It has long been thought that the rule with regard to challenging the credibility of a witness restricts a party to adducing evidence of general reputation. Doubt has been cast on this rule by the *Toohey* case. It is submitted that in light of the *Toohey* case it is now time to think over the purpose of the rule and give serious consideration to liberalising the rule.

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A CONJECTURE ON THE CANADIAN LAW OF TREASURE-TROVE

A novice in law can be somewhat dismayed to find a topic among his subjects which is not only rare in his native country but positively non-existent. Such was the case when this writer, to settle a controversy on the definition of treasure-trove, found that Canada has been without any cases on that subject for one hundred years.

In consequence, the novice decided to investigate further and in the process made a hypothetical finding (something he has been told no experienced judge will do except by necessity). This brief article, therefore, will deal with two main points: the definition of treasure-trove, with its numerous national variations, and the constitutional question arising out of the Canadian situation.

The modern definition was discussed in an English case in 1903,[1] the definition being an adaptation from Blackstone[2] and Coke.[3] This definition,[4] as was authoritatively pointed out by Cecil Emden in an excellent article in 1926,[5] consists of four elements: the property must be gold or silver; it must have been hidden; in the ground or in a secret place; and the owner must be unknown.

According to common law, once it is established that a finding is treasure-trove,[6] the property of the goods vests in the Crown. The reasons for this, though still somewhat doubtful, are explored

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1. A.-G. v. British Museum Trustees (1903) 2 Ch. 598.
2. 1 Bl. Comm. (14th ed.) pp. 295-6.
3. 3 Co. Inst. 132-3.
4. "Treasure Trove, is where any gold or silver, in coin, plate or bullion is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the King or his grantee, having the franchise of treasure trove". Farwell J. at page 608.
5. "The Law of Treasure Trove" 42 L.Q.R. 368.
6. In England, the Coroner has, since the statute 'De Donis Coronatoris' 4 Ed. I St. 2, the authority and duty to hold an inquest upon the notice of gold or silver being found, to ascertain whether or not it is treasure-trove. See Boys' on Coroners by C. R. Magone and E. R. Frankish (5th Ed.); and Thurston, Coroners Practice, and also see A.-G. v. Moore (1893) 1 Ch. 676 where besides ruling on the jurisdiction of the coroner, the judge applied Chitty's definition of treasure-trove which was almost exactly followed in A.-G. v. British Museum Trustees (Supra).

in detail in Emden's article. The civil law of the continental countries differs from the common law on this question of disposition of the treasure-trove. The *Encyclopedia Britannica* (1948) points out that modern French law is that one-half goes to the finder and one half to the owner of the land on which the treasure-trove was found (*i.e.*, owner of the *Locus Quo*). In Germany, Italy, and Spain, as well as the state of Louisiana in the U.S.A. the law is the same. India has a rather unique system whereby the first finder acquires three quarters of the property with the other one quarter going to the owner of the *Locus Quo*. In the other states of the U.S.A., title to treasure-trove belongs to the finder as against all but the true owner.[7]

Canada has as yet not had a case on treasure-trove, but it is contended that the decisions in the *Moore* and *British Museum* cases would be followed and that treasure-trove in Canada would be defined as "gold or silver in a state other than their natural state,[8] found concealed in a house, or in the earth or other private place, the owner of such gold or silver being unknown." Also, consistent with English rather than American or other decisions, such treasure-trove would vest in the Crown.

This, however, leads to a problem not encountered in England. Which Crown? The Crown in right of Canada, or the Crown in right of the province?

My submission is that treasure-trove vests in the Crown in right of the province, unless the province has expressly granted this right to the Dominion or to some individual or group of persons.[9] This submission is based on two authorities.

First, in *A.-G. v. British Museum Trustees*, it was found that treasure-trove was one of the *Jura Regalia*. In *Rex v. A.-G.B.C.*[10] it was held that "Royalties" is a word equivalent with *Jura Regalia* and by virtue of section 109 of the British North America Act[11] such *Jura Regalia* belong to the province in which they

7. Zech v. Accola 253 Wisc. 80; 33 N.W. (2nd) 232 (1948); quoted in Zolman Cavitch's article in 47 Mich L. Rev. 718 (1949). On the other hand, note this quotation from A New English Dictionary on Historical Principles (Edited by Sir. James A. H. Murray) where in the article concerning treasure-trove in England, it states: "To encourage the giving up of such treasure, when found, and to prevent the destruction of valuable antiquities, the finder now receives from the crown four-fifths or nine-tenths of the value." For more of this and a good discussion of A.-G. v. British Museum Trustees see Martin's article in (1904) 20 L.Q.R. 27.
8. Foster v. Fidelity Safe Deposit Co. 162 MO. App. 165, quoted in Cavitch, op. cit; paper representatives of gold and silver were included in the definition but there is no authority for considering that it would be so defined in Canada.
9. There are many recorded examples of franchises to treasure-trove being granted. In A.-G. v. British Museum Trustees such a defence was also raised. The Canadian aspect will be mentioned later in the text. See also A.-G. Alta v. A.-G. Can. (1928) A.C. 475.
10. (1924) A.C. 213.
11. "All Lands, Mines, Minerals, and Royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and All Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same". The four western provinces were placed in the same position as the original provinces by the British North America Act, 1930, of Geo. V. c. 26 (U.K.).

are situate or arise, and not to the Dominion.[12] Thus by simple logic — treasure-trove is a *Jura Regalia; Jura Regalia* is a royalty under section 109 belonging to the province; "*Ergo*", treasure-trove is a royalty under section 109 belonging to the province.

The second authority is a statute, but is not quite as strong. To date only one jurisdiction in Canada has passed legislation respecting treasure-trove. The Treasure-Trove Act, chapter 299 of the Revised Statutes of Nova Scotia, 1954, provides that the province, through the Governor-in-Council, may grant licenses to search for and, upon payment of a royalty, retain "Precious Stones or Metals in a state other than their natural state or any treasure or treasure-trove." The province did in fact issue such a license to Alex Storm who found the famous treasure-trove from the French paymaster ship 'The Chameau'.[13] Storm had also obtained from the Federal Department of Transport, a letter giving him permission to retain whatever he salvaged from 'The Chameau' without having to hand it over first to the Receiver of Wrecks.

The latter authority for my submission is, of course, somewhat weak. Just because a province passes legislation does not make such legislation automatically *intra vires* even if unchallenged by the Dominion. Yet in conjunction with section 109 of the B.N.A. Act and the wide interpretation given section 92 of the same Act, the conjecture should stand.[14]

To recapitulate then, treasure-trove consists of gold or silver in a state other than natural — such as refined into bullion, or manufactured into jewellery which had been concealed[15] — that is, not abandoned or merely lost, in which case the first finder has a good title as against all the world but the true owner[16] — the owner thereof being unknown.[17] Title to such treasure-trove

12. This is in accordance with a decision respecting escheats to the Crown in Mercer v. A.-G. Ont. (1883) 8 A.C. 767.

13. As reported in MacLean's Magazine, June 18 and July 2, 1966.

14. Mr. Justice Laskin, in his work on Canadian constitutional law states: " . . . The Privy Council drew the lines between legislative power and proprietary right, making it clear that it was the Crown (Province) rather than the Crown (Dominion) in which, except as provided expressly in the B.N.A. Act, Public Property vested and that federal legislative power did not Per Se give the Crown (Dominion) any proprietary rights in connection with the classes of subjects listed in S. 91 save as the Dominion might have acquired such rights otherwise." Canadian Constitutional Law, Bora Laskin, 3rd Edition, p. 552.

15. In A.-G. v. British Museum Trustees (supra) it was held that if the treasure is found buried in the earth or in some secret place, there is a presumption that it was concealed and thus constitutes treasure-trove. A plausable counter-explanation is not sufficient to rebut the presumption. In that case certain artifacts were found which the finder attempted to explain were not treasure-trove because they were votive offerings to some sea-god.

16. Armory v. Delamirie. (1722) 1 Stra. 505.

17. Blackstone wrote that if the owner or his personal representative shows up, the treasure belongs to him and not the Crown (Bl. Comm. pp. 295-6). It has also been stated that a corporation can recover such property proved to belong to it.

vests in the Crown in right of the province of the *Locus Quo*. This, however, it is repeated, is conjecture and, no one need be told, definitely not binding authority.

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PICKETING AND THE COURTS

It has been suggested that various areas of the law of labour relations should be defined by legislation rather than left to develop through the normal judicial process. It is perhaps in the area of picketing that the advocates of legislative initiative find the greatest amount of ammunition. It is this particular field of the law that the legislators seem most eager to avoid while at the same time the courts do not seem to appreciate the modern day context within which the picketing takes place. *Robert Williams et al v. Aristocratic Restaurants (1947) Ltd.*[1] gave a certain recognition to picketing but most judges since that decision have been able to find facts which prevent the picketing before them to be considered "peaceful" and thus be protected by the principle put forward in that case.

This judicial antipathy to picketing is even more evident in the area of secondary picketing. The judicial attitude towards this type of picketing is comprehensively discussed by Dean Carrothers in an article in the Canadian Bar Review[2] at which time he hoped for some judicial or legislative guidance in this respect.

Such guidance was soon provided by the Ontario Court of Appeal in the much discussed case of *Hersees of Woodstock Ltd. v. Goldstein.*[3] The conclusion reached by Mr. Justice Aylesworth and subsequently followed, was that secondary picketing was illegal *per se*. The merits of this decision is not the purpose of this comment; suffice it to say that the result was not unexpected in view of the indicated judicial reaction to the use of secondary pressure.[4] The application of this principle, especially in the case of *Heather Hill Appliances Ltd. et al v. McCormack,*[5] would strengthen Professor H. W. Arthurs call for legislative discussion.[6] However, before we accept legislative interference in this field and thus sacrifice the flexibility which should be available through the courts it appears that there is a possibility that the *Hersees* decision may not be the blindly followed precedent that first

1. (1951) S.C.R. 762.
2. Secondary Picketing (1962) 40 C.B.R. 57.
3. (1963) 38 D.L.R. 449.
4. Op. Cit. footnote 2.
5. (1966) 1 O.R. 12.
6. (1962)41 C.B.R. 573, 585, 586.

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