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THE LEGAL PROTECTION OF CULTURAL PROPERTY IN BRITAIN: PAST, PRESENT AND FUTURE

*Simon Halfin**

INTRODUCTION

“The national heritage of this country [Britain] is remarkably broad and rich. It is simultaneously a representation of the development of aesthetic expression and a testimony to the role played by the nation in world history . . . But this national heritage is constantly under threat.”¹ As the illicit trade of cultural property has grown, this threat to Britain’s cultural past has become more acute. It is a danger that is heightened by two essential problems facing cultural property law in Britain today. First, British law still remains remarkably ill-equipped to protect its own treasures, and calls for reform are often ignored or at most ineffectively answered. Second, and perhaps more important, successive governments have remained consistently unwilling to use the existing protective legislation effectively.

The domestic law of cultural property in Great Britain has been in a state of disrepair for many years. British cultural property law is still largely based on archaic concepts that originally evolved for a different purpose from that which they now serve. Brimming with anomalies and unanswerable questions, British cultural property law has been slow to heed the call for reform. This idiosyncratic area of British law has largely remained idle, mainly due to government inaction, while many cultural artifacts of national importance have been lost to private collections both at home and abroad. Only in the last few years has there been a slow move toward reform. Government action has at last been forthcoming, spurred on by calls from the bar, interested organizations,² and an increasingly concerned public.³ Many outmoded concepts are at last being reformed or in some cases abandoned.⁴ However, many areas of British cultural property law

* The author wishes to thank Professor Patty Gerstenblith of the DePaul University College of Law, and his wife, Elizabeth Halfin, for their comments, insight and assistance in writing this article.

1. National Heritage Memorial Fund’s Trustees’ Report (HMSO, 1981).

2. Organizations such as the Council for British Archaeology and the English Heritage have been particularly effective at presenting the need for reform of both treasure trove laws and the law of finds, in light of the ever growing number of amateur treasure hunters armed with metal detectors.

3. Media coverage of cases such as the “Middleham Pendant,” discovered in North Yorkshire in 1985 and worth around £1.3 million, has brought to public attention the ease with which many national treasures slip through the nation’s hands, in this case, simply because the Pendant was lost and not buried. See text accompanying *infra* note 75.

4. For example, in 1994, the Sale of Goods (Amendment) Act abolished the rule relating to the sale of goods in market overt. Market Overt, originally known as the rule of the Law Merchant, was first recognized in Britain in 1332. See text accompanying *infra* notes 92-98.

remain that are particularly problematic. This article asserts that without further government action, the state of British cultural property law will remain largely an anachronism, unable to cope with the dangers facing cultural property in Britain today.

This article will address three issues. First, it will present an historical overview of different cultural property laws in Britain. This overview will trace the historical development of these laws, while also highlighting the recurring problems that have hindered, and continue to hinder, efforts aimed at reform. Second, this article will present a summary of the current state of these cultural property laws. In particular, the issues of the need for reform and the failure of successive governments to recognize this need by either effectively utilizing existing legislation or implementing new legislation are addressed. Third, this article will propose reforms which would afford cultural property a greater degree of protection.

Section I outlines the development and current state of those laws dealing with ancient sites and monuments. This article asserts that the lack of protection for monuments and sites in Britain is not due to a lack of effective legislation, but is instead due to a failure by successive governments to use this legislation effectively.

Section II then explores the laws regarding moveable objects. This section will examine the treasure trove laws and the recently abolished concept of market overt. This discussion will maintain that the anachronistic nature of these laws means that they are not suited to the purpose for which they are now used, namely cultural property protection. This section of the paper will maintain that existing legislation is ineffective and that successive governments have largely ignored calls for reform. Furthermore, this section will demonstrate that the few attempts at reform have been hastily conceived, poorly thought out, and are ill-suited to meet the demands of modern day cultural property protection.

Section III explores the laws regarding protection of shipwrecks. This section will demonstrate the inability of present legislation to effectively protect wrecks, the great reliance on goodwill to save many of these wrecks, and the failure of successive governments to implement more effective legislation.

In Section IV this paper will explore the regulations regarding the export of cultural property from Britain. In addition to discussing the need for reform, this section will also briefly examine the impact of recent European Community legislation on Britain's export regulations and on British law as a whole.

Finally, section V proposes several reforms for cultural property laws and policy in Britain. This section notes the need for the British government to recognize the great dangers facing cultural property in Britain today. In addition, the need to utilize existing legislation effectively and to implement new legislation is addressed. This paper also proposes increasing the resources made available for the protection of cultural property. Finally, this section discusses the need for increased judicial review of governmental decisions regarding Britain's cultural property.

I. PROTECTION OF ANCIENT SITES AND MONUMENTS

Nowhere among the myriad of laws aimed at protecting British cultural property has there been more legislative activity than in the area of the protection and preservation of ancient sites and monuments. Nowhere else has there been a greater degree of detailed and complex legislation aimed at preserving Britain's cultural past.

Nevertheless, in recent years there has been an increasing awareness of the inadequacies and failures of the present law and policy. Although the aim of this legislation was intended to protect ancient sites and monuments at both a national and local level, the actual degree of protection has been very limited. These limitations were demonstrated in 1989, when the remains of the Roman governor's palace at Huggin Hill, near St. Paul's Cathedral, disappeared beneath an office block.⁵ Despite being some of the best preserved remains found in London in the last hundred years, the remains were destroyed to make way for an underground car park, and the laws in place⁶ could do little more than allow for a brief rescue mission.⁷ The destruction of these remains in London is not an isolated case, but is an all too clear example of the need for more protective legislation. However, in order to understand fully the inadequacies of the current laws, it is necessary to trace the historical development of those laws that have tried to protect Britain's ancient sites. In particular, a discussion is necessary of the various obstacles which have been overcome to achieve the very limited protection that the present laws afford.

A. Pre-1979 Legislation

1. Ancient Monuments Protection Act

England and Wales began their preservation of ancient buildings or sites with the Ancient Monuments Protection Act of 1882.⁸ The 1882 Act listed twenty-nine monuments, all earthworks, stone circles and the like, of which Stonehenge was the most important. The aim of the 1882 Act was to provide some protection for certain ancient sites and monuments in Britain and Wales. However, in its final form, the Act provided little effective power to protect these sites, and in many ways, the Act failed to achieve its aims.

The passage of the 1882 Act began in 1873 when Sir John Lubbock, a Member of Parliament for Maidstone, introduced into the House of Commons "A Bill

5. Carolyn Shelbourn, *Burying Our Mistakes? - The "palace" at Huggin Hill*, 139 *NEW L. J.* 676 (1989).

6. See, e.g., the Ancient Monuments and Archaeological Areas Act, enacted in 1979.

7. The legislation in place was unable to do more than fine Bovis Construction Company for the destruction of the quay to the Roman governor's palace dating from the first century. In 1979, a survey estimated that some 44% of the 906 visible archaeological sites in the Cotswolds were being destroyed by ploughing. Shelbourn, *supra* note 5, at 676.

8. Ancient Monuments Protection Act, 1882, 45 & 46 *Vict.*, ch. 73, §§ 2-4 (Eng.) [hereinafter

to Provide for the Preservation of Ancient National Monuments.”⁹ The Bill was an attempt to address the loss of antiquities, mostly Roman and prehistoric remains, which were being destroyed for their stones or to make way for housing developments.¹⁰ Almost all of the sites in question were privately owned at this time and had no legal protection at all.

Lubbock’s Bill came at a time when England was among the last of the European nations to be completely without protective legislation for cultural property. Many of his ideas were borrowed from a long history of royal and aristocratic interest in preservation that was prevalent in Europe during the nineteenth century. In particular, Lubbock was strongly influenced by the Abbe Gregoire,¹¹ who had so successfully championed the cause of cultural preservation in France.

Lubbock’s aim was to provide “. . . some authority, who, speaking in the name of Parliament and his countrymen . . .” could condemn acts of “desecration” of national values.¹² The Bill proposed to establish a commission with authority to designate important antiquities as ancient monuments.¹³ The owners of any such designated monuments would be obligated to notify the government, which would then have the authority to purchase the site, before any construction on the site could be undertaken.¹⁴ If the government decided not to purchase the site, then the owner would be free to go ahead with any construction.¹⁵ The owners of purchased sites would be entitled to full compensation.¹⁶ In an effort to make the Bill uncontroversial, all inhabited places, dwellings, gardens and parks that “neither form part of nor include the ruins of any castle, fortress, abbey, religious house, or ecclesiastical edifice”¹⁷ were excluded from the Bill’s coverage.

Despite his attempt to avoid controversy, Lubbock’s Bill generated fierce opposition. When the Bill was finally passed in 1882,¹⁸ it had been stripped of its strongest provisions, those concerning notice and compulsory purchase. Under the Bill as passed, “the government could do no more than purchase from a willing seller should the Treasury deign to provide any money for that purpose.”¹⁹

9. 1873, 36 Vict., Bill 5 (unenacted)(Eng.) [hereinafter *Ancient Monuments Bill*].

10. Very often ancient sites were broken up for the stones so as to make paving stones.

11. For a detailed discussion of the work of the Abbe Gregoire, see Joseph L. Sax, *Heritage Preservation As A Public Duty: The Abbe Gregoire And The Origins Of An Idea*, 88 MICH. L. REV. 1142 (1990).

12. 266 PARL. DEB., H. C. (3rd ser.) 885-86 (1882). In particular, Lubbock was referring to the near destruction of the site of the largest ancient monument in Britain at Avebury, which he himself purchased to prevent its destruction.

13. *Ancient Monuments Bill*, *supra* note 9.

14. *Id.*

15. *Id.*

16. *Id.*

17. Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 CAL. L. REV. 1543, 1547 (1990).

18. Ancient Monuments Protection Act, 1882.

19. *Id.*

Lubbock's Bill had been a reaction to a present and acute threat to many ancient sites in Britain. Despite this threat and the relatively moderate provisions in his Bill, the opposition essentially won the day. The opposition was not opposed to the idea of protecting ancient sites and monuments. At the time of the passage of this Bill, British expeditions had for more than a century scoured the Mediterranean in search of classical treasures. Lord Elgin's removal of the Parthenon marbles nearly sixty years earlier had been considered a great triumph by many of his contemporaries. However, Lubbock's methods marked a significant development in property law and in particular property ownership rights. Lubbock's Ancient Monuments Bill was the first piece of legislation in the Anglo-American world to embrace "two related principles: that the protection of cultural property was a governmental duty, and that public ownership and control should be brought to bear on unwilling proprietors."²⁰ The extension of public authority over private property interests was too radical for Lubbock's contemporaries. Lubbock's motives were not criticized but his methods were likened to communism and were regarded as an insult to the private property owner.

Lubbock argued that he was merely utilizing the concept of eminent domain, which was already an established idea. However, the opposition maintained that his proposals sought an extension of eminent domain, and if this extension was granted, "where was its application to cease."²¹ Furthermore, the government was unwilling to undertake the responsibility of cultural property protection. The government was in part unwilling to provide the vast funds such a scheme would require and was unwilling to take on the role of trustee.

In its final form, the Act represented eleven years of political maneuvering and concessions and was little more than a token gesture. However, the passage of the Act is important not for its substantive provisions (or lack thereof), but more for the ideas that motivated it and the effect of these ideas on the public conscious. The passage of the Bill introduced into Britain for the first time the principle of public responsibility to protect cultural heritage properties, notwithstanding the reluctance of the private owner.²² Ancient sites were no longer just property with economic or use value; they were sites of significant historic and scientific value that belonged to the nation. The sites were national heirlooms that no one had the right to destroy. Today, these are ideas that are firmly established and accepted concepts. For example, it is now accepted that the power of eminent domain allows the government to protect national treasures.²³

Lubbock's Bill, to some extent, provided the impetus that helped to shape the development of future protective legislation. However, passage of his Bill has also come to typify the passage of many later legislative attempts to protect cultural property. As discussion of the development of those laws protecting sites

20. Sax, *supra* note 17, at 1548.

21. 232 PARL. DEB., H. C. (3rd ser.) 1542-43 (1877); Sir John Holker, the Attorney General, who was the spokesman for the Disraeli government, which opposed the Bill.

22. Sax, *supra* note 17, at 1564.

23. For example, British export laws provide the government with authority to compulsorily purchase certain antiquities.

and monuments proceeds, a recurring pattern will become apparent. As with Lubbock's Bill, opposition to change has remained consistent and as will be shown, the phrase "too little, too late" has come to typify much of the protective legislation. Successive governments have largely been unwilling to respond effectively to the dangers facing cultural property. Later legislation has largely been a piecemeal process of reacting to the dangers facing cultural property, recognizing these dangers, and then sacrificing Britain's cultural past for the sake of economy and for the sake of maintaining the status quo.

The 1882 Act listed twenty-nine monuments deemed worthy of protection. These monuments were listed in the schedule of the Act, from which the term "scheduling" ancient monuments is derived. In general, before any regulations could be imposed affecting private property, the property had to be "scheduled." Scheduling became the legal form of notifying the owner that owing to cultural, historic or artistic values, a given site or building could not be modified without authorization. Once a monument was deemed of sufficient importance to fall within the parameters of the Act, the Commissioners of the Board of Works²⁴ were called in. The Commissioners could accept, with the monument owner's agreement, either guardianship or a transfer of ownership.²⁵ The Queen was also given the power to add monuments to the list. However, the activity generated by this Act was very limited since few monuments were actually listed, and the Act restricted listings to monuments that were prehistoric.²⁶

2. *The 1900 Amendment*

The scope of protection granted to ancient monuments under the 1882 Act expanded with the passage of the 1900 Amendment to that Act.²⁷ The main purpose of this Amendment was to extend protective coverage to medieval buildings as well as prehistoric remains.²⁸ In addition, this Amendment also contained a broader definition of the word "monument" than the 1882 Act, defining "monument" as "any structure, erection or monument of historic or architectural interest." In addition, unlike the 1882 Act, the only sites now excluded from coverage were inhabited dwellings. With a broader definition and thus broader coverage, this Amendment had the potential to provide far greater protection than the 1882 Act.

The 1900 Amendment also extended the authority of the Commissioners of Public Works. At the owner's request, the Commissioners could now become guardians over any monument not included in the 1882 Act that was, the Commissioners deemed, "of public interest by reason of the historic, traditional, or

24. The Commissioners of the Board of Works was predecessor to the Ministry of Public Building and Works.

25. Ancient Monuments Protection Act, 1882, §§ 2-4.

26. *Id.*

27. Ancient Monuments Protection Act, 1900, 63 & 64 Vict. ch. 34 (Eng.) [hereinafter *1900 Amendment*].

28. The inclusion of medieval sites led to the acquisition of Deal Castle in 1904 and of Richmond Castle in 1910.

artistic interest attaching thereto," provided that it was not occupied by anyone other than a caretaker.²⁹

The 1900 Amendment was clearly a step forward, but there were still severe limitations. Most importantly, like the 1882 Act, this Amendment only applied to those buildings or sites that the government considered important enough to accept the financial liability for their upkeep. Like the 1882 Act, this Amendment was largely a concession to the private land owner. There was still no legislation enabling the government to compulsorily purchase property for the sake of preservation. The 1900 Amendment again showed the piecemeal process by which protective legislation struggled through Parliament. Once again the government response was a concessionary and minimal answer to a heightened threat to Britain's cultural past.

3. *The Ancient Monuments Consolidation and Amendment Act*

The legislation that finally enabled the government to compulsorily purchase property to protect monuments of national importance arrived in 1913 with the passage of the Ancient Monuments Consolidation and Amendment Act.³⁰ The impetus behind the passage of this Act was the scandal surrounding the sale of Tattershall castle.³¹ After having been owned by one family for over five hundred years, the castle was sold to a buyer who went bankrupt. The castle was then sold to an American syndicate of speculators who started selling off individual mantelpieces to art dealers.³² The speculators even threatened to pull the whole building down at one point.³³ The 1913 Act gave the Minister of Works the power to issue a Preservation Order for any monument in danger.³⁴ Once this order was issued, the owner would have to obtain the Minister's consent before doing any work of demolition, removal, alteration, or addition.³⁵ In certain cases, where consent was refused, the owner could be entitled to compensation.³⁶ For the first time, legislation had been passed which enabled the government to take action against an unwilling owner.

The 1913 Act also empowered the Commissioners of Works to prepare and publish a list of monuments (whose preservation was considered of national importance) with the advice of the Ancient Monuments Boards for England, Wales and Scotland. In actual fact, the first such list was not made and published until 1921. The list comprised of 139 monuments in England and Wales.

In many ways the 1913 Act can be seen as a leap forward. Within thirty years, Lubbock's initial aims had largely been achieved. One of his main objec-

29. Ancient Monuments Protection Act, 1900, § 1.

30. Ancient Monuments Consolidation and Amendment Act, 1913, 3 & 4 Geo. 5, ch. 32 (Eng.) [hereinafter *1913 Act*].

31. Wayland Kennet, *PRESERVATION*, 32-34 (1972).

32. *Id.*

33. *Id.*

34. Ancient Monuments Consolidation and Amendment Act, 1913.

35. Ancient Monuments Consolidation and Amendment Act, 1913, §§ 6-8.

36. Ancient Monuments Consolidation and Amendment Act, 1913.

tives, to give the government the power to impose protective regulations on unwilling owners, had been accomplished. Yet, until the government was willing to use the power more effectively, the pattern of reacting to dangers at the eleventh hour would continue. Lubbock had set the wheels in motion toward a greater degree of national responsibility for the preservation of Britain's cultural past. However, until the British conscious was prepared to fully appreciate the dangers facing many national heirlooms, both the protective legislation and the will to effectively enforce such legislation would remain sadly lacking.

The Ancient Monuments Consolidation and Amendment Act was amended in 1931. This Amendment made no important substantive changes. The owner of a listed monument or building now had to give three months notice of intent to demolish or alter a scheduled "ancient monument." The Act also required that all preservation orders (which now required confirmation by Parliament) had to be registered in the Local Land Charges Registry.

Two years later, a 1933 Amendment further restructured the procedure for issuing a protective order. The Amendment of 1933 simplified the procedure by enabling the Minister of Works, with the advice of the Ancient Monuments Board, to issue an interim preservation notice that would be valid for twenty-one months. At the end of such time, that notice would expire unless a preservation order was substituted for it. The mechanism was thus in place for a greater degree of governmental power in the fight to protect Britain's heritage. However, the public conscious, which Lubbock had tried and to a limited degree succeeded to instill with his ideas, was still not fully aware of the dangers facing many national heirlooms. The legislation in place, while an advancement, did little to educate this public conscious. In 1931, the penalties for violating the 1931 Ancient Monuments Act were insignificant compared with the damage that could be done by such violations. The maximum fine in 1931 for a violation of the Act was £20 and/or one month's imprisonment.³⁷

In the end it was the Second World War that was to complete the education of the British conscious that Lubbock had begun more than sixty years earlier. As a result of the war, and in particular the aerial bombardment of Britain, the public began to be very concerned about the preservation of ancient monuments.³⁸ The change in public opinion spurred government action. A provision was inserted in the Town and Country Planning Act of 1944,³⁹ enabling the newly constituted Minister of Town and Country Planning⁴⁰ to prepare a list of buildings of special or historic interest for the guidance of the local planning authorities.⁴¹ For the first time, protective legislation was in place at both a

37. G.J. Bennett & C.M. Brand, *Conservation, Control and Heritage - Public Law and Portable Antiquities*, 12 *ANGLO-AM. L. REV.* 141, 151 (1983).

38. The destruction of Coventry Cathedral after aerial bombardment caused a great deal of public concern over the protection of historic sites.

39. Town and Country Planning Act, 1944, 7 & 8 Geo. 6, ch. 47 (Eng.).

40. This was later renamed the Ministry of Housing and Local Government.

41. The Town and Country Planning Act has twice been repealed, but on both occasions, this insertion was reinstated.

local and a national level; thus, the potential protective coverage was greatly increased. At the same time, however, the provisions of the Town and Country Planning Act were largely negative. The Act could prevent destruction, but it could not insure maintenance. Nevertheless, the arrival of legislation at a local level was a big advance of Lubbock's cause since it helped make the public aware of the many lesser known sites.

4. *The Historic Buildings and Ancient Monuments Act and the TCPA*

After the end of the Second World War, it soon became clear that many of these sites would need more than just protection from destruction; they would need a more positive form of assistance.⁴² Heavy taxation combined with increasing maintenance costs meant that many large country houses and other historical sites needed some form of state aid to ensure their upkeep.⁴³ The Historic Buildings and Ancient Monuments Act of 1953⁴⁴ was passed to provide that state aid. Under the 1953 Act, the Minister of Works was authorized to make monetary grants toward the maintenance or repair of buildings of outstanding interest and their contents, with the condition that there was limited public access to these sites.⁴⁵ The Minister was also authorized to purchase sites or to assist local governments in doing so.⁴⁶ Historic Buildings Councils for England, Wales and Scotland were set up to advise the Minister in making such grants.

After 1953, there was a great deal of largely local legislation passed to give more protection to Britain's historic sites. Over the next two decades, various regulatory measures were passed with increasingly detailed provisions outlining the procedures for protecting these sites. As the number of sites granted protection grew, more detailed and comprehensive legislation was required. Of particular importance was the 1971 Town and Country Planning Act.⁴⁷ The 1971 TCPA laid down a comprehensive set of regulations detailing how to decide which buildings, conservation areas, and ancient monuments were to be protected.⁴⁸ The success of this Act can in part be measured by the fact that in the two decades immediately following its implementation, the number of listed buildings in England and Wales rose from 120,000 to over 400,000.

The 1971 Act required the Secretary of State for the Environment to compile, subject to certain considerations and consultations, a list of buildings of special architectural or historic interest.⁴⁹ Importantly, this Act greatly expanded the definition of a "building." A building now also included "any object or structure fixed to the building" and "any object or structure within the curtilage of the

42. Kennet, *supra* note 31, at 34.

43. *Id.*

44. Historic Buildings and Ancient Monuments Act, 1953, 1 & 2 Eliz. 2, ch. 49 (Eng.).

45. The Act also included monies toward the upkeep of any amenity lands.

46. Historic Buildings and Ancient Monuments Act, 1953.

47. Town and Country Planning Act, 1971, ch. 78 (Eng.) [hereinafter *1971 TCPA*].

48. This Act was later to be replaced by the Planning (Listed Buildings and Conservation Areas) Act 1990 (enacted August 24, 1990).

49. Town and Country Planning Act, 1971, § 54.

building that, although not fixed to the building, forms part of the land and has done so since before 1 July 1948.”⁵⁰ The particular importance of this definition is that, when read together with other provisions in the Act, even ruins could become listable by the Secretary of State for the Environment. For example, all buildings built before 1700 that survive “in anything like their original form” could be listed.⁵¹ The fact that a building was dilapidated did not make it unlistable.

Although the potential scope of buildings and sites to be included was greatly increased, the 1971 Act still suffered from one major weakness: the absence of any provision forcing the government to act. When it came to deciding about the listability of a building, the Secretary of State was left with a considerable degree of discretion. The Minister was merely required to decide whether the building possessed special architectural or historic interest. However, once the Minister was satisfied that a building was of special architectural or historic interest, he was under a duty to list it.

Although these sites were still essentially at the mercy of the government, the 1971 Act was a powerful weapon when used. Once a building was listed and the owner was notified, the Act took effect immediately and acted like a strict liability statute. In other words, once the owner was notified, he would immediately be liable for any violation of the Act. The owner of a listed building was prohibited from demolishing, or in any other way altering, the appearance of the building without consent. Furthermore, this restriction extended in some circumstances to the interior of the building. The Act did not contain any statutory right of appeal against listing, although the owner could appeal against the refusal to grant listed building consent.

The 1971 Act thus contained some very important and powerful provisions, ones that were certainly more powerful than Lubbock had ever dared to imagine. Yet the legislation would only ever be truly effective if the government was prepared to use it.

B. Post-1979 Legislation

Eight years after the passage of the 1971 Town and Country Planning Act, the most important piece of legislation (even today) concerning the protection of ancient sites and buildings was enacted with the passage of the 1979 Ancient Monuments and Archaeological Areas Act.⁵²

The 1979 Act was potentially the most far-reaching piece of legislation containing the most detailed and comprehensive provisions for the protection of

50. *Id.* at § 54(9)(a) & (b).

51. Appendix 1 of Department of Environment Circular 8/87.

52. Ancient Monuments and Archaeological Areas Act, 1979, ch. 46 (Eng.) [hereinafter *1979 Act*]. Parts I and III of the 1979 Act were brought into force in England and Wales on October 9, 1981, by the Ancient Monuments and Archaeological Areas Act (Commencement No. 2) Order 1981 SI 1981 No. 1300, and in Scotland on November 30, 1981, by the Ancient Monuments and Archaeological Areas Act (Commencement No. 3) Order 1981 SI 1981 No. 1466. Part II was brought into effect only in England and Wales on April 14, 1982, SI 1982 No. 362.

ancient sites and monuments in Britain. Importantly, the Act broadened the definition of a "monument" to a degree never before seen in Britain. Under the 1979 Act, a "monument" is defined as "any building, structure or work, whether above or below the surface of the land, and any cave or excavation" or any site comprising the remains of such things or comprising any "vehicle, vessel, aircraft or other moveable structure of part thereof" or their remains.⁵³ "Remains" includes "any trace or sign of the previous existence of the thing in question."⁵⁴ This definition, in effect, had been drafted "to cover practically anything, or the site where practically anything once was."⁵⁵

Under the Act, the Secretary of State for the Environment has responsibility for compiling and maintaining a schedule of monuments. This schedule is to contain all the monuments listed under previous legislation and any other monument (other than a dwelling occupied by an owner or a caretaker) which the Secretary of State thinks is "of national importance."⁵⁶ The schedule is also to contain any other monument that the Secretary of State thinks is "of public interest by reason of the historic, architectural, traditional, artistic or archaeological interest attaching to it."⁵⁷ The Secretary of State may also add or remove monuments from the schedule, or even add or remove parts of a monument. Under the old legislation, the Secretary of State had no power to remove monuments from the schedule. The owners of a monument must be notified if it is scheduled, but they have no right to object to the listing of a monument.⁵⁸

Monuments are scheduled simply because they are worth preserving, but neither the owners nor the occupiers of these sites are under any obligation to preserve the sites. The purpose of the scheduling is to protect the monument by establishing control of construction affecting it. The Secretary of State may, however, with only seven days notice to the owner, enter a site to carry out emergency repairs.⁵⁹

The Secretary of State may also acquire any ancient monument,⁶⁰ either by

53. Ancient Monuments and Archaeological Areas Act, 1979, ch. 46 § 61(7) (Eng.).

54. *Id.* at § 61(3). This definition was intended to cover, for example, the discoloration of the soil which is often the only remaining evidence of where a boat, hut or post-hole once was. Frank A. Sharman, *The New Law on Ancient Monuments*, J. PLANNING & ENVTL. L. 785 (1981).

55. Sharman, *supra* note 54, at 786.

56. Ancient Monuments and Archaeological Areas Act, 1979, § 61(2).

57. *Id.* at § 61(3).

58. *Id.* at § 1(6).

59. *Id.* at § 5(1). There is no provision for the Secretary of State to receive compensation for this work. However, if the owner is fined for damaging the monument, then this fine may be applied to the costs of the emergency work carried out by the Secretary of State.

60. In an effort to give the Secretary of State the power to make such acquisitions, and in response to the White Paper, "A National Heritage Fund," the National Heritage Act was passed a year later in 1980. The Act set up a trust fund, The National Heritage Memorial Fund, to empower its trustees (who are appointed by the Prime Minister and comprised of a chairperson and ten other members) to make grants and loans for the maintenance and preservation of personal property.

The main catalyst which spurred the establishment of this trust was the failure of its predecessor, the National Land Fund, to save the Mentmore Estate in 1977. The new trust was provided with

agreement or by compulsory purchase.⁶¹ Any local authority may also acquire, only by agreement, any ancient monument “in or in the vicinity of their [the local authority’s] area.”⁶² The same powers are also given to acquire land adjoining or which is in the vicinity of an ancient monument, and which is required for the upkeep of the monument.⁶³ The same powers are also available for the acquisition of easements.⁶⁴ The 1979 Act provides that the public “shall have access” to any ancient monument that is either owned by, or under the guardianship of, the Secretary of State or a local authority.⁶⁵ Notwithstanding this provision, public access may be limited as necessary to preserve and safeguard the monument.

The 1979 Act also gives the Secretary of State powers of entry either for purposes of valuation of an ancient monument or where there is reason to believe that a piece of property contains an ancient monument. No excavations can be carried out without the owner’s consent.⁶⁶ Nevertheless, anyone⁶⁷ acting under the powers of the Act may “take temporary custody” of any objects of archaeological or historical interest that they find there and take them away for “examining, testing, treating, recording or preserving it.”⁶⁸

Once a monument is scheduled, it is an offense for any person to “execute, or cause or permit to be executed, any of the works listed in § 2(2) of the Act⁶⁹ unless consent has been obtained from the Secretary of State.”⁷⁰ The comprehensive nature of the Act makes it worthwhile for anyone considering working on a protected site to first obtain advice to see if that work is permissible. A problem often arises when a person, or even a successive owner, is not apprised of the protected status of the site or monument. There is no requirement that such a protected site has its status recorded, and if a successive owner is not apprised of this status, complications may arise. Ignorance of the existence of a protected site or monument on a piece of property is no excuse if the owner or occupier innocently damages or destroys that monument.⁷¹

personal property may be accepted in lieu of certain tax obligations. The Act provides the framework for an effective system of preservation, but like much protective legislation, the trust suffers from severe underfunding which often leaves it powerless to intervene. For a more detailed discussion of The National Heritage Memorial Fund, see Bennett & Brand, *supra* note 37, at 157-62.

61. Ancient Monuments and Archaeological Areas Act, 1979, § 10 & § 11.

62. *Id.* at § 11.

63. *Id.* at § 15.

64. *Id.* at § 16.

65. *Id.* at § 19.

66. *Id.* at § 26.

67. “Anyone” refers to that person who is authorized by the Act to act and who has been delegated authority by the Secretary of State.

68. Ancient Monuments and Archaeological Areas Act, 1979, § 54.

69. Such operations include any operations which will disturb the ground, such as ploughing, planting, repairing masonry, installing drains, flooding or tipping on the scheduled site. Moving heavy vehicles or objects on the monument may also sometimes require consent.

70. The Law Society of Scotland, *Scheduled Monuments*, 36 No. 10 J. L. SOC. OF SCOTLAND 405 (1991).

71. There is no requirement that the protected status of a monument be recorded in the Land

In response to the growing number of amateur treasure hunters, § 42 of the 1979 Act outlaws the use of metal detectors on protected sites.⁷² In an effort to provide an effective deterrent to the amateur treasure hunters, the punishments for violating the Act were increased for the first time since 1931. The maximum fine was raised from £20 to £1,000, and there was also a possibility of prison for up to two years.⁷³

One of the most significant protective powers given to the Secretary of State by the 1979 Act is the power to designate a site of "archaeological importance" by means of a "designation order."⁷⁴ Thus, the potential effect of this provision is that any development of a designated site could be delayed for up to six months while emergency excavations are carried out.⁷⁵ Ironically, the objects discovered on the site may end up belonging to the owner or occupier anyway, since there is no accompanying provision for compulsory purchase.

This emergency excavation provision has been the subject of much controversy in recent years and has again shown that the legislation is only truly effective if the government is prepared to use it. The controversy centered on the discovery, in 1989, of the Rose and the Globe Theaters. The discoveries were made at a building development in Southwark, London (the South Bank). This find was immensely important. Although the location of all five of the Elizabethan and Jacobean theaters on the South Bank were known, there were strong fears that the remains of the theaters had been destroyed by building in Victorian times (when basements went deeper than any previous structures).

When the sites were found, there were calls for the Secretary of State for the Environment to grant the six month period for emergency excavations.⁷⁶ Many called for the outright purchase of these sites, and there was a high degree of public support. However, the Secretary of State refused to schedule the sites. He spoke of "the need to balance the desirability of preservation against the need to enable a modern city to thrive."⁷⁷ The Minister also spoke of his fear that scheduling could give rise to claims for compensation.⁷⁸ When a trust company set up to save these sites tried to intervene, it was held to lack standing to appeal.⁷⁹

72. In an effort to provide an effective deterrent, § 42 provided that even the mere use of a metal detector was a punishable offense regardless of whether or not there was any intent to remove objects found.

73. Ancient Monuments and Archaeological Areas Act, 1979, § 61.

74. *Id.* at § 33.

75. *Id.* at § 38(1), § 38(2) and § 39(4).

76. Pursuant to provisions § 38(1), § 38(2) and § 39(4).

77. Mark Moore, *Centrefolio '90*; *London Boroughs; Southward Archaeology*, CHARTERED SURVEYOR WEEKLY, May 31, 1990.

78. The Land Compensation Act of 1973 provides for compensation to a land owner whose land is compulsorily purchased or occupied by government action either locally or nationally. The Act does expressly provide for compensation where an owner is deprived of the economic use of his land unless that land is either occupied or compulsorily purchased.

79. *Ex parte* Rose Theatre Trust Co., 1990 1 Q.B. 504. The court held (Schieman J.) that the trust company did not have standing to appeal the government's decision. The court held that the trust company had not been, nor would be, adversely affected by the decision; nor did the court consider that it was in the public interest for an applicant to make an application.

Thus, the government's decision was not subjected to any judicial review. Eventually, a compromise of sorts was reached when the developers agreed to cover the remains with an inert material such as sand and preserve the remains for archaeologists of the future.⁸⁰

This whole episode highlighted the fact that even with comprehensive protective legislation in place, ancient monuments were still at the mercy of the government. If the government was unwilling to act, then the legislation would not force them to do so. The national importance of the Rose and the Globe Theaters cannot be understated. However, in the end, all the government could do was to reinter some of its most valuable heirlooms. Lubbock's education of the public conscious had reached a large percent of the populous, but sadly, not those in positions of power. Thus, the legislation in place remained a powerful but a largely unused weapon, ineffective in the fight to preserve Britain's cultural past.

C. *Protection from the Private Sector*

Despite the ineffectiveness of successive governments, the private sector has proven remarkably successful and adept at protecting Britain's national heirlooms. Ever since the days of Lubbock, the role of private groups has assumed an ever increasing role in the preservation of ancient monuments and sites. The efforts of these groups have often equaled, if not exceeded, the efforts of the government. The earliest private group, which was initially formed for the preservation of buildings, was the Society for the Protection of Ancient Buildings, founded by William Morris in 1877. In recent years this group has been particularly active and effective by generating a great deal of publicity and public support in the fight to save historic buildings. An offshoot of this group was the Georgian Group, founded in 1937, that concerns itself with buildings dating from the Elizabethan to the early Victorian period. Besides these groups, there are over five hundred local preservation or civic societies.

The most important of these non-governmental bodies is the National Trust for Places of Historic Interest and Natural Beauty, which was founded in 1894. The Trust is now the largest landowner in Britain, with most of its properties acquired through gifts or testamentary bequests. At first, the Trust was concerned with unspoiled stretches of coastal scenery, fenland, downs and moors. By 1940, however, the Trust turned its attention to the rising dangers facing many of Britain's great country homes. Reacting to these dangers, the National Trust evolved its "Country House Scheme," which allowed for a tax-free transfer of properties to the Trust. The Trust would then set up an endowment for each property. The income from this endowment (also tax free since the Trust is a registered charity) would then be used for the maintenance of the property.

It was in part the success of these private groups which led to what amounted to a governmental privatization plan for over two hundred nationally owned and managed archaeological sites in 1992.⁸¹ This move by the government was another

80. *Id.*

81. *English Heritage Set to Privatise 200 Major Sites*, THE INDEPENDENT (London), Oct. 26, <https://via.library.depaul.edu/jatip/vol6/iss1/2>

er example of its unwillingness to take responsibility for Britain's national heirlooms. The government's action was sharply criticized, not only because the government had failed to consult the various interested groups that would be affected by this move, but also because of the general lack of debate in Parliament that would normally precede such a change. An editorial in the newspaper, *The Independent*, stated that it was "sadly consonant with the tone set by this government that an important change of policy relating to the care of the nation's archaeological heritage should be thrust on the public without consultation or debate."⁸²

Overburdened and underfunded, the government decided to denationalize two hundred of Britain's three hundred and fifty major sites.⁸³ Under the plan these sites would be handed over to private charities, trusts, local councils and private commercial companies. Although the plan would enable for the continued preservation of these sites without government expenditure, undoubtedly many will cease to be free to the public. In addition, the government has yet to reveal how this private management would be regulated in order to ensure the quality of the preservation of these sites.⁸⁴ The plan would reverse over one hundred years of policy whereby the government had steadily assumed greater responsibility for the management of many of Britain's ancient sites. Despite the overwhelming criticism, the government was determined to remove this drain on its purse. Yet as many pointed out, the drain on the purse was not as great as the government believed. Many of the sixteen million foreign visitors who visit Britain each year are attracted by Britain's many historic sites. However, the government again demonstrated that it was willing to jeopardize centuries of history because of the economic constraints of one brief era.⁸⁵

Government efforts at preservation have not entirely disappeared. In 1994, the government, through the English Heritage, sponsored the Monuments at Risk Survey.⁸⁶ Carried out over three years, this survey will be the first full survey of ancient monuments and archaeological sites in England. The aim of this survey is to provide a general assessment of the present condition of these monuments and sites, the extent to which they have deteriorated, and the risk of further damage and decay. The conclusions of this survey and the reactions from the government are a matter of great speculation. However, given the government's current unwillingness to care for even Britain's most important

1992, at 3 [hereinafter *English Heritage*].

82. *Yesterday and Tomorrow*, THE INDEPENDENT (London), Oct. 27, 1992, at 16.

83. Such sites included the White Horse at Uffington, Oxfordshire; Europe's largest stone age earth work at Silbury Hill, Wiltshire; the Roman City Walls at St. Albans, Hertfordshire; and important forts along Hadrian's Wall.

84. Interestingly, neither the National Heritage's senior archaeologists and historians nor the Council for British Archaeology were consulted in the preparation of this "secret" plan. Both groups plan to launch a fierce attack on the move, and the outcome of this plan is not yet certain. *English Heritage*, *supra* note 81, at 3.

85. *Yesterday and Tomorrow*, *supra* note 82, at 16.

86. John Young, *Scientists Run "Health Check" on Ancient Sites*, TIMES (London), Aug. 17, 1994.

national heirlooms, the outlook is gloomy.

Ironically, in many ways British policy has come full circle and is now at a position not unlike that which Lubbock faced over a century earlier. Much of Britain's cultural past is now being returned to private ownership and control. Successive governments have been slow to implement effective legislation and have often refused to utilize this legislation effectively once it is in place. Until governments are willing to recognize the importance of Britain's cultural past, the question begs, how much of Britain's cultural past will survive for the next generation? How much of Britain's cultural past will, like the Rose Theater, simply be buried?

II. MOVEABLE GOODS

Like the laws dealing with the protection of sites and monuments, the laws dealing with moveable property are similarly unable to afford an adequate degree of protection for cultural property. However, this lack of protection is not the result of a failure to utilize existing legislation, but is instead due to a lack of adequate legislation. This section will explore the idiosyncratic areas of treasure trove laws and the law of market overt. Both of these laws are based on outmoded concepts that were originally evolved for a very different purpose from that which they serve today. There have been many calls for reform that have met with a mixed response. In the case of treasure trove laws, there has been a consistent failure to implement any reform. However, in the case of market overt, reform has been forthcoming. Yet, as will be seen, this reform was poorly structured and has largely failed to provide the extra protection for cultural property that was envisioned.

A. *Treasure Trove Laws*

1. *The Archaic Concept*

Throughout the myriad of laws aimed at protecting Britain's past, no doctrine has "attracted greater disquiet than that of treasure trove."⁸⁷ This archaic concept, which was first mentioned in Britain in the *Leges Henrici*⁸⁸ (compiled between 1114-1118), remains the primary method whereby terrestrial antiquarian finds are compulsorily acquired by Britain. Introduced by Richard I in 1195 to fortify his failing revenue,⁸⁹ treasure trove holds that buried gold or silver that had apparently been hidden for safekeeping,⁹⁰ and whose owners or heirs cannot be traced, falls to the Crown.

87. Norman E. Palmer, *Treasure Trove and Title to Discovered Antiquities*, 2 INT. J. CULTURAL PROP. 275 (1990).

88. The Laws of Henry.

89. Treasure Trove is now part of the hereditary revenues of the Crown which are surrendered in return for the Civil List at the beginning of each reign. The Civil List represents the income paid by the Country to the Monarch.

90. Much of the gold and silver had actually been hidden by Romans who buried their precious metals fully anticipating to return to Britain after a short period of upheaval.

Throughout this century, the criticisms of this anachronism have been steadily growing along with the calls for legal reform. In 1903, the editor of the *Juridical Review* wrote:

The truth is that the object which the law of treasure trove is now invoked to aid is diametrically opposed to the object which it was originally devised to subserve. Its original intention was to secure to the Crown a not inconsiderable source of income; it is now invoked, on the contrary, to ensure the preservation of objects of antiquarian value for the public benefit.⁹¹

In 1982, Lord Abinger described treasure trove as an instrument of “almost pitiable inadequacy for archaeological preservation.”⁹² Lord Denning M.R.⁹³ emphasized the need for reform.⁹⁴ In 1984, the Law Society, and in 1986, the Surrey Archaeological Society, requested the Law Commission to examine the law with a view to reform.⁹⁵ Despite overwhelming calls for change, including recommendations from the Law Commission, the government, in 1994, refused to support a bill for reform. The government did not accept the need to amend the existing laws. Despite the overwhelming criticism that this body of law has drawn, the government has been slow to act. Once again the preservation of Britain’s cultural past has been a low priority on the government’s legislative agenda.

2. *The Treasure Trove Requirements*

Three essential requirements must be met for an object to be declared treasure trove.⁹⁶ First, the object must be made of gold and/or silver. Second, it must have been concealed by someone who intended to return for it subsequently. Third, the original owner (or his successors in title) must be unknown. The initial body that determines whether these requirements have been met is the Coroner’s Court.⁹⁷ The coroner must summon a jury to determine both the character of the object found and the identity of the finder.⁹⁸ When a jury fails to

91. 5 JURID. REV. 276 (1903).

92. PARL. DEB. H.L. (1982).

93. Master of the Rolls.

94. Lord Denning made his comments while opining in the case of *AG of the Duchy of Lancaster v. G.E. Overton Farms, Ltd.*, 1982 ch. 277.

95. Palmer, *supra* note 87, at 275.

96. It should be noted that the first and second requirements of treasure trove, the gold and silver rule and *animo recuperandi*, do not apply to Scotland. See generally *Lord Advocate v. Aberdeen Univ.*, 1963 SLT 361, at 364 (Lord Patrick) and at 366 (Lord Mackintosh). The state of treasure trove law is not entirely clear in Scotland, but Carey Miller asserts that the principle *quod nullius est fit domini regis* now extends to treasure and objects of antiquity, thus potentially broadening the scope of objects that could become Crown property. Carey Miller, *Corporeal Moveables in Scots Law*, 25-26 (1991). On February 7, 1994, the Secretary of State for Scotland assumed responsibility for the administration of treasure trove in Scotland. According to the Scottish Office press release issued that day, the Crown’s right in Scotland extends to *bona vacantia* (i.e., property which falls to the Crown because there is no known successor to the last lawful owner).

97. The Coroner’s Act, 1988, ch. 13 § 30 (Eng.) affords the coroner the jurisdiction to investigate whether objects found are treasure trove. This Act does not extend to Scotland.

98. If the Coroner’s Court determines that the object is not treasure trove it may retain the object

find that an object is treasure trove, it is most often because the first and second requirements of treasure trove are not met. These two requirements are thus the main cause of objects being excluded from national ownership.

The first requirement, the gold and silver rule, requires that the objects found contain a “substantial” gold and silver content. This rule was reaffirmed and clarified by the Court of Appeal in *AG of the Duchy of Lancaster v. G.E. Overton Farms, Ltd.*⁹⁹ In *Overton*, “[s]ome 7,811 third century Roman coins were found on land owned and occupied by the defendant within the “liberties” of the Duchy of Lancaster.”¹⁰⁰ The coins were made of alloys of silver and base metal. The plaintiff, the Attorney General of the Duchy of Lancaster, introduced expert evidence that the coins were intended to be of silver denomination in the Roman empire. However, an analysis of fifteen of the coins revealed that the actual silver content ranged from zero to 18% and that nearly half of the coins had only 1.6% of silver.¹⁰¹ The Attorney General of the Duchy of Lancaster claimed that the coins were treasure trove and as such belonged to the Duchy.¹⁰² The Coroner’s Court jury upheld this claim. The lower court,¹⁰³ however, held that the coins were not treasure trove, and on appeal, this decision was affirmed. The appeal court held that an object should have a gold or silver content of 50% or more before it can be described as a gold or silver object. The fact that the coins had been deliberately made with gold or silver did not affect this issue.¹⁰⁴

The ruling in *Overton* has created several disadvantages regarding the gold and silver requirement. First, since the “substantial” requirement excludes many objects from being classified as treasure trove, these objects are then allocated according to the law of finds. Second, and more important, this ruling has in fact led to the break up of many finds. The Crown receives that which is substantially gold or silver, and the remaining objects go to the landowner or finder.¹⁰⁵ This rule not only reduces the value of the find, but makes effective recording and analysis of the find very difficult. Fortunately, in many cases the finders have often allowed the finds to be united, but this outcome “at present depends entirely on good-will.”¹⁰⁶ Thus, one of the suggested reforms of treasure trove has called for treasure trove to include all objects to which gold or silver has been deliberately added.

pending resolution over any dispute as to who now actually owns the object.

99. 1982 ch. 277.

100. *Id.*

101. *Overton*, 1981, at ch. 333.

102. *Id.*

103. *Id.*

104. In 1985, a hoard of nearly 48,000 base silver coins from before 300 A.D. found in Normanby, Lincolnshire, was declared not to be treasure trove because its silver content was too low. British Museum staff spent more than a year cleaning and studying the hoard, but the day after the inquest, it was sold to a dealer. *Id.*

105. The Hoxne hoard, found in Suffolk in 1992, was divided, with gold and silver items going to the British Museum, but bronze coins, base-metal and organic objects being excluded.

106. Palmer, *supra* note 87, at 279.

The second requirement of treasure trove is that the object has been concealed with the intention of retrieval (*animo recuperandi*). Objects that were abandoned or discarded will not be included, nor will items that have been lost or “forfeited to natural disaster.”¹⁰⁷ This element has proven to be difficult to satisfy. While gold or silver content can be accurately assessed, the same cannot be said for concealment *animo recuperandi*. In order to make this rule workable, a clear if questionable presumption was developed that such precious metals will have been intended to be recovered. Only in the clearest cases of abandonment, such as grave goods, would there be a finding of no *animo recuperandi*.

However, the effectiveness of the presumption *animo recuperandi* has been greatly reduced in recent years. In fact, in some cases, it has been completely rejected. For example, in *Regina v. Hancock*,¹⁰⁸ the court of appeal held that the presumption could not be used in criminal proceedings to establish that an object was treasure trove. In *Hancock*, the defendant was charged with the theft of sixteen ancient coins, which were found in an area that appeared to have been the site of a Romano-Celtic temple. The defendant’s conviction for theft of treasure trove was overturned on appeal. The appeal court held that, although the presumption of *animo recuperandi* may be available in civil cases, it was impermissible in criminal cases where its effect was to lower the burden of proof for the Crown. Since the removal of the coins had been carried out covertly, there was no proof as to their original position. Thus, the Crown was unable to establish that the coins had been deposited by someone who had intended to return to collect them. In other words, the theft had destroyed any potential evidence of *animo recuperandi*, which consequently made it impossible for treasure trove to be established.

Since many cases involving treasure trove are criminal cases, the finding in *Hancock* was a serious blow to any party attempting to establish treasure trove. Where the objects have been clandestinely removed before any trove inquest, much of the evidence is destroyed, and it is difficult and often impossible to establish *animo recuperandi*.¹⁰⁹ As Professor Palmer pointed out: “The requirement of *animo recuperandi* [like that of gold or silver] removes a vast range of antiquarian finds from the realm of treasure trove.”¹¹⁰ Finds like the Sutton Hoo treasure¹¹¹ are not treasure trove and neither are objects deposited or dispersed by way of sacrifice or to glorify deities.

An infamous example of how treasure trove law allows national treasures to

107. Neil Cookson, *All That Glitters*, 141 NEW L. J. 1255 (1991).

108. 1990 2 Q.B. 242.

109. The opposite is true when objects are found and reported immediately since they can then be examined in situ. Earlier this year, a hoard of over six thousand Roman coins, minted in the reign of Emperor Magnus Maximus in 383 A.D. and worth over £50,000, were found by an off-duty policeman. A Coroner’s Court determined the coins to be treasure trove, and the British Museum will receive the greatest hoard of Roman coins ever found. *Roman Coins Hailed as Greatest Find*, DAILY TEL. (London), Mar. 2, 1995, at 2.

110. Palmer, *supra* note 87, at 280.

111. The discovery of this Viking warship was allocated according to the law of finds because the ship did not fall within the definition of treasure trove.

slip through the nation's hands is the Middleham Pendant. This fifteenth century gold jewel, set with a sapphire, which was discovered by amateur treasure hunters, was described as the most important addition to the "surviving body of English medieval jewellery since the last war."¹¹² Discovered in North Yorkshire on a bridle path near Middleham Castle, the Middleham Pendant was found to have been lost by its fifteenth century owner and therefore was not treasure trove.

As mentioned above, it is the role of the Coroner's Court to make an initial determination about whether an object is treasure trove. If the object is deemed treasure trove, then it will be delivered to the British Museum or to the National Museum of Wales depending on where the find is located. The museum will then make a valuation and submit that valuation to the Treasure Trove Reviewing Committee.¹¹³ If the Committee confirms the valuation, this valuation will be the basis of the *ex gratia* award that will be paid to the finder. This award paid to the finder can be reduced or even eliminated where the finder acted in bad faith, such as when the finder tried to conceal the find. Where no museum wishes to retain the object, there is no reward, and the treasure trove will be returned to the finder. The purpose of the reward system, which sometimes operates at the expense of the landowner on whose land the object is found,¹¹⁴ is simply to encourage reporting of these finds.

3. Attempted Reforms of the Treasure Trove Laws

Attempts to reform the treasure trove laws have thus far met with consistent failure. In 1981, an attempt to reform the law of treasure trove by Lord Abinger was rejected. Lord Abinger's 1981 Bill had sought to abolish the requirement of *animo recuperandi* and extend the gold and silver rule to include not only objects made with any alloy containing gold and silver, but also to any objects lying with or adjacent to a treasure trove object. In addition, the 1981 Bill had proposed to give the Secretary of State the power to extend the doctrine to include any object "contained in any class of object specified by order." In other words, the Bill would have allowed the Minister to extend treasure trove to subclasses of objects. The Bill would have thus enabled the Minister to issue a special order declaring a certain item as treasure trove irrespective of its substance. The government was fearful of the effect that these changes would have on property laws and on the rights of ownership. Once again the government showed itself fearful of change. In 1987, the Law Commission published a paper proposing to investigate issues concerning treasure trove as well as broader prop-

112. Peter Davenport, *Jewel Saved from Export as Appeal Raises Pounds 2.5M*, TIMES (London), Aug. 9, 1991.

113. The Treasure Trove Reviewing Committee is an independent body set up in 1977 to advise Ministers on the valuation of treasure trove finds. The Committee publishes reports annually to report the numbers and value of reported treasure trove finds. For example, in 1992-93, there were twenty-two treasure trove finds considered, with a total value of £210,457.

114. Where the land is tenanted, the true land owner will not receive the reward unless she can prove that she was in possession of the treasure trove item. Sax, *supra* note 11, at 1142.

erty issues. However, despite the fact that a committee was set up and recommendations were made, no action was ever taken.

The latest attempt to reform the treasure trove laws has also recently met with failure. In 1994, Lord Perth's Treasure Bill was rejected by the government despite the strong support it received in Parliament. Ironically, despite the government's inaction in the area of reform, the reasons it gave for rejecting the 1994 Bill were essentially because the Bill's scope did not go far enough. Explaining the government's position, Baroness Trumpington said that Lord Perth's 1994 Bill would not remove the anomalies of treasure trove law and that "far from simplifying the arcane complexities of the present law, this Bill would leave them in place and, in some respects, add to them."¹¹⁵

Lord Perth's Bill had attempted to reform the law while considering the competing interests of archaeologists, landowners, treasure hunters, and other interested groups. First, the Bill contained a provision requiring that all finds reported to the Coroner's Court had to be reported to the occupier of the land within fourteen days.¹¹⁶ The aim of this provision was to enable occupiers to take preventive action against a possible invasion of treasure hunters armed with metal detectors. The provision was in part a reaction to the controversy surrounding an archaeological discovery at Wanborough, Surrey. In 1985, at Wanborough, Surrey, treasure hunters had flocked to the site of a Roman Temple and Iron Age settlement after a coin hoard was found. Overnight, the site in question turned into a battlefield, until the police arrived and arrested some of the enthusiasts. None of the treasure hunters were ever convicted, and to this day, archaeologists cannot be sure exactly what is missing.¹¹⁷

Second, the proposed Bill contained a provision requiring a finder who has reasonable grounds to believe an object is treasure trove to notify the coroner as soon as is reasonably practicable, and in any event within four weeks.¹¹⁸ Failure to notify would be a criminal offense.¹¹⁹ Third, and most important, the Bill sought to create the criminal offenses of (1) searching for any treasure on any land as a trespasser,¹²⁰ and (2) removing treasure trove from any land without lawful authority¹²¹ other than for the lawful purpose of delivering it to the coroner.

The principal change contemplated by Lord Perth's 1994 Bill was to reclassify objects that might constitute treasure trove. First, treasure trove would no longer be confined to objects that are *animo recuperandi*, but would also extend to lost or abandoned objects, including treasure buried in a grave. Second, the 1994 Bill proposed some fundamental changes to the gold and silver rule. Under

115. *Treasure Trove - Government to Review Law*, ESTATES GAZETTE (London), Apr. 16, 1994.

116. Clause 4 of Lord Perth's Bill.

117. Margot Norman, *A Rich Hoard of Trouble - Bill to Control Treasure Hunters*, TIMES (London), Mar. 7, 1994.

118. Lord Perth's Treasure Bill, clause 4(1) (1994) (unenacted).

119. *Id.* at clause 4(2).

120. *Id.* at clause 5(1).

121. *Id.* at clause 5(2).

the proposals, any coin or token which contained at least 5% gold or silver would be made notifiable to the coroner. All coins discovered in a hoard where at least one of them is 0.5% gold or silver would be categorized as treasure, as long as the coins are part of a connected series.¹²² In addition, any other objects found in the same place that are deemed to form part of a connected series with the gold or silver would also be part of that treasure, even if some or any of those objects do not qualify individually as treasure trove. Third, plate, jewellery and other objects, excluding coins or tokens, which contain at least 5% precious metal and are at least 200 years old, would be deemed treasure trove. In addition to these changes, the Secretary of State would be able to designate any object as treasure trove by a special order.¹²³ The limitations on this order would be that the object be at least two hundred years old and that the object be an artifact. Thus, unworked natural objects, such as fossils or human remains, fall beyond its scope.

The proposals submitted by Lord Perth would clearly have affected the number of objects that could have become classified as treasure trove. The removal of *animo recuperandi*, the broader class of treasure trove objects, and the powers given to the Secretary of State all made this a potentially very powerful weapon in the protection of Britain's national heirlooms. Treasure hunters or metal-detectorists strenuously objected to this Bill. They maintained that they have always been a valuable source of information and a great help in the quest to discover Britain's past by uncovering up to seven hundred archaeological sites per year.¹²⁴ However, the arguments of these enthusiasts are weak. First, the damage done by their enthusiasm is irreparable. In fact, it would be better for many sites to remain undiscovered rather than to risk being plundered by these "nighthawks." Second, the Council for British Archaeology believes that about two million antiquities are dug up each year with the help of metal detectors, but only a tiny proportion are declared treasure trove.¹²⁵ Third, the Bill would not prevent treasure hunters from detecting, but they would be required to do so with permission from the occupier or owner of the land.

The government's reaction to this Bill was disappointing. Despite admitting the need for reform, it refused to act upon Lord Perth's initiative. After initially saying that the government would not oppose the Bill,¹²⁶ Lady Trumpington rejected the Bill without clearly articulating any clear reasons. Lord Perth's Bill was a private member's Bill. As such, Lord Perth was restricted and could not incur additional government expenditure, for example. Due to such restrictions, Lord Perth's Bill was actually quite limited in its scope. He had hoped that the

122. Thus, an individual coin, no matter what its gold or silver content, could not be treasure trove.

123. Such orders would have to be approved by both the House of Commons and the House of Lords.

124. *Department of National Heritage - Treasure Finders will still be Rewarded, says Lady Trumpington*, THE INDEPENDENT (London), Apr. 21, 1994.

125. *Treasure Trove Laws in Line for Shake-up*, OBSERVER (London), June 13, 1993.

126. UK Government Press Release, Apr. 21, 1994.

government would not only support the Bill but that the government would take it over and strengthen it. As with monuments and historic buildings, the government's biggest and furthest step has been to admit that there is actually a problem. Hopefully, Lord Perth's initiative will not die. But the question remains as to when reform will be forthcoming. Moreover, as with the historic sites legislation, the question begs, how effective will any reforms be while the government seems unwilling to effectively utilize the modicum of protective legislation in place?

4. *Objects Not Classified as Treasure Trove*

Before leaving the subject of treasure trove, a brief discussion is necessary of the fate of objects not classified as treasure trove. When objects found are not treasure trove, they will be allocated according to the private law of finders (as modified by any contract between the relevant parties). Subject to a statute of limitations, the owner of lost goods remains their owner. If the owner does not claim his goods however, then the finder will generally have a superior title to all other parties. In some circumstances, a preemptive possession can arise. If an employee finds goods in the course of her employment, and her employment is the cause of the find, then the employee's possession is deemed to be that of her employer. Another situation where preemptive possession can arise is where goods are found on land owned or occupied by someone else. As Professor Palmer notes, "occupation of the land may have conferred on the occupier a possession over lost goods situated on that land which is prior to, and therefore stronger than, that of the finder or his employer. Such prior possession can exist even though the occupier was unaware that the goods were present on his land."¹²⁷ In *Elwes v. Brigg Gas Co.*,¹²⁸ the tenant for life was awarded possession of the remains of a prehistoric boat that the lessee found beneath the land. Nothing in the lease gave the lessee the right to remove the boat, and so the remains were awarded to the tenant for life.¹²⁹

The holding in *Elwes* was reaffirmed most recently in *Parker v. British Airways Board*.¹³⁰ In *Parker*, the plaintiff, a passenger at London airport, found a valuable bracelet in the executive lounge of British Airways at the airport. The plaintiff handed the bracelet over to an employee of the airline and asked for the bracelet to be returned to him if the owner failed to claim it. However, the airline sold the bracelet and kept the proceeds. The plaintiff sued and was awarded damages. The lower court found that the finder of a chattel which was found attached to and on the surface of the land, was entitled to that chattel as against all persons except the true owner, unless the occupier of the premises on which

127. Palmer, *supra* note 87, at 299.

128. 1886, 33 ch. D. 562.

129. The boat was actually presented to a local museum without any cost to the museum. In 1943, the boat was destroyed during a German air raid. Michael L. Nash, *Are Finders Keepers? One Hundred Years since Elwes v. Brigg Gas Co.*, 137 NEW L. J. 118 (1987).

130. 1982 Q.B. 1004.

it was found could show that it was in his custody.¹³¹ On appeal the decision was affirmed. The appeal court quoted a 1722 passage by Chief Justice Pratt: “. . . that the finder of [a jewel] though he does not by such finding acquire an absolute property or ownership, yet he has such property as will enable him to keep it against all but the rightful owner”¹³² The nature of the premises, the degree of public access, and the quality of the control over the area exerted by the occupiers were such that the court felt unable to conclude that the occupiers (British Airways) had asserted any superior possession over the bracelet prior to the finder himself.

Thus, to a certain extent, the maxim “finders keepers” holds true. However, this will be limited by a party who is held to have better title, such as the rightful owner. Wrongdoers will not be allowed to benefit from their wrongdoing. As the *Parker* decision demonstrates, the courts will act to uphold equity.

B. Market Overt

Until its abolition in 1994, the doctrine of market overt represented another of the idiosyncratic anachronisms of British law. Under this doctrine, it became possible to pass on a title that the conveyor never in fact possessed. This rule, embodied in the Sale of Goods Act of 1979,¹³³ provided that “where goods are sold in market overt, according to the usage of the market, the buyer obtains a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.”¹³⁴ Until 1994, the doctrine of market overt represented a clear exception to *nemo dat non quod habet*.¹³⁵

The rule of market overt essentially allowed a purchaser of stolen goods to acquire good title to those stolen goods if the purchase was made at a market within the city of London between the hours of sunrise and sunset. The rule, that a sale of stolen goods in a shop in the city of London passes good title in the property to the buyer, results from the adoption of two distinct customs: (1) an immemorial custom of London, and (2) a mercantile custom of later origin. The custom that a shop in the city of London is market overt is immemorial and is thought to have been in existence since the first year of the reign of Richard I (1189).¹³⁶ However, the rule itself regarding the passing of property by sale in market overt was not adopted by common law until the end of the thirteenth century.¹³⁷

The rule of market overt has had dramatic and disastrous consequences for the rightful owners of stolen property. Many such owners have seen their property

131. Nash, *supra* note 129, at 123.

132. *Id.*

133. Sale of Goods Act, 1979.

134. Sale of Goods Act, 1979, § 22(1).

135. He who hath not cannot give.

136. Michael Nash, *Feudal Hangover*, 143 *NEW L. J.* 592 (1993).

137. *Id.*

lost forever through the rule of market overt. For example, in 1993, the theft of two valuable paintings, one by Gainsborough and one by Reynolds, highlighted the injustice of this rule. The stolen paintings were put up for sale in Bermondsey Market (a market overt) and were bought for £145.¹³⁸ They were then taken to Sotheby's by the purchasers, and the estimate given by Sotheby's for the pair was £65,000. Because of the rule of market overt, the buyer had acquired good title to the paintings. A prominent art lawyer, Michael Kay, was reported as saying that the system is effectively a legal dumping ground for stolen goods, equivalent to the medieval right of sanctuary.¹³⁹

Despite the injustice of the rule and the calls for reform, until its abolition in 1994, the only limitation placed on the rule was that sales must be between sunrise and sunset.¹⁴⁰ One reason for the failure to reform this rule was a desire to protect the innocent buyer. In *RH Willis & Son v. Car Auctions Ltd.*,¹⁴¹ Lord Denning M.R. expressed his concern that the "innocent purchaser" and the "innocent handler" must also be protected.

In 1994, an amendment to the Sale of Goods Act¹⁴² was introduced and was rapidly passed through both houses. The 1994 Amendment abolished the rule of market overt. Despite being welcomed in many respects, this move was criticized for being poorly structured.¹⁴³ Specifically, there was still a need to address the problem faced by the innocent purchaser. Both the Law Reform Committee and the Consultation Paper, upon which the 1994 Amendment was largely based, had sought to protect the innocent buyer. There were calls for a provision whereby the purchaser who buys through retail outlets and auction houses should acquire good title. While this government action was welcomed, it was regarded as a hasty move that failed to consider all interests. In particular, the move was a step away from the law in many other civil law European nations that favor the innocent purchaser. This law could also have implications for British law in the future as the European Community moves toward a greater harmonization of the law throughout the member states. There is, therefore, concern that at some future point British law may be in conflict with European Community law.¹⁴⁴

The 1994 Amendment, though hasty, was at least a positive step by the government. However, the government's action only came about as the result of the efforts of a "persuasive phalanx of Law Lords"¹⁴⁵ who convinced the govern-

138. Despite the excessively low price paid for the paintings, the owners were under no duty to inquire as to the origins of the paintings, since they had been purchased in a market overt.

139. DAILY TELEGRAPH (London), Mar. 29, 1993. The medieval right to sanctuary was exercised by a criminal who would seek refuge in a church where theoretically, he could not be seized, if that church gave him sanctuary.

140. This old rule was enforced as a result of *Reid v. Metropolitan Police Commissioner*, 1973 2 All E.R. 97 (Eng. C.A.).

141. 1978 1 W.L.R. 438 (Eng. C.A.).

142. Sale of Goods (Amendment) Act 1994 [hereinafter *1994 Amendment*].

143. Sheila Bone & Leslie Rutherford, *Market Overt - "Closed All Hours?,"* 144 NEW L.J. 1014 (1994).

144. This issue is addressed in detail, *infra* Section IV (B).

145. Bone & Rutherford, *supra* note 143.

ment of the case for reform. As with treasure trove and historic sites, government inaction has been the norm. Action was only forthcoming after significant pressure and demand for reform. Again, the government was content to allow the fate of many of Britain's cultural treasures to remain in the hands of an anachronistic legal doctrine. When reform was at last forthcoming, it was a hastily conceived and poorly thought out measure that failed to effectively address all the issues at hand.

III. HISTORIC WRECKS AND SHIPWRECKS

Like the laws dealing with sites and moveable cultural property, the laws dealing with the protection of cultural property in the form of shipwrecks is in need of reform. The laws dealing with shipwrecks, like the moveable property laws, are also extremely outdated and were originally developed for a different purpose from that which they serve today. Although some powerful legislation has been enacted, as with the laws dealing with ancient sites, successive governments have been largely unwilling to effectively use this legislation, especially where commercial interests are at stake.

Interest in wreck law has increased greatly in recent times as technology has advanced, allowing many wrecks to become accessible. Much of the law dealing with historic wrecks and wreckage originally developed to deal with commercial interests, although an increasing focus is now being placed on the interests of cultural heritage protection. Unfortunately, many wrecks which are of significant historical interest are also of great commercial value. A conflict has therefore arisen between those parties whose interests are commercially motivated and those who are concerned with the preservation of these finds.

This conflict has largely centered on the various attempts to reform existing laws dealing with shipwrecks. International law allows a nation to regulate the activities concerned with wrecks located within its territorial waters. Much of the legislation dealing with the treatment of wrecks in Britain is in need of revision and consolidation. The law has remained stagnant and has largely failed to keep pace with modern developments and modern diving practice. Provisions originally designed to prevent nineteenth century plundering of wrecks are ineffective in the fight to protect archaeological remains.

The main body of law dealing with wrecks is the Merchant Shipping Act of 1894.¹⁴⁶ The provisions of this Act were drafted at a time when wrecks were much more frequent than they are today. These provisions were designed to deal with the plunder of distressed vessels by coastal communities, not with the protection of remains that had been lying on the seabed for a considerable time. The Act required any person taking over a wreck to report the wreck to the receiver¹⁴⁷ in order both to prevent illegal retention of any property and to establish

146. Merchant Shipping Act, 1894. The 1894 Act was an amendment of the Merchant Shipping Act 1854, which itself was a consolidation of the earlier Wreck and Salvage Act of 1846.

147. The receiver was normally an officer of HM Customs and Excise, but since January 1, 1993, they have been appointed by the Department of Transport's Marine Directorate.

legal entitlement to the wreck.¹⁴⁸ The receiver would then be responsible for advertising the wreck to inform potential claimants of the find. If the wreck is deemed valuable, then the find must be reported to the Secretary at Lloyd's,¹⁴⁹ in case an insurer wishes to exercise rights of ownership. The owner must make his claim within one year. If a wreck is unclaimed, then title might vest in the Crown. In practice, the wreck is usually sold by the receiver and the proceeds minus expenses go to the salvor.

This system for reporting and disposing of wrecks has largely fallen into disuse.¹⁵⁰ Indeed, the 1894 system is as much honored in breach as it is in observance. A similar lack of observance is noticeable with the Protection of Wrecks Act of 1973.¹⁵¹ This Act was designed to protect certain wrecks on account of their historical, archaeological, or artistic importance.¹⁵² The Act gives the Secretary of State the power to designate historic or dangerous wrecks of any nationality and to prevent any kind of activity in relation to them. However, in practice, the 1973 Act like the 1894 Act, suffers from a lack of observance and an even greater lack of enforcement.

Ironically, the greatest amount of protection for many ancient wrecks comes not from the 1973 Act, but from the Ministry of Defence. The Ministry of Defence exercises, on behalf of the Crown, the right of title over all British warships and other ships that sank while on non-commercial service. This exercise of power applies wherever the wrecks lie. In practice, the Minister of Defence often sells or licenses these rights to other parties either for a flat fee plus a percentage of the proceeds, or, in the case of historic organizations, just for a flat fee. In certain cases the Ministry of Defence will give the vessel by Deed of Transfer to a reputable archaeological group that then holds the vessel in trust for the British public.¹⁵³

The motives behind the Ministry of Defence's actions are not solely motivated by the economic value of the wreck. There are also sentimental considerations, since many of these wrecks are also mass graves for the British servicemen who went down with their vessel.¹⁵⁴ In fact, because of the lack of respect shown to

148. Merchant Shipping Act, 1894, § 518.

149. Lloyd's of London is an insurance agency.

150. In 1989, there were eighteen finds reported to the receiver. In 1990, there were twenty-five finds reported of which twenty-one were of no value. In 1991, there were ten reports made.

151. Protection of Wrecks Act, 1973.

152. *Id.*

153. The *Mary Rose*, flagship of Henry VIII, and the English warship *Anne*, which sank off the coast of Sussex in 1545, are two such vessels which were deeded to reputable archaeological groups.

154. HMS *Birkenhead*, which sank off the coast of South Africa in 1852 was such a case. When the ship was found, there were concerns that the quest for the gold supposedly on board would override the fact that the ship was also the resting place for hundreds of soldiers and sailors. When the *Birkenhead* actually sank, the troops remained at attention, while the women and children were saved in lifeboats.

The Ministry of Defence regularly refuses permission to dive on the remains of HMS *Repulse* and HMS *Prince of Wales*, which were sunk in 1941 off the coast of what was then Malaya. The ships rest in comparatively accessible waters, and the British navy regularly replaces the White Ensigns, which indicate both respect for the 840 men lost, and the manifest intention to retain rights

those lost in shipwrecks, the 1986 Protection of Military Remains Act¹⁵⁵ was passed. The Act was passed partly as the result of a major controversy which arose during the salvage of the British warship, the HMS Edinburgh, which sank in 1942 during the Second World War. The commercial salvors caused an outrage when the public learned that the salvors had placed chemical lights in skulls to scare off other divers.

This 1986 Act also allows the Secretary of State to designate both sites and wrecks of either aircraft or ships.¹⁵⁶ Once designated, it is an offense to tamper with the remains at that site. The Act was well-intentioned and aimed at paying respect to the sailors who had lost their lives fighting for their country, while also preserving what had become important historical remains. However, the Act was limited in its effectiveness. First, although the Act extends to international waters, only British citizens or British controlled ships can be prosecuted. Second, the Act is somewhat convoluted and significantly does not extend to sites of merchant ships. The government may have been afraid of interfering with commercial interests, but it is difficult to see why some human remains are entitled to more respect than others. There have been calls to extend the coverage of the Act, but thus far, the government has been unwilling to take any action.

Besides the statutorily created rights to wrecks, there are also Crown rights that have their origins in the Dark Ages. The rights of the owners of wrecks were subjugated to those of the local feudal lord who seized the wrecks as they were washed ashore. In time, the rights of the feudal lords were in turn subjugated to the rights of the Crown, and these rights became a royal prerogative. In 1236, Henry III laid down a rule that was to govern for over five hundred years. This rule was enacted by Edward I in 1275 in the Statute of Westminster I.¹⁵⁷ The rule restored the remains of the wreck to the owner if they were claimed within one year. However, since most owners were lost with their vessels, and one year was not a long time when owners lived overseas, most wrecks went to the Crown. In an effort to encourage reporting of wrecks, the finders were often paid a reward.

Crown rights to wrecks are now embodied in the Merchant Shipping Act of 1894.¹⁵⁸ Section 523 provides that all unclaimed wrecks found in "Her Majesty's dominions belong to the Crown except where the right to the wreck has been granted to other persons." If a wreck is unclaimed for the one year period, then the wreck shall be sold, and all proceeds less expenses shall go to the Crown.

Although British law is well-suited to protect the interests of the State and the Crown, the interests of archaeologists have largely been ignored. The archaeologists would often prefer to leave a wreck *in situ* until the technology is available to raise the wreck intact. However, the law at present encourages salvors to

both of possession and ownership.

155. Protection of Military Remains Act, 1986 [hereinafter *1986 Act*].

156. Aircraft are protected on land or at sea.

157. 3 Edw. 4 (1275).

158. Merchant Shipping Act, 1894.

disturb these finds. Under the law of salvage, the salvors will have a huge economic incentive to salvage these finds, even if not all of the wreck can be saved. The archaeologists are largely dependent on the goodwill of the Ministry of Defence and other related government bodies in order to have access to these wrecks. Similarly the large costs involved in investigating these finds mean that few historical groups can prevent the wholesale looting of many wrecks. Once disturbed, much of the historical evidence is also destroyed. Again, government action has largely been motivated by economic interests, or at most, by a sentimental respect for the dead, the latter often being a reaction to veterans' associations and other pressure groups. Until the government is prepared to appreciate the almost incalculable historical value of these wrecks, the historical community will, as with much cultural property preservation, be dependent on private goodwill.

IV. EXPORT OF CULTURAL PROPERTY

Although the laws regulating the export of cultural property have their failings, by comparison with many nations,¹⁵⁹ the British selective export regulations¹⁶⁰ have been very effective. The export regulations in Britain give the government very broad powers to restrict the export of goods. However, the powers which these laws give to the government have often been left to stand idly by for the sake of commercial interests. These laws have also been unable to prevent many of Britain's cultural treasures from being lost to private collections abroad due to a lack of government funding. Interestingly, recent legislative developments within the European Community (EC), which demand additional requirements for the export of cultural property from the EC, may provide greater safeguards for Britain's cultural property. The impact of this legislation and the possible future legislative moves from the EC's legislative headquarters in Brussels are a cause for great debate and speculation. The supremacy of European Community law will mean that the British government will no longer be able to stand idly by, and will instead be forced to implement European Community legislation.

A. *Export Regulations*

The law regulating the export of works of art in Britain is based on the Import, Export and Customs Powers (Defence) Act of 1939, a statute passed at the outbreak of the Second World War.¹⁶¹ This Act gave the Board of Trade the power to prohibit the import or export of goods of any specified description. This Act was later amended by the Customs and Excise Export of Goods (Con-

159. See generally Paul Bator, *The International Trade in Art*, 254 PLI/Pat 659 (1988) (Bator notes the particular successes of the British and the Japanese export regulations in preventing the loss of many national cultural treasures by comparison with many other nations).

160. The Import, Export and Customs Powers (Defence) Act, 1939.

161. Import, Export and Customs Powers (Defence) Act 1939, as implemented by the Import of Goods (Control) Order 1954.

trol) Order.¹⁶² The Order prohibits the export, without a license, of various items, including “any goods manufactured or produced more than fifty years before the date of exportation” except personal property, letters, and so forth.¹⁶³ Violations of the Order could result in the forfeiture of the goods in question.¹⁶⁴ The licensing requirement thus takes center stage in the control of exports.

The licensing requirement of the Order provide for two tiers of export licenses that are needed for export.¹⁶⁵ First, there is an “Open General License” for antiques valued at less than £4,000. Second, for those objects that are more valuable, there is a “Specific License.” Objects that were imported into Britain more than fifty years ago are scrutinized for their significance and national importance by the Reviewing Committee on the Export of Art.¹⁶⁶ When an application for a license to export is received, it is initially vetted to determine if the object is subject to the export controls.¹⁶⁷ If it is subject to export controls, then the Reviewing Committee is consulted.

When making its determination, the Reviewing Committee considers each of the following criteria: “(i) Is the object so closely connected with our history and

162. SI 1987 No. 2070.

163. *Id.*

164. *Id.*

165. Similar licensing controls exist for the import of cultural property into Britain. Great Britain does not have a formal policy concerning the import of cultural property. All goods imported into Britain must have an “Open General Import License” to be allowed into the country. This license permits the import of all goods, unless specifically excluded. No cultural material, however, is presently excluded. Britain has developed an essentially “ad hoc approach to the import of cultural property” and has shown a “reluctance to enforce the laws of a foreign country.” L.M. Rafanelli, *A Comparative Study of Cultural Property Import Regulation: The United States, the United Kingdom and Canada*, 15 COLUM.-VLA J. L. ARTS 496 (1991).

This reluctance was demonstrated in *Attorney-General of New Zealand v. Ortiz*, 1982 1 Q.B. 349. In *Ortiz*, the plaintiff, the New Zealand government, was seeking the return of a rare Maori wood carving which had been illegally exported from New Zealand in 1973. Under New Zealand law, an illegally exported object should be automatically forfeited. The trial court found for the New Zealand government, but on appeal, the decision was reversed. The appeal court, while recognizing the foreign law as valid, held that under British law, the defendant did not have to forfeit the object, because the object had not been seized. In one of his last decisions before retirement, Lord Denning said that “no country can legislate so as to affect the rights of property when that property is situated beyond the limits of its own territory.” *Id.* at 576.

Britain is reluctant to implement legislation which would curtail sellers’ and collectors’ access to important works of art or require the return of properties publicly or privately owned upon the request of another country. One reason for this is an unwillingness to implement legislation that could result in the return of many works of art currently owned by British museums. Additionally, Britain has a preeminent position in the art market, with London auction houses playing an important role in the high-volume and high-priced sale of cultural property. In short, what may be bad for the national image is good for trade figures.

166. The Reviewing Committee on the Export of Works of Art, appointed by the Minister of Art, is an independent six person committee which vets export license applications. The Committee is also assisted by experts and an Advisory Council that also acts in the capacity of an overseer.

167. Such objects are referred to an expert advisor, generally a curator or the director of one of the national collections with relevant expertise.

national life that its departure would be a misfortune? (ii) Is it of outstanding aesthetic importance? (iii) Is it of outstanding significance for the study of some particular branch of art, learning, or history?"¹⁶⁸ Applying these criteria, the Reviewing Committee may deny an export license in order to give a British museum a chance to purchase the item. If such museum steps forward to purchase the item, then the export license will usually be granted. Since it was formed in 1952, the Reviewing Committee has heard some 275 cases out of well over 35,000 applications. Export licenses were denied in about 180 of these cases.

The Reviewing Committee can also advise the Arts Minister to deny an export license for a fixed period, usually about three months, to allow a British institution to raise funds to match the price.¹⁶⁹ This procedure has led to some major art works being retained,¹⁷⁰ but the procedure is dependent largely on the ability of British institutions to raise the funds alone, since government aid is not often forthcoming. The Reviewing Committee itself has criticized the inadequacy of funds to purchase the works that should be retained for "national patrimony."¹⁷¹

Despite the success of these regulations in keeping many national treasures in Britain, there remain several significant deficiencies in the regulations. An illustration of one major deficiency was illustrated by the failure to prevent the export of the three thousand item George Brown collection of South Pacific art in 1986. Although the total collection was valued at over £600,000, the export controls were evaded by simply exporting pieces individually. In the end, all but the nineteen most valuable items were saved.¹⁷² The major flaw, however, lies with the lack of government funding to effectively utilize the regulations. Many export licenses that are initially refused are later granted when no institution can raise sufficient funds to purchase the object.

The government also has economic motivations for not wishing to restrict the cultural property export trade. Between 1984 and 1989, British earnings from these exports rose by fifty per cent, to approximately £6 billion.¹⁷³ Earnings such as these come close to the revenues generated by North Sea Oil, and therefore, the government is unwilling to sacrifice these earnings for the sake of culture. However, Britain is paying a price for these earnings as more of Britain's cultural heritage disappears abroad. The government's reaction in May 1991 was to allow private bids for those works of art whose export licenses were deferred.

168. These are called the Waverley criteria and apply to all objects regardless of whether they are a product of British culture.

169. In 1977-78, of the twenty export licenses refused, eight were eventually issued because no requisite offer was made.

170. Works such as El Greco's "Dream of Phillip II," Ruben's "The Holy Family" and Titian's "The Death of Actaeon" were retained as a result of the denial of an export license.

171. Bator, *supra* note 159, at 665.

172. The remaining 2,981 items were exported individually so that the value of each individual piece was below £4,000, and thus did not require a specific export license.

173. Nicholas de Jongh, *Culture Provides a Really Useful £6BN Export Boost, Latest Figures Show*, GUARDIAN (London), Mar. 16, 1991.

This new rule was sharply criticized by the Reviewing Committee which argued that this rule could be abused by art speculators. Such speculators could buy works of art and then resell them at a later date when the price might have risen beyond the budgets of most public collections. In addition, although these works of art may be retained in Britain in the interim, there are no provisions requiring private buyers to publicly display the works or even to conserve them.

The government's move also came at a time when the funds available for the purchase of art works had been frozen since 1985 (an effective reduction of 40% after inflation is considered).¹⁷⁴ The Committee recommended that if a major art work was saved from export by being taken into private ownership, then the owner should be compelled to give an irrevocable undertaking to make the object available to public access for not less than twenty years. In addition, the private owner would have to give undertakings to conserve the piece of art.¹⁷⁵ The Committee's recommendations were not taken up by the government, and in light of the changes within the European Community,¹⁷⁶ there is every likelihood that many of Britain's works of art will continue to disappear overseas at an ever-increasing rate.

B. European Community Impact on British Export Laws

The European Economic Community (now known as the "EC") has recently adopted a regulation¹⁷⁷ on the export of cultural goods from the territory of a Member State.¹⁷⁸ The Regulation was prompted both by the removal of border controls within the EC and by the growth of illicit trading in cultural property. The legislation was an attempt to protect cultural property while still promoting legitimate free trade.

This export regulation establishes an export certification system under which every cultural object must receive an export certificate before exportation from the EC.¹⁷⁹ If a prospective purchaser finds a cultural object outside the EC without such a certificate, commonly referred to as a "passport," then the potential purchaser should be alerted to the possibility that the object was unlawfully removed.¹⁸⁰

An export license is not required for what is termed "archaeological junk," which includes archaeological objects that are at least one hundred years old and

174. Nicholas de Jongh, *Arts Minister Warned That Art Export Rules 'Not Working'*, GUARDIAN (London), Sept. 28, 1990.

175. *Id.*

176. The elimination of the customs barriers in 1992 has made it easy for many works of art to be taken to another Community state which has fewer controls on exports, and from there, to be sold abroad.

177. Council Regulation on the Export of Goods 3911/92/EEC 1992 O.J. (L 395) 1 [hereinafter *Export Regulation*]. EEC Regulations are binding without any implementing national legislation.

178. The current members of the EEC are: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, United Kingdom, and as of this year Sweden, Finland and Austria are members.

179. Council Regulation on the Export of Goods 3911/92/EEC 1992 O.J. (L 395) 1.

180. *Id.*

that do not have any commercial value. This provision was a result of the United Kingdom's desire to exempt archaeological finds of little value from the export license system.

In Britain, where 75% of the EC art trade is conducted,¹⁸¹ the effect of this legislation on export licensing requirements was immediate but minimal. The National Heritage Minister, Robert Key, said that "the onus will be on exporters to apply for the correct license."¹⁸² Under the EC regulation, the licensing authority in Britain will need to know that the object has either been in Britain before January 1, 1993,¹⁸³ or has been lawfully imported from another Member State after January 1, 1993. The Department of National Heritage will add this consideration to those applications for export. In short, the only restriction of any importance placed on British export licenses is that a good which is to be taken out of the EC must have an EC export license. This will undoubtedly affect the very lucrative U.S. market; however, the export certification procedure could have far-reaching effects outside of Britain. Put simply, if an object is found outside the EC without an export certificate, then the purchaser will have a hard time showing that she was a good faith purchaser. On the other hand, the purchaser could argue that she thought that the object was exported before the certification requirement, making her a bona fide purchaser.

So far the effects of this regulation have been minimal. The impact of the Regulation will mostly be felt by the London auction houses as well as the individual sellers. There will be much stricter scrutiny of a seller's title to property, and those unable to prove title may find their ability to sell restricted. However, perhaps the most important aspect of the Regulation lies outside of its substantive provisions. The Regulation clearly demonstrates that those in favor of greater protection for cultural property in Britain should look to the legislators in Brussels for assistance and not to the British Parliament.

C. European Community Legislation Concerning the Recovery of Stolen Cultural Property

In addition to the export regulation, the EC has also recently issued a Council Directive concerning the Return of Cultural Goods¹⁸⁴ that have been unlawfully removed from the territory of a Member State. The Directive was spurred on by the concern that thieves would take stolen cultural property directly from countries with a rich cultural heritage to civil law nations where the purchaser of sto-

181. Victoria J. Vitano, *Protecting Cultural Objects In An Internal Border-Free EC: The EC Directive and Regulation For The Protection And Return Of Cultural Objects*, 17 FORDHAM INT'L L.J. 1164, 1176 (1994).

182. UK Government Press release, Mar. 16, 1993.

183. The effective date of the regulation was Apr. 1, 1993.

184. Council Directive 93/7/EEC of Mar. 15, 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, 1993 O.J. (E74) 74 [hereinafter *Return Directive*]. Directives are binding only as to the result to be achieved, but each member can choose the form and method within a defined time period.

len property could gain good title.¹⁸⁵ In a civil law nation, a purchaser of stolen property can gain good title if she does not know or learn about the object's illicit removal from its rightful owner. In a common law nation,¹⁸⁶ the rightful owner can reclaim the object regardless of whether the purchaser knew she had bought a stolen object.

The Directive establishes the legal procedure for the return of cultural objects that are unlawfully removed from one Member State and resurface in another. Under the Directive, courts of a Member State where unlawfully removed cultural property surfaces must order the return of the object to the Member State claiming ownership of the object.¹⁸⁷ The Member State claiming ownership must prove that the object: "(1) belongs to the common core categories defined in the Directive or is part of one of the public collections, inventories of museums, archives, or conversation libraries, or is a religious article and (2) left the national territory illegally after January 1, 1993."¹⁸⁸ The Directive also permits a court to determine equitable compensation for the dispossessed owner who is a bona fide purchaser for value.¹⁸⁹ The Directive does not, however, give a private person standing to make a claim for the return for a cultural object.

The issue of bona fide purchasers for value was a subject of great debate due to the differences between civil law nations and those that follow the common law. Purchasers were flocking to civil law nations where the law favored bona fide purchasers for value. In common law nations, the title stays with the original owner, even though a bona fide purchaser may have bought it.

Under the Directive, the bona fide purchaser for value is accorded many of the same protections provided in a civil law nation. First, Article 9 of the Directive provides:

where the return of an object is ordered, the competent court in the requested States shall award the possessor such compensation as it deems fair according to the circumstances of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object.¹⁹⁰

The compensation provision does not force a court to award compensation, but it has the power to do so. If a court does not award compensation, then the Member State will have the right to appeal to the European Court of Law. By allowing for the possibility of compensation, the Directive follows the civil law tradition, thereby forcing British Courts to ignore common law traditions and to apply civil law.

The compensation provision is not the only provision which follows the civil law traditions. The Directive also contains a provision which will give the bona fide purchaser for value secure title after the Statute of Limitations has run.

185. Vitrano, *supra* note 181, at 1166.

186. Great Britain and Ireland are the only two EC countries that follow the common law tradition. All other EC countries are generally representative of the civil law tradition.

187. *Return Directive*, *supra* note 184.

188. *Id.*

189. *Id.*

190. *Id.*

Article 7 of the Directive allows for a one year statute of limitations during which the true owner must bring suit. The suit must be brought within a year from the time the owner knew or ought reasonably to have known of the location of the object. After this period, the bona fide purchaser for value obtains good title. Thus, for one year, the common law approach is followed, but after this period, the civil law approach is followed. However, any proceeding brought under this Directive may not be brought more than thirty years after the object was unlawfully removed from the territory of the requesting Member State.¹⁹¹ In the case of objects forming part of a public collection or if the object is an ecclesiastical good, the statute of limitations is seventy-five years from the time of the unlawful removal of the object.¹⁹² There is thus a point after which the right of the legitimate owner to reacquire the good will be cut off.

These provisions were not unexpected since the majority of Member States follow the civil law tradition. However, the Directive does little to protect true owners or Member States trying to achieve the return of stolen works of art, since they will now be obligated to pay compensation to a bona fide purchaser.¹⁹³

The Directive has important consequences for Great Britain, where title is always held to lie with the true owner. As yet, there have been no reactions from the British legal community. However, it will be interesting to see how Britain implements this directive. Though not immediately binding, Britain is under an obligation to implement this Directive so its aims are achieved.

The immediate effects of the Directive will probably be limited. First, only Member States have standing to seek the return of works of art. Second, those nations most likely seeking the return of works of art are the source nations, and these nations are generally less able to bear the litigation costs that would be involved. Third, and most important, this Directive is prospective, so collections like the Elgin Marbles are safe for now in the British Museum. It is likely that British courts may find, however, that in interpreting this legislation, they will be forced to adjudicate in the context of civil law traditions in certain circumstances. For example, a British Court may be forced to ignore common law traditions and compensate a bona fide purchaser for value of stolen property.

The fact that the Directive passed was in itself quite a feat. It proved difficult to reconcile the interests of source nations, which wanted stricter measures, with the interests of market nations, which took a more liberal view. When the measure was passed, it was without the support of Greece or Germany. In addition, Belgium, Germany, and the Netherlands were granted an extended period to implement the Directive.

191. *Id.* at Article 7.

192. The Member States may decline to have a period of limitations. Alternatively, they may enter into bilateral agreements with other members, so long as the period is longer than seventy-five years. *Return Directive*, *supra* note 184. Not surprisingly, source nations such as Greece and Italy argued for a longer period but this was opposed by market nations such as Britain, Germany, and the Netherlands. Vitano, *supra* note 181, at 1184.

193. *Return Directive*, *supra* note 184.

Both the EC Regulation and the EC Directive are important, not so much for their substantive provisions, but more for their recognition of the need for EC-wide protection of cultural property. Unfortunately, the Directive, by failing to adopt the common law approach or at least to implement stronger bona fide purchaser requirements, does not put a high burden on the purchaser.

It is thus unclear how successful this legislation will be in curtailing the illicit trade in cultural property. For Britain, the Regulation does have an effect on exports and imports of cultural property. Additionally, the Directive may have important consequences for British courts, depending on how Britain actually implements the Directive. British courts could find themselves applying two conflicting property ownership traditions: civil law for Member States and common law for private parties.

Thus far Britain has largely been successful, along with other market nations, in preventing the implementation of stricter legislation. As yet, the only immediate effect of these changes in Britain has been in the London auction houses. Importantly, the legislation is prospective. However, future legislation may have a stronger impact on Britain. The supremacy of European Community law will mean that greater protective legislation may be forced upon the British government with or without its consent.

CONCLUSION

The increasing dangers facing cultural property throughout the world make it imperative that Britain safeguard its national treasures. Successive British governments have been slow to recognize this danger and even slower to implement effective protective legislation. Some change has been forthcoming. The abolition of market overt was a step in the right direction. However, there remain many areas of British law that are based on outmoded concepts like the treasure trove laws and other protective laws which evolved in a different era and for a purpose other than to protect Britain's cultural property. These laws must be adapted to serve the purpose for which they are now intended. Most important, the legislation in place must be effectively used; the government cannot stand idly by and let British heirlooms be buried.

Therefore, government recognition of the dangers facing British cultural property needs to be coupled with affirmative action. The government must respond to the cries for reform. The law of treasure trove is a prime example of a law which ought to be relegated to the history books, or at the very last significantly modified. The government needs to set up a committee¹⁹⁴ to review existing cultural property legislation, propose reforms and then act on these proposals. In addition, the government must allocate greater resources to the protection of cultural property so that those laws in place can be effectively utilized. The export regulations are an empty weapon without the resources to purchase important national heirlooms.

194. Such a committee should be representative of all interested and concerned groups.
<https://via.library.depaul.edu/jatip/vol6/iss1/2>

There must also be a greater degree of judicial review of governmental decisions concerning the fate of cultural property. Ironically, the current state of judicial review in Britain may eventually afford the individual greater rights under European law than national law. In October, 1994, the Law Commission published long-awaited proposals for carrying "judicial review into the next millennium."¹⁹⁵ Among the proposals are the recommendations that a preliminary hearing should be conducted when deciding the issue of judicial review. At this preliminary hearing, it is proposed that the party seeking review should only have to demonstrate whether there is "a serious issue which ought to be determined," and not whether the case is arguable.¹⁹⁶ In addition, these proposals recommend that interim relief should be able to be granted before the preliminary consideration has been concluded. These proposals are an important step which the government must take; otherwise, governmental decisions may remain almost "impervious to legal redress."¹⁹⁷

The government must recognize its duty and realize that British heirlooms are a "finite, depletable and nonrenewable resource."¹⁹⁸ Unless this recognition is forthcoming the trend of the British government away from cultural property protection seems likely to continue.

195. Administrative Law: Judicial Review and Statutory Appeals, Law Com. No. 226, HC 669 (HMSO).

196. Richard Gordon QC, *When The Stargazing Stopped*, 144 New L.J. 1527 (1994).

197. Justice Schiemann commenting on the court decision in *Ex parte Rose Theatre Trust Co.*, 1990 1 Q.B. 504.

198. Professor Patty Gerstenblith, lecture on *Art & The Law Seminar* at DePaul University College of Law (Apr. 24, 1995).

