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The Legal Regime Governing the Recovery of Underwater Cultural Resources in the United States

Richard J. Dodds
University of Rhode Island

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THE LEGAL REGIME GOVERNING THE RECOVERY
OF UNDERWATER CULTURAL RESOURCES
IN THE UNITED STATES

BY
RICHARD J. DODDS

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THE LEGAL REGIME GOVERNING THE RECOVERY
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I. INTRODUCTION

Sunken cities and towns, submerged harbor works and historic wrecks and their cargoes, all are repositories of cultural information and represent a non-renewable resource of the continental margins. Historic wrecks contain information of an historical nature which is available from no other source, and it is with the legal status of such wrecks in the offshore waters of the United States, that this study is primarily concerned.

Historic wrecks exist in many of the navigable waters of the United States, particularly along the Atlantic and Gulf coasts. Sites have also been excavated in the Great Lakes, Lake Champlain, the Mississippi and Missouri Rivers and in smaller rivers and canals. Closer to home, the wreck of HMS Orpheus, sunk in Narragansett Bay in 1778, involved the University of Rhode Island in excavations in 1973 and 1974.¹

Attention will mainly focus, however, on the waters off Florida. These often dangerous waters, as part of a long-established trade route, contain more than their share of historic wrecks. As a number of these are Spanish galleons, wrecked on their way to Europe with valuable cargoes of gold, silver and precious stones, claim to such

sites has been the subject of bitter disputes. The results of the legal battles arising from these disputes will have profound implications for the future of underwater antiquities, not only in Florida, but throughout the navigable waters of the United States. The remainder of this paper will examine the present and future legal status of this portion of America's cultural heritage.

II. TREASURE HUNTING VERSUS NAUTICAL ARCHAEOLOGY

Almost 98 per cent of historic wrecks in the Western Hemisphere lie in waters less than 30 feet deep making them easily accessible to a scuba diving population estimated to be more than 2.5 million. Modern technological advances like the proton magnetometer, metal detector, side-scanning sonar and aerial photography have given nautical archaeologists the means to further their opportunities to learn more about past civilizations from archaeological material found on the seafloor. The same technology has also been used by recreational divers and professional treasure hunters, and has led to the rapid disappearance of many of these wrecks.

Treasure hunting is a profit-seeking commercial enterprise fueled by the popular myth of vast treasures lying on the seabed only waiting for the first person to find them. By their nature most of these enterprises are concerned primarily with dismantling a wreck as quickly and cheaply as possible in order to acquire valuable artifacts for future operating capital and as an impetus to sponsors to continue funding. There is little interest in conducting a proper scientific investigation. Treasure hunters have traditionally been glorified in press and television and receive widespread sympathy from people who view them as entrepreneurs acting in the spirit of

free enterprise, struggling against unwarranted government interference.

The goals of the treasure hunter are often diametrically opposite to those of the nautical archaeologist who seeks to increase our knowledge of old ships, shipbuilding and design, historic patterns of trade and of all facets of man's seafaring activities through the examination of the material remains of ships and other submerged sites. Historic wrecks are viewed as "time capsules"--seabed depositories of historical information frozen in an instant of time. Consequently, the information derived from the physical relationship between all pieces of a wreck is worth more to the archaeologists than the monetary value of the artifacts themselves.

To some archaeologists it is a matter of principle that historical finds should stay in the public domain. The artifacts recovered by treasure hunters, however, are usually confined to homes or vaults, unavailable for ongoing study or a centralized display available to the general public.

Nautical archaeologists also argue that many recovered artifacts are subsequently damaged or lost through lack of proper conservation and preservation. Aside from gold, some silver, some ceramics and some bronze, virtually all materials subjected to prolonged immersion in seawater completely decompose after exposure to air without sophisticated conservation measures. In the United States there are only a handful of conservation laboratories with the resources necessary to preserve artifacts from the effects of seawater.

Archaeologists face a dilemma however. Lack of available finance on the part of the state often means that recovery efforts are slow in coming even when a wreck is reported. The instant gratification

which acts as a stimulus to private efforts is not sought in a properly executed and interpreted excavation of an historic shipwreck site. States are quicker to respond if the ship contains treasure, with the possibility of the excavation paying for itself. Often, though, considerable funds must first be spent on locating the site, funds which many states cannot afford.

A further problem faced by the preservationists, according to one analyst, is that a strict antiquities law declaring automatic sovereignty over all finds made within coastal state jurisdiction, could lead to a burgeoning trade in illicitly excavated materials. A sort of black market in artifacts could be created.

Most laws exercising sovereign prerogative over historic underwater sites have attempted to come to terms with this problem by granting the excavators property rights to certain of the finds in order to capitalize future undertakings and encourage legitimate marine archaeological research, while retaining a representative example for the government. In this way a certain balance is created between protecting and preserving historical artifacts on the one hand while providing the means to locate and recover the artifacts on the other. This approach will be raised again later in regard to state laws but first it is necessary to examine the question of sovereign prerogative versus salvage law.

III. PROPERTY RIGHTS TO HISTORIC WRECKS IN U.S. WATERS

In Anglo-American common law personal property that is found after becoming separated from its owner is either lost, mislaid, abandoned, or treasure trove.² Lost property is that which the owner parted involuntarily through neglect, carelessness or inadvertence.³

Mislaid property has been intentionally left in a place for later use, the location of which is subsequently forgotten.⁴ Treasure trove is gold or silver coin, plate, bullion, or other specie concealed by the owner in the earth or elsewhere for safekeeping.⁵ Abandoned property, which would best describe underwater marine antiquities, are objects in which the owner has no intention of reclaiming possession or re-assuming ownership and enjoyment of the thing in the future.⁶

Property means the exclusive right to possess and use it in a manner not inconsistent with law.⁷ Thus abandoned property lying on the seabed and relinquished by its former owner is both possessionless and ownerless until found. In the absence of specific legislation exercising a sovereign pre-emptive power, title to such property rests with the finder or salvor that first reduces it to his possession. As will shortly be seen attempts at exercising sovereign prerogative in the United States have often proved unsuccessful.

IV. THE ENGLISH RULE VERSUS THE AMERICAN RULE

William Blackstone divided property recovered from the sea into four categories: Wreck (wreccum maris--wreck of the sea) or those portions of ship or cargo which have come to shore. Flotsam or the same property still floating at sea. Jetsam or goods cast overboard to save a ship and Lagan or buoyed jetsam.⁸ The Statute of Westminster of 1275⁹ explicitly recognized the right of the British sovereign to wreck but also granted the original owner of the wreck a year and a day in which to regain his property before it became the King's. In Constable's Case¹⁰ the sovereign's common law prerogative was extended to flotsam, jetsam and lagan.

Between 1798 and 1837 there were a series of cases, The Aquila,¹¹

The King v. Property Derelict,¹² and The King v. Two Casks of Tallow¹³ which firmly established the "English rule" that regarded the sovereign as the owner of derelict property, as against all but the original owner. A derelict is "a boat or vessel found entirely deserted or abandoned on the sea without hope or intention of recovery or return by the master or crew."¹⁴ Required is both an intent to abandon and the external action by which the intention is carried into effect. Under English common law, then, such derelict property found at sea by a British subject devolves to the Crown rather than to the finder if the original owner does not step forward to claim his property.

When the owner relinquishes all right, title, claim and possession to derelict property, with no intention of resuming its ownership, possession or enjoyment, that property is considered abandoned.¹⁵ Nonuse over a period of time does not necessarily infer intent to abandon. As in the case of derelict property where the original owner is not an issue, title to abandoned vessels under the English rule resides with the government.

Similar to English practice, the "American rule" declares that the claims of the original owners of objects found at sea are preferred to those of either the sovereign or the finder. The owner does not forfeit his property unless it has been abandoned; that is unless all reasonable hope and expectation of recovery have ceased. At this point the two rules diverge as American courts have usually held that once abandonment was established, and in the absence of a legislative statement to the contrary, title and ownership to the property vests with the finder who reduces the property to his possession, in accordance with traditional salvage principles. In the case of abandoned property the finder and salvor may be granted the entire

property as a reward.

Defendants of a separate American rule argue that the United States should not be bound by a British rule that did not become firmly established until 22 years after the Declaration of Independence.¹⁶ Accordingly, common law as it existed prior to 1776, as modified by local institutions, should prevail.

The most frequently heard justification for the existence of a separate American rule, however, is that while the American sovereign has the inherent constitutional power to legislate with respect to ownership, it has never actually done so, and until such time the courts should favor the finder. Four cases, Thompson v. United States,¹⁷ Murphy v. Dunham,¹⁸ Russell v. Forty Bales of Cotton,¹⁹ and United States v. Tyndale²⁰ all rejected the concept of sovereign prerogative. In Thompson v. United States the court explained, "Congress could undoubtedly provide that the proceeds of derelicts and abandoned vessels in the navigable waters of the U.S. be paid into the Treasury; but no such law has been passed, and until it is the principles of natural law must prevail."²¹ The other three cases were decided on similar lines.

Although the courts appear to favor the finder, there have been several recent cases which have mitigated against distinct American and British rules by holding for the sovereign. In Ervin v. the Massachusetts Co.,²² Wade v. Flying "W" Enterprises Inc.,²³ and Platoro Ltd., Inc. v. Unidentified Remains of a Vessel,²⁴ ownership of sunken property, not claimed within a reasonable period of time, was held to revert to the state and not to the finder and salvor. In Ervin v. the Massachusetts the Supreme Court of the State of Florida reversed the lower court decision and held that the battleship

Massachusetts, sunk in target practice within Florida's territorial waters in 1922, belonged to the state. This decision has been much criticized. Kenneth Beall, for instance, noted²⁵ that the court cited English derelict cases, but not American, and discussed in detail the Statute of Westminster while failing to note that it was inapplicable because the Massachusetts was not a wreck as it never reached the shore.

One factor, which according to another commentator,²⁶ is common to all three cases and which could explain the outcome, is that the abandoned res was acquired for the beneficial use and enjoyment of many people over a long period of time. The same source also points out that the doctrine of sovereign prerogative was being acknowledged and enforced by the Crown's admiralty courts in the Colonies prior to the American Revolution.²⁷ In sum, while most American courts have assumed the existence of a distinct American rule, there has been some uncertainty as to whether this is indeed the case.

V. HISTORIC WRECKS AND ADMIRALTY LAW

As previously stated, in the absence of legislation to the contrary, American courts have generally relied on admiralty remedies to decide the owner of derelict or abandoned property found at sea. Such remedies provide an inadequate means of protecting cultural property.

According to Black's Law Dictionary²⁸ a salvage service is "voluntarily rendered to a vessel in need of assistance, and is designed to relieve her from distress or danger, either present or to be reasonably apprehended and for which a salvage reward is allowed by maritime law." A salvage reward is the compensation allowed for

the service in aiding distressed property from the perils of the sea. Three elements must be present before a salvage award is made: (1) a marine peril (2) a service voluntarily rendered when not required by an existing duty or special contract and (3) success in whole or in part, and that service rendered contributed to such a success.²⁹ Admiralty's traditional high regard for salvors and belief in generous remuneration as insurance against both undetectable acts of dishonesty and indifference to another's peril has meant that awards have been high. A lien against abandoned property frequently results in outright ownership.

The criteria which admiralty courts use in determining an award have been those established in The Blackwall³⁰ and include inter alia the risks incurred by the salvors in securing the property from the impending peril and the degree of danger from which the property was rescued.³¹

From this overview it should be apparent that the laws of salvage are not particularly suited to historic shipwrecks. Logic would seem to indicate that a wreck which has lain a century or more on the seabed has long ceased to be in peril. It is difficult to view historical artifacts as distressed property under imminent threat of danger. Nevertheless, in recent court cases admiralty law favoring the finder and salvor has been used to grant ownership of historic wrecks to private interests to the detriment of archaeologists and the general public.

VI. STATE ANTIQUITY LAWS AND HISTORIC UNDERWATER SITES

The 1953 Submerged Lands Act (SLA)³² vests title to and ownership of the lands beneath navigable waters and the natural resources

within such lands and waters out to 3 geographical miles with the states. Within this area states have the right to "manage, administer, lease, develop and use" the lands and natural resources. On the basis of the property rights granted to the states by the SLA, police and eminent domain powers, and the saving to suitors clause of the 1789 Judiciary Act³³ by which the presence of state jurisdiction in admiralty and maritime matters is dependent on the availability of a remedy under the saving to suitors clause, a number of states have asserted ownership or regulation of marine antiquities found within their waters.

Florida was the first state to expressly include underwater archaeological resources in its antiquities legislation largely in response to the recovery and subsequent widespread publicity of finds from the 1715 plate fleet. The Antiquities Act of 1965³⁴ declared as public policy the protection and preservation of historic sites and objects of antiquity, including sunken and abandoned ships, for the edification and benefit of the public. A State Board of Antiquities was authorized to enter into contracts with private companies or individuals for the discovery and salvage of objects of which the salvager could retain 75% of the value of all recovered in cash or in kind or in a combination of both. The Act was significant since it established sovereign ownership of property abandoned in state waters.

It was superseded in 1967 by the Archives and History Act³⁵ which declares that, "artifacts and such objects having intrinsic or historical...value which have been abandoned on state-owned sovereignty submerged lands shall belong to the State of Florida..."

Unlike its predecessor there is no mention of the 75-25 per cent split

between the state and private salvagers; whatever was salvaged would be divided pursuant to the contract. Contracts would be issued only to qualified salvors and on-site supervision by state employees was required.

Largely in response to the uncertainties that surrounded their title to sunken property, eight other states followed Florida's lead by attempting to protect their marine antiquities legislatively.³⁶ The main provisions of these laws are similar and are summarized by James K. Meenan.³⁷ The legislation vests title to underwater archaeological resources in the states with unauthorized interference with state-owned historic properties being prohibited. Age qualifications for submerged antiquities range from unclaimed for more than 10 years to unclaimed for 100 years or more. Exploration and excavation permits are addressed as well as artifact disposal. All state statutes, except that of Texas, provide for a compromise by allowing states to keep a representative sample for museum display or public access, while allowing qualified excavators to keep either a percentage share, a fair share of recovered objects or reasonable cash value of the artifacts. Texas finances its own program.

State antiquity laws draw on land salvage principles in which substantial property rights come to the owner of land on which the true owner happens to have parted, voluntarily or involuntarily, with his possessions. The state is not required as salvor to actively explore for or physically possess its marine antiquities as a condition to its claims of exclusive possession and title. This runs counter to admiralty principle that possessory rights are granted only to those who reduce sunken property to defacto or physical possession. Admiralty courts favor claims from "the quick and the strong"

to those resting merely on fiat or pronouncement.

A further divergence lies in the size of the reward. In anti-quity law the size of the reward is disassociated from the intensity of the salvage effort. Admiralty awards in proportion to the effort expended and believes in liberality as an inducement to avoid dishonesty, traditionally allowing a salvor of abandoned property the entire find. Despite these differences it was only recently that state sovereignty over marine antiquities lying within territorial waters was challenged.

VII. TREASURE SALVORS INC. V. ABANDONED SAILING VESSEL

Professional treasure hunter Melvin A. Fisher, president of Treasure Salvors Inc., found the wreck of the Neustra Senora de Atocha, part of the Spanish treasure fleet of 1622, which sank in a hurricane the same year. The Atocha lay 11 miles off the Marquesas Islands at the western end of the Florida Keys, outside the 3 mile limit but in waters claimed by the state of Florida. Florida accorded the company salvage rights under the 1967 Archives and History Act³⁸ in return for 25% of the artifacts recovered.

Meanwhile in 1973 in an environmental dispute having no relationship to the shipwreck situation, the United States Supreme Court in United States v. Florida³⁹ struck down Florida's historic boundary of 3 marine leagues and ruled that the state could not claim a boundary over three miles. Although the state then had no rights to the Atocha site, Treasure Salvors offered to continue on the same basis as before --a quarter of the treasure in return for the state's protection. Prior to the United States v. Florida decision, Florida state archaeologists had been in contact with their colleagues in the Department

of the Interior and with Justice Department attorneys in order to maintain proper archaeological controls over the wreck if Florida lost. It was assumed by both federal and state archaeologists that sufficient federal law existed to continue the protection of such sites. In 1975 Treasure Salvors Inc. repudiated their contract with Florida and filed Treasure Salvors Inc. v. Abandoned Sailing Vessel⁴⁰ to establish their claim in federal law that they were the first to find the Atocha and reduce it to their possession through salvage, thereby entitling them to ownership of the wreck.

The state of Florida and the Interior Department requested the Department of Justice to intervene in order to protect objects of antiquity on the outer continental shelf. According to Michael W. Reed, an attorney with the Justice Department,⁴¹ the United States Government sought to establish a precedent under existing legislation for protecting submerged historic sites lying outside the three mile limit. It also sought to require salvors to conduct systematic scientific excavation and ensure that a representative example of the recovered artifacts were held in trust for the people of the United States.

The United States claimed possessory rights to the wreck under the Antiquities Act⁴² and the Abandoned Property Act⁴³ with jurisdiction over the site of the wreck derived from the Outer Continental Shelf Lands Act.⁴⁴ The Antiquities Act of 1906 authorizes the President to designate as national monuments "objects of historical interest that are situated upon the lands owned or controlled by the government." Unauthorized persons are forbidden to "appropriate, excavate, injure, or destroy any...object of antiquity." Permits to excavate are only issued to qualified institutions by the Secretary

of the Interior. The Abandoned Property Act was originally enacted in 1870 to govern rights in property abandoned as the result of the Civil War. During codification in 1965 references to the Civil War were deleted opening the way for a possibly more expansive interpretation of the Act. The Abandoned Property Act authorizes the Administrator of General Services to enter into contracts "for the preservation, sale, or collection of any property,...which may have been wrecked, abandoned, or become derelict, being within the jurisdiction of the United States, and which ought to come to the United States."

The government argued that the Antiquities Act applied to objects located on the continental shelf.⁴⁵ and that it had territorial jurisdiction and control over the site for the purposes of that act by virtue of the Outer Continental Shelf Lands Act of 1953. Although the OCSLA was primarily initiated to control mineral leases, it contains the declaration "that the subsoil and seabed of the outer continental shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition."⁴⁶ This was the first time that the OCSLA had been invoked to interpret the Antiquities Act phrase "lands owned or controlled by the government" to include submerged lands.

As an alternative to its first position of applying the Antiquities Act to the continental shelf, the government in support of its claim to the Atocha also maintained that as heir to the sovereign prerogative of the English Crown, it had possessory rights to goods abandoned at sea and found by its citizens. Such rights were part of the common law of England as incorporated into American common law, the government believed, and the Abandoned Property Act and the Antiquities Act represented the legislative exercise of sovereign

prerogative to the extent necessary to justify a claim to the vessel.

The District Court ruled⁴⁷ that both the Antiquities Act and the Abandoned Property Act were inapplicable and concluded that in the absence of a clear expression of Congressional intent to retain title to abandoned property, the finder of archaeological sites on the continental shelf beyond territorial waters was entitled to possession and title in accordance with admiralty salvage law. In the opinion of the court the OCSLA granted to the United States jurisdiction only over natural resources.⁴⁸ Even if a liberal interpretation of natural resources was made, reasoned the court, the terms of the Geneva Convention on the Continental Shelf,⁴⁹ which entered into force as the law of the United States eleven years after the passage of the OCSLA, more narrowly defines natural resources and supersedes any incompatible terminology in the Act. In accordance with U.S. practice when an act of legislation and a treaty are inconsistent, the last one in date will control.

The court relied on International Law Commission commentary on an article in the proposed Convention on the Continental Shelf which excluded wreck from the definition of "natural resources." In the words of the Commission, "It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by sand of the subsoil."⁵⁰ To have allowed a U.S. claim would violate the Geneva Convention.

The court also narrowly interpreted the phrase "lands owned or controlled by the government" in the Antiquities Act to apply only in the dry-land sense. As far as applying the Abandoned Property Act, the court cited United States v. Tyndale⁵¹ and Russell v. Forty

Bales of Cotton,⁵² declaring that the Act does not manifest legislative intent to claim all wrecked, abandoned or derelict property but only such which should equitably go to the United States. In the case of the Atocha the United States could not have any equitable claim to a Spanish vessel wrecked more than a century before the American Revolution. And, for reasons mentioned earlier, the vessel was found not to be within the jurisdiction of the United States Government, as required by both the Abandoned Property Act and Antiquities Acts.

VIII. IN THE AFTERMATH OF TREASURE SALVORS

The decision of the court in Treasure Salvors Inc. v. Abandoned Sailing Vessel was subsequently upheld in Federal Appeals Court in March 1978.⁵³ The company now had clear title to the wreck, free of both state and federal government claims. In June 1981 Treasure Salvors filed suit in Federal District Court to seek exclusive rights to the site as against other treasure hunters.

Considerable sympathy for Fisher existed in Florida. He spent seven years and more than \$700,000 searching for the Atocha and his son and daughter-in-law were both drowned in an accident on the site. The judge in Treasure Salvors accused the state of "coveting" the treasure and using the federal government as a front by which to lay hands on it after the state's own efforts had failed. It is fair to say that Treasure Salvors has made attempts to retrieve archaeological information while salvaging wrecks. It has a professional archaeologist on the payroll and according to one source⁵⁴ the company spent \$80,000 in 1981 on archaeological and conservation activities on wrecks, although they were legally free to strip the sites of their

treasure.

Most nautical archaeologists, however, see the Treasure Salvors case as a roadblock preventing the extension of the policy of historic preservation to the continental shelf. The precedent set by the Government's series of losses against Treasure Salvors has encouraged the recovery of offshore marine artifacts by private interests less responsible than Fisher, free from government intervention. This was in fact happening even before the case was decided. Wilburn A. Cockrell, state underwater archaeologist for Florida, has written that within two years of the United States v. Florida decision in 1973 all known sites of the hitherto protected 1733 plate fleet, lost off the Florida Keys, were either massively looted or totally destroyed.⁵⁵ Furthermore, wrecks in adjacent state waters were being openly looted.

IX. HISTORIC WRECKS AND THE NATIONAL PARK SYSTEM

The federal government's failure in court to assert jurisdiction over historic sites on the outer continental shelf has brought into question the legal protection of similar sites within aquatic related national parks, national monuments and national recreational areas. A suit brought in Federal District Court in Florida in October, 1981 could determine the fate of hundreds of submerged wrecks within the national park system.

A wreck, possibly one of the 1733 plate fleet, was discovered by Gerald Kline, an amateur diver, in Biscayne National Monument near Miami. Kline was granted temporary custody of the vessel but the National Park Service and the state of Florida intervened claiming that the wreck was an historic site.⁵⁶ Within national monuments

excavation permits are issued by the Secretary of the Interior only to qualified institutions and penalties are provided for the illegal excavation or appropriation of any object of antiquity.⁵⁷ A preliminary injunction has given the Park Service control of the site.

The Biscayne case, like Treasure Salvors, pits the traditional rules of salvage in admiralty against the federal and state governments' perceived responsibilities to protect historic sites on their lands. A decision against the government could remove the existing protection for wrecks within the confines of national monuments, parks and the like, and could leave the Monitor Marine Sanctuary as the only site on federal lands with legal protection against the activities of treasure hunters.

X. THE MONITOR MARINE SANCTUARY

The creation of marine sanctuaries was encouraged by the first major offshore oil spill, the Santa Barbara blowout in 1968, which threatened many forms of marine life and caused millions of dollars worth of damage. Largely as a result of this incident the Marine Sanctuaries Act⁵⁸ was passed in 1972 with the object of preserving and restoring areas in coastal waters and in the Great Lakes for their conservation, recreational, ecological and esthetic values. Marine sanctuaries could be established in waters as far out as the outer edge of the continental shelf; to be administered by the National Oceanographic and Atmospheric Administration (NOAA), Office of Coastal Zone Management.

Sanctuaries are classified into different types and include habitat areas, species areas, recreation and esthetic areas, research areas and unique areas. The last-named, of which the Monitor Marine

Sanctuary is an example, have one-of-a-kind economic, biological, cultural or physical characteristics. Located in 1973 in 210 feet of water sixteen miles southeast of Cape Hatteras, the wreck of the historic ironclad--U.S.S. Monitor--was nominated by North Carolina in September, 1974 as a marine sanctuary to safeguard it from treasure hunters and irresponsible salvage operations.⁵⁹ On January 30, 1975 the wreck was designated as the nation's first marine sanctuary.

Within a vertical cylinder of water and seabed one mile in diameter anchoring, salvage and recovery, diving, dredging, detonation of explosives, drilling or coring, cable laying, trawling and discharging waste materials are prohibited.⁶⁰ Applications for research permits must be vetted by NOAA who will ensure that whatever research is conducted at the site is for the purpose of gaining knowledge about the wreck under proper scientific, and archaeological supervision.

While the Monitor Sanctuary "remains the most unequivocal assertion of federal interest in marine antiquities,"⁶¹ the undisputed historical value of the wreck makes it an "uncertain precedent" for the application of the Act to less nationally significant marine wrecks. Future use of the Act to protect historically important non-naval vessels is unlikely. The Monitor remains a unique area and new sanctuaries are expected to reflect not historical but environmental and recreational values.

XI. SUBMARINE ANTIQUITIES WITHIN STATE WATERS

The precedent established by Treasure Salvors could result not only in a law of 'finders keepers' on federal lands but even within

the three mile limit. State legal control over historic wreck sites within territorial waters is being challenged by Treasure Salvors Inc. and other treasure hunters. In April, 1978, after the Appeals Court decision in Treasure Salvors Inc. v. Abandoned Sailing Vessel, the District Court in Miami issued a warrant for arrest in rem of the 25% share of the artifacts recovered from the Atocha and turned over to the state in accordance with an earlier agreement. In State of Florida Department of State v. Treasure Salvors Inc.,⁶² July, 1980, the District Court denied Florida's motion to quash the warrant and ordered the state to deliver the artifacts to the court. The decision was subsequently upheld in Appeals Court and on May 18th, 1981 a petition for writ of certiorari was granted,⁶³ with the case still pending before the Supreme Court.

Judge Mertens of the District Court, in making his decision, saw the submarine antiquities section of the Florida Archives and History Act of 1967 as "new and unprecedented concept." He further declared, "The extent of control over which the Division of Archives claims in reference to maritime salvage operations...raises a serious question of interference with the jurisdiction of the federal courts in admiralty and maritime matters."⁶⁴

On August 7, 1979, in another case brought to test the constitutionality of Florida's law, the Cobb Coin Co. claimed ownership of a 1715 shipwreck lying within the state's three mile limit and Florida counterclaimed, asking the court to consider the state as the owner. In October, 1981 in Cobb Coin Co. v. Abandoned Sailing Vessel,⁶⁵ the court held that Florida's regulations were inconsistent with admiralty salvage law and that federal maritime law (Art. III sect. 3 of the U.S. Constitution) preempted state law.⁶⁶ Furthermore,

the court declared, neither the doctrine of concurrent jurisdiction (saving to suitors clause) nor the Submerged Lands Act authorizes Florida to exercise plenary authority to administer the recovery of abandoned wrecks within its territorial limits.⁶⁷

It is highly unlikely that historic wrecks within the three mile limit of Florida's jurisdiction will soon lose the legal protection they once had. As one writer has stated, "by fighting so hard against Treasure Salvors and losing so badly, the state has severely damaged the legal framework of control it once had."⁶⁸ But the ramifications will spread beyond the boundaries of Florida as the constitutionality of all state antiquity laws which address the subject of marine antiquities, would then be open to question. The result will be that more historic wreck sites will be open to the finders to do as they please. What then, are the options open to those who would like to see this trend reversed? One means towards reasserting sovereign prerogative in U.S. offshore waters could lie in international law.

XII. SUBMARINE ANTIQUITIES AND INTERNATIONAL LAW

The destruction of historic wrecks is not a problem which is confined solely to the United States. It has been claimed by some European archaeologists that there are virtually no unlooted shipwrecks in the entire Mediterranean in less than 30 metres of water.⁶⁹ There is a variety of approaches to the subject of property rights to marine archaeological material found within the territorial limits of coastal States. Many countries do exercise their sovereign prerogative and claim jurisdiction over the sites. In France, for instance, the 1961 Regulations Respecting Wrecks and Derelicts gives

protection to wrecks of historical, archaeological or artistic interest.⁷⁰ Competent excavators are issued licenses by the government and are entitled to compensation for artifacts subsequently recovered.

Another country where sovereign prerogative is exercised is in the United Kingdom where the Secretary of State, Department of Trade, by authority of the Protection of Wrecks Act of 1973, can issue an order protecting the site of an historic wreck from unauthorized interference.⁷¹ Licenses to excavate sites, as in France, are only issued to competent salvors, subject to conditions and restrictions. Responsible attitudes are fostered among recreational divers in the belief that the skills of the amateur can be put to use if given the proper guidance and support. Many countries bordering on the Mediterranean Sea have also found it necessary to enact tougher laws in order to prevent the loss of marine artifacts from their territorial waters.

The United Nations Economic and Social Council (UNESCO) has served as the medium through which states have voiced their concern on the international level. Unesco Convention on International Principles Applicable to Archaeological Excavations,⁷² adopted by the General Conference in New Delhi in 1956, outlined action which each Member State should take to preserve its archaeological heritage.

Among the actions recommended were to make archaeological exploration and excavation subject to prior authorization by the competent authority and to oblige any person finding archaeological remains to declare them at the earliest possible date to that authority.

Other Unesco conventions which have some bearing on nautical archaeology include the Convention on the Means of Prohibiting and

Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (November 14, 1970)⁷³ and the Convention for the Protection of the World Cultural and Natural Heritage (November 16, 1972).⁷⁴ All of the above mentioned conventions do not have the force of law, but are morally binding on Member States which are required to bring their domestic regulations into line with them.

As regards to international law it has already been stated that a country may regulate access to archaeological sites within its territorial sea as an exercise of its sovereignty over that area. As the United States has not, according to judicial opinion, exercised its sovereign prerogative, any extension of the territorial sea would have no effect on submarine antiquities.

The Convention on the Continental Shelf gives the coastal State sovereign rights to explore and exploit the natural resources of the seabed and subsoil of its shelf.⁷⁵ But those resources, as recounted in the Atocha case, do not include wrecks or their cargoes. Thus even though "recovery of such wrecks and their cargoes entails physical contact with the seabed or removal of sand and other materials of the continental shelf in order to uncover the wreck,"⁷⁶ such sites seaward of the territorial sea remain res derelictae and subject to the laws of salvage with no coastal State property rights.

As early as 1971 several States, notably Greece and Turkey, requested the U.N. Seabed Committee to place the question of the legal regime of submarine antiquities on the agenda of the Third United Nations Conference on the Law of the Sea (UNCLOS III) which was to be convened in 1973. In 1972 sixty maritime museum representatives from all over the world gathered in Greenwich, England and passed a resolution stressing the threat to unique cultural objects

posed by unrestricted diving and the need for increased protection.⁷⁷ Hope was raised that UNCLOS III would reach some agreement in preserving this portion of the world's cultural heritage. Such hopes were not to be realized however. Nautical archaeology became subject to the give and take of the Conference and remained only a minor issue in comparison with more weighty topics such as seabed mining and the international straits regime.

During the eighth session of the Conference held in New York in 1979, seven States sponsored a proposal that the coastal State exercise sovereign rights over any object of an archaeological and historical nature on its continental shelf.⁷⁸ Certain maritime States, in particular the United States, the United Kingdom, and the Netherlands, opposed such a move in the belief that rights over the continental shelf, unrelated to natural resources, would pave the way for other exceptions. Secondly the new provision would mean reopening negotiations on the continental shelf. The compromise solution which resulted became Article 303 of the Draft Convention⁷⁹ and reads as follows: "States have the duty to protect archaeological objects and objects of historical origin found at sea, and shall cooperate for this purpose." (sect. 1) This was qualified, however, by section 3 of the same article: "Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty..." In effect, what was given in one section of the article was taken away in the other.

Further reference to submerged antiquities is found in Article 149 concerning the area beyond national jurisdiction: "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole,

particular regard being paid to the preferential rights of the State or country of origin, or the State of historical and archaeological origin." Apart from being vague and ambiguous, there are few historical wrecks found in the area addressed i.e., the deep sea. This article would thus appear to be of little consequence. In regards to the 200 mile economic zones granted to each State it is doubtful, in the light of past interpretation, whether sovereign rights to the living and non-living resources of the seabed and subsoil include shipwrecks and their cargoes. No reference is made to them in the articles on the exclusive economic zone in the Draft Convention.

In sum, the proposed Law of the Sea Treaty has little to offer in the way of increased protection of historic underwater sites. International law in general has developed with little regard to marine archaeological interests. This is in part due to the fact that it was not until the early 1970's that marine archaeology emerged as a recognized discipline. And, as H. Crane Miller has pointed out in International Law and Marine Archaeology,⁸⁰ there has been a lack of an international political constituency that can give effective voice to marine archaeological interests. The result is that there is no international law, in treaty or in custom, that obligates the United States to act in any particular way towards marine artifacts in its offshore waters. Further protection, if desired, can only come from within the legal and political framework of the United States itself.

XIII. THE FUTURE OF SUBMARINE ANTIQUITIES

As clearly illustrated in Treasure Salvors Inc., federal legislation as it presently exists, offers no legal protection whatsoever

for historic wrecks in federal waters with the exception of the U.S.S. Monitor which lies in a specially created marine sanctuary, and those wrecks within the confines of national parks, monuments etc. The future of historic sites within the last-named areas is now uncertain. The Antiquities Act, the Abandoned Property Act and the Outer Continental Shelf Lands Act never contemplated underwater archaeology when originally written. Likewise the regime of admiralty salvage law has shown itself to be ill-adapted to the purpose of preserving marine antiquities.

There is an urgent need to restore to federal control historic wrecks on federal submerged lands. The possibility of an extension of U.S. territorial waters out to twelve miles, as sanctioned by a Law of the Sea Treaty, would permit the outward extension of federal jurisdiction. However the lack of a satisfactory expression of sovereign prerogative remains. An amendment to the Outer Continental Shelf Lands Act could provide such an expression but would run counter to the narrow interpretation given by the Convention on the Continental Shelf to what constitutes the mineral and other non-living resources of the seabed and subsoil of the shelf. Accession by the United States to the Law of the Sea Treaty would lead to the supersession of this terminology although indications are that a narrow interpretation is also being applied in the new treaty.

An alternative path might be to amend the Antiquities Act to include submerged lands owned or controlled by the government. This would provide an adequate assertion of sovereign prerogative for the courts have not stated that the United States cannot lay sovereign claim to historic wrecks, merely that it has not done so. This would make it possible for the Department of the Interior to then

issue permits to qualified excavators, as it does on land, with the Government retaining a representative example, leaving the remainder to salvors as an incentive.

The issue as it relates to dry land was recently addressed in the Archaeological Resources Protection Act of 1979 (Pub. L. 96-95) which provides protection for archaeological sites on public lands and Indian lands. A similar law is necessary for underwater sites, particularly if state antiquity laws are held to be unconstitutional.

Most states that have passed antiquities legislation provide for excavation under contract to private companies with the exception of Texas which excludes all treasure hunters from its territorial waters while underwriting all costs of its wreck salvage program. According to Texas archaeologist Carl Clausen, a state can finance its own shipwreck archaeological program for less than half the cost that it would take that state to maintain a similar program involving treasure salvors.⁸¹ Self-financing publicly operated excavations are the ideal solution for the coastal state and one which might prove viable.

Such programs could prove irrelevant, however, if legal protection within the three mile limit is lost. In that case a new federal law asserting sovereign prerogative over historic wrecks from the shore seaward to the outer edge of the territorial sea, will be the only alternative. A law of this kind should provide for competent professional supervision of any excavations and permit the salvager, in the case of a private company, to retain a certain percentage of the recovered artifacts.

Unregulated treasure hunters remain the greatest single threat to underwater archaeological resources. Such resources are a

national wealth, the legal framework of which should not be left to the courts to patch together. As one archaeologist has pointedly observed, "In an era of concern for the destruction of non-regenerative natural resources it seems especially criminal to destroy the last vestiges of a significant period of western history for the fun and profit of a few, at the expense of the irrevocable loss of knowledge for all subsequent generations."⁸²

FOOTNOTES

1. William A. Turnbaugh, Sarah P. Turnbaugh and Albert P. Davis, "Life Aboard HMS Orpheus," 32 Archaeology (May/June 1979): 43-49.

2. 1 Am. Jur. 2d, Abandoned Property sects. 1-4 (1962).

3. Id. sect. 5.

4. Id.

5. Id.

6. Id.

7. Black's Law Dictionary (5th ed. 1979).

8. 1 Blackstone Commentaries 290-294.

9. Statute of Westminster 3 Edw. 1.c.4.

10. 77 Eng. Rep. 218, 223 (K. B. 1601).

11. 165 Eng. Rep. 87, 89 (Adm. 1798).

12. 166 Eng. Rep. 136 (Adm. 1825).

13. 166 Eng. Rep. 414 (Adm. 1837).

14. Black's Law Dictionary (5th ed. 1979).

15. Id.

16. See notes 11-13 supra.

17. 62 Ct. Cl. 516 (1926).

18. 38 F. 503, 509-10 (E. D. Mich. 1889).

19. 21 F. Cas. 42, 48-50 (S.D. Fla. 1872).

20. 116 F. 820 (1st. Cir. 1902).

21. 62 Ct. Cl. 516 (1926) at 524.

22. 95 So. 2d 902 (Fla. 1957).

23. 273 N.G. 399, 160 S.E. 2d 482 (1968).

24. 371 F. Supp. 356 (S.D. Tex. 1973) rev'd and remanded with directions to dismiss 508 F. 2d 1113 (1975).

25. Kenneth S. Beall, "State Regulation of Search for and Salvage of Sunken Treasure," 4 Natural Resources Lawyer 1: 17.

26. James K. Meenan, "Cultural Resources Preservation and Underwater Archaeology: Some Notes on the Current Legal Framework and a model Underwater Antiquities Statute," 15 San Diego Law Review (1978) 3: 636.

27. *Id.* at 634.

28. Black's Law Dictionary (5th ed. 1979).

29. *Id.*

30. The Blackwall 77 U.S. (10 Wall) 1, 12 (1869).

31. Other elements include: The labor expended by the salvors in rendering the salvage service. The promptitude, energy and skill displayed in rendering the service and saving the property. The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed, plus the value of the property saved.

32. 43 U.S.C. 1301 (1970).

33. 28 U.S.C. 1333(1) (1970).

34. Fla. Stat. 267 .01-08 (1965).

35. Fla. Stat. 267 .011-14 (West 1975).

36. Massachusetts 1973 Mass. Acts Ch. 989 Sect. 5.
Mississippi 1970 Miss. Laws Ch. 267 Sect. 1.
North Carolina 1967 N.C. Sess. Laws Ch. 533 Sects. 1-8 as
amended by 1973 N.C. Sess. Laws Ch. 476 Sect. 48.
Rhode Island 1974 R.I. Pub. Laws Ch. 161 Sect. 1.
South Carolina 1968 S.C. Acts (55) 3077.
Texas 1969 Tex. Gen. Laws 61st Leg., 2d C.S., at
98 Ch. 2. emerg. eff. Sept. 10, 1969.
Vermont 1975 Vt. Acts No. 109 Sect. 4.
Virginia 1976 Va. Acts Ch. 579.

37. Meenan, "Cultural Resources Preservation," p. 655.

38. Fla. Stat. 267 .011-.14 (West 1975).

39. 420 U.S. 531, 95 S. Ct. 1162.

40. 408 F. Supp. 907 (S.D. Fla. 1976).

41. As cited in Meenan, "Cultural Resources Preservation," p. 654.

42. 16 U.S.C. 431-433 (1970).

43. 40 U.S.C. 310 (1970).

44. 43 U.S.C. 1332 (1970).

45. The continental shelf is defined as the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources. Art. 1 Convention on the Continental Shelf, done at Geneva Apr. 29, 1958, U.N. Doc. A/CONF. 13/L55.
46. 43 U.S.C. 1332(a) (1970).
47. 408 F. Supp. 907 (S.D. Fla. 1976).
48. Guess v. Reed 290 F. 2d 622 (5th Cir. 1961) held that the OCSLA was aimed primarily to assert ownership and jurisdiction over mineral resources in and under the continental shelf.
49. Convention on the Continental Shelf, done at Geneva Apr. 29, 1958.
50. Report of the INC to the General Assembly (1956), 2 Y.B. Int'l L. Comm'n 298, U.N. Doc. A/3159 (1956). Reprinted in 51 American J. Int'l Law 154 (1957).
51. 116 F. 820 (1st Cir. 1902).
52. 21 F. Cas. 42 (S.D. Fla. 1872).
53. 569 F. 2d 330 (5th Cir. 1978).
54. Nicholas Wade, "Galleon Yields Gold, Silver and Archaeology," 212 Science (June 26, 1981): 1486.
55. Wilburn Cockrell, "The Trouble with Treasure--A Preservationist View of the Controversy," 45 American Antiquity (1980)2: 337.
56. "Shipwreck Case to Decide Fate of Spanish Galleon," National Parks (Nov./Dec. 1981): 28.
57. 16 U.S.C. 432-433 (1970).
58. 16 U.S.C. 1431-1434 (1976).
59. For a detailed history of the Monitor see Edward M. Miller, U.S.S. Monitor--The Ship that Launched a Modern Navy (Annapolis Md.: Leeward Publications, 1975).
60. 15 C.F.R. 924.3 (1981).
61. Adam Lawrence, "State Antiquity Laws and Admiralty Salvage: Protecting Our Cultural Resources," Univ. of Miami Law Review (March, 1978)2: 319.
62. 621 F. 2d 1340 (S.D. Fla. 1980).
63. 101 S. Ct. 2312 (1981).

64. 621 F. 2d 1340 at 525.
65. 525 F. Supp. 186 (1981).
66. Id. at 189.
67. Id.
68. Wade, "Galleon Yields Gold," p. 1487.
69. Cockrell, "The Trouble with Treasure," p. 335.
70. See Jean Chabert, "How Underwater Archaeology is Regulated in France," Underwater Archaeology--A Nascent Discipline (Paris: Unesco, 1972).
71. See Cecil Jones, "Marine Archaeology in the UK--A Pattern of Development," Marine Policy (Oct. 1978)2: 321-330.
72. Unesco, General Conference, Ninth Sess., Dec. 5, 1956, Sect. 12.
73. Reprinted in 10 International Legal Materials 289 (1971).
74. Reprinted in 11 International Legal Materials 1358 (1972).
75. Convention on the Continental Shelf, U.N. Doc. A/CONF. 13/L55.
76. H. Crane Miller, International Law and Marine Archaeology (Belmont Mass.: Academy of Applied Science , 1973): 22.
77. As reported in the Journal of Nautical Archaeology and Underwater Exploration 2 (1973): 225.
78. For a full discussion of UNCLOS III as it relates to nautical archaeology see Luigi Migliorino, "Submarine Antiquities and the Law of the Sea," Univ. of Delaware, Marine Policy Reports (April 1982) 4: 1-5.
79. U.N. Doc. A/CONF. 62/WP. 10/Rev. 3 in International Legal Materials 1129-1295 (1980).
80. Miller, International Law, p. 34.
81. Robert F. Burgess, Man--12,000 Years Under the Sea (New York: Dodd, Mead and Co., 1980): 203.
82. Cockrell, "The Trouble with Treasure," p. 338.

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