

THE LEGAL PROTECTION OF ANTIQUITIES IN THE BRITISH ISLES:
AN HISTORICAL SURVEY

Judith Rodden

Berkeley, California

In Britain antiquities have been accorded legal protection for rather less than a century. The Ancient Monuments Act was passed in 1882 after almost ten years of intermittent but always controversial debate. The Act may be criticised as being imprecise, inadequate and riddled with compromise; but the ultimate success of its proponents should not be estimated solely in terms of conservation. They had achieved what was, in effect, public and official acknowledgement of the importance of archaeological monuments as sources of historical information, as 'unwritten history' to quote a phrase used when the bill finally reached the House of Lords. Indeed it might be argued that much of the real significance of the 1882 Act lay in the effect upon national opinion of the arguments and evidence presented during the several attempts to see the bill through Parliament. Despite its practical limitations the first Ancient Monuments Act did embody certain assumptions about the value of British antiquities and the nature of public responsibilities concerning them; these may be assessed fairly only in the context of contemporary apathy and the destructive ignorance prevailing towards archaeological remains. The average villager, tenant-farmer or land owner inherited a tradition

which viewed archaeological monuments as, by and large, part of the landscape available for exploitation. The supernatural associations suggested by the names of certain megaliths may have given some of them a limited protection at one time, but in the early medieval period numerous Romano-British sites were robbed systematically for their brick and dressed stone; documentary evidence indicates that from at least as early as the seventh century until the late seventeenth century burial mounds were broken into in the hopes of finding treasure. During the eighteenth century, a period of innovations in agriculture and the enclosure of the ancient open fields, tumuli were levelled because they impeded the plough or in order to lighten the soil. Even a prehistoric site of the magnitude of the Avebury stone circles, recognized for what it was by John Aubrey in 1649 and a subject of scholarly interest in the eighteenth century, suffered periodic depredations. Describing the 'temple at Abury' in the Gentleman's Magazine in 1829 Joseph Hunter wrote that 'for some centuries past, whenever stone has been wanted, whether to build houses or walls, or to pave the roads, the temple was the ready quarry to which everyone had recourse; and within the last two years, three, if not four, of the few remaining stones have been broken up ...'. Comparable if unrecorded destruction must have taken place at many other sites.

Until the Ancient Monuments Act of 1882 was passed, the only law which might be invoked with regard to archaeological discoveries was that of treasure trove. This law offered no protection to antiquities, but defined the proprietary right of the Crown to treasure of gold or silver found in the earth, a right exercised mainly for the purpose of acquiring precious metals to turn into coin. Despite the limitations of its relevance to archaeology, the law of treasure trove may be appropriately described at this point, for the movement in favor of its reform was linked very closely with that advocating the protection of archaeological field monuments. In Britain the earliest written statement of this law dates to the second decade of the twelfth century, but it is possibly of Anglo-Saxon origin (Hill 1936). Treasure trove was defined in England as coins or objects of gold or silver; in Scotland it came in time to be interpreted to include artifacts of other materials. The salient point was that in order to come into the category of treasure trove, the objects in question had to have been discovered buried in the earth in circumstances suggesting that they had been deliberately hidden, presumably with the idea of eventual reclamation, and not lost accidentally or thrown away; objects found lying upon the earth or in the sea were excluded and belonged to the finder. It fell upon the Coroner's Court to determine whether the owner of buried treasure was unknown, in which case the treasure belonged to

the king. Since it could be argued that the Crown had a right to treasure not yet discovered, the king might grant licenses to individuals to dig for treasure in likely places, such as prehistoric barrows, often with the condition that any finds of value must be shared. There was no reward, though, for the man who brought a chance find of treasure trove to the attention of the authorities; and if he were found to have concealed such a discovery, he might be liable to imprisonment or a fine. These conditions made it virtually inevitable that gold and silver antiquities and objects supposedly of precious metal must often have been melted down quickly and in secret.

The impetus to the late nineteenth century movement for the legal protection of British antiquities may be traced to the fashions and preoccupations of the period between approximately 1825 and 1850. It is worth emphasizing, perhaps, that this period antedates many of the events which are often thought of as having affected the course of the development of European archaeology, such as the recognition of the great antiquity of the hand-axes on the Somme, the pioneer Paleolithic excavations in the Dordogne and Schliemann's discoveries at Troy and Mycenae. During the second half of the eighteenth century interest in local archaeology had been at a comparatively low ebb in the British Isles. Classical antiquities were deemed more worthy of attention and the early history of man was a matter of rational enquiry rather than the study of

material evidence. The change in attitudes may be ascribed partially to political unrest, which curtailed continental travel and replaced the Grand Tour with local journeys, while widespread feelings of nationalism in the years immediately after Waterloo might be thought likely to have fostered a concern with history of one's own rather than a foreign country. In any event, a reaction was beginning to take place against 'the aristocratic dilettantism of the Grand Tour' (Evans 1956: 263) as many more men from the increasingly important middle class came into archaeology. In contrast to the situation in the late eighteenth century, by the later nineteenth century British archaeologists tended to be businessmen such as John Evans, author of Ancient Stone Implements of the British Isles (1872), whose income came from family paper mills, or John Lubbock, who was a merchant banker, rather than members of the landed nobility or diplomats whose duties took them to the classical lands or the Near East. These are, however, hardly adequate reasons for the great increase in contemporary concern for British antiquities and explanations need to be sought on other levels. Indeed, during approximately the second quarter of the nineteenth century certain very basic changes were beginning to take place in British life, not only economically and socially but in philosophical outlook and aesthetic preferences also. New fashions in literary taste and architectural styles influenced archaeology; in the course of

the 1877 debate on the Ancient Monuments bill, the Member of Parliament for Elgin went so far as to state that it was 'Scott and the Oxford Movement' which had been responsible for the preservation of the remains of the Middle Ages in Britain. Certainly Sir Walter Scott's novels, published between 1814 and 1828, and others in contemporary 'romantic' vein very probably evoked a good deal of the admittedly somewhat indiscriminate enthusiasm for medieval antiquities, using the term in a wide sense. The regenerative movement within the Church of England, with its emphasis on embellishing churches and enriching the liturgy, aroused a rather different type of interest in pre-Reformation ecclesiastical art and architecture. By complete contrast, a materialistic interpretation of the development of British archaeology emphasizes the effect upon public awareness of the number of antiquities and ancient sites discovered by chance during the middle decades of the century as a result of, in particular, the construction of railways and the building of artisans' houses in areas which rapidly were becoming industrialized.

Growing public interest in national antiquities had very definite repercussions in organized archaeology. Two national institutions, the Archaeological Association and the Royal Archaeological Institute, were founded in 1845. There was a striking increase in local societies for the study of archaeology and architectural history during the years 1846-51; at least

eighteen were found at this time (Evans 1956: 264-265).

Admittedly, the archaeology they pursued, as represented by such publications of the period as Thomas Wright's Archaeological Album (1845), lacked particular aims and was concerned mainly with the description of various medieval antiquities and depictions of landscapes. Contemporary books on prehistoric archaeology, such as Thomas Bateman's Vestiges of the Antiquities of Derbyshire (1848) confined themselves to straightforward descriptions and whatever quotations from the classics that might be relevant. This generalized interest was invigorated with a greater sense of purposes as a result of the visit in 1846-7 of the Danish archaeologist J.J.A. Worsaae, the successor of C.J. Thomsen. Worsaae travelled widely in the British Isles during this visit and became acquainted with a number of archaeologists. It is apparent that it was largely through conversation and subsequent correspondence with these men that the idea of the three age system, as conceived in Scandinavia as a relative chronology of the prehistoric past, was introduced into Britain. Throughout the long effort to secure legal protection for antiquities in Britain, Worsaae was repeatedly asked for information on Danish practices in this regard. Several of his correspondents were curators in the British Museum, which was being assailed by demands for a Department of British Antiquities. Layard's monumental finds from Assyria were arriving at the Museum during these years, but no space

was devoted to British archaeology (Kendrick 1951-55: 139-149) and indeed it was not until 1866 that a separated department of British and Medieval Antiquities was created.

The state of educated opinion concerning national antiquities just prior to the middle of the century may be surmised from an article in the Edinburgh Review for 1847. Ostensibly a review of recent books on archaeology, the author embarked upon a denunciation of the neglect of archaeology in Britain and the lack of government action or of official encouragement to archaeologists. He deplored the 'irretrievable loss of so many objects of antiquarian interest, which have been allowed to perish through ignorance and neglect' and was of the opinion that 'nothing but active interference can guard against these scandals being re-enacted on a larger scale and in a more aggravated form ...'. Strong words: but it was to be some years before an attempt was to be made to translate them into plans for practical action. Certain events occurring soon after the mid-century may have had an influence in precipitating activity. Up until that time, the 'objects of antiquarian interest' had, almost without exception, been medieval, Anglo-Saxon, Romano-British and 'Ancient British' antiquities, the latter being viewed, it would appear, as having existed in some sort of limbo preceeding the Roman invasion. Even the Stone Age of the Scandinavian antiquaries was limited to what would now be termed the Neolithic. In 1859 the recognition, by a

British group comprising the geologists John Prestwich and Hugh Falconer and the archaeologist John Evans, of the human manufacture and great antiquity of the flint axes found at Abbeville by Boucher de Perthes added what was in effect another dimension to archaeology. The previous year William Pengelly had made public his finds of flint tools in stratigraphic association with bones of extinct animals at Brixham Cave in Devonshire. Possibly it was excitement at the realization of the implications for archaeology of the study of such geological associations - and, maybe, some degree of shock at contemplating the extent of the savagery of the earliest inhabitants of Britain - that stimulated John Lubbock to put together the first popular work of archaeological synthesis, Prehistoric Times (1865). This book, which introduced the terms Paleolithic and Neolithic, was a best-seller. By the time of the author's death, in 1913, it had reached its seventh edition and it was still being sold as an undergraduate textbook in Cambridge in 1932 (Daniel 1962:50). Prehistoric Times was based on five papers on prehistoric archaeology and enlarged to include a great deal of quite varied ethnographic material with the intention that this should 'throw some light on the remains of savage life in ages gone by'. Judging by the book's success the combination of the cave man and the contemporary savage must have proved irresistible.

It was fortunate that works such as Prehistoric Times, Lyell's Geological Evidences for the Antiquity of Man and Nilsson's Primitive Inhabitants of Scandinavia were available, for the 1870's were a period of exceptional discoveries in European archaeology, notably Lartet and Christy's work in south-western France and de Mortillet's pioneer works of classification. Although it is not easy to comprehend in retrospect the impact, made upon a generation brought up on classical literature, of the demonstration made through Schliemann's excavations at Troy and Mycenae that the Homeric epics had their roots in an actuality that could be revealed by the archaeologist, these were possibly the most significant archaeological discoveries of the age from the point of view of the general public. It is not surprising that it was in 1871 that John Lubbock, who was also Member of Parliament for Maidstone in Kent, decided to bring a bill for the protection of Ancient Monuments before the British Parliament.

It is hardly pertinent to describe here the complications of procedural tradition to which the Ancient Monuments bill was subjected before it became law in 1882, but it has been said that it was given nine first readings and passed its second reading six times, as well as being relegated to a select committee of the House for a year in 1877-8 (Brown 1905). The bill posed many problems, for it proposed to extend government activity into matters with which it had not been

concerned hitherto and there were few precedents to follow. In its initial form it was very moderate in aim; certain commissioners should have power to purchase an archaeological site and to interrupt work which was thought likely to damage a monument, while three months' notice was to be given by any landowner who intended to interfere with archaeological remains on his estate. Immediate criticism of the vagueness of Lubbock's bill was not unjustified. No explanation was given as to what constituted an Ancient Monument and at first no list was given of archaeological sites which it was proposed to schedule as monuments. The powers of the commissioners were wide and lacked definition; in any case, there was disagreement as to who should be designated commissioners, some Members of Parliament favoring the Trustees of the British Museum while others suggested the Society of Antiquaries, the Society of Antiquaries of Scotland and the Royal Irish Academy. Over and above these points of argument there was the reiterated question as to who should pay for the protection of monuments. Considered on another, less disinterested level, the main criticism of the bill, and one which came up every time it was debated, was that it represented an intolerable intrusion upon the rights of private property. Some of the most outspoken criticism was made in a debate in March, 1877, by Lord Francis Hervey, Member for Bury St. Edmunds in Suffolk. Without doubt the opinions he voiced have been echoed elsewhere since. Lord Francis

declared that he was dubious as to what was a 'national' monument, and questioned whether they were worth preserving. The proposed powers of the commissioners were such that 'People who wanted to have some works of utility carried out might be put to a great deal of trouble and expense, and possible litigation' and, in conclusion, he queried whether 'Englishmen should be called upon to exhibit enthusiasm for the monuments of that barbarous and uncivilized race whom our forefathers took the trouble to expel from the country' (Hansard 1877: 1527-1563). Despite this vehemence, the bill passed its second reading that day; during the six years since its introduction into the House of Commons the small group of Members of Parliament supporting the bill had, in repeated attempts to see it pass into law, presented a good deal of information on the destruction of monuments going on at that time and the eloquence of their arguments had roused increased interest in the House. Sufficient people remained unconvinced, however, to prevent the Ancient Monuments bill from reaching the House of Lords until 1880. At that date it was in an amended form, having been referred to a Select Committee of the House of Commons; this had resulted in the clarification of several uncertain points, the Trustees of the British Museum being selected as the commissioners who were to extend protection over archaeological monuments, and a list having been drawn up of those monuments which it was proposed to schedule. Although

certain of their Lordships expressed satisfaction at the amended form of the bill, the entrenched interest of the great landowners proved insurmountable.

After this setback, there was recourse to public relations. A list of the monuments which it was proposed to schedule was published by C.P. Kains-Jackson under the title of Our Ancient Monuments and the Land Around Them (London, 1880). The book began with a concise prehistory of Britain written by Lubbock and continued to give an illustrated description of each monument, concluding with an account of the recent debate in the House of Lords and a list of those members of the Commons who had voted for and against the bill when it passed its second reading in 1877. The list of the sixty-eight monuments or groups of monuments scheduled is notable in that it was made up predominantly of prehistoric sites and by far the most of these were megalithic structures, passage and gallery graves, stone circles and standing stones. The antiquarian societies who had drawn up the list had also included earthworks such as Uffington and Cadbury Castles and certain hillforts in Ireland and Scotland. The only medieval site included was the deserted town site of Old Sarum. As Lubbock pointed out in his preface, it was decided not to include as Ancient Monuments such buildings as Castles and ecclesiastical structures. His reasons were the greater expense involved and that with the need for occasional repairs, 'questions of style and taste would arise'. Conceivably

he felt that the inclusion of such buildings would prevent the bill from ever being approved by Parliament. If an Englishman's castle was his home he would hardly tolerate its being scheduled as an Ancient Monument.

As it ultimately became law upon receiving the royal assent in 1882, the Ancient Monuments Protection Act included three main provisions. The owner of a scheduled monument might constitute the commissioners of works its guardians, in which case they would pay for its upkeep and expect to have access to it in order to do so and to prevent its being damaged; the government would provide the necessary money; the commissioners were empowered to purchase any monument to which the act applied, with Treasury consent, but only by agreement and not by compulsion. It was hoped, apparently, that owners of all the monuments listed as scheduled would eventually make them over to the custodianship of the Office of Works. By 1900, Forty-three of the sixty-eight were public property. The Act also instituted the Office of Inspector of Ancient Monuments and Lieutenant-General Augustus Pitt-Rivers was appointed to the position, which he held until his death in 1900. The choice was fortunate, for Pitt-Rivers had begun, two years earlier, an extensive programme of excavations on his estates in Cranborne Chase in south-western England, investigations of barrows, earthworks and settlement sites which were conducted with military precision and thoroughness and which involved total

excavation of sites and the publication of all archaeological finds. His privately published reports, Excavations in Cranborne Chase, set a standard in quality and completeness which it has been difficult to emulate since.

Although the cause of the protection of field monuments has received more attention, the question of the reform of the law of treasure trove had also concerned antiquaries. Again, Scandinavian traditions in this regard had been used as examples. In 1858 an Irish peer, Lord Talbot de Malahide, had introduced a bill into the House of Lords which would have ensured that the finder of treasure trove should be given the full antiquarian, and not merely the bullion, value of the gold or silver objects he had discovered. In this case also the problem of who should provide the necessary funds was raised, and the bill foundered in difficulties brought up by the Treasury. Although comparable reforms had been made in Scotland in 1859 and Ireland in 1861, it was not until 1886 that a minute was issued from the Treasury in London stating that eighty to ninety percent of the antiquarian value of articles designated as treasure trove might be paid to the finder.

In the period since 1882 the original Ancient Monuments Act has been modified by several minor acts.¹ Following the precedent of the Irish Church Act of 1869 and a subsequent Act in Ireland in 1892, the provisions of the Ancient Monuments

Act were extended to English and Scottish medieval archaeological monuments in 1900, with the result that the number of monuments under governmental guardianship increased by almost one hundred during the next thirteen years. The Ancient Monuments Consolidation and Amendment bill of 1913 recognized the fact that about twenty of the monuments listed on the schedule appended to the 1882 Act still remained in private hands, including Stonehenge, and sought powers to provide such owners with free advice and to permit the authorities to act quickly to prevent the destruction of a monument through thoughtless neglect. Lord Curzon, a champion of the bill, wished to extend the provisions of the Ancient Monuments Act to a far greater extent with respect to Church property. He also emphasized the relative inadequacy as a deterrent of a fine of £20 incorporated in this bill; but it is perhaps relevant to note in this regard that the annual salary of the Inspector of Ancient Monuments was only £400 at the time. When the Ancient Monuments bill of 1930 was first read in December of that year there were 3,000 scheduled ancient monuments and 280 under the guardianship of the Office of Works. This bill, which was passed as an Act in 1931, was drawn up with the aim of protecting the areas immediately around scheduled sites; it was pointed out that both Stonehenge and Hadrian's Wall were threatened by nearby quarrying. The Historic Buildings and Ancient Monuments Act of 1953 constituted a new departure in this field of

legislation since it introduced the principles both of compensation and of compulsory procedures. During the debate on this bill the Solicitor General commented on the difficulties of bringing successful legal actions against persons who damaged or destroyed monuments, since it was necessary to establish that this was the result of deliberate and positive action.

During the last twenty years developments have taken place in Britain which point to the need for additional and far more extensive changes in the Ancient Monuments Acts. The most spectacular problem concerns the archaeological investigation of ancient wrecks, a matter which has received considerable publicity. The present legal situation results in an almost incredible tangle which makes methodical nautical archaeology virtually impossible and places great difficulties in the way of the adequate preservation of objects found in wrecks (Marsden 1972: 198-202). Since the lawful descendent of an original owner can lay claim to his property even centuries after its loss, wrecks of Dutch, Danish and Spanish ships within British territorial waters have been claimed successfully by the governments in question. Objects found in or on wrecks are, however, classed as personal property of those who had sailed in the vessel and since it is almost always impossible to prove modern ownership they pass ultimately into the possession of the British Crown, which is bound to sell them.

If the articles are of gold or silver they cannot be classified as treasure trove since this law applies only to articles found in the earth. The publicity given to the antiquities, which included thousands of silver coins, recovered from eighteenth century wrecks off the Scilly Isles in the far south-west of England has acted as a great stimulus to treasure hunting by amateur divers and to the illicit sale of articles which they have discovered under water. The possibilities of legislation to protect ancient wrecks and their contents is now under consideration by the Council for Nautical Archaeology and the governmental departments legally involved with matters of shipwrecks and salvage.

There may be some parallels to draw between the situation in Britain today and that of the 1840's in that building and major construction work, in the present instance of motorways rather than railways, are revealing a great number of archaeological sites. The situation is compounded by extensive rebuilding in cities of ancient origin. It is almost insuperably difficult for archaeologists to receive adequate time to investigate sites before they are covered with a new road or with buildings since the contractors' time is too valuable for work to be held up for more than a short time. A possible solution may be that in the future town planning law may be changed so that the archaeological investigation of a site has to be permitted before its development is

allowed to take place.² Such a major step would possibly evoke quite as much opposition, and from even more vested interests, as did Lubbock's original Ancient Monuments bill. Money is an inevitable additional problem for archaeologists working in Britain; in 1972 the entire governmental grant for the excavation of archaeological sites, which amounted to L310,000, had been expended totally during the first four months of the financial year. It has been proposed that this grant should be increased by L100,000 a year until the annual total is L800,000.

Money, however, is not the answer to the problem of the protection and preservation of archaeological remains, whether it is in the form of an inadequate grant for their excavation or an inadequate fine as a punishment for damaging them. Nor, to paraphrase the Solicitor General's words in the debate on the 1953 Act, does the proper preservation of ancient monuments come about by creating criminal offences by Acts of Parliament. At a time when archaeologists increasingly are preoccupied with the comparative objectivity imparted to their field of interest by the utilization of scientific techniques, perhaps it is worth taking the risk of recalling that in its beginnings archaeology had a toe-hold in early nineteenth century romanticism. Romanticism may not be among the nobler sentiments, but it may be that it is in these terms that the great majority of people are prepared to

accept the idea of the value and significance of archaeological remains. In 1880 John Lubbock concluded his preface to Our Ancient Monuments with John Ruskin's uncompromising eloquence on the destruction of ancient buildings:

The dead still have their right in them ... that which they laboured for, the praise of achievement or the expression of religious feeling, or whatsoever else it might be which they intended to be permanent, we have no right to obliterate. What we ourselves built, we are at liberty to throw down, but what other men gave their strength and wealth and life to accomplish, their right over does not pass away with their death ... (Ruskin 1855: 181).

In another age and another continent, perhaps these lines have not yet lost all their relevance.

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Endnotes

1. I am indebted to Dr. I.M. Stead, Inspectorate of Ancient Monuments and Historic Buildings, Department of the Environment, London, for information on the later Ancient Monuments Acts, 1913-53.

2. I am indebted to Mr. Charles Sparrow, Q.C., Honorary Legal Adviser to the Council for British Archaeology, for information on the possible forms of new legislation. I am, however, wholly responsible for comments made in this paper.