NEW ZEALAND ARCHAEOLOGICAL ASSOCIATION NEWSLETTER

COMMENTS ON THE APPLICATION OF THE LAW OF TREASURE TROVE IN NEW ZEALAND

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First, we as archaeologists must establish exactly why we may wish to apply Treasure Trove here. We are concerned at the way private individuals excavate archaeological sites in order to collect, for their own use, ancient Maori artefacts. This results in the extensive destruction of archaeological sites which would have been capable of supplying information of scientific value, if properly excavated. It also leads to the loss into private hands of what may reasonably be considered to be objects of public value. We also believe that this wide-scale destruction is aggravated by the commercial value attached to certain Maori artefacts, which are eagerly bid for in auctions and which, we also believe, are illictly exported for private profit. In short, the inadequacy of our laws for the protection of antiquities is leading to the serious impoverishment of our heritage. The sum of goods and records which our descendants may fairly hope to inherit from us is being lost to them, and private individuals are now making profits out of it. We might therefore look to the law of Treasure Trove as a possible means of protecting our archaeological evidence, by making all finds the property of the State, and thereby discouraging the private collectors and profiteers, who would have no legal claims to finds.

The law of Treasure Trove is an English institution, originating in the early Middle Ages, and administered through officers responsible to the Crown, called coroners. The legal aspects are succintly outlined in G. C. Parmiter's recent paper in Antiquity, and the purpose of the present discussion is to enlarge on some of the aspects of the law, including its real objectives, and also to look at its possible application in New Zealand, discussing the chances of its applicability and whether other legislation might not be more appropriate.

Treasure Trove is concerned only with bullion, that is, the two noble metals of gold and silver. Its concern has always primarily been with the bullion value of discovered treasure, rather than aesthetic or historical values. This should be remembered throughout the following discussion. The law goes back at least to the reign of Edward I and represented a code, formulated by the King, whereby a fair line might be drawn between what may be called the rights of the individual to picking

up and keeping accidentally lost trifles; and the ultimate legal ownership by the Crown or State of the land, its mineral rights and so forth, which are made available to the individual through freehold and other subdivisive legal devices. We should remember that Mediaeval agriculture and earthworking were turning over the ground very widely, and may be said to have taken the first pickings of most archaeological sites. Treasure Trove was a law which was intended to ensure that the ever-hungry Treasury had a clearly stated right, supported by sanctions, to a proportion of such accidentally discovered wealth. Two points may be noted; the law is intended to settle the disputable position of ownership, where a finder is logically not the owner. The second point is that the law originally must have operated over the discovery of coins (which may be supposed to have been minted by the Exchequer), or bullion, whose value lay in being melted down into coin. One supposes that little or no market existed in the Middle Ages for curiosities, art works or collectors' items. Whatever market there was cannot have created, as it does in our own time, greater values than the value of gold and silver as money.

It is worth underlining the point of definition of ownership, and we shall return to it again in discussing New Zealand. It is first assumed that useful and valuable objects must have owners. Next, owners of valuables can only have a limited number of ways in which they and the objects may become separated. Apart from theft, extortion, etc., an owner may accidentally lose a valuable; a ring may slip off a finger, a coin fall through a hole in a pocket. In which case, if the object is found by someone else, and the legal owner cannot be traced, then the finder may lay claim to the object. Alternatively, an owner may deliberately hide valuables, often by burial, with the intention of recovering them later. However, there are obvious reasons why this intention may be thwarted, such as death, poor memory, or changed topography, and if the treasure is found by another, and the legal owner not traced, then the treasure will belong to the state. We may wonder that anyone should be fool enough to report a find to the state, but there are two points to be remembered: there are sanctions against people who fail to report their finds; the finder has no legal rights to possession and so anyone else could take the treasure off him, or, in effect, defraud him if he chooses to sell the treasure.

How, in practice, is this distinction arrived at between deliberate hiding and unintentional loss? The writer's father was a coroner for many years and though he had virtually no cases of Treasure Trove an example is illustrative. A workman found an old gold coin while digging a road which had run through the town since time immemorial. This was taken to be a case of accidental loss, and, no-one able to claim ownership

coming forward, the workman was allowed to keep the coin. But this raises the question of the jurisdiction of the coroner. Parmiter makes it quite clear that the coroner and his jury cannot decide on the title to a find; the procedure looks cumbersome, for it seems that the title of the Crown is always assumed, and that the finder must institute proceedings to justify his claim. Obviously it would be hard on the finder of goods worth say ten dollars, if he had to institute proceedings which would swallow all of that up in lawyer's fees, as well as time. Presumably therefore the coroner may make a decision in small cases.

It is difficult to say what guide-lines are followed in more substantial matters: as an archaeologist one may suspect that lawyers have claimed for themselves greater powers of site interpretation than is claimed by many a professional archaeologist. Do we know the motives of the people who created our archaeological sites? However, a rule of thumb may well be that where treasure is found in concentrated quantities, in what are called hoards or caches, then they were probably intended to have been hidden. What comes to mind are the well-known hoards of metalwork and gold, many associated with the European Bronze Age. In New Zealand one thinks of caches of adzes, or perhaps the Kauri Point swamp site deposit of wooden combs and other artefacts. On the other hand, if the finds are isolated and random, the chances of accidental loss seem high. Thus, the litter of finds on many archaeological sites are presumably the result of unintentional loss or abandonment.

We have seen that the law of Treasure Trove was never designed as an antiquities law; how then did it become so? This appears to have taken place only towards the end of the Nineteenth Century. It can best be seen in the historical perspective of the legislation introduced by Sir John Lubbock (Lord Avebury) in 1882 to protect archaeological sites. There is an ancient tradition of re-applying an old law to serve a new function, and it is obvious from the difficulties experienced by Lubbock over getting his site protection legislation accepted, that archaeology would be far better served through use of an old law, than in attempting to introduce a new one which threatened the by-then sacred rights of private property. In short, the law is not designed for archaeological protection and is, as a result, far from comprehensive. Its disadvantages are (1) it can only apply to gold and silver, which form only a minute fraction of important archaeological finds in Europe; (2) it confines archaeology to artefacts, whereas we now know that sites and structures and even middens have an equal, if not greater importance, to the archaeologist; (3) it is concerned only with things after they have come out of the ground, whereas nowadays we want to protect our sites from disturbance before this stage.

In discussing English Treasure Trove it is reasonable to ask how effective the law is in practice. We cannot turn to any statistics, though it is possible that the number of inquests on Treasure Trove during a period could be supplied by the Coroners' Society of England and Wales. What we cannot tell is the proportion of inquests to the total of reported finds, and still less do we know of the number of unreported finds. One suspects that many smaller finds are not reported, while the numbers of prosecutions for failure to report are evidently rare. There is probably a marginal "black market" in such finds, though certainly nothing on the scale of some countries, such as Mexico or Turkey, if the Dorak Treasure revelations are anything to go by. However, where a substantial find is made in England it is probable that it will be reported. Reputable antique dealers would be cautious over a sudden run of ancient coins or other archaeological remains. One may also hope that a combination of law-abiding nature, innocence and a desire for television or press publicity, would ensure that more important finds are reported. The British public has developed a keen awareness of archaeology since the Second World War; there was much publicity in the early days of television and there is a fair amount of public education on the subject, though probably less than in a country like Denmark. One fears that in New Zealand the public is largely uninformed or misinformed by news media, in spite of the efforts of the museums. What comes to mind was some publicity for the "Moehau Monster" this past Christmas. Also, in Britain there are proportionately fewer collectors of artefacts; the squirrel instinct of most British is amply satisfied with antiques, particularly the current discovery of Victoriana. But there is a negative side: ever since the delay of nearly a year to the construction of the building in whose foundations the Temple of Mithras was found, there have been hints that contractors have not encouraged their navvies to report finds. The realization of this led archaeologists to carry out prior salvage operations, such as, for example, the St Ebbes development of an old quarter of Oxford. This was a particularly good opportunity to examine the mediaeval and earlier sections of a modern city, but unhappily it may be suspected that there were insufficient resources to do the work as thoroughly as the archaeologists would have liked.

The applicability of Treasure Trove to New Zealand:

There is no obvious reason why the law should not be applied in New Zealand, at least for its originally intended purpose, though the writer is not aware of any instances. Basically, the New Zealand legal system is the Common Law of England, her lawyers share the precedents and traditions of English Law, and she has the same legal offices, including that of the coroner. There are, of course, practical differences and possibly one may be in the role of the police, to whom bone discoveries

are usually reported. An interesting example of this comes from Australia, where the highly important Kow Swamp fossil discoveries, aged 20,000-30,000 years, were originally reported to a country police constable. Presumably, however, most obviously archaeological finds are reported to the museums in New Zealand, or not at all. However, it is obvious from the earlier definition of Treasure Trove, with its specification of bullion, that the law does not automatically apply here, as far as archaeology is concerned, for the ancient Maori used no metals.

In originally preparing this paper, the writer felt that the metal specification ruled out any chance of Treasure Trove being applied here, and that those most concerned with the question of protecting archaeological finds and ensuring their ownership by the State would be best advised to start from the beginning by seeking to have appropriate, and properly drawn up, Antiquities legislation. But second thoughts suggest that we do not dismiss the idea of using Treasure Trove too hastily. Two factors are relevant; it is always much easier, as we have seen, to turn to an already existing law: next, the present climate in New Zealand seems to be highly obstructive to the creation of laws which would threaten "private ownership". A dispassionate eye on our present Government suggests that it would not willingly disturb important sections of its electorate by enacting laws which strengthen the powers of the State over what might be termed private property. It may be supposed that farmers and property owners would prefer to be coaxed, rather than coerced into transferring finds, made on their property, to public ownership.

Therefore, it might well be a good idea if a test-case were brought forward to test whether Treasure Trove could be applied, in a carefully chosen case. What is on our side is the present concern with conservation. There must be many cases where fossickers have pillaged sites on land to which they have no rights - say, for example, Crown Lands - and have made ancient Maori artefacts their own property. But the stumbling block is, of course, the specific mention of bullion. It may be suspected that this would be the opinion of any Queen's Counsel, but it might be worth trying. Might it not be possible to extend the term "Treasure" to include Maori treasure? What comes to mind are objects in greenstone, finely wrought wood-carving and textiles. Whether the ancient Maori had quite this concept of treasure is an academically debatable point, but at least this holds true for the present. We may also find some help in Maori law which, it seems clear, had little room for private ownership. Valuable objects were the property of the tribe or group, and Raymond Firth illustrates this with instances of "gifts" made to people outside the group, with the clear expectation of their return, even several generations later. Instances in European times of

individuals alienating tribal land also show how little belief the Maori had in the idea of an individual being able to claim personal property rights. Here again, therefore, there are grounds for arguing that the State could lay claims to ownership, but we must still tackle the problem of the intentions of the original owners. We have noted that caches and such concentrated finds might reasonably indicate intentional hiding. But it must be admitted that the bulk of archaeological finds are not so readily interpreted. But, by way of a conclusion, we must turn to the present situation. There are signs that sites are being improperly destroyed by individuals in order to gain possession of artefacts. Any form of restrictive legislation is likely to discourage some and cause others to go "underground" (no pun intended), whereas a locally adapted Treasure Trove could supply a flexible and fairly realistic way of drawing the attention of the general public to the claims of the State to ancient artefacts.

REFERENCE

Parmiter, G. de C. 1968. "Treasure Trove", Antiquity vol. XLII, 307-309.