PROPERTY OWNERS' CONSTRUCTIVE POSSESSION OF TREASURE TROVE: RETHINKING THE FINDERS KEEPERS RULE

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“We penetrated a small cavern. In the middle, there were two stacks of bricks. We took one of the bricks and scratched it with a pocketknife and it . . . was gold.”1

INTRODUCTION

Thirty-three years ago, while exploring the mountains at the White Sands Missile Range in New Mexico, Tom Berlett stumbled onto a tunnel secreted in Victorio Peak.2 Crawling on his stomach, he followed the tunnel’s path into the mountain and discovered caverns filled with ancient treasures. Since his discovery, the federal government and rival claimants have prevented Berlett from reclaiming the treasure.3 Berlett’s primary rivals are the descendents of “Doc” Noss, who claimed he was the first to discover the trove in the 1930s, but was unable to remove the treasures because the cave’s entrance collapsed.4

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3. Id.
4. Noss had been unable to remove the treasure because an attempt to widen the cave’s entrance had caused the tunnel to collapse. Id. at 2, col. 1; Hirshon, Going for the Gold, Boston Globe, Jan. 18, 1990, at 74, col. 1; Treasure Seekers Gain Capitol Hill
The public's interest in Berlett's discovery has been intense. Twenty-six different groups and individuals, including the federal government, an Apache tribe, and a group led by F. Lee Bailey, have attempted to excavate the treasure. The treasure's story has been described in a book, *One Hundred Tons of Gold*, and featured on the television programs "Unsolved Mysteries" and "60 Minutes." The sixty-year hunt should culminate in the summer of 1991, when some of the rival claimants return to Victorio Peak to try to unearth the treasure.

If successful, these treasure hunters may unearth items of great monetary, historical, and cultural importance. Various observers speculate the treasure could be the hidden horde of Mexican emperors, Apache raiders, Spanish conquistadors, stagecoach robbers, Aztec tribes, or Catholic missionaries. Noss and Berlett described the cavern's treasures as containing stacks of gold bars, silver, jewelry, Wells Fargo chests, gold armor, and wooden religious artifacts. If these descriptions are accurate, much is at stake in the legal disposition of the treasure.

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6. See Smith, *supra* note 2. These attempts were fruitless; no treasure was found despite diligent attempts to burrow into the mountain to discover the cavern. Abcarian, *supra* note 5, at E9, col. 1. Recent radar readings have discovered previously unknown caverns that match Noss' descriptions of the cave. *Id.* at E9, col. 2.


9. *60 Minutes* (CBS television series).

10. See Abcarian, *supra* note 5, at E9, col. 2; Smith, *supra* note 2.


Although few discoveries of treasure trove\(^\text{14}\) are this exotic, searches are frequent, and discoveries can have important legal and historical repercussions.\(^\text{15}\) Indeed, the Mormon religion began as a

\(^{14}\) The term "treasure trove" evolved from the Old French phrase "tresor trove," which meant found treasure. See G. Hill, *Treasure Trove in Law and Practice* I (1936) (explaining the antecedents of the word "treasure").

\(^{15}\) In the last thirty years, many finders have uncovered treasure trove. In Tennessee, finders discovered a cache of antebellum five dollar gold coins. See Morgan v. Wiser, 711 S.W.2d 220, 220–21 (Tenn. Ct. App. 1985). In Georgia, finders discovered 111 gold coins worth $30,000 to $40,000, hidden in a chimney hearth. Davison v. Strickland, 145 Ga. App. 420, 242–21, 243 S.E.2d 705, 707 (1978). Additionally, three small boys found $12,590 in a bottle embedded in a landfill in Illinois. Bishop v. Ellsworth, 91 Ill. App. 2d 386, 388, 234 N.E.2d 49, 50 (1968); see also Cesearini v. United States, 428 F.2d 812, 813 (6th Cir. 1970) (old currency found in a used piano); Ritz v. Selma United Methodist Church, 467 N.W. 2d 266 (Iowa 1991) ($24,548 found while razing a house).


Recently, many adventurers and salvagers have discovered the remains of ancient sunken ships. The law of finds may govern the disposition of items found within these ships if the ships are found in lands belonging to the United States. See Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985); Chance v. Certain Artifacts Found and Salvaged From the Nashville, 606 F. Supp. 801 (S.D. Ga. 1984), aff'd, 775 F.2d 302 (11th Cir. 1985). Admiralty and salvage laws govern the majority of sunken ship finds, however. Since the determinative issues governing the disposition of artifacts in salvage situations differ from those that control in the case of finds, see 78 C.J.S. Salvage § 4 (1952), this Comment will not address the admiralty and salvage issues that surround the discovery of sunken ships.

Similarly, this Comment makes no attempt to address the art law issues which may eventually come to play as the result of a find of treasure trove. This Comment's discussion is directed solely at proposing changes in American treasure trove law. This Comment does not, therefore, address the repercussions of the sale of stolen treasure trove that constitutes art, nor does it deal with export and import restrictions on art. For a discussion of these art law issues, see 2 F. Feldman, S. Weil & S. Biederman, *Art Law Rights and Liabilities of Creators and Collectors* 273–444 (1986) (discussing title disputes); S. Hodess, *Legal Rights in the Art and Collectors' World* (1986); B. Hollander, *The International Law of Art* 17–55 (1959) (analyzing the role of art in war); Note, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443 (1983) (discussing art law and theft). This Comment also does not address the restrictions on excavations of federal lands provided by the Antiquities Act of 1906, 16 U.S.C.A. § 431–33 (1983), or the Archaeological Resources Protection Act of 1979, 16 U.S.C.A. § 470aa–470ll (1983). *See generally* Murphy, *Pay Dirt*, *Atlantic Monthly*, Mar. 1991, at 26 (noting that federal, state, and municipal laws require that contract archaeologists examine proposed building sites, and describing some of the archeological discoveries that have resulted).
search for lost gold tablets. Treasure hunting is quite popular; many people regularly comb beaches, parks, and even private property with metal detectors. Trespassers often prowl around sites of abandoned outhouses and stills in search of treasure trove.

The “finders keepers” rule governing treasure trove rewards these trespassers by allowing them to keep the trove they find without reimbursing the owner of the land. The landowner has no rights to treasure trove discovered by a trespasser.

As more land is developed, and technology better enables treasure hunters to find hidden objects of value, discoveries may become more frequent. The law governing discoveries of treasure trove was created to meet the solvency needs of ancient monarchs and has little contemporary justification. By awarding the finder possession, current American law distributes these finds in an arbitrary manner, illogically ignoring similar laws treating trespassers' finds of mislaid, embedded, and abandoned property. Only a few courts have recognized this inconsistency, and rectified it by awarding pos-


18. The definition of treasure trove, which was formulated for the convenience of medieval monarchs, has remained essentially unchanged through the passage of time. See generally Krys, supra note 15 (describing the evolution of the treasure trove doctrine in England and in the United States).

19. When courts determine who is entitled to discovered property in the true owner's absence, they speak of awarding one person "possession" of the property. See, e.g., Campbell v. Cochran, 416 A.2d 211, 221-222 (Del. Super. Ct. 1980); Schley v. Couch, 155 Tex. 195, 198, 284 S.W.2d 333, 335 (1955). For consistency, this Comment will also use the term "possession" to indicate which claimant should be awarded title to the property. The question of possession is predicated on the assumption that the true owner, or the true owner's executor or heirs, cannot be found. If they can be found, they are entitled to keep their treasure trove.
session of treasure trove to the owner of the locus in quo on which it was found.21

Many commentators, while ignoring the problems of the treasure trove laws, have criticized the distinction between lost and mislaid property.22 Some have argued that courts should treat all discovered property as lost property.23 Others have defended the mislaid property category, emphasizing the public policies that the category serves.24 Despite these deficiencies, neither courts nor legislatures have indicated any interest in changing the existing system. Because such change is unlikely, this Comment will work within the established scheme to propose a solution for one of its most incongruous aspects—the treatment of treasure trove.25

20. The term “locus in quo,” translated from Latin, means “place in which.” State v. Green, 456 So. 2d 1309, 1310 n.5 (Fla. Dist. Ct. App. 1984). This Comment will use the term to refer to the place in which the treasure trove or other article is found. This Comment will also use the shortened term “locus,” and will often refer to the owner of the property in which the treasure trove or other property was found as the “locus owner.”


22. See Morton, Public Policy and the Finders Cases, 1 Wyo. L.J. 101, 109 (1947) (no satisfactory theoretical distinction exists between lost and mislaid items); Riesman, Possession and the Law of Finders, 52 Harv. L. Rev. 1105 1121 (1939) (the definitions of lost and mislaid property are contradictory and rely too heavily on antiquated theories of possession); Note, Personal Property—Finding Lost Goods—Rights of Finder and Owner of Locus in Quo in Lost and Mislaid Personal Property, 21 Minn. L. Rev. 191 (1936) (noting the practical problems of this distinction). Under the current law, property is classified as “lost” if its owner parts with it involuntarily. In contrast, the owner of mislaid property parts with possession of the property intentionally, but forgets where he put it.

This Comment does not attempt to suggest a change in the basic lost, mislaid, and embedded property laws. Instead, this Comment accepts the present laws governing these items, and works within them to analyze the problems of current treasure trove law. This Comment acknowledges that the confusion and possible theoretical inconsistencies within the laws governing lost, mislaid, and embedded property may have enhanced the inconsistencies inherent in courts' treatment of treasure trove.

23. See Morton, supra note 22, at 109 (suggesting that lost and mislaid property should not be treated differently); Riesman, supra note 22, at 117-25 (noting that the distinction between lost and mislaid property is outdated and unnecessary).

24. See Comment, Lost, Mislaid, and Abandoned Property, 8 Fordham L. Rev. 227 (1939) (advocating temporarily awarding possession to the locus owner in order to expedite the return of the property to the true owner); Note, supra note 22, at 201 (noting that courts should award property to the person most likely to facilitate its return to the true owner).

25. Indeed, this Comment's proposal to grant possession of treasure trove to the owner of the property on which it is found concurs with the theories of several commentators critical of the distinction between lost and mislaid property. These commentators believe that property rights should be divided between the finder and the locus owner. See, e.g., Helmholz, Equitable Division and the Law of Finders, 52 Fordham L. Rev.
The separate category of treasure trove should be abolished: courts should award the trove to the locus owner. Part I of this Comment traces the evolution of the common law definition and disposition of treasure trove. Part II examines other nations' treatment of treasure trove.26

Part III then examines the finders keepers approach, concluding that the rule leads to socially undesirable results. Section A evaluates the definition of treasure trove, and concludes that classifying discoveries as treasure trove builds artificial distinctions between treasure trove and similar finds of mislaid and embedded property. Section B critiques the finders keepers rule, and shows that courts' application of the rule to finds of treasure trove leads to incongruous results.

Finally, Part IV suggests a new rule that will solve the problems engendered by the finders keepers rule and the definition of treasure trove: recognizing and enforcing the property owners' constructive possession of all treasure trove found within the owner's property. Part IV notes that recognizing the locus owner's constructive possession of treasure trove will eliminate the ambiguities of the treasure trove definition by adopting the rule governing the factually and analytically similar category of mislaid property. Section A of Part IV shows that the proposed constructive possession rule would eliminate artificial distinctions between treasure trove and other embedded property. Section B argues that the constructive possession rule will discourage trespass by preventing trespassers from keeping treasure trove they discover. Finally, Section C provides an economic analysis of the constructive possession rule and concludes that it would be more efficient than the current finders keepers rule.

313 (1983); Comment, supra note 24. These commentators and this Comment agree that the locus owner should have rights in discovered treasure trove. As this Comment further explains, in the absence of high transaction costs, the parties will contractually resolve the exact division. The law should not impose an arbitrary division of rights to discovered property since the parties will reach a more efficient result by privately contracting.

26. This Comment makes no attempt to discuss exhaustively the laws governing treasure trove in other nations. Instead, it will evaluate some aspects of these rules to better illustrate the difficulties in the current American treatment of treasure trove.
I. AN OVERVIEW OF THE LAWS GOVERNING TREASURE TROVE AND OTHER DISCOVERED PROPERTY

A. General Characteristics of Treasure Trove

1. Treasure Trove Defined

Treasure trove has traditionally been defined as “any gold or silver, in coin or bullion, found concealed in the earth or in a house or other private place, but not lying on the ground, the owner of the treasure being unknown.”

Modern courts have expanded this traditional definition slightly by including paper money, the modern representative of gold and silver coin, and other gold and silver items. Courts continue to hold that other hidden valuables, including jewels and bronze, do not constitute treasure trove.

Generally, the property’s owner must be unknown and the property must be concealed for a discovery to constitute treasure trove. Once the true owner is discovered, the property is no longer treasure trove. Courts disagree, however, about the necessary duration of the trove’s concealment. Although no court has

29. Courts also consider gold and silver plate to constitute treasure trove. See, e.g., Morgan v. Wiser, 711 S.W.2d 220 (Tenn. Ct. App. 1985). Additionally, in his law dictionary, Bouvier included “whatever may constitute riches, such as vases, urns, statues, etc.,” as well as gold and silver, as treasure trove. J. Bouvier, Law Dictionary 745 (1890). Since Bouvier apparently included items not made of gold and silver in his definition of treasure trove, his opinion is contrary to the great weight of the authority on this subject.
30. Livermore v. White, 74 Me. 452, 456 (1883) (valuable leather hides concealed in vats for fifty years are not treasure trove); see also Favorite v. Miller, 176 Conn. 310, 316 n.2, 407 A.2d 974, 978 n.2 (1978) (lead statue head is not treasure trove); Goddard v. Winchell, 86 Iowa 71, 52 N.W. 1124 (1892) (aerolite is not treasure trove); Allred v. Biegel, 240 Mo. App. 818, 219 S.W.2d 665 (1949) (ancient Indian canoe is not treasure trove); Ferguson v. Ray, 44 Or. 557, 563, 77 P. 600, 601 (1904) (gold bearing quartz is not treasure trove since it is neither gold nor bullion). But see C.C.D.F. art. 875 (Mex.) (treasure trove includes jewelry and other precious objects).
32. Sovern v. Yoran, 16 Or. 269, 276, 20 P. 100, 104 (1888). The true owner’s right to recover the treasure trove from the finder continues from the time the trove is found until a statute of limitations period expires. Campbell v. Cochran, 416 A.2d 211, 222 (Del. Super. Ct. 1980).
33. All courts seem to require that the owner conceal the treasure trove for safe keeping. See Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634 (1935).

Courts do not require that treasure trove be concealed in the ground. For example, one court has classified paper money concealed in a ball of carpet rags as treasure trove;
stated a specific time period, most have required trove to have an “appearance of antiquity.” To fulfill this requirement, treasure trove must appear to have been concealed for so long that the true owner is probably dead or unknowable. Courts do not always adhere strictly to this requirement, however. In one instance, a court held that gold coins apparently bearing no signs of age fulfilled this antiquity requirement and constituted treasure trove.

2. Historical Background of the Treasure Trove Laws

Laws governing the discovery and disposition of treasure trove have existed since ancient times. The current American rule evolved from medieval English statutory and common law. These laws were framed to establish title to treasure left by the Romans

that court also noted that treasure trove could be concealed in bureaus, safes, and machinery. Zech v. Accola, 253 Wis. 80, 85, 33 N.W.2d 232, 235 (1948); see also Cesarini v. United States, 428 F.2d 812 (6th Cir. 1970) (categorizing currency found in a used piano as treasure trove).


35. A prior possessor is functionally equivalent to the true owner for purposes of this analysis.


37. Sovern v. Yoran, 16 Or. 269, 20 P. 100 (1888); see also Morgan v. Wiser, 711 S.W.2d 220 (Tenn. Ct. App. 1985) (twenty-year-old coins are treasure trove). But see Willsmore v. Oceola Township, 106 Mich. App. 671, 682, 308 N.W.2d 796, 801 (1981) (money is not treasure trove when the teller bands encircling it indicate that it could only have been buried for a few months); Hill v. South, 207 Or. 71, 74, 292 P.2d 141, 143 (1956) (hidden currency is not treasure trove since one piece was probably hidden less than one year before its discovery).

38. The laws governing treasure trove before the Romans’ statutory compilation are uncertain. Some historians have surmised from various Biblical references that treasure trove belonged to the locus owner in ancient times. See 1 H. GROT rius, ON WAR AND PEACE 400 (W. Whewell trans. 1853); Matthew 13:44 (the parable “[t]he kingdom of heaven is like a treasure hidden in a field, which a man found and covered up; then in his joy he goes and sells all that he has and buys that field,” implies that treasure belongs to the locus owner, not the finder, since the finder would otherwise have no reason to cover his find and buy the land). But see Krys, supra note 15, at 238 n.4 (examining these Biblical passages and concluding that the Bible does not indicate that any law controlled the disposition of discovered treasure). In contrast, historians have noted that Aristotle implies that the finder of treasure was awarded his find. See ARISTOTLE, POLITICS 143 (H. Apostle & L. Gerson trans. 1986) (discussing a disagreement between two brothers in Hestiaea about who was entitled to treasure found by their deceased father; since their father had possession of his find, it appears that the finders keepers rule applied to discoveries of treasure); Krys, supra note 15, at 238 n.4.

39. See generally Krys, supra note 15; Note, supra note 22.
driven from the British Isles. The Romans planned to hide their troves of gold and silver only temporarily, expecting a brief period of turmoil after which they would return to reclaim their treasures. Instead, the Romans were permanently ejected from Britain.

Although title to English treasure trove may have originally been awarded to the finder, the Crown quickly imposed its prerogative to discovered treasure trove. The disposition of treasure trove was mentioned as early as 1130 in the Leges Regis Edwardi, which codified the legal system established by Edward the Confessor. That law specified that the King kept all discovered gold treasure trove. If the trove was found on Church grounds, however, the King gave half of the discovered silver to the Church. Current British law awards all discovered gold and silver to the Crown.

41. Id. Similar burials occurred throughout Europe in times of turmoil. One South German burgher buried a hoard of treasure trove in 1634; with the hoard, he enclosed a poem stating he was burying his hoard because the Swedes were coming to his town to remove everything. Finders discovered his hoard in the beginning of this century. Kent, supra note 13, at 138.
42. See generally Greene, Treasure Trove, 125 SOLIC. J. 92 (1981) (providing an overview of various recent finds and cases); Kent, supra note 13 (describing various finds); Krys, supra note 15 (examining several finds).
43. See 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 263 (W. Lewis ed. 1898); 3 E. COKE, THE INSTITUTE OF THE LAWS OF ENGLAND 132 (1629); Doakes, Sawyer et al. v. Administrator of Injun Joe., 16 Mo. L. REV. 27, 31 (1951).
47. G. HILL, supra note 14, at 137; Comment, supra note 24, at 229 n.53.
48. See Emden, supra note 44, at 371; Krys, supra note 15, at 215; Palmer, supra note 44, at 179; Comment, supra note 24, at 229.

Currently, in England, treasure trove usually belongs to the Crown as a royal revenue. A franchisee is entitled to the trove if the sovereign has granted the right to treasure trove found on certain land as a franchise to a city or feudal entity. Greene, supra note 42; Kent, supra note 13, at 136–37. The Crown also loses possession if the true owner, or a descendent of the true owner, appears to claim the trove.

For an English court to classify a hoard as treasure trove, the hoard must meet several criteria. First, the found property must consist of gold or silver. A court may determine that an article made of an alloy of gold or silver and a base metal does not satisfy this condition. See Attorney Gen. of Lancaster v. G. E. Overton Farms Ltd., 3 All E.R. 503 (1980); Preece, Treasure Trove—Whether Crown’s Right to Treasure Trove Limited to Articles of Gold and Silver—Meaning of Silver Coins, CONV. & PROP. LAW. 385 (1981). Second, to qualify as treasure trove, an unknown person who intended to recover the property must have hidden it purposefully; property that the owner lost or
Historians believe the original purposes of the Crown prerogative were to gather riches for the Crown to use in minting coins and to impress the King's subjects with his sovereignty.\textsuperscript{49} As England abandoned does not constitute treasure trove. Thus, the famous Sutton Hoo Viking treasure, which was part of an ancient burial, was not treasure trove, since the true owner abandoned it rather than hiding it with an intent to reclaim it. Kent, supra note 13, at 147. Trove does not need to be hidden in the earth, since property can constitute treasure trove if the owner hid it in a house or other private place. See Greene, supra note 42.

When a finder reports a discovery of a potential treasure trove, a coroner's jury determines whether the discovered hoard constitutes treasure trove. See Kent, supra note 13, at 143; Krys, supra note 15, at 224–25. If the jury finds the hoard is treasure trove, the Crown is awarded possession. Because the Crown will usually compensate the finder with the entire value of her find, Krys, supra note 15, at 231, the finder is usually treated equivalently regardless of whether the find constitutes treasure trove.

The English appear to be growing dissatisfied with this definition of treasure trove. See, e.g., Emden, supra note 44, at 380–81; Kent, supra note 13, at 148; Palmer, supra note 44 at 183–87. A 1982 proposed Antiquities Act would have eliminated many of the traditional requirements of treasure trove and addressed many of the concerns of commentators who considered the current law to be outdated. See Emden, supra note 44, at 380–81; Palmer, supra note 44; Ruoff, Links with London, 56 AUSTL. L.J. 313, 315 (1982). This Act would have dispensed with courts' need to discover whether the true owner hid the treasure with the intent to retrieve it later. Also, the Act would have increased the coverage of treasure trove to include gold and silver alloys, objects lying adjacent to the treasure trove, and any class of object specified by statutory regulations. As a result, items not made of gold or silver, but of historical, artistic, and scientific importance, would also be considered treasure trove. Id. The Act failed to pass in the House of Commons, however, and was never enacted. Kent, supra note 13, at 148.

Historians' dependence on these rationales may be misplaced: the theories do not seem to explain adequately the origination of the limitation of treasure trove to gold and silver items. The medieval monarchs placed great importance on their prerogative as a means to exhibit their sovereignty and to alleviate their financial difficulties. Given this emphasis, it is incongruous that these kings did not also impose their prerogative on other discovered items of value that were not made of gold or silver, such as valuable hoards of discovered jewels or bronze. Like gold and silver, these items would have been very valuable. Although these items could not have been melted down to mint coins, they could have been sold for gold or silver that could then have been melted. Additionally, seizing these valuable items would have impressed the King's subjects with his majesty. Blackstone's mention of these reasons for the limitation seems as the earliest source of knowledge about the origination of the definition of treasure trove; perhaps historians have adopted his explanation for lack of a better theory.

Certainly, enforcing the Crown prerogative to treasure trove allowed the King to impress his subjects with his lordship; the law graphically illustrated that the King prevailed in important conflicts with his subjects. Kent, supra note 13, at 135. This right was very important to medieval English monarchs; Richard I died attempting to enforce his prerogative to treasure trove that he felt a subject had withheld from him. J. GILTINGHAM, THE LIFE AND TIMES OF RICHARD I 212–13 (1973) (Richard I died from complications of a crossbow wound to his left shoulder, incurred while he besieged the castle of a subject who would not relinquish discovered treasure trove); see L. CASE, TREASURE TROVE (1873) (providing a humorous look at the death of Richard I, in verse form); Kent, supra note 13, at 135. Because these monarchs highly valued their
became financially and politically stable, these justifications vanished. Nevertheless, the Crown continued to exercise its right to all discovered treasure.

This Crown prerogative was transplanted to the early laws of colonial America. After the United States gained independence from Britain, however, most states adopted a “finders keepers” rule to determine who was entitled to discovered treasure: the finder of the treasure trove was granted possession of the entire trove. Only New York perpetuated the remnants of the Crown prerogative by statutorily awarding to the State any discovered treasure. By the early nineteenth century, however, even New York had accepted the majority finders keepers approach.

Currently, different jurisdictions within the United States decide in different ways who properly possesses treasure trove. The majority of the American states follow the common law rule, classi-
fying hidden gold, silver, or paper money as treasure trove and awarding the finder possession. Several states apply this rule through statutory requirements. A few states refuse to recognize a separate category of treasure trove and instead treat treasure trove like lost property. Finally, several jurisdictions award at least some portion of the trove to the locus owner.

B. Related Law Governing the Disposition of Lost, Mislaid, Embedded, and Abandoned Property, and Property Discovered as a Result of a Trespass

The requirements that categorize discovered items as treasure trove differ from the rules governing lost, mislaid, abandoned, and embedded property, and from the laws governing property acquired as a result of a trespass. Property is considered legally "lost" if the owner parts with its possession involuntarily and has no knowledge of its location. Under the finders keepers rule, the claim of the


60. State v. Green, 456 So. 2d 1309 (Fla. Dist. Ct. App. 1984) (dicta stating the locus owner’s possessory interest in unclaimed treasure trove surpasses the finder’s); Bishop v. Ellsworth, 91 Ill. App. 2d 386, 234 N.E.2d 49 (1968) (locus owner’s claim to treasure trove is sufficient to state a claim for possession of possible treasure trove superior to the claim of the trespassing finder); Morgan v. Wiser, 711 S.W.2d 220 (Tenn. Ct. App. 1985) (recognizing the locus owner’s constructive possession of treasure trove); see also Schley v. Couch, 155 Tex. 195, 204–05, 284 S.W.2d 333, 338–39 (1955) (Calvert, J., concurring) (suggesting merging the laws governing treasure trove and property embedded within the soil, and awarding possession of both to the locus owner); id. at 206, 284 S.W.2d at 339–40 (Wilson, J. concurring) (advocating eliminating the distinctions between treasure trove, lost property, mislaid property, and awarding possession of all property in or on land to the locus owner).

61. Schley, 155 Tex. at 206, 284 S.W.2d at 339–40, see also Campbell v. Cochran, 416 A.2d 211, 221 (Del. Super. Ct. 1980) (noting that the owner of lost property usually loses possession of the property because of neglect, carelessness, or inadvertence).
finder of lost property supersedes all claims except those of a prior possessor or the true owner. For example, the money a finder discovered in a crevice between the exterior and lining of a safe would be lost property; the money was probably not left in the crevice intentionally, but had either slipped or was put there without the owner's knowledge. In that case, the finder would be entitled to the discovery.

Commentators speculate that courts give the finder possession of a lost item as a reward for returning the item to circulation and as an incentive to report the find. Both of these rationales of the finders keepers rule are designed to help reunite the true owner with his property. The finder's rights are subordinate to those of the true owner; the finder only possesses the find until the true owner returns to claim his property. Courts hope that a finder will report her discoveries, realizing she will probably be able to keep it since that the true owner is unlikely to return to claim a find he has lost possession of unknowingly. If the true owner does return, he will more easily be able to trace the lost property if its discovery has been reported by the finder.

In contrast, "mislaid" property is property that the owner intentionally puts in a place that he later forgets. Unlike the finders keepers rule, the locus owner is entitled to possession of the mislaid item until the true owner appears. Thus, neat stacks of money

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62. Campbell, 416 A.2d at 221. Thus, the old Scottish proverb "finders keepers, losers weepers" inaccurately describes the law. The loser, a prior possessor or true owner of the property, will have a right to the property superior to that of the finder. As long as the loser can discover who found the property, he should never have to weep; the loser will always be able to recover the property if he can prove prior possession or ownership.


64. For convenience and clarity, this Comment will usually refer to the true owner or locus owner as "he," and the finder as "she." In historical contexts in which female finders may not have been granted the same rights as male finders, this Comment will refer to the finder as "he."

65. See, e.g., Erickson v. Sinykin, 223 Minn. 232, 26 N.W.2d 172 (1947); Loucks v. Gallogly, 1 Misc. 22, 23 N.Y.S. 126 (Albany City Ct. 1892); Comment, supra note 24. But see Cohen, The Finders Cases Revisited, 18 Tex. L. Rev. 1001, 1003 (1979) (noting that true owners' interests are not explicitly considered by courts).

66. Functionally, a prior possessor will have the same status as a true owner.

67. See Morton, supra note 22 passim; Paulus, Finder vs. Locus in Quo—An Outline, 6 Hastings L.J. 180, 190 (1955); Riesman, supra note 22, at 1118.


found in a dusty can secreted on the top of a rock in a cave would be considered mislaid property, since the money apparently was carefully placed in that spot.\textsuperscript{70}

Courts award the locus owner possession of mislaid items, reasoning that the true owners will retrace their steps to the locus once they realize that they have mislaid the item.\textsuperscript{71} By awarding the locus owner possession of mislaid items, courts facilitate the return of the items to their true owners.

Courts consider property to be “abandoned” when its owner intentionally and completely relinquishes all right to the property, without relinquishing the property to a specific person or for a specific purpose.\textsuperscript{72} Specialized feed mill equipment, not removed within three years of its sale from a building open to trespassers, vandals, and the weather, constitutes abandoned property.\textsuperscript{73} Courts consider that abandoned property has returned to a “state of nature,” and is subject to appropriation by the first person who reduces it to possession.\textsuperscript{74} Thus, the first claimant of this property is entitled to keep it.

Finally, courts characterize “embedded” property as any property other than gold, silver, or their paper representatives, that a finder discovers buried or embedded in the ground.\textsuperscript{75} For instance,

\textsuperscript{70} Morrison v. United States, 492 F.2d 1219, 1225 n.5 (1974) (the United States Court of Claims noted that the property would be considered misplaced under the common law rule, but instead applied the Uniform Code of Military Justice, since the find occurred in Viet Nam); \textit{cf.} Riesman, \textit{supra} note 22, at 1126 (noting finders must be honest or else a rule not allowing finders to keep their finds will be ineffective). \textit{But see} Helmholtz, \textit{supra} note 25, at 317 (suggesting that the distinction between lost and mislaid property is unhelpful because finders do not change their behavior on the basis of this difficult legal rule).

\textsuperscript{71} See Morton, \textit{supra} note 22, at 108–09; Paulus, \textit{supra} note 67, at 190; \textit{Comment, Finders—Rights as Against the Owner of the Locus in Quo}, 46 MICH. L. REV. 235, 238 (1947); \textit{cf.} Morton, \textit{supra} note 22, at 109 (suggesting that owners of lost property would benefit from a similar rule); \textit{Note, supra} note 22, at 197 (proposing that this theory can also be applied to lost property).


\textsuperscript{73} Botkin v. Kickapoo, Inc., 211 Kan. 107, 505 P.2d 749 (1973). A court has held that 200-year-old, historically valuable criminal indictments, found in the possession of a private party, were not abandoned by the State or the King. Neither the State nor the King intended to abandon the indictments, or to authorize a custodian to transfer possession of them. State v. West, Jr., 293 N.C. 181, 235 S.E.2d 150 (1977).

\textsuperscript{74} 1 AM. JUR. 2d Abandoned, Lost, Etc., Property § 18 (1963); 1 C.J.S. Abandonment § 12 (1985).

an ancient Indian canoe, found partially embedded in an eroded section of a river bank, would constitute embedded property.\textsuperscript{76}

Because of policy concerns, courts award embedded property to the locus owner.\textsuperscript{77} Courts consider embedded property to be an exception to the general category of lost property. By distinguishing embedded property from other finds, courts hope to eliminate waste and spoilage of property and recognize locus owners' expectations about and constructive possession of items embedded within the land.\textsuperscript{78}

Finders of these types of property generally cannot keep property acquired as the result of a trespass. This common law trespass rule normally does not apply to discoveries of treasure trove. Instead, trespassing finders of treasure trove are allowed to keep the discovered treasure trove and reap the fruits of their trespass.\textsuperscript{79}

II. THE TREATMENT OF TREASURE TROVE IN OTHER NATIONS

Not all nations award the possession of treasure trove to its finder.\textsuperscript{80} While this rule is prevalent in most of the United States,\textsuperscript{81} Great Britain still awards treasure trove to the Crown.\textsuperscript{82} Similarly, ancient Indian and Mohammedan law allocated a portion of the trove to the State.\textsuperscript{83} The majority of foreign nations, however, rec-

\textsuperscript{76} Allred v. Beigal, 240 Mo. App. 818, 219 S.W.2d 665 (1949).
\textsuperscript{78} See, e.g., \textit{36A C.J.S. Finding Lost Goods} § 5.
\textsuperscript{79} See \textit{infra} text accompanying notes 171–194.
\textsuperscript{80} See generally \textit{2 S. Scott, THE CIVIL LAW} 39 n.1 (1932).
\textsuperscript{82} Krys, \textit{supra} note 15; Palmer, \textit{supra} note 44. The Crown will usually award the finder the value of the discovered trove. Ruoff, \textit{supra} note 48, at 314. Other governments agree that the State should keep all discovered treasure trove. In the nineteenth century, many of the governments of British possessions, such as Ceylon, the Falkland Islands, and Gibraltar, adopted the rule that treasure trove belongs to the Crown absolutely. \textit{G. Hill, supra} note 14, at 269–72. Czechoslovakia and the Soviet Union have at one time also awarded all discovered treasure trove to the State. \textit{Civ. Code} 453 (Czechoslovakia); \textit{V. Gsovski, SOVIET CIVIL LAW} 590–91 (1948). Before the Russian Revolution, Russian law reflected the influence of Roman treasure trove law by mandating that the finder and locus owner split any treasure found by chance. \textit{G. Hill, supra} note 14, at 273.
\textsuperscript{83} In ancient India, the King was awarded at least half of discovered old hoards because of his Lordship and general protection of the land. \textit{2 S. Scott, supra} note 80, at 40 n.1. Mohammedan law awarded the State one-fifth of all discovered foreign coins, and returned the remainder to the finder. \textit{Id.; I THE HODAYA} 1:5.
ognize the importance of protecting the rights of the locus owner, and split the trove in equal shares between the locus owner and the finder.84

Roman law appears to have pioneered this sharing approach, and contains one of the oldest known dispositions of treasure trove.85 According to the Justinian Institutes,86 the Emperor allowed the finder of treasure trove to keep all trove found on his own land, or found accidentally on sacred land.87 The finder had to share equally the treasure trove he accidentally found on another's land with the locus owner. This sharing rule also applied to lands owned by the Emperor, the Treasurer, or the City.88

Many countries still apply versions of this Roman law. The Napoleonic Code,89 still in effect in France,90 and the laws of Spain,91 Japan,92 Mexico,93 Italy,94 the Netherlands,95 and Belgium96 have all provided that the finder of treasure trove keeps possession of trove he finds on his own land. If the finder discovers treasure trove by chance on another's land, the finder splits it equally with the locus owner.97

84. See generally 2 S. Scott, supra note 80, at 40 (providing an overview of various jurisdictions' treatment of treasure trove).
85. See Emden, supra note 44, at 373; Comment, supra note 24, at 229.
86. J. INST. 2.1.39.
87. Id.
88. Id. In these provisions, the Institutes followed the laws conceived by the "Divine Hadrian." Id.
89. CODE NAPOLEON art. 716.
90. CODE CIVIL art. 716 (Fr.). This provision is essentially the same as the original Napoleonic Code, drafted in 1804. See id.
91. CIVIL CODE art. 351 (Spain).
93. C.C.D.F. art. 876 (Mex.). Unlike the codes of other nations, which do not definitively address the issue, the Mexican Civil Code specifically provides that trespassers who discover treasure trove while trespassing are not entitled to possession of the trove. Instead, the locus owner is entitled to the discovered trove. Id. art. 881.
94. CODICE CIVILE art. 932 (Italy).
95. See G. Hill, supra note 14, at 171.
96. See id.
97. 2 S. Scott, supra note 80, at 40 n.1. The Swiss rule, although phrased differently, contains essentially the same provisions. That rule awards discovered treasure trove to the locus owner. The finder of the trove can claim a suitable award of up to half of the treasure trove's value. CC art. 723 (Switz.). Thus, the finder and the locus owner may still evenly split the value of the trove. The laws of Portugal, Germany, and Austria also incorporate the principles of the Roman sharing theory, although they do not split the discovered trove equally between the finder and the locus owner. 2 S. Scott, supra note 80, at 41 n.1. Each country awards the finder with one-third of the find, and Austria and Germany allocate one-third of the treasure to the State. BURGER-
In the United States, the Louisiana Civil Code, based on French law, functions similarly. Specifically, the Louisiana Civil Code, Article 3420, requires that the finder and the locus owner split equally the treasure trove found on land. Unlike other Roman-based treasure trove laws, this statute also encompasses items found in nonrealty; the treasure can be found in a moveable or an immovable object. Also, unlike Roman law, the statute does not require that the treasure be found by chance.

III. Problems with the Current Treasure Trove Laws

While attempting to allocate discoveries of treasure trove, American courts are often swayed by the romantic and adventure-some nature of treasure trove. For instance, in Groover v. Tippins, a typical treasure trove case, the finders discovered thirty-seven pounds of gold dust and bullion after trespassing and digging under a large rock. Before analyzing the facts of the case, the judge's opinion stressed the "appealing and alluring quality of treasure trove" as illustrated in the Bible, Treasure Island, Poe's Gold Bug, and the legends of Blackbeard and Captain Kidd. The Court rhapsodized that "the search for their buried treasure..."
will continue to thrill millions yet unborn," 112 and summarily awarded the finders possession of the trove. 113

Perhaps the judge in Groover decided that the entertainment value the community derived from the search for buried treasure exceeded the costs the trespass imposed on the locus owner and society. 114 That judge may well have been distracted from logic and equity by the emotional appeal of awarding the treasure trove to its adventurous finders. 115 Modern courts continue to allow romance to overwhelm the logical application of property doctrines. As a result, courts propagate the inherent inconsistencies of treasure trove law by awarding the finder possession of treasure trove.

By continuing to apply the finders keepers rule to treasure trove discoveries, courts perpetuate several analytical problems. First, establishing a separate classification of treasure trove forces courts to make arbitrary judgments about whether the discovery can be categorized as treasure trove. The definition of treasure trove requires judges to analogize treasure trove to the factually dissimilar category of lost property, 116 and to perpetuate the inconsistent distinction between treasure trove and mislaid and embedded items.

Furthermore, applying the finders keepers rule to discovered trove produces results which are contrary to public policy. By allowing trespassing finders to keep their discoveries, courts encourage trespass. In addition, courts' adherence to the finders keepers rule severely inhibits contractual resolution of the inefficiencies that the property allocation produces.

The laws of foreign countries discussed previously are preferable to the American system because they recognize the locus owner's constructive possession of treasure trove found in the locus owner's property. Still, those laws change only the proportional awards granted to the locus owner and finder. These compromises

111. Blackbeard was a legendary English pirate. See, e.g., G. PARRISH, HUNG FOR A SONG (fictional account of Blackbeard's adventures). Captain Kidd gained enormous piratical fame in the later seventeenth century, and was hanged in 1701 for piracy on the high seas. See W. BONNER, PIRATE LAUREATE: THE LIFE AND LEGENDS OF CAPTAIN KIDD (1947) (tracing the growth of the legend of Captain Kidd's piracy); C. MILLIGAN, CAPTAIN WILLIAM KIDD: GENTLEMAN OR BUCCANEER? (1932) (showing that Kidd was not the infamous pirate that legends portray).

112. Id.; accord Riesman, supra note 22, at 1112; Comment, supra note 71, at 240-41.


114. See infra text accompanying notes 189-192.

115. See Riesman, supra note 22, at 1112.

116. See Paulus, supra note 67, at 184-185; Note, supra note 22, at 197-98.
are unsatisfactory since they still accept the theoretical underpinnings of the finders keepers rule and perpetuate the arbitrary classification of property as treasure trove. In the same way, a compromise such as those adopted by other nations still encourages trespass, and produces economic inefficiencies.

A. The Definition of Treasure Trove Builds Arbitrary Distinctions Between Treasure Trove and Similar Finds of Mislaid and Embedded Property

1. Courts’ Inability to Define Treasure Trove Unambiguously

The definition of treasure trove is based on vague requirements that make it difficult to predict how a court will classify discoveries. As this Section will illustrate, no clear-cut distinction exists to allow easy identification of what does and does not constitute treasure trove. Instead, the definition hinges on the courts’ subjective evaluation of whether potential treasure trove is old and hidden. Courts must establish the length of time required for an object to have the “appearance of antiquity.” Similarly, courts must discover the intent of a long-deceased property owner to determine whether the owner intended to hide the item. Since courts must resort to educated guesswork, the classification of items as treasure trove will inevitably be somewhat arbitrary.

Although discovered gold, silver, or money must have the “appearance of antiquity” to be classified as treasure trove, courts have not supplied a precise definition of this quality. Unlike countries that enforce specific age criteria that items must fulfill to be considered treasure trove, the United States has formulated no definitive age requirements. Instead, courts rely on their own sub-

117. Since these nations’ approaches to embedded property are usually not clearly identifiable from their statutory compilations, this Comment makes no attempt to exhaustively discuss that issue.
119. Id.
121. Id.
122. One court has admitted the impossibility of saying, as a matter of law, how ancient a find must be to constitute treasure trove. Robertson v. Ellis, 58 Or. 219, 228, 114 P. 100, 103 (1911).
123. For example, Portugal requires items to have been hidden for at least thirty years in order to qualify as treasure trove. CODE CIVIL PORTUGUEZ, art. 424; 2 S. SCOTT, supra note 80, at 41.
jective views to determine whether this vague requirement of antiquity has been met.¹²⁴

Some courts virtually ignore this antiquity requirement,¹²⁵ making it difficult to predict whether certain items of more recent vintage will be classified as treasure trove. For example, when dealing with virtually identical facts, two courts came to opposite conclusions about whether similar property constituted treasure trove. The court in Sovern v. Yoran determined that coins hidden under a barn floor for safekeeping by a recent decedent qualified as treasure trove.¹²⁶ In contrast, the court in Hill v. South¹²⁷ determined that money hidden by a recent decedent could not be treasure trove because “treasure trove carries the thought of antiquity;”¹²⁸ since these pieces of currency had been recently deposited, they did not adequately carry that “thought.”¹²⁹

Courts have similar difficulty determining whether the owner of an item intended to conceal it,¹³⁰ as the definition of treasure trove requires.¹³¹ Courts recognize the difficulty of discerning the intent of a deceased person.¹³² For example, in Favorite v. Miller,¹³³

¹²⁵. See, e.g., Sovern v. Yoran, 16 Or. 264, 20 P. 100 (1888).
¹²⁶. Id. In that case, the court acknowledged that “the facts of the case in hand are more akin to what is known as treasure trove.” Id. at 276, 20 P. at 103.
¹²⁷. Hill, 207 Or. at 71, 292 P.2d at 141.
¹²⁸. Id. at 74, 292 P.2d at 143.
¹²⁹. Id. The availability of antiques increases uncertainty about whether an item with the appearance of antiquity should be classified as treasure trove. Since antique coins can be bought and sold, a court would have difficulty distinguishing between a century-old antique hidden by a person for safe keeping within the last few years, and an item hidden long ago and forgotten. While the presence of dust or tarnish on the item ideally might help the court make such a determination, the finder may have cleaned her find before reporting it. In that situation, the court would have to rely on the finder’s testimony that such marks of age appeared on the item when the finder discovered it. The opportunity for such self-serving testimony might influence the finder to twist the facts in her favor. Although this distinction may be difficult to make, it is vital under the current definition of treasure trove. Courts would classify the recently hidden antique as a mislaid item, but the rules regulating treasure trove would govern the disposition of the item that had been hidden for many years. Since current treasure trove law does not presume that the locus owner has a right to discovered treasure trove, this requirement may put an unfair burden of proof on the true owner. A true owner who is also the locus owner will have difficulty proving that the item is a recently bought and hidden antique, rather than one hidden for decades. Without purchase slips, the locus owner’s proof may hinge entirely on his own testimony. The court’s propensity to view the finder sympathetically may cause the court to dismiss such testimony as self-serving.
¹³². See, e.g., Favorite, 176 Conn. at 314, 407 A.2d at 977.
the appellate court questioned the trial court’s ability to determine the owner’s intent to hide, noting that “any conclusion as to the mental state of persons engaged in events which occurred over 200 years ago would be of a conjectural nature and as such does not furnish an adequate basis for determining rights of 20th century claimants.” Since the owner’s intent cannot be fully ascertained, it will always be the subject of a judgment call by the court.

For example, suppose a mover finds an item in a niche inside a hidden passageway. The court will classify the item as treasure trove and award it to the finder if the judge believes the passageway was used as a hiding place when the owner deposited the item. If the court instead believes the passageway was used solely as a hallway, perhaps as a shortcut between two rooms, the court will conclude that the property has not fulfilled treasure trove’s intentional concealment requirement. Then the court will classify the property as mislaid, and will award the property to the locus owner.

2. The Inconsistencies Resulting From Courts’ Insistence on Equating Treasure Trove with Lost Property

Currently, courts tend to merge the laws governing treasure trove with those governing lost property. Despite criticism, many courts perpetuate this “faulty analogy to lost property” without explanation. As the court in Morgan v. Wiser noted,
“treasure trove, despite its being manifestly not lost property, is treated the same as lost property and the right to possession is recognized to be in the finder.”

Finds of treasure trove fulfill neither the requirements necessary to categorize property as lost nor the policy justifications underlying the lost property rule.

The characteristics that typify treasure trove discoveries differ from those of lost property. One court has noted that

[to lose is not to place or put anything carefully and voluntarily in the place you intend, and then forget it; it is casually and involuntarily to part from the possession, and the thing is then usually found in a place or under circumstances to prove to the finder that the owner’s will was not employed in placing it there.]

The first description, which the court emphasizes does not define lost property, exactly describes discoveries of treasure trove. For property to qualify as treasure trove, its owner must have concealed it; by its very nature, concealment is usually performed “carefully and voluntarily,” rather than “casually and involuntarily.” Also, unlike lost property, treasure trove is found in a place and under circumstances showing that the owner’s will was employed in placing it there.

For instance, a true owner could not inadvertently bury his gold coins in a container; instead, the owner's will would be employed in burying the treasure trove.

In addition, the policies underlying the lost property finders keepers rule do not justify treating treasure trove as lost property. Courts often award lost property to its finder like an incentive to encourage finders to report their finds, and to reward the finders'

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139. 711 S.W.2d 220 (Tenn. Ct. App. 1985).
140. Id. at 222; see also Cesarini, 246 F. Supp. at 7–8 (trove given to the finder); Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634 (1955) (gold awarded to finders).
141. Sovern, 16 Or. at 274, 20 P. at 102–03 (emphasis added) (quoting Lawrence v. State, 20 Tenn. (1 Humph.) 228, 229 (1839)).
143. Campbell, 416 A.2d at 221; 1 Am. Jur. 2d Abandoned, Lost, Etc., Property § 4; 36A C.J.S. Finding Lost Goods § 1; see e.g., Groover, 51 Ga. App. at 47, 179 S.E. at 634 (treasure trove hidden under a large rock); cf. Morrison, 492 F.2d 1219 (since money contained in a can located on a beam inside a recently occupied cave was not concealed, under common law doctrines it would constitute mislaid property, rather than treasure trove).
144. Thus, treasure trove has been found concealed in a ball of rags, Zech v. Accola, 253 Wis. 80, 33 N.W.2d 232 (1948), under rocks, Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634 (1955), inside of a used piano, Cesarini v. United States, 296 F. Supp. 3 (N.D. Ohio 1969), aff’d 428 F.2d 812 (6th Cir. 1970), and under a chimney hearth, Davison v. Strickland, 145 Ga. App. 420, 243 S.E.2d 705 (1978). In each of these situations, it is highly unlikely that the owner could have placed the treasure trove involuntarily where the finder eventually discovered it.
honesty. Courts hypothesize that finders will be more likely to report discoveries if they will be able to keep the finds when the true owner does not reclaim the property. Courts encourage such reporting because they hope it will facilitate the return of lost property to true owners. Courts may also want to reward the trove finders' socially desirable act of finding the trove and returning it to societal circulation. Courts can reward these acts by awarding trove to its finders.

These policy concerns may not justify applying the finders keepers rule to discoveries of treasure trove. Because the definition of treasure trove is ambiguous, and because treasure trove is similar to mislaid and embedded property, which courts award to locus owners, many finders may not report their finds. These finders will be unsure to which category their finds belong, and will surmise that courts may identify their finds as mislaid or embedded property and award them to the locus owner. Since finders may not report their finds, treating treasure trove like lost property and awarding it to the finder may not be an effective incentive or reward; these policy goals cannot justify the application of the finders keepers rule to treasure trove.

Similarly, returning the discovered trove to circulation may not always be a socially desirable act; because courts cannot accurately classify discoveries as treasure trove, awarding the treasure trove to the finder may deprive the trove's owner of his property. Because the definition of treasure trove is ambiguous and courts unevenly apply the antiquity requirement, an item that a court has classified as treasure trove may not actually be ancient. If so, since the true owner, unlike the owner of lost property, knows where he deposited the trove, he might return to claim it. The true owner will be unable to reclaim his treasure trove because the finder has discovered and returned the item to circulation. In that case, the finder has not performed a socially desirable act; she has prematurely returned the trove to circulation and deprived the true owner of his property. The finder should not be rewarded for her undesirable act.

145. See Morton, supra note 22, at 109–10; Paulus, supra note 67, at 190; Riesman, supra note 22, at 1118.
3. Courts' Refusal to Apply the Common Law Embedded Property Exception to Finds of Embedded Treasure Trove

Courts recognize an exception to the finders keepsers rule when a finder discovers property embedded within the earth. Courts award embedded property to the locus owner, theorizing that embedded property is part of the realty and is constructively possessed by the realty's owner. Locus owners' constructive possession of embedded items can be unknowing; property embedded within the earth can be devised or sold as a part of the realty without the locus owner's knowledge of the embedded property's existence. Courts have recognized locus owners' superior claim to the head of a lead statue of King George III, gold bearing quartz rocks, an ancient Indian canoe, an aerolite, sunken ships, and valuable earthenware.

To reach this conclusion, American courts have relied on the principles enunciated in two historic English cases. In Elwes v. Brigg Gas Co., the court emphasized that the locus owner claimed both the surface of the property and everything contained within the soil down to the center of the earth. Similarly, the court in


148. See Burdick v. Chesebrough, 94 A.D. 532, 537, 88 N.Y.S. 13, 16 (1904); see also Allred, 240 Mo. App. at 823, 219 S.W.2d at 667 (property embedded in realty is inherited as a part of the realty, even though neither the testator nor the devisee is aware of the embedded property's existence). One court has held that a life tenant, who had inherited realty, had no right to sever the remainderman's interest in embedded property found in the realty. That court held that the wrongfully severed personality belonged to the remainderman. See id.


150. Ferguson v. Ray, 44 Or. 557, 77 P. 600 (1904).


156. Elwes v. Brigg Gas Co., 33 Ch. D. 562 (1886). In that case, Judge Chitty awarded to the locus owner possession of a 2000-year-old ship, which the lessee of the locus had discovered. The locus owner had been unaware of the ship's existence until that time. Since the locus owner was in lawful possession of the ground, Chitty noted...
South Staffordshire Waterworks v. Sharman held that the locus owner had a right of possession superior to that of the finder of two rings submerged in the mud at the bottom of a pool because of the locus owner's "real de facto possession, constituted by the occupier's general power and intent to exclude unauthorized interference." The court reasoned that in such a situation, the law presumes that the locus owner possesses the article found, emphasizing the irrelevance of the possessor's awareness of the item's existence.

Courts refuse to apply this embedded property exception of the finders keepers rule to discoveries of embedded treasure trove. Instead, the courts distinguish buried gold, silver, and money from other embedded property. Thus, courts award embedded treasure trove to the finder, but award all other embedded property to the locus owner.

The dichotomy imposed by the finders keepers rule treats similar items inconsistently. In Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, the court awarded the United States, the locus owner, possession of a sunken ship and the artifacts it contained. In that case, the finder removed artifacts from an eighteenth century ship that had sunk within the United States territorial waters of the Biscayne National Park. Applying the law that the locus owner's possession extended from the surface to the middle of the earth; as such, the locus owner also possessed the ancient ship. Id. at 568. 157.

157. 65 L.J.Q.B. 460 (1896); accord Ferguson v. Ray, 44 Or. 557, 567-68, 77 P. 600, 603 (1904).

158. 65 L.J.Q.B. at 462.

159. Id. at 461. Specifically, that court noted that possession of the locus includes possession of everything attached to or contained under the locus, in the absence of a superior title. Id.; accord Elwes v. Brigg Gas Co., 33 Ch. D. 562 (1886); Ferguson v. Ray, 44 Or. 557, 77 P. 600 (1904).

160. See also Favorite v. Miller, 176 Conn. 310, 407 A.2d 974 (1978) (awarding the locus owner possession of a lead statue head she was unaware existed before reading about its discovery in a newspaper); Allred v. Biegel, 240 Mo. App. 818, 219 S.W.2d 665 (1949) (recognizing the locus owner's claim to an ancient Indian canoe of which he had been unaware until the finder's discovery).

161. 758 F.2d 1511 (11th Cir. 1985). In that case, the court applied the law of finds to determine the proper owner of the shipwreck.


163. Klein, 758 F.2d at 1512-13. Klein discovered the shipwreck while sport diving in the Biscayne National Park. Klein also discovered cutlasses and other articles in the ship's vicinity. Id. at 1512. This English shipwreck was located entirely within the submerged lands of the United States' territorial waters. Id. at 1512-13.
of finds, the court held that the United States owned the ship and its contents because the United States owned the locus in which they were embedded. The anomalous results produced by treasure trove and embedded property laws can be illustrated as follows: assume a sailor had hidden gold and silver bullion, plate, or coin within the ship. The locus owner would keep iron cannons and all the rest of the other artifacts contained in the ship, including any gold and silver cargo not hidden in the ship; only hidden gold and silver items would be awarded to the finder because they constitute treasure trove.

No practical modern reason justifies this distinction between treasure trove and property embedded within the earth. The category of treasure trove was originally limited to gold and silver to identify which substances would belong to the Monarch under the Crown Prerogative. Since medieval monarchs were primarily concerned with obtaining gold and silver to use to mint money and increase the Crown’s wealth and status, they limited the definition of treasure trove, to which the prerogative applied, to gold and silver items.

The reason for this distinction does not exist in the United States. Treasure trove is not awarded to the government to be used for minting or any other purposes. Since this original reason for distinguishing treasure trove from other embedded property is not applicable, and since the distinction forces courts to treat similar discoveries inconsistently, courts should abolish the archaic distinction between treasure trove and embedded property.

164. The court of appeals affirmed the district court’s use of the law of finds, rather than maritime salvage law. Klein, 758 F.2d. at 1514 (11th Cir. 1985), aff’g 568 F. Supp. 1562 (S.D. Fla. 1983). The Court of Appeal refused to uphold the finder’s salvage claim, since he had not successfully saved the ship from maritime peril. Id. at 1515. See generally 78 C.J.S. Salvage § 4 (1952) (describing the necessary elements of a successful salvage claim).

165. Klein, 758 F.2d at 1514.

166. See also Note, Personal Property—Finding Lost Goods—Finder of Treasure Trove Entitled Thereto, 6 MINN. L. REV. 527, 528 (1922).

167. But see supra note 49 (questioning the validity of this theory describing the origins of the treasure trove laws).

168. See Note, supra note 166, at 528.

169. See id. (noting that since there is no Crown appropriation, there seems to be no reason not to apply the embedded property rule to treasure trove discoveries).
B. Problems Resulting from Applying the Finders Keepers Rule to Treasure Trove Discoveries: Promoting Trespass and Economic Inefficiencies

Applying the finders keepers rule to discoveries classified as treasure trove has further negative practical consequences. Courts refuse to apply the common law trespass exception of the finders keepers rule to discovered treasure trove. Instead, courts allow trespassing finders to keep any treasure trove they find. In addition, these trespassers generally escape punishment for their trespasses. Subsection 1 will discuss the incentive effects and the inconsistencies of allowing trespassing finders to retain the treasure trove they discover. Then, Subsection 2 will employ an economic analysis to reveal the inefficiencies of the finders keepers rule.

1. The Finders Keepers Rule Encourages Trespass by Allowing Trespassers to Keep the Fruits of their Trespass

The finders keepers approach applies even if the finder discovers treasure trove by trespassing on another's property. Courts define trespassing as going upon another's private premises without invitation or authorization, for the trespasser's own purposes or convenience and without a mutuality of interest between the locus owner and the trespasser. Courts do not award trespassers possession of lost or embedded property they find. Although courts otherwise treat treasure trove as lost property, they refuse to apply this trespass exception to finds of treasure trove. By allowing trespassers to keep treasure trove, the finders keepers rule rewards trespassers with the fruits of their trespasses. The law also harms the locus owner by allowing the finder to disturb and disrupt the locus owner's property without compensating him.

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170. See e.g., Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634 (1935) (allowing trespassing finders to keep treasure trove they found under a rock in the locus owner's property); Gaither v. Jones (Feb. 16, 1935), (reprinted in E. Warren, Cases on Property 129–30 (2d ed. 1938)) (court stated, without clearly deciding whether a trespass had occurred, that even a trespasser would be entitled to treasure trove discovered as a result of the trespass); Note, Treasure Trove—The Effect of Trespass: Gaither v. Jones, 15 B.U.L. Rev. 556 (1935); Note, Finders of Lost Property—Treasure Trove—Article 3423, 23 Tul. L. Rev. 409, 410 (1949).


172. See generally Chance v. Certain Artifacts Found and Salvaged from the Nashville, 606 F. Supp. 801, 807 (S.D. Ga. 1984), aff'd, 775 F.2d 302 (11th Cir. 1985) (noting that courts seek to avoid spoilage and waste of the locus owner's property interest); cf. Favorite v. Miller, 176 Conn. 310, 315, 407 A.2d 974, 977 (1978) (even archaeologists, mountaineers, hunters, and fishermen must obtain the locus owner's permission to
The common law has traditionally mandated that trespassing finders of *lost property* cannot keep their finds.\(^{173}\) For policy reasons, courts punish nontrivial trespassers who find lost goods in another person's property by withdrawing their right to possession of the lost goods.\(^{174}\) The trespassing finder of lost property has no superior right to possession over the locus owner.\(^{175}\) Thus, the court in *Niederlehner v. Weatherly*\(^{176}\) did not allow a trespassing finder who followed a map showing the location of money to keep the find.\(^{177}\) Instead, the court found that "a trespasser can obtain no right to possession of property unlawfully removed from the premises of another."\(^{178}\)

Similarly, courts use finders' acts of trespass as a further incentive to award the locus owner title to discovered *embedded property*.\(^{179}\) In *Favorite v. Miller*,\(^{180}\) the court held that the finder was not entitled to keep his find because he entered the locus owner's property with the intent to trespass and to remove an eighteenth century lead statue of King George III.\(^{181}\) That court emphasized that a trespasser is a wrongdoer and should not be allowed to benefit from the wrongdoing.\(^{182}\) The court in *Chance v. Certain Artifacts Found and Salvaged from the Nashville*\(^{183}\) reiterated this rule, and noted that courts also deprive trespassers of their finds in order to enter his property; the owner of the locus in which property is embedded should not be subject to different rules).


175. *See* Niederlehner v. Weatherly, 73 Ohio App. 33, 54 N.E.2d 312 (1943); *Morton, supra* note 22, at 105.

176. 73 Ohio App. 33, 54 N.E.2d 312 (1943).

177. *Id.* at 38, 54 N.E.2d at 314–15 (noting that the thievery involved in this trespass situation was so egregious that the court will not even consider that a "finding" took place); *see* Helmholz, *supra* note 173.

178. *Niederlehner*, 73 Ohio App. at 39, 54 N.E.2d at 315 (citation omitted).


181. *Id.* at 317, 407 A.2d at 978.

182. *Id.* at 315, 407 A.2d at 977–78.

protect locus owners from the spoilage and waste of their property.\textsuperscript{184}

The definition of trespass encompasses the intentional search for treasure trove. In a typical treasure trove hunt, the potential finder goes upon another's premises, without invitation or authorization, for the sole purpose of finding treasure trove, and without mutuality of interest with the locus owner.\textsuperscript{185} Even a person who casually crosses another's land and stumbles upon treasure trove is a trespasser. That person also crosses another's land, without authorization, for the person's convenience, without a mutuality of interest with the locus owner.

Although courts discourage the disturbance of private property by finders of lost and embedded items,\textsuperscript{186} courts usually tolerate such disturbances when trespassers discover treasure trove. The Chance court emphasized the importance of protecting the locus owner against the waste and spoilage that accompany the search for items embedded in the earth,\textsuperscript{187} and rejected the trespassing finder's claim to the property.\textsuperscript{188} In contrast, in Groover v. Tippins,\textsuperscript{189} the court ignored the disruption resulting from the trespassing finders'\textsuperscript{190} efforts to unearth treasure trove hidden under a rock,\textsuperscript{191} the

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\item[184.] Id. at 807.
\item[185.] For example, in Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634 (1935), the finders entered the locus owner's property, allegedly after "being warned not to go thereon." Id. at 49, 179 S.E. at 635. Thus, the finders entered without the locus owner's invitation or authorization. Similarly, the finders entered the land for their own purposes: to dig for buried treasure. Id. at 48, 179 S.E. at 636. Finally, the locus owner had nothing to gain from the finders' actions since the finders alone would keep the treasure trove; therefore, the finders had no mutuality of interest with the locus owner. Thus, although that court did not pursue the trespass issue, the finders committed trespass.
\item[186.] See Ferguson v. Ray, 44 Or. 57, 77 P. 600 (1904).
\item[187.] Chance, 606 F. Supp. at 807. That court recognized the public policy mandating against trespass and disparaged the trespassing finder for creating waste while attempting to recover the embedded ship. Id.; see also Elwes v. Brigg Gas Co., 33 Ch. D. 562 (1886) (noting that the trespasser could only reach the embedded property by acts involving spoilage and waste).
\item[188.] Chance, 606 F. Supp. at 801.
\item[189.] 51 Ga. App. 47, 179 S.E. 634 (1935).
\item[190.] This court did not specifically address the allegation of trespass, but instead only noted that "[t]his is not a suit in trespass, but is a suit in trover for the recovery of the property or its value." Groover, 51 Ga. App. at 50, 179 S.E. at 639. Since the court did not further explain its treatment of the trespass issue, the court probably eliminated the trespass issue procedurally. The facts clearly illustrate that the finders were trespassers. Id.; see supra note 185. In addition, commentators have interpreted this as a trespass case. See, e.g., Helmholz, supra note 173, at 1231 n.67; Morton, supra note 22, at 106; Paulus, supra note 67, at 193; Riesman, supra note 22, at 1116 n.38.
\end{enumerate}
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court allowed the finders to keep their find. Only one court has recognized that trespassing finders of treasure trove disturb another's property and impair the preservation of peace in the community. That court emphasized that since trespassers who discover treasure trove also disturb the locus owner's property, they should not benefit from their find and the concurrent harm they inflict upon the locus owner. This court reached the correct result—to avoid the incentive to trespass, trespassing finders of treasure trove should not benefit from their wrongdoing, and should not be awarded possession of the treasure trove they discover.

2. The Inefficiencies of the Finders Keepers Approach: An Economic Analysis

In addition to being inconsistent with related areas of the law, the finders keepers rule is also inefficient. Subsection a reviews the economic theories this Comment uses to analyze the the finders keepers rule. Next, Subsection b shows that granting treasure trove to trespassing finders engenders high transaction costs that prevent contractual arrangements between finders and locus owners, keeps resources from moving to their most valued use, and results in social waste.

a. The Tools with which to Construct an Economic Analysis of Property Rights

Economists have accepted Professor Coase's theorem that, absent transaction costs inhibiting the formation of contractual agreements, parties involved in a conflict will reach the economically efficient outcome regardless of the initial allocation of property rights. Coase assumes that parties faced with conflicting incom-

192. Groover, 51 Ga. App. at 47, 179 S.E. at 634; see also Gaither v. Jones (Feb. 16, 1935), (reprinted in E. WARREN, supra note 170, at 129-30) (court notes, apparently without deciding whether a trespass occurred, that a minor tenant and a guest who trespassed into a forbidden area of a tenement basement and found treasure trove were entitled to keep their find).
194. Id.
195. Judge Posner has defined efficiency as "exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized." R. POSNER, ECONOMIC ANALYSIS OF LAW 4 (2d ed. 1977).
196. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960); see A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 11–14 (1989); R. POSNER, supra note
Compatible property uses will contract with each other to end the conflict by maximizing the value of the contract to both parties.197

In short, in the absence of high transaction costs, special legal rules are unnecessary because people will contract to solve their problems.198 Assume Person A values her use of the property Blackacre in the amount of $50.00, and Person B values his use of Blackacre in the amount of $125.00. If there are no transaction costs, Blackacre will be put to its most valued use regardless of the initial allocation of rights. If the law entitles A to the legal rights to Blackacre, B will contract with A to use it. B will offer A some amount in excess of $50.00, but not in excess of $125.00, for the right to use Blackacre; A will accept, since she values Blackacre at only $50.00. Similarly, if the law initially grants B the right to use Blackacre, B will keep Blackacre because he values it to a greater extent than does A. A will only offer B up to $50.00, which B will refuse because Blackacre is worth $125.00 to him. In this way, B will end up with Blackacre, regardless of the initial allocation of rights.

The Coase theorem's assumption of zero transaction costs is often unrealistic, however. Transaction costs are defined as the costs associated with the transfer, capture, and protection of rights.199 Costs rise when difficulties exist in identifying the parties with whom to transact, in meeting and bargaining with those

195, at 7–8 & n.S2.4 l. But see Mishan, Pareto Optimality and the Law, 19 OXFORD ECON. PAPERS 255 (1967) (qualifying the Coase theorem to note that even with no transaction costs, assignment of rights might affect the relative wealth of the parties and the use of resources).

197. See Coase, supra note 196; see also A. POLINSKY, supra note 196, at 11–14; R. POSNER, supra note 195, at 17 n.S2.4 l.

198. See Landes & Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. LEGAL STUD. 83, 89 (1978). See generally R. POSNER, supra note 195, at 16–21 (explaining contractual resolution of incompatible uses, and the Coase theorem). Landes and Posner note in the context of maritime salvage law that a rescuer sometimes will rescue without first consulting the victim or against the victim's wishes. Landes and Posner, supra, at 90. If the purpose of the law is to promote economic efficiency, the law would deny the rescuer compensation in that case, since compensating the rescuer would promote coerced exchanges. Id. The finders keepers law governing treasure trove leads to similar inefficient results. See infra text accompanying notes 205–211.


200. The cost of meeting includes the costs of transportation to reach the meeting place and the opportunity costs of time spent in the meeting, rather than in other pursuits. A. POLINSKY, supra note 196.
parties, in dealing separately with the holders of the rights when many parties hold rights, and in enforcing bargains.

Sometimes transaction costs may be so high that parties will not find it worthwhile to enter into voluntary transactions that could alter the initial allocation of resources. In such cases, society as a whole would be better off if property rights were initially allocated to the parties who value those rights most highly. In still other cases, the initial allocation of resources will itself affect the magnitude of transaction costs. This suggests that courts should consider the effect that the initial allocation of rights might have on the cost of subsequent voluntary exchanges.

\(201^\text{b. The Inefficiencies of the Finders Keepers Approach}\)

By allowing trespassing finders to keep possession of the treasure trove they unearth, the finders keepers approach constructs an economically inefficient system. This Subsection will gauge the efficiency of the finders keepers rule, showing that it increases transaction costs to a level at which voluntarily contracting to alter the allocation of rights between the trespassing finder and the locus owner is virtually impossible. The finders keepers rule encourages finders to make their discoveries known and provides entertainment to the community observing the finders' adventurous deeds. These benefits are outweighed, however, by the costs the finders keepers rule imposes on society by forcing the landowner to guard his land and by giving the finder the incentive to outwit the landowner.

201. Problems with holdouts and free riders raise transaction costs when many parties must agree to, and enforce, the contract. If all the members of a 90 member group must agree to the provisions of a contract and only 89 members agree, the lone holdout can frustrate the agreement. Without the holdout's agreement, the contract will be worth nothing to the other parties to the contract. For this reason, the holdout can command a high price for his agreement to the terms of the contract. The free rider presents a related problem. Each person who is obligated to pay, as a member of the group, for a right the entire group will enjoy, will have an incentive to delay his payment. The free rider will assume that other group members who value the contracted right will chip in the free rider's share, and the free rider will reap the benefits of the contracted right without paying for it. See R. Posner, supra note 195, at 24–25.


205. See infra text accompanying notes 260–261 for a discussion of the efficiency of the proposed constructive possession rule.
The finders keepers rule is economically inefficient because it awards treasure trove found as a result of a trespass to the trespassing finder. The locus owner retains the right to exclude potential trespassers. The problem the locus owner faces is how to enforce this right to exclude trespassers in the face of judicial favoritism toward the trespassing finder. High transaction costs will prevent the locus owner from identifying potential trespassers, and therefore will also prevent him from contracting with the trespassers not to enter his land and remove treasure trove.

Under the finders keepers rule, the locus owner will resort to self-help methods to prevent trespassers. The resources the locus owner spends to inhibit potential trespassers and those potential trespassers spend to overcome the locus owners’ methods result in a waste of social resources. Locus owners will invest both capital and labor to prevent the potential trespass. For example, locus

206. But see supra text accompanying notes 170–194 (noting that trespassing finders of treasure trove rarely seem to be punished for their trespasses).

207. Consider an owner of beach front property—in the absence of laws or private enforcement methods restraining them, trespassers with metal detectors would be likely to comb the beach in search of treasure. See Bennett, supra note 17 (claiming that many treasure hunters scour beaches, parks, and private property in search of trove, and that as a result of these searches, “[w]ithin months, or even weeks, you could be up to your ankles in gold and silver bracelets, chains, rings, watches and rare coins”). The landowner would have no way to identify in advance the multitude of potential trespassers and contract with them to prevent their trespasses.

208. A unilateral contract, by which the locus owner would announce to the community that he would contract to avoid trespass, cannot solve this problem. See Landes & Posner, supra note 198, at 116–18 (discussing the merits of the unilateral contract in lost property situations). First, it would be difficult for the locus owner to make a general announcement that would inform all of the potential trespassing finders of his willingness to contract. Second, and more fundamentally, only those potential finders who would not have placed a high value on trespassing to find treasure trove will contract with the locus owner. Those potential finders who desired to trespass would do so, knowing that they will not be forced to give up any trove they find. Perversely, those potential finders with no desire to trespass would be able to extort money from the locus owner in exchange for their promise not to trespass; the “potential finders” earn money by contractually agreeing not to do something they had no intention of doing in the absence of the contract. This transfer of resources from the potential finder to the trespasser will not benefit society; the transaction costs will constitute a net social loss.

The parties will not be forced to resort to a unilateral contract to resolve their problems, however. Since the locus owner has the right to exclude trespassers from his property, he will erect fences, and take other preventative measures to discourage potential trespassers. See supra text accompanying notes 209–210. But cf. Liebeler, A Property Rights Approach to Judicial Decision Making, CATO J. 783, 797–801 (1985) (discussing situations in which the landowner has no right to exclude trespassers).


owners could erect fences and hire guards to ensure that trespasses are less likely to occur. Similarly, potential trespassers will invest capital and labor to outwit the locus owner in attempts to succeed despite the locus owner’s preventive techniques. These efforts, and the opportunity costs of the alternative uses of the capital and labor involved in their efforts, are entirely wasted. The potential discovery of treasure trove does not mitigate this wasted effort; since a market economy will prompt such discoveries, the question is only when the trove will be discovered, not if it will be discovered.\textsuperscript{211}

IV. A Solution: Recognize the Locus Owner’s Constructive Possession of Treasure Trove

To avoid the logical incongruities of treasure trove law, courts should recognize the locus owner’s constructive possession of treasure trove found in his land, and should allow him to keep any trove discoveries. Some states have already recognized the inconsistencies of the finders keepers rule, and currently refuse to apply it to discoveries of treasure trove.\textsuperscript{212} For example, Illinois currently employs the constructive possession doctrine to allow the locus owner to state a claim for possession of treasure trove.\textsuperscript{213} Most significantly, Tennessee has completely rejected the common law rule of treasure trove.\textsuperscript{214} In \textit{Morgan v. Wiser},\textsuperscript{215} the Tennessee Court of Appeals specifically refused to award possession of nineteenth century gold coins to a trespassing finder.\textsuperscript{216} Instead, the court found “the rule with respect to treasure trove to be out of harmony with modern notions of fair play.”\textsuperscript{217} In so finding, the court adopted Justice Calvert’s concurring opinion for the Texas Supreme Court in \textit{Schley v. Couch},\textsuperscript{218} and categorized treasure trove as property

\textsuperscript{211} Landes & Posner, \textit{supra} note 198.

\textsuperscript{212} \textit{E.g.}, Morrison v. United States, 492 F.2d 1219 (Ct. Cl. 1974); Bishop v. Ellsworth, 91 Ill. App. 2d 836, 234 N.E.2d 49 (1968); Morgan v. Wiser, 711 S.W.2d 220 (Tenn. Ct. App. 1985); \textit{Schley v. Couch}, 155 Tex. 195, 284 S.W.2d 333 (1955); \textit{see also} Annotation, \textit{supra} note 57.


\textsuperscript{214} Morgan v. Wiser, 711 S.W.2d 220 (Tenn. Ct. App. 1985).

\textsuperscript{215} \textit{Id.}

\textsuperscript{216} \textit{Id.} In that case, a trespassing finder discovered a hoard of five dollar gold coins buried eight to twenty inches below the earth’s surface. The coins all dated from before 1862, “were covered with rust [sic] and appeared to have been buried in a container that had decomposed.” \textit{Id.} at 221.

\textsuperscript{217} \textit{Id.} at 222.

\textsuperscript{218} 155 Tex. 195, 201, 284 S.W.2d 333, 336 (1955) (Calvert, J., concurring).
embedded within the earth.\textsuperscript{219} Thus, the Tennessee Court of Appeals adopted the presumption that the locus owner possesses treasure trove located in his property.\textsuperscript{220}

More courts should recognize the locus owner's constructive possession of treasure trove located in his land. By adopting this rule, courts could avoid the judicial guesswork needed to determine whether property constitutes treasure trove. First, courts would not need to establish an arbitrary age requirement with which to classify treasure trove or guess whether each discovery fulfilled the requirement. Second, courts would not be forced to speculate whether the true owner intended to hide the treasure trove. Since courts would award discovered treasure trove, as well as embedded and mislaid property, to the locus owner, courts would only award discovered property to the finder in situations that indicate the property was lost.\textsuperscript{221}

By recognizing the locus owner's constructive possession of treasure trove, courts would eliminate the distinction between the analytically similar categories of mislaid property and treasure trove. Since the true owners' actions when they mislay property or hide treasure trove are so similar, the law should consistently grant the possession of the item to the locus owners in both situations. Treating discovered treasure trove like mislaid property and awarding possession to the locus owner would also help to reunite the true owner with his property.

Treasure trove closely resembles mislaid property. The owner of mislaid property intentionally put down the property where he could later retrieve it. Because the owner forgot about the property, however, he failed to regain custody.\textsuperscript{222} Similarly, the owner of treasure trove intentionally concealed it in a place where he could later return to it; the owner failed to recover the treasure because he forgot or could not reach its hiding place.\textsuperscript{223}

\textsuperscript{219} Morgan, 711 S.W.2d at 223.
\textsuperscript{220} Id.
\textsuperscript{221} But cf. Riesman, supra note 22 (disparaging the distinction between lost and mislaid items).
\textsuperscript{222} Paset v. Old Orchard Bank and Trust Co., 62 Ill. App. 3d 534, 537, 378 N.E.2d 1264, 1268 (1978); Schley, 155 Tex. at 199, 284 S.W.2d at 335.
\textsuperscript{223} For example, in Groover v. Tippins, since the gold bullion was hidden under a rock, the owner presumably concealed it intentionally. 51 Ga. App. 47, 48, 179 S.E. 634, 635 (1935). Because accessing the space under a rock is difficult, it would be a logical hiding place; similarly, it is highly improbable that the owner could have inadvertently placed the gold under a large rock. The owner likely placed the trove under the rock because the owner felt no one would bother it until he later regained its custody. The markings on a nearby rock lend credence to this theory, since the owner may
This marked similarity between treasure trove and mislaid property is evident by comparing the facts of typical mislaid property and treasure trove cases. In *Hill v. South*,224 finders discovered recent currency in the bottom of a natural water pool.225 The owner had carefully placed the currency there; he had wrapped it in oil paper, then stuffed it in a fruit jar sealed by wax paper. The jar was in turn sealed in a small wooden cask attached to the bottom of the pool.226 In *Groover v. Tippins*,227 finders discovered gold dust and bullion carefully buried under a large rock.228 In both situations, the property was found where the owner must have intentionally placed it, at a location where the owner could later retrieve it, and in a situation in which the owner evidently had forgotten about it or was prevented from reclaiming it. Thus, both items fulfilled the legal definition of mislaid property. Because the hidden currency in *Hill v. South*229 was of recent vintage, the court classified it as mislaid property instead of as treasure trove, and awarded possession to the locus owner.230 In *Groover v. Tippins*,231 the court classified the gold as treasure trove and awarded possession of the trove to the finder.232

Courts may be reluctant to classify treasure trove as mislaid property if they suspect that the rationales behind the mislaid property rule will not apply to finds of treasure trove. Courts award possession of mislaid property to the locus owner to facilitate the property's return to the true owner.233 The law theorizes that since the owner intentionally placed the property down and forgot about it, when the owner realizes it is missing, he will retrace his steps, return to the locus, and reclaim the property.234 In contrast, since the law requires treasure trove to have the appearance of antiquity, courts assume that the owner of the trove is dead. As such, the

have used these markings as symbols to identify the trove's location. *Id.* Finally, after exerting the effort to hide the trove, the owner likely failed to retrieve it solely because he forgot its location or was prevented from reaching it. Thus, this typical treasure trove situation fulfills precisely the requirements of the mislaid property definition.

224. 207 Or. 71, 292 P.2d 141 (1956).
225. *Id.*
228. *Id.*
229. 207 Or. 71, 292 P.2d 141 (1956).
230. *Id.*
232. *Id.*
233. Loucks v. Gallogly, 1 Misc. 22, 26, 23 N.Y.S. 126, 127 (1892); Comment, supra note 71, at 238.
234. Riesman, supra note 22, at 1121; Note, supra note 22, at 196.
court may believe that the owner cannot reclaim the property and will not benefit from a rule giving its custody to the locus owner.

This rationale overlooks important realities permeating courts' classifications of discoveries as treasure trove. Since courts do not always adhere to the treasure trove requirement of ancient appearance, it is impossible to say definitively that the true owner of the trove will not attempt to reclaim it. For example, courts have categorized discoveries of gold coins bearing no signs of age\textsuperscript{235} and twenty-year-old coins\textsuperscript{236} as treasure trove. Courts seem only to require that the discovered bounty have no obvious indications of recent vintage.\textsuperscript{237}

Courts' laxity when applying the antiquity requirement creates the possibility that the true owner might be able to reclaim property categorized as treasure trove.\textsuperscript{238} The owner's executor or descendants would also be more likely to have knowledge of the existence and location of treasure trove hidden by a decedent.\textsuperscript{239} The descendants, as the trove's true owner, would have paramount rights to the treasure trove. As in the case of mislaid property, the true owner would be more likely to regain the property if the law gave possession of the trove to the locus owner rather than to the finder. The trove's owner would look for the trove where he, or his ancestors, left them—on the property and with the property owner. On the other hand, the true owner may not know the identity or the existence of any finders, and would therefore not be able to find or reclaim his property from them.

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\item[235.] Sovrn v. Yoran, 16 Or. 269, 20 P. 100 (1888).
\item[237.] For instance, courts would not consider money encircled by teller bands indicating that the money had been buried for only a few months as treasure trove. Willsmore v. Oceola Township, 106 Mich. App. 671, 308 N.W.2d 796 (1981); accord Hill v. South, 207 Or. 71, 292 P.2d 141 (1956) (hidden currency, one piece of which was probably deposited in the hiding place less than one year before the find, is not treasure trove).
\item[238.] For example, the court might assume that the owner is dead since the property had been buried for twenty-five years. The court might then judge that the property has a sufficient "appearance of antiquity" to classify it as treasure trove. See Morgan, 711 S.W.2d at 220; accord Davison, 145 Ga. App. at 410, 243 S.E.2d at 705. It is possible, though, that a person buried the property at the age of twenty. In that case, the true owner could still be alive twenty-five years later to return and claim the property.
\item[239.] Because of the length of the modern life span, a family secret revealing a treasure's location more easily could be handed down through the generations. Even if the property was buried one hundred years ago, the original owner's grandchildren could know the location of the trove. Thus, the grandchildren could return to the hiding place and remove the treasure.
\end{enumerate}
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Applying the constructive possession rule to finds of treasure trove will also fulfill several practical justifications. Section A illustrates how the constructive possession rule will improve the consistency of the law and fulfill the expectations of locus owners by awarding all embedded property to the locus owner. Section B describes how the constructive possession doctrine will thwart trespassers by denying them their find; the frequency of trespasses should decrease in the absence of the incentive to trespass. Finally, Section C will analyze the constructive possession rule in an economic framework, and will show that the rule will eliminate the inefficiencies of the current finders keepers approach.

A. Avoiding Illogical Distinctions Between Treasure Trove and Property Embedded Within the Earth

Recognizing the locus owner's constructive possession of treasure trove, as well as of other objects embedded within the earth, will improve the law's consistency. Locus owners have the necessary intent to control and possess all objects found under the earth, regardless of whether these objects constitute "embedded" property or "treasure trove." To award the property owner constructive possession of treasure trove, courts must first determine whether the locus owner linked physical control over the locus with an intent to possess the trove. To establish linkage, the locus owner is not required to intend to possess any particular item of treasure trove. Instead, the locus owner's intent to control the locus will encompass the intent to possess items secreted underneath it. Because the average locus owner will intend to exert control over his locus, the locus owner will possess the embedded treasure trove at the time the finder discovers it. The locus owner should remain in possession of the trove following discovery.

240. See Morgan v. Wiser, 711 S.W.2d 220 (Tenn. Ct. App. 1985); see also Schley, 155 Tex. at 203, 204–06, 284 S.W.2d at 337–39 (Calvert, J., concurring) (ignoring the distinction between treasure trove and embedded property).

241. See generally Ferguson v. Ray, 44 Or. 557, 77 P. 600 (1904) (discussing the land occupant's possessory interest).


243. Cf. Ferguson, 44 Or. at 567, 77 P. at 603 (noting the locus owner's constructive possession over those items embedded in the land even though the locus owner did not know those items existed); Elwes v. Brigg Gas Co., 33 Ch. D. 562 (1886) (noting that title to embedded property remains the locus owner's, even though the locus owner has no idea of the item's existence).

244. O.W. Holmes, supra note 242, at 206–46.

245. Otherwise, the court would reach the inconsistent result of divesting the locus owner of possession in favor of the finder. No overriding concern prompts the court to
By treating treasure trove as property embedded within the earth and recognizing the locus owner's constructive possession, courts will reach a result that is both consistent with other property law tenets, and more aligned with the average locus owner's expectations. A locus owner will expect to own all the property that may be found on the locus's surface and under the soil, subject to any restriction revealed at the time he acquired the locus. The locus owner's expectation to possess all items contained within his property will not vary simply because the items found are composed of gold or silver rather than iron. Because a primary purpose of the law of finds is to dispose of items according to the average person's expectations, the court should recognize the locus owner's constructive possession of discovered treasure trove.

A typical treasure trove situation will more fully illustrate the locus owners' similar expectations about embedded property and treasure trove, and the irrationality of treating embedded property and treasure trove differently. Suppose that a locus owner, with the help of a friend, digs a hole in the locus owner's cellar. The friend, while digging, finds a cache of gold coins hidden in an iron pot. The average locus owner would probably expect that both the cache of gold coins and the pot belong to the locus owner, since both were discovered in the locus owner's home. Under current treasure trove law, the locus owner's expectations would not be fulfilled. Instead, the friend, as the finder, would be entitled to the gold coins, while the locus owner would keep only the iron pot.

By avoiding the inconsistency; instead, many reasons mandate against that result. Thus, the locus owner should not be divested of possession of treasure trove.

246. Courts have recognized the locus owner's expectation of owning property embedded in the earth. The court in Allred v. Biegel, 240 Mo. App. 818, 822, 219 S.W.2d 665, 666 (1949), recognized that the claim of the locus owners included the surface and anything within the soil, to the earth's center. Since the law has recognized and complied with locus owner's expectations about embedded property, there seems to be no reason not to comply similarly with the locus owner's expectations about embedded treasure trove.

247. For instance, the locus owner would expect to own any valuable minerals, such as oil or coal, which are discovered in his property. This expectation will only be altered if the locus owner bought or inherited the property subject to another's superior claim to the property's mineral rights. Absent such an agreement, or other regulations, the locus owner will expect his right to the property to extend below the surface to the earth's center.

248. In addition, if a handyman, whom the locus owner had hired to fix the cellar, found the iron pot full of gold, the court would allow the handyman to keep the gold. Finders of lost or embedded property who are employed by the locus owner for a limited purpose, and who found the property while engaged in that purpose, do not get to keep their finds; instead, the court will award the locus owner possession of the find. See McDowell v. Ulster Bank, 60 Alb. L. J. 346 (1900); cf. South Staffordshire Water-
current distinctions between treasure trove and other embedded property, the constructive possession rule aligns with the locus owner’s expectations to keep all property discovered in his land.

B. Discouraging Instances of Trespass by Eliminating the Incentive to Trespass

As one commentator noted, courts’ evaluations of trespassing treasure trove finders seems to be grounded in emotion and legends rather than in legal analysis; a court would not require Huck Finn and Tom Sawyer to return the treasure to the cave owner. Courts would reach more legally consistent results by ignoring the romantic appeal and entertainment value of treasure trove and then applying the trespass exception to treasure trove, much as they apply the exception to lost, mislaid, and embedded items. Punishing both the trivial and the substantial trespasser by depriving her of her find would entirely remove the trespasser’s incentive to search for treasure trove on another’s land.

Trespass laws do not adequately counteract the trespassing finders’ incentive to trespass. For example, in California, even trespass works v. Sharman, 65 Q.B. 460 (1896). Finders of treasure trove who find the trove in the course of their employment are entitled to keep their find. See, e.g., Hurley v. City of Niagara Falls, 30 A.D.2d 89, 289 N.Y.S.2d 889 (1968), aff’d, 25 N.Y.2d 687, 254 N.E.2d 917, 306 N.Y.S.2d 689 (1969) (contractor hired to build a recreation room in the basement entitled to keep discovered money over the claim of the landowner who had hired him); Robertson v. Ellis, 58 Or. 219, 114 P. 100 (1911) (employee entitled to trove discovered while removing goods from warehouse for tenant/employer); Danielson v. Roberts, 44 Or. 108, 74 P. 913 (1904) (boys who found money while employed to clean out old henhouse entitled to possession of find over employer/locus owner). Because of the limited contractual purpose of his employment, the handyman would neither expect to find and keep treasure trove nor act in reliance of such an expectation. Because of the finder’s lack of expectation and reliance, and because the locus owner expects to control and possess everything within his land, the court should also award possession of the entire find to the locus owner.

249. Riesman, supra note 22, at 1116.

250. Punishing the trespassing finder of treasure trove will also be consistent with other legal treatment of trespassers. See, e.g., CAL. FISH & GAME CODE § 121641 (West 1984) (punishing trespassers by confiscating any game the trespasser had taken while trespassing). Similarly, punishing the trespasser by making her relinquish her claim to the discovered find mirrors the treatment of trespass in tort law. See Riesman, supra note 22, at 116.

251. This solution would entirely avoid a positive incentive effect on treasure hunting trespassers. By awarding trespassers no portion of their find, the court gives trespassers no reason to trespass to look for treasure trove. In fact, the rule would provide a negative incentive; since trespassers could not be compensated for the effort and time they spend discovering treasure trove, they would allocate their time to more profitable endeavors. This negative incentive, plus any punishment the state inflicted on trespassers, would help reduce the instances of trespass to discover treasure trove.
pass to a dwelling house is punished only as a misdemeanor.252 Furthermore, no treasure trove case mentions sanctioning the trespassing finder. In fact, courts do not even address the trespass issue.253

Recognizing the locus owner’s constructive possession of the treasure trove would negate rewards or windfalls to both the substantial trespasser and the technical trespasser254 who stumbles onto the trove by chance. Equity considerations might, at first glance, seem to indicate that a technical or trivial trespasser, whose trespass harms the locus owner only to a small degree, should recover at least part of the discovered treasure. Such a rule would, however, promote inconsistency in the law and encourage trespass. The law has a strong presumption against rewarding the trespasser for her wrongdoing;255 the mere fact that the trespass is technical should not overcome this presumption.256

Similarly, awarding the technically or trivially trespassing finder a portion of her find would reward the trespasser for an unauthorized interference with the locus.257 Although the monetary reward that the trespassing finder of treasure trove will expect to receive could be reduced to acknowledge any damage to the locus as a result of the trespass, the high value of most troves will ensure that trespassing treasure hunters will still have a strong incentive to trespass. For example, the value of a recent find in Michigan totaled more than $650,000;258 even if finders knew they could not keep the entire $650,000, they would have a strong incentive to trespass in order to find treasure trove if they could keep a small portion of the money.259

Punishing trespassing finders of treasure trove by not allowing them to keep the find will not further discourage them from disclosing their discoveries. Under current law, the trespasser will, in all likelihood, already remain quiet about any discovery, since the tres-

253. See supra note 185.
254. For example, someone who, while trespassing, does not interfere substantially with the locus owner’s rights would be a technical trespasser.
255. See Favorite v. Miller, 176 Conn. 310, 315, 407 A.2d 974, 977 (1978); Niederlehner v. Weatherly, 73 Ohio App. 33, 54 N.E.2d 312 (1943); Note, supra note 22, at 199.
256. But see Morton, supra note 22, at 105–06.
257. See e.g., Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634 (1935).
259. For instance, even if the finder were allowed to keep only one-third of the find, the finder would still retain $216,667. Many finders would risk a minor punishment for the chance to acquire $216,667.
passer will anticipate losing possession of the find if the court considers the find to be mislaid or embedded property. Depriving the trespassing finder of the treasure trove will not greatly affect the finder's honesty, and subsequently will not affect the probability of reuniting the true owner with the treasure trove.

C. A Workable Alternative: Eliminate Economic Inefficiencies by Awarding Possession of the Treasure Trove to the Locus Owner

The proposed constructive possession rule eliminates the primary inefficiencies of the finders keepers rule. By awarding any discovered treasure trove to the locus owner, the rule will not reward a trespassing finder by allowing her to keep the fruits of her trespass. By eliminating the finders' incentive to trespass, the constructive possession rule ends the need for locusowners to fence and police their property, and for trespassers to devote capital and labor to outwit the locusowner. As this Section will show, these benefits will probably outweigh the potential costs the constructive possession rule may engender; specifically, any loss of entertainment value and any increased incentive of the finders not to reveal their find will not be significant. This Section will show that the constructive possession rule's benefits exceed its costs, and exceed the benefits provided by the finders keepers rule.

Under the constructive possession rule, the potential finder could contract with the locus owner for the right to enter the locus owner's property to attempt to discover treasure trove. No transaction costs would prevent the parties from contracting to reach an optimal situation. The potential finder would know that the locus owner was the party with whom she would need to contract to gain the right to enter. Similarly, the potential finder would have the incentive to contract with the locus owner; without the locus owner's permission to enter his land to look for treasure trove, the finder will not be entitled to keep her discoveries. The locus owner and potential finder would be free to contract to reach an optimal agreement about the fee the finder would pay the locus owner for

260. Cf. Morton, supra note 22, at 106 (noting that the fear of the consequences of a substantial trespass will already cause the trespasser to remain silent about her trespass and find).
the right to search the property and the percentage of any find that each would keep.261

Since no transaction costs exist to skew their ability to contract, neither party will waste resources on noncontractual avoidance techniques. The locus owner will not need to erect high fences to keep out trespassing finders. Conversely, finders will not need to expend resources to discover methods to penetrate the locus owner's defenses.

Under this rule, competition between rival treasure hunters will develop, forcing trove finders to streamline their finding process and increase their efficiency. As a result, less time and resources will be wasted, and troves should be discovered at a faster rate.

The costs engendered by the constructive possession rule will not outweigh these benefits. Certainly, the community will suffer from the loss of the entertainment that the exploits of the adventurous finders provide. It seems unlikely, however, that the value of this loss will outweigh the benefits to society of avoiding the high policing costs of the finders keepers rule.

A more significant cost of the proposed constructive possession rule may be the possible incentives it provides to trespassing finders to discover treasure trove by stealth and to keep their discoveries a secret. A trespassing finder may devote capital and labor to stealth to avoid being discovered while searching for treasure trove. The constructive possession rule will give her an incentive to keep her discovery a secret to avoid it from being taken from her, and to avoid any other punishment her trespass may engender. If the trespassing finder acts on this incentive, society may suffer by not receiving the benefit of her discovery.

Although these costs may seem probable in theory, practice has shown that any such costs will be minor. The constructive possession rule already applies to discoveries of embedded property and mislaid property. Discovered property of these kinds can also be quite valuable, yet the constructive possession rule has apparently not provoked any significant attempt by trespassing finders to discover these items by stealth and to conceal their existence. Even if this proposed rule would have such an effect, the effect would prob-

261. Economic analysis assumes a competitive market will develop for treasure trove hunters. In such a market economy, the contractual award the finder would retain for her discoveries of trove would compensate her for her capital and labor expenditures, and for a return on her investments. Landes & Posner, supra note 198.
ably be minor; the fear of the repercussions of substantial trespass may already keep trespassing finders silent about their finds.\textsuperscript{262}

\textbf{CONCLUSION}

Although the majority of jurisdictions still follow the finders keepers rule governing treasure trove, some courts have moved beyond this rule to recognize the locus owner's constructive possession of the trove. As time progresses and technology fosters the discovery of more hidden treasures, more courts are likely to re-think this rule.\textsuperscript{263} As courts discard the antiquated finders rule, they will probably choose the consistent solution of merging the laws of treasure trove and mislaid and embedded property. In so doing, courts will rise above their emotional identification with the finder of treasure, and recognize the locus owner's constructive possession of treasure trove.

By recognizing the locus owner's possession of the treasure trove found in his land, courts would achieve a more legally consistent result. Triers of fact would not need to guess whether property fulfills the amorphous definition of treasure trove because they would award discovered trove, as well as mislaid and embedded property, to the locus owner. In this way, courts would effectively merge the laws surrounding mislaid property, embedded property, and treasure trove.

By awarding discovered trove to the locus owner, courts would also discourage finders from trespassing to discover treasure trove, and would thereby promote economic efficiency. Because courts would no longer allow trespassers to keep discovered trove, the finders would have no incentive to trespass to look for treasure trove. This rule would also enhance economic efficiency by enabling locus owners and potential finders to contractually achieve the optimal allocation of resources.

\textsuperscript{262} Morton, \textit{supra} note 22, at 106.

\textsuperscript{263} When courts are faced more frequently with the inconsistencies of the rule, they will be more likely to reevaluate the rule's logic, instead of applying it in a rote manner.