'TRESPASSERS WILL BE PROSECUTED': A GUIDE FOR THE LAWFUL ARCHAEOLOGIST

Suzanne Bailey and Chris Scarre

Readers of this journal may be tempted to give only a cursory glance to this article as it appears to be not about archaeology but the law. If so, they would be making a mistake, for knowledge of the law is essential to the modern archaeologist who wants to ensure the preservation of sites and material and remain out in the field instead of sitting in some courtroom. A full survey would demand considerably more space than is here available, and the authors' aims, in this article, are limited to the following: first, to provide an introduction to those areas of law which may be of particular relevance to the archaeologist, and second, to present an outline of the recent ancient monuments legislation. Unless otherwise stated, all references in this paper are to the law of England and Wales.

Civil Liability

Trespass to Land:

Much of the archaeologist's raw material comes from the earth and it is probably not unreasonable to surmise that at any one time there will be an archaeologist somewhere wandering through a farmer's field searching for that elusive site. From the moment an archaeologist enters private property without permission the civil wrong of trespass to land is committed.

Trespass to land, and in this context land includes the subsoil, is a direct interference with another's land without lawful authority. It can take a number of different forms. Walking on land, digging a trench or dumping shovelfuls of dirt onto another's property during an excavation may all constitute a trespass. Proof that the archaeologist was unaware of trespassing, or mistakenly believed that no trespass was committed is irrelevant. Trespass to land does not require that damage actually be caused to the land, although it is unlikely that any legal action would be taken unless some damage was done or the continual wanderings of archaeologists had become a common and irksome occurrence.

One certain way to avoid any unnecessary confrontation and unwelcome consequences is to obtain prior permission (a 'licence') to go onto the land from the occupier. A distinction must be made between a licence granted gratuitously and a contractual licence. Under the former, the authorisation may be revoked at any time although the archaeologist must be given a reasonable time in which to remove equipment and leave the land. If the licence was contractual,

presumably because money was paid for it, termination will be a question as to what terms were agreed. This should be a consideration when the agreement is negotiated. A contractual licence can be revoked contrary to the terms of the agreement, but the licensor may then be liable for a breach of contract. If a contractual licence is granted for á limited period and for a definite purpose, it cannot be revoked until either that period has expired or the purpose has been accomplished. If an attempt is made to revoke such a licence, this can be blocked by obtaining an injunction.

Whatever the type of licence, the archaeologist will probably only have permission to do certain specified things. If the archaeologist goes beyond the scope of the licence -- for example, permission has been given for the archaeologist to walk a site and in addition a trench is dug -- that trench will represent a trespass. It is not a trespass to fail to restore land to its prior condition, subject to any agreement reached, apart from removing anything put on the land. Thus, if an archaeologist fails to fill up a trench there will be no liability in trespass, but there may be liability in negligence if anyone falls into it.

Some archaeologists have taken to the air. Those who enjoy hanging upside down in order to photograph evidence of ley lines while turning green will be pleased to know that in 1977 it was held that it was not a trespass to fly over land in order to take photographs (Bernstein of Leigh (Baron) v. Skyviews and General Ltd. (1977) 2 ALL E.R. 902). The Civil Aviation Act 1982 provides that no action will lie in trespass or nuisance if a plane is flying at a reasonable height over land, having regard to the weather and other circumstances.

Notwithstanding the above, the sign "trespassers will be prosecuted" is erroneous. Trespass, even into the Queen's bedchamber, is not a crime and there will be no 'prosecution'. If property is damaged during the trespass, however, such as by trampling crops, the archaeologist may face a charge of criminal damage.

Trespass to Goods:

Trespass to goods is the unlawful direct interference with goods which are in another's possession. In many ways this civil wrong is similar to trespass to land. It is actionable without any damage actually having been done to the goods and a mistaken belief that you have the right to interfere with the goods is not a valid defence. Its most common manifestation is simply taking goods, but it can include damaging goods or interfering with them by, for example, moving them about. Trespass to goods must be either intentional or negligent. It cannot be merely accidental. Thus, in one case a contractor was held not to be liable in trespass for damaging a cable during an excavation as it was held to have been purely an accident (National Coal Board v. J.E. Evans and Co. (Cardiff), Ltd. (1951) 2 All E.R. 310). This case carries a note of warning to the over-enthusiastic archaeologist: it is

always wise to check whether anything might be lying under where you propose to excavate. If you don't, the court may find that you acted negligently when you tunnelled into that water pipe and order that damages be paid for trespass and/or negligence. It is advisable to consider insuring against the possibility of such disasters occurring during an excavation.

Conversion:

Conversion and trespass to goods overlap to some extent. Conversion is the intentional dealing with goods in a way which is inconsistent with the rights of the person who either has possession of the goods or the immediate right to possession. Acts of conversion can take numerous forms. Taking goods and disposing of them is conversion as is destroying or altering them. A refusal to return goods which are lawfully and reasonably demanded is a form of conversion. Thus, the Greek Government may argue that the refusal of the British Museum to return the Elgin Marbles is a form of conversion. The British Government, on the other hand, in reply might argue that they have good title to the Marbles.

One aspect of conversion of particular relevance to the archaeologist concerns the finding of objects. The basic principle, subject to any contractual agreement or the law of treasure trove, is that a finder acquires a good title to any goods found as against all other claimants other than the rightful owner. This is subject, however, to the rule that the owner or occupier of land is entitled to any object found, whether aware the object was there or not, if that object was buried or attached to the land. Thus, when a buried prehistoric boat was discovered, it belonged to the occupier of the land and not to the finder (Elwes v. Brigg Gas Co. (1886, 33 Ch.D. 562)). In those circumstances if the finder retains the object, not only is the civil wrong of conversion committed, but also probably the crime of theft. A finder, however, will probably be able to keep any object if it was found lying on the land and unattached to it. Thus, for no explainable reason in law, there is a material difference between 'digging up' and 'picking up'.

Treasure Trove:

All objects made substantially of gold and silver which were hidden with the intention of recovery but were never recovered, and where no owner can be traced, are Treasure Trove and the property of the Crown (A-G of the Duchy of Lancaster v. G.E. Overton (Farms) Ltd. (1982) 1 All E.R. 524). Objects such as the Battersea Shield or the cauldron chain from the Sutton Hoo longship may be priceless but they would not qualify as Treasure Trove as they are not substantially made of gold and silver. The law regarding Treasure Trove is one of the oldest laws in England and dates back to the time of Edward the Confessor. It was originally a means of supplementing the Crown's income. Richard I, it may be recalled, met his death attempting to enforce a claim of Treasure Trove against an unruly Aquitainian baron.

It is for the coroner's court to determine whether an object is or is not Treasure Trove. If it is pronounced to be Treasure Trove, the modern practice is for the object to be offered to a national or regional museum, which will compensate the finder by paying the market value if the museum decides to keep it. This practice of compensation is intended to encourage disclosure of any finds made. Archaeologists are, however, justifiably dismayed to see the despoiler of ancient metalwork rewarded, often handsomely, in this way. The Council for British Archaeology has for the last few years advocated legislation to replace the ancient laws of Treasure Trove by provisions which take more account of the archaeological value of the find and the circumstances of the discovery.

Negligence:

In addition to being a state of mind relevant to the consideration as to whether any particular civil wrong has been committed, negligence also represents an independent area of civil liability. For an archaeologist to be held liable in negligence, it must be proved that a duty of care was owed to another person, and that the archaeologist fell below the standard of care which would be expected of a reasonably careful archaeologist doing that particular job at that particular time, with the result that damage to that person or that person's property was caused. Thus, a person who falls into an unfilled or badly secured trench may be able successfully to sue in negligence. The best advice is always to be adequately insured.

Criminal Liability

The same activity may lead to both criminal and civil liability. Thus, an act of conversion or trespass to goods may also constitute theft, handling stolen goods or criminal damage.

Theft (section 1 Theft Act 1968):

In law, theft is the dishonest appropriation of property belonging to another with the intention permanently to deprive the other of that property. A person appropriates goods by assuming the rights of an owner over them. This can be done simply by taking an object, such as a sheep's tooth, out of its plastic bag. In addition, the appropriation must be dishonest, and this is a question of fact. A person is not acting dishonestly if, for example, the defendant believed that consent would have been given for the appropriation. Further, a person will not be acting dishonestly by keeping property found in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

For property to be stolen it must belong to someone. Under the Theft Act 1968, property belongs to a person who has possession or

control over it, or any proprietary right or interest in it. Thus, an object buried under someone's land is that person's property. If property has been abandoned there can be no theft. Whether property has been abandoned is a question of fact. Any archaeologist who may be considering setting up a garbage project should note that a householder does not abandon goods when they are put in the dustbin, for it is intended that those goods should be under the control of the local authority.

There are no rights of ownership, it seems, in a human corpse and therefore, theoretically, a corpse cannot be stolen. But it may be that a person or institution will acquire a proprietary interest in a corpse if time and skill have been expended on it with the aim of preserving it for scientific purposes, as has been held in Australia. Further, if anything is attached to a corpse, such as a wrap, that can be stolen. However, it is an offence to remove any body, or the remains of any body, including cremated remains, from its place of burial without lawful authority (section 25 Burial Act 1857). The Home Office issues licences for this purpose.

Finally, to commit theft, there must be an intention permanently to deprive. If it can be shown that there was always an intention to return the object, there can be no conviction for theft although there might be other criminal liability.

Removal of Articles from Places Open to the Public (section 11 Theft Act 1968):

This offence was included in the Theft Act 1968 to provide for those situations when an object is removed but there is no intention to deprive permanently. It would cover, for example, the removal of an object from a museum so that a student could live with it for a while in order to absorb its 'atmosphere'. The Act provides that it is an offence, where the public have access to a building in order to view the building or part of it, or a collection or part of a collection housed in it, to remove from the building or its grounds, without lawful authority, any article or part of any article which is displayed or kept for display to the public either in the building or that part of the building or in its grounds. The maximum penalty is five years imprisonment.

Handling Stolen Goods (section 22 Theft Act 1968):

An archaeologist should always beware of an offer of a Roman funerary urn that just happened to 'fall off the back of a lorry', for in dealing with it the archaeologist may be handling stolen goods. The offence of handling stolen goods is widely defined. In law a person handles stolen goods if knowing or believing the goods to be stolen, that person dishonestly receives the goods or dishonestly undertakes or assists in their retention, removal, disposal or realisation or arranges to do so by or on behalf of another.

Criminal Damage (section 1 Criminal Damage Act 1971)

The archaeologist, whether in the field or working on material in the bowels of some museum, should be aware of the law regarding criminal damage. It is an offence, without lawful excuse, to destroy or damage property belonging to another intending to do so either intentionally or recklessly. Belief that consent was or would have been given for the damage or destruction is a valid defence.

Ancient Monuments Legislation

Since 1882, England, Scotland and Wales have had laws protecting ancient monuments even if this at first meant little more than a recognition that they should be protected (Chippindale 1983). The present law is contained in the Ancient Monuments and Archaeological Areas Act 1979, which in England is currently administered by the Department of the Environment.

Scheduled Monuments:

The Act provides for a schedule of ancient monuments to be maintained. The term 'monument' is given a wide definition in the Act and is capable of including a site only identifiable from the air by crop marks. Any monument may be added to the Schedule, literally overnight if necessary, if it appears to the Secretary of State for the Environment, or the Secretaries of State for Scotland or Wales, as appropriate, to be of national importance. The Ancient Monuments Board advises on whether a monument should be scheduled. Once scheduled a monument is protected from interference and help may be made available to maintain it. In 1982 there were some 12,700 scheduled monuments in England alone.

The Act assumes that no one, not even the owner, has the right to damage or destroy a scheduled monument. Any person wishing to carry out works affecting a scheduled monument must first obtain the written consent of the Secretary of State. It is an offence, punishable by a fine, to carry out work without scheduled monument consent or to act in breach of any conditions under which the consent was given. To find out whether a site is scheduled or being considered for scheduling, the Department of the Environment, the local planning authority or the county council should be contacted.

Areas of Archaeological Importance:

'Area of Archaeological Importance' is a completely new concept and is the direct result of the city centre development boom of the 1960s and early 1970s. The creation of such an area is the responsibility of the Secretary of State for the Environment or the Secretaries of State for Scotland or Wales, who act in consultation with local authorities and archaeologists.

Where an Area of Archaeological Importance has been designated, developers are automatically under a statutory obligation to allow a period of up to six months for archaeological work to take place before development of the site commences. Flexibility has been built into the Act's provisions allowing the maximum scope for voluntary agreements to be reached between developers and archaeologists. Whenever a satisfactory agreement is reached, a considerable part of the statutory framework need not apply and this could be of benefit to both parties. Areas of Archaeological Importance are intended principally for historic town and city centres. Eight areas should soon be in operation: in Berwick-on-Tweed, Canterbury, Chester, Colchester, Exeter, Hereford, Oxford and York.

Metal Detectors:

Whether or not the success of metal detecting is a measure of archaeology's failure, as asserted by Tony Gregory (1983), it is recognised by archaeologists as a potential disturbance to important and sensitive sites. The 1979 Ancient Monuments and Archaeological Areas Act specifically prohibits the use of metal detectors at Scheduled Monuments, in Areas of Archaeological Importance or at unscheduled monuments which are in the care of the Department of the Environment or a local authority, without written consent from the Department of the Environment. This protection is not entirely new since earlier legislation had provided penalties for persons damaging protected monuments, but low fines and infrequent success in prosecution had made a mockery of the law. The new Act is a distinct improvement and there have already been successful prosecutions under its provisions.

Historic Buildings:

Most archaeological sites are field monuments, but some are standing buildings such as houses, churches, mills and factories, and if these are still in occupation or use, they fall within the scope of planning laws, for which the local authority is primarily responsible, rather than under the 1979 Act. Individual buildings are given a measure of protection by 'listing'. If a building is listed, listed building consent is necessary before such a building can be altered or extended in a manner which would affect its character, or demolished.

Where there is a group of buildings of note, these may be included in a Conservation Area. This differs from an Area of Archaeological Importance in that the former is designed to promote the conservation of the buildings within an area, whereas the Area of Archaeological Importance is not for preservation but for the extraction of information before the area is developed.

The Historic Buildings and Monuments Commission

Under the National Heritage Act 1983 many of the duties and powers of the Secretary of State for the Environment concerning ancient monuments and historic buildings will be transferred, on the 1st April 1984, to the Historic Buildings and Monuments Commission for England. This Commission will be composed of archaeologists, architectural historians and conservationists as well as people experienced in tourism, commerce and finance. While the rationalisation which this represents must be welcomed, it is to be hoped that the tourism and commercial considerations do not operate at the expense of the archaeological and historical interests.

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Address: Suzanne Bailey,
Cambridgeshire College of Arts and Technology,
East Road,
Cambridge.

Chris Scarre,
Department of Archaeology,
Downing St.,
Cambridge CB2 3DZ.