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THE LAW OF TREASURE IN ENGLAND AND SCOTLAND

by Zeb Micic

The law of real property has often been ridiculed: indeed, J. W. Harris considers reasoning in common law and related commentaries appears nowhere as arcane than when they deal with property.¹

Literature on treasure law is by no means voluminous, yet much valuable material can be found. Sir George Hill's *Treasure Law* (1936) is a semi-antiquarian study of England, Scottish and foreign treasure law and is particularly useful for a comparative element. Equally, A. G. Guest's *The Law of Treasure* (2018) is a prescient practitioner's guide for England and Wales and is a valuable addition to Hill. Scottish law has received analysis recently, principally by D. L. Carey Miller, which are important contributions to the literature.²

English Treasure Law

F. W. Maitland once wrote that English real property law as full of rules 'which no one would enact nowadays unless he were in a lunatic asylum'.³ This is especially true of the pre-1996 system of treasure trove. From very early times treasure trove has been the unquestioned property of the Crown. The first laws on the subject were promulgated during the reign of Edward the Confessor, which provided that treasure found anywhere – except on the premises of a church or cemetery – should be the absolute property of the king. If found on ecclesiastical property, all the gold and half the silver discovered belonged to the king.⁴

Bracton, however, did not limit treasure to gold and silver. He extended it to any other metal. This is what he is believed to have written between 1250-58:

Treasure, that is, silver or gold or metal of some other kind... Treasure is any ancient store of money or other metal which has been forgotten so that it no longer has an owner; thus it belongs to the finder since it belongs to no one else.⁵

¹ J. W. Harris, "Reason or Mumbo Jumbo: the Common Law's Approach to Property," *Proceedings of the British Academy*, 117 (2002): 445.

² These are principally: D. L. Carey Miller and Alison Sheridan, "Treasure Trove in Scots Law," *Art Antiquity and Law* 1 (1996): 393-406; D. L. Carey Miller, "Treasure Trove in Scots Law," *Fundamina* 8 (2002): 75-90; M. Guthrie, "A Comparative Study of the Scottish Law of Bona Vacantia and the English Law of Treasure," *Art Antiquity and Law* 17 (2012): 307-324.

³ F. W. Maitland, "The Making of the German Civil Code", in *The Collected Works of Frederic William Maitland* vol 3, ed. H. A. L. Fisher (Cambridge: Cambridge University Press, 1911), 486.

⁴ *Leges Edwardi Confessoris*: [14] Thesauri de terra regis sunt, nisi in ecclesia uel in cimiterio inueniantur. [14.1] Et si ibi[†] inueniatur aurum, regis est; et si argentum, dimidium regis est et dimidium[†] ecclesie ubi inuentum fuerit, quecumque[†] sit diues uel pauper.

⁵ *Bracton on the Laws and Customs of England*, trans. S. E. Thorne, 2 (Cambridge, Mass: Harvard University Press, 1968), 338.

Sir William Stanford, one of the justices of the Common Pleas, is the next authority. Writing in c. 1548, he simply quotes Bracton verbatim in Latin.⁶

Sir Edward Coke, chief justice of the King's Bench, is, said Lord Denning, 'the greatest authority of all'.⁷ After he was dismissed in 1616 he wrote his institutes, bringing Bracton's medieval law up to date to fit the needs of his time of Elizabeth I and James I. His definition of treasure trove formed the basis of all subsequent law upon the subject until the 1996 Act:

Treasure trove is when any gold or silver, in coin, plate, or bullyon 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 kings grant, or prescription.⁸

In *G. E. Overton* the Court spent much time on the words 'when any gold or silver, in coin, plate, or bullyon:' Lord Denning ruled that it should be read as 'gold or silver *in the form of* coin, plate or bullion,' and not, 'gold or silver *contained in* coin, plate or bullion'.⁹

Sir William Blackstone took a different view to Coke. He said:

Treasure-trove (derived from the French word, trover, to find) called in Latin *thesaurus inventus*, which is where any money, or coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king.¹⁰

His view that treasure included money of any metal was not a prevailing one. Chitty goes back to Coke:

13. Treasure trove, is where ant 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.¹¹

Turning, next, to the case law. Before the codification of treasure law, the case law did not settle the law in England: neither *R v. Thomas and Willett* nor *R v. Toole* were binding authorities on the true meaning of treasure trove. Indeed, in 1936 Sir George Hill, director of the British Museum, did not regard the law as settled.¹² Home Office circulars of 1931 and 1936 simply outlined the mechanisms for the administration of the law, i.e. the reporting of finds to police authorities, the British Museum and, ultimately, the Coroner.

⁶ *Attorney General of the Duchy of Lancaster v. G. E. Overton (Farms) Ltd* [1981] EWCA Civ J1118-3, 287.

⁷ *Ibid.*

⁸ Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: W. Clarke and Sons, 1817), 132.

⁹ *Attorney General v G. E. Overton*, 288.

¹⁰ William Blackstone, *Commentaries on the Laws of England*, 17th ed., vol. 1 (London: Collins & Hannay, 1830), 295.

¹¹ Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown, and the Relative Duties and Rights of the Subject* (London: J. Butterworth and Son, 1820), 152.

¹² G. F. Hill, *Treasure Trove in Law and Practice from the Earliest Time to the Present Day* (Oxford: Clarendon Press, 1936).

The case of *Overton*, referred to above, settled, first, that the law of treasure trove did not apply to any metal other than gold or silver and, secondly, that an object of treasure trove must contain an 'substantial' amount of gold or silver.

The issues with pre-1996 treasure law is particularly well illustrated by the Sutton Hoo discovery in 1938-9. An inquest was held on 15 August 1939, at which Sir George Hill (formerly director of the British Museum and a leading authority on treasure trove) sat with the coroner. The discovery, 'without their equal in interest to anything hitherto found in England of that nature', could not be deemed as treasure and, therefore, claimed for the nation. Firstly, the jury could only be concerned with those objects of gold and silver, thus excluding many items of historical and cultural significance. More importantly, however, the jury had to 'find that the articles were hidden and not concealed', and, therefore, belonged to the Crown. C. W. Phillips, a fellow of Selwyn College, Cambridge, gave extensive evidence on contemporary funeral rites.¹³ The verdict was that, as the owner of the articles could not be found, Mrs Edith Pretty, the owner of the land, was the finder and, as the objects did not constitute treasure trove, the owner. The Sutton Hoo objects could have been lost, were it not for Mrs Pretty's generosity in presenting them to the British Museum, and it is remarkable that it took until 1996 for the law to be rendered satisfactory on this point.

There the law lay until the 1996 Act, with which treasure was given a statutory definition as:

- All coins from the same find, providing it was of two or more coins and are at least 300 years old. If the coins contain less than 10 per cent gold or silver, ten are needed for the find to qualify as treasure.
- Two or more pre-historic base metal objects, providing they are associated with each other.
- Any individual item that is over 300 years old and contains 10 per cent gold or silver.
- Objects, substantially made from gold or silver, but less than 300 years old, providing that they had been deliberately hidden with the intention of recovery and the owners or heirs are unknown (i.e. the pre-1996 definition).
- Any other finds found in the same place, or had previously been together, as another object determined as treasure.

Equally important is the fact that the Act allows for the a reward of up to the market value of any treasure surrendered to the Coroner. This was previously a non-statutory, but useful,

¹³ R. L. S. Bruce-Mitford, *The Sutton Hoo Ship-Burial*, vol. 1 (London: British Museum Publications, 1975), 721-23.

practice.¹⁴ The amount of the reward and how it is to be divided among the claimants (i.e. the finder, tenants and owner of the land) is determined by the Treasure Valuation Committee, an advisory non-departmental public body of the Department for Culture Media and Sport. Its terms of reference are laid down in the Act's code of practice.¹⁵

Although not technically treasure law, mention of the Portable Antiquities Scheme would be prescient. This voluntary scheme, managed by the British Museum (in partnership with the National Museum of Wales), records public archaeological finds not determined to be treasure. All recorded finds are recorded in an open-access and free-to-use database. The Scheme was funded by the National Lottery Heritage Fund until 2006, from which year it was funded by the Department of Culture, Media and Sport (DCMS). Management passed to the British Museum in 2007, who fund it through its grant-in-aid from DCMS.¹⁶

Scottish Law

The Scottish position is somewhat different. Treasure law is a part of the common law of Scotland: the feudal system, of which, classifies prerogative rights vested in the Crown as *regalia majora* or *regalia minora*. The former is held in trust for the people and, therefore, inalienable (it includes rights to the sea and seabed, foreshore and rivers).¹⁷ The *regalia minora* is a miscellaneous group of alienable property rights. The Crown's right to treasure and lost property – *bona vacantia* – are included in this category.¹⁸ It differs from Roman law as there is a rule attributed to Emperor Hadrian which vests treasure in equal shares in the finder and landowner.¹⁹ The Scottish approach to treasure law is relatively simple and the definition of which must include all archaeological objects.

The leading Scottish case is *Lord Advocate v. University of Aberdeen and Budge* (1963) concerning the 'St Ninian's Isle Treasure'.²⁰ Some twenty-eight items of eighth century treasure was found during an Aberdeen University archaeological dig on St Ninian's Isle. The university took the items to Aberdeen for display in the university museum. The Lord Advocate, responsible for representing the Crown's legal interests in Scotland, brought the case requiring the university to hand the treasure over to the Crown and to accept the usual,

¹⁴ Much correspondence on this subject can be found in files HO 45/10031/A58223 and 23032, the National Archives.

¹⁵ Department of Culture, Media & Sport, *Treasure Act 1996 Code of Practice*, 2nd ed. (n.d.), last accessed December 2021, https://finds.org.uk/documents/treasure_act.pdf.

¹⁶ Portable Antiquities Scheme, "About Us", last accessed December 2021, <https://finds.org.uk/about>.

¹⁷ W. M. Gordon, *Scottish Land Law* (Edinburgh: W. Green and Son, 1989), para 27.06; Carey Miller and Sheridan, "Treasure Trove in Scots Law," 393-406.

¹⁸ Gordon, *Scottish Land Law*, para 27.06; Miller and Sheridan, "Treasure Trove in Scots Law," 393.

¹⁹ Justinian, *Institutes*, trans. J. B. Moyle (Oxford: Clarendon Press, 1967), 2.1.39.

²⁰ *Lord Advocate v University of Aberdeen and Budge* [1963] SC 533; see also, D. L. Carey Miller, "St Ninian's Treasure," in *Scots Law Tales*, ed. J. P. Grant & E. E. Sutherland (2010), 111-35.

but non-statutory, monetary reward. The university defended the action, considering Norwegian treasure law – the islands of Orkney and Shetland originally belonged to Norway – rather than Scottish to be applicable. This would have split the abandoned property between the finder (the university), the owner of the ground (Budge) and the Crown. The islands had not, the university argued, been given to Crown by god (as with the rest of Scotland) but acquired differently; therefore, the feudal system of treasure law, as on the mainland, did not apply as the Norwegian law had never been replaced.

The Court of Session predictably ruled that the treasure law of mainland Scotland did indeed apply and the treasure belonged to the Crown. It was deposited in the National Museum of Scotland. This case created the important precedent, in Scotland, that the standard law of *bona vacantia* applied, whatever the original application of law in a particular area was.

The 1996 does not apply in Scotland,²¹ where treasure trove comes under Scottish common law. The application of the law, unlike the pre-1996 position in England, is an application of the law concerning *bona vacantia*. Simply, *quod nullius est fit domini regis* ('that which belongs to nobody becomes the king's'). Treasure is one of the *regalia minora* ('minor things of the king') and, therefore, it is the Crown's do as it pleases.

The wider, Scottish, definition of treasure negates the need for a similar body to the Portable Antiquities Scheme in England and Wales, from a purely historical point of view, the lack of a publicly accessible database of finds is to be regretted and is, perhaps, a loss to scholarship.

Reform

Much headway was made by the 1996 act in England and Wales, yet more work is left to be done. Sections 7-9 of the act concern coroners' jurisdiction and makes prospective provision for the appointment of a designated Coroner for Treasure. This seems to the author a much more satisfactory position where a suitably expert and legally-qualified judicial officer will control the national system for treasure, rather than individual area coroners whose expertise and experience of treasure and its related law is variable.

Many of the defects of the 1996 act, in England and Wales, were rectified when the Government recognised 'the growing popularity of metal detecting ... has brought to light an increasing number of finds' which do not constitute treasure. This is principally because they made from bronze and not, therefore, precious metal. Under plans published in December

²¹ Treasure Act 1996, <https://www.legislation.gov.uk/ukpga/1996/24/contents>, s 15 (3).

2020, revisions to the definition of treasure are to be made.²² It would seem sensible if legislation were enacted in Scotland which (a) brought the definition of treasure into statutory form and (b) the extension of an unclear and unsatisfactory definition to be analogous to the reformed English example. In an age of increased devolution and tension between governments of the Union, the law surrounding treasure is an issue of real importance (as far as a cultural legacy is concerned) on which the four nations might come to a unified agreement.

²² Department of Culture Media & Sport, *Revising the definition of treasure in the Treasure Act 1996*, government response to public consultation, 4 December 2020, <https://www.gov.uk/government/consultations/revising-the-definition-of-treasure-in-the-treasure-act-1996-and-revising-the-related-codes-of-practice/outcome/revising-the-definition-of-treasure-in-the-treasure-act-1996-and-revising-the-related-codes-of-practice-government-response-to-public-consultation>.

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