

1984

# Conservation, Control and Heritage - Public Law and Portable Antiquities

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## Recommended Citation

Geoffrey Bennett, *Conservation, Control and Heritage - Public Law and Portable Antiquities*, 12 *Anglo-Am. L. Rev.* 141 (1983).

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## CONSERVATION, CONTROL AND HERITAGE - PUBLIC LAW AND PORTABLE ANTIQUITIES

By G.J. BENNETT\* and C.M. BRAND\*\*

The authors wish to acknowledge the generous assistance and advice given them by Charles Sparrow QC, Henry Cleere (Director of the Council for British Archaeology), and Brian Lang (Secretary to the Trustees of the National Heritage Memorial Fund), all of whom also made valuable comments on an earlier draft of this article.

“There must be a beginning of any great matter, but the continuing unto the end until it be thoroughly finished yields the true glory.” With this quotation from Sir Francis Drake begins the first Annual Report of the Trustees of the National Heritage Memorial Fund: HMSO July 22, 1981. The Report details the development of the fund, which was brought into existence by the National Heritage Act, 1980, from its inception on March 31, 1980. The range of activities undertaken by the Fund, covering as it does the raising of King Henry VIII's ill-fated warship “Mary Rose,” the preservation of the Dryden family home, Canons Ashby, and a grant to the Rifle Brigade Museum to purchase the medals of one of its first company commanders, Lieut-General Sir Thomas Beckwith, which were auctioned at Sotherby's on November 26, 1980, reflects the scope of the Trustees understanding of the national heritage. As the Trustees themselves observed: “The national heritage of this country 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.” Part of that threat is lack of adequate legal provision for the protection, conservation and control of portable antiquities<sup>1</sup>. In this article we propose to examine the nature of that threat and to indicate those areas where reform is essential.

One of the difficulties that stand in the way of a comprehensive rethinking of the contribution of the law in this area is that hitherto it has scarcely been considered to be an identifiable area at all. While provision has been made over the years for the protection and acquisition by public authorities of land and buildings of historic interest, mainly through the provisions of the Town and Country

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NB: The order in which the authors' names appear does not signify a greater contribution to the article by the first named.

Planning legislation and culminating most recently in the Ancient Monuments and Archaeological Areas Act 1979, the protection of individual moveable items which might be recovered from such property has not fared so well. Such law as exists is spread amongst a multifarious array of statutes and common law principles which have emerged in a piecemeal and almost random manner. Because of this, not only is the law out of touch with modern conditions, but lawyers and laymen alike may fail to appreciate that the cultural heritage reflected in the tangible remains of the past is a concept that demands attention and requires protection.

In what follows, an attempt has been made to examine critically the web of law relating to portable antiquities not only for its intrinsic interest, but also because an awareness of the current state of the law must be the starting point for any reform and codification. To obtain a realistic appreciation of the present situation it is necessary initially to examine the civil and criminal law relating to the protection of portable antiquities in their immediate context; to discuss recent developments in the law relating to their conservation and the availability of funds, and finally restrictions on trade in antiquities. Accordingly, after considering topics broadly raised by treasure trove, and by the protection of ancient sites and monuments, it is proposed to discuss the National Heritage Act 1980, and the export restrictions which to some extent control trade in antiquities.

### Treasure trove

The obscurity of the origins of the law of treasure trove is a fitting back-drop to its present irrationality. Under Roman Law there was a principle of *Thesauri Inventio*,<sup>2</sup> but there seems no discernible link between this and the English Law. Blackstone appears to refer the King's right to treasure trove to the same original as the prerogative right to mines of gold and silver. In the *Case of Mines*<sup>3</sup> the basis of the latter right was picturesquely described as turning upon the fact, inter alia, that:

“[T]he common law, which is founded upon reason, appropriates every thing to the persons whom it best suits, as common and trivial things to the common people, things of more worth to persons in a higher and superior class, and things most excellent to those persons who excell all other; and because gold and silver are the most excellent things which the soil contains, the law has appointed them (as in reason it ought) to the person who is the most excellent, and that is the King.”<sup>4</sup>

There is perhaps more to be said for the suggestion that the availability of hoards of treasure might provide the “sinews of war” for a person other than the King, or enable a subject to undermine the currency by converting the precious metal into coin. Whatever the appeal of all or any of these considerations in the past, none of them

would seem to provide an adequate justification now for such a law.

The present law relating to treasure trove seems to be based on Bracton and a surprisingly small number of reported cases.<sup>5</sup> A passage which has received general approval as being a correct description of the law is also to be found in Chitty's Prerogatives of the Crown (1820) at p. 182, where it is stated:

Treasure trove is where any gold or silver in coin or plate or bullion is found concealed in a house or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the King or his grantee, having the franchise of treasure trove.

More simply, there are three conditions which need to be satisfied before a find is considered treasure trove, namely that:

1. the articles are of gold or silver;
2. the ownership is unknown;
3. the object(s) was hidden in the ground or in a building with the intention of subsequent recovery.<sup>6</sup>

### The Overton case

In March 1975 some 7,811 third century coins were found in a field at Coleby in Lincolnshire. In the course of the case to which the find gave rise, *Attorney General of the Duchy of Lancaster v G. E. Overton Farms Ltd* [1980] 3 All ER 503 at p. 506e, Dillon J commented:

"The position . . . in which the preservation for the nation of recently discovered antiquities depends on a prerogative which originated for quite different purposes is not satisfactory and the topic is one which could well merit the attention of Parliament so as to adopt criteria in keeping with modern thinking and the ways of modern life."

It is disappointing to reflect that much the same thing had been said nearly 80 years previously by William Martin observing that:

"The present condition of the law is scarcely adapted to the needs and requirements of the present age; in fact, the old law should be labelled and relegated to the shelf of bygones in company with *peine forte et dure*, trial by battle and deodand": see *op. cit.*, n. 5 at p. 27.

The remarks by Dillon J in the case are given added weight by the fact that since the coins were held not to be treasure trove, any certainty of conserving the find for the benefit of the nation was lost. There is thus raised the whole problem of the law's response to the preservation, conservation and control of portable antiquities, of which the law relating to treasure trove is only one small and clearly inadequate part.

What seemed a pious hope in 1904 is now however a matter of

more immediate concern. Never before, perhaps, has there been such a keen interest in the remains of the past, and never before has our capacity for obliterating them been greater. The ravages of development or uncontrolled interference with ancient sites could inestimably reduce the richness of our heritage for future generations. The damage once done can be irreversible.

This case provides an excellent illustration of the problems involved in the law, and has been examined in detail by Professor Palmer.<sup>7</sup> There are however aspects of the discussion with which one may respectfully disagree, and other matters which can usefully be considered further. The court was faced with two questions: was the right to treasure trove limited to articles of gold and silver even when coins are concerned? If the Crown's rights were so limited what were the criteria to be applied in deciding whether a coin is a silver coin? The learned judge at first instance and the Court of Appeal subsequently ([1982] 2 WLR, 397) after a careful review of the authorities held (1) that the prerogative right was limited to articles of gold and silver, and therefore excluded coins made of other metals; (2) whether an object was made of silver was a question for the judge of fact to decide. Since the evidence in this case showed the silver content to vary between 0.2 per cent and in one case 18 per cent, but most coins falling within the range 5.85 per cent to 0.2 per cent, the coins could not be regarded as silver. The Duchy's claim of treasure trove therefore failed, and its attempt to secure the coins for the benefit of the state proved abortive.

It is difficult to feel quite the same confidence that Professor Palmer has that no objection can be made to the decision. Although the conclusion of Dillon J and Lord Denning MR in the Court of Appeal that treasure trove embraces only articles of gold and silver is certainly supported by a diversity of references in legal writings, the opposite is suggested by the earliest authorities. Glanvill<sup>8</sup> in discussing the offence of concealing treasure trove mentions '*aliquod genus metalli.*' Bracton refers to '*argentum vel aurum vel aliud genus metalli*' and a little later in the same passage to '*quaedam vetus depositio pecuniae vel alterius metalli.*' Neither author suggests that the prerogative is limited to gold and silver. The Attorney General relied on the definition in Blackstone's Commentaries<sup>9</sup> that treasure trove was:

Where any money or coin, gold, silver, plate, or bullion is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the King.

Again it is quite clear that money was not limited to gold or silver. Sir Edward Coke's definition<sup>10</sup> was slightly different:

Treasure trove is where any gold or silver, in coin, plate or bullyon hath been of ancient time hidden.

Dillon J regarded the passage from Blackstone as "no more than a synthesis of Bracton and Coke... without independent support." Lord Denning MR tersely commented: "So far as I can see Blackstone's view did not prevail."

The passages need not, however, be regarded as irreconcilable. Doubtless the attention of the authorities was always likely to be greater in valuable metals, and therefore it was in that area that treasure trove was important. Is it not possible that Coke was merely stating the current significance of treasure trove, rather than saying what the law always had been? If this is correct then Bracton, Glanvill and Blackstone are all of one view, and Coke's definition is not necessarily inconsistent with it. It is difficult to place much weight on arguments from silence, but no-one seems hitherto to have suggested that Blackstone's view was actually incorrect, and the limited case law does not compel an opposite view. Hardly surprising then is Martin's view that:

"There is much to be said for the view that treasure trove is not restricted to the precious metals merely."

Dillon J's decision on the second issue, "that the question whether a particular coin or object is of silver is for the judge of fact to decide as best he can on all the evidence, without being bound by any hard and fast rule or fixed percentage of silver content," was refined and slightly modified by the Court of Appeal. Lord Denning MR stated that the only test applicable was that, "there must be a *substantial* amount of gold in the object or a *substantial* amount of silver. It will be for the coroner's jury to decide this question: what is *substantial*?" On the meaning of "substantial" reference was made to the Rents Acts case of *Palser v Grinling, Property Holding Co. Ltd v Mischeff* [1948] AC291. Viscount Simon there commented that: "it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case..." and that the laying down of percentage values would be wrongly, "to play the part of the legislator." The whole thrust of this statement which the Master of the Rolls quoted with such approval is therefore to leave the matter to the discretion of the tribunal of fact. Unfortunately, Lord Denning then appears seriously to undermine the approach he advocates by making the obiter statement that: "It should, I think, be 50 per cent or more gold or silver before it could be described as a gold or silver object."

Although it seems to run counter to the approach of *Palser v Grinling* and the apparent approval of this principle in *Overton*, it is difficult to resist the suspicion that Lord Denning's reference to the figure of 50 per cent will result in it being widely regarded as the dividing line between objects of gold and silver and base metals. Such an approach would be both unduly restrictive and wrong in principle. There seems much to be said for Dillon J's original formulation which at

least appeared to give somewhat greater latitude for a tribunal sympathetic to the idea of preserving a find for the nation to decide that the percentage of noble to base metal rendered the article "gold" or "silver."

There is some authority, however, for a slightly stricter view of the matter which was apparently overlooked by the court of first instance and only cursorily referred to (for the purposes of dismissal) by the Court of Appeal. Dillon J at least made some reference to the Crown's prerogative to treasure trove being related to the King's right to mines.

It seems quite clear from the *Case of Mines* (1567) 1 Plowd, 310 that the fact that land was not worked predominantly as a gold or silver mine would not by itself exclude the Crown's interest. The position was summarized by Lindley LJ when he stated in *Attorney-General v Morgan* [1891] 1 Ch. 432 at p. 455:

"if metalliferous ores contained gold or silver to such an extent as to be worth extracting and if such ores could not be obtained without interfering with such gold or silver, the whole of such ores belonged to the Crown; and the Crown had the right to work not only gold and silver mines, but also other mines containing gold and silver worth extracting."

It was the harshness of this rule that was the whole point of the statutes 1 Wm. & M. c. 30 and 5 Wm. & M. c. 6, which were intended to encourage the exploitation of minerals that might otherwise be left untapped or even concealed for fear of the intrusion of the prerogative right. Thus the position at common law appears to have been that in respect of mines, the gold and silver content had to be significant, but need not be so great as to be the cause of the mine's operation. If the analogy can legitimately be extended to treasure trove, then it would seem here also that the silver content in a silver coin need not predominate to render the coin silver within the prerogative's right to treasure trove. This would appear to point to a generous interpretation of an object as being of "gold" or "silver." Whilst one may wonder whether a silver content of 0.2 per cent, quite apart from the maxim *de minimis non curat lex*, could be sufficient to allow it to be declared treasure trove, would it really be so unreasonable to ascribe this status to an object the silver content of which was, say, 15 per cent? It is a matter for regret that the Court of Appeal failed adequately to examine this possibility in its judgment.

### Other criticisms

As Professor Palmer points out (see n. 7) the law of treasure trove is quite inadequate to protect the great range of portable antiquities of high historical interest. The limitation to gold and silver which *Overton* at least adopted necessarily excludes perhaps the majority of

historical artefacts. The requirement that the goods should be hidden with the intention of eventual retrieval on the one hand appears to exclude, for example, articles buried in graves, on the other it may involve an inquiry into the mental state of an unknown person, at an unknown time in totally uncertain and unknowable personal circumstances. To adopt the words of Farwell J in *A-G v Trustees of the British Museum* ([1903] 2 Ch. 598, at p. 610) such an inquiry might be characterised as being full of, "fanciful suggestions more suited to the poem of a Celtic bard than the prose of an English law reporter." To assist the discharge of this weighty but highly speculative burden the courts seem to have developed a rather artificial presumption in favour of the *animus revertendi*. Where the articles are valuable, Farwell J at least took the view that abandonment was unlikely, and together with the careful arrangement of the articles in that case, the Crown had made out a *prima facie* case. The defendants had then to achieve the almost impossible task one would have thought of proving a better title. Thus the absurdity of the law's requirement is relieved by what is virtually an equally dubious fiction.

Once a find has been declared treasure trove the actual object is likely to find its way to the British Museum. It is also the practice of the Crown to pay the finder a reward equivalent to the market value of the article: Brodrick Report, Cmnd 4810, para. 13, 23. The award is entirely discretionary although it seems that it is only reduced or withheld when there has been an attempt at concealment by the finder<sup>12</sup>

What seems at first sight somewhat surprising is that it is the finder rather than (if different) the landowner who is entitled to what may be a very substantial reward. In the past when discoveries were likely to be entirely accidental and therefore perhaps relatively rare, this may have been a tolerable state of affairs. With the advent of cheap and readily obtainable metal detectors and the rapidly growing hobby of "treasure hunting" the position is radically altered. It is now not unknown for people deliberately to seek out and trespass upon an archaeologically "promising area." Is it still appropriate that any reward should go to the finder? There is much to be said for some modification of this state of affairs. Quite apart from what might be seen as the element of onesidedness in the arrangement, the knowledge that a landowner had some financial stake in activities carried out on his land might encourage more care in permitting (or keeping out) persons from using that land. It has been suggested by Sparrow, QC, that a landowner might sue the finder of treasure trove on his land in trespass. The measure of damages, instead of being nominal, could then be assessed as the reward value of the articles found. Professor Palmer (see n. 7 at p. 185) has advanced the view that the landowner's possessory title to the goods might also found an action. So far as is known, neither



of these suggestions has been tested in the courts, and it is perhaps unsatisfactory that the landowner should be obliged to indulge in a potentially costly course of litigation.

A further practical dilemma is the position of the archaeologist who discovers treasure trove in the course of an excavation. Some play has been made of this occurrence in the propaganda war raged between those advocating the use of metal detectors, and those opposed to their use. Although it may not be as great a problem as the former body of people might like to suggest, it could clearly benefit from a clear and unambiguous answer. Whatever the precise relationship between an individual excavator and the supervising authority or owner of the land, it would now seem prudent to introduce some contractual provision to ensure the ultimate destination of any reward is made clear from the outset. This would help to alleviate any suggestion of unjust enrichment against individuals engaged in bona fide archaeological excavations.

### **Non-treasure trove items**

When the coroner's finding is that an article does not come within the ambit of treasure, then the general civil law indicates that title to the goods is vested in the landowner.<sup>13</sup> Yet there is an anomaly in the operation of the law even in this area in that it is the practice of a coroner's inquest when a find is not held to be treasure trove to declare who is the owner of the articles: see Brodrick Report, Cmnd 4810, para. 13, 23. Although such a decision as to ownership is open to challenge in the civil courts, it seems strangely inappropriate that a coroner's inquest should be involved in this task. It seems that an alleged misunderstanding of the impact of coroners' decisions (clearly of no authoritative value) on the civil law was one of the background considerations which led to an acquittal on the basis of a lack of "dishonesty" in the case of *R v Fletcher*.<sup>14</sup> Since both antiquarian interest and financial value are independent of the fact that an article is not made of gold or silver, surely this area of jurisdiction should be removed from coroners' courts altogether and be left to the established civil courts with expertise in unravelling the often complex intricacies of title to goods?

### **Reform of treasure trove Act**

In 1979 Lord Abinger introduced an Antiquities Bill into the House of Lords. Its failure to receive detailed consideration arose from the fact that the Bill formally lapsed with the fall of the Labour administration. An amended Bill was introduced in 1981 but having failed to pass its final stages by the end of the second parliamentary session in 1982 also formally lapsed. There must be some doubt as to whether having failed on two separate occasions to become law, the Bill will be introduced again in identical form. Nevertheless it remains the only attempt to date to effect any statutory reform, and

it seems likely that even a subsequent and modified Bill will at least be drafted with similar aims in mind. The aims of the Bill were to have been achieved by two significant reforms: (1) the widening of the class of objects which fall within the definition of treasure trove, and (2) provision for the creation of a new category of specifically protected classes of object.

Its most important clause provided:

1. After the coming into force of this Act the law of treasure trove shall operate with the following amendments:
  - (1) Treasure trove shall comprise not only gold and silver but also any object which is:
    - (a) made of any alloy containing gold or silver; or
    - (b) lying with or adjacent to a treasure trove object; or
    - (c) contained in any class of object specified by order made under this subsection for the protection of portable antiquities by the Secretary of State.
  - (2) It shall no longer be necessary to establish that an object was hidden with a view to recovery.

Although the change produced in the law by such a provision might be considered the minimum possible reform, the Bill was a positive proposal that would have gone a considerable way to rationalize and clarify the law.

The need for the inevitably speculative and arguably pointless inquiry into the *animus revertendi* was eliminated by cl. 1(2). Clause 1(1)(a) broadened the category of objects by including "any alloy containing gold or silver." This seems particularly helpful as gold and silver invariably occur in an impure form or mixed with other metals. One of the further failures of the present law is that in finding say, a jar of coins, the coins could be declared treasure trove, and the pot revert to the finder or landowner. Hence cl. 1(1)(b) ensures that this anomaly is not perpetuated by bringing within the sphere of protection adjacent objects. Whilst it would certainly include the pot in the above example, there is obvious scope for disagreement as to how much further it might extend.<sup>15</sup> It is difficult to envisage, however, an alternative form of drafting which would be both efficacious and give rise to fewer difficulties. Clause 1(1)(c) contained within it the seeds of a radical and far-reaching development. By enabling the class of objects protected by the classification "treasure trove" to be widened by statutory instrument, a variety of currently excluded items (such as ceramics and documents for example) could be gradually brought within the Crown's domain. The result could be a comprehensive code of protection for all portable antiquities, but achieved at a speed and in a manner

acceptable to all parties involved. Clause 3 provided an offence for failure to report a find of property falling within cl. 1, and enjoined the finder, "so far as practicable leave such property undisturbed." This would clearly further protect archaeological sites from depredations. Surprisingly perhaps, the prerogative right of the Crown to make discretionary payments in respect of treasure trove objects was specifically preserved by cl. 3. This presumably reflects the view that although a rationalization of the conditions on which rewards are dispensed has considerable *prima facie* attraction, this is outweighed by the lack of flexibility which might accompany such change. When the circumstances of finds vary from extremes as great as the chance discovery of a gold bracelet on a beach, to the premeditated depredation of another's property without his consent or even knowledge, a high degree of flexibility in the allocation of rewards might be thought worth retaining.

It would seem unfortunate that so modest and elementary a reform as the Bill envisaged could not find support on all sides of the House, especially as the Bill does not seek to abolish the law of treasure trove. It was noteworthy that there was no suggestion of the more radical reform of compulsory purchase of items of historical significance,<sup>16</sup> in the way that can be achieved in the sphere of real property. If there is justification for the latter, is it so unreasonable to include the former? This might be thought particularly unexceptionable when items have been recovered from an archaeological excavation, and which no-one has in any real sense hitherto enjoyed or had the use of.

### **The protection of ancient sites**

One of the results of a long and continuous history of habitation in a small country is that there must be few areas of the country which could not be regarded as of archaeological interest. Nevertheless, some areas are likely to be richer in finds than others, and it is natural that protection should be emphasized in those areas. The general protection from development or destruction of land and buildings which may be considered as "monuments" has been the subject of a series of statutes from 1882 to the present time, of which the Ancient Monuments and Archaeological Areas Act 1979 is of special importance. The 1979 Act<sup>17</sup> largely supersedes, improves and extends the protection afforded by the earlier legislation. Its detailed provisions relating to the planning controls which affect archaeological sites which are scheduled as ancient monuments have been considered in some detail elsewhere.<sup>18</sup> What follows concentrates on those provisions of the Act which are of novel interest, having no precedent in special planning controls but which have an impact on the protection of portable antiquities.

## The new protective legislation

### *Part II of the Act*

There was provision under s. 7 Ancient Monuments Act 1931 for an offence of damaging a scheduled monument, the maximum fine being £20 and/or one month's imprisonment. Convictions under this legislation appear to have been very uncommon, and one may wonder how efficacious it ever was. The restricted scope of its provisions, being limited to monuments, should be compared to the provisions of Part II of the 1979 Act, potentially the most far-reaching part of the legislation, which envisages a scheme for the protection of entire archaeological areas. Section 33 of the 1979 Act allows the Secretary of State for the Environment or a local authority to designate an area as one of "archaeological importance" by means of a "designation order." Once such a designation order is in force, a complex protective machinery is invoked. Any developer of the land must thereafter serve on the district council an "operations notice" at least six weeks before undertaking any operations which will disturb the ground, or flood or involve tipping on it. Failure to do so is an offence under s. 35(1). Once such notice has been received, the "investigating authority," ie, the person designated by the Secretary of State under s. 34 as being competent to undertake archaeological excavations, will be informed by the district council and can consider appropriate action. A number of options are then available which are relevant to the protection of portable antiquities.

The archaeologists may of course be able to negotiate a voluntary agreement with the developer which will enable them to carry out an excavation. Failing this, s. 38(1) provides for a right of entry to inspect the site and determine whether it would be desirable to carry out excavations. Even more importantly, the investigating authority after giving due notice has a right under s. 38(2) to excavate the site. The period allowed under s. 39(4) is four months and two weeks. Allowing for service of the requisite notices, a developer could be put to a maximum statutory delay of six months, without compensation. The protection given to portable antiquities by Part II of the Act is characteristically somewhat oblique and in particular it may be noted that there is no provision for compulsory purchase of any especially valuable items which might be recovered. Subject to the law of treasure trove and any contractual provision to the contrary, any articles recovered will generally belong to the landowner, although by s. 54 there is a power to remove an article temporarily for the purposes of examining, testing, treating or recording it, but the owner's consent is required to retain the article beyond such period "as may reasonably be required" to carry out these exercises. Nevertheless this part of the Act ensures that antiquities in a designated area cannot be readily destroyed before their presence has even been detected. As such, the Act is designed to make provision for recording but is not to be considered a

conservation measure per se. Once they have been located and recovered, public interest or pressure can then have some effect on their ultimate destination.

*Parts I and III of the Act*

Section 28 increases the penalties that existed under the 1931 Act for the offence of damaging an ancient monument which under the 1979 Act includes a specific site of archaeological interest, as distinct from any land comprised in a designation order made under Part II. The person charged must know the monument was scheduled, or owned or subject to guardianship by the Secretary of State or a local authority, and he must intend to destroy or damage the monument or be reckless as to the same. The offence is triable summarily or on indictment. In the former case it is punishable by a fine not exceeding the "statutory maximum"<sup>19</sup> and/or six months imprisonment, while in the latter case is punishable by a fine and/or up to two years' imprisonment. Whilst this offence is clearly appropriate to cover damage to the fabric of an ancient monument, it could cover damage incidental to some other activity, for example theft or attempted theft of some portable antiquity, thereby providing additional means of protection.

Although this provision may occasionally be applicable, of more direct relevance to the protection of portable antiquities is the completely new offence created to restrict the use of metal detectors. Section 42(1) makes it an offence to use a metal detector in a protected place without the consent of the Secretary of State. "Metal detector" signifies any device designed or adapted for detecting or locating any metal or mineral in the ground. The term "protected place" covers not only a scheduled monument or one under guardianship, but also an area designated as of archaeological importance and therefore is of relevance to Parts I, II and III of the Act.<sup>20</sup> The offence is punishable summarily by a fine of up to £200. Section 42(3) creates an aggravated form of the offence, that of removing an object of historical or archaeological interest discovered by a metal detector in a protected place. The punishment in this case on summary conviction is a fine, not exceeding the statutory maximum, or on indictment to a fine without limit.

The origins of this new offence lie in the need to control the growing popularity of "treasure hunting" as a pastime. The requirement under the Wireless Telegraphy Act 1949 for a Pipe-finder Metal Detector Licence was an ineffective means of control, and has now been abandoned: see Hansard, vol. 988, col. 357. The former requirement for a licence did at least give a minimum figure for the number of detectors in operation, and even these figures show a staggering increase. In 1961, 400 licences were issued, but by 1979 the total figure exceeded 130,000. The result of this increased activity has been the formation of two rival campaigns: STOP

("Stop Taking Our Past") an umbrella organization designed to represent various archaeological interests, including the Council for British Archaeology, and DIG ("Detector Information Group") formed to put forward the case of users and manufacturers of metal detectors. Space does not permit a detailed assessment of the conflicting views put forward, and doubtless there are many detector users who behave in a responsible and even public spirited way. Nevertheless, the claims by detector users that minimal damage is caused by a tiny percentage of irresponsible users is a sweeping assertion of dubious optimism. There is considerable evidence that a large number of sites have been damaged by use of metal detectors, both "virgin" sites and even areas in the course of excavation.<sup>21</sup> The uncontrolled removal of metal objects from their archaeological context means they are robbed of their scientific value in addition to the damage done to adjacent objects or the stratigraphy of the site. A Roman coin for example, which can itself be readily dated, can be used in turn to date the site or the stratum in which it is found. If it is removed, the archaeologist is deprived not only of an interesting artefact, but also the chance to date other material found in the same context. The damage once done will usually be irreparable. There is also evidence that there is growing up a substantial commercial market in portable antiquities, the provenance of which is sometimes uncertain.

The introduction of such an offence is a welcome addition that will do something to curb a growing menace to portable antiquities. It is noteworthy that under s. 42(1) the mere *use* of a metal detector constitutes an offence and no ulterior intent, for example to damage or steal, needs to be proved. Rather curiously, s. 42(6) introduces a defence that the accused was using the metal detector for a purpose other than detecting or locating objects of archaeological or historical interest. Is this not a somewhat generous defence to an accused? The mischief aimed at is surely the disturbance of the site often consequent upon use of a metal detector, so why should it make a difference that the user is interfering with the archaeological remains because he is looking for something other than historical artefacts? If he has a legitimate reason for using a detector, there is provision for its use with the consent of the Secretary of State under s. 42(4).

Section 42(7) introduces a rather more problematic defence, that the accused had taken "all reasonable precautions" to find out if the area in which he was operating was a protected place, and that he did not believe that it was. What will amount to "all reasonable precautions"? The Act offers no guidance and it may well be that this subsection will prove to be of considerable importance. Anyone who makes a reasonable assessment based on a consultation of the records held by the Department of the Environment or by the appropriate local authority has clearly done enough. What if the detector user has simply asked the local farmer or landowner? Is he

still obliged to check the official records and even for example, search in the local Land Charges Register? The uncertainty in the application of the defence resides perhaps in whether a court chose to emphasize the "all" or the "reasonable" element in "all reasonable precautions." Had the statute used the phrase "all *practicable* precautions" then it might be easier to argue for a strict and narrow application of the defence. As it is, the wording of the subsection suggests that the matter must be decided as a question of fact in the light of all the circumstances. Presumably, therefore, a very youthful or inexperienced detector user might be excused for relying on a farmer's reply whereas an older and more experienced user might reasonably be expected to know that land owners are not always completely conversant with restrictions affecting their land and that official records can easily be checked. Accordingly, he should not be able to avail himself of the defence. Having regard to the fact that checking documents is likely to be a relatively simple, even if time-consuming affair, there would seem much to be said for favouring a restrictive view of the availability of the defence.

Both subsections make clear that once the prosecution have established their case beyond reasonable doubt, the onus is on the defendant to establish on a balance of probabilities that he can bring himself within one of the defences. It is necessary to do more than merely raise a reasonable doubt. Rather surprisingly, however, the Act does not provide the court with any power to order the forfeiture of a metal detector, or any artefact found, if the accused is convicted of an offence under s. 42. This omission could be partly circumvented in an appropriate case by a charge of theft and the invocation of the restitution provisions in s. 28 of the Theft Act 1968. Nevertheless, the addition of a forfeiture power to the 1979 Act would seem a simple and obvious improvement.

### **Scope of "designated areas"**

The effectiveness of the protection offered by the new Act will to a considerable extent depend upon the willingness with which local authorities or the Secretary of State are prepared to make designations of areas of archaeological importance. The omens are not favourable for a generous interpretation of the power. In a written answer on April 14, 1980, see Hansard, vol. 982 col. 496, Hector Munro, Parliamentary Under Secretary of State, made clear that "designation under Part II of the Ancient Monuments and Archaeological Areas Act 1979 will be limited to a few areas of the highest archaeological importance, where it appears unlikely that co-operation from developers to enable archaeological access or excavation would otherwise be forthcoming. . . ." More recently in the Department of the Environment Consultative Document circulated in January 1981,<sup>22</sup> the view is expressed that having regard to the slower rate of urban development in the 1980s compared with the

1970s and earlier, and improved co-operation between archaeologists and developers, "designation should be reserved for those areas where its reserve powers are demonstrably necessary." A factor which, although not often expressed, may be a further deterrent to designation is the fear that such orders will frighten off developers and lead to reduced job opportunities. Some such fear seems to lie behind the refusal of Gloucester and Lincoln to participate in an experimental scheme of voluntary designation: *The Guardian*, August 8, 1981. Accordingly, the impressive array of protection under the Act could be subtly subverted to a large extent by an over-cautious policy in the making of designation orders. Since the provisions of the Act need not detract from arrangements of voluntary co-operation, and need be invoked only when such desirable goodwill has failed, it is difficult to justify such conservatism.

Section 53 enables the protection of the 1979 Act to be extended to monuments in or under the sea bed within territorial waters. A moot point is whether the law of treasure trove has application to goods concealed under coastal waters. Professor Palmer sees no reason in theory why treasure trove should be confined to terrestrial hoards although there appears to be no reported case on the matter. In the case of native offerings of gold and silver cast into the sea, it would seem that such goods could not be regarded as treasure trove, as there would seem to be no *animus revertendi*. Such seems to be the view of Chitty.<sup>23</sup>

### Other Criminal Sanctions

The 1979 Act does not affect an owner's rights in respect of the property in or on his land nor the law of treasure trove. Accordingly, since the demise of the common-law offence of concealment of treasure trove,<sup>24</sup> there is the possibility of a prosecution for theft under the Theft Act 1968 against a finder who conceals his discovery.

The crucial stumbling block to any prosecution for theft under s. 1 of the Theft Act 1968 is likely to be the problem of "dishonesty." All the authoritative cases are agreed that "dishonesty" is essentially a question of fact for the jury or bench of magistrates the answer to which will depend on all the circumstances of the case. The Court of Appeal in *R. v Ghosh* [1982] 2 All ER 689, has now laid down a twofold test which does much to clarify the previous conflicting case law. The tribunal of fact must first ask itself, according to the ordinary standards of reasonable and honest people, was the act dishonest? Only if the answer to this is "yes" is it necessary to ask the final question, did the defendant realize that what he was doing was dishonest by those standards. The test therefore contains both "objective" and "subjective" elements, and clearly includes as dishonest anyone who entertains even a genuine belief that he was morally justified in acting as he did if he knew that such conduct was proscribed by law or that ordinary people would consider it to be



dishonest. Robin Hood could now be convicted of theft with little difficulty! Whilst every case must be judged on its own peculiar facts (including for example the mode and time of entry on to property), it may well be that the defence of lack of dishonesty under the Theft Act 1968 may become more precarious as public awareness of the problems and dangers posed by treasure hunting increases.

No farmer or landowner would be likely to encourage metal-detector users to make damaging holes in his land. It is also increasingly well known that the market and interest in portable antiquities makes the removal of even Victorian bottles a loss of a valuable commodity, quite apart from obviously valuable coins and metal work. As Charles Sparrow QC has succinctly put it, "the so-called 'treasure-hunter' has no claim under the Theft Act to be treated as a special case": *The Magistrate* (1978) 34, 20. There is no difficulty over the "property" ingredient of the offence, since quite clearly s.4(2)(b) Theft Act 1968 provides that appropriation by a person not in possession of the land by severing a part of the land or causing it to be severed, is theft.

In a case where, for example, it could be established that a metal-detector user was on his way to a site where such use was known to be prohibited, there is the possibility of a prosecution under s.25 Theft Act 1968. This makes it an offence for a person "when not at his place of abode" to have with him, "any article for use in the course of or in connection with any burglary, theft or cheat." In those cases where holes have been dug on a site to recover artefacts, a charge could be brought under the Criminal Damage Act 1971. Whilst it is more generally applied to other situations, s.10 brings the definition of property broadly in line with the Theft Acts, and so includes real property<sup>25</sup> in which the user hopes artefacts are contained.

It may also be open to local authorities to make bye-laws under a range of statutory powers including the "good rule and government" provision of s.235 of the Local Government Act 1972, which confers a general power to legislate where there are no other provisions available. This would seem to be appropriate in the context of protection of any area of archaeological interest which would otherwise attract the attention of metal-detector users, especially in view of the announced reluctance to make designation orders. It seems therefore that as the 1979 Act is silent on the matter of bye-laws, the use of the s.235 power may be the only effective protection for extensive areas of the country where buried portable antiquities are at risk.<sup>26</sup>

### **From protection to conservation**

So far discussion has been limited to the discovery and protection of portable antiquities. A completely different but equally important set of problems is raised after the identification and recovery of an

artefact, problems which are shared equally by artefacts such as paintings and sculptures which have been carefully preserved since their first creation. The law is required to cope with the often conflicting claims of political and cultural interests transcending national borders; adequate funding of public institutions to enable them to exercise their function of conservation of items representing the national heritage; and the problems of export control in a growing commercial market. In relation to the last two matters, revenue considerations may hold an important and under-utilized key to the solution of the problem of inadequate conservation arrangements.

In the international context, a growing claim which must be taken into consideration comes from the increased sense of national identity of former colonies, and their recognition that items which may properly be regarded as belonging to their cultural heritage should be returned to them: see "The Empire Strikes Back"; *The Guardian*, June 3, 1981. The processes of acquisition in the colonial past led to the transference of portable antiquities on a large scale from areas as far apart as Africa and Polynesia. The attempt to retrieve such objects as the Benin Bronzes removed by a British punitive expedition in 1897 has been the background to the formation of such bodies as the Unesco Intergovernmental Committee for Promoting the Return of Cultural Property or its Restitution in Case of Illicit Appropriation. Of course it may never be desirable to return all such artefacts, but the need to face up to such problems is hardly likely to diminish, and will almost certainly become more acute.

A particular problem in this area is posed by the restrictive wording of s. 3(4) of the British Museum Act 1963, which provides that objects shall not be disposed of by the Trustees otherwise than in accordance with certain strict conditions.<sup>27</sup> These are largely set out in s. 5, which provides a number of exceptions. These include the duplication of an article, and provided it does not violate the terms of a gift or bequest, the disposal of an object which is "unfit to be retained" and can be disposed of "without detriment to the interests of students." Thus even if for political or diplomatic reasons an object could be regarded as "unfit to be retained," it could hardly be said that objects such as the Benin Bronzes could be retained without violating the latter condition. To some extent the difficulty can be circumvented by a generous interpretation of the lending provisions in s. 4, but this does not seem to be a satisfactory solution. The answer, it is submitted, is in response to the growing interest in all nations in cultural heritage: to widen the Trustees powers under the 1963 Act.

### **Public institutions and the National Heritage Act**

Although a critical survey of the English Law on the topic of portable antiquities shows clear evidence of inadequacy, an important

remedial step has been taken by the terms of a new statute, the National Heritage Act 1980, and by an associated provision contained in the Finance Act 1980, s. 118, which came into force on March 31, 1980 and April 1, 1980 respectively.

### **The National Heritage Act 1980**

The object of the National Heritage Act 1980 was to implement the proposals of the White Paper "A National Heritage Fund" by establishing a trust fund (The National Heritage Memorial Fund) from which the trustees may make grants and loans for the acquisition, maintenance and preservation of real or personal property which is "of importance to the national heritage," (s. 3(2)). While the 1980 Act confers powers to enable the trustees to finance purchases of land,<sup>28</sup> the discussion of the Act which follows is limited to the acquisition of personal property in order to remain within the ambit of this article.

It is, hopefully, well known that there are many funds which exist in non-statutory forms which are available to our national museums, galleries and libraries to assist them in the purchase of portable antiquities, and also that central government makes purchase grants available to such institutions via the administrative organs of the Victoria and Albert Museum and the Science Museum. In addition to these resources there is also a statutory precedent for the National Heritage Memorial Fund in that a National Land Fund was established in 1946 (Finance Act 1946, s. 48) with the intention of providing a permanent memorial to those British service-men who lost their lives in the two World Wars by the acquisition of real property forming part of the national heritage. This fund could be used (inter alia) to finance acquisitions by the Secretary of State of buildings which appeared to him to be of outstanding historic or architectural interest, *together with their contents*: Historic Buildings and Ancient Monuments Act 1953, ss 5 and 7. The fund was relieved of most of its assets (initially £50 million) in 1957 by s. 41 of the Finance Act of that year, and became less effective than many observers would consider desirable, bearing in mind the spirit in which the Fund was created, with the result that the lack of revenue vested in the Fund and the unco-ordinated nature of the resources of the British cultural institutions could not prevent the controversial sale of the Mentmore estate and contents in 1977<sup>29</sup> an event which the National Land Fund was not even called upon to attempt to prevent. That regrettable occurrence emphasized the need for a properly administered institution, with suitable statutory powers and with independence from central government control, and the necessary resources to prevent further losses of items which contribute to our heritage.

The National Heritage Memorial Fund was established by the 1980 Act to try to fill, at least to some extent, the gap exposed by the

Mentmore affair and to make changes in the administration of the scheme for acceptance of property in lieu of capital transfer tax. Thus s. 1 of the Act created a body corporate known as the Trustees of the National Heritage Memorial Fund to whom have been transferred the remaining assets of the National Land Fund,<sup>30</sup> and which is to receive an annual grant payable under s. 2 of the Act. At the outset the Fund had total assets of £12.4 million, including the first annual grant of £5.5 million (the second annual grant was £3.0 million), the latter sum having been determined by the Secretary of State for the Environment and the Chancellor of the Duchy of Lancaster who jointly exercised the ministerial powers conferred by the Act.<sup>31</sup> The Trustees of the Fund are appointed by the Prime Minister and comprise a chairman and up to 10 other members. All the appointments have been made, the chairman being Lord Charteris of Amisfield.<sup>32</sup>

While the Act provides the statutory framework within which the Trustees have to carry on their task of evaluating applications for assistance, there is very little detail contained in the Act beyond describing the type of property which may be the subject of a grant or loan and the eligible recipients of such assistance. To supplement the Act the Secretary of State and the Chancellor of the Duchy of Lancaster jointly issued "Guidelines for the Trustees," dated August 11, 1980, but which were not formally announced until October 28, 1980.

#### **Application of the assets of the National Heritage Memorial Fund**

The Trustees of the fund are empowered by s. 3 to advance money by way of grant or loan to "eligible recipients" for the purpose of assisting them to "acquire, maintain or preserve" the following items of personal property:

- (a) any object which in their opinion is of outstanding historic, artistic or scientific interest;
- (b) any collection or group of objects, being a collection or group which taken as a whole is in their opinion of outstanding historic, artistic or scientific interest.

The "eligible recipients" of grants or loans for the purpose of enabling them to acquire, maintain or preserve the property of this description are listed in s. 3(6). These are:

- (a) any museum, art gallery, library or other similar institution having as its purpose or one of its purposes the preservation for the public benefit of a collection of historic, artistic or scientific interest;
- (b) the Secretary of State acting in exercise of his functions under s. 5 of the Historic Buildings and Ancient Monuments Act 1953 (acquisition of buildings of special architectural or historic interest together with their contents).

Before giving any assistance under the Act the Trustees must be satisfied, after obtaining such expert advice as appears to them to be appropriate, that the object in question is "of importance to the national heritage": s. 3(2). This is not an expression defined by the Act but the Guidelines show that this was a deliberate omission and that the Trustees should proceed to draw up their own "working definition," possibly but not necessarily with a view to publication.<sup>33</sup> Early in their existence the Trustees considered publishing their definition of "national heritage" but decided that the concept is both too abstract and too broad. After one year of exercising their functions under the Act the Trustees stated in their Annual Report that they could no more define the national heritage than they could define "beauty" or "art." Instead, they preferred to let the national heritage virtually define itself by responding to requests for aid from eligible recipients who considered that they were dealing with parts of the national heritage which warranted assistance. It is clear from examination of the details of items which have been the subject of grant or loan that the concept is exceptionally broad. This open-minded approach is supported by the absence of any policy restricting the categories of items which should be the subject of assistance or of any fettering of discretion by identification of priorities. To illustrate the wide-ranging and flexible nature of the powers available to the Trustees it may be noted that the Guidelines also make it clear that the Trustees may use the Fund to give eligible recipients assistance for the purpose of bringing back from abroad objects with a clear British connection.<sup>34</sup> Similarly, there is no limit on the amount of any single grant or loan, given only that the Fund has the necessary reserves. Thus money may in theory be advanced for large numbers of comparatively humble acquisitions, and for more ambitious purchases, as is illustrated by the Trustees advance of £500,000 to the Victoria and Albert Museum to purchase a unique medieval English enamelled ciborium (circa 1180) from Lord Balfour of Burleigh, believed to be valued at £1m. In the first full year of the use of the Fund 22 allocations were made, mostly by way of grant, 10 of which were for the acquisition of individual paintings or collections ranging from a grant of £825,000 to the National Gallery towards the purchase from the Luton Hoo collection of A. Altdorfer's "Christ Taking Leave of His Mother," to a grant of £1,150 to the Ashmolean Museum towards the purchase of Paolo de Matteis' "The Choice of Hercules." The range of the balance of allocations is illustrated by the grant of £50,769 to Lincolnshire County Library towards the purchase of some Tennyson manuscripts, including a manuscript of "In Memoriam," and a grant of £14,375 to the Fitzwilliam Museum, Cambridge, towards the purchase of a 9th/10th Century illustrated Latin manuscript of the Gospels, known to have been in Britain since at least 1000 AD, which was being sold by private owners.

While it would be interesting to discuss the features of each individual use of the Fund, the authors' present purpose is to point out that this Act is no panacea, for it is apparent that the Government expects the Fund to be regarded as something of a last resort for assistance, a role which the Trustees readily accept by describing their function in the first Annual Report as a "voyage of mercy with many ports of call." The Trustees are thus an ultimate safety net and the Guidelines make it clear that private sources of finance should have been explored before application to the Trustees is made. This may, for instance, involve application to the National Art Galleries Fund, the Pilgrim Trust, or the National Art Collections Fund, while the private trust funds of any given eligible recipient should also be considered first. Public appeals are also not to be ruled out. It is the intention of the Trustees that applicants for assistance must not only make efforts of their own to raise money but also must demonstrate local support for saving an item. But is not the need for such a fund at its greatest when public awareness of an object's worth is at its least? It is more difficult to raise funds for saving family archives than to save a painting and therefore such projects are inevitably less attractive to the Trustees, but despite these unofficial limitations there is no evidence to suggest they deter potential applicants.

To be an eligible recipient it is not essential that a museum, gallery, or library should be publicly owned. Private institutions are eligible recipients within s. 3(6) if their intention is preservation of some part of the national heritage, but it is a condition that public access to the relevant object is granted at reasonable times.<sup>35</sup> The Trustees are not mere financiers, even for the public institutions, as the Trustees themselves are empowered to acquire, maintain or preserve property falling within s. 3(1). But this is a limited power, as s. 4(3) provides that any property should not be retained by the Trustees except in such cases and for such periods as the Secretary of State may allow. The object is clearly that the Trustees should transfer their acquisitions to eligible recipients at a future stage but should not be hampered by the lack of immediate proximity of an eligible recipient when it is clear that urgent action is needed to purchase property of importance to the national heritage which might otherwise be lost to the nation by suppression or export. A good example of the use of this power is provided by the Trustees' purchases of five pieces of Indian ivory furniture and a silver centrepiece previously belonging to Lord Curzon which were sold from Kedleston Hall. Pending the anticipated settlement of the future of the Hall the pieces are deposited in the Victoria and Albert Museum and the British Museum with the intention of returning the pieces to the house, which it is anticipated will pass into public ownership. The Trustees are similarly empowered by s. 5 to accept gifts of property but these should also be transferred to

eligible recipients in due course. Following the enactment of s. 118 of the Finance Act 1980 the Trustees are accorded charitable status for the purpose of s. 360 of the Income and Corporation Taxes Act 1970 which provides for numerous special exemptions from fiscal measures applicable to income. They are also exempt from capital gains tax.

### **Capital transfer tax and acceptance in lieu**

The Act makes no changes to the liability to capital transfer tax but s. 8 provides for the transfer of the responsibility of the Treasury for acceptance of property in lieu of the tax to the Secretary of State. It is now in the discretion of the Secretary of State whether to reimburse the Commissioners of Inland Revenue the net cost of any property accepted in lieu of tax out of their Votes although in practice this is always done. In due course this function may in turn be transferred to the Trustees by the making of an Order in Council under s. 14 of the 1980 Act, but the White Paper recommending the establishment of the National Heritage Memorial Fund also recommended abolition of the acceptance-in-lieu procedure and replacement by a system of sales by private treaty operated through the Fund. This proposal may overtake any possible exercise of the power under s. 14 although the Trustees have not entered into discussions with the Government regarding either matter. A further possible improvement to the acceptance-in-lieu procedure is called for by the Trustees of the National Heritage Memorial Fund. They point out that "[t]he present refusal to give either 'change' or tax credit when items of value greater than the tax debt are offered has meant the loss of significant items": First Annual Report of the Trustees of the National Heritage Memorial Fund (1981) HMSO.

### **Export control**

While the Acts of 1979 and 1980 are presently having only a limited effect in redressing the balance in favour of conservation of portable antiquities, emphasis must be placed upon a further matter of fundamental importance, namely the law and practice of export licensing. At first glance one might expect that, in noting the existence of a system of export licensing, one might further expect that control of exportation might act as a final legal safeguard, or "longstop" device, to preserve the national heritage when antiquities do not pass into public ownership, or the Trustees of the National Heritage Memorial Fund are unable to assist eligible recipients, whether public or private. By the operation of export control it may at least be hoped that antiquities would remain in the United Kingdom. On examination, however, the system of export licensing is lamentably inadequate to prevent loss of antiquities because only a small proportion of items destined for export are subject to control and the control system itself is of only limited efficacy in

ensuring retention in this country.

The current system of export control is founded upon the Import, Export and Customs Powers (Defence) Act 1939, s.1 of which permits the making of export control orders by the Secretary of State for Trade and Industry<sup>36</sup> breach of which may, according to circumstances, involve a number of possible criminal offences which are discussed below. Goods which are subject to export control are listed in sch.1 of the Export of Goods (Control) Order 1978 (as amended).<sup>37</sup> Examination of the Order shows that it is principally concerned with aircraft, military equipment, materials relevant to atomic energy and strategic goods - which reflects the nature of the enabling Act - however Group B of sch. 1 Part 1 of the Order, which deals with miscellaneous items, is headed "Photographic material, antiques, collectors' items etc." The effect of the Order is to place a general prohibition on the export of all goods "manufactured or produced" more than 50 years<sup>38</sup> before the date of export, except in the case of photographic positives and negatives, postage stamps and other articles of philatelic interest, documents concerning the personal affairs of the exporter or spouse, any goods exported by and being the personal property of the manufacturer or producer or the spouse, widow or widower of that person. Where these exceptions apply export control is relaxed, except that relating to photographic materials. In this instance, export of materials produced more than 60 years before the date of export, having a value of £200 or more in respect of any individual item, is subject to export control except when the materials are the personal property of the manufacturer or producer or the spouse, widow or widower of that person.

This general prohibition on export is qualified by Article 3(a) of the 1981 Order which permits the export of goods under the authority of a licence granted for the purpose by the Secretary of State. Specific application for an export licence is, in most cases, unnecessary as the Secretary of State periodically issues instruments known as "Open General Export Licences" which serve to grant permission for export of items falling within the scope of such licences. The current Open General Export Licence<sup>39</sup> was issued on March 5, 1980 and permits the export of antiquities valued at less than £8,000, or matching sets of articles collectively valued at less than £8,000.<sup>40</sup> For the purposes of this licence an "antique" means any article "manufactured or produced" more than 50 years before the date of export, but the licence does not include documents, manuscripts and archives, other than printed books, printed pamphlets or similar printed matter, nor newspapers, periodicals or magazines, or papers relating to the personal affairs of the exporter or spouse of the exporter. Also excluded are articles recovered from the soil or from the bed of any inland water or the territorial limits of the sea bed, unless such items are coins or have been buried or concealed within the past 50 years. It will be observed therefore



that export of archaeological material buried or concealed for over 50 years is not permitted otherwise than by a specific licence.<sup>41</sup>

Export control is further relaxed by the issue of "bulk licences" to regular exporters in lieu of individual export licences. A bulk licence permits the export of documents, manuscripts, archives or a group of associated such documents which are valued at not more than £200 per article, or per group of articles, as the case may be. Specific licences are required in respect of such items valued at more than £200 and also in respect of three further categories of documents etc: (a) papers and memoranda of those who have held public office relating to that office; (b) manuscript Books of Hours, Missals, Psalters, Antiphoners and Graduals, and illuminated or illustrated manuscripts in Arabic, Persian, Turkish, Urdu and other oriental languages and miniature paintings by Persian, Chinese, and other eastern artists, whether in, or extracted from, books or albums which are valued at more than £2,000 each; (c) any item or group of associated items recognized by the holder of the bulk licence as being of national importance, irrespective of value. This last category of exceptions requires the co-operation of regular exporters in that the onus is placed upon them to act conscientiously. Thus the holders of bulk licences should take into account the national or local importance of any item in deciding whether to export it under a bulk licence. In 1978-79 and 1979-80 and 1980-81, the total number of applications for items in this category were 26, 21 and 22 respectively. In evaluating the importance of documents the exporter must ensure that the archivist's point of view is given consideration with particular attention given to the consequences of breaking up a collection by selective export and when it is appropriate should apply for a specific licence. When a specific licence is applied for, the application should state that the documents concerned are part of a larger archive or collection, although it is not necessary to deposit copies with the application with the Export Licensing Branch of the Department of Trade and Industry. The Department of Trade and Industry may, however, insist on the deposit of a copy of a document as a condition of export if the item is considered to be of British historical or literary interest.

The effect of the use of Open General Export Licences and bulk licences is such that almost all export activity is automatically licensed. Thus trade returns reveal that in the years 1975-6; 1976-7; 1977-8; 1978-9 and 1979-80 the number of paintings and drawings exported (including re-exports) totalled 61,723; 60,708; 75,033; 97,024 and 74,550 respectively.<sup>42</sup> The total value of these and other items was £177,010,000; £229,835,000; £246,735,000; £310,812,000 and £336,181,000 respectively.<sup>43</sup> During this period the number of applications for specific export licences were only 2,559, 3,254, 3,604, 2,838 and 3,639 respectively. Of these the majority were granted, the number of individual items ultimately exported being

2,612, 3,682, 3,842, 2,309, and 2,678 respectively. In 1980-81, 4,052 applications were made and the number of items exported totalled 4,500.

The criteria for determining whether an export licence should be issued are the considerations recommended as a guide by the Waverley Committee Report of 1952. These are (a) is the object so closely connected with our history and national life that its departure would be a misfortune?, (b) is it of outstanding aesthetic importance?, (c) is it of outstanding significance to the study of some particular branch of art, learning or history? These criteria are applied by the Department of Trade and Industry, after reference to expert advisers on the question of the national importance of any given item. When an expert adviser recommends that a licence should be refused on grounds of national importance the matter is referred to the Government's Reviewing Committee on the Export of Works of Art which has powers to refuse the grant of a licence after hearing the applicant, usually through an expert representative, who is advised of the objection to export and is provided with a copy of the expert adviser's written statement of the case against the issue of a licence. Other than the application of the Waverley criteria the Reviewing Committee does not give reasons for their decisions from which there is no appeal. However, no appeal system is necessary for the effect is that the Reviewing Committee can recommend only that, where appropriate, an export licence shall be withheld for a specific period, usually three or six months, during which an offer to purchase at a valuation recommended by the Committee may be made. If no offer to purchase is made by one of the established institutions, including the Trustees of the National Heritage Memorial Fund, an export licence will be granted, but if an offer is made and refused no licence will be issued. In practice, very few applications come before the Reviewing Committee as is illustrated by the following table:<sup>44</sup>

Year	Total number of applications	Number of cases where export licence was suspended	Number of works retained	Number of works exported	Value of works exported	% of cases where a licence was eventually granted
1975-76	15	13	9	4	202,081	30.8
1976-77	11	8	5	3	299,400	37.5
1977-78	28	20	12	8	1,008,900	40.0
1978-79	33	23	21	2	108,900	8.7
1979-80	16	11	7	4	512,817	36.4
1980-81	15	12	8	4	5,215,588	33.4
Totals	103	74	53	21	7,145,189	
Averages	20.6	14.8	10.6	4.2	1,429,038	31.2

It can be appreciated from these figures that at the apex of the export control system, arrangements are satisfactory and that the finest of items are retained in the United Kingdom. Concern may however be considered appropriate in the case of items falling within the scope of the current Open General Export Licence as the freedom it confers on exporters is based on a financial criterion without regard to the possible intrinsic value of a given item. No machinery exists to draw the attention of experts to items for export although it must be conceded that export control has been tightened by a new provision contained in the current Open General Export Licence relating to British historical personages. Thus a restriction now applies to items consisting of, or including any representation of, the likeness (whether two or three dimensions) of any person, except photographs and coins, in respect of whom an entry appears in the Dictionary of National Biography (or any supplements thereto), "Who's Who," or "Who Was Who." The restriction prohibits the export of any such item unless the value is less than £2,000, or if its value is £2,000 or more, but less than £8,000, and the exporter produces to the proper officer of Customs and Excise at the place of export a certificate from either the Director of the National Portrait Gallery or the Keeper of the Scottish National Portrait Gallery stating that in his opinion the object concerned is not a work of national importance.

As demonstrated by the trade returns, export control is effectively negated by the issue of the Open General Export Licence and, where appropriate, bulk licences. The scope for prosecution for breach of export control is thus not very significant and, more importantly, there is little hope of recovery of illegally exported items. Under existing law goods which are exported in contravention of the Export of Goods (Control) Order 1978 are deemed to be "prohibited goods" for the purposes of s.3(1) of the Import, Export and Customs Powers (Defence) Act 1939, with the result that the goods concerned are forfeited to the Crown, and, in addition, the exporter or his agent or the shipper of the goods is liable to a customs penalty of £500.<sup>45</sup> If an export licence is obtained the exporter having knowingly or recklessly made a false statement in a material particular, an offence is committed which is punishable on summary conviction by a customs' penalty not exceeding £1,000, but on indictment is punishable by an unlimited fine or up to two years imprisonment, or both, and the licence is invalid *ab initio*: Export of Goods (Control) Order 1978 art. 5. A further control arises from the need to deliver in the case of all exports an "entry outwards" to the Commissioners for Customs and Excise for revenue purposes: failure to do so renders the goods liable to forfeiture and, if done with fraudulent intent, any person concerned with knowledge of that intent is liable to a penalty of three times the value of the goods or £100, whichever is the greater, or imprison-

ment for up to two years, or both: Customs and Excise Act 1952, s. 47 (1)(3).

While these provisions for criminal penalties may act as some deterrent to illegal export, in those cases where export control has been successfully evaded there are no complimentary provisions to facilitate retrieval of the objects involved. This is due to the absence of any multi-national treaty which could be called in aid for the purpose. Even if such arrangements did exist there would be difficulties in attempting retrieval of objects which have been sold in the importing country to a bona fide purchaser. The reviewing Committee has considered this matter and concluded that if a system of retrieval could be established it would need to be limited to objects which are still in the control of the illegal exporter: Cmnd 8050, para. 12.

The impact of international treaties upon this area of law is small but, so far as the EEC is concerned, serves to support our export control system. This can be demonstrated by the attitude of the Reviewing Committee in one celebrated recent example, concerning the Committee's consideration of a silver plaque by Paul van Vianen which had been purchased by the Rijksmuseum in Amsterdam. The Reviewing Committee declined an export licence on application of the second and third of the Waverley criteria and it was suggested these criteria might be inconsistent with European Community Law.

This argument was based on arts 30-36 of the EEC Treaty. More specifically art. 34 prohibits the application to intra-Community trade of quantitative restrictions on exports, or measures having an equivalent effect. The Netherlands and the United Kingdom are both, of course, member states of the European Communities. The apparently strict provisions of art. 34 are modified to a certain extent by the application of what is known as a rule of reason (as expounded by the Court of Justice in, inter alia case 8/74 *Procureur du Roi v B. & G. Dassonville* [1974] ECR 837) and also by the provisions of art. 36 of the Treaty. This article is, though, designed to protect certain deserving interests, not to act as a thoroughfare for member states and others to drive a coach and horses through the basic principles of the Treaty. One of these interests deemed worthy of protection is "the 29 [1974] ECR 837; protection of national treasures possessing artistic, historic and archaeological value." It is now clear from the case-law of the Court of Justice that such measures do, prima facie, fall within the scope of arts 30-34 and that the exceptions of art. 36 are permitted only to the extent that they can be justified on the grounds mentioned.<sup>46</sup> So far there has been no case directly on the exception in respect of national treasures. However, the Reviewing Committee did think, in respect of the Paul van Vianen plaque, that the Waverley criteria formed an acceptable basis for refusing an export licence without losing the

protection of the first sentence of art. 36. It is submitted that, on the facts, this view is indeed correct. If, however, it could have been shown that the decision to refuse an export licence constituted a means of arbitrary discrimination, or a disguised restriction on trade between member states then the decision would - no matter how supportable for the protection of national treasures - have been in breach of Community Law. This is the effect of the second sentence of art. 36.

Although there has been no direct decision on national treasures and arts 30-36 of the EEC Treaty, certain relevant points arose in the first *Art Treasures* case, case 7/68 *Commission v Italian Republic* [1968] ECR 423; [1969] CMLR I. In this case the Commission attacked a progressive tax on the export of art treasures from Italy. This tax was just one of the several options open to the Italian Government to enable it to limit the export of Italian antiquities. It was argued on the government's behalf that the tax fell within the protection afforded by art. 36. The Court of Justice held that this was not the case and that consequently the tax was in breach of Community Law in that it was incompatible with the prohibition of customs duties and charges having equivalent effect between Member States contained in art. 9 of the Treaty.

Thus it can be asserted most firmly that any proposal to impose a tax or duty on the export of national treasures would, insofar as it purported to affect exports to other member states of the Community, be illegal.

As has previously been inferred, it is submitted that the decision of the Reviewing Committee on the van Vianen plaque was correct. It would seem that in this case (rightly) no argument was advanced as to the applicability of the second sentence of art. 36.<sup>47</sup>

One of the weaknesses of the export control system is that it is capable of being undermined by the simple method of applying for a temporary export licence, ostensibly for the purpose of exhibition abroad. Because the application is not for a permanent export licence there are no arrangements for suspension of the grant of a licence pending an offer to purchase by a British institution. There is clear potential for abuse here as the exporter may achieve his object of securing that the item is legally exported and under existing law will not be subject to any penalty if the item should later be sold. At present such licences are granted in return for an undertaking from the exporter that he will not sell or otherwise dispose of his property before its return to the United Kingdom at the end of the period during which its absence was authorized. If the exporter disposes of the item in breach of his undertaking his conduct may be considered dishonourable but it is not illegal. The Reviewing Committee has expressed the view that it is desirable that objects of national importance should be allowed to leave this country temporarily for purposes such as exhibition or restoration when there is

no intention of a sale, and it is presently studying the problem of imposition of sanctions against those who fail to reimport within the stipulated period. In researching this problem the Committee investigated 18 cases in which the items had not been returned and devoted considerable effort to reminding the owners of their obligations. In all but one case the items were eventually reimported, but in the one outstanding case concerning a painting of George Washington by Gilbert Stuart, owned by Lord Rosebery, the painting was not reimported. It had originally been exported in August 1968 for exhibition at the Smithsonian Institution in Washington, the application for the export licence having stated that the approximate date of its return was January 1969. An extension of nine months was granted and the Export Licensing Branch of the Department of Trade and Industry (at that time the Board of Trade) was advised by Lord Rosebery that the painting had been requested by the Institution for permanent loan. The Department agreed to this but wanted Lord Rosebery to give an undertaking that it would not be sold or disposed of before its return to the United Kingdom. This suggestion was declined by Lord Rosebery who stated his intention not to sell, but wished to reserve the right to change his mind. It would appear that, in contrast to present practice, no undertaking had been sought at the time of the export and therefore little pressure could be brought to bear on Lord Rosebery since he was not in breach of any undertaking but had acted contrary to the terms of the temporary export licence. This glaring defect in the system might be overcome by the device of placing the object to be exported in the custody of a British institution such as the Victoria and Albert Museum, the British Museum or the National Gallery, and the potential of such arrangements is now being studied by the Reviewing Committee: *The Guardian*, June 19, 1981. If a system based on this idea were to be established there would be no need for temporary export licences as these institutions, being Crown bodies, are not bound by export control regulations.

### Conclusions

While the creation of the National Heritage Memorial Fund is to be thoroughly applauded it would be wrong to conclude that the law relating to the preservation and conservation of artefacts and works of art is now in an orderly state. A simple comparison with the law applicable to buildings of special architectural or historic interest, and ancient monuments of national importance, will make this conclusion clear. Such buildings and monuments are now subject to comprehensive, albeit not entirely fool-proof, statutory codes which confer powers of compulsory purchase<sup>48</sup> on the Secretary of State and local authorities and establish special planning controls to prevent their unauthorized alteration or destruction.<sup>49</sup> It is however a commonly heard complaint that the scheme is not as successful in

the case of listed buildings as may be desirable, for reasons which are ultimately financial, in that the exercise of default powers involves significant expense.<sup>50</sup> If it is accepted that artefacts and works of art are just as much a part of the national heritage, the extent of legal provision for the preservation of them is, in contrast, very much weaker, fundamentally because there is no comprehensive scheme to ensure conservation.

The reflection that the first Annual Report of the Trustees of the National Heritage Memorial Fund contains only a very small glimpse of the richness, scope and variety of our national heritage is a frightening reminder of what we have to lose and have already lost. The precarious protection offered by the law of treasure trove and the advent of the readily obtainable metal detector provide means for the accelerated erosion of our past. A well co-ordinated, clearly thought out, legal framework for the protection of our portable antiquities is essential. It would be unfortunate if this were realized too late.

#### NOTES

1. We use the term "portable antiquities" generally to include all personal, as opposed to real, property which is of historical or aesthetic interest.
2. W.W. Buckland, *Text-Book of Roman Law*, 3rd edition, pp. 218-221.
3. (1568) 1 Plowd 310; 75 E.R. 472.
4. *Ibid* at p. 479; the explanation seems to owe more to Elizabethan metaphysics than reason, even the "artificial reason" of the law. See Tillyard, *The Elizabethan World Picture*.
5. Martin, "Treasure Trove and The British Museum," (1904) 20 *LQR* pp. 27-28.
6. Report of the Committee on Death Certification and Coroners, Cmnd. 4810, (1971) para: 13.22. The Brodrick Report, as it is more generally known, noted the inadequacy of the present law at paras 13, 24 and 25, but considered further discussion was not within their terms of reference.
7. Palmer, "Treasure Trove and The Protection of Antiquities" (1981) 44 *MLR* 178.
8. *Tractatus de Legibus et Consuetudinibus Regni Angliae* XIV 2.
9. Bk. 1, ch. 8, para. 13.
10. 3 Co. Inst. 132.
11. Martin, *op. cit.* p. 29. It is apparent that in Scots Law treasure trove is not limited to gold and silver, see Walker, *Principles of Scottish Private Law*, vol. 11, p. 1551. There is no evidence for such a limitation in Roman Law.
12. This is illustrated by the discovery on a building site on Gallows Hill, generally known as the Thetford hoard, by means of a metal detector, of one of the most important treasure-trove finds in this country. The total value was assessed at £261,540, of which the personal representatives of the finder received only £87,180, ie, one third of the valuation, due to the finder's concealment for a period of six months. *The Guardian*, July 17, 1981.

13. Leading authorities include *South Staffordshire Water Co. v Sharman* [1896] 2 Q.B. 44; *Elwes v Brigg Gas Co.* (1886) 33 Ch.D. 562 (prehistoric boat found in digging foundations). For a helpful summary, see *Winfield & Jolowicz on Tort* 11th edition, pp. 460-462. See also Brand and Bennett, "Treasure Hunters and your Client" (1982) *L.S. Gaz.*, 79, 22, p. 732.
14. (Unreported), Lincoln Crown Court, September 1979. The case excited great interest amongst the archeological and treasure hunting fraternities alike, and is discussed by Peter Hibbert, "Treasure Hunting on Trial - A Solicitors View," in *Rescue News* (March 1980) No. 21 p. 6. The case arose from Mr Fletcher's use, at night and without consent, of a metal detector on the site of a Roman settlement.
15. "'Adjacent' is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to or near. What degree of proximity could justify the application of the word is entirely a question of circumstances," per Sir Arthur Wilson in *Wellington Corporation v Lower Hutt Corporation* [1904] A.C. 773 at pp. 775-6.
16. As suggested in the course of debate on the Ancient Monuments and Archaeological Areas Bill, Hansard, H.L. Vol 398, col. 486.
17. 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 by the Ancient Monuments and Archaeological Areas Act (Commencement No. 3) Order 1981 SI 1981 No. 1466. Part II was brought into effect in England and Wales only on April 14, 1982 SI. 1982 No. 362.
18. For detailed examination see Brand, "Modern Legislation for the Protection of History: The Ancient Monuments and Archaeological Areas Act 1979," *Scottish Planning Law and Practice*, Occasional Paper No. 2, (December 1980). The Planning Exchange, Glasgow, 186 Bath Street, G2 4HG; for summary of the main legislative provisions see Bennett, "The Ancient Monuments and Archaeological Areas Act 1979," *Law Society's Gazette*, vol. 77 No.37 p. 1009, October 15, 1980. See also the helpful review of developments in R. Blossidge, "Conservation Reports and Studies, Continuation List and Commentary," *Town Planning Review*, vol. 52 No. 4 (October 1981).
19. Section 61 provides that it is the prescribed sum within the meaning of s.28 of the Criminal Law Act 1977. The 1977 Act permits the maximum statutory fine to be altered by statutory instrument to take account of inflation. The 1979 Act is thus provided with an automatic machinery for ensuring that fines keep pace with changes in the value of money. The current maximum fine is £1,000.
20. "There is of course no question of areas being designated primarily to stop the use of metal detectors," D. of E. Consultative Document, "Areas of Archaeological Importance," (January 1981), para. 25.
21. We are greatly indebted to Richard Morris, Research Officer of the Council for British Archaeology, who made available to us his extensive collection of reports of damage done by metal-detector users. Quite clearly, it is a problem of very much greater dimensions than seems generally to be realized. See also references in Palmer, *op cit*.
22. See also Scottish Development Department (Ancient Monuments), Consultative Document, "Areas of Archaeological Importance," (May 1981), which further warns in para. 13 that, "[b]ecause of the severe constraints in staffing the Department could not readily take on the role of an investigating authority and in the absence of a competent body locally there is little or no prospect of an area being designated."
23. *Op. cit.* p. 132. It is proposed to consider the legal aspects of marine archaeology in a subsequent article.
24. Examples under the old common law include *R. v Toole* (1867) 11 Cox CC75; *R. v Thomas & Willett* (1863) 9 Cox CC376. The offence of concealment of treasure trove was repealed by s. 32 (1)(a) of the Theft Act 1968. Halsbury's Laws, (4th ed.), vol. 9 para. 1178 is misleading on this point.
25. [1978] *Crim. LR* 242 and commentary. This approach was affirmed recently in *R. v Landy* [1981] 1 All E.R. 1172 CA.
- 25a. Trampling on grass would seem to be sufficient "damage," see *Gayford v Chouler* [1898] 1 Q.B. 316.
26. No such bye-laws are known to exist at the present time and there is the possibility of



- challenge on the grounds of ultra vires, with particular reference to the application of the test of unreasonableness as stated by Russell LCJ in *Kruse v Johnson* [1893] 2 Q.B. 91 at p.100. Possible enabling legislation also includes the Open Spaces Act 1906 s.15; Commons Act 1899, ss 1 and 10.
27. A further reason for the modification of this section is provided by the course of the litigation in *Attorney General v The Trustees of the British Museum* [1903] 2 Ch. 598 the expense of which seems to have been caused by the forerunner of s.3(4); which was drafted in similar terms. See Martin, *op. cit.* p.36. The costs of the litigation amounted to the staggering sum (for the time) of £3,114. 0s. 2d.
  28. For an account of the land aspects of the 1980 Act see Brand, (1981) *SPLP* 12.
  29. It is believed that the disposal of the Mentmore Estate and contents realized £6 million, far in excess of resources available to ensure that the collections contained therein remained intact. It may be noted, however, that the National Land Fund had assisted in the purchase of Haddo House (1978) and Brodie Castle (1979).
  30. The National Land Fund was formally wound up under s. 15 of the 1980 Act.
  31. By the Transfer of Functions (Arts, Libraries and National Heritage) Order 1981, s. 1 1981 No. 207, the ministerial functions under the 1980 Act are to be exercised solely by the Secretary of State for the Environment. This Order was necessitated by the resignation of Mr Norman St. John Stevas as Minister for the Arts while remaining Chancellor of the Duchy of Lancaster. It has had no effect on the Fund.
  32. The Trustees are Maurice Lindsay, Professor Brian Morris, Sir Rex Richards, John Smith, Clive Jenkins, Charles Kipahan, Baroness Airey of Abingdon, Sir Robert Cooke, Professor F.G.T. Holliday, and the Marquess of Anglesey. The Trustees may be contacted through their Secretary, Brian Lang, at Church House, Great Smith Street, London SW1.
  33. "Guidelines for the Trustees of the National Heritage Memorial Fund" para. 2. The Guidelines had not been published at the date of completion of this article.
  34. *Ibid.* para. 3. It is perhaps appropriate to note that the first grant made by the Trustees was to the Gilbert White museum in Selbourne to purchase the final draft manuscript of *The Natural History of Selbourne* which had been brought from the USA for sale in this country. cf export control discussed below.
  35. *Ibid.* para. 11
  36. The power to make such orders was originally conferred on the Board of Trade, the function having been transferred to the Secretary of State for Trade and Industry by the Secretary of State for Trade and Industry Order 1970 SI. 1970. No. 1537.
  37. SI. 1981 No. 1641. This Order consolidates the many amendments to the Export of Goods (Control) Order 1978 SI. 1978 No. 796, which itself consolidated amendments to the Export of Goods (Control) Order 1979 SI. 1970 No. 1288.
  38. Before the amending Order of 1979 any goods manufactured or produced less than 100 years before the date of export were not subject to export control. It seems implicit that goods "manufactured or produced" includes works of art, though it is odd that the current Order does not specifically so state since the earlier Orders of 1965 and 1970 made specific reference to works of art.
  39. General Export Licences are not statutory instruments but are published by HMSO.
  40. The present system of export control is based upon the recommendations of the Waverley Committee, a committee appointed by the Chancellor of the Exchequer in 1950 under the chairmanship of Lord Waverley "to consider and advise on the policy to be adopted by HM Government in controlling the export of works of art, books, manuscripts, armour and antiques and to recommend what arrangements should be made for the practical operation of policy." The Report was published by HMSO in 1952; it had recommended that the limitation of value should be £1,000 though the Government commenced the present scheme with a value limitation of £500, which has been increased by stages to the current £8,000 limit. An account of these developments is given in the Appendix to the Notice to Exporters issued jointly by the Export Licensing Branch of the Department of Trade and the Reviewing Committee on the Export of Works of Art, dated 1980. This Appendix is reproduced as Appendix VI to the 26th Report of the Reviewing Committee Cmnd. 8050 May 11, 1981.
  41. This safeguard on the export of archaeological materials was first introduced in 1969, but in practice very few applications for specific export licences have been made. In

1978-79 only one application was made in respect of archaeological material valued at £245, while in 1979-80 two applications were made in respect of archaeological material of total value £445. It is therefore remarkable that in 1980-81 no less than 768 applications were made: Cmnd. 8515, Appendix V. No comment is made on this in the report.

42. Twenty-seventh Report of the Reviewing Committee on the Export of Works of Art Cmnd. 8515 Appendix VI. Figures for the quantities of items not being paintings or drawings are not available, albeit valuation figures of these items are provided. Figures for 1980-81 are reproduced in Appendix VI but cover only the eight months ending February 1981. Industrial action at the Government Computer Centre prevented more up-to-date figures being compiled.
43. *Ibid.* Appendix VI also provides figures for import over the same period. These figures show that a rather larger number of paintings and drawings were imported than exported although aggregation of the valuation figures indicates that when considering the balance of trade in all portable antiquities there is a consistent loss annually if assessed purely in financial terms.
44. *Ibid.* para. 26.
45. Regard may also be had to the Customs and Excise Act 1952 s. 56(2) which provides that "Any person knowingly concerned in the exportation . . . of any goods with intent to evade any . . . prohibition or restriction . . . shall be liable to a penalty of three times the value of the goods or £100 whichever is the greater and also to imprisonment for a term not exceeding two years, or both." Although s. 79(3) of the Act provides that exportation occurs at the time of departure of the conveyance it was held in *Garrett v Arthur Churchill (Glass), Ltd* [1969] 2 All E.R. 1141 that on a charge under s. 56(2) a person may be concerned with the export of goods by doing things in advance of the time when the conveyance departs. It was held in *Attorney-General of New Zealand v Ortiz* [1982] 3 All E.R. 432 that the words "shall be forfeited" in s. 12 of the (New Zealand) Historic Articles Act 1962 meant that the title to goods illegally exported does not pass to the Crown until after seizure by customs officers. In the court below Staughton J taking a purposive view of the Act had held that they were forfeited as at the time of the illegal export.
46. See further: Simmonds (ed.) *Encyclopedia of European Community Law*, Vol. BII, para. B10-085 et seq. (Gormley) and Verloren van Themaat and Gormley (1981) 3 *Northwestern Journal of International Law and Business* 577. For the apparent adoption of the discrimination criterion in respect of non-commonly organized sectors of the market see, inter alia cases 15/79 *P.B. Groenveld B.V. v Produktschap voor Vee and Hees* [1979] ECR 3409 and 155/80 *Oebel* [1981] ECR 1993.
47. This discussion of the EEC points is contributed by Laurence Gormley, Barrister, Lecturer in Law in the University of Liverpool
48. Town and Country Planning Act 1971, s. 114; Ancient Monuments and Archaeological Areas Act 1979 s. 10.
49. Town and Country Planning Act 1971, s. 55; Ancient Monuments and Archaeological Areas Act 1979, s. 2. The effect is that buildings of special architectural or historic interest are listed pursuant to s. 54 of the 1971 Act while ancient monuments of national importance are "scheduled" under the 1979 Act, formerly under the Ancient Monuments Consolidation and Amendment Act 1913. The 1979 Act introduces a requirement to obtain "scheduled monument consent" for alteration or destruction of a scheduled monument which is similar to the present arrangements for obtaining listed building consent for alteration or destruction of listed buildings, with the important differences that scheduled monument consent is available only by application to the Secretary of State.
50. This is despite the provision for minimum compensation on compulsory purchase under s. 116 of the 1971 Act when the owner has deliberately permitted the building to fall into disrepair. The main expense is, of course, in restoration. It may be noted that the National Heritage Act 1980 permits the Trustees to make advances by way of grant or loan to the Secretary of State in exercise of his functions under s. 5 of the Historic Buildings and Ancient Monuments Act 1953 (voluntary acquisitions) but not in respect of compulsory acquisitions: s. 3(6)(d). There are no statutory provisions which give relief to public authorities wishing to restore a listed building.