a substantial amount of gold and silver which have been deliberately buried with the intention of subsequent recovery and of which the owner is unknown. Determination of whether an article is treasure trove is carried out by Coroners' Courts, where the jury is asked to decide whether precious metal content is substantial enough and to assess the intentions of individuals in possession of the article sometimes thousands of years before. Monetary value is no indication of archaeological value, and many important finds have been split up according to precious metal content, or not recorded at all.

There has been discussion whether the problem can be solved by reforming existing law or whether it should be abolished and replaced by new legislation to require the reporting of all archaeological finds.

What has emerged is a two-fold initiative to extend and clarify the definition of treasure to cover items with some precious metal content and articles such as containers found in association with them, and to consult on the best way of recording information about finds of all kinds. The increase in numbers of finds in recent years is attributed at least in part to metal detection.

The proposals for remedying deficiencies in the law of treasure trove embodied in Lord Perth's Bill of 1993-94 were to some extent the result of concern about the illegal activities of people using metal detectors at an Iron Age site in Wanborough in Surrey in the mid 1980s. This has undoubtedly contributed to the view that the proposed legislation is hostile to the hobby of metal detecting, but it is strongly denied that any restriction on legal activities is proposed, and care has been taken both to recognise the important role of detectorists in archaeological discovery, and to meet their concerns in framing legislation.

The Bill extends to Northern Ireland, but not to Scotland.

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A. England and Wales

In mediaeval times treasure trove was of considerable importance as a source of revenue to the Crown. *Halsbury's Laws of England*, Vol. 8, para. 1513 describes in general terms the common law of treasure trove:

> **1513. Meaning of "treasure trove".** Treasure trove is where any gold or silver in coin, plate or bullion is found hidden in the earth or in any other secret place, and belongs to the Crown by prerogative right, unless the person who hid it is known or afterwards discovered, in which case it belongs to him .
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> The Crown gains no title unless the treasure is actually hidden in the earth with the intention of recovering it. Therefore, where it is scattered in the sea or on the surface of the earth, or lost or abandoned, it belongs to the first finder; but where the circumstances under which the treasure is found raise a prima facie presumption that it was hidden, it will belong to the Crown unless somebody else can show a better title.

According to Sir George Hill[1] the first reference in English law appeared early in the twelfth century, in the *Leges Henrici*, compiled between 1114 and 1118. Hill also writes, however, that it is likely that the law of treasure trove significantly predated that codification and quotes the *Laws of Edward the Confessor* that:

> "treasures from the earth belong to the King, unless they be found in a church or a cemetery".

By about 1258 the law had more or less fully developed into what is now the common law of treasure trove.

Jurists have offered varying definitions since the first known authority, Bracton, who was writing in the thirteenth century and these were reviewed in detail by Lord Denning, Master of the Rolls, in *Attorney General of the Duchy of Lancaster v G E Overton (Farms) Ltd.*[2] This case involved the discovery of 7,811 third century Roman coins, *antoniniani*, which were made of alloys of silver and base metal, with a sample showing that the silver content ranged from nothing to 18%. The Attorney General for the Duchy of Lancaster claimed that the coins were treasure trove and therefore the property of the Duchy. A coroner's inquest upheld the claim, but this finding was later reversed. The Duchy appealed, contending that treasure trove was not restricted to gold and silver coins. In his judgment, Lord Denning reviewed the research which had been presented to the court including the views of the "greatest authority of all, Sir Edward Coke" in the seventeenth century: "So Coke makes it clear that

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1 *Treasure Trove in Law and Practice*, 1936

2 [1982] 1 All ER 524

only gold or silver objects are treasure trove. Nothing else will do". A "high authority on the other side", Sir William Blackstone writing in the middle of the eighteenth century, included money or coin as well as 'gold silver plate or bullion'. It was held that, in Lord Denning's words: "Bracton and Blackstone were wrong and.... Sir Edward Coke was right. In these Courts we must hold that, in order to be treasure trove, the objects must be of gold or silver".

It was further held that for an article to be so described, it had to contain a substantial amount of precious metal, which was a question of fact for the coroner's jury in each case. Lord Denning suggested that an object should have a gold or silver content of 50% or more before it could be described as a gold or silver object. He alluded to the Antiquities Bill introduced by Lord Abinger in 1979 to promote the better protection of small antiquities and commented "It does appear to be very desirable that the law should be amended on some such lines, but it is for Parliament to do it and not for the Courts. I am sorry that we cannot help ourselves, but I hope Parliament will."[3]

Jervis[4] sets out three essential characteristics for property to be treasure trove:

- it must be gold or silver
- it must have been deliberately concealed by the owner with a view to later recovery
- the owner or his present heirs or successors must be unknown.

The first characteristic has been discussed above. The second requirement is that the item(s) must have been hidden with an intention to recover them at a later date: an item which has been discarded or lost will not be included, neither will votive offerings buried in a grave or objects intentionally abandoned as part of burial rites such as the Sutton Hoo treasure. It has been suggested that the concept developed as a way of ensuring that the King could seize hoards hidden away as a means of escaping taxation. Finally, the items will vest in the Crown only if the original depositor cannot be traced and if no other claim is stronger than the Crown.

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3 loc.cit. 531 c

4 Jervis on the Office and Duties of Coroners, 11th ed., 1993 p.301

B. Scotland

In Scotland where the current Bill will not apply, the definition of articles of treasure trove is considerably wider and based on the Roman law concept of *thesaurus* - ie. hidden valuables the ownership of which could no longer be traced. In Scotland, all newly discovered ancient objects, whether of precious metal or not, and regardless of whether they were hidden or lost, belong the Crown. Although the Crown may not always exercise this claim, all objects found must be reported.

In principle all ownerless property belongs to the Crown if it has once been owned. *The Stair Encyclopaedia* discusses the scope and effect of Scots law as follows:[5]

> Treasure found should be reported to the Queen's and Lord Treasurer's Remembrancer either by the finder, who otherwise risks prosecution for theft, or by the chief constable to whom it is delivered in terms of the Civic Government (Scotland) Act 1982 and who is required to notify the owner of lost or abandoned property where the owner can reasonably be identified .
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> The precise nature of the Crown's right to treasure in Scots law came under close examination in the case of the 'St Ninian's Isle Treasure' . This case concerned a hoard of objects, mostly of silver, found in the Shetland Islands by an archaeological expedition from the University of Aberdeen. The main point at issue in that case was whether the Crown could claim the hoard, given that it was found in udal land. It was argued that the *regalia*, of which the right to treasure is one, are feudal rights and that on the analogy of salmon fishings, which in the Orkneys and Shetlands are not *inter regalia* where the land is udal, treasure likewise could not be claimed by the Crown when the treasure was found in udal land. The decision was that the Crown's right is based on its sovereignty and not on its ultimate feudal superiority and that treasure is simply a particular form of ownerless property claimable by the Crown on the principle *quod nullius est fit domini regis.* It was also held that treasure is not *pars soli* claimable by the owner of the land as part of the land and that, although treasure is described by the institutional writers as 'hidden valuables', it is not necessary to show that the treasure was in fact hidden by its former owner; hidden implies merely that it has had to be found. Finally, it was held that although treasure in Scots law does not mean merely articles of gold and silver, as in England , but any valuables or precious things, the hoard found, which included a porpoise bone of no great intrinsic value, was to be treated as all one 'treasure'. Not all the views expressed are entirely convincing but, as already remarked, it does not seem that the matter is likely to be tested further in th courts as, in the absence of a claim by a donatory of the Crown, the only real issue is whether the property is ownerless or not.
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> The Crown is advised on disposal of treasure by the Treasure Trove Advisory Panel which may, for example, suggest where it should be housed and displayed. The panel also determines the value of any treasure found. Normally reward is paid to the finder.

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[5] The Laws of Scotland, Vol. 18, para. 553, 1993

On February 7 1994, the Secretary of State for Scotland assumed responsibilities for the administration of treasure trove in Scotland. Since the Union of the Scottish and English Parliaments in 1707, the Lords Commissioners of the Treasury had been accountable for that function. This was a step in developing the policies set out in the White Paper *Scotland in the Union : A Parliament for Good*.[6]

The functions of the Queen's and Lord Treasurer's Rembrancer (an office now held by the Crown Agent) were not affected by the transfer of responsibilities. The Secretary of State's role comprises policy oversight of Scottish treasure trove procedures and responsibility for making appointments to the Advisory Panel. Scottish Office press notice 7.2.94 reports the appointment as independent chairman of Dr Barbara Crawford, a lecturer in mediaeval history at the University of St Andrews and not a member of the museum community. Membership was increased from three to four members and procedural changes were announced, notably that greater publicity was to be given to finds claimed as treasure trove and their allocation.

C. Northern Ireland

English common law of treasure trove applies, but the Historic Monuments and Archaeological Objects (Northern Ireland) Order 1995[7] requires the reporting of discoveries of objects, a provision which has been in force since 1937. Licences are required to search for archaeological objects, and these are not normally granted to hobbyist detectorists.

D. The jurisdiction of the Coroner in relation to treasure trove

Discovery of a gold or silver item in England and Wales must be reported to the Coroner for the district in which the find is made. The common law offence of concealment of treasure trove was abolished by S.32(1)(a) of the *Theft Act 1968*. It is then the coroner's duty to summon a jury and hold an inquest "in order to inquire whether the articles found are or are not treasure trove and who was the finder or were the finders thereof".[8] The duty is set out in S.30 of the *Coroners Act 1988.* It is generally considered that the purpose of the inquest is to find the facts to enable a decision to be made on whether the object is treasure trove, but not to determine ownership in the event that it is not.[9]

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6 Cm 2225, March 1993

7 SI 1995/1625 (N.I. 9)

8 Home Office Circular 10/1989

9 Home Office Circular 10/1989 para. 11

The provision in the Coroners Rules permitting a coroner to hold an inquest without a jury does not apply to inquests on treasure trove. The Home Office Circular of 1989 strongly advises coroners to avail themselves of the advice of the British Museum or National Museum of Wales. *Jervis* lists the questions which it is usual for the coroner to put to the jury:

- Where was the object found?
- What did the find consist of?
- Was it intentionally hidden, accidentally lost or purposely abandoned?
- Is the answer of the find unknown?
- Who was the finder of the object?[10]

The same source goes on to comment:[11]

> Although the original importance of the coroner's Jurisdiction in treasure trove appears to have been to protect the prerogative right (and therefore the financial interests) of the Crown, its importance in modern times (and probably the main reason why it has not been abolished) is that of preserving artefacts for their archaeological or historical interest. However, this purpose is poorly served by the present situation for two reasons: first, the definition of treasure trove does not include all things of archaeological or historical interest, and secondly the verdict of the jury is not conclusive, and the question whether or not the object is treasure trove can be, and often is, litigated in the ordinary courts.

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[10] loc. cit. pp308-9

[11] ibid, pp310-11

II Ownership of treasure

If an object is found to be treasure trove, it *prima facie* belongs to the Crown by prerogative right. In Lancaster it belongs to the Crown in right of the Duchy of Lancaster, and in Cornwall it belongs to the Duke of Cornwall. In a particular areas or areas, prerogative right to intervention may have been granted to a subject as a franchise by the Crown. For example, the Corporation of London is franchisee of treasure trove in the City of London and Southwark, under charters of 1444, 1462, 1608 and 1638.[12]

If the object is found not to be treasure trove, the question of ownership as between finder and landowner is unclear. As we have seen, the coroner is limited to investigate ownership in order to determine the Crown's prerogative rights, and then to identify the finder, but not to examine potential claim to ownership where an object is not claimed by the Crown. *Jervis* states that an object buried in or attached to land or a building is in the legal possession of the owner or occupier of that land or building - unless the original owner or his heirs can be found. When the occupier of land or building on or in which an unattached object is found has "manifested an intention to exercise control over the land or building and the things which may be found on or in it" before the find, he will be in a similar position.[13]

But if an object is found on land not occupied by anyone, or occupied by a person not manifesting an intention to exercise control over it, then, unless he is a trespasser, the first finder of the object has a "finders keepers" right to possession of it.[14] But as Lord Justice Auld commented in *Waverley BC v Fletcher* "the English law of ownership and possession, unlike that of Roman law, is not a system of identifying absolute entitlement but of priority of entitlement".[15]

In 1987 the Law Commission identified various aspects of the law of treasure trove which had given rise to problems. On ownership, they commented:[16]

> The law relating to claims to the ownership and possession of goods found has been said to be in an unsatisfactory state. In 1971 the Law Reform Committee reported on the Law of Conversion and Detinue and stated that arbitrary rules are required to clarify the rights of finders as against those of occupiers in 3 main cases:
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> (a) where the article is found by a trespasser;

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[12] *Jervis* p.302

[13] Parker v. British Airways Board [1982] Q.B. 1004

[14] Ibid and *Armory v Delamirie* 1 Stra 505, [1558-1774]; All ER Rep 121

[15] [1995] 4 All ER 764

[16] Law Commission; Treasure Trove: Law Reform Issues, September 1987, p.5

(b) where it is found by a servant of the occupier of the land; and

(c) where the article is found on premises to which the public have access.

The Committee suggested that public policy dictated that in the case of articles found on the land of the occupier by a trespasser, the former rather than the latter should be regarded as the owner. The same opinion was expressed by the Court of Appeal in the recent case of Parker v. British Airways Board, though the observations to that effect were not part of the actual decision. In the case of articles which are attached to the property or buried in the ground, it has never been in doubt that the occupier has a better title to them than a trespasser. It is thus inconsistent that a trespasser who finds articles of treasure trove should be awarded the value of the article and treated as if he were entitled to it.

The general rule that an owner or lawful possessor of land has a better title to an object found in or attached to his land - and the question, identified above, of land to which the public have access - were tested in the case of *Waverley Borough Council v. Fletcher*[17] which upheld the two main principles described above. The Court of Appeal held that where a member of the public, using a metal detector, discovered and removed a medieval gold brooch buried in a park owned by a local authority, to which free access was given to the public for pleasure and recreational use, it was the local authority and not the finder who was entitled to its ownership. The brooch had been found not to be treasure trove, and a claim for possession by Waverley Borough Council had been refused by the High Court. The local authority had appealed contending that an owner or lawful possessor of land was entitled by virtue of that ownership or possession to any object other than treasure trove found in the land, as against a finder with no interest in the land.

III Awards

The system of treasure trove developed as a way of adding to the revenues of the Crown, but additions to this gradually became less significant because there was no incentive for finders to report their finds. Towards the middle of the nineteenth century, however, the historical, as opposed to monetary, value of treasure trove began to be appreciated and procedures were devised to provide such an incentive to behave correctly. These were set out in a Treasury Minute of 1886:[18]

- objects found would be forwarded by the Treasury to the British Museum, where they would be examined and separately valued at open market prices;
- such objects as might be considered desirable for the national collection would be so retained, and their value charged to the British Museum;

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[17] [1995] 4 All ER 756

[18] HM Treasury: Report of a view of ex gratia awards to finders of treasure trove, February 1988

- the Royal Mint, local museums and the owner of the land on which the trove was found would be allowed to acquire specimens on the same terms; and

- if the finder had fully and promptly reported his find and handed it over to the authorities, he had returned to him such of the trove as was not required for the museums or other interested persons, and also the market value of such of the trove as was retained. If he wished, all the objects not retained could be sold on his behalf.

There was, however, a deduction made from the award to the finder, in order to cover administrative costs, equal to either 20 per cent of the value of retained items or 10 per cent of the value of the entire find.

In 1931 the deduction for costs was abandoned as was the practice of offering objects to the Royal Mint and the landowner. The administration of the system was handed to the British Museum.

Speaking as a trustee of the British Museum on second reading of Lord Abinger's Antiquities Bill (HL) on 8 February 1982, Lord Windlesham said:[19]

> The trustees have considered this Bill and I have been asked to speak today on their behalf. As the noble Baroness, Lady Birk, has just remarked, the British Museum declined to support a previous Private Member's Bill, also sponsored by the noble Lord, Lord Abinger, largely because it abolished the concept of treasure trove and made no reference to the system of rewards which in our view is essential to prevent the concealment of finds.

The importance of the award system was also emphasised by Home Office Circular 10/89:

> 6. It is important for historical and archaeological reasons that finds should not be concealed, but should be reported promptly and handed over in their entirety to the proper authority: a finder who fails to do this may be guilty of a criminal offence. If the finder does report the find promptly, and it is decided that it is treasure trove and, therefore, the property of the Crown, he will, if he has acted properly and lawfully, receive an ex gratia award of its full market value if it is retained for the Crown, the Queen, the Duke of Cornwall, or for a museum. If it is not retained, he will receive back the objects themselves, with full liberty to do what he likes with them; or, if he wishes it, the British Museum will sell them for him at the best price obtainable. If the coroner decides that more than one person was concerned in the finding, then the reward may be divided; but it should be emphasised that the reward is made to the actual finder(s) and not to the owner or occupier of the land.

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[19] HL Deb. 427, c.23

Following criticisms that the British Museum was valuing objects which it wished to acquire, the Treasure Trove Reviewing Committee was established in 1977 as an independent body to advise Ministers on the valuation of finds. The Committee is advised by a panel of expert advisors independent of the museum service. In reaching an estimate of market value, the Committee considers advice from the museums, information from recent auctions of similar objects and any other advice or information considered relevant.

In 1986, the Chief Secretary to the Treasury, John MacGregor, initiated a review of ex gratia awards, carried out by an inter-departmental group of officials chaired by the Treasury and including representatives of the Department of the Environment, the Office of Arts and Libraries and the Home Office. Its terms of reference were "to review, within the framework of existing law, the practice and procedures relating to treasure trove, including the payment of ex gratia awards to finders".

The system is one of rewards, rather than compensation, and payments are made to finders with no consideration of ownership. This was pointed out by the Chancellor of the Exchequer, Nigel Lawson, when he announced the conclusions of the review on 26 April 1988:[20]

Mr. Key: To ask the Chancellor of the Exchequer whether he is now in a position to announce his conclusions following the review of ex gratia awards to finders of treasure trove; and if he will make a statement.

Mr. Lawson: I have carefully considered the report of this review (a copy of which I am today placing in the Library), in consultation with ministerial colleagues in the Home Office, the Department of the Environment and the Office of Arts and Libraries.

Her Majesty's Government accept all the report's recommendations. I am sure it is right that the objective of making ex gratia awards to finders of treasure trove should be to encourage the prompt and proper reporting and handing-in of finds. Finders who act properly and lawfully will continue to receive ex gratia awards equal to the full value of their finds, as assessed by the independent treasure trove reviewing committee, or, if no public museum wishes to acquire them, will have their finds returned to them. Awards will, however, continue to be made only to finders of treasure trove, and not to landlords or employers who are not themselves finders.

Where, as happens in a small minority of cases, there is evidence of illegal activity in relation to a find, I agree with the report's conclusion that the criminal law should be seen as the principal sanction. But, in making decisions about ex gratia awards in those cases, Ministers will wish to take account of criminal convictions of finders arising from the circumstances of a find. Ministers will also wish to consider whether an ex gratia award should either be refused or abated where:

- there is evidence of illegal activity in relation to a find but, for whatever reason, no prosecution has been mounted;
- there was unreasonable delay between making and reporting a find;
- all the relevant circumstances surrounding a find were not reported;
- there is evidence that only part of a find has been handed in;
- there are reasonable grounds for believing that a find was made elsewhere than on the alleged site; or
- there are other factors which it is appropriate to take into account in individual cases.

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[20] HC Deb 132, c.105-64

> Decisions about the level of awards in such cases will be taken in the light of the particular circumstances of each case. The intention, however, will be to reflect a balance between the objective of those awards to encourage the prompt and proper reporting of finds, and the need for those awards not themselves to provide an incentive for illegal or improper behaviour.
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> The report makes a number of recommendations for speeding up the handling of treasure trove. These are designed to achieve a target time of no more than nine months, and ideally less, between the reporting of most finds and the payment of ex gratia awards. I believe that target strikes a reasonable balance between finders' legitimate expectations that they should receive their awards promptly and the work involved, not least by national and local museums and by coroners, between reporting a find and payment of an award. We are taking steps to inform those involved in each stage of the process, and I hope that they will do everything in their power to meet the suggested targets. I shall wish to review performance in about 18 months. I accept the report's administrative recommendations and these will be implemented. I understand that, as also recommended by the report, the Home Office intends to review and update its advice to coroners about treasure trove inquests.

On 17 December 1992 the Chancellor, Norman Lamont, announced further changes

- finders to be invited to submit any information about the possible valuation of their find which they wish the Committee to consider
- in the absence of evidence of market value from auctions of similar items, the Committee to seek valuations from two independent sources in addition to advice from museums
- a list of additional named specialists to be drawn up on whose advice the Committee could call when appropriate to the consideration of particularly unusual items.[21]

It was also announced on this occasion that responsibility for treasure trove would be transferred from the Treasury to the Department of National Heritage from 1 April 1993.

The 1994-95 Annual Report of the Treasure Trove Reviewing Committee includes, for the first time, details of finds declared treasure trove but not referred to the Committee because no museum wished to acquire them. These were all coins and returned to the finder. No valuation was given. The Chairman commented in his foreword:

> In order to ensure the widest possible public confidence in our valuations, the Department now routinely invites finders to submit evidence that they might wish the Committee to consider when valuing their finds. In addition, in cases of difficulty the Committee can also call on a panel of Expert Advisers and we are very grateful to them for giving generously and freely of their time to help in this way. Thus in all those cases where the valuation is not totally straightforward the Committee normally has before

[21] HC Deb. 216, c.381-2W

> it a variety of expert opinions. As in previous years, we are pleased to note that our valuations of the coins from the Whitwell (no. 13) and Middleham (no.20) hoards have proved to be in line with prices realised for coins which have not been required by museums and which have subsequently been sold at auction.

Also for the first time, the report names the 27 finders of whom all but five were metal detectorists.

IV The Ancient Monuments and Archaeological Areas Act 1979

This Act ("the 1979 Act") extends to England, Scotland and Wales. Part I of the Act enables the Secretary of State to include monuments which he considers to be of national importance in a schedule of monuments, and requires his prior consent to be obtained for any works likely to affect the monuments once scheduled. It is an offence to carry out any authorised works to a scheduled monument. Part II of the Act enables the Secretary of State (or a local authority, subject to confirmation by the Secretary of State) to designate areas of archaeological importance, and it is also an offence to carry out unauthorised works in such areas, including works involving disturbance of the ground. This designation procedure was devised to allow for archaeological excavations prior to development, particularly in historic town centres, and where it was unlikely that co-operation from developers to enable archaeological access or excavation would be forthcoming. Part III of the Act makes it an offence for anyone to use a metal detector, without prior consent, in any "protected place". A paper issued by the Department of the Environment in January 1981 invited comments on how "areas of archaeological importance" could be used, and described s.42 of the Act:

> 25. The designation of an "area of archaeological importance" must be publicised. The publicity may attract treasure hunters. Section 42 of the Act will make it an offence to use a metal detector without the consent of the Secretary of State for the Environment in an area designated as an area of archaeological importance (as well as on a scheduled ancient monument or a monument owned or in the guardianship of the Secretary of State or a local authority by virtue of the Act). There is of course no question of areas being designated primarily to stop the use of metal detectors. That effect is secondary but necessary since indiscriminate searching and digging would lead to loss of vital archaeological evidence - evidence that Part II of the Act is designed to allow the retrieval of in a studied and scientific fashion, by skilled archaeological excavation.

The penalty on summary conviction for using a metal detector in a protected place without permission is a maximum fine of £1,000. Removal of an object of archaeological or historical interest discovered by use of a metal detector in a protected place carries a maximum fine of £5,000 on summary conviction, and an unlimited fine on conviction on indictment. There is no requirement to declare any object found within a scheduled site, but it is open to the Secretary of State, when granting consent for works, to lay down conditions relating to archaeological investigation or observation, and persons authorised to carry out such works may take temporary custody of objects for examination, recording or preservation.

The prohibition afforded by s.42 on removal of objects from a protected place extends only to those discovered by means of a metal detector. On 13 December 1989, Lord Hesketh announced that the legislation would be strengthened when the opportunity arose:[22]

> I am happy to tell the House that my right honourable friend is minded to seek, after the usual consultations, a suitable legislative opportunity to amend the Ancient Monuments and Archaeological Areas Act 1979 to strengthen controls over finds from scheduled sites; that is, to make it an offence to remove any finds from the site of a scheduled monument, whether or not they were discovered by means of a metal detector. He also intends to promote improvements in the administration procedures not involving legislation and dealing with non-scheduled sites - one such option being a code of practice.

V The Consultation Paper on Portable Antiquities 1988

In January 1987, Lord Skelmersdale announced a review of the present arrangements for reporting important archaeological finds in order that a proper record could be made of them. In September 1987 the Law Commission published a paper *Treasure Trove: Law Reform Issues* to which reference has already been made - see p.10. The paper records that "the growth in the use of electronic metal detectors between 1970 and 1980 and the vast increase in the value of treasure found undoubtedly gave impetus to demands for a more effective law to protect archaeological and historical artefacts". As a result of a preliminary study, the Commission decided that the objects sought by those advocating a change in the law were fundamentally different from those for which the law of treasure trove was originally designed, and that it would not be appropriate to seek to achieve the objects of reporting and recording valuable finds by altering or widening the scope of the law of treasure trove. Furthermore, the Commission commented:

> 10. Although one can well understand the desire to protect the archaeological heritage of the nation, it can also be argued that such a heritage is of no use to the nation if it remains buried. Therefore some encouragement to find and to declare such articles should be available to treasure seekers who may in their searches come across archaeological sites and antiquities of exceptional value to the heritage. There thus may be said to be an interest in encouraging the controlled use of metal detectors.

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[22] HL Deb. 513, c.1359-60

They identified as in the forefront of the problems to be considered the question of the financial resources which would be necessary for the purpose of securing the nations archaeological heritage. The Commission recommended a "thorough investigation" of the subject by an inter-departmental committee to look at a new law, not "mere reform of the law of treasure trove", and suggested a number of essential topics for consideration. These included

- definition of the classes of objects to be protected
- rights of land owners and occupiers and the rights of finders
- provision for purchase or reward for the handing in of objects found and a single procedure for determining the rights of interested parties in any purchase or reward
- whether concealment of objects found and failure to report them should be made specific criminal offences, thus obviating the need to charge the more serious offence of theft.

The consultation paper published on 11 February 1988 by the Department of the Environment and the Welsh Office took account of the Law Commission report. Emphasis was placed on the need to record finds:

> 4. Increasing concern has been expressed by archaeologists and others that important archaeological information - either objects themselves or the opportunity to carry out investigations - is being lost through unskilled or unrecorded removal of antiquities from the ground. Several factors lie behind this concern. Changes in farming methods, particularly deep ploughing, and the continuing spread of development have meant increasing disturbance of ancient sites, known and unknown. Another new and significant factor has been the use of metal detectors for leisure purposes. As an affordable hobby it is of relatively recent origin, being an offshoot of rapid technological advance.

The purpose of the review was to "consider whether a system can (and should) be devised which ensures that archaeological finds are reported promptly to an appropriate authority, so that both the object and the context in which it was found can be properly examined and recorded". The Paper provided a checklist of questions for respondents to provide information on the scale of any problem; the adequacy of existing laws of theft, criminal damage, trespass, etc; the possibility of framing a clear and precise definition of objects to be reported along with the identification of easily definable groups of objects which need not be declared; how non-experts could be expected to recognise what needed to be reported. The paper also consulted on **reporting arrangements**, such as to whom finds should be reported; the timescale for reporting and the desirability of sanctions for delay; implications of the work load for receiving bodies; whether there should be a national archive in which information about finds made generally available. The final questions dealt with **inducement to comply**: rewards or fines; resource implications; rights of finders, owners and occupiers; whether fines for non-reporting or delay would be counter-productive.

In the debate of 13 December 1989 on the problems of museums and galleries, Lord Hesketh described the responses to the consultation:[23]

> The noble Earl will, I believe, be aware that my department received more than 100 responses to the paper and that the Welsh Office received about 20. These came from a wide range of respondents - local authority interests, landowning interests, metal detecting groups, museum and archaeological bodies and a number of private individuals.
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> We have been most impressed by the thought and care which has gone into the preparation of many of these responses, and it has not been easy to reach an answer which balances all of the different views expressed. Part of the problem lies in the increasing professionalism of the 20th century archaeologist. Nineteenth century and earlier antiquarians made sporadic finds without worrying unduly about the precise context of the stratigraphy. And many metal detectorists are following in the tradition of that enthusiastic amateur. Although their activities may fall some way short of the highest scholarly standards, that might be a problem best dealt with by education, and it would be unduly cumbersome to set up a bureaucratic machinery to deal with it.

He rejected the adoption of compulsory reporting for all finds:[24]

> There are doubtless, as always, very good reasons why the law is different in Scotland, and indeed these proposals were considered very carefully in the context of our review. The conclusion we came to was that they would go too far. There is a valid public interest in some archaeological finds, but not all; and there is a valid public interest in the knowledge represented by those finds, but not to the extent of requiring nationalisation of finds in England and Wales.

While archaeologists supported greater controls, there was opposition from metal detectorists, some of whom objected *inter alia* to being called "treasure hunters". The National Council for Metal Detecting (NCMD) was opposed to legislation for the compulsory reporting of finds, and urged that current expenditure on archaeology should be examined and referred before further expenditure on new legislation was contemplated:[25]

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[23] HL Deb. 513, c.1359

[24] ibid

[25] NCMD Response to the Consultation Paper on Portable Antiquities, April 1988, p.2

Alternatively, if new legislation threatens every member of the public who encounters an unfamiliar object, such law will fall into disuse and poor repute or it will be incalculably expensive to police and enforce. If such law were applied effectively and without exception the huge number of trivial objects to be dealt with by museum staff or other experts would create an unstoppable drain on resources.

Quite apart from objectionable interference with private property rights, such expenditure would severely damage that aspect of "the heritage" which proponents of new legislation claim it will protect.

The demand for more legislation and increased bureaucratic powers to solve "heritage" problems underlines the failure of the "heritage industry" to interest the general public in its endeavours. If existing expenditure on archaeology, for example, has not engendered public enthusiasm and an opportunity to profit from voluntary co-operation, then there is still less justification for further expenditure on new legislation and controls.

The NCMD was particularly critical of a perceived tendency in the paper to suggest that law-breaking by a minority of metal detector users demonstrated the need for new laws to be imposed on law-abiding members of the hobby:[26]

The Consultation Document appears to accept without question the proposition that metal detector users either co-operate with archaeologists and museums or they are law breakers. This is a quite unacceptable and unsubstantiated distortion of reality. We believe, and commonsense suggests, that most detector users enjoy their hobby through local historical research, or in finding items of money value, beauty or suitability to add to specific collections.

Within the hobby there is an army of people devoted to rescuing metal artefacts and coins from unstratified ground where such objects are exposed increasingly to rapid destruction by farm chemicals, acid rain and corrosion. Such people may be persuaded, encouraged, "educated" or induced to assist with recording data, donating or lending finds to public institutions, and sharing research information. Indeed, success without compulsion in this matter is a test of whether the "national heritage" is to mean anything more than an academic preserve.

The Federation of Independent Detectorists (a Member of the NCMD) was critical of the lack of co-operation shown by "professional archaeologists":[27]

The Federation does not consider the current controls, applicable to non-professional finders of portable antiquities, are inadequate. Indeed, with regard to treasure trove legislation it is felt this infringes certain rights inherent in law.
Irrespective of the current general inadequacy of the Treasury's ex gratia payments for articles containing precious metals seized by the State, the democratically unsound origins of treasure trove legislation - a form of legalised State theft - should claim the attention of any legal review of portable antiquities, with a view to returning to landowners the right of possession.

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[26] ibid, p.5

[27] Response to the Consultation Paper on Portable Antiquity, p.4

> With regard to the adequacy of present controls this Federation regrets and expresses increasing concern that important archaeological information and objects of archaeological value are being lost through the general refusal of professional archaeologists to enlist the voluntary assistance of responsible and experienced metal detector users, particularly in rescue archaeology, at no cost to public funds.

It expressed concern at the financial effect of staff increases at Museums "to cope with the massive influx of material concomitant with any compulsory legislation requiring the reporting of portable antiquities", and advocated a voluntary code of practice "requiring finder and archaeologist to meet on common ground", and a national archive, independent of any museum, to which information could voluntarily be sent.

The Detector Information Group was also concerned about expenditure on professional archaeology:

> Although the concern expressed by the Archaeological lobby about the information allegedly lost through unrecorded retrieval of items of historical interest appears at first sight to be genuine, it is most important that the real reason for this concern is correctly identified.
>
> The millions of pounds of public funds poured into excavations on prime sites produces an almost unbelievable lack of interesting coins and artefacts. The general public, however, do find a relatively large amount of such items whilst pursuing one or other leisure activity, or in the course of their normal work. These items are almost entirely from areas of no real archaeological significance, so are therefore not removed from any archaeological context.
>
> Such 'treasure' far more readily captures the public's imagination than the finds recorded from a typical archaeological dig. This creates a problem for career archaeologists because their public image is seriously damaged, bringing into question their competence, their very integrity and also the real value of their work. This all adds up to an increased difficulty in achieving Public funding of non-essential archaeological excavations.

VI Problems with the law of treasure trove

Perceived difficulties with common law of treasure trove have already been touched on in this paper, and we have seen that the Law Commission advocated its complete abolition, rather than mere reform. It provides, at the moment, the only legal requirement to report finds, albeit a restricted one.

The need for change is summed up briefly in the briefing pack on the current Treasure Bill prepared by the British Museum:

> The main problems with Treasure Trove are threefold: first, many very important finds which may have been lost rather than buried intentionally, such as the Middleham Jewel, valued at £2,500,000, are excluded; secondly, the requirement that only objects that are 'substantially gold or silver' can be Treasure Trove is the cause of much confusion and has led to many hoards of coins being split, which is absurd; and finally, objects not made of precious metal which are found with items of treasure, such as pottery or engraved gemstones, are excluded. In the last twenty years or so there has been an enormous increase in the number of antiquities being found and the vast majority of these fall outside the scope of Treasure Trove and therefore go completely unrecorded and are dispersed, often abroad. The need for reform is urgent.

The need to prove the intention of recovery is a source of difficulty and inconsistency among juries: the NCMD has commented:[28]

> As defined today, treasure trove requirements are widely ignored. The huge majority of the general public and most law officers are either unaware of them or ignore them. Only a tiny percentage of the many thousands of gold or silver items of any age, found each year by any method, are reported as the law requires to the coroner, producing as few as forty inquests *per annum* on average in recent years. Under 50% of these inquests result in treasure trove verdicts. Not surprisingly the procedure and rules of evidence imposed vary widely from one coroner's court to another; and juries have problems of understanding evidence of intent in the mind of humans living perhaps 3,000 years ago.

Finds which were not protected as treasure trove for this reason include the Middleham jewel, found in 1985 and described as the most important piece of mediaeval jewellery discovered this century. It was sold at auction in 1986 for £1,300,000 and when in 1990 the purchaser applied for an export licence, a valuation of £2,500,000 was placed on it. The export licence was deferred in order to allow a British institution time to raise the money, and after an appeal it was acquired by the Yorkshire Museum.

The Sutton Hoo ship burial was excavated in 1939 and was not declared treasure trove because it was buried in a grave and could not be shown to have been buried with the intention of recovery. It was presented to the British Museum by the land owner.

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[28] A Shared Heritage, 1992, p.11

Hoards of coins which have been scattered by the plough or are found without a container also present difficulties in this context. At Portsdown Hill in Hampshire an important hoard of 26 silver pennies of the reign of King Stephen (1135-54) was discovered. The inquest was held on 23 March 1995 and decided that the find was not treasure trove. The finder wrote "my view was that as we had found no container, or contemporary pot shards, the coins could have come from a lost purse dropped by a knight on horseback".[29] The coins were subsequently sold at auction, and no museum acquired any of them.

The requirement that only objects that are substantially gold or silver can be treasure has led to the breacking up of collections of coins and jewellery. Among these are two collections found at Snettisham in Norfolk. Several hundred items including torcs, bracelets, ingots, coins and scrap metal were discovered in 1990. These finds have been described as "by far the greatest concentration of wealth from any early Iron Age context in Britain". Only the objects containing at least 50% of gold or silver were declared treasure trove. In the same place, a Roman jeweller's hoard was discovered in 1986 and consisted of 89 pieces of silver jewellery, 110 cornelian gems unmounted, 83 silver and 27 bronze coins of the 1st and 2nd centuries AD, and a pot. The gems, bronze coins and pot were not declared treasure trove because they were not made of precious metal. In addition, frequent mention is made of the 'Coppergate helm' an important Saxon find made in York, which could not be treasure trove because it was made of bronze - and of the 'derisory' payment made to its finder.

Coins present particular difficulties, partly because hoards have been split up, partly because of the differing views taken by coroner's inquests since Lord Denning's judgment in 1981 (see p.5). The BM briefing lists various cases where the same silver content did not always result in a declaration of treasure trove, while in others a lower silver content did. Some major coin hoards, such as the Normanby hoard of 47,912 coins, have not been declared treasure trove because their silver content was too low. Other collections of bronze coins have been sold or dispersed before any record of the finds could be made.

The BM briefing describes "anomalies" in the system of paying awards:

> **Donhead St Mary:** this hoard of Iron Age gold coins was declared Treasure Trove in 1987. The finder was convicted under *1979 Ancient Monuments Act* for metal-detecting on a scheduled site and fined £100. The hoard was subsequently valued at £5,210 and the Treasury decided to reduce the reward to £2,000 in view of the fact that the finder had been convicted for searching on a scheduled monument. Although no museum wished to see the finder receive a reward of £2,000 after he had been

[29] *Treasure Hunting*, June 1995, pp32-5

convicted of breaking the law, it then became clear that if no museum acquired it the Treasury would return the whole hoard to the finder. In the end therefore the British Museum decided to acquire the hoard as the lesser of two evils. The landowner was aggrieved that he was not entitled to any payment.

Burton Overy: this hoard of 282 silver coins of 17th century was found by an electrician while working in the loft of the house. He then banded them to the owner of the house who reported them to the local museum. The hoard was declared Treasure Trove in December 1994 and the finder was named as the electrician. The hoard was valued by the Treasure Trove Reviewing Committee at £9,675. Leicestershire Museums Services acquired the whole hoard and the owner of the house was not eligible for a reward, although common sense would suggest that he should have been.

Finally, it considers two cases which have highlighted problems arising out of the differing burdens of proof required at Coroners' inquests and in criminal prosecutions, and the limitations of protection afforded by the law of treasure trove once objects have been removed from the soil and lost their provenance:

Wanborough: probably the most important find of Celtic coins ever made in this country was made at Wanborough in Surrey in the mid 1980s. An initial discovery of Iron Age coins from this site was reported to the Coroner and declared Treasure Trove in 1984. Unfortunately, the find spot was revealed at the inquest and this encouraged unscrupulous individuals to search on the site, without permission and often at night, causing considerable damage. It will never be known exactly how many coins were found, because most of them were immediately dispersed in trade, but estimates suggest that the total was probably more than 9,000, and possibly as high as 20,000.

The police recovered several hundred coins from individuals at the site, and they were declared Treasure Trove at a second inquest. One of the individuals from whom coins were recovered was Mr Hancock, who was subsequently convicted of theft of Crown property. He was then acquitted at the Court of Appeal (in 1990) because the higher court found that the trial judge had misdirected the jury when he advised them that the fact that the coins had been declared Treasure Trove at an inquest meant that their status as Crown property was sufficiently well established to stand up to a criminal prosecution.

The problem essentially hinges on the differing burdens of proof required at Coroners' inquests and in criminal prosecutions. A jury at a Coroner's inquest simply has to decide whether a find is Treasure Trove or not on the balance of probabilities: in other words it has to decide whether it was more likely that a particular find was deliberately buried with the intention of recovery or came to be in the ground for some other reason. On the other hand, an individual can only be convicted of a criminal offence if the jury is convinced beyond reasonable doubt that he must have committed the crime. In the nature of things it will always be very difficult, if not impossible, to prove beyond reasonable doubt how a particular object came to enter the ground several hundred or thousand years ago. The lesson of this case, therefore seems to be that it will always be very difficult to obtain a conviction for theft of Treasure Trove under the current law.

The 'Heathrow Airport' case: this case shows very clearly the limitations of the law of Treasure Trove once objects have been removed from the soil and lost their provenance. The inquest, held in November 1994, concerned three groups of ancient British coins which had been detained by Customs at Heathrow Airport in July 1993 from a dealer who was attempting to export them to the United

States. There was no evidence as to where the coins were actually found, beyond that provided by the coins themselves: they were of a type that is only found in East Anglia. The British Museum gave as its opinion that the three groups were parts or all of three hoards which had not been to Inquest. Counsel for the dealer argued that he had bought the coins from various other dealers and they represented 'stock'. To support this contention, invoices were produced at the Inquest, although the dealer had previously told Customs that he had no such invoices. He also argued that even if the coins were found together they might have been found outside the UK and anyway they were more likely to be votive offerings or burial deposits than hoards deposited with the intention of recovery. The jury, much confused, found that the coins were not Treasure Trove.

The lesson of this case is that it seems unlikely that a Treasure Trove verdict would be obtained in any other cases where it is suspected that an undeclared hoard is being sold in the UK or exported. Perhaps the most damaging aspect of the case is that this message has not gone unnoticed and is likely to be exploited by unscrupulous dealers. It is significant that the dealer's solicitor concluded: 'Treasure trove is an anachronistic law being enforced on inadequate evidence ... I hope this important inquest leads to a radical revision of the treasure trove law'.

The Treasure Bill would have dealt with most, although not all, of the problems thrown up by this case: it would make the question of whether a particular object was Treasure or not a straightforward matter of fact in almost all cases; it would also cope with the 'votive deposit' argument and it would help with the standard of proof required.

The National Council for Metal Detecting proposed in 1992 that treasure trove law should be abolished "or allowed to become a dead letter".[30]

Some detector users are not opposed to treasure trove practice because, superficially, it appears to reinforce finders' rights. However the National Council policy committee has concluded that finders rights are better protected by the mainstream of British law and that the element of compulsory purchase allowed by treasure trove is contrary to usual rights of private ownership.

While it is difficult, if not impossible, to ascertain market values without going to market, the principle of awarding finders with full market value in the case of treasure trove declaration means there is no intention for the state to make any financial gain, or to offset the substantial costs of treasure trove processes.

Treasure trove law discourages a free exchange of information that is of value to academic study and the heritage.

However, the Federation of Independent Detectorists, in their response to the Treasure Bill introduced by Lord Perth in 1993/94, defended the law and practice of treasure trove:

TREASURE TROVE This practice has a proven record of success over the past 800 years which has accelerated phenomenally in the two decades since metal detecting became a popular pastime. Treasure Trove has no rivals in other countries. It does not seek to deprive

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[30] A Shared Heritage, p.14

the holders of land nor finders of genuinely lost or abandoned property, it does not seek to confiscate religious objects and it does not interfere with the rights of the owners of single objects of treasure to test their market value at auction, surely this is the fairest way to both determine financial worth and the will of the public to purchase exceptional finds for the Nation, if they so wish. The practice of a respected legal officer (Coroner) to hold an enquiry and for a jury to weigh the evidence follows the British tradition of enquiring after the true circumstances and facts, surely an admirable practice that should not be lightly abandoned.

VII Lord Perth's Treasure Bill HL (Bill 23 1993/94)

This Bill was sponsored by the British Museum and the Surrey Archaeological Society, who in the words of Lord Perth on 9 March 1994 "had seen the tragedy of the pillage of their great find at Wanborough".[31] (see p.23)

The Bill passed through all its stages in the House of Lords, and was sponsored in the House of Commons by Sir Patrick Cormack, but was lost through lack of time when objections prevented it from going through "on the nod". It was never debated in the House of Commons. When it was debated on second reading in the House of Lords on 9 March 1994, Baroness Trumpington said that the Government was unable to support it, though the case for reform of the law was accepted. Various amendments were made, *inter alia* for the placing of awards for the discovery of treasure on a statutory basis, and for the consultation of interested parties in the drawing up of a statutory code of practice. On 20 April 1994, Lady Trumpington said that the Bill, with certain further changes, would deserve Government support.[32]

The Treasure Bill (HL) 1993-94 was intended to create a new category of property to be known as "treasure", title to which was to be vested in the Crown, and to amend the law of treasure trove. The main provisions of the Bill were as follows:

1. All objects other than coins would be treasure provided that they contained at least 5% by weight of gold or silver and were at least 300 years old.

2. As far as coins were concerned, all coins found in hoards would now be treasure, whatever they were made of, provided that at least two of the coins were at least 300 years old. Single coins would not be treasure.

3. It would not matter whether objects had been buried in the ground with the intention of recovery, or buried in a grave or simply lost: provided they qualified under (1) or (2) above, all such objects would be treasure.

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[31] HL Deb. 552, c.1483
[32] HL Deb. 564, c.1465

4. In addition all objects found together with items that were treasure would be deemed to be Treasure, whatever they were made of.

5. The Secretary of State, with the approval of Parliament, was to be able to designate additional classes of object as Treasure; he would also be able to remove classes of object from the definition of Treasure.

6. All finds that were likely to be Treasure were to be reported to coroners within two weeks.

7. Coroners would be required to make reasonable efforts to ensure that occupiers and land-owners were informed of any reported finds of Treasure on their land.

8. Coroners would no longer need to summon juries to inquests on Treasure, thus speeding the process up considerably.

9. Rewards would be dealt with in a separate Code of Practice to be drawn up after consultation with interested parties (metal detectorists, landowners and the archaeological community). The Bill would not come into force until the Code of Practice had been approved by both Houses of Parliament.

10. The Bill would extend to England, Wales and Northern Ireland (but not Scotland, which already had a much broader definition of Treasure Trove - see page 7).

Failure without reasonable excuse to comply with the duty of the finder of treasure to inform the coroner was to be punishable on summary conviction with a term of imprisonment of up to three months or a fine of up to £5,000 or both.

The Bill was supported by the County Landowners' Association and the National Farmers' Union, as well as the British Antiques Dealers Association, the Association of Art and Antique Dealers and the British Numismatic Trade Association and very many archaeological and museum organisations. The Council for British Archaeology established the Standing Conference on Portable Antiquities in 1995 with representatives from all the leading archaeological and museums bodies. At its inaugural meeting on 24 May 1995, the Conference unanimously urged reform of the "archaic law of treasure trove" and urged the Government to proceed with the passage of the Treasure Bill.

Some archaeologists regarded the Bill as an unhappy compromise likely to jeopardise the possibility of full-scale legislation. It was opposed by the editor of *Current Archaeology* in an editorial "Nationalising our Past".[33] This criticised the situation in Scotland "where the present excessive law on Treasure Trove leads to considerable under-declaration" and the Bill

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[33] Current Archaeology Vol. XII no. 6 p.214

for leaving "the heart of the law" undecided : ie. the question whether rewards should be paid to the landowner or the finder. The Metal Detectorists were also opposed to the Bill on various grounds, some of which it is hoped have now been resolved - see p.29.

VIII The Treasure Bill 1995-96, Bill 21

Answering the short debate on treasure trove initiated by Lord Perth on 7 June 1995, Baroness Trumpington said:[34]

> As the noble and learned Lord, Lord Templeman, said, the need for the reform of treasure trove is generally agreed. The provisions of the Bill have wide support and we do not believe it necessary to reopen this issue-as distinct from the wider issue of the reporting of antiquities-in the context of the Green Paper consultations. I can assure my noble friend Lord Stewart by that we shall therefore be looking for an opportunity to secure the Bill's reintroduction in the next Session.

The Bill was presented by Sir Anthony Grant who came seventh in the ballot for Private Members' bills. It has three main objectives:

- To change the definition of Treasure by removing the need to prove that objects must have been intentionally buried; by specifying exactly how much gold or silver objects must contain in order to be treasure and by including objects found in association with finds of treasure.

- To streamline the procedures for determining what is treasure.

- To make the law enforceable by providing a new offence for the non-declaration of treasure.

Clause 1 defines treasure. All objects other than coins will be treasure provided they contain at least 5% by weight of gold or silver and are at least 300 years old. All coins that are more than 300 years old and found in hoards will be treasure : a minimum of at least two is required if they have a precious metal content of at least 5%; a minimum of ten if their precious metal content is below 5% single coins will not be treasure. All objects found in clear archaeological association with items that are treasure will be deemed to be treasure, whatever they are made of.

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[34] HL Deb. 564 c.1456

Clause 2 enables the Secretary of State to designate by order any class of object which he considers to be of outstanding historical, archaeological or cultural importance. Any object belonging to such a class will be treasure if it is at least 200 years old when found. The Secretary of State may also remove any class of object from the definition of treasure.[35] The order making power is subject to the affirmative procedure.

Clause 3 supplements Clause 1 by defining precious metal as gold or silver; clarifying how an object is part of the same find as another and allowing for reasonable presumptions as to age.

Clause 4 deals with ownership which in general vests in a franchisee or the Crown. It makes clear that it will no longer be significant where the treasure was found nor the circumstances in which it was left "including being lost or being left with no intention of recovery".

Clause 5 defines "franchisee"

Clause 6 enables the Secretary of State to disclaim objects that have been submitted as potential treasure. This is to ensure that objects which may qualify as Treasure but which no museum wishes to acquire can be dealt with the minimum of bureaucracy.

Clause 7 applies the *Coroners Act 1988* to anything which is treasure as defined by the Bill, and states that an inquest is to be held without a jury, unless the coroner orders otherwise.

Clause 8 requires the finder to notify the coroner of a find likely to be treasure within two weeks. The maximum penalty for the new offence of concealing such finds is three months imprisonment or a fine of £5,000 or both.

Clause 9 requires the coroner to take reasonable steps to ensure that occupiers and landowners are informed of any reported finds and to give them and the finder the opportunity to examine witnesses at the inquest.

Clause 10 provides for a system of rewards to be paid if treasure has vested in the Crown and is to be transferred to a museum. The total reward may not exceed the treasure's market value to be determined as the Secretary of State thinks fit. It may be payable to the finder, owner, or occupier of the land and shared between them as the Secretary of State determines. The procedures will be dealt with according to a code of practice.

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[35] Claims 2(2) and 1(2)

Clause 11 provides for the drawing up of a code of practice which may include guidance for those who search for or find treasure. It is to be drawn up after consulting such persons as the Secretary of State thinks appropriate. On report stage of Lord Perth's Bill on 20 April 1994, Baroness Trumpington said that "Such consultation would certainly include the major interests such as the National Council of Metal Detectorists and the County Landowners' Association as well as the archaeological community".[36] The code is to be subject to affirmative procedure.

Clause 12 provides for an annual report on the operation of the Act. The Act extends to Northern Ireland, but not Scotland.

The differences between the current Bill and Lord Perth's Bill are, briefly, as follows:

1. The minimum number of coins with a precious metal content of less than 5% that can qualify as treasure has been raised from 2 to 10.[37]

2. The Crown will now have the power to disclaim objects submitted as potential treasure.[38]

3. Coroners will now have discretion about the summoning of a jury to a treasure inquest.[39]

4. Coroners will be required to inform the finder (as well as owners and occupiers) if they intend to have an inquest and to ensure that they have the opportunity to examine witnesses.[40]

5. The Secretary of State will be required to lay before Parliament an annual report on the making of the Act.[41]

6. A provision has been introduced to make it clear that unworked natural objects, such as minerals, will not be treasure.[42]

Clause 14(3) makes a number of consequential changes to the provisions concerning the application of the Bill to Northern Ireland following the enactment of the Historic Monuments and Archaeological Objects (Northern Ireland) Order 1995.

The first four amendments have been made in answer to points raised by the National Council

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36 HC Deb. 554 c.254-5
37 Clause 1(a)(iii)
38 Clause 6(3)-(4)
39 Clause 9(3)-(5)
40 Clause 9(3)-(5)
41 Clause 12
42 Clause 1(2)

for Metal Detecting. The latter were particularly concerned about the previous Bill's proposed abolition of the jury at inquests, because the presence of a jury was seen as an important safeguard to the finder's rights, which might be endangered if only the coroner and expert witnesses were present. Their critique of Lord Perth's Bill : *The Treasure Bill examined,* 18.2.95, expresses concern about the additional costs of dealing with ever increasing amounts of all kinds of material, and the expenses incurred by finders. There is also criticism of the vesting (also in the current Bill) of treasure in franchisees where the original franchise extended only to treasure trove and did not include a right to the additional objects now to be defined as treasure : "The framers of the Bill..... defeat the purpose of the Bill by intentionally leaving outside the sanctions of a heritage protection law an anciently privileged group".[43] It remains to be seen whether further consultation, particularly over the code of practice, can win the support of the NCMD for the Bill.

IX The disscussion document on portable antiquities

This paper is complementary to the treasure Bill and represents the other half of the two-fold initiative of the DNH to the problem of knowledge being lost because of the variability of arrangements for the recording of finds where value is archaeological rather than monetary. The paper makes a clear distinction between the public *acquisition* of finds and the treasure procedure whereby national and local museums have right of first refusal to certain finds, provided they can pay for them, and the *recording* of finds. Though the Treasure Bill will add to the numbers of objects to be reported, there is no legal requirement to report important finds which are not treasure.

The paper refers to the increase in numbers of objects found, particularly because of the use of metal detectors : Research carried out by the Council for British Archaeology has found recently that there are about 30,000 metal detectors operating in England, Wales and Scotland. They suggest, tentatively, that around 400,000 objects made before about 1600 are being found each year. In Norfolk (often held up as an example of how well co-operation between metal detecting societies and the Museums Service can work) museum staff estimate that they see about 24,000 detector finds each year. Norfolk is seen as being "considerably richer in such finds than many other parts of England and Wales" and this and the fact that there are 54 counties in England and Wales, tends to support a figure of 400,000 finds.

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[43] loc.cit. p.8

The value and the cost of Norfolk's achievement is described in the following extract from a report in *Museums Journal*, September 1991, p.35:

Under the plough

With 20,000 finds through the system each Year, Norfolk's identification service is hailed as one of the best in the country

Norfolk is exceptional, not just for its identification service, but also for the level of amateur archaeological activity going on in the county. It is an intensively farmed area and much of the farmland is under the plough churning up finds. David Guerney, principal landscape archaeologist at Norfolk Museums Service, estimates that there are as many as 300 active metal detectorists across the county.

In part, the finds service is a response to this activity. 'We have built up the expertise and resources to be able to record the level of finds in the county,' Guerney says. But the Museums service also actively encourages finders to report their discoveries. It publishes a leaflet outlining the identification process. It also provides finders with a list of museums where they can report their discoveries and guidance on good practice.

In addition staff from the archaeology service go out to talk to the four local metal-detecting clubs. They regularly come back with boxes of stuff to record, Guerney says.

The success of the service Is built on trust between the professional archaeologists and the metal detectorists, says keeper of archaeology Sue Margeson. 'It is about building up personal contacts with people and the public in general. They come to know what we are looking for and in return we are as open as we can be with people and provide them with the information they want.'

Margeson has little doubt about the value of the service. 'It has vastly increased our information on Viking settlers in the area,'she says. Until the advent of metal detectors there were 20 to 30 finds relating to the Viking period. But the past 20 years have produced a further 300 objects. 'We now know much more about the kind of people who came over as immigrants,' she says.

But the information does not come cheaply. With as many as seven staff working on the identification service, although not full time, Guerney estimates the cost at £60.000 a year - £3 for each find.

The consultation paper concludes that many finds are not recorded at present: "Once an object has left the ground and lost its provenance, a large part of its archaeological value is lost. The result is a loss of information about the past which is irreplaceable. To state this is not to criticise the finders of these objects, but to highlight the weakness of the current recording arrangements".[44]

Thus the Government is seeking views on two options: for a voluntary Code of Practice on the recording of archaeological objects, and for legislation requiring the reporting of such finds. The paper sets out various questions to be answered before a code could be drawn up, and the possible advantages or otherwise of a statutory system. The conclusion is that it would be right, at least initially, to go for a voluntary system. Comments are sought from interested parties, particularly archaeologists, metal detectorists and museum curators by 28 June 1996.

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[44] Portable Antiquities, a discussion document, February 1996 p.4

The discussion document bases its estimate on the quality of objects being found on the Study Metal Detecting and Archaeology in England, English Heritage and Council for British Archaeology, 1995. Though this found that archaeological sites are suffering significant damage from unregulated metal detecting, and that the level of illicit detecting on scheduled sites is unacceptably high, it also concluded that the metal detector is an extremely important archaeological tool, responsible for some major advances in archaeological knowledge: "The overall quantity of finds made by detectorists is so colossal that even the tiny reported proportion is enough to multiply by several times the known corpus types of some types of find".

The study recommends:

- improved liaison between archaeologists and the detecting community
- improved communications among archaeologists themselves
- investigation of ways of managing a large increase in the referral rate
- investigation of new methods of protecting sites from illicit metal detecting: "Such measures could be taken jointly between archaeologists and responsible detectorists to foster a spirit of co-operation".
- investigation of the relationship between illicit detector finds and the antiquities market
- education of archaeologists about the metal detector which is currently under used in field work
- investigation of finds erosion and metal degradation in plough soil.

X Protection of portable antiquities in Europe

A survey done by the British Museum concludes that the legal protection afforded portable antiquities in England and Wales is more limited in scope and more liberal in its treatment of finders than in almost every other country in Europe.

1. *Duty to report finds.* Only Belgium has a weaker requirement that England and Wales, where, as has been shown, only finds of gold and silver likely to qualify as treasure trove have to be reported. Scotland and Northern Ireland, in common with almost every other European country, have legislation which requires the reporting of all archaeological finds.

2. *Ownership.* In most countries the state claims ownership of objects of historical or archaeological interest or has the right to pre-empt all significant archaeological finds. Belgium is the exception.

3. *Rewards.* Systems vary. In France, compensation by the State has to be agreed between the parties concerned and rewards are split equally between finder and landowner. In the Netherlands, the finder is not rewarded if he is an archaeologist; in Spain finder and landowner are each entitled to one quarter of the value. In Sweden, for finds of gold and silver the finder receives the value of the metal plus one eighth; for finds of copper the scientific value of the object.

4. *Control of excavation.* In most countries licences are required to search for archaeological objects, and these are not normally given to hobby detectorists in for example France, Germany, Austria, Spain, Greece, Cyprus. In the Republic of Ireland metal detecting magazines are banned, and in the French speaking area of Belgium advertising for metal detectors must not make to reference to treasure. In Malta, import of metal detectors has been banned since 1979. In the Scandinavian countries except Sweden no licences are required except for excavation on ancient monuments or scheduled sites.

Appendix I

Numbers of treasure trove inquests held by coroners in each year since 1970:[45]

1970	16	1979	52	1987	46
1971	18	1980	57	1988	44
1972	19	1981	59	1989	54
1973	78	1982	51	1990	63
1974	46	1983	38	1991	60
1975	17	1984	48	1992	38
1976	32	1985	46	1993	40
1977	29	1986	29	1994	59
1978	45				

Appendix II

Debates on Lord Perth's Treasure Bill (HL) 1993-94.

Second Reading; 9 March 1994, HL Deb. 552 c.1482.

Committee; 23 March 1994, HL Deb. 553, c.715.

Report; 20 April 1994, HL Deb. 554, c.234.

Third Reading; 27 April 1994, HL Deb. 554 c.747

[45] Source: Home Office Statistical Bulletins

Appendix III

The National Council for Metal Detecting

CODE OF CONDUCT

(as revised and first published by the National Council in 1983)

1. Do not trespass. Ask permission before venturing on to any private land.

2. Respect the Country Code. Do not leave gates open when crossing fields, and do not damage crops or frighten animals.

3. Do not leave a mess. It is perfectly simple to extract a coin or other small object buried a few inches under the ground without digging a great hole. Use a sharpened trowel or knife to cut a neat flap (do not remove the plug of earth entirely from the ground), extract the object, replace the soil and grass carefully and even you will have difficulty in finding the spot again.

4. Help to keep Britain tidy – and help yourself. Bottle tops, silver paper and tin cans are the last things you should throw away. You could well be digging them up again next year. Do yourself and the community a favour by taking the rusty iron and junk you find to the nearest litter bin.

5. If you discover any live ammunition or any lethal object such as an unexploded bomb or mine, do not touch it. Mark the site carefully and report the find to the local police and landowner.

6. Report all unusual historical finds to the landowner.

7. Familiarise yourself with the law relating to archaeological sites. Remember it is illegal for anyone to use a metal detector on a scheduled ancient monument unless permission has been obtained from the Historic Buildings and Ancient Monuments Commission in England and the Secretary of State for the Environment in Scotland and Wales. Also acquaint yourself with the practice of Treasure Trove.

8. Remember that when you are out with your metal detector you are an ambassador for our hobby. Do nothing that may give it a bad name.

9. Never miss an opportunity to show and explain your detector to anyone who asks about it. Be friendly. You could pick up some useful clues to another site. If you meet another detector user, introduce yourself. You may learn much about the hobby from each other.

National Council for Metal Detecting: 1992

Recent Research Papers from the Home Affairs Section include:

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96/22	Forms of Investigatory Inquiry & the Scott Inquiry	09.02.96
96/25	Public Interest Immunity	22.02.96
96/27	The Individual Responsibility of Ministers: An Outline of the Issues	21.02.96

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Research Paper 96/36 **Section Code: HAS**

Title: The Treasure Bill 1995/96 [Bill 21]

It would greatly help to ensure that Research Papers fulfil their purpose if Members (or their staff) would fill in and return this brief pre-addressed questionnaire. Negative responses can be as useful as positive.

For your purposes, did you find this paper:

Any comments? _____

	Very useful	**Quite useful**	**Not much use**
1.	☐	☐	☐
	Too long	**The right length**	**Too short**
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	Clear	**Not always clear**	**Rather unclear**
3.	☐	☐	☐

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