RECENT DEVELOPMENTS

ADMIRALTY—SALVAGE RIGHTS—SOVEREIGN CLAIMS ON THE OUTER CONTINENTAL SHELF DO NOT EXTEND TO ABANDONED VESSELS.

Plaintiff brought this action for possession and confirmation of title against all persons as to an unidentified, wrecked, abandoned vessel, thought to be the *Nuestra Señora de Atocha,* which sank in or about the year 1622 while enroute from the Spanish Indies to Spain.[1] The wreck was located on the continental shelf,[2] but outside the territorial waters of the United States. The United States intervened, claiming possessory rights in the wreck itself under the Antiquities Act[3] and the Abandoned Property Act,[4] with jurisdiction over the site of the wreck derived from the Outer Continental Shelf Lands Act.[5] On plaintiff's motion for summary judgment, *held* the United States has not exercised its sovereign prerogative to the extent necessary to justify a claim to an abandoned vessel located on the outer continental shelf. *Treasure Salvors, Inc. v. Abandoned Sailing Vessel,* 408 F. Supp. 907 (S.D. Fla. 1976).

The ancient maritime law adheres to the natural law concept of ownership by possession.[6] The traditional American rule was that, since the American sovereign had declined to exercise its inherent power to assert ownership over abandoned property at sea, the courts were bound to favor the finder by following the natural law.[7] As the Court of Claims explained in a leading case,

> Congress could undoubtedly provide that the proceeds of derelict and

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[1] The wreck and treasure are described in 149 NAT'L GEOGRAPHIC 786-809 (1976) [hereinafter cited as NAT'L GEOGRAPHIC].

[2] The legal continental shelf differs from the geological continental shelf and may be understood as:

> referring (a) to 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 of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Convention on the Continental Shelf, *done* at Geneva, Apr. 29, 1958, art. 1 [1964] 15 U.S.T. 471, 473, T.I.A.S. No. 5578, 499 U.N.T.S. 312 [hereinafter cited as Geneva Convention]. For use of an international convention to define terms in domestic legislation, see United States v. California, 381 U.S. 139 (1965).

[3] 1 U.S.C. § 432(f) (1970).

[4] 40 U.S.C. § 310 (1970).

[5] 43 U.S.C. § 1332 (1970).

[6] Note, *Abandoned Property at Sea: Who Owns the Salvage "Finds"?,* 12 WM. & MARY L. REV. 97, 98 (1970). The author points out that the earliest formal sea code recognizing the concept was the Maritime Ordinance of Trani promulgated in 1063. *Id.*

[7] *Id.* at 104. This is contrary to the well established British rule that disputes as to ownership of property abandoned at sea are settled in favor of the Crown. *Id.* at 102.

> abandoned vessels in navigable waters of the United States be paid into the Treasury; but no such law has been passed, and until it is the principle of natural law must prevail.[8]

Thus, under the traditional rule in the United States, abandonment constitutes a relinquishment of ownership,[9] and a party later taking possession under salvage operations is considered a "finder."[10] Ownership vests in the finder by operation of law.[11] Parties who undertake salvage operations and are successful usually are entitled to sole possession of the items found.[12]

The federal government may, under its constitutional jurisdiction over admiralty cases,[13] claim property which is lost at sea.[14] Congress must, however, manifest a specific intent to appropriate derelict property.[15] One such manifestation is the Abandoned Property Act,[16] enacted in 1870 to govern rights in property abandoned as a result of the Civil War.[17] The

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[8] Thompson v. United States, 62 Ct. Cl. 516, 524 (1926). *See also* United States v. Tyndale, 116 F. 820 (1st Cir. 1902).

[9] *E.g.*, Nippon Shosen Kaisha, K.K. v. United States, 238 F. Supp. 55 (N.D. Cal. 1964); *cf.* United States v. Cowan, 396 F.2d 83 (2d Cir.1968).

[10] Brady v. The Steamship African Queen, 179 F. Supp. 321 (E.D. Va. 1960); Petition of Esso Shipping Co., 122 F. Supp. 133 (S.D. Tex. 1954).

[11] Rickard v. Pringle, 293 F. Supp. 981 (E.D.N.Y. 1968); Fisher v. The Sybil, 9 F.Cas. 141 (No. 4,824) (C.C.S.C.), *aff'd*, 17 U.S. (4 Wheat.) 98 (1816). For a general discussion of these principles, see Annot., 63 A.L.R.2d 1369 (1959).

[12] Wiggins v. 110 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960); In re Moneys in Registry of District Court, 170 F. 470 (E.D. Pa. 1909). One respected authority argues that ownership does not automatically rest in the finder. M. NORRIS, THE LAW OF SALVAGE § 158 (1958). This view was rejected, however, in *Wiggins, supra* at 456.

[13] While the Constitution grants federal jurisdiction under Art. 3, § 2, the extent of admiralty jurisdiction and power is determined by Congress. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 433, 460; *cf.* Crowell v. Benson, 285 U.S. 22 (1932).

[14] One early case held that after paying the salvors of lost property a generous reward for their efforts, the balance, if any, went to the United States as inheritor of the king's similar admiralty preogatives. Peabody v. Proceeds of Twenty-eight Bags of Cotton, 19 F. Cas. 39 (No. 10,869) (D.D.C. Mass. 1829). Subsequent cases have entirely rejected its holding that such funds accrued to the federal government by common law. *E.g.*, United States v. Tyndale, 116 F. 820 (1st Cir. 1902).

[15] Thompson v. The United States, 62 Ct. Cl. 516 (1926); *cf.* United States v. Huckabee, 83 U.S. (16 Wall.) 414 (1872).

[16] 40 U.S.C. § 310 (1970). The relevant part reads:

> The Administrator of General Services is authorized to make such contracts and provisions as he may deem for the interest of the Government, for the preservation, sale, or collection of any property, or the proceeds thereof, *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,* and in such contracts to allow such compensation to any person giving information thereof, or who shall actually preserve, collect, surrender, or pay over the same, as the Administrator of General Services may deem just and reasonable (emphasis added).

[17] J. Res. 75, 41st Cong., 2d Sess., 16 Stat. 380 (1870). This joint resolution was the forerunner of the Abandoned Property Act. It authorized the Secretary of the Treasury:

> to make such contracts and provisions as he may deem most advantageous for the

crucial phrase in the act, "property . . . which ought to come to the United States,"[18] has been held to be descriptive and not declarative of a principle that all property "wrecked, abandoned, or [which has] become derelict . . ."[19] ought to belong to the United States.[20] Under this interpretation the statute claims only that property should equitably go to the United States.[21] Therefore the courts hold that the statute does not manifest legislative intent to claim all wrecked, abandoned or derelict property.[22]

Another Congressional enactment, the Antiquities Act,[23] demonstrates an intent to conserve relics of the American past. The statute's restriction to "*lands* under . . . respective jurisdictions"[24] does not automatically

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interest of the government, for the preservation, sale, or collection of any property, or the proceeds thereof, 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, or any moneys, dues, and other interests lately in the possession of or due to the so-called Confederate States, or their agents, and now belonging to the United States, which are now withheld or retained by any person, corporation, or municipality whatever.

[18] Note 16 *supra*. The wrecked, abandoned status of the res in the instant case was not at issue, and the jurisdictional requirement is discussed later.

[19] Note 17 *supra*.

[20] Russell v. Forty Bales Cotton, 21 F.Cas. 42 (No. 12,154) (S.D. Fla. 1872), *aff'd without opinion*. *Russell* contains an extensive examination of the proper interpretation of the 1870 Resolution. This interpretation has been followed by all later courts.

[21] Leathers v. Salvor Wrecking and Transportation Co., 15 F. Cas. 116 (No. 8,164) (C.C.S.D. Miss. 1875). The Treasury Department entered into twelve contracts for salvage of vessels under the Abandoned Property Act in the ten years preceding the 1965 amendment of the Act. All the vessels belonged to the United States. Perry, *Sovereign Rights to Sunken Treasurers*, 7 LAND & NAT. RESOURCES J. 89, 104 (1969) [hereinafter cited as Perry].

[22] United States v. Tyndale, 116 F. 820 (1st Cir. 1902).

[23] 16 U.S.C. §§ 432, 433 (1970). This act states:

§ 432. PERMITS TO EXAMINE RUINS, EXCAVATIONS, AND GATHERING OF OBJECTS; REGULATIONS.

Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and Army to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe.

§ 433. AMERICAN ANTIQUITIES.

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

§ 433 was held unconstitutional as being too vague in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).

[24] *Id.* § 432 (emphasis added).

preclude its application to an underwater wreck,[25] but the word "lands" was apparently intended to apply only in a narrow dry-land sense.[26] Also, the restrictive phrase implies existing *jurisdictions,* which seemingly limits the act's application to the area within the traditional "territorial waters" jurisdiction of the United States.

With the Outer Continental Shelf Lands Act (OCSLA), however, the federal government has extended its jurisdiction.[27] This statute was primarily enacted to control mineral leases, as is apparent from the majority of its provisions,[28] but it does contain the Congressional 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."[29]

The initial decision in a series of cases construing OCSLA was handed down by the Fifth Circuit in 1961. In the case of *Guess v. Read,* the court held that the Act only conferred general federal jurisdiction over that portion of the seabed and subsoil being exploited for its mineral content.[30] That same year, in *Pure Oil Company v. Snipes,* the Fifth Circuit again

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[25] The phrase "public lands" should be construed consistently with the intent of the statute. Hynes v. Grimes Packing Co., 337 U.S. 86, 110-16 (1949). *Contra,* Illinois Central R.R. v. Chicago, 176 U.S. 646 (1900) ("lands" does not mean submerged lands so not within statutory intent). Perry considered *Illinois Central* as controlling. Perry, *supra* note 21, at 110.

[26] The regulations drafted to implement the statute seem to indicate this. *See* 43 CFR § 3.1 *et seq.* (1975). The language is inconclusive. When it is specific it defines jurisdiction over forest reserves and military reservations, but also over "all other lands owned or controlled by the Government of the United States." 43 CFR § 3.1 (1975). Lands are to be restored to their customary condition. *Id.* § 3.11.

[27] 43 U.S.C. § 1332 *et seq.* (1970) [hereinafter cited as OCSLA]. This statute and its companion act, the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.* (1970), were both passed in 1953. The Submerged Lands Act essentially gave the states title to and control of the lands under the territorial sea, out to three miles or three marine leagues, depending on what the state possessed when it came into the Union. The domestic effects of both statutes are analyzed in Stone, *United States Legislation Relating to the Continental Shelf,* 17 INT'L & COMP L.Q. 103 (1968).

[28] Both § 1335, concerning validation and maintenance of prior leases, and § 1337, concerning the granting of leases by the Secretary, deal exclusively with mineral leases. The explorations and research specifically regulated are in § 1340, which covers geological and geophysical studies. The Act has been criticized for its limited scope. Krueger, *An Evaluation of the Provisions and Policies of the Outer Continental Shelf Act,* 10 NAT. RESOURCES J. 763 (1970) [hereinafter cited as Krueger].

[29] 43 U.S.C. § 1332(a) (emphasis added). The full text of § 1332 is:

> (a) It is declared to be the policy of the United States 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 as provided in this subchapter.
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> (b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

[30] Guess v. Read, 290 F.2d 622 (1961), *cert. denied,* 368 U.S. 957 (1962). The case held that a helicopter crash while flying from a drilling platform to shore is not covered by the Act.

considered the extent of the statute's application, stating that "it is important at the outset to emphasize the comprehensive, unqualified, unlimited claim of Federal sovereignty asserted and accomplished by that statute."[31] When reviewing a later case in this line, the Supreme Court struck down certain aspects of that ruling but nevertheless affirmed the Fifth Circuit's finding of exclusive federal regulatory power in the area of the outer continental shelf over the seabed, subsoil and fixed structures.[32] However, the Court did not define the extent of the power or the area within the power. In the 1970 case of *United States v. Ray*, the Fifth Circuit held that the United States *does* have a claim of sovereignty and jurisdiction over reefs outside the territorial waters of the United States.[33] The holding was that, though the government's interest in the reefs themselves was less than possessory, it was sufficient for the government to obtain an injunction against parties building on the reefs.[34]

International law also deals with the question of national sovereignty over waters outside traditional territorial limits, as set out in the Geneva Convention on the Law of the Sea.[35] This convention, promulgated subsequent to OCSLA and signed by the United States, superseded any incompatible terminology in the domestic statute.[36] It did not directly conflict with an assertion by the United States of jurisdiction and control over reefs outside the territorial waters,[37] but the International Law Commission (ILC), in its commentary on article 2, said: "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 the sand of the subsoil."[38]

In deciding that the federal government does not have jurisdiction, the court in the instant case[39] first cites *Guess v. Read*[40] for the proposition that

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[31] Pure Oil Company v. Snipes, 293 F.2d 60, 62 (5th Cir. 1961).

[32] Rodriguez v. Aetna Casualty and Surety Co., 395 U.S. 352 (1969).

[33] United States v. Ray, 423 F.2d 16 (5th Cir. 1970).

[34] *Id.* at 20.

[35] Note 2 *supra*. The relevant article is:

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
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> . . . .
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> 4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Id. art. 2.

[36] Since Congressional enactments and treaties have equal authority as the law of the land, U.S. CONST. Art. VI, the later in time controls. *See* Whitney v. Robertson, 124 U.S. 190 (1888).

[37] United States v. Ray, 423 F.2d 16, 21 (5th Cir. 1970).

[38] 11 U.N. GAOR, Supp. 9, U.N. Doc. A/3159, at 42.

[39] 408 F. Supp. 907.

[40] 290 F.2d 622 (1961).

the jurisdiction asserted under OCSLA is limited to the minerals in and under the continental shelf.[41] Secondly, the court determines that the Geneva Convention would be violated if the United States were allowed to have a claim in the treasure.[42] Finally the government's claim of jurisdiction based upon the power to restrict the activities of its citizens also fails,[43] because the Antiquities Act and the Abandoned Property Act deal mostly with *property* rather than *persons* within the jurisdiction of the United States.[44] The court notes that part of the Antiquities Act does apply to persons, but this provision has been held unconstitutionally vague.[45]

The court in *Treasure Salvors* adopts the ILC's commentary on article 2 of the Geneva Convention[46] without explicitly considering whether the wreck is, for judicial purposes, part of the seabed or of the superadjacent waters.[47] The court does suggest that the wreck is part of the superadjacent waters,[48] and implicitly treats it as such.[49] But instead of expressly defining the wreck's location, the court, in excluding shipwrecks from its definition of the seabed, elevates commentary which is not part of the official convention to the status of law. Of course, whether it is defining shipwrecks as part of the superadjacent waters from which they come or as a judicially adopted exception to the general jurisdiction over the seabed, the court is making a substantive addition to the Geneva Convention. Perhaps the former proposition would be the better rationale for the court's findings, as it would make the Convention and OCSLA compatible on this point.

The court also fails to consider the application of article 5 of the Geneva Convention, which prohibits interference with "fundamental oceanographic or other scientific research."[50] The salvage of a ship such as the

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[41] 408 F. Supp. at 910. That decision, however, was sufficiently supported by § 1332 (b) of OCSLA. Furthermore, the Fifth Circuit in *Ray* expressly said that OCSLA § 1332 (a) "does not limit the nation's jurisdiction, control, and power of disposition to the natural resources of the shelf." United States v. Ray, 423 F.2d at 21.

[42] 408 F. Supp. at 910.

[43] *Id.* at 911.

[44] *Id.* at 910.

[45] *Id.* at 911, *citing* United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).

[46] Note 38 *supra*, at 42.

[47] 408 F. Supp. at 910. 43 U.S.C. § 1332 (b), *supra* note 27, deals with these waters, as does article 3 of the Geneva Convention. It reads: "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters."

[48] 408 F. Supp. at 910. (It is significant that 43 U.S.C. § 1332 (b) preserves the character of the water above the outer continental shelf as "high seas.")

[49] "It appears, then, that the Convention does not change the law of salvage as it applies to res derelictae, even though the recovery of such property *might involve contact* with the seabed or removal of sand or other materials." *Id.* at 910 (emphasis added).

[50] The relevant parts are:

> 1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference

Nuestra Señora de Atocha could be categorized as a recovery of archaeological artifacts.[51] As an exercise of marine archaeology, this operation could fall under the provisions for "other scientific research" in article 5,[52] and as such, would properly be subject to the consent and participation of the coastal state.[53] One commentator has concluded that the coastal state has authority over archaeological operations on the continental shelf, but then points out that: "[c]learly, however, an argument can be made for differentiating research concerning the archaeological remains of the Continental Shelf from research concerning the Continental Shelf *simpliciter*, on the basis that archaeological research is not in fact at all concerned with the Continental Shelf or its natural resources."[54]

The ambiguities in the Convention and OCSLA concerning marine archaeology and old shipwrecks are not adequately resolved in *Treasure Salvors*. However, the decision does accomplish two things. First, it imposes a clear limit upon the jurisdiction of the federal government under OCSLA, which, from a reading of the earlier decisions, had seemed limitless.[55] More importantly, it indicates that an amendment to OCSLA is necessary, if the federal government wants to assert the act as a basis for protecting its interest in the American past by claiming wrecks such as the *Nuestra Señora de Atocha*. A second purpose for such an amendment would be to regulate and protect the activities of legitimate treasure hunt-

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with fundamental oceanographic or other scientific research carried out with the intention of open publication.

. . . .

8. The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published.

Geneva Convention, *supra* note 2, art. 5.

[51] The government's use of the Antiquities Act suggests this. *See also* H. MILLER, INTERNATIONAL LAW AND MARINE ARCHAEOLOGY 22 (1973).

[52] Submarine archaeological research, however, was probably not originally envisaged as falling within the term "other scientific research." Brown, *Freedom of Scientific Research and the Legal Regime of the Hydrospace*, 9 INDIAN J. OF INT'L L. 327, 353 n. 101 (1969) [hereinafter cited as Brown].

[53] While the ILC's comment (5) to the preliminary draft of article 2 clearly excludes shipwrecks from the coastal state's control, comment (10) to the same preliminary draft article was incorporated into article 2 of the official document, suggesting that the framers of the convention considered it more important to make a clear statement of the coastal state's authority over continental shelf research than had the ILC. *See* note 38 *supra*. For a thorough discussion of the rights and restrictions of scientific research on the coastal shelf, see Brown, *supra* note 52, at 349-63.

[54] Brown, *supra* note 52, at 358.

[55] *See* notes 31 and 32 *supra* and accompanying text.

ers.[56] This decision blocks the efforts of the federal government toward protection of the historical and the human interests in treasure hunting, and confirms the need for further legislation.[57]

Regulation of the activities of treasure hunters presents some special problems. Considering the unavoidable risks, both financial and personal, to the entrepreneur engaging in treasure searches,[58] the exaction of a large tax or fee would not be justified by the services the salvor might receive from the government. A requirement of registration and restrictions on the sale or dispersion of the artifacts found, however, would protect the salvor in his claim, and the government in its historical interest. South Carolina's legislation authorizing the regulation of salvage and treasure recovery,[59] could perhaps serve as a model. However, that state's claim of title includes all shipwrecks within its territorial waters that are unclaimed for over ten years.[60] If by analogy the United States extended such a claim to the outer continental shelf, the asserted jurisdiction would probably conflict with the provisions of the Geneva Convention. Regulation of the searchers themselves would be allowed under article 5.[61] Because improvements in the methods and technology employed by salvage companies such as Treasure Salvors, Inc. will increase effectiveness in recovery of wrecks and treasures, and increase potential for disputed claims, federal legislation in this area is essential.

Though the decision in *Treasure Salvors* accurately applied the laws presently available, the many uncertainties remaining in this area of the law guarantee the continued existence of controversy and frequent litigation. Congress should clearly state its intentions on this point, in accord with international definitions and jurisdictional limits, instead of leaving to the courts the task of patching together the applicable law. In the future, the iniative in this field should be taken by Congress.

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[56] See Rickard v. Pringle, 293 F. Supp. 981 (E.D.N.Y. 1968) (propellor with great antique value, stolen and sold for metal content while salvor getting equipment to raise it).

[57] See comments in Perry, *supra* note 21, at 112; Kreuger, *supra* note 28, at 804.

[58] Two million dollars were spent and four lives lost in the recovery of the treasure in the instant case. NAT'L GEOGRAPHIC, *supra* note 1.

[59] S.C. CODE §§ 54-321 to -328 (Supp. 1975); *accord*, N.C. GEN. STAT. §§ 121-22 to -28; CAL. PUB. RES. CODE § 6309 (West, 1959); FLA. STAT. ANN. § 267.061 (West, 1975).

[60] S.C. CODE § 54-321 (Supp. 1975).

[61] *See* notes 51 and 52 *supra* and accompanying text.