

## PROPERTY SECTION 2

Professor Donahue

**Available for download:** January 9, 8:30 a.m.

**Due:** By 4:30 p.m., January 9

### EXAM, PART II

The exam mode for this exam is TAKEHOME.

This exam is 10 pages long. Please check to see that you have all 10 pages. (If you don't, try downloading it again; if that doesn't work, get in touch with [UserSupport@extegrity.com](mailto:UserSupport@extegrity.com).)

There is one essay question.

This is an open-book exam. You may use your casebook, your notes, and any other material that you wish (including material that is "online"). Collaboration is not permitted. Your answer must be entirely your own work. Please do not discuss these questions with anyone until 4:30 p.m. today.

There is no page or word limit, but conciseness will be rewarded and verbosity penalized. I won't tell you how to allocate your time, but I would strongly encourage you to spend at least an hour reading through the exam and making notes of issues that you see. I would also urge you to spend at least an hour at the end editing and proofreading your answers. Seven hours of non-stop writing can produce an impressive amount of paper, but the thought reflected is likely to be incoherent. Think before you write and edit what you write.

Once you have entered your exam in Exam4, copy what you wrote and paste it into a document using your word-processing program. This is the only way that you can save it, because once you send in the exam, it is available on your computer only in encrypted form.

The question contains the "Minnekota" antiquities statute (Appendix I) and the memorandum from Wikipedia on treasure trove ([http://en.wikipedia.org/wiki/Treasure\\_trove#United\\_States\\_law](http://en.wikipedia.org/wiki/Treasure_trove#United_States_law), Appendix II) that I distributed during the Christmas break. The text of these documents is unchanged from what I distributed previously.

The "background law" in the General Instructions applies to this part as well. If you don't have a copy of the General Instructions handy, you can find them at : [http://www.law.harvard.edu/courses/fall\\_08/property\\_2\\_donahue/Exam08Inst.doc](http://www.law.harvard.edu/courses/fall_08/property_2_donahue/Exam08Inst.doc).

Once you have turned in the exam you might want to read Longfellow's poem "A Skeleton in Armor" ([http://gateway.proquest.com.ezp-prod1.hul.harvard.edu/openurl?ctx\\_ver=Z39.88-2003&xri:pqil:res\\_ver=0.2&res\\_id=xri:lion-us&rft\\_id=xri:lion:ft:po:Z400194389:4](http://gateway.proquest.com.ezp-prod1.hul.harvard.edu/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:lion-us&rft_id=xri:lion:ft:po:Z400194389:4)) (you'll need your Harvard username and password) and read up on the fascinating story of the Kensington runestone ([http://en.wikipedia.org/wiki/Kensington\\_Runestone](http://en.wikipedia.org/wiki/Kensington_Runestone)). But don't do it now. It won't help you with the exam.

## PART II PROPERTY: SECTION 2

[The story on which this problem is based is the story of Kensington runestone, a slab of rock containing a runic inscription found near Kensington, Minnesota, in 1898. Runes are an alphabet that was used by Germanic peoples prior to their adoption of the Latin alphabet, and writing in runes is found in Scandinavia until quite late in the Middle Ages. The inscription on the Kensington runestone is dated in 1362. It is widely believed to be a fake, though there are some who argue for its authenticity. This story has then been combined with a poem by Henry Wadsworth Longfellow called “A Skeleton in Armor.” That poem was inspired by the belief that a stone tower in Newport, Rhode Island, was built by Vikings. Few today believe that. The tower, which still stands, is almost certainly the work of 17th century colonists. The problem, however, is entirely fictional, and you should not attempt to fill in facts with anything that you may happen to know about the Kensington runestone, Longfellow’s poem, or the stone tower in Newport. Similarly, the state of Minnekota is entirely fictional, and its laws are as described, and should not be filled in with anything that you happen know about the laws of Minnesota or of the Dakotas. I assume, however, that you have at least a rough idea of where those states are, and Minnekota is in the same place.

*Some advice:* The question is long (it contains the statute and memo already distributed), but the answer need not be. Virtually every fact given here could be used to create an “issue,” but many of those issues are not relevant to our client, or only marginally so. Also, and from a quite different point of view, everyone mentioned in the problem has a given name that begins with a different letter of the alphabet. You don’t have to spell out all these Scandinavian names.]

*Background.* In 1998, Olaf, a farmer of Norwegian descent, cut down an old poplar tree on the edge of a grove of such trees on his farm in Bensington, Minnekota, because he wanted to expand the field that lay close by. (No archaeological remains had ever been found in the area, and the area was not designated as an “archaeological landmark” under the Minnekota “antiquities” law.) As Olaf was digging up the stump of the tree, he found a smooth slab of stone tangled in the roots. The stone was covered with writing, which was clearly not in the Latin alphabet. The workman who was helping him thought the inscriptions might have been put there by the native people (Dakotas, perhaps, or Chippewas) who used to live in the area. Olaf took a picture of the slab, put it in his wood shed, and thought nothing more about it until about a year later Thorkell, one of Olaf’s neighbors, also of Norwegian descent, saw it and opined that the inscription was in Scandinavian runes, raising the obvious question of what was a runestone doing in the middle of Minnekota. That night the stone disappeared. Olaf suspected that Thorkell had taken it, but he had no proof (a number of other people had seen the stone), and Olaf let the matter drop.

In 2005, Olaf happened to see on television that Verner, a Norwegian collector of antiquities, had just acquired for very high price a remarkable runestone. It looked very much like the one that he had dug up on his farm seven years previously. Verner had transcribed the runes, which turned out to be skaldic poetry, the opening stanza of which might be translated as follows:<sup>1</sup>

I was a Viking old!  
My deeds, though manifold,

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<sup>1</sup> These are, in fact, verses 17–20 of Longfellow’s poem. In order to make the story plausible, we must assume that no such poem by Longfellow exists.

PROPERTY, SECTION 2, PART II, CONTINUED

No Skald in song has told,  
No Saga taught thee!

The poem then goes on to tell a wild tale of the consensual abduction of a young woman from her father, Hildebrand's, house. Pursued by Hildebrand on the open seas the Viking of the poem rams and sinks the father's ship and then flees to the west. They arrive at a place that looks as if it might be Greenland, but the people there do not want to receive them because they have heard of the death of Hildebrand and fear that his kin will take vengeance on him. The Viking, with about twenty men, heads again to the west, enters what seems to be a huge bay, follows the long course of a river at the south end of the bay, and after a short portage through a gap, finds another river. They pursue that river for some miles until they reach fertile ground. The young woman dies in childbirth, the child also dies, and the poem is written as the author is contemplating suicide.

It is just possible that this is a true story. With some difficulty, it is possible to reach Minnekota by water from Hudson's Bay, and the portage described in the poem seems to describe what is now known as Traverse Gap, which divides the waters that flow north into the Arctic Ocean and those that flow south either into the Gulf of Mexico or the Atlantic. Not only that, the Icelandic sagas recall a continental chieftain named Hildebrand, whose ship was sunk while he was pursuing a man who had abducted his daughter. Another Icelandic story mentions a famous skald (the type of poet who composes skaldic verses), named Snorri, who fled to the west under mysterious circumstances, though nothing in this story connects it with the Hildebrand story. Indeed, Uwe, a modern Icelandic scholar has a genealogy that purports to describe one of his ancestors as the brother of Snorri. None of these stories can be precisely dated, but they all could be contemporary with each other, and probably quite late in the tradition, say, mid-to-late 12th century.

Verner's find was greeted with some skepticism by the scholarly community. The provenance of the stone was not known. Verner had bought it in 2000 from a not particularly respectable dealer in antiquities in Paris. He, in turn, said that he got it from "an American," but he could not recall the man's name. The dealer had advertised it in his catalogues as "90 kilogram (200 lbs.) stone of uncertain provenance possibly containing runic inscriptions." Olaf decided that it was worth a trip to the Scandinavian department of the University of Minnesota, and the specialists there are convinced that the picture that he has of the stone he dug up is, in fact, a picture of the runestone that has just come to light. In January of 2007 (there's not much else to do in Minnesota in January) Olaf notified Verner that the stone was "his." He received no response.

Publication of the identification by the Scandinavian department produced a flurry of scholarly activity. Specialists in runic inscriptions pronounced that if these letters are fakes, they are the best fakes that they have ever seen of mid-twelfth-century runes. Specialists in epigraphy opined that wear marks on the carvings suggest that the stone was inscribed at least 250 years ago (when no one in Minnesota who knew how to carve runes), and it is probably more than 500 years old. The literary and linguistic experts provided the clearest evidence: Skaldic poetry is written in Old Norse, the ancestor of modern Icelandic and Norwegian. On the Continent, the language had mutated into the medieval versions of Norwegian by the twelfth century, but it was still a literary language in Iceland, and the language of the poem tracks in all respects what we know of Icelandic Old Norse. Skaldic verse has a complicated rhythmic pattern and makes use of a number of literary conventions that are very hard to fake. Not only does this poem bear all the hallmarks of skaldic verse of the twelfth century (with no anachronisms in either direction), but it's a very good example (admittedly a more subjective judgment) of this kind of verse.

PROPERTY, SECTION 2, PART II, CONTINUED

*Enter the Lawyers.* Olaf wants “his” runestone back. He’s not particularly interested in keeping it, but Verner paid \$100,000 for it, and now that it has been authenticated, it would probably fetch ten times that amount if put up to auction. Late in 2008, Olaf goes to see SP, the senior partner of your law firm, who asks what he has to back up his title to the property on which the stone was found. It turns out that the poplar grove was a relatively recent acquisition. Olaf bought it from the town of Bensington in 1995. Prior to that time, the title had been disputed between Olaf and Per and Rikard, two of his neighbors, although the dispute was not serious. None of them was particularly interested in seeing that the land be anything but a poplar grove. What finally brought matters to a head was that the town of Bensington was looking for more tax revenue, and it discovered that no one had been paying taxes on the grove. A series of description errors in deeds had left the title to the grove in a family named Johanson who had given up farming and moved west. The Johansons had not been paying taxes on the grove, and the descriptions of Olaf’s, Per’s, and Rikard’s properties (on which they had been paying taxes) did not include the grove. Olaf, Per, and Rikard had asked a lawyer if any of them might have a claim to the property on the basis of adverse possession. He advised them that they did not, and so the town foreclosed its tax lien on the property and took possession. After an auction on the property failed, the town sold it to Olaf for a low price, because neither Per nor Rikard was interested in buying it.<sup>2</sup>

This story sounds plausible, but your senior partner was aware that one should not rely on a lay property owner’s description of the state of his title. He ordered a title search, and while it confirmed the basic story that Olaf told of the most recent transactions with the town, it revealed some additional complexities of possible relevance: Olaf’s family and those of Per and Rikard have been in the area since late in the 19th century. The title to their farms was originally acquired from the federal government by patent and is solid. The Johanson family’s farm bordered on the other three. When the Johansons decided to move west in 1961, they divided their farm into three parts, selling approximately a third each to Olaf’s father and the fathers of Per and Rikard. It was this series of transactions that left the poplar grove unaccounted for.

All three deeds were signed by four people, Frans and his wife Kirsten, and Nissa and her husband Ingmar, all of whom were living on the property when it was sold. Frans and Nissa were the son and daughter, respectively, the only children of Borg Johanson, who died intestate in 1940. Borg was the son of Anders, a prosperous farmer who was the original patentee of the Johanson farm. Anders died testate in 1910. His will, which you may assume was proper in form, read, in relevant parts, as follows: “I devise and bequeath to my first-born son Borg the farm [adequately described] for his life, with a remainder to his first-born son for his life, with remainder to his first-born son for his life, with remainder to his first-born son for his life, with remainder in fee to his first-born son when he reaches the age of 25. If any of the life-tenants mentioned does not have a son living at the time that the son is to take the property, I devise the property to the life-tenant’s first-born daughter for life, with remainders to follow as above. If any of the life-tenants mentioned has neither a son nor a daughter living at the time he or she is to take the property, I devise the property to my residuary legatees or if they be dead, to their issue.” The residuary legatees were Anders’s only children Borg, Erika, and Davin. Erika and Davin were also devised other farmland, but none of that land is relevant to this case. The will

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<sup>2</sup> The process is usually more complicated than this. I’m imagining a situation in which there was no sale of the tax lien and where the attempt to sell a tax deed at auction resulted in no bidders because the property wasn’t worth what the back taxes were. Hence, the town had the property in its portfolio and was forced to sell it to the highest bidder without regard to amount of back taxes.

PROPERTY, SECTION 2, PART II, CONTINUED

reserved from the devise the right to cut down trees older than 10 years on the lands devised and to take the timber from them. This right was devised to Borg, Erika, and Davin. No one challenged the will, and it was duly admitted to probate and recorded.

Frans died in California in 1991 at the age of 82, intestate, bankrupt, and childless. Kirsten is still alive. Nissa and Ingmar, who were also childless, divorced in Oregon in 1972 and died there in 1994. Nissa left her entire estate to her second husband Jakob; Ingmar left his entire estate to his second wife Mia. Both wills are unimpeachable, and both devisees are still alive. Numerous descendants of Erika and Davin are alive and living in Minnekota. None of these people had actual notice of the tax sale and none was personally notified. Whether the methods that the town of Bensington uses for notification by publication are legally adequate is at least questionable.

SP calls you into his office and outlines the story. Somewhat diffidently you ask, “Are you sure that even if it turns out that Olaf owned the land on which the stone was found, that means that he owns the stone?” SP hesitates for a moment and then says, “No, I’m not.” “Obviously, we don’t have all the facts,” he continues, “but we’ve got enough that we ought to have a preliminary memo. You’d better start with the issue that you just raised. At the moment that the stone was dug up, who owned it? Assuming that one of the possible claimants to the stone is the owner of the land, who owned the land? If title to the land was divided in some sort of way, who owned what pieces? The more claimants we have, the more problems we’ll have settling this case. Then, who owns the stone now? In this last case you can assume that Norwegian law on the topic is the same as Minnekota law. It isn’t, but to the extent that it’s applicable, it’s probably close enough that it’s not a waste of time to outline the result under Minnekota law. The one thing that you can’t assume is that Norway’s ‘antiquities’ statute is the same as ours. It’s broader, and applies to all ‘artifacts’, whether found on private land or public. You can also assume away all the procedural difficulties that we’re going to have bringing an action in Norway, if it comes to that. Finally, you need not say anything about the validity of the notice given for the tax sale. It may be valid, and it may not be. I need to know the results under both possibilities.”

“A few years ago,” SP continues, “an employee of one of our corporate clients found a cash box containing about \$10,000 hidden above the ceiling in the basement of one of our client’s buildings. The building was almost a century old, and the police, who were called in, suspected on the basis of the serial numbers on the notes, that the money was connected with organized crime in our capital city of St. Peter’s in the 1930’s. We had a summer associate do a general memorandum on the topic of treasure trove in US [attached as Appendix II]. He wasn’t the best summer associate that we have ever had, and some of the details may be wrong, but the basic principles seem to be right, though they may not be relevant. Our treasure trove case never came to litigation. Though there is no statute in our state requiring this, the police advertised the find for a year, and when no one appeared to claim the money, our client and the employee agreed to split it in an arrangement that was satisfactory to both parties.”

As you are leaving the office, SP adds, “Oh, by the way, you may know that because of the brouhaha about the runestone, a number of legislators have introduced a bill in the Minnekota legislature to amend our ‘antiquities’ law by eliminating the distinction that that law draws between state-owned lands and privately-owned lands, thus making all land in the state subject to the provisions that govern state-owned lands. There are obviously a lot of details to be worked out. No one is suggesting that privately-owned land that contains an archaeological site can’t be sold. As you know, we represent the Minnekota Farmers’ Union on legislative matters, and they want us to oppose the bill. I think it may have constitutional problems, but I can also see how the legislature might draft its way around potential constitutional problems. Hence, I want you to

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outline for me not only the constitutional issues that such legislation might pose but also any policy arguments that you can think of against such legislation.”

“And did I tell you?,” SP adds at the end, “I need the memo by 4:30 this afternoon.”

Write the memo.

In addition to the statutory assumptions that are common to the entire exam (see General Instructions) Minnesota has the following statutes:

- (1) A twenty-year statute of limitations on actions to recover real property (1858 [when Minnesota became a state]).
- (2) A six-year statute of limitations on actions to recover personal property (1858).
- (3) A race-notice recording statute. (1858)
- (4) An “antiquities” statute (1967), the current text of which is attached as Appendix I and which you can assume was the text in effect as of 1998.
- (5) An intestacy statute, most recently amended in 1990, which provides that property of an intestate decedent, passes one-third to his/her surviving spouse and two-thirds to his/her children as tenants in common, if more than one survives, one-half if only one child survives. The property of an intestate who is not survived by his or her spouse goes to his or her surviving children as tenants in common. If there is a surviving spouse but no surviving children, the property is divided one-half to the surviving spouse and one-half to the intestate’s next of kin.

There are no other relevant statutes. In particular, the state has no “finder’s” statute. No state case law is directly relevant to the issues in this case. Authority on actions to recover personal property is skimpy. The state does not differentiate sharply between real and personal property and abandoned long ago the peculiarities associated with the common-law action of replevin (e.g., those that are evident some states, such as New York [see DKM3, pp. 94–9]). As a general matter, the state has taken a middle-of-the road course both in the private law of property and in the public law. Quotations from the most recent *Restatements of Property* are frequently found in opinions of the Minnesota Supreme Court, but the court has as not yet taken not position on whether it will follow the *Restatement Third* on servitudes or the *Restatement Second* on perpetuities. The court’s attitude toward “regulatory takings” is neither as permissive as that of the California courts nor as restrictive as the courts in New York sometimes are.

[APPENDIX I]

[The Minnesota “antiquities” law, MNKStats. §§ 13-6-301 to 13-6-307]

§ 13-6-301. Rights reserved

- (a)(1) The State of Minnesota reserves to itself the exclusive right and privilege of field archeology on sites owned or controlled by the state, its agencies, departments, and institutions, in order to protect and preserve archeological and scientific information, matter, and objects.
- (2) All information and objects deriving from state lands shall be utilized solely for scientific or public educational purposes and shall remain the property of the state.
- (b)(1) It is a declaration and statement of legislative intent that field archeology on privately owned lands should be discouraged except in accordance with both the provisions and spirit of this subchapter.
- (2) Persons having knowledge of the location of archeological sites are encouraged to communicate the information to the Minnesota Archeological Survey.

§ 13-6-302. Definitions

As used in this subchapter:

(1)(A)(i) “Archeological site” means a location containing the physical remains of human life or human activities that are no less than one hundred (100) years old.

(ii) An archeological site may but need not contain pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, rock paintings, graves, and human skeletal remains.

(B) “Archeological site” includes all aboriginal mounds, forts, earthworks, village locations, burial grounds, historic or prehistoric ruins, mines, or caves that are or may be the source of a significant amount of artifacts;

(2) “Artifact” means a relic, specimen, or object of an historical, prehistorical, archeological, or anthropological nature that:

(A) May be found above or below the surface of the earth; and

(B) Has scientific or historic value as an object of antiquity, as an aboriginal relic, or as an archeological specimen; and

(3) “Field archeology” means the study of the traces of human culture at any land or water site by means of surveying, digging, sampling, excavating, or removing subsurface objects or going on an archeological site with that intent.

§ 13-6-303. State and local cooperation

(a) All state agencies, departments, institutions, and commissions, as well as all counties and municipalities, shall cooperate fully with the Minnekota Archeological Survey in the preservation, protection, excavation, and evaluation of artifacts and sites.

(b) To that end, where any site or artifacts may be found or discovered on property owned or controlled by the state or by any county or municipality, the agency, bureau, commission, governmental subdivision, or county or municipality, having control over or owning the property or preparing to excavate or perform work upon the property or currently performing work of any type upon the property is urged to notify the survey of the discovery and location of the site or artifacts.

(c) Any state or local entity shall cooperate to the fullest extent practicable with the survey to preserve and prevent the destruction of the site or artifacts and to allow the survey to assist in, and effect, the removal of artifacts by means designed to preserve and permit the study and evaluation of the artifacts.

(d) The provisions of this subchapter shall be made known to contractors by the state agencies doing the contracting.

§ 13-6-304. Sale of state lands

(a)(1) Upon written notice to the Commissioner of State Lands given by the Minnekota Archeological Survey, the Commissioner of State Lands shall reserve from sale any state lands, including lands forfeited to the state for nonpayment of taxes, on which sites or artifacts are located or may be found, as designated by the survey.

(2) However, the reservation of lands from sale may be confined to the actual location of the site or artifacts.

(b) When sites or artifacts have been explored, excavated, or otherwise examined to the extent desired by the survey, the survey shall then file with the Commissioner of State Lands a statement releasing the lands and permitting the sale of the lands.

§ 13-6-305. State archeological landmarks--Penalty for disturbing

(a)(1) An archeological site of significance to the scientific study or public representation of Minnekota’s aboriginal past may be publicly designated by the Minnekota Archeological Survey as a state archeological landmark.

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(2) However, no sites shall be so designated without the express written consent of the state agency having jurisdiction over the land in question or, if it is on privately owned land, of the owner thereof.

(b) When an archeological site has been designated as a state archeological landmark, excavation for the purpose of recovery or the recovery of one (1) or more artifacts from the state archeological landmark by a person other than the survey or its designated agent is a:

(1) Class D felony for the first offense and a Class C felony for a subsequent offense if the value of the artifacts excavated or recovered or the cost to restore or repair the damage to the archeological site is greater than one thousand dollars (\$1,000); or

(2) Class B misdemeanor for the first offense and a Class A misdemeanor for a subsequent offense if the value of the artifacts excavated or recovered or the cost to restore or repair the damage to the archeological site is one thousand dollars (\$1,000) or less.

(c) Once so designated, excavation for the purpose of recovery or the recovery of artifacts from such sites by persons other than the survey or its duly designated agents shall be a misdemeanor.

§ 13-6-306. Digging up or removing artifact without permission -- Penalty

(a)(1) It is unlawful for any person, natural or corporate, to knowingly dig up an artifact from the private land of the owner without first obtaining the owner's permission.

(2) A violation of subdivision (a)(1) of this section is a:

(A) Class D felony for the first offense and a Class C felony for a subsequent offense if the value of all artifacts dug up or the cost to restore or repair the owner's property is greater than one thousand dollars (\$1,000); or

(B) Class B misdemeanor for the first offense and a Class A misdemeanor for a subsequent offense if the value of all artifacts dug up or the cost to restore or repair the owner's property is one thousand dollars (\$1,000) or less.

(b)(1) It is unlawful for any person, natural or corporate, to knowingly remove an artifact from the private land of the owner without first obtaining the owner's permission.

(2) A violation of subdivision (b)(1) of this section is a Class C misdemeanor for the first offense and a Class B misdemeanor for a subsequent offense.

§ 13-6-307. Vandalism of archeological sites and artifacts -- Penalty

(a) In order that archeological sites and artifacts on state-owned or controlled land shall be protected for the benefit of the public, no person, natural or corporate, shall knowingly dig up and remove, write upon, carve upon, paint, deface, mutilate, destroy, or otherwise injure any artifact or archeological site.

(b) A violation of this section is a:

(1) Class D felony for the first offense and a Class C felony for a subsequent offense if the value of all artifacts dug up and removed or the cost to repair or restore the damage to the archeological site is greater than one thousand dollars (\$1,000); or

(2) Class B misdemeanor for the first offense and a Class A misdemeanor for a subsequent offense if the value of all artifacts dug up and removed or the cost to repair or restore the damage to the archeological site is one thousand dollars (\$1,000) or less.

[APPENDIX II]

*Memorandum*

To: SP

From: Summer Associate

RE: Treasure Trove in the United States

The law of treasure trove in the United States varies from state to state, but certain general



PROPERTY, SECTION 2, PART II, CONTINUED

conclusions may be drawn. To be treasure trove, an object must be of gold or silver.<sup>1</sup> Paper money is also deemed to be treasure trove since it represents gold or silver.<sup>2</sup> On the same reasoning, it might be imagined that coins and tokens in metals other than gold or silver are also included, but this has yet to be clearly established.<sup>3</sup> The object must be concealed for long enough so it is unlikely that the true owner will reappear to claim it.<sup>4</sup> The consensus appears to be that the object must be at least a few decades old.<sup>56</sup>

A majority of state courts, including those of Arkansas, Connecticut, Delaware, Georgia, Indiana, Iowa, Maine, Maryland, New York, Ohio, Oregon and Wisconsin, have ruled that the finder of treasure trove is entitled to it. The theory is that the English monarchs claim to treasure trove was based on a statutory enactment which replaced the finders original right. When this statute was not re-enacted in the United States after its independence, the right to treasure trove reverted to the finder.<sup>7</sup>

In Idaho<sup>8</sup> and Tennessee<sup>9</sup> courts have decided that treasure trove belongs to the owner of the place where it was found, the rationale being to avoid rewarding trespassers. In one Pennsylvania case,<sup>10</sup> a lower court ruled that the common law did not vest treasure trove in the finder but in the sovereign, and awarded a find of US\$92,800 cash to the state. However, this judgment was reversed by the Supreme Court of Pennsylvania on the basis that it had not yet been decided if the law of treasure trove was part of Pennsylvania law.<sup>11</sup> The Supreme Court deliberately refrained from deciding the issue.<sup>12</sup>

Finds of money and lost property are dealt with by other states through legislation. These statutes usually require finders to report their finds to the police and transfer to their custody the objects. The police then advertise the finds to try and locate their true owner. If the objects remain unclaimed for a specified period of time, title in them vests in the finders.<sup>13</sup> New Jersey vests buried or hidden property in the landowner,<sup>14</sup> Indiana in the county,<sup>15</sup> Vermont in the township,<sup>16</sup>

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<sup>1</sup> In *Favorite v. Miller* 407 A. 2d 974 (Connecticut, 1978), the court stated that the “strict definition” that limited treasure trove to gold and silver objects was “well-established” in US law.

<sup>2</sup> *Terry v. Lock* 37 S.W. 3d 202 at p. 206 (Arkansas, 2001).

<sup>3</sup> *Favorite v. Miller*, at p. 978 n. 2 (the court held it was unnecessary to decide the issue definitively).

<sup>4</sup> *Hill v. Schunk* 292 P. 2d 141 at p. 143 (Oregon, 1956).

<sup>5</sup> In *Terry v. Lock*, 11 years was held to be too little time, whereas in *Benjamin v. Lindner Aviation, Inc.* 534 N.W. 2d 400 at p. 407 (Iowa, 1995) and *Ritz v. Selma United Methodist Church* 467 N.W. 2d 266 at p. 269 (Iowa, 1991) the view was taken that periods of 35 and 59 years respectively might be sufficient.

<sup>6</sup> Kleeberg, John M., *Treasure Trove Law in the United States*, Numismatik.org – Texte und Materialien zur Numismatik [Texts and Materials about Numismatics], pp. 15–16, <http://www.muenzgeschichte.ch/downloads/laws-usa.pdf>, retrieved on 13 April 2008.

<sup>7</sup> William Blackstone; Wayne Morrison (ed.) (2001), *Blackstones Commentaries on the Laws of England*, 2, London: Cavendish, p. 296, ISBN 1859414826 (set) and James Kent (1873), Oliver Wendell Holmes, Jr., ed., *Commentaries on American Law*, 2 (12th ed.), Boston, Mass.: Cambridge [printed], pp. 357–358, cited in Kleeberg, p. 17.

<sup>8</sup> *Corliss v. Wenner* 34 P. 3d 1100 (Idaho C.A., 2001).

<sup>9</sup> *Morgan v. Wiser* 711 S.W. 2d 220 (Tennessee Court of Appeals, 1985).

<sup>10</sup> *In re Escheat of \$92,800* (Pennsylvania Court of Common Pleas, Philadelphia, 1948): see “Note, Treasure Trove – History and Development”, *Temple Law Quarterly* 22: 326 at pp. 339–341, 1948–1949.

<sup>11</sup> *In re Rogers* 62 A. 2d 900 at p. 903 (Philadelphia, 1949).

<sup>12</sup> Kleeberg, p. 18.

<sup>13</sup> See, for example, Alaska Statutes §12.36.045; California Civil Code §2050; New York Personal Property Law §254 (Consolidated, 1988); Wisconsin Statutes and Annotations §§170.07–11.

<sup>14</sup> New Jersey Statutes Annotated §46:30C-4.

<sup>15</sup> Indiana Code §32-34-8-9.

<sup>16</sup> Vermont Statutes Annotated, title 27, §1105.

PROPERTY, SECTION 2, PART II, CONTINUED

and Maine in the township and the finder equally.<sup>17</sup><sup>18</sup> In Louisiana, French codes have been followed, so half of a found object goes to the finder and the other half to the landowner.<sup>19</sup> The position in Puerto Rico, the laws of which are based on civil law, is similar.<sup>20</sup>

Finders who are trespassers generally lose all their rights to finds,<sup>21</sup> unless the trespass is regarded as “technical or trivial”.<sup>22</sup><sup>23</sup>

Where the finder is an employee, most cases hold that the find should be awarded to the employer if it has a heightened legal obligation to take care of its customers’ property, otherwise it should go to the employee.<sup>24</sup> A find occurring in a bank is generally awarded to the bank as the owner is likely to have been a bank customer and the bank has a fiduciary duty to try and reunite lost property with their owners.<sup>25</sup> For similar reasons, common carriers are preferred to passengers<sup>26</sup> and hotels to guests (but only where finds occur in guest rooms, not common areas).<sup>27</sup><sup>28</sup> The view has been taken that such a rule is suitable for recently misplaced objects as it provides the best chance for them to be reunited with their owners. However, it effectively delivers title of old artifacts to landowners, since the older an object is, the less likely it is that the original depositor will return to claim it. The rule is therefore of little or no relevance to objects of archaeological value.<sup>29</sup>

Due to the potential for a conflict of interest, police officers<sup>30</sup> and other persons working in law enforcement occupations,<sup>31</sup> and armed forces<sup>32</sup> are not entitled to finds in some states.<sup>33</sup>

By the Archaeological Resources Protection Act 1979, finds more than a hundred years old on government land belong to the government. There is analogous state legislation. Special rules also apply to grave goods from Indian burials discovered on Federal and tribal lands under the Native American Graves Protection and Repatriation Act<sup>34</sup> enacted on 16 November 1990.<sup>35</sup>

THE END

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<sup>17</sup> Maine Revised Statutes Annotated, title 33, §1056.

<sup>18</sup> Kleeberg, pp. 18–19.

<sup>19</sup> Kleeberg, p. 14.

<sup>20</sup> *Barker v. Bates* 23 Am. Dec. 678 (Massachusetts, 1832); *Mitchell v. Oklahoma Cotton Growers Assn* 235 P. 597 at p. 599 (Oklahoma, 1925); *Niederlehner v. Weatherley* 54 N.E. 2d 312 at p. 315 (Ohio C.A., 1943); *Bishop v. Ellsworth* 234 N.E. 2d 49 (Illinois C.A., 1968); *Favorite v. Miller*; *Morgan v. Wiser*, pp. 222–223.

<sup>21</sup> *Favorite*, p. 977

<sup>22</sup> Kleeberg, p. 19.

<sup>23</sup> See, for example, *Ray v. Flower Hospital* 439 N.E. 2d 942 (Ohio C.A., 1981).

<sup>24</sup> *Foster v. Fiduciary Safe Deposit Co.* 145 S.W. 139 (Missouri Court of Appeals, 1912); *Dennis v. Nw. National Bank* 81 N.W. 2d 254 (Minnesota, 1957).

<sup>25</sup> Kleeberg, pp. 22–23.

<sup>26</sup> *McDonald v. Railway Express Agency, Inc.* 81 S.E. 2d 525 (Georgia Court of Appeals, 1954).

<sup>27</sup> *Jackson v. Steinburg* 200 P. 2d 376 (Oregon, 1948); *Flax v. Monticello Realty Co.* 39 S.E. 2d 308 (Virginia, 1946).

<sup>28</sup> Kleeberg, pp. 20–22.

<sup>29</sup> Arizona Revised Statutes §12-941; Florida Statutes §705.104; New York Personal Property Law §256 (Consolidated, 1988); Washington Revised Code §63.21.070; Wisconsin Statutes and Annotations §170.105; *In re Funds in the Possession of Conemaugh Township Supervisors* 724 A. 2d 990 (Philadelphia Commw. Ct., 1999); *Pennsylvania v. \$7,000.00 in U.S. Currency* 742 A. 2d 711 (Philadelphia Commw. Ct., 1999).

<sup>30</sup> *Farrare v. City of Pasco* 843 P. 2d 1082 (Washington Court of Appeals, 1992) (baggage examiner in airport).

<sup>31</sup> *Morrison v. US* 492 F. 2d 1219 (Ct. Cl., 1974).

<sup>32</sup> Kleeberg, pp. 21–22.

<sup>33</sup> 16 United States Code §§470aa–mm (2000).

<sup>34</sup> 25 United States Code §§3001–3013 at §3002.

<sup>35</sup> Kleeberg, pp. 22–23.