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Derrynaflan: Ten Years On — 2

Supreme Court Makes New Law

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by Marcus Bourke

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On 17 February 1980, Mr. Michael Webb, a Clonmel businessman, and his son (also Michael), using metal detectors, found buried at a monastic site, known as Derrynaflan and situated between Horse and Jockey and Killenaule in co. Tipperary, a hoard consisting of a chalice, paten, strainer and bowl. The following day Mr. Webb delivered what has since become known as the Derrynaflan Hoard into the custody in Dublin of Mr. Breandán O Ríordáin, then Director of the National Museum of Ireland.

On the same day (18 February) Mr. Webb handed to the Director a solicitor's letter, purporting to protect any rights Mr. Webb might have to the hoard or to any reward for finding it. Mr. O Ríordáin assured him on that occasion that he would be honourably treated.

In the Spring of 1980 officials of the Irish Antiquities Division of the National Museum, with the permission of the landowners concerned, carried out excavations at Derrynaflan. These yielded important components of the hoard. In March 1980 the hoard, still in an unrestored state, was put on view in the National Museum in Dublin. Over a period of a year or so experts in the British Museum restored the hoard at a cost of £24,000.

On July 14, 1982, at a special ceremony presided over by the Minister for Education (whose Department was then responsible for the Museum),the Derrynaflan Hoard (with the exception of the paten) was put on public display in the Museum[1]. Over the following three months it was seen by some 40,000 people. In May 1985 the paten, now also restored, rejoined the other objects in the Museum.

Meanwhile, back in October 1980 Mr. Webb through his solicitor reminded the Museum of the promise made some eight months earlier to treat him honourably. This reminder produced in June 1981, a further eight months later, an offer of £10,000 for the hoard from the Chief State Solicitor on behalf of the Minister for Education.

Five months later again, in November 1981, Mr. Webb asked for the return of the hoard, to be informed (after three months, in February 1982) by the Chief State Solicitor — who repeated the £10,000 offer — that the hoard was the property of the State. Faced with this refusal to return the hoard, Mr. Webb on 11 March 1982 commenced proceedings in the High Court for its return.

Unknown to Mr. Webb, during the Spring and early Summer of 1981 negotiations were in progress between the Department of Education and the two landowners of the Derrynaflan site. These culminated on 17 July 1981 in the signing by each of the two landowners of a document conveying to the Minister "all rights property and interest that I may have" in the hoard. For this transfer, the purpose of which became clear at the hearing of the Webbs' action, each landowner was paid £25,000 — or two-and-a-half times the amount of the offer made to the Webbs three weeks earlier!

As the State persisted in its claim to own the hoard, no settlement was reached between Mr. Webb and the National Museum. Accordingly, the action by the Webbs against the State and the Attorney General for the return of the hoard began before Mr. Justice Blayney in the High Court in June 1986, over four and a half years after Mr. Webb had issued his writ.

During the hearing, which took eight days, a director of the famous London auctioneer Sotheby's,

giving evidence for the Webbs, valued the hoard at between £5 millions and £8 millions. For the State Dr. Michael Ryan of the National Museum valued it at between £2.5 and £3 millions.

On 29 July 1986 Judge Blayney delivered judgement in favour of the Webbs. He found that, since he was bound by a Supreme Court decision in a 1972 case, the royal right to treasure trove had ceased to exist since the enactment in 1922 of the Constitution of the Irish Free State[2]. He also held that the State was estopped from challenging the Webbs' title to the hoard.

In the judge's view, the transaction between Mr. Webb and the Museum's Director constituted a bailment, the terms of which obliged the Director to return the hoard[3]. However, since the State had incurred expenditure in restoring the hoard, he postponed making a final order until he had heard evidence of the amount of this expenditure.

On November 11 and 12 evidence was given as to the value of the hoard and the cost of the restoration carried out by the British Museum, including the cost of photography. On 10 December, in a second judgement, Judge Blayney held that, since the hoard had been sent to London before the Webbs sought its return, the State was entitled to be repaid the restoration costs, which (including photography) came to £25,800. He therefore ordered the return of the hoard to the Webbs, or alternatively (at their option) the payment by the State to them of its value — £5,536,000 less £25,800, or £5,510,200.

From this (to it unfavourable, not to say disastrous) decision the State appealed to the Supreme Court, which heard the appeal over six days in mid-1987. Delivering judgement five months later on 16 December 1986, the Supreme Court allowed the State's appeal, reversing Judge Blayney. Holding that the hoard was the property of the State, it awarded £25,000 each (the same amount paid in 1981 by the State to the two landowners) to the Webbs as rewards as finders of the hoard. The remainder of this article attempts to examine the Supreme Court's decision, and to assess its impact on the law relating to any such future archaeological objects found.

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In allowing the State's appeal against the High Court's decision, the Supreme Court substituted a new order for that of the lower court. The latter, in directing the State to return the hoard to the Webbs (or to pay them its value), had implicitly accepted that, in the absence of the original or true owner, the Webbs were its owners. Now, however, while holding that the Webbs were entitled to rewards as finders, the Supreme Court declared that the State owned the hoard.

The Supreme Court based its decision on two main statements of the law applicable to the Webbs case — and presumably also to any similar case in the future. One of these two propositions, shortly to be explained, was predictable in the light of the Byrne case of 1972. The other was a totally new interpretation of the Constitution, so novel that it attracted trenchant comment from two leading legal academics, Professor John M. Kelly of UCD and Mr. David Gynn Morgan of UCC[4].

The first basic proposition adopted by the Supreme Court runs as follows. Any royal prerogative (such as, in particular, the Crown's right to treasure trove like the Derrynaflan Hoard), which existed immediately before the enactment in 1922 of the Constitution of the Irish Free State, did not vest in that State. Therefore no such right was captured by Art. 39.1 of the 1937 Constitution, which continues the laws of the Free State in existence. On this point the Supreme Court agreed with Judge Blayney.

In place of the pre-1922 royal right to treasure trove, the Supreme Court "invented" (the verb is Prof. John Kelly's) a new idea — its second basic statement in the Webb case. In a modern democratic republican State such as ours, ownership by the State of objects which comprise important ownerless antiquities is, the Court held, a necessary ingredient of sovereignty.

This proposition, found hidden in our Constitution 50 years after its enactment in 1937, is largely based on the emphasis placed in our Constitution on the State's historical origin. Since it means that the Derrynaflan Hoard belonged to the State from the moment the Webbs dug it up, one may

The Derrynaflan paten— detail of filigree panel and two studs.

(Copyright, National Museum of Ireland.)

wonder what was the purpose of the move by the State's legal advisers that resulted in the payment to the landowners of £50,000 out of public funds.

Furthermore, if the hoard belonged to the State from its discovery, one may also wonder what right the Webbs had to any reward. The Supreme Court's answer to this was simple, reasonable and ingenious. The assurance given by the Museum Director to Mr. Webb of honourable treatment was, in the Court's view, an integral part of the bailment transaction between the Webbs and the State, and gave the Webbs a legitimate expectation of a reasonable reward from the State. Under the law of estoppel Mr. O Ríordáin, having led Mr. Webb to believe he would be rewarded, could not be permitted to go back on his undertaking.

The Supreme Court also made other findings of lesser importance than its two major rulings. It held that the circumstances of the deposit of the hoard with the Museum, especially the terms of Mr. Webb's solicitor's first letter (which admitted a doubt as to the ownership of the hoard), excluded the usual term in a bailment that the bailor (the Webbs) had a good title to the hoard. It also decided that the fact that the Webbs were trespassers when they found the hoard deprived them of any rights to it, as between them and the landowners.

The Supreme Court further held that the conveyance in July 1981 by the Derrynaflan landowners to the State of their rights (if any) in the hoard entitled the State to both ownership and possession of the hoard, subject always to the rights of the true owners. The Court decided too that, should a bailee acquire a good title to the subject of a bailment, this acquisition terminated the bailment. For the Webbs, this meant that the State (the bailee) could now deny the right to possession of the hoard of the bailors (the Webbs), since termination of bailment caused any estoppel between bailor and bailee to cease to operate.

To the non-lawyer, some of the these propositions may seem complex, even contradictory. It must be realised, however, that (save in exceptional circumstances) each Supreme Court judge is entitled to deliver his own judgement[5]. As it happened in the Webb case, there were three quite different judgements, and (except where all agree) the reader has to try to reconcile them as best he or she can.

Broadly speaking, the five judgements in the Webb case split three-two on some of the more important points[6]. Moreover, on one of the most important issues, while being unanimous, they based their conclusions on different Articles of the Constitution — again producing the same split. As a result, the editors of the two main law reports disagree on their summaries of the decision!

Specifically, the three judges reveal a division between Chief Justice Finlay and Judges Henchy and Griffin on one side, with Judges Walsh and McCarthy on the other. On the new concept of State ownership of treasure trove, all five agreed; but the first three depended on Art. 10 and the other two on Art. 5 of the Constitution[7].

Similarly, the finding that Mr. Webb's solicitor's first letter deprived his clients of the right to good title to the hoard was expressly dissented from by Judges Walsh and McCarthy. The same divergence arose on the ruling that, as trespassers, the Webbs lost any right to the hoard as against the landowners. Again, Judges Walsh and McCarthy expressed reservations (or, depending on which law report one uses, disagreed with the other three) on the effect of the conveyance of July 1981 by the landowners to the Minister for Education.

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Despite the extent of disagreement among the judges, however, it seems unlikely that the two main findings (that such objects belong to the State, and that finders are entitled to rewards) will be disturbed. But some of the other findings give ground for concern to archaeologists and others interested in preserving such evidence of our past. For example, so much turned on the Museum assurance of honourable treatment to Mr. Webb that one may surmise that the Attorney General has advised against such undertakings in the future. Yet, without such a promise, surely future

finders of archaeological objects may not act in as "praiseworthy" (the word is Judge McCarthy's) a manner as did Mr. Webb, who sought expert advice and brought his find to the National Museum inside 24 hours?

The finding of this hoard served to highlight the problems associated with the use of metal detectors, and to control the use of such devices the National Monuments (Amendment) Act, 1987 was passed. In addition to increasing substantially (to £50,000 in some cases) penalties for improper use of detectors, the Act obliges finders of archaeological objects to report them to the Gardaí or the National Museum. It gives new search and seizure powers to the Gardaí, and creates a new offence of withholding information about archaeological objects, which are widely defined.

Above all, however, the Webb case revealed (at least to those who did not already know this) how out-of-date and inadequate, after 65 years of political and legislative independence, our law on treasure trove is. Once again, as has happened so often in the past quarter-century, it was left to the Supreme Court to make new law as best it could, given the failure of successive Governments to legislate on topics such as this - which, of course, win no votes at general elections!

Nor is that the end of the matter. As if to ease the task of the legislators, the Supreme Court went so far as to outline the kind of new law it felt was needed. It suggested giving formal effect to the new principle that archaeological objects "be deemed to vest in the State", and "abolishing any distinction between objects made of different materials and any requirements for evidence that objects had been hidden for safe keeping". It also called for "a system of reward so as to encourage finders to deliver up articles or items . . ."

One may doubt if, in the current uncertain economic climate, the State will be able to pay rewards attractive enough to deter finders from disposing of them elsewhere. Reading between the lines of the evidence and counsels' arguments, one detects a niggardly approach by the State to the Webbs. Indeed, one may wonder if, instead of embarking on such costly litigation (which nearly left the State with a £5.25 millions bill, exclusive of legal costs), the State would have been better advised to accept the National Museum's advice and pay the Webbs 5% of the Museum's £3 millions valuation, a mere £150,000.

Finally, one is surely entitled to ask, where is the legislation the Supreme Court urged? In reply to a Dail question drafted by this writer, the Taoiseach on March 21 last said: "work is now well advanced in drafting the heads of appropriate legislation . . . and I . . . hope to bring (it) forward later this year". When this article went to press the Dail was in recess for the Summer, without any sign of the new law. By the time this article is published, it will be three years since the Supreme Court decision in Webb v. Ireland.

FOOTNOTES

1. Responsibility for the Museum has since been transferred to the Dept. of the Taoiseach.
2. Byrne v. Ireland, 1972 Irish Reports, p.241.
3. Bailment is the delivery of goods by one person (the bailor) to another (the bailee), who is bound to take reasonable care of them and return them to the bailor when reclaimed. Estoppel in its broadest sense — there are several types — is a rule of evidence preventing a person from denying the truth of a statement he has previously made, or the existence of facts in which he has led another person to believe.
4. For Kelly, see interview on RTE for RTE documentary "The Master's Own Touch", first screened 27 February 1990; for Morgan, see *Irish Times* of 27 March 1990.
5. The exceptions are found in Art. 26.2.2 (reference of Bills to Supreme Court) and Art. 34.4.5 (the Courts).
6. Two of the five on the Court in 1987, Judges Henchy and Walsh, have since retired, and the sixth (Judge Hedderman) probably did not sit because he was Attorney General in 1981 when the Derrynaflan Hoard was found.
7. Art. 10 deals with State ownership of natural resources, and Art. 5 declares Ireland to be "a sovereign independent democratic State".
8. Dail Debates, 21.3.1990, Question No. 2. The writer acknowledges the co-operation of Deputy Therese Ahern of South Tipperary in this matter.

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