NOTES ON THE ROMAN AND EARLY ENGLISH LAW OF TREASURE TROVE.

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The English Common Law of Treasure Trove appears, like many other parts of our common law, to be derived partly from a Teutonic and partly from a Roman source. I have been obliged to consider the latter somewhat at length, as it has been incorrectly stated by several of our English authorities.

I can find no authentic record of the law of treasure under the Republic. In the tyrannical reign of Nero, the story of Caesellius Bassus (Tacitus Ann. xvi, 1-3) seems to indicate, but not very clearly, an imperial right to finds of ancient treasure. It is recorded (Zonaras xi, c. 20, page 583) to the credit of Nerva, that he declined to exercise such a right in the case of Atticus, the father of Herodes Atticus.

The first legislation on the subject, known to us, is a constitution of Hadrian, which, "on grounds of natural equity," gives to the finder of treasure, in his own ground, the entire ownership. If the finder be a stranger, and the discovery be accidental, half goes to the finder and half to the owner of the ground, whether the latter be a private person, a municipality, or the *fiscus*. (Just. Instt. 2. 1. 39. see too Spartianus, Hadrianus c. 18).

This law, which is to be placed between 117 and 138 A.D., appears to claim a right for the Emperor, but to waive that right in favour of the owner of the soil and the accidental finder. It is clear that the former was to be *solely* entitled, if the finding was the result of deliberate search.

A constitution of the Divi Fratres (L. Verus and M. Aurelius), therefore between 161 and 169 A.D., gives the half of treasure found in all public or consecrated places to the *fiscus*. In all other cases, it releases the finder and the owner of the ground from any obligation to inform the public authorities; imposing, however, a fine of double the total amount, where a half *is* due to the *fiscus* and has been embezzled (Dig. 49. 14. 3. 10, 11.) This law is quoted by Callistratus, writing between 193 and 198 A.D., and was therefore, doubtless, in force at that time.

The meaning of *Thesaurus* seems to be assumed as known in these enactments; but disputed cases, of course, arose. On one of these, Cervidius Scaevola (A.D. 180-192) tells us that money lost or left behind him by an ascertainable owner is *not Thesaurus* (Dig. 6. 1. 67); and Paulus, Scaevola's pupil, about 220 A.D., defines *Thesaurus* as an ancient deposit of money of which there is no memory; for it only becomes the property of the finder because it does not belong to any one else; so that in the case of an ascertainable depositor it is no *Thesaurus*. (Dig. 41. 1. 31. 1). I have explained the last words of this passage rather with reference to their general effect (which is undoubted) than their literal meaning. I take the *immemorial* character of the deposit, with Savigny (System B. 4, sec. 196 note *a*), to indicate simply that the owner, or his representative, cannot be ascertained in the present time; and I believe that the term *finder* is used generally; in contradistinction to the original owner of the money, and to the *fiscus*; not to the present owner of the land.

A statement in Lampridius' Life of Alex. Severus, who reigned from 222 to 235, A.D., leaves the same doubt as to the exact meaning of *finder* (c. 46): but the view of good authorities has been that this emperor restored or confirmed the law as settled by the Divi Fratres. A second restoration of the same law, as against imperial encroachments, may be gathered, from the fourth Eclogue of the poet Calpurnius, to have taken place under the Emperors Carus and Carinus (A.D. 282-3). Similar alternations of treatment continue down to the time of Theodosius the

Great. Constantine, in the year 315, enacted that all treasure found should be brought into the *fiscus*, under penalty of examination by torture in case of concealment: of treasure so brought in, the finder was to receive one half. On the other hand, two constitutions of Theodosius restore all Treasure Trove, however found, to the owner of the land, if also the finder: if the finder be not the owner, he takes three fourths, the owner one. But any intentional search in another person's land is prohibited (A.D. 380 and 390). These laws form L. x, Tit. 18 of the Code of the second Theodosius, published in 438 A.D.

A constitution of the Emperor Leo, in the year of his death (A.D. 474), restores the law of Hadrian, expressly depriving the finder of his half, when the search is intentionally made in another's ground, (Novellae Leonis, 51). Finally, this law of Leo was included by Justinian in his Codex (L. x, Tit. 15), of which the second issue appeared in A.D. 534.

In several of these later laws the term *mobilia*, occurs, instead of the *pecunia* of Paulus. I think it probable that *Thesaurus* would have been, ultimately, taken to cover *any* moveable articles of value: but I do not give much weight to the word *mobilia* which is, in fact, an alteration from *monilia* in the oldest authority, the Codex Theodosianus.

Coming to the second or Teutonic source of our common law, I find it extremely difficult to say how far the law of the Anglo-Saxon kingdom was independently evolved, and how far it was borrowed, perhaps through intercourse with the Frankish sovereigns, from a Roman original.

Kemble (Saxons in England B. 2, Ch. 2.) represents the Anglo-Saxon Sovereigns as claiming to themselves all Treasure Trove, and supports his view by the charters in which the right to "hoards whether above or within the earth" are occasionally granted away.

A general confirmation of the old law of England, as the law or laws of King Edward (Confessor), may be confidently attributed to William the Conqueror and Henry the First. The so called Laws of William the Conqueror, however, which probably belong to the

reign of Henry the First, contain no mention of Treasure Trove. The "Leges regis Henrici primi," of which the part with which we are concerned was drawn up, by a private hand, either under Stephen or in the early part of Henry the Second's reign, contain a claim to "Thesaurus inventus," among the rights of the King (Ch. x, Thorpe p. 518). Lastly the "Leges regis Edwardi Confessoris"—a compilation dating from the latter part of the reign of Henry the Second, and which has been attributed to Glanville himself—have the following clause: "Treasures out of the earth belong to the King, unless found in a church or burial ground. And, if found there, gold belongs to the King: silver, half to the King and half to the church, where the silver was found, be it rich or poor" (Ch. xiv, Thorpe p. 448).

The treatise on the laws and customs of England which is more certainly attributed to Henry the Second's Justiciar, Ranulph Glanvill, enumerates, among the offences prosecuted by the Crown, the fraudulent concealment of Treasure Trove (L.I. cap. 2.), which does not appear to have been then limited to any particular metal (*ib.* L. xiv, cap. 2). The Old Scotch *Quoniam Attachiamenta*, probably founded on Glanvill, merely tells us (c. 48) "To the King belong, by direct operation of law, all treasures hidden under the earth and in other places, of which the owners are unknown."

In the English authorities hitherto quoted there is little or no direct trace of any Roman original for their law of Treasure Trove. Their claim for the crown would seem rather to be derived from some such *feudal* doctrine as that of ultimate ownership—nay the only true ownership—of land, being vested in the Lord Paramount. Such a doctrine is not properly of Italian growth. In the Lombard feudal law of the Twelfth century, the rules as to Treasure Trove are the Roman ones. (Liber Feudorum, 2, 56). The famous glossator Azo, it is true, when speaking of the *dominus soli* as entitled to Treasure, defines him, in one passage, as the *proprietary*, not the *feudatory*. (Summa in decimum librum Codicis, fol. 955). In the main, however, he retains the rules of Roman law, as settled by Justinian's Codex. In this same author's *Summa* on the second book of the

Institutes, he adopts Paulus' definition of *Thesaurus*, and adds that, having become a *res nullius*, it is, according to rule, the property of the occupant, *i.e.*, the finder, he being bound. however, in equity to give half to the *dominus soli* (fol. 1086).

I have mentioned this Italian author in particular, because his *Summa Institutionum* is considered by Güterbock to have been the original of considerable portions of our own Bracton. Azo died in 1230; Bracton wrote his De "Legibus &c." in 1262-8. On this particular subject however, although Bracton borrows his definition of Treasure Trove and his "natural law of occupancy" from the Roman jurists through the Italian, he represents the right of the finder to have been transferred, by *jus gentium*, to the King, and entirely ignores that of the owner of the soil. (Bracton L. 3, sec. 4, fol. 120). Fleta repeats this curious argument, as well as the definition of Bracton (L. 1. cap. 43. sec. 2): and Britton (L. 1. cap. 18, p. 66 of Nichols) represents the Sovereign as declaring his pleasure that "treasure hidden in the earth, and found, be ours." These two last-named works were most probably written in the reign of Edward the First, whose statutory provisions on this subject are referred to by Mr. Baylis.

Coke (3 Instt. c. 58) limits Treasure Trove to *gold* or *silver*, apparently on the authority of the Custumier de Normandie ch. 18. This may be a misapplication of a passage about gold and silver on a *wreck*, in the previous chapter. I find no other such limitation in the Custumier, except what might perhaps have been inferred from an absurd derivation of Thesaurus as *thesis auri*. Elsewhere (2. Instt. fol. 577) Coke says that the money of England is the treasure of England, and *therefore* nothing is said to be Treasure Trove but gold and silver. On such foundations does our Common law occasionally rest!

Blackstone (1, ch. 8. sec. 13 pp. 295-6) states the English Common law as appearing in Coke, Britton and Bracton, correctly; he follows the last named author's expressions and definitions derived from the Roman law, as if they accurately stated that law it-

self, which they do not; and he employs the argument about a change effected by *jus gentium.* which however, he refers to Grotius ("De Jure &c." L. 2, cap. 8, sec. 7). According to this last authority, the laws of the Roman Emperors varied considerably on the subject of Treasure Trove: but the *peoples of Germany* assigned treasures, with other ownerless property, to the prince, and that principle is now common law and a kind of *jus gentium.* A considerable amount of truth is contained in Grotius' account, as is generally the case with that painstaking and conscientious writer.

The main principle recognised by the Roman law was that treasure found belonged to the owner of the land, subject to a right of the innocent finder to retain one half. As the only legislation on the subject was in imperial times, the sanction of these rights was represented as an act of grace on the part of the Emperor. Such representation, and the actual encroachments occasionally made by more tyrannical Emperors, may possibly have furnished a model to the sovereigns of modern Europe. But I am more inclined to believe that the sovereign's exclusive claim originated, as Grotius intimates, among the Teutonic nations, and was merely backed by arguments and phrases derived from the language of Roman law rather than from its spirit.

As a matter of history, then, I am disposed to trace our law to the gradually increasing power of the Teutonic chieftain, as he developed into the feudal overlord. Our Treasure Trove must be found in the earth, or in buildings &c., which are technically "parts of the freehold." It has little, if anything, to do with *bona vacantia* or title by occupancy. We may, however, refer to the Roman law, as an indication of justice or reasonableness. For such indication, I should set little store by arguments merely based upon so-called "natural law" or the "law of nations." The latter was appealed to by the Romans on behalf of slavery; in the mouth of Grotius, it simply means, on this subject the practice of certain northern nations. "Natural" law, or rights, often indicates, with the Romans, what their jurists thought reasonable and fair: but I take the legislation of a prince like Hadrian, so persistently renewed, to be a better

guarantee for good sense and general utility, than reference to either the law of nature or the law of nations. I think the owner of the soil would be now considered, by most people, the person properly entitled to valuable or interesting articles found therein, subject to a reasonable reward for the finders—often persons in his own employ. For retaining the claim of the sovereign at the present day I can see no reason, but the questionable ground of expediency, on public archæological considerations. I should rather say that such a claim is against public feeling, whence its evasion raises no moral scruple and is therefore systematically practised. It is useless to the state, unless we return to the barbarism of melting down ancient money in order to coin new. It only leads to the concealment and distraction of valuable archæological finds. On the other hand a statutory regulation of the relations between the finder and the owner of the ground would save the rights of the latter and check much small dishonesty on the part of the former. If it were authoritatively declared that the finder should receive something approaching to the bullion value of a hoard, from the owner of the soil, he would get as much as he now gets from an ordinary country dealer, without the present underhand transaction and robbery, and without the delay of application to the police or any other authority. Objects of antiquarian interest not coming under the head of Treasure Trove, if parts of the freehold, belong, I apprehend, to the owner of the soil. If otherwise, they should be legally made his property, subject to a reward for the finder, the estimation of which would, I admit, require a little consideration, but would not involve any insuperable difficulty.

Another slight complication, of a different character, would still arise, as to the interpretation of the term, "owner of the soil," in the case of copyhold. But as this inconvenient tenure is probably doomed, the difficulty in question might not be of long duration.

I am here, I know, arguing against the opinion of leading antiquaries, with whom the undoubted desirability of forming great national collections of archæological objects, seems to outweigh every other consideration. If the same ignorance and carelessness

were to be anticipated, from owners of the soil, which has been evinced in past times, my view, too, would be that of extending and enforcing the claims of the Crown. But, surely, every archæological excursion shews us, in place of that ignorance and carelessness, a daily increasing and more intelligent interest. The owner is, with few exceptions, proud of his collection, liberal and hospitable in exhibiting it. It is at least questionable whether the retention of archæological objects *in situ* has not a greater instructive and educational value than their absorption into some vast central collection. And I doubt whether that feeling of injustice, which prompts evasion of the Crown claims, will be any more alleviated by the fact that a pot of coins, which most landowners would naturally consider to be theirs, has gone into the national Museum, than by the fact that it has gone into the national melting-pot.