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Treasure Trove in Roman Law and in its Subsequent Fate

Abstract

In this study, some problems of regulation concerning treasure trove in Roman law, in mediaeval legal history, in modern age, and in contemporary legal systems are scrutinised. As for Roman law, e.g. the famous text by Paul (D. 41, 1, 31, 1, in which the original, classical, influential, but dogmatically strongly discussed definition of treasure can be found) and the relevant imperial constitutions [e.g. the constitution by Hadrian (cf. Vita Hadr. 18, 6 and Inst. 2, 1, 39)] are briefly analysed. Although later utterly new regimes were created concerning treasure trove, Hadrian's (and Justinian's) regime of treasure trove – as well as the famous definition by Paul – survives even in many contemporary codes of the civil law jurisdictions.

Keywords: treasure, treasure trove, money, valuable movable, landowner, finder, media sententia, natural equity, Roman law tradition, "private law" and "public law" approach

I. Antecedents and purposes of our research

a) With regard to the numerous relevant sources of Roman law, treasure trove could be considered as an important legal problem in ancient Rome.

During the analysis of treasure trove patterns of Roman law, dogmatically as well as terminologically important questions appear, which have not been clarified even today. Just some examples need to be named here: Could only money or other movables of any value also be regarded as treasure in classical Roman law? Can treasure trove be regarded as an autonomous way of acquiring ownership in classical Roman law, or not? In addition, several important questions are to be studied, such as the different points of view of classical Roman jurists concerning the legal nature of treasure, the problems of treasure trove by a slave or a *filius familias,*[1] and the development of the treasure trove regime in the context of imperial constitutions.

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[1] Many debates arose regarding a *filius familias* (under the authority of his father) or a slave who found treasure in an immovable property – neither of whom was able to acquire ownership of them. In this

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b) As for the Roman law literature, a number of studies have been published, on the one hand related to general issues (cf., for instance, Pampaloni,[2] Perozzi,[3] Rotondi,[4] Bonfante,[5] Mayer-Maly,[6] Marchi,[7] and Knütel[8]) and, on the other, linked with certain details (see, for example, Appleton,[9] Schulz,[10] Lauria,[11] Nörr,[12] Scarcella,[13] Busacca,[14] and Klingenberg[15]) of treasure trove.

The most specialised analysis of treasure trove in Roman law could be found in the great monograph by a Spanish Romanist, Alfonso Agudo Ruiz, published in 2005.[16]

respect, the texts by Tryphoninus (D. 41, 1, 63) are relevant. Cf. F. Schulz, Fr. 63 D. 41, 1 (Zur Lehre vom Schatzerwerb), (1914) (35) *SZ,* 94 ff. https://doi.org/10.7767/zrgra.1914.35.1.94; A. Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano,* (Madrid, 2005) 92 ff.

2 M. Pampaloni, Il concetto giuridico del tesoro nel diritto romano e odierno, in *Per l'VIII centenario della Università di Bologna,* (Roma, 1888) 101 ff.

3 S. Perozzi, Contro l'istituto giuridico del tesoro, in *Monitore dei Tribunali,* 31, (Milano, 1890) 705 ff.

4 G. Rotondi, I ritrovamenti archeologici e il regime dell'acquisto del tesoro, *Rivista di diritto civile,* (1910) (2) 310 ff.

5 P. Bonfante, La vera data di un testo di Calpurnio Siculo e il concetto romano del tesoro, in Mélanges *P. F. Girard,* I, (Paris, 1912) 123 ff.; Idem, *Corso di diritto romano. La proprietà,* II/2, (Torino, 1968) 127 ff. (In our study, Bonfante's famous and even in the modern research relevant *Corso* will be cited.)

6 See, for instance, Th. Mayer-Maly, Der Schatzfund in Justinians Institutionen, in P. Stein and A. D. E. Lewis (eds), *Studies J. A. C. Thomas,* (London, 1983) 109 ff.; Idem, Thensaurus meus, in *Studia V. Pólay,* (Szeged, 1985) 283 ff.; Idem, Ducente fortuna, in *Studies A. A. Schiller,* (Leiden, 1986) 141 ff.

7 E. C. S. Marchi, A 'fanciulla d'Anzio' e o instituto do tesouro, (1997) (25) *Index,* 365 ff.

8 R. Knütel, Von schwimmenden Inseln, wandernden Bäumen, flüchtenden Tieren und verborgenen Schätzen. Zu den Grundlagen einzelner Tatbestände originären Eigentumserwerbs, in R. Zimmermann, R. Knütel and J. P. Meincke (Hrsg.), *Rechtsgeschichte und Privatrechtsdogmatik (Festschrift H. H. Seiler),* (Heidelberg, 1999) 569 ff.; Cf. Idem, Arbres errants, îles flottantes, animaux fugitifs et trésors enfouis, *Revue historique de droit français et étranger,* (1998) 76 (2) 206 ff. (In our study, the author's German language work will be cited.)

9 Ch. Appleton, La trésor et la « iusta causa usucapionis », in *Studi P. Bonfante,* III, (Milano, 1930) 3 ff.

10 Schulz, Fr. 63 D. 41, 1, 94 ff.

11 M. Lauria, Dal possessore del tesoro all''inventor', (1955) (1) *Labeo,* 21 ff.

12 D. Nörr, Ethik von Jurisprudenz in Sachen Schatzfund, (1972) (75) BIDR, 11 ff.

13 A. S. Scarcella, Una nuova concezione del tesoro alla luce del C.I. 10.15.1, (1989) (58) *Atti dell'Accademia Peloritana dei Pericolanti,* 188 ff.

14 C. Busacca, Qualche osservazione sulle innovazioni introdotte dai Divi Fratres nel regime giuridico del tesoro, in *Studi A. Falzea,* IV, (Milano, 1991) 133 ff.

15 G. Klingenberg, Der „Angeber" beim Schatzfund, in *Gedächtnisschrift Th. Mayer-Maly,* (Wien, 2011) 237 ff. https://doi.org/10.1007/978-3-7091-0001-1_15

16 Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano,* See the Spanish author's studies on this topic, too: Idem, La definición del tesoro en las fuentes jurídicas romanas, (2006) (4) *Revista electrónica del Departamento de Derecho de la Universidad de La Rioja,* 153 ff. https://doi.org/10.18172/redur.3986, http://www.unirioja.es/dptos/dd/redur/numero4/agudo.pdf (Last accessed: 31 July 2019); Idem, El concepto de tesoro en derecho romano, in *Scritti G. Franciosi,* I, (Napoli, 2007) 31 ff.; Idem, La adquisición del tesoro en época clásica en derecho romano, (2013) (11) Revista electrónica del Departamento de Derecho de la Universidad de La Rioja, 7 ff. https://doi.org/10.18172/redur.4121, https://www.unirioja.es/dptos/dd/redur/numero11/agudo.pdf (Last accessed: 31 July 2019). [Henceforth, the author's book (published in 2005) will be cited.] – From the Spanish bibliography of treasure trove see, in addition, G. R. de las Heras Sánchez, Adquisición del tesoro en el Fuero de

As for the Hungarian literature on this topic, Károly Visky's paper,[17] the doctoral thesis by János Erdődy,[18] and our works[19] should be mentioned. (In these works, several treasure trove-related topics were examined in the context of Roman law, legal history, and modern legal systems.)

c) Utterly new regimes were created in the Middle Ages concerning treasure trove. Unlike classical and Justinianic Roman law – in which half of the treasure was given to the finder and half to the owner of the land. Regarding the sources of the legal history of the Mediaeval and modern age, treasure trove could be considered as an important legal problem then, too, and, in addition, it bears great importance in contemporary legal systems as well – with terminologically and dogmatically important questions in all periods of legal history. Therefore, as a kind of appendix to the research in Roman law, some different mediaeval and modern legal constructions of treasure trove need to be examined, too.

d) As for the structure of our study, as one of the main antecedents of the modern treasure trove systems, some aspects of the regulation of treasure trove in Roman law will be investigated first and foremost (II.). The subsequent fate of treasure trove systems will then be examined; in this regard, some different solutions in the Mediaeval, as well as in the modern age (III.), and in some modern legal systems (IV.) will be examined briefly. Finally, our most important conclusions will be summarised (V.).

II. A brief history of treasure trove in Roman law

a) The Latin word "the[n]saurus" – originating from the Greek noun *thesauros*[20] – first appeared in non-legal writings in Rome. In several works from the time of the Republic, as well as of the Principate, the problem of treasure trove arose (see, for instance, the works by Plautus, Horatius, and Petronius).[21]

Cuenca: bases romanas y evolución posterior, in *Actas del II Congreso Internacional y V Iberoamericano de Derecho Romano. Los derechos reales,* (Madrid, 2001) 53 ff.; A. Ortega Carillo, El concepto romano de tesoro y el artículo 352 del Código civil, in *Estudios A. Calonge,* II, (Salamanca, 2002) 739 ff.

[17] Visky K., Kincs és kincstalálás (Teasure and treasure trove), (1982) (37) *Jogtudományi Közlöny,* 125 ff.

[18] J. Erdődy, *Radix omnium malorum?,* PhD thesis, (Budapest, 2012), https://jak.ppke.hu/uploads/articles/12332/file/Erd%C5%91dy%20J%C3%A1nos%20PhD.pdf (Last accessed: 31 July 2019), 159 ff. In addition, see Idem, Le sens de l'expression du trésor dans les sources romaines comme la base des réglementations contemporaines, (2014) 10 (2) *Iustum Aequum Salutare,* 134 ff.

[19] Especially see Siklósi I., *A kincstalálás római jogi, jogtörténeti és modern jogi kérdésköre, (Treasure trove in Roman law, in legal history, and in modern legal systems),* (Budapest, 2016).

[20] See, for instance, W. H. Gross, in K. Ziegler, W. Sontheimer and H. Gärtner (Hrsg.), *Der kleine Pauly,* (München, 1979) s. v. thesauros; H. G. Liddell and R. Scott, *A Greek-English lexicon,* (Oxford, 1940) s. v. *thésauros*.

[21] See Bonfante, *Corso di diritto romano,* 132 ff.; Knütel, Von schwimmenden Inseln..., 574; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano,* 65 ff.

b) In the Roman legal texts, the word *thesaurus* appeared only later. Originally, the Roman jurists did not distinguish the proprietor of the land from the owner of the treasure. According to the oldest Roman law tradition, represented even by the *fundatores iuris civilis* (Brutus and Manilius) in preclassical Roman law, treasure – as an *accessio* of the land – belongs to its owner; therefore, the *usucapio* of a plot of land and the treasure ought to go together (cf. Paul. D. 41, 2, 3, 3).[22]

c) The detailed rules of treasure trove were only elaborated by classical Roman jurists. In this regard, the famous text by Paul (D. 41, 1, 31, 1)[23] – in which the original, classical, influential, but dogmatically strongly discussed definition of treasure could be found – deserves an in-depth analysis.

According to Paul, "thensaurus est vetus quaedam depositio pecuniae, cuius non exstat memoria, ut iam dominum non habeat" ("Treasure is an ancient deposit of a valuable movable object, the memory of which is no longer sustained, so that it now has no owner any longer.").

Concerning the term *depositio pecuniae,* we can emphasise that – in the light of other relevant sources (Paul. D. 47, 9, 4, 1; Paul. D. 50, 16, 5 pr.; Herm. eod. 222) – not only money, but generally further movables of great value could be regarded as treasure, even in classical Roman law. On the basis of several postclassical sources – which contain the words *monile* and *mobile* in the scope of defining "treasure" – it could theoretically be concluded that only money could be regarded as treasure in classical Roman law, though it seems more likely that the above-mentioned term *depositio pecuniae* referred to each and every movable object of value even back then.

[22] "Brutus et Manilius putant eum, qui fundum longa possessione cepit, etiam thensaurum cepisse, quamvis nesciat in fundo esse [...]" From the virtually boundless literature of this text see e.g. F. C. von Savigny, *Das Recht des Besitzes. Eine civilistische Abhandlung,* (Giessen, 1837[6]) 260 ff.; Appleton, La trésor et la « iusta causa usucapionis », 10 ff.; Lauria, Dal possessore del tesoro all''inventor', 21 ff.; Th. Mayer-Maly, Studien zur Frühgeschichte der „usucapio" III, (1962) (79) *SZ,* 104 ff. https://doi.org/10.7767/zrgra.1962.79.1.86; A. Metro, *L'obbligazione di 'custodire' nel diritto romano,* (Milano, 1966) 60 ff.; A. Watson, *The law of property in the later Roman Republic,* (Oxford, 1968) 55 ff.; Nörr, Ethik von Jurisprudenz in Sachen Schatzfund, 14.; R. Backhaus, *„Casus perplexus." Die Lösung in sich widersprüchlicher Rechtsfälle durch die klassische römische Jurisprudenz,* (München, 1981) 146 ff.; Knütel, Von schwimmenden Inseln..., 571 ff.; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano,* passim; G. Krämer, *Das besitzlose Pfandrecht. Entwicklungen in der römischen Republik und im frühen Prinzipat,* (Köln, 2007) 167 ff.

[23] "Thensaurus est vetus quaedam depositio pecuniae, cuius non exstat memoria, ut iam dominum non habeat: sic enim fit eius qui invenerit, quod non alterius sit. Alioquin si quis aliquid vel lucri causa vel metus vel custodiae condiderit sub terra, non est thensaurus: cuius etiam furtum fit." Cf., for instance, F. Schulz, *Classical Roman law,* (Oxford, 1951) 362.; V. Arangio-Ruiz, *Istituzioni di diritto romano,* (Napoli, 1960[14]) 191.; Bonfante, Corso di diritto romano, 128 ff.; M. Kaser, *Das römische Privatrecht,* I, (München, 1971[2]) 426; Mayer-Maly, Thensaurus meus, 283 ff.; Marchi, A 'fanciulla d'Anzio' e o instituto do tesouro, 368 ff.; Knütel, Von schwimmenden Inseln..., 573; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano,* 31 ff.

As for the expression *iam dominum non habeat* mentioned in Paul's text: since treasure, (in principle) has or may have an owner, it cannot be regarded as *res nullius.* The other observation by Paulus – *cuius non exstat memoria* – can be considered as a dogmatically more relevant element, because the owner of treasure seems to be in a "memory hole". As a result of practical considerations, treasure can be regarded as an object, the ownership of which cannot be ascertained conclusively.

d) Since treasure is not *res nullius* in a strict (technical) sense, the acquisition of its ownership cannot be regarded as *occupatio* – which is carried out as a result of *apprehensio* – but *inventio.* It is, however, questionable whether classical Roman jurists institutionalized an absolutely autonomous way of acquiring ownership, which is different from *occupatio.* In our opinion, treasure trove could be regarded as an autonomous way of acquiring ownership in Roman law; however, it is probable that this was so merely from Hadrian's time.

e) The *locus* of treasure trove is not disputed in Roman law literature, since classical, postclassical, and even Justinianic law focused only on treasures which had been found in an immovable – contrary to the mediaeval and modern jurisprudence, in which treasure trove in any movable property is also dealt with.

f) Especially on the basis of texts by the early classical jurists (for instance Labeo), but even by the later classical jurists, it can be observed that the word *thesaurus* was not only used in strict legal (technical) sense but also in a non-technical sense. In these fragments, *thesaurus,* of course, has nothing to do with treasure trove as one of the original ways of acquiring ownership (see, for instance, Pomp. D. 10, 4, 15; Ulp. D. 10, 2, 22 pr.; Lab. D. 34, 2, 39, 1; Pap. D. 41, 2, 44 pr.).

g) Considering the imperial constitutions related to treasure trove, the most famous and significant regulation was introduced by Hadrian. His constitution can be described as a *media sententia* compared to the different prior opinions by classical jurists. Hadrian's constitution, equally cited in the Institutes of Justinian (see below), is also known from an earlier, though not a legal source, *Historia Augusta* (*Vita Hadr.* 18, 6).[24] With regard to treasure trove, Hadrian ruled that if anyone made a find on his own property, he might keep it; if on another's land, he should turn over half to that landowner; if on state land, he should share the treasure equally with the *fiscus*.

h) However, later – on the basis of the text by Callistratus (D. 49, 14, 3, 10) – the *divi fratres:* Marcus Aurelius and Lucius Verus modified Hadrian's concept. According to their constitution, if a treasure had been found "in locis fiscalibus vel publicis religiosisve aut in monumentis" ["on land belonging to the Treasury, or in public or religious places, or in monuments" *(res extra commercium)*], half of it could

[24] "De thesauris ita cavit, ut, si quis in suo repperisset, ipse potiretur, si quis in alieno, dimidium domino daret, si quis in publico, cum fisco aequabiliter partiretur." Cf. e.g. Bonfante, *Corso di diritto romano,* 131.; Knütel, Von schwimmenden Inseln..., 571.

be claimed by the Treasury. Such a treasure trove needed to be reported to the *fiscus* (cf. eod. 3, 11 and eod. 1 pr.). A regulatory attitude which implies a "public law-approach".[25]

i) The rather obscure constitution of Alexander Severus – which is often disregarded in Roman law literature – is only mentioned by *Historia Augusta* (*Vita Alex.* 46, 2).[26] According to it, treasure – as a rule – belonged to the finder, but when the treasure was too precious, a part of it belonged to the imperial authorities. ("Treasure-trove he always gave to the finders, and if these were numerous he would include among them the officials of his various departments.") Unfortunately, the background and the exact content of these rules are unknown, and we cannot come to any well-founded conclusions on the basis of such an uncertain source.

j) As for postclassical Roman law, the imperial constitutions concerning treasure trove are to be mentioned (cf. CTh. 10, 18 and C. 10, 15). In this respect, perhaps the most notable postclassical ruling related to treasure trove was created by the constitution of Leo and Zeno in 474 AD, which, on the one hand, reinstated the regime institutionalised by Hadrian and, on the other hand, established noteworthy and substantial new rules related to treasure trove, which often appear even in the modern era.[27]

k) It is well-known that Hadrian's regulations were implemented by Justinian, according to his Institutes (2, 1, 39).[28] It is worth mentioning that only Hadrian's constitution was cited in Justinian's Institutes, while the above-mentioned constitution by Leo and Zeno was disregarded in this law-book. According to Inst. 2, 1, 39, if anyone found treasure on his own land, the Emperor Hadrian, following natural equity, adjudged to him the ownership of it. Hadrian established the same rule when the

[25] Cf. Busacca, Qualche osservazione sulle innovazioni introdotte dai Divi Fratres nel regime giuridico del tesoro, 133 ff.; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano,* 95 ff.; Klingenberg, Der „Angeber" beim Schatzfund, 242 f.

[26] "Thesauros reppertos iis qui reppererant donavit et, si multi essent, addidit his eos quos in suis habebat officiis." Cf. Bonfante, *Corso di diritto romano,* 135.; Busacca, Qualche osservazione sulle innovazioni introdotte dai Divi Fratres nel regime giuridico del tesoro, 154; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano,* 106 f., with summary of the relevant literature.

[27] Cf. Mayer-Maly, Ducente fortuna, 142.; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano,* 108 ff.; Klingenberg, Der „Angeber" beim Schatzfund, 241.

[28] "Thesauros, quos quis in suo loco invenerit, divus Hadrianus, naturalem aequitatem secutus, ei concessit qui invenerit. Idemque statuit, si quis in sacro aut in religioso loco fortuito casu invenerit. At si quis in alieno loco non data ad hoc opera sed fortuitu invenerit, dimidium domino soli concessit. Et convenienter, si quis in Caesaris loco invenerit, dimidium inventoris, dimidium Caesaris esse statuit. Cui conveniens est et si quis in publico loco vel fiscali invenerit, dimidium ipsius esse, dimidium fisci vel civitatis." Cf., for instance, Mayer-Maly, Der Schatzfund in Justinians Institutionen, 126 ff.; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano,* 85. – Another solution was in force in the Ostrogothic Kingdom at the same time. It can be assumed on the basis of a brief text by Cassiodorus (*Variae,* 6, 8, 6) that Theodoric the Great gave all treasure the aerarium: "Depositivae quoque pecuniae, quae longa vetustate competentes dominos amiserunt, inquisitione tua nostris applicantur aerariis, ut qui sua cunctos patimur possidere, aliena nobis debeant libenter offerre." Cf. Bonfante, *Corso di diritto romano,* 127.; Marchi, A 'fanciulla d'Anzio' e o instituto do tesouro, 369.; Knütel, Von schwimmenden Inseln..., 5738[8]; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano,* 37.

treasure was found by accident in a sacred or religious place. If the treasure was found in a land of another by accident, and without specially searching for it, Hadrian gave half to the finder, half to the owner of the land; and upon this principle, if the treasure was found in a land belonging to the Emperor, he decided that half should belong to the latter, and half to the finder. Consistently with this, if anyone found treasure on land belonging to the imperial treasury or in a public place, half belonged to the finder, and half to the treasury *(fiscus)* or the *civitas.* This text, being a legal source, is more accurate and precise than the above-mentioned text in *Historia Augusta*. Justinian also referred to *naturalis aequitas* ("natural equity"), which had not been mentioned in *Historia Augusta,* but which was referred to nonetheless in the text of Gratianus', Valentinianus', and Theodosius' imperial constitution, published in 380 AD (cf. CTh. 10, 18, 2).

III. From the history of treasure trove in the mediaeval and modern ages

a) Compared to Roman law – especially to classical and Justinianic Roman law – utterly new regimes were created concerning treasure trove in the mediaeval period of legal history. Nevertheless, it is worth mentioning that Justinian's ruling was sometimes equally in force. In this respect, the *constitutio (Regalia sunt hec)* of the Holy Roman Emperor, Frederick Barbarossa (1158) could be referred to, in which the solution by Justinian appeared; namely that half of the treasure belonged to the finder.[29] However, the Constitutions of Melfi by Frederick II (*Constitutiones Regni Siciliae,* 3, 35, in 1231) gave the whole treasure to the *fiscus*.[30] According to the famous law-book of Eike von Repgow, the Mirror of the Saxons (*Sachsenspiegel, Landrecht,* I, 35, 1), every treasure hidden in the ground belongs to the Emperor.[31] However, according to the *Schwabenspiegel* (*Landrecht,* 347), a quarter of the treasure belonged to the finder.[32]

In France, according to the *Établissements de Saint Louis* (I, 94), which consists of thirteenth-century French customary law, no one but the king could acquire treasure

[29] "[...] dimidium thesauri inventi in loco cesaris, non data opera, vel in loco religioso [...]" Cf. Th. Mayer-Maly, Der Schatz im Acker, in Idem, *Rechtsgeschichtliche Bibelkunde,* (Wien, Köln and Weimar, 2003) 48 f.

[30] "Scire enim debet unusquisque inventiones regni nostri, quarum dominus non apparuerit, ad fiscum specialiter pertinere." Cf. Mayer-Maly, Der Schatz im Acker, 49. For the whole context see W. Stürner (Hrsg.), *Die Konstitutionen Friedrichs II. für das Königreich Sizilien,* (Hannover, 1996) 402.

[31] "Al schat, under der erde begraven diepher den eyn pluch geit, horet zu der koninclichen gewalt." Cf. e.g. K. Zeumer, Der begrabene Schatz im Sachsenspiegel I, 35, (1901) (22) *Mitteilungen des österreichischen Instituts für Geschichtsforschung,* 420 ff.

[32] "[...] dem vinder sol daz vierteil werden." Cf. e.g. Th. Mayer-Maly, Komponenten der Regelung des Schatzfundes im Schwabenspiegel, in D. Medicus, H.-J. Mertens, K. W. Nörr and W. Zöllner (Hrsg.), *Festschrift H. Lange,* (Stuttgart, Berlin and Köln, 1992) 185 ff.

consisting of gold, while silver treasures belonged to the barons, who had the so-called high justice in their lands (« Nus n'a fortune d'or, se il n'est rois. Celle d'argent est au seignor qui a grant joutise an sa terre. »). Obviously, this rule is closely related to the French law principle "nulle terre sans seigneur".[33] In the same work, the definition of treasure could be discovered as well: "Treasure is when it is buried under the ground, and the earth has been disturbed" (« Fortune est don terre est effondrée. »).[34]

b) On the basis of the research by Coing,[35] it should be pointed out that not only in the medieval legal sources, but even in the modern age similar regulations can be found (see, for instance, the argumentation of King James VI in his famous work "The Trew Law of Free Monarchies" [1598]: "For if a hoord be found under the earth, because it is no more in the keeping or use of any person, it of the law pertains to the king."[36]), although Justinian's treasure trove-related rules were also in force. In the works by Hugo Grotius,[37] Simon van Leeuwen,[38] and Arnoldus Vinnius[39] Justinian's regime was introduced again. However, the rules stemming from the Mediaeval era – according to which any treasure found should belong to the emperor – were still in force and were termed as a "ius commune et quasi iuris gentium" by Grotius and van Leeuwen, as well. For instance, van Leeuwen pointed out that any concealed treasures which a person may have found upon or in his own ground, belonged to themselves, but if any such treasure was found in the land of another person, one half of it belonged to the owner of the premises, and the other half to the finder. In many countries, however, the treasure was to be appropriated by the government. As for Roman-Dutch Law, it can be regarded as uncertain, according to van Leeuwen's opinion.[40]

Concerning the French *droit coutumier* in the 17th century – on the basis of Jean Domat's famous *Les loix civiles dans leur ordre naturel* – we can refer to the rule according to which one third of the treasure belonged to the finder, one third to the landowner, and one third to the baron (« Seigneur haut Justicier »). When the finder was the landowner himself, half belonged to them, and the other half to the baron.[41]

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33 See F. Bourjon, *Le droit commun de la France et la coutume de Paris,* I, (Paris, 1747). 126.: « il n'y a nulles terres [...] qui ne relèvent d'un Seigneur ».

34 Cf. J.-Ph. Lévy and A. Castaldo, *Histoire du droit civil,* (Paris, 2002) 538. For the whole context, see P. Viollet, *Les Établissements de Saint Louis,* (Paris, 1883) 164.; *The Établissements de Saint Louis. Thirteenth-century law texts from Tours, Orléans, and Paris* (translated and with an introduction by F. R. P. Akehurst), (Philadelphia, 1996) 60 f.

35 H. Coing, *Europäisches Privatrecht,* I, (München, 1985) 300.

36 Cf. J. P. Sommerville (ed.), *King James VI and I. Political Writings,* (Cambridge, 1994) 74.

37 De iure belli ac pacis, 2, 8, 7; cf. H. Grotius, *Inleiding tot de hollandsche rechtsgeleerdheid,* (Graven-Haghe, 1631) 18.

38 S. van Leeuwen, *Het Rooms-Hollands-Regt,* (Amsterdam, 1708) 115.

39 A. Vinnius, *Institutionum imperialium commentarius,* (Amsterdam, 1665[4]) 176.

40 van Leeuwen, *Het Rooms-Hollands-Regt,* 115.

41 J. Domat, *Les loix civiles dans leur ordre naturel,* I, (Paris, 1745) 268.

In the rules concerning treasure trove of the *Codex Maximilianeus Bavaricus Civilis* (1756)[42] and the *Allgemeines Landrecht für die Preußischen Staaten* (1794)[43] – which cannot be considered as civil codes in modern sense – reflects on the one hand Justinian's treasure trove system, and, in addition to all this, the influence of several mediaeval legal rules as well.

IV. Treasure trove in modern legal systems

a) Justinian's regime of treasure trove (as well as the famous definition by Paul) survives in many contemporary codes of the civil law jurisdictions.

In the modern French rules concerning treasure trove (see art. 716 of French *Code civil*[44]), the subsequent fate of the Roman law tradition could clearly be pointed out. Although the French *Code civil* achieved a kind of a "symbiosis" between the earlier *droit écrit* and *droit coutumier,* the rules of the article related to treasure trove belong to the rules that prefer the Roman law solution to customary law. Regarding the new social order after the French Revolution, it is obvious that the solution of the earlier French customary law – according to which the one third of the treasure had belonged to the baron – was no longer allowed to be applied. Since the French *Code civil* had greatly affected many subsequent civil law codifications, the treasure trove system of Roman law has survived in all legal systems inspired by French legal tradition (see, *inter alia,* the

[42] 2, 3, 4: "Gefundener Schätzenhalber, welche solange Zeit vergraben, eingemaurt, oder sonst verborgen gewest, daß man den Eigenthümer nicht mehr davon weiß, wird das General-Mandat von Anno 1752 hiermit folgendermassen erneuert. Soll man den Schatz in deren Theile theilen, wovon dem Fisco zwey Drittel zugehen, der Überrest aber dem Erfinder, wenn er den Fund auf seinem Eigenthum thut, verbleibt. Falls aber derselbe in fremden geschiehet, so theilt der Erfinder sothanes Drittel mit dem Eigenthümer des Orts, ausser da der Schatz nicht von ungefehr gefunden, sondern ohne des Eigenthümers Wissen und Willen mit Fleiß darauf nachgesucht oder gegraben worden, welchenfalls das ganze Drittel dem Proprietario Loci allein zugehört. Gebraucht man sich aber etwan gar Aberglaubischer Dingen hierunter, so verfallt man dadurch nicht nur in malefizische Straf, sondern der Antheil, welchen man sonst dabey gehabt hätte, gehet verlohren, und kommt dem Fisco zu, jedoch ohne Præjuditz des Eigenthümers, wenn er bey der Sach unschuldig ist."

[43] 1, 9, 86: "Wer zur Nachsuchung von Schätzen vermeintlicher Zaubermittel, durch Geisterbannen, Citiren der Verstorbenen, oder anderer dergleichen Gaukeleyen, es sey aus Betrug oder Aberglauben, sich bedient; der verliert, außer der sonst schon verwirkten Strafe, sein Anrecht auf einen etwa zufälliger Weise wirklich gefundenen Schatz." Cf. Mayer-Maly, *Ducente fortuna,* 144.

[44] « La propriété d'un trésor appartient à celui qui le trouve dans son propre fonds; si le trésor est trouvé dans le fonds d'autrui, il appartient pour moitié à celui qui l'a découvert, et pour l'autre moitié au propriétaire du fonds. »

Chilean *Código civil* of 1855,[45] the Louisiana Civil Code of 1870,[46] the Spanish *Código civil* of 1889,[47] and the Québec Civil Code of 1994[48]).

The Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811 maintained a solution until 1846, according to which one third of the treasure belonged to the treasury.[49] The Austrian system of treasure trove is now based to a considerable extent on the treasure trove system of Justinian's rules.[50]

Since the German *Bürgerliches Gesetzbuch* of 1900 is a result of the research by Pandectist legal scholars, the liberal regime of treasure trove of Hadrian and Justinian entered the German Civil Code due to the respect for the Roman law tradition.[51] (In this regard, Wieacker's opinion seems to be highly relevant: „[...] das Bürgerliche Gesetzbuch von 1896 ist das spätgeborene Kind der Pandektenwissenschaft und der nationaldemokratischen, insoweit vor allem vom Liberalismus angeführten Bewegung seit 1848".[52]) Since the BGB – besides the French *Code civil* – had an essential impact on many succeeding civil law codifications (see, inter alia, the Italian *Codice civile* of 1942, the Portuguese *Código civil* of 1966, and the Brazil *Código civil* of 2002), the Roman

[45] Art. 626: "El tesoro encontrado en terreno ajeno se dividirá por partes iguales entre el dueño del terreno y la persona que haya hecho el descubrimiento."

[46] Art. 3420: "One who finds a treasure in a thing that belongs to him or to no one acquires ownership of the treasure. If the treasure is found in a thing belonging to another, half of the treasure belongs to the finder and half belongs to the owner of the thing in which it was found."

[47] Art. 351: "El tesoro oculto pertenece al dueño del terreno en que se hallare. Sin embargo, cuando fuere hecho el descubrimiento en propiedad ajena, o del Estado, y por casualidad, la mitad se aplicará al descubridor." Cf. J. M. Farré Alemán, *Código civil comentado y concordado,* (Barcelona, 2001) 421 ff.; A. Roma Valdés, La ley y la realidad en la protección del patrimonio arqueológico español, (2001) (48) *International Numismatic Council, Compte rendu,* 69 ff.

[48] Art. 938: "Le trésor appartient à celui qui le trouve dans son fonds; s'il est découvert dans le fonds d'autrui, il appartient pour moitié au propriétaire du fonds et pour l'autre moitié à celui qui l'a découvert, à moins que l'inventeur n'ait agi pour le compte du propriétaire."

[49] Cf. U. Floßmann, *Österreichische Privatrechtsgeschichte,* (Wien, 2008[6]) 175.

[50] Cf. 399. §: „Von einem Schatze erhalten die Finder und der Eigentümer des Grundes je die Hälfte." See, for instance, G. Dembski, Münzfunde und Münzsammlungen – die gesetzlichen Bestimmungen in Österreich, (2001) (48) *International Numismatic Council, Compte rendu,* 66 ff.

[51] 984. §: „Wird eine Sache, die so lange verborgen gelegen hat, dass der Eigentümer nicht mehr zu ermitteln ist (Schatz), entdeckt und infolge der Entdeckung in Besitz genommen, so wird das Eigentum zur Hälfte von dem Entdecker, zur Hälfte von dem Eigentümer der Sache erworben, in welcher der Schatz verborgen war." Cf. H. J. Wieling, *Sachenrecht,* (Berlin, Heidelberg and New York, 2007[5]) 160 ff.; M. K. Hermans, *Der Schatzfund. Eine Gegenüberstellung der Rechtsverhältnisse an einem Schatz im deutschen und niederländischen Recht unter Berücksichtigung öffentlich-rechtlicher Sonderbestimmungen*, (Münster, 2011) 10 ff.

[52] F. Wieacker, Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft, in Idem, *Industriegesellschaft und Privatrechtsordnung,* (Frankfurt am Main, 1974) 15. Cf., in addition, 10: „Frucht der Pandektenwissenschaft"; p. 22: „spätgeborenes Kind des klassischen Liberalismus". [Wieacker' study was published originally in 1953 (Juristische Studiengesellschaft Karlsruhe, Schriftenreihe, 3)]. – Cf., in addition, Idem, *Privatrechtsgeschichte der Neuzeit,* (Göttingen, 1967[2]) 478 f.

law regime of treasure trove has survived in these legal systems due to the French and the German legal tradition as well.[53]

b) The Swiss *Zivilgesetzbuch* of 1907 had a great effect, for example, on the new Italian *Codice civile,* and on many more civil codes. Still, the approach of treasure trove in Swiss law – according to which the treasure belongs to the owner of the property in which a hidden treasure has been found, while the finder (contrary to the above-mentioned legal systems based on Roman law tradition) has only a claim for an equitable fee[54] – had no influence on any later codifications.

Compared to the majority of the legal systems based on the Roman law tradition, another solution is in force in Hungary, too. As for the treasure trove system of the Hungarian Civil Code of 1959, a socialist legal approach was institutionalised, according to which the treasure ought to be offered to the state. In contrast to this, the prior Hungarian private law gave one third of the treasure to the finder, one third to the owner of the property on which the hidden treasure had been found, and one third to the Treasury. According to Section 132 of the (old) Hungarian Civil Code of 1959, if a person finds a valuable object which has been hidden by unknown persons, or the ownership of which has otherwise been forgotten, he is obliged to offer it to the state. If the state does not claim the object, it shall become the property of the finder; otherwise the finder shall be entitled to a finder's fee proportionate to the value of the object found. However, if the object found is a relic of great value or historic importance, its ownership may be claimed by the state. The same rules are sustained nowadays, with regards to the relevant provisions of the new Hungarian Civil Code of 2013 [5:64. § (1)–(3)].

c) As for the common law jurisdictions, English law – which has developed separately to continental civil law practices – maintains its old legal tradition[55] concerning the rules of treasure trove as well. According to the old common law and the *Treasure Act* of 1996 – in accordance with the general principles of the English Law of Property as well – the treasure belongs to the Crown or to the franchisee, if there is one.[56]

[53] See *Codice civile,* art. 932.; *Código civil port.,* art. 1324.; *Código civil bras.,* art. 607.

[54] *Schweizerisches Zivilgesetzbuch,* art. 723.

[55] Cf. H. Bracton, De legibus et consuetudinibus Angliae (ed. G. E. Woodbine), (New Haven, 1922) 338 ff.; W. Blackstone, *Commentaries on the laws of England,* 1, (Oxford, 1765) 285 f. Regarding the whole problem of treasure trove in English legal history see Ch. R. Beard, *The romance of treasure trove,* (London, 1933); G. F. Hill, *Treasure trove in law and practice from the earliest time to the present day,* (Oxford, 1936).

[56] *Treasure Act,* Section 4 (1). See, for example, R. Bland, The Development and Future of the Treasure Act and Portable Antiquities Scheme, in S. Thomas and P. G. Stone (eds), *Metal Detecting and Archaeology,* (Woodbridge, 2008) 63 ff.

The leitmotiv of Scottish law – which belongs to the mixed jurisdictions – happens to be the same. According to the principle "quod nullius est, fit domini regis", treasure, as a kind of "bona vacantia", belongs to the Crown.[57]

The "treasure trove systems" of the United States[58] are quite heterogeneous. Since Louisiana and Puerto Rico belong to the so-called mixed legal systems, their rules considering treasure trove are based on Roman law. As for the case law of treasure trove, it is very divergent in the Member States of the USA. It is worth mentioning that the principle of equitable division can also be found in the legal literature. As for some treasures of great importance, federal acts ought to be applied (cf., for instance, the *Antiquities Act* of 1906, the *National Historic Preservation Act* of 1966, and the *Archaeological Resources Protection Act* of 1979).

V. Conclusions

The original concept by Hadrian related to treasure trove is currently amended with numerous "public law elements",[59] even in those legal systems which are based on the Roman law tradition, since nowadays treasures of great archaeological and cultural importance would not be awarded exclusively to the finder or, for instance, the landowner. Hadrian's regime is to be evaluated in its own time and context, that is in Roman law. An individualist and liberal approach is reflected in this regime on treasure trove. An exclusively "private law approach" seems to be unsustainable today, as the ruling of treasure trove deserves a complex approach according to which any treasure could be regarded as a national heritage or even a kind of "common heritage of mankind" (of course not in the "technical" sense of modern international law). The regulation of treasure trove has only to serve this fine purpose.

[57] Cf. J. Erskine, *An institute of the law of Scotland, in four books, in the order of Sir George Mackenzie's institutions of that law,* I, (Edinburgh, 1824) 224.; A. Saville, The law and practice regarding coin finds. The treasure trove system in Scotland – an update, (2008) (55) *International Numismatic Council, Compte rendu,* 13.

[58] Cf. R. H. Helmholz, Equitable division and the law of finders, (1983) (52) *Fordham Law Review,* 313 ff. (first of all, on the development of case law of treasure trove); J. R. Richman and M. P. Forsyth (eds), *Legal perspectives on cultural resources,* (Walnut Creek et al., 2004) Especially see the studies of R. B. Cunningham (The twilight of treasure trove, 38 ff.) and L. Sebastian (Archaeology and the law, 4 ff.); J. M. Kleeberg, The law and practice regarding coin finds. Treasure trove law in the United States, (2006) (53) *International Numismatic Council, Compte rendu,* 13 ff.

[59] On the problem of the distinction between private law and public law see G. Hamza, Reflections on the Classification (divisio) into 'Branches' of Modern Legal Systems and Roman Law Traditions, in *Studii L. Labruna,* IV, (Napoli, 2007) 2449 ff. From the Hungarian literature, in addition, see: Menyhárd A., A polgári jog tudománya Magyarországon, (The science of private law in Hungary), in Jakab A. and Menyhárd A. (eds), *A jog tudománya,* (The science of law), (Budapest, 2015) 255., with further literature references.