2. Dealing with Scottish Portable Antiquities - the Treasure Trove System

It is not merely the case that Scotland has its own system for dealing with portable antiquities, but rather that the system is also distinct from other systems that operate within the United Kingdom. This may seem a subtle distinction, but it is a significant one, as its operation can be frequently at variance with a wider public perception of how such systems should operate. The significance of this, and the effects it can have, will be dealt with fully below. Nevertheless it is the case that the process in Scotland follows procedures and principles that will be familiar elsewhere; that significant objects are considered part of the national cultural heritage rather than the property of the finder, and that the finder is rewarded or recognised for their role in the discovery of these objects.

Figure 2: Common detector finds, all post 1800. That many metal-detector users actively strive to find such objects may be surprising to many archaeologists, yet a finder might prize a Victorian army badge more than a Roman brooch. © Crown Copyright

The Scottish system for dealing with portable antiquities is based not on statute law but rather a wide-ranging principle of common law. (In the Scottish sense, this refers to law established through legal precedent or custom rather than enacted through statute or legislation.) The ability to preserve objects for the public benefit is rooted in the ancient legal principle of *bona vacantia* or ownerless goods, where any object whose original owner could not be ascertained fell to the Crown. These rights of ownership have in recent centuries lain with the state rather than the personage of the monarch. Archaic as all this may sound, it is the same principle by which the assets of those who die without will or heirs fall to the state, a fairly common practice in other jurisdictions. This law has been used to protect antiquities as far back as 1808, but it was only in the 20th century that it began to be used consistently for the public benefit by ensuring objects were preserved in Scottish museums. It should be noted at the outset that the law by no means trespasses on private rights of ownership; like a wallet or purse lost in the street, these artefacts simply do not belong to whoever finds them. That the Scottish system has come thus far without statutory legislation is perhaps a testament to the universality of the basic law. The unsuitability of the equivalent English law of treasure trove, with the attendant problems of divining the intentions of parties long dead through *animus revertendi*, was a direct encouragement to formulate the 1996 Treasure Act (Bland 2009). Yet in Scotland the wider principle of *bona vacantia* has meant that objects could be claimed as treasure trove regardless of what has been the bone of contention in similar laws; that is, whether the object was lost or hidden, and regardless too of the material from which it was made.

In archaeological terms, *bona vacantia* is not limited to objects of precious metal and allows objects made of stone or base metal to be claimed, a clear advantage when dealing with prehistoric artefacts. Nor is there a requirement that a find be over a certain age, and significant finds of relatively recent date can be claimed. In this sense the law avoids what is often a problem in statute law, that an artefact is defined as being older than a certain date, often an archaic definition of historical significance that can rapidly be outmoded by academic research. This advantage aside, it could be said that the Scottish system lacks the clarity in the public eye that statute law bestows.

Broad similarities aside, the system in Scotland can and does claim objects which in England or Wales would belong to the finder or landowner. This is not to imply the Scottish system is superior, but it is a complex distinction which, to many metal-detector users at least—many of whom also pursue their hobby in England—may seem inconsistent and illogical. It would be fair to observe that archaeologists from other jurisdictions often see the law in Scotland as superior, yet this is often based on a reflexive assumption that *all* objects are best placed in museums. Yet rather than operating on the basis that all objects must go to museums, the treasure trove system operates on a rationale that is specific to Scotland, and neither the archaeological rationale nor public benefits are readily transmissible to other jurisdictions.

The most significant influence on the Scottish system has been, like elsewhere, the increasing popularity of metal detecting, which effected a major change in how the treasure trove system operated. Although earlier metal detector discoveries were reported, it was not until the early 1990s that metal detector finds began to appear in regular numbers as treasure trove. At the same time, the treasure trove system was dealt with by existing staff at the National Museum of Antiquities of Scotland (now National Museums Scotland), a practice that went back to the 19th century. Given that the high point of metal detecting in the UK was in the late 1970s and early 1980s (Addyman 2009), it seems reasonable to speculate what opportunities were missed at this earlier date. In a position not too dissimilar to initiatives in England, it was often local museum curators rather than national authorities who took initial steps to make contact with metal detecting groups in their area. A case in point is staff at Fife Museums service, who worked consistently with local metal-detector users from the mid-1990s onwards, with the result that a steady stream of objects entered the treasure trove system. In what may be another echo of the problems elsewhere, this early approach was not without detractors among the local archaeological community, although these reservations never appear to have been committed to the page. This is an intriguing recurrence that will be examined below.

The increasing engagement with metal-detector users that took place in Scotland in the 1990s made an eloquent case for more resources and staff. It would be accurate to say that the growth of metal detecting in Scotland is largely responsible for the change from treasure trove being the part-time responsibility of one individual curator to there being a full-time unit to deal with finds made by members of the public. The challenges and intricacies of meeting this type of public need have been examined in detail elsewhere (Bland 2009), but whatever universal truths there may be, they point clearly to the need for specialised staff who deal only with chance finds of portable antiquities, and local museums who are able and willing to do likewise.

Yet it is also the case that heritage laws must reflect the particularities of a country, and what may work well in one jurisdiction may be far from a panacea elsewhere. To the layperson the difference between the English and Scottish systems might seem an intractable legal conundrum, a glaring disparity between two parts of the United Kingdom. Why should a commonly found type of artefact such as a bronze Roman brooch be claimed for the state in Scotland but not in England? Is one system incorrect or the other

too heavy handed? Should there be one UK-wide system in place in order to achieve parity? This apparent quandary can be resolved very easily; these differences reflect a very real distinction in the scope and nature of the archaeological record in Scotland, which remains surprisingly unacknowledged in much published work. Put simply, the archaeological record is different enough to mean that the potential for recovering topsoil finds by metal detecting is far more limited. This seems a statement of the obvious, yet is often unremarked; the modern Anglo-Scottish border also marks broadly the zone where an urbanised and heavily populated Roman province merged with a rural militarised zone. Scotland also lacked urbanised early medieval cultures, which make finds so prolific in southern England and Yorkshire. All of this means that many finds are sparser and thus more significant, the very reason that they are claimed and allocated to museums. The law is not being used to make a statement on an idealised position that all finds belong in a museum, but is applied to ensure the most appropriate solution for the artefact. Nevertheless, it does operate on the principle that museums are the appropriate repository for significant objects, rather than private hands. While this may seem an unremarkable statement it is perhaps not one that meets with universal agreement across the political spectrum.

The picture of metal detecting too is very different from the rest of the UK; at the time of writing, the author would suggest there are around 500 active metal-detector users in Scotland. Compared to the rest of the UK the figure is minuscule (Thomas 2012a). Nevertheless these differences have often been ignored or misinterpreted to suggest a significant level of under-reporting (Saville 2009, 95-6). With both less objects and less individuals seeking them this seems inherently contradictory, requiring a Stakhanovite application of leisure time to daunt even that legendary Soviet labourer. It does, however, reflect the real difficulty in quantifying what people actually find, and it is a common mistake to equate lack of reporting with wilful non-reporting of objects. In many cases the author has dealt with regular reporters of objects who have been active for years without finding anything that would be considered worthwhile in archaeological terms. There is perhaps a difficulty in accepting that much metal detecting goes on in spite of finding nothing, rather than because objects are found. The reasons and motivation for the hobby have been discussed in detail elsewhere (Thomas 2012a), and an excellent personal perspective is also included in this issue).

In itself, this is a useful distinction between the law per se, and the system that operates; if we ask people to submit only important finds we lack a real understanding of the true pattern of discovery and what else might be found, or not found, compounded by the risk that finders might misunderstand what 'important' means. The missing link here is, of course, the outreach and engagement that characterises any successful system. On paper at least, the Scottish law seems a broad and useful cultural heritage tool, allowing any object of archaeological significance to be claimed by the state for preservation in a museum. It is, of course, at this point where problems and challenges emerge as we move from the letter of the law to a real world where the law (or the purpose behind it) may be perceived in a different way by other groups with their own interests. This last sentence is by no means a euphemism for metal-detector users, but rather an emphasis that there are various aspects that can affect what might be viewed objectively as a simple archaeological discovery.

This is itself part of a larger issue - that a system must be seen to have legitimacy in the public eye, and be explicit as to the wider public benefits that it brings. This may seem an obvious point, but it is best not to assume that those outside the archaeological profession will automatically perceive this. The author is reminded of a conversation he had with an English antiquities and metal detector dealer who attended a metal detecting event in Scotland to sell his wares. It would be better, the dealer observed, if you had the

same law up here that we have where finders can keep their objects. He was unwilling to provide an answer to my obvious retort; better for whom? Yet much hinges on such reflexive assumptions, and it is worth expanding on this point. Who would benefit if finders in Scotland could keep their objects? Who benefits from the fact that they do not?

Perhaps any archaeologist should be able to grapple with that last question. But before they do so it might be wise to reflect that others might see the requirements of archaeology as conflicting with their own needs, which might appear equally valid. To many collectors or dealers, archaeologists might appear as just another interest group with no greater moral claim than any collector or hobbyist. It is a useful point at which to consider that an object can mean very different things to different people, and that some metal-detector users may not see museums as representing their interests. These are facts that would undoubtedly dismay many museums and archaeologists, and dissection of such an issue is complex at best. However, one simple observation may suffice; the period between the appearance of metal detecting and the willingness or ability of archaeologists to engage constructively with metal-detector users created a gap, which was readily filled by other groups. Foremost among them were coin and antiquities dealers and the proliferation of adverts in metal detecting magazines is a testament to the enduring influence this group has. In areas like Lincolnshire and East Anglia it is commonly the case that even that most prosaic of venues, the car-boot sale, have stands devoted to the sale of antiquities. A rudimentary search on eBay shows a similar picture; what archaeologists might see as primary research material has been thoroughly and of course legally commodified. This by itself is not an impediment, as for England and Wales the PAS database exists to give such material a durable presence. These are of course examples taken from England, yet as can be seen with the antiquities dealer encountered at the rally, the same cultural judgements that might see an object as a trinket or collectable can be found across the UK. Even when the principles they espouse are not valid in Scotland, they can affect how a finder might see or value an object.

Like it or not, there is a direct link between the antiquities market and current archaeological research. One example that shows how UK-wide perceptions can have an impact in Scotland is the common occurrence where a finder might not report an object such as a Bronze Age axehead because the low market value seems to suggest such finds are not important. To an archaeologist, the cultural or research value of an object and the price the market might put on the same are two different things, yet not to many finders or dealers. It is the case also that archaeology and the antiquities market are linked in unexpected and uncontrollable ways. The author would argue that there is a clear and empirical link, where archaeological research drives and informs the antiquities market, making certain objects desirable or valuable. In particular the market for Early Historic metalwork such as gilt mounts and brooches relies on current archaeological work to assess types and rarity. Equally, the growing archaeological awareness of many types of medieval object has been paralleled by their emergence on the antiquities market. Overall, metal detecting across the UK has brought new categories of objects to the attention of archaeologists while at the same time providing the knowledge both to create a market and whet consumers interests in these same objects. While much effort and angst has been concentrated on the issue of wilful non-reporting of finds, the experience of the author would suggest that these other perceptions acting on the finder have as much influence on whether an object is reported or not. A finder may perceive an object with low market value as unimportant, but they might also be influenced by wider cultural perceptions of their finds.

One example involves the finding of Roman objects in Scotland, where the author has dealt with a number of cases where an object has almost not been reported. The primary reason is that seeing so many Roman brooches appear in metal detecting magazines -

and on sale for low prices - the finders often do not think them important finds. Yet the very classification of an item as 'common' is more appropriate to the collector or saleroom than to archaeology.

To return to the antiquities dealer, who would benefit from his proposal? It would certainly benefit him and his clients, but it would also deprive Scottish museums, and the public that use them, of significant artefacts and objects. In effect, Scots law states that the public benefit outweighs any private benefits of mercantile profits or collectors' satisfaction. What the law does, then, is not prioritise archaeology and archaeologists, but rather uses archaeology to articulate a broader ideal of common cultural heritage over other, more individual interests. The author would argue that archaeology should have a priority, precisely because archaeology is not just another interest group. With the emphasis on interpretation and access, the goal is to work for a wider public benefit rather than a private one. To return to the ethics and morals of selling antiquities, the Scottish position is that it is wrong to do so precisely because it would harm this wider public benefit.

As the question of selling and owning artefacts will recur through this article and this special issue, it should be emphasised that this opposition is pragmatic, yet it is also the case that many archaeologists see the sale of objects in this way as a moral issue. To be clear, having moral qualms is in no way synonymous with objective archaeological reservations, and many archaeologists of the author's acquaintance are unclear about why, exactly, it is wrong to sell or own objects.

However, it would be arrogant to see this claimed benefit as a *carte blanche*, or to assume that others' goals and aims are mutually exclusive or opposed to this aim. Or indeed that those that have other views cannot be accommodated; in this journal Wayne G. Sayles provides a cogent and eloquent piece on his own motivations, which might be a useful corrective to many preconceptions.

In particular, it should be noted that some of those objects legally sold on eBay are those that have been through the Scottish system; in spite of the nature of the treasure trove system, one curious side-effect is a legal market in Scottish antiquities, mainly medieval coinage. Why this might be is also a useful way of examining what the value of artefacts actually is, and how different or conflicting values clash or come together. At the time of writing it is a requirement that all medieval Scottish coins should be reported for treasure trove purposes; however, the majority are returned after numismatic research and only a few significant specimens claimed for museum collections. For the remainder their findspots and coin type are recorded and this information has been a significant asset in understanding the use and distribution of coinage in medieval Scotland, and also how this changed over time (Bateson and Holmes 2003). These coins are then returned to the finder where they can be, and often are, sold on the antiquities market.

That reflects the case that it is often the information the object holds that is culturally significant rather than the object itself, and in the particular case of coinage, there is little purpose in filling museums with what are effectively identical specimens. On a pragmatic level, it is also true to say that the limited interpretative value of the coins would make their acquisition hard to justify, since the market value of the item far outstrips the cultural value of the object. This is a point which is perhaps not discussed enough, that the fiscal cost of acquiring an object might far exceed the cultural value it holds, a useful reminder that cultural worth and the often arbitrary whim of the marketplace are not so much competing forces but at wild variance.

The antiquities dealer at the rally has been cast very much in the role of a useful idiot, and it seems worthwhile to turn to him once again. If the Scottish system treated all finds like it does coins, by recording rather than keeping, would we see more finds? Again, with a

wider UK context this seems an inevitable question, yet the issue is rather more subtle than it appears. Firstly it assumes that all finders wish to keep their objects. That distinction, whether made by metal-detector users or archaeologists, assumes or implies that there is an absolute divide between the interests of a finder and the wider public interest, a judgement very much open to debate. It is an easy question to answer, however, since if this was the case we should certainly see more coins than objects, as finders might be confident of getting the former back. In reality this is not the case, and reported objects far outweigh reported coins. Comparing the different systems in place across the UK the author would argue that the problem of under-reporting exists whether or not an object is kept, and this together suggests that the question of whether finders report an object is not dependent on the letter of the law. Why a finder might or might not report a find seems to have little to do with whether they will get it back, but is part of a more complex situation that will be discussed below. It is a useful reminder that what succeeds is not just a law, but also a system that engages and communicates to finders, where aims and benefit are explicit, and not just seen to benefit archaeologists.

The treasure trove system is, then, tailor-made for the particular archaeological and social circumstances of Scotland, just as the system in England and in Wales meets those particular needs. Whatever the merits of comparative exercises between different jurisdictions (Karl 2011), it is also the case that there is no universal solution for dealing with portable antiquities and no universal parity of objects across countries and jurisdictions. Yet it is when these specific national factors meet popular concepts of what happens that confusion is caused among both metal-detector users and the wider public.
