

THE LAW AND PRACTICE REGARDING COIN FINDS

Treasure Trove Law in the United States

John M. Kleeberg, Esq.*

The United States, although a comparatively young country, has been the site of some remarkable archaeological discoveries. Litigation has concerned such remarkable objects as a statue of King George III that was hacked into pieces by patriots in 1776¹ and a prehistoric Indian canoe.² The United States has also been the site of the discovery of large money hoards. One hoard discovered in Baltimore in August 1934 consisted of 3,558 United States gold pieces.³ Another hoard, discovered in Puerto Rico in March 1990, comprised \$43 million in currency.⁴

Coin hoards are not found as frequently as in Europe. Coinage has been in general use in what is now the continental United States for less than four hundred years. The earliest date of deposit for a coin hoard in what is now the continental United States is 1631.⁵ Coin hoards *sensu stricto* (i.e., not including finds of paper money) are found in the continental United States at the rate of about three every year.⁶ In England and Wales, by contrast, coin hoards are found at the rate of twenty to forty every year.⁷ England and Wales have a much smaller population and area, but that area has used coinage for two millennia. Furthermore, for much of the period that

* B.A., Yale, 1979; D.Phil., Oxford, 1988; J.D., New York University School of Law, 2003. The author was Curator of Modern Coins and Currency at The American Numismatic Society in New York, 1990-2000. He now practices law in New York City.

1 See *Favorite v. Miller*, 407 A.2d 974 (Conn. 1978).

2 See *Allred v. Biegel*, 219 S.W.2d 665 (Mo. Ct. App. 1949).

3 See A Large Quantity of Gold U.S. Coins Unearthed, 47 *Numismatist* 677-78 (1934); Court Gives Boys \$27,800 Gold They Found; Poor Youths Will Buy Homes for Mothers, *N.Y. Times*, February 17, 1935, at 1. The litigation concerning the hoard proceeded under the captions *Gaither v. Jones* and, subsequently, *French v. McNabb*. See *Gaither v. Jones*, Edward H. WARREN, *Cases on Property* 129-31 (2d ed. 1938) (Md. Balt. City Ct. 1935), *aff'd per curiam* by an equally divided court sub nom. *French v. McNabb*, 179 A. 928 (Md. 1935).

4 See James LEMOYNE, Talk of a Puerto Rico Town: Buried Treasure, No Kidding, *N.Y. Times*, April 18, 1990, at A1; Goods Linked to Drugs are Seized by Agents, *N.Y. Times*, May 12, 1990, at 8. The litigation arising from this hoard included: *Torres Gonzalez v. United States*, 240 F.3d 14 (1st Cir. 2001), cert. denied, 533 U.S. 951 (2001).

5 See Walter BREEN, Survey of American Coin Hoards, 65 *Numismatist* 7, 8-9 (1950).

6 This estimate is based on the author's own work in preparing an inventory of numismatic finds in the Americas.

7 Cf. Roger BLAND, *The Law of Treasure Trove in England and Wales*, *CIN, Compte Rendu* 42 (1995), 62-63 (stating that twenty to thirty finds a year are declared treasure trove, ninety percent of which are coin hoards, and that hoards of base metal and bronze coins are found at the rate of five to ten such hoards a year).

coinage has been used in the Americas, the existence of banks has made coin hoarding superfluous.

This article will discuss the treatment of coin and money hoards found on land in the United States, which is dealt with under the United States law of treasure trove and the related United States laws regarding lost and found property.⁸ This article will not discuss other legal issues, such as coins found in shipwrecks (which has given rise to a large body of statute law and litigation in itself), nor legal restrictions on import and export of archaeological artifacts to and from the United States. It is hoped to discuss the legal situation in the United States concerning shipwrecks, at least, in a later article.

Most jurisdictions in the United States follow the common law. Two important jurisdictions, however, follow the civil law: Louisiana and Puerto Rico. Under the civil law, treasure found on one's own land goes to the finder, and if it is found by chance on the land of another it is split half to the finder, and half to the landowner. Puerto Rico follows the rule on treasure in this original formulation.⁹ Louisiana amended its law in 1982 to clarify that it applies not only to treasure found in the land, but also hidden in a moveable; Louisiana also eliminated the phrase "by chance."¹⁰ Under the pre-1982 code, one Louisiana court held that property discovered while using a metal detector is not property found "by chance," and thus a finder using a metal detector on the land of another does not have a right to the property.¹¹ The elimination of the phrase "by chance" in the Louisiana Civil Code has mooted this in Louisiana, but the holding still could be applied in other civil law jurisdictions; Puerto Rico, for example, still has the phrase "by chance" ("por causalidad") in its Civil Code.

8 For other discussions of the law of treasure trove in the United States, see George HILL, *Treasure Trove in Law and Practice from the Earliest time to the Present Day* 287-89 (1936); Patty GERSTENBLITH, Identity and Cultural Property: The Protection of Cultural Property in the United States, 75 *B.U. L. Rev.* 559, 596-97 (1995); Roman KRYS, Treasure-Trove under Anglo-American Law, 11 *Anglo-Am. L. Rev.* 214 (1982); Leeanna IZUEL, Note, Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule, 78 *UCLA L. Rev.* 1659, 1692 (1991); Annotation, Modern Status of Rules as to Ownership of Treasure Trove as between Finder and Owner of Property on which Found, 61 *A.L.R.* 1180 (1988); Richard B. CUNNINGHAM, The Slow Death of Treasure Trove, *Archaeology*, February 7, 2000, <http://www.archaeology.org/online/features/trove/>. The best article on treasure trove is the student note written by Dean Izuel. Professor Gerstenblith provides a comprehensive account of the laws affecting the disposition of archaeological artifacts. Professor Krys gives a useful comparison of English law and United States law on treasure trove. The Annotation is a helpful summary of recent United States cases on treasure trove.

9 *P.R. Laws tit. 31*, §§1116-17.

10 *La. Civ. Code art.* 3420.

11 *Charrier v. Bell*, 496 So.2d 601, 602-3 (La. Ct. App. 1986).

In the law of lost property, the paramount rights are those of the true owner. This law interacts with the criminal law of larceny; the courts privilege the rights of the true owner, because they do not want to create a safe harbor in the law for thieves.

The framework of the law of lost and found property law in the common law jurisdictions in the United States is based on a distinction among lost, mislaid, and abandoned property. Abandoned property is property that the owner throws away or voluntarily forsakes its possession, and the first person to find it gets absolute title.¹² Lost property is property that the owner involuntarily parted with through neglect, carelessness, or inadvertence, and of whose whereabouts the owner has no knowledge, and the finder gets title against everyone except the true owner.¹³ Mislaid property is that which is intentionally put into a certain place and later forgotten¹⁴ – e.g. the owner places a hat on a hat rack in a restaurant, but forgets to take the hat upon leaving. The courts give the possession of mislaid property to the owner of the place in which the property was lost (in Latin, the *locus in quo*; this person will henceforth be referred to as the locus owner).¹⁵ The rationale is that the true owner's recollection is more likely to be refreshed in the case of mislaid property, and that true owners will retrace their steps and return to the locus to reclaim their property.

In addition to the lost/mislaid/abandoned distinction, United States courts distinguish two further types of lost property: Embedded property and treasure trove. Embedded property is property that is buried in the land, unless it is treasure trove. Courts have ruled that embedded property includes lumber company scrip,¹⁶ a gilded lead statue of George III,¹⁷ a meteorite,¹⁸ a prehistoric Indian canoe,¹⁹ old ceramics,²⁰ and gold-bearing quartz.²¹ Treasure trove is refined gold and silver, either as bullion or made into coin, plus paper money, since the paper representatives of gold and silver are deemed to be treasure trove as well.²² Treasure trove is buried or otherwise hidden or concealed. It need not be fixed to the land, but can be hidden in a

12 See, e.g., *Terry v. Lock*, 37 S.W.3d 202, 206 (Ark. 2001) (enumerating the elements of abandoned property).

13 See, e.g., *id.* at 206 (enumerating the elements of lost property).

14 See, e.g., *id.* at 207 (enumerating the elements of mislaid property).

15 See, e.g., *id.* (stating that the right of possession of mislaid property is in the owner or occupant of the premises where the property is discovered).

16 See *United States v. Shivers*, 96 F.3d 120 (5th Cir. 1996), *aff'g In re Shivers*, 900 F.Supp. 60 (E.D. Tex. 1995).

17 See *Favorite v. Miller*, 407 A.2d 974 (Conn. 1978).

18 See *Goodard v. Winchell*, 52 N.W. 1124 (Iowa 1899).

19 See *Allred v. Biegel*, 219 S.W.2d 665 (Mo. Ct. App. 1949).

20 See *Burdick v. Chesebrough*, 88 N.Y.S. 13 (N.Y. App. Div. 1904).

21 See *Ferguson v. Ray*, 77 P. 600, 601 (Ore. 1904).

22 See, e.g., *Terry v. Lock*, 37 S.W.3d 202, 206 (Ark. 2001) (enumerating the elements of treasure trove).

moveable: Courts have been willing to consider as treasure trove finds of money in the wing of an airplane,²³ safes,²⁴ and mattresses.²⁵

Treasure trove has the thought of antiquity: A find of money must have been concealed so long that it is unlikely that the true owner will re-appear before a court will consider it treasure trove. This language originated in a 1956 Oregon case where the money had been concealed for less than a year.²⁶ The courts have not enunciated a bright line rule as to how many years will allow a find to be considered treasure trove. The consensus appears to be several decades, perhaps three or more. A 2001 case decided that eleven years was too little time for a find to be considered treasure trove;²⁷ a 1995 case considered that thirty-five years might be sufficient;²⁸ a 1991 case stated that fifty-nine years might be sufficient.²⁹ Thus a coin hoard is treated as treasure trove if it is old enough; otherwise, it is treated as lost, abandoned, or mislaid.

It is not yet clear whether treasure trove in the United States also applies to coins and tokens in metals other than gold and silver. There is some non-binding language in one case that indicates that it would not.³⁰ So far, there has been only one treasure case involving base metal numismatic items – the case concerned lumber company

23 Cf. *Benjamin v. Lindner Aviation, Inc.*, 534 N.W.2d 400, 407 (Iowa 1995) (considering that a find of money hidden in an airplane could be treasure trove, but deciding that it is not, because it was too recently hidden to have the thought of antiquity).

24 Cf. *Campbell v. Cochran*, 410 A.2d 211, 215 (Del. Super. Ct. 1980) (considering that a find of money found in a safe in a thieves' junkyard outside Wilmington, Delaware, called "Bazooobie Land," could be treasure trove, but treating it instead as either lost, abandoned, or stolen money under a Delaware statute).

25 Cf. *United States v. Peter*, 178 F.Supp. 854, 855-56 (E.D. La. 1959) (applying Louisiana law, and willing to consider gold certificates found in a mattress to be treasure trove, but instead awarding the money to the heirs of the true owner).

26 See *Hill v. Schrunk*, 292 P.2d 141, 143 (Ore. 1956).

27 Cf. *Terry v. Lock*, 37 S.W.3d 202, 203, 208-9 (Ark. 2001) (describing how the hoard must have been hidden in 1988 or later, when a beam was installed, and was discovered in 1999).

28 Cf. *Benjamin v. Lindner Aviation, Inc.* 534 N.W.2d 400, 407 (Iowa 1995) (stating that although the money was thirty-five years old, which might have led to a decision that it was treasure trove, there was other evidence that might have shown the money was concealed for a shorter period of time).

29 Cf. *Ritz v. Selma United Methodist Church*, 467 N.W.2d 266, 269 (Iowa 1991) (stating that money buried no earlier than 1928 and found in 1987 or later could be considered treasure trove).

30 See *Favorite v. Miller*, 407 A.2d. 974, 978 n.2 (Conn. 1978) (stating that the "strict definition" that limits treasure trove to gold and silver is "well established" in United States law, and that since the statue involved in the litigation was made of gilded lead, the finder was making no claim that it was treasure trove).

scrip that was struck brass – but the court chose to treat those items as embedded property, rather than treasure trove.³¹ Yet as noted above, United States courts have had no problem holding that paper money is treasure trove. It would be an odd result to consider gold coins, silver coins, and paper money to be treasure trove, but not coins struck in copper, nickel, or zinc.

Most courts in the United States that have addressed the question of treasure trove rule that it goes to the finder. The doctrine is recognized in Arkansas,³² Connecticut,³³ Delaware,³⁴ Georgia,³⁵ Indiana,³⁶ Iowa,³⁷ Maine,³⁸ Maryland,³⁹ New York,⁴⁰ Ohio,⁴¹ Oregon,⁴² and Wisconsin.⁴³ The historical theory behind this is that the English monarch's claim to treasure trove was a statutory enactment that replaced an original right in the finder to treasure trove.⁴⁴ When this statute was not re-enacted after American independence, the right to treasure trove reverted to the finder.⁴⁵

31 See *In re Shivers*, 900 F.Supp. 60 (E.D. Tex. 1995), *aff'd sub nom. U.S. v. Shivers*, 96 F.3d 120 (5th Cir. 1996). Neither decision specifies the metal of the lumber company scrip. Other sources state that the scrip involved is bimetallic, with a brass ring and an aluminum insert; but in all specimens known, the aluminum insert is missing. See Terry N. TRANTOW, *Catalogue of Lumber Company Store Tokens* 385 (National Scrip Collectors Association, Inc., 1998).

32 See *Terry v. Lock*, 37 S.W.3d 202, 207-8 (Ark. 2001).

33 See *Favorite v. Miller*, 407 A.2d 974, 978 n.2 (Conn. 1978).

34 See *Campbell v. Cochran*, 416 A.2d 211, 221-22 (Del. Super. Ct. 1980).

35 See *Davison v. Strickland*, 243 S.E.2d 705, 707 (Ga. Ct. App. 1978); *Groover v. Tip-pins*, 179 S.E. 634, 636 (Ga. Ct. App. 1935).

36 See *Vickery v. Hardin*, 133 N.E. 922 (Ind. App. 1922).

37 See *Benjamin v. Lindner Aviation, Inc.*, 534 N.W.2d 400, 405 (Iowa 1995); *Ritz v. Selma United Methodist Church*, 467 N.W.2d 266, 269 (Iowa 1991); *Zornes v. Bowen*, 274 N.W. 877, 879 (Iowa 1937).

38 See *Weeks v. Hackett*, 71 A. 858 (Me. 1908); *Livermore v. White*, 43 Am. Rep. 600, 602 (Me. 1883).

39 See *Gaither v. Jones*, Warren, *supra* note 3, at 129-31 (Md. Cir. Ct. Balt. City), *aff'd per curiam* by an equally divided court sub nom. *French v. McNabb*, 179 A.928 (Md. 1935).

40 See *Hurley v. City of Niagara Falls*, 289 N.Y.S.2d 889, 891 (N.Y.S. App. Div. 1968), *aff'd per curiam*, 25 N.Y.2d 689 (N.Y. 1969).

41 See *Niederlehner v. Weatherley*, 69 N.E.2d 787, 790 (Ohio Ct. App. 1946); accord, *Cesarini v. United States*, 296 F.Supp. 3, 7-8 (N.D. Ohio. 1969).

42 See *Hill v. Schrunck*, 292 P.2d 141, 142-43 (Ore. 1956); *Jackson v. Steinberg*, 200 P.2d 376, 378 (Ore. 1948); *Roberson v. Ellis*, 114 P. 100, 102-3 (Ore. 1911); *Ferguson v. Ray*, 77 P. 600, 601 (Ore. 1904); *Danielson v. Roberts*, 74 P. 913, 914 (Ore. 1904); *Sovern v. Yoran*, 20 P. 100, 103-4 (Ore. 1888).

43 See *Zech v. Accola*, 33 N.W.2d 232, 235 (Wis. 1948).

44 See William BLACKSTONE, 2 *Commentaries* *296; James KENT, 2 *Commentaries on American Law* *357-58.

45 See KENT, at *357-58.

Texas declines to recognize treasure trove,⁴⁶ but this difference is more a matter of nomenclature than a real legal difference from the general rule. The same court that held that treasure trove did not apply in Texas also held that mislaid property, if not claimed for a long enough period, would cease to be mislaid and would be considered lost.⁴⁷ Thus, money that was hidden recently would go to the locus owner, to hold as bailee for the true owner, but money that had been hidden a long time would go to the finder. The result is the same as in the other states, it is just that instead of finds of mislaid money being recognized as treasure trove if they have “the thought of antiquity,” they are treated as lost instead. In both cases – whether it is called treasure trove or whether it is called lost property – the money goes to the finder.

Two states have chosen a different rule, which gives the treasure trove to the locus owner. These states are Tennessee⁴⁸ and Idaho.⁴⁹ The rationale behind this different rule is that otherwise trespassers would be rewarded. However, the same object could be achieved by giving treasure trove to the finder, but ruling that the finder loses if the finder is a trespasser. The problem of the trespassing finder will be discussed further below.

There has been only one exception to the rule of United States courts refusing to vest the right to treasure trove in the sovereign. This was a trial court in Pennsylvania, which in 1948 ruled that the common law of treasure trove did not vest the right to treasure trove in the finder, but in the sovereign, and awarded a find of \$92,800 in currency to the state.⁵⁰ The Supreme Court of Pennsylvania, however, reversed this decision and held that it was not yet determined as to whether the law of treasure trove was part of the law of Pennsylvania.⁵¹

Michigan declines to adopt treasure trove into its common law, and instead handles finds of money through its statutory scheme.⁵²

Approximately half of the states have statutes prescribing the disposition of lost property.⁵³ Under these statutes, the finder must inform the police of the find and

46 See *Schley v. Couch*, 284 S.W.2d 333, 335 (Tex. 1955).

47 Cf. *id.* at 336 (holding that the length of time that an object is hidden will determine whether it is mislaid or lost). This holding, which is implicit in the majority opinion, is brought out into full clarity in the concurrence. See *id.* at 338 (Calvert, J., concurring).

48 See *Morgan v. Wiser*, 711 S.W.2d 220 (Tenn. Ct. App. 1985).

49 See *Corliss v. Wenner*, 34 P.3d 1100 (Idaho Ct. App. 2001).

50 See *In re Escheat of \$92,800*, Note, *Treasure Trove – History and Development*, 22 *Temple L. Q.* 326, 339-31 (1948-49) (Pa. Ct. C.P. Phila. County 1948), vacated sub nom. *In re Rogers*, 62 A.2d 900 (Pa. 1949).

51 *In re Rogers*, 62 A.2d 900, 903 (Pa. 1949) (stating “[w]e purposely refrain, therefore, from considering whether the law of treasure trove is or ever has been a part of the law of Pennsylvania”).

52 See *Willsmore v. Township of Oceola*, 308 N.W.2d 796, 800 (Mich. Ct. App. 1981).

53 See, e.g., *Alaska Stat.* §12.36.045; *Cal. Civ. Code* §2080; *N.Y. Pers. Prop.* §254 (Consol. 1988); *Wis. Stat.* §§170.07-170.11.

place the item in their custody. The police search for the owner by posting a notice in the courthouse or advertising in a newspaper. If the owner does not reclaim the property within a certain period of time – the periods range from ninety days⁵⁴ to one year⁵⁵ – the title to the property vests in the finder. Nowadays, when finders prevail against locus owners, they are more likely to do so through one of these statutory schemes, rather than through a treasure trove claim. The courts are leery of divesting the true owner of any rights merely by a characterization of the property as abandoned, lost, mislaid, embedded, or treasure trove, and prefer statutory schemes that provide a certain modicum of due process before the property is vested in a new owner. When the true owner emerges after the statutory period has expired, the courts have been most vigorous in defending the rights of the new owner.⁵⁶

Only one state, New Jersey, has a statute that vests buried or hidden property in the locus owner, as well as any lost property found by a trespasser. All other lost property in New Jersey vests in the finder.⁵⁷

Two states give lost property to a government authority: Indiana gives it to the county;⁵⁸ Vermont gives it to the township.⁵⁹ One state, Maine, has the finder give half the value to the township; the finder gets to keep the other half.⁶⁰

The better authority in the United States holds that a trespassing finder loses all rights to the find.⁶¹ Moreover, two states, New Jersey and New York, specify this in their statutes.⁶² There are, however, four cases that hold that a trespassing finder will still be awarded the find.⁶³ Although three of them can be regarded as non-control-

54 See, e.g., *Ariz. Rev. Stat.* §12-941.

55 See, e.g., 765 *Ill. Comp. Stat.* 1020/28.

56 See *Peterson v. Diaz*, 379 So.2d 990 (Fla. Dist. Ct. App. 1980) (per curiam); *Ho v. Rubin*, 756 A.2d 643 (N.J. Super. Ct. Ch. Div. 1999), aff'd per curiam, 756 A.2d 633 (N.J. Super. Ct. App. Div. 2000).

57 See *N.J. Stat. Ann.* §46:30C-4 (West 2003).

58 See *Ind. Code* §32-34-8-9.

59 See *Vt. Stat. Ann.* tit. 27, §1105.

60 See *Me. Rev. Stat. Ann.* tit. 33, §1056. See also *Obscure Maine Lost-Goods Law Turns Finders into Weepers*, *N.Y. Times*, Jan. 5, 1997, at 16 (reporting the complaint of a woman who objected to having to pay \$300 to the township in order to keep a gold necklace that she found that was worth \$600).

61 See *Favorite v. Miller*, 407 A.2d 974, 977-78 (Conn. 1978); *Bishop v. Ellsworth*, 234 N.E.2d 49 (Ill. App. Ct. 1968); *Barker v. Bates*, 23 Am. Dec. 678 (Mass. 1832); *Niederlehner v. Weatherley*, 54 N.E.2d 312, 315 (Ct. App. Ohio 1943); *Mitchell v. Oklahoma Cotton Growers' Ass'n*, 235 P. 597, 599 (Okla. 1925); *Morgan v. Wiser*, 711 S.W.2d 220, 222-23 (Tenn. Ct. App. 1985).

62 See *N.J. Stat. Ann.* §46:30C-4 (West 2003); *N.Y. Pers. Prop.* §256 (Consol. 1988).

63 See *Groover v. Tippins*, 179 S.E. 634 (Ga. Ct. App. 1935); *Hendle v. Stevens*, 586 N.E.2d 826 (Iowa App. Ct. 1992); *Gaither v. Jones*, WARREN, *supra* note 3, at 129-31 (2d ed. 1938) (Md. Balt. City Ct. 1935), aff'd per curiam by an equally divided court sub nom. *French v. McNabb*, 179 A.928 (Md. 1935); *Deaderick v. Oulds*, 5 S.W. 487 (Tenn. 1887).

ling for various technical reasons,⁶⁴ in a fourth case, *Hendle v. Stevens*, the court stated “we think the ... statement that a trespasser has no claim to possession of lost property is erroneous, as the finder of lost property has a right of possession superior to that of the owner of the premises where the article is found.”⁶⁵ This statement, however, can still be regarded as non-binding because the Hendle court in the end decided that the finders had not really trespassed after all.⁶⁶

A trespassing finder can prevail if the trespass is “technical or trivial.”⁶⁷ One court defined a “technical or trivial” trespass with the following hypothetical: Say that some youths, out hunting rabbits, find a wallet on the track bed of the Baltimore & Ohio Railroad. The youths should prevail even though they committed a “technical or trivial” trespass.⁶⁸

Employees frequently find lost property when acting in the course of their employment. The authority is badly split as to whether the employee gets the property, or whether it goes to the employer.⁶⁹ The explanation that fits the greatest number of cases is that if the employer has a heightened legal obligation (usually imposed by statute) to take care of customers’ property, the court will award the found item to the employer; otherwise the property found goes to the employee. Examples of employers who have a heightened legal obligation to take care of their customers’ property are hospitals vis-à-vis their patients,⁷⁰ common carriers vis-à-vis their passengers;⁷¹

64 Groover was not strictly a case about trespass, since the court stated that the lawsuit sounded in trover (property law), and not in trespass (tort law). See Groover, 179 S.E. at 636. In Gaither the court decided there was no trespass, or if there was indeed a trespass, it was only technical or trivial. See Gaither, WARREN, at 130-31. In Deaderick, the court did not specifically address the trespass question, although the court did state: “Lost property found on the premises of another may be rightfully retained by the finder as against the owner of the premises.” See Deaderick, 5 S.W., at 488.

65 *Hendle*, 586 N.E. at 832.

66 See *id.*

67 See *Favorite*, 407 A.2d at 977; Gaither, Warren, at 130-31. See also *Willsmore v. Township of Oceola*, 308 N.W.2d 796, 803 (Mich. Ct. App. 1981) (concluding that the finder did not commit a trespass, but would have prevailed anyway, since the finder’s trespass was “technical” at most).

68 Gaither, WARREN, at 130-31.

69 Compare *Kalyvakis v. the T.S.S. Olympia*, 181 F.Supp. 32, 37 (S.D.N.Y. 1960) (applying New York law) (stating that “the weight of American authority ... tends to reject any master-servant exception to the law of finders”), with *Ray v. Flower Hosp.*, 439 N.E.2d 942, 945 (Ohio Ct. App. 1981) (stating that “[i]n a long line of cases ... virtually every case has charged the employee with the duty to turn the found property over to the employer for safe-keeping”). This contradiction has been previously noted by Professor Helmholz. See R. H. HELMHOLZ, *Equitable Division and the Law of Finders*, 52 *Fordham L. Rev.* 313, 321 (1983).

70 See *Ray v. Flower Hosp.*, 439 N.E.2d 942 (Ohio Ct. App. 1981).

71 See *McDonald v. Ry. Express Agency, Inc.*, 81 S.E.2d 525 (Ga. Ct. App. 1954).

and hotels vis-à-vis their guests.⁷² In a hotel this rule applies in the private guest rooms,⁷³ but not in the public areas.⁷⁴ Thus if a hotel cleaner finds a lost item while cleaning out a guest room, it goes to the employer as a custodian for the true owner, but if the cleaner finds it while walking through the lobby of the hotel, the cleaner gets it if the item remains unclaimed.

Two special types of finders do not get rights in the property that they find. The first type of finder is police officers⁷⁵ and persons working in similar law enforcement occupations (the case on point involved a baggage examiner at an airport⁷⁶). The rationale is that police are also supposed to advertise for the true owner. If they have the chance of being awarded the trove as finder, they will have a conflict of interest,⁷⁷ and will not search for the true owner with proper diligence. Another rationale is that the police and baggage examiners are given the legal right to see things that most other people keep private. They intrude into people's private homes and luggage.⁷⁸ They thus have more chances to find valuables than the ordinary person, who can only hope to find the odd wallet in the street. If they have the chance of enriching themselves by finding property that they deem "lost," the conflict of interest may be too tempting for them. For this reason, too, they do not have a right to the property that they find.

The second special type of finder comprises members of the United States armed forces. This issue arose after Sergeant Donald Wayne Morrison and his platoon discovered \$300,000 in United States currency in a cave in the Vinh Thanh Mountains of the Central Highlands of Vietnam on July 31, 1968.⁷⁹ Here the rationale is simi-

⁷² See *Jackson v. Steinberg*, 200 P.2d 376 (Ore. 1948); *Flax v. Monticello Realty Co.*, 39 S.E.2d 308 (Va. 1946).

⁷³ See *id.*

⁷⁴ See *Hamaker v. Blanchard*, 35 Am. Rep. 664 (Pa. 1879). This distinction would also explain the award of the find to the hotel employees in the Peterson case, since those employees were wait staff in the hotel's restaurant (a public area), not cleaners of the private guest rooms. See *Peterson v. Diaz*, 379 So.2d 990 (Fla. Dist. Ct. App. 1980).

⁷⁵ See *Ariz. Rev. Stat.* §12-941; *Fla. Stat.* §705.104; *N.Y. Pers. Prop. Law* §256 (Consol. 1988); *Wash. Rev. Code* §63.21.070; *Wis. Stat.* §170.105; *In re Funds in the Possession of Conemaugh Township Supervisors*, 724 A.2d 990 (Pa. Commw. Ct. 1999); *Pennsylvania v. \$7,000.00 in U.S. Currency*, 742 A.2d 711 (Pa. Commw. Ct. 1999).

⁷⁶ See *Farrare v. City of Pasco*, 843 P.2d 1082 (Wash. Ct. App. 1992).

⁷⁷ Cf. *Conemaugh Township*, 724 A.2d at 994 (stating that "[a]llowing police to claim property found" ... "creates an obvious conflict with [their] duties"); *\$7,000.00*, 742 A.2d at 713-14.

⁷⁸ Cf. *Farrare*, 843 P.2d at 1084 (observing that the luggage examiner "was employed to visually search closed luggage for illegal items and report them to an airport security officer. There is no evidence the terms of her employment gave the personal right to any property which she observed on the screen and reported to the authorities").

⁷⁹ See *Morrison v. United States*, 492 F.2d 1219 (Ct. Cl. 1974).

lar to the cases where the law of finds interacts with the law of larceny: If members of the armed forces can keep lost property that they found, it will provide a safe harbor for looters. To avoid giving looters a free pass, lost property that is found by members of the United States armed forces vests in the United States government. The Morrison decision, however, specifically limits its holding to a combat situation.⁸⁰ The question of what are the rights of members of the armed forces who find treasure when they are not in a combat situation, or even when they are not on duty, has yet to be determined.

Certain special loci can change the result. These special loci are banks, government land, and Indian graves.

Many of the finds of lost currency and other valuable items are made in banks, often in safe deposit areas. Here the general practice of the courts has been to award the find not to the finder, but to the locus owner, here, the bank.⁸¹ In most cases there is no special bond between the true owner and either the locus owner or the finder. In this case, however, the true owner is more likely than not a customer of the bank, and thus there is a fiduciary relationship between the bank and the true owner. The bank has a fiduciary duty to try to reunite the true owner with the lost property. It is better to award custody of the find to someone who has that fiduciary duty (the bank), than to someone who has no such duty (the finder). The bank also has access to information that the finder does not, namely a list of its customers and records of who entered the safe deposit area.

Another special locus is government land. The Antiquities Act of 1906 sought to stop the despoliation of archaeological artifacts from Federal and Indian tribal land.⁸² The Antiquities Act was struck down in 1974 because the term “antiquity” was unconstitutionally vague.⁸³ It was replaced by the Archaeological Resources Protection Act of 1979 (ARPA), which applies to all archaeological resources that are more than one hundred years old.⁸⁴ ARPA, however, does not apply to finds of coins that are less than one hundred years old.⁸⁵ Thus when the Federal government seized brass lumber company scrip that was about 50 to 100 years old, which Billy Ray Shivers found in the Angelina National Forest with a metal detector, ARPA did not apply. Instead, the Shivers court held that the common law of finds applied; that

80 See *id.* at 1227.

81 See, e.g., *Dennis v. Nw. Nat'l Bank*, 81 N.W.2d 254 (Minn. 1957); *Foster v. Fid. Safe Deposit Co.*, 145 S.W. 139 (Mo. Ct. App. 1912).

82 See 16 U.S.C. §§431-33 (2000).

83 See *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

84 See 16 U.S.C. §§470aa-470mm (2000).

85 See 16 U.S.C. §470kk(b)(2000) (declaring that “[n]othing in this chapter applies to, or requires a permit for, the collection for private purposes of any ... coin ... which is not an archaeological resource”).

the lumber company scrip was property embedded in the land; and that as embedded property it went to the locus owner, here, the Federal government.⁸⁶

However, the case upon which the Shivers court relied as precedent for this interpretation of Federal common law, *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, also stated that treasure trove, namely, gold and silver coins and their paper representatives, was not embedded property.⁸⁷ Because of this complex legal background, it remains theoretically possible that a finder of gold or silver coins less than one hundred years old on Federal or Indian tribal land could claim those coins on the basis of treasure trove. There is, however, a clear public policy of the Federal government that private individuals should not be able to despoil archaeological resources of any type from Federal or Indian tribal land. Given this strong preference of the Federal government, it seems unlikely that a finder of gold or silver coins on Federal land would end up prevailing with a treasure trove argument. After all, a Federal court could adopt the Tennessee rule under which treasure trove is considered embedded property, and thus is the property of the locus owner, i.e., the Federal or an Indian tribal government.

Likewise, state governments explicitly reserve to themselves the right to historic or archaeological resources found on state lands.⁸⁸

Another type of find, grave goods found in the graves of Indians, also receives special treatment: These go to the Indian tribe that is most closely related to the buried individual. The Native American Graves Protection and Repatriation Act (NAGPRA) seeks to end the desecration of Indian graves and Indian human remains.⁸⁹ Under NAGPRA, grave goods from Indian burials discovered on Federal or tribal land after the law was enacted (November 16, 1990) are the property of the tribe that is most closely related to the buried individual, and must be turned over to that tribe.⁹⁰ Museums that receive Federal funds that have grave goods in their collections must return these goods to Indian tribes when demanded by the tribe.⁹¹ Some of the most valuable numismatic objects discovered in the United States are Indian Peace Medals. Indian Peace Medals are medals, usually made of silver, given to Indian chiefs to wear upon the conclusion of treaties as a mark of peace and friendship, first by the colonial powers of France, Great Britain and Spain, and latterly by the United States and Canada.⁹² The medal was often buried with the body

86 See *United States v. Shivers*, 96 F.3d 120, 123-24 (5th Cir. 1996), aff'g *In re Shivers*, 900 F.Supp. 60 (E.D. Tex. 1995).

87 See 568 F.Supp. 1562, 1566 and n.12 (S.D. Fla. 1981).

88 See *Gerstenblith*, *supra* note 8, at 596-97.

89 See 25 U.S.C. §§3001-13.

90 See *id.* at §3002.

91 See *id.*

92 See Alan M. STAHL, *American Indian Medals of the Colonial Period*, in *Money of Pre-Federal America* 159 (John M. KLEEBERG ed., 1991).

when the chief died. Insofar as these are discovered on Federal or tribal land, they must now be returned to the Indian tribes. Indian Peace Medals in museums that receive Federal funding must be inventoried; if a tribe demands the object, it must be returned.

The United States Federal government levies a tax upon income. Treasure trove is considered income for income tax purposes. This income tax is payable at the rate of ordinary income, not at the more favorable capital gains rate. According to the Treasury Regulation concerning treasure trove, “[t]reasure trove, to the extent of its value in United States currency, constitutes gross income for the taxable year in which it is reduced to undisputed possession.”⁹³

A further deciding principle behind the treasure trove cases is whether the litigants are acting in good faith. When three people (for example, two finders plus a locus owner) have a surplus of some \$30,000 to divide, they should not have to go to court in order to decide how to split it. When they do end up in court, something must have gone wrong. Someone must be acting in bad faith.⁹⁴ Upon re-reading the treasure cases, one can often identify one party who acts in bad faith, and the court almost invariably rules against that party. The language often refers to the good faith or bad faith of the parties.⁹⁵ Although treasure litigants cannot be certain of being awarded the find if they act in good faith, they will be more likely to prevail in court if they do so.

Commentators have proposed a number of changes to United States treasure trove law. Dean Leeanna Izuel proposed that treasure trove be awarded to the locus occupant to discourage trespassers,⁹⁶ and Professor Richard Cunningham has echoed her argument.⁹⁷ This suggestion ignores the point that the same purpose can be achieved by depriving only trespassing finders of their treasure trove. If all finders lose their rights to treasure trove, the finders, who are the ones who have the information that we need, will conceal this information from us, and coin hoards will go under-

93 *Treas. Reg.* §1.61-14 (as amended in 1993). The income tax law concerning treasure trove is discussed in *Cesarini v. United States*, 296 *F.Supp.* 3 (N.D. Ohio. 1969).

94 A good example is the treasure that led to the lawsuit *Corliss v. Wenner*. Compare Tad FRIEND, Letter from Sun Valley: The Gold Diggers, *New Yorker*, May 31, 1999, at 80, with *Corliss v. Wenner*, 34 P.3d 1100 (Idaho Ct. App. 2001).

95 See, e.g., *Campbell v. Cochran*, 416 A.2d 211, 225n.14 (Del. Super. Ct. 1980) (noting the “substantial evidence of bad faith” by the defendant, against whom the court ruled); *Walker v. West Hills Reg’l Police Dep’t*, 13 Pa. D. & C.3d 456, 459 (Pa. Ct. C. P. Cambria County 1980) (noting the “good faith and entire fairness of conduct” of two parties, in whose favor the court ruled). Cf. also HELMHOLZ, *supra* note 69, at 326-27 (1983) (enumerating instances where courts decide finders’ cases upon the good faith or lack thereof of the finder).

96 See IZUEL, *supra* note 8, at 1692.

97 See CUNNINGHAM, *supra* note 8.

ground. By depriving all finders of their rights, this proposal threatens to encourage even non-trespassing finders to trespass.

Professor Patty Gerstenblith has proposed a model law for all types of archaeological finds.⁹⁸ Like Izuel, she would give treasure trove to the locus owner, but subject to the public trust.⁹⁹ Under her model law, anyone who discovered archaeological resources by accident, say when digging a foundation for a building, would have to cease activity for at least thirty days while the state archaeologists examined the site.¹⁰⁰ Her proposal, although written with a commendable desire to preserve archaeological evidence, involves such an extensive intrusion into the rights of private landowners that it seems improbable that it can be enacted into law.

Professor Helmholz has proposed reducing the unnecessary litigation in finders' cases by using the equitable power of the courts to make an equitable division of the find between the locus occupant and the finder.¹⁰¹ This is a good solution, but Helmholz's proposal of a straight fifty-fifty split is too unfavorable to the finder to work. An example is provided by the case of Belgium. Belgium observes the civil law rule that a treasure found by chance on the land of another belongs half to the finder and half to the landowner. Johan van Heesch has observed that this has had the unfortunate result that finders lie about where they found the hoard, and always claim that it was found on their own land.¹⁰² Fifty-fifty, judging by the Belgian experience, is too unfavorable to the finder to work in practice.

This author would therefore propose that Helmholz's proposal for equitable division be adopted, but with a more favorable division to the finder – with most, ninety percent, going to the finder. The ten percent must go to the locus owner so that there is a disincentive to litigate. But how can the finder be persuaded to give up even that ten percent? An answer here may be given by the statutory schemes. These have the advantage for the finder who complies in that they give the finder full title, even against the true owner, when the true owner shows up too late.¹⁰³ But there should be a further incentive so that the finder will give up the ten percent to the locus occupant, and not just conceal the find. This incentive can be provided by the tax system. Finding a treasure trove can upset an honest person's tax situation. That person may wish to keep the treasure intact – after all, finding that treasure ranks

98 See GERSTENBLITH, *supra* note 8, at 673-88.

99 See *id.* at 680.

100 See *id.* at 677.

101 See HELMHOLZ, *supra*, note 69, at 322 (1983).

102 Johan VAN HEESCH, Belgian Laws Regarding Coin Finds, 43 *CIN, Compte Rendu* 82, 83 (1996).

103 See *Peterson v. Diaz*, 379 So.2d 990 (Fla. Dist. Ct. App. 1980) (per curiam); *Ho v. Rubin*, 756 A.2d 643 (N.J. Super. Ct. Ch. Div. 1999), *aff'd per curiam*, 756 A.2d 633 (N.J. Super. Ct. App. Div. 2000).

among the greatest experiences of that person's life – but the tax treatment will not allow it. The finder, who may have a yearly income of only \$30,000, suddenly has to pay tax on an income of double that sum. Finders should be allowed to use income averaging of their windfall. Just as the depreciation of most business property is allocated over a five year period, so should a treasure trove windfall not become taxable in its entirety in the year of finding, but 20% of its value should be taxable the first year, 20% the next year, and so on until year five, when the tax on the final 20% is paid. This added tax incentive, plus the chance of getting full title to the find, plus the chance of avoiding litigation with the locus occupant, should be enough to encourage finders to report their finds of treasure trove.

Treasure trove law in the United States may be summarized as follows:

(1) Treasure trove goes to the finder, unless the finder is trespassing. If the finder is trespassing, it goes to the locus owner.

(2) Treasure trove includes gold coins, silver coins, gold bullion, silver bullion, plus paper money; it must have “the thought of antiquity,” i.e. be several decades old. Courts have not yet decided whether treasure trove includes coins of base metals.

(3) Many finds of money are now handled not through the common law of treasure trove, but through statutory schemes, under which the money is deposited with the police for between ninety days and a year, and if the owner does not claim it by the end of that period, the money vests in the finder.

(4) Two states – Tennessee and Idaho – award treasure trove to the locus owner.

(5) Treasure trove is taxable at the ordinary income rate in the year that it is discovered.

(6) Employees get to keep what they find when acting in their course of employment, unless their employer has a heightened legal obligation towards the customers, in which case the property goes to the employer. Examples of employers with heightened legal obligations are hospitals vis-à-vis their patients, common carriers vis-à-vis their passengers, and hotels vis-à-vis their guests.

(7) Police officers, baggage inspectors, and members of the armed forces do not get to keep what they find when on duty.

(8) Finds in banks go to the bank; finds on government land go to the government.

(9) Finds in Indian graves on Federal or Indian land go to the Indian tribe that is most closely related to the decedent.