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THE OWNERSHIP OF THE TREASURES OF THE SEA

JOHN J. KENNY* AND RONALD R. HRUSOFF**

To speak of "treasures of the sea" evokes for most of us visions born in childhood, of pirates and buried chests and all the trappings of the Robert Louis Stevenson tales. And in fact the gold coins and precious stones sought by Elizabethan adventurers still exist; current periodicals record their recovery with surprising frequency.¹ However, the modern treasure hunter is a businessman, not a buccaneer; and careful legal planning is essential to his success.

Learned articles are written concerning the necessity for a "law of space"² and the "control of criminal conduct in Antarctica"^{2a}; yet the nations have never been able to agree on a uniform law to govern the sea which covers most of their planet. Even in Britain—surprisingly in view of her long maritime dominance—the law regarding ownership of property taken from the sea crystallized at a relatively late period; and the American law, founded on similar premises, comes to an opposite conclusion.

The English rule is that, in the absence of the original owner, property recovered from the sea belongs to the sovereign; whereas the American courts have, until recently, consistently held that it belongs to the finder. It will appear, however, that the American rule tends to come full circle as a result of the declining importance of the concept of ownership in modern law. That is, there are many cases in which, for tax reasons, it is a clear advantage *not* to own something; and there is no purpose to being an owner under American law rather than a mere finder under the English rule, where this means only that the property is taken, not by Her Imperial Majesty the Queen, but by the Commissioner of Internal Revenue—less majestic, perhaps, but even more imperial. Thus the modern treasure hunter must, in prudence,

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1. See N.Y. Times, July 3, 1965, at 19, col. 2; N.Y. Times, January 9, 1965, at 26, col. 6; National Geographic, January 1965, at 1; Time, August 28, 1964, at 42.

2. See, e.g., *National Sovereignty of Outer Space*, 74 HARV. L. REV. 1154 (1964); Johnson, *Problems of Law and Public Order in Space*, 52 A.B.A.J. 555 (1966).

2a. Bilder, *Control of Criminal Conduct in Antarctica*, 52 VA. L. REV. 231 (1966).

not only ascertain the law governing the waters in which he plans to operate, but he must also carefully organize and conduct his activity to take into account the probable tax treatment of his anticipated recovery.

As tax techniques necessary to minimize taxable profit from any venture are generally known—at least to a certain element of the bar—this article will be limited to the dark area of the law: who owns the treasures of the sea? In the pages that follow, we shall be concerned with law as it is, not as it may or should be. However, it is not visionary to observe here that the sea covers one of man's last two uncharted frontiers. It would be reckless to assume that the age which explores the planets will not be the age which penetrates the waters around us; and no one can say what mineral stores lie hidden there—a treasure less romantic than the pirate chests of yore, but far more significant. The law to govern these riches will be based, as law always is, on what has gone before.

THE DEVELOPMENT OF THE BRITISH RULE

Under the common law, property recovered from the sea falls into one of two broad classes: that which results from shipwreck, and that which does not. The former category can be further subdivided into (1) wreck of the sea; (2) flotsam; (3) jetsam; and (4) ligan, or lagan. "Wreck" is property lost at sea which has come to shore, while "flotsam" is the same property still floating at sea. "Jetsam" describes sunken goods thrown overboard to save a ship, and "ligan" is buoyed jetsam—the idea being that at some future time the owner will return to the buoy and retrieve his goods.³

The development of the law in this area has proved difficult to trace, for several reasons. First, there are relatively few cases on the subject, and one is consequently thrown back on such authorities as Bracton, Coke and Blackstone—who are often in disagreement. Moreover, the cases and other authorities are concerned almost exclusively with property resulting from shipwreck—and particularly with wreck, which forms only a small part of such property. Finally, though the law of treasure trove developed separately from that governing property recovered from the sea and has its own distinct principles, there has been some interaction between these two areas, the exact nature of which is not easy to ascertain.⁴

3. 1 BLACKSTONE, COMMENTARIES 290-94.

4. Another difficulty stems from the fact that terms such as "wreck" are often used

Oliver Wendell Holmes, in his celebrated book *The Common Law*, remarked that it was rarely safe to draw conclusions from the English cases involving wreck of the sea, "mixed up" as they are with "questions of prescriptions and other rights."⁵ Perhaps some of this difficulty stems from the fact that wreck was considered part of the royal revenue;⁶ and the old English tax laws were apparently touched by some of the same Alice-in-Wonderland reasoning which characterizes our own. Thus, since there can be no true *wreccum maris* unless the property in question actually touches land, it was held that where goods come ashore between the high and low water marks, they are wreck while the tide is in and they rest on the land, but droits of admiralty when they begin to float as the tide comes in.⁷

But though one would be rash indeed to rush in where the distinguished jurist feared to tread, the question cannot be safely ignored. England's era of maritime dominance has made her law the basis for that of many western-hemisphere countries, and this is not an area where new law has sprung up to displace the old. Lest it be thought that we are here concerned with history only, we might note that as recently as 1956 the Supreme Court of Florida—going counter to over a century of American law—invoked the English common law rule regarding wreck of the sea to determine ownership of a sunken vessel.⁸

As early as the thirteenth century, the King's ownership of wreck of the sea was established. Thus Bracton, in his *De Legibus et consuetudinibus Angliae*, asserted that

Things which are considered derelict are also said to be the goods of no one. Things such as treasure are likewise said to belong to no one due to the passage of time. This is also the case when the owner of the thing does not appear, as with wreck of the sea . . . and things which formerly belonged to the finder by natural law are now the property of the sovereign by the law of nations.⁹

imprecisely. Thus "wreck" is sometimes used in its strict sense, to mean property lost at sea which has come to shore, and sometimes is loosely used to include flotsam, jetsam, and ligam. See *Murphy v. Dunham*, 38 F. 503, 509 (E.D. Mich. 1889).

5. HOLMES, *THE COMMON LAW* 223 (1881).

6. See 1 BLACKSTONE, *supra* note 3, 290-94.

7. *The King v. Two Casks of Tallow*, 166 Eng. Rep. 414, 416 (Adm. 1837).

8. *State ex rel. Ervin v. Massachusetts Co.*, 95 So. 2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957).

9. Dicuntur etiam res in nullius bonis esse quae habitae sunt pro derelicto.

Item tempore dicuntur res nullius esse ut thesaurus. Item ubi non apparet

Bracton is of course suspect because of his well-known tendency to present Roman law under the guise of English common law.¹⁰ Moreover, though he subscribes to the traditional view that under "natural law" ownership is acquired by occupancy or possession, he attempts to postulate a sweeping exception whereby the king preempts some of the finder's rights in this regard—an exception for which he can give no reason better than "the law of nations."¹¹

Whatever the soundness of Bracton's view, however, in 1274 the king was explicitly awarded wreck of the sea by the Statute of Westminster:

Concerning wrecks of the sea, it is agreed, that where a man, a dog, or a cat escape quick out of the ship, that such ship nor barge, nor any thing within them, shall be adjudged wreck; but the goods shall be saved and kept by view of the sheriff, coroner, or the king's bailiff, and delivered into the hands of such as are of the town where the goods were found; so that if any sue for these goods, and after prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not they shall remain to the king and be seized by the sheriffs, coroners, and bailiffs, and shall be delivered to them of the town, which shall answer before the justices of the wreck belonging to the king.¹²

Since the king's ownership of this *wreccum maris* was part of his royal prerogative, he could, without consulting parliament, surrender his right to such property in favor of the owner of the land upon which the sea-borne property came to rest, either by grant or by prescription.¹³ But ownership of the land conveyed in itself no right

dominus rei, sicut de wrecco maris. Item de his quae pro wayvio habentur, sicut de averiis, ubi non apparet dominus, et quae olim fuerunt inventoris de jure naturali, iam efficiuntur principis de jure gentium.

2 BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 41 (Woodbine ed. 1922).

10. See generally Holdsworth, *Bracton and Roman Law*, 2 A HISTORY OF ENGLISH LAW 267-86 (4th ed. 1936).

11. The concept of *jus gentium*—the law common to all nations—originated among Roman jurists, and referred simply to the customs common to all of the tribes of Italy. It was a lesser law, used to determine the rights and liabilities of foreigners, who were not entitled to be judged according to the pure Roman civil law—the *jus civile*. Only far later did the supposedly universal characteristics of the *jus gentium* cause some to regard it as a sort of model for all law. See MAINE, ANCIENT LAW 49-52 (6th ed. 1876).

12. Statute of Westminster, 3 Edw. 1, c. 4.

13. See *Talbot v. Lewis*, 172 Eng. Rep. 1383, 1384 85 (Ex. 1834). *Constable's Case*, 77 Eng. Rep. 218, 221 (K.B. 1601), indicates that the king may likewise so grant

to the property lodging there,¹⁴ nor did even actual possession, without more, confer such a right.¹⁵

By its terms, the Statute of Westminster refers to wreck of the sea only. And Blackstone indicates that the purpose of the Statute was simply to alleviate the harshness of the existing common law by granting the original owner of wreck a year and a day in which to reclaim his property, before it became the king's.¹⁶ However, in *Constable's Case*, the Court of King's Bench held that the Statute of Westminster was declarative of the common law, and "therefore all that which is provided as to wreck extends also to *flots*, *jetsam* and *ligan*."¹⁷ Sir Edward Coke, in his report of the case, notes that Bracton and Britton had held otherwise, but feels that the extension of the king's ownership to property other than true *wreccum maris* is justified on the basis of the common law rule that where property has no owner, the king succeeds to ownership in virtue of his royal prerogative: "the sea is of the king's allegiance, and parcel of his Crown of England."¹⁸

Thus where Bracton had felt that the king could not claim flotsam, jetsam, or ligam while they were at sea,¹⁹ *Constable's Case* extended the royal prerogative to include all these classes of property. And Bracton's view of the common law was challenged in another respect by his celebrated successor, Britton; for Bracton had asserted that while the king might not own flotsam, jetsam, or ligam at sea, he did own treasure trove, whether found at sea or in any other place:

And so if any one is accused of having found treasure, i.e., gold, silver or other sort of metal, in any place at all [this must be reported to the agents of the crown]. . . . And it is immaterial according to modern law, where such treasure is found, although in ancient times this was observed. . . .

Therefore, since treasure is no one's property, and in ancient times belongs by natural law to the finder, now by the law of nations it is the property of our lord the king himself.²⁰

flotsam and jetsam, and that flotsam between the high and low water marks may be acquired by prescription.

14. See *Sutton v. Buck*, 127 Eng. Rep. 1094 (C.P. 1810) (per Mansfield C.J.).

15. See *The King v. Two Casks of Tallow*, 166 Eng. Rep. 414 (Adm. 1837); *Constable's Case*, 77 Eng. Rep. 218 (K.B. 1601).

16. 1 BLACKSTONE, *supra* note 3, 290-94.

17. 77 Eng. Rep. 218 (K.B. 1601).

18. *Id.* at 223.

19. *Id.*

20. 2 BRACTON, *supra* note 9, at 339.

Ut si quis accusatus fuerit quod thesaurum invenerit scilicet argentum vel

On the other hand, Britton held that treasure trove belongs to the king if found on the land, but otherwise to the finder: "For treasure hid in the earth and found shall belong to us [the crown] but if found in the sea, it shall belong to the finder. . . ." ²¹

Faced with this conflict of authorities, Blackstone ends by holding, with *Constable's Case*, that the king is entitled to flotsam, jetsam and ligam along with wreck,²² and with Britton that the royal prerogative extends to treasure only when found on land. He explains that at natural law property which has no owner is acquired by occupancy, and that though the king is preferred ahead of the finder in some situations, treasure recovered from the sea is not one of these:

So it seems it is the hiding, not the abandoning of it, that gives the king a property. . . . A man, that hides his treasure in a secret place, evidently does not mean to relinquish his property, but reserves the right of claiming it again, when he sees occasion; and if he dies and the secret also dies with him, the law gives it to the king, in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into common stock, without any intention of reclaiming it, and therefore it belongs, as in a state of nature, to the first occupant, or finder. . . . ²³

Bracton's theory regarding treasure trove has a certain weakness, in that "the law of nations," which he asserts as the basis for the king's ownership, is a vague concept, and has not generally been considered an important factor in English property law. Moreover, any theory awarding ownership of abandoned or derelict property to the king is

aurum vel aliud genus metalli, quocumque loco, cum super hoc fuerit apud bonus et graves diffamatus per patriam, statim attachietur quod sit coram justitiariis in adventu eorum, ubi se negaverit se aliquid invenisse, poterit veritas per patriam declari, et cum non sit de aliquo seisitus, poterunt tamen contra ipsum esse praesumptionis probabiles, quibus standum erit donec per patriam probetur contrarium. . . . Et non refert quo loco huiusmodi thesaurus inveniatur secundum tempora moderna, licet aliter hoc antiquitus fuerit observatum. . . . Cum igitur thesaurus in nulus bonis sit, et antiquitus de jure naturali esset inventoris, nunc de jure gentium efficitur ipsius domini regis.

² BRACTON, *supra* note 9, at 338-39.

²¹. 1 NICHOLS, BRITTON 66-67 (1865).

²². 1 BLACKSTONE, *supra* note 3, 290-94.

²³. *Id.* 295-97.

necessarily inconsistent with the occupancy-ownership approach traditional to the common law.²⁴ Blackstone seeks to avoid these difficulties by basing his views on treasure trove on the need to protect the king's right of coinage, which he believes can be adequately safeguarded without giving the king ownership of treasure recovered from the sea:

To the same original [the king's prerogative of coinage] may in part be referred the revenue of treasure trove . . . which is where any money or coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king. . . .

* * * *

Formerly all treasure trove belonged to the finder. . . . Afterwards it was adjudged expedient for the purposes of the state, and particularly for the coinage, to allow part of what is so found to the King; which part was assigned to be all hidden treasure; such as is casually lost and unclaimed, and such also as is designedly abandoned, still remaining the right of the fortunate finder.²⁵

Thus, in the Blackstone-Britton view, the preference of the king to the finder with regard to treasure trove rests upon a very practical basis—the king's exclusive right to coin money. Because of the exclusive nature of this right, and because of the seriousness with which counterfeiting was regarded at common law,²⁶ the king had long preempted the finder with regard to hidden and unclaimed stores of gold and silver—a right settled as far back as Glanville.²⁷ But perhaps because this right is in derogation of the natural law approach traditional in English jurisprudence, Blackstone and Britton do not regard it as extending beyond gold and silver found on land.

This view, if accepted, would be most significant; for gold and silver are precisely what the modern treasure hunter—like his ancient counterpart—is usually seeking. But Blackstone's theory has not won acceptance—nor, for that matter, has it been repudiated. It has been ignored. In *Talbot v. Lewis*,²⁸ a number of Spanish coins were found

24. This theory is set out at length in 2 BLACKSTONE, COMMENTARIES 1-13.

25. 1 BLACKSTONE, *supra* note 3, 295-97.

26. Coinage offenses were regarded as a form of treason at common law. See 3 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 177-79 (1883).

27. GLANVILLE, DE LEGIBUS ET CONSUEUDINIBUS REGNI ANGLIAE 177 (Woodbine ed. 1932). There is a rather good, though old, translation in BEAMES, GLANVILLE 351-53 (1812).

28. 172 Eng. Rep. 1383 (Ex. 1834).

in the sands on the seashore. The lord of the manor claimed them as wreck, and it was suggested in reply that the law of treasure trove might be controlling. But Baron Parke brushed this argument aside, stating that since the coins could not have dropped from the clouds, they would be *presumed* to have come from some wrecked vessel;²⁹ and therefore it was the law of wreck which applied. In this area, then, it is Bracton who at length prevailed in England.³⁰

It is clear that the law regarding the king's rights in the treasures of the sea evolved late in England. Indeed, it does not appear to have crystallized prior to the American Revolution—which may account in part for the different route American law has taken in its development. *Talbot v. Lewis* was not decided until 1834; and we believe that this case was one of a series, decided between 1798 and 1837, that firmly established the rule which regards the sovereign as the owner of derelict property, as against all but the original owner.³¹

*The Aquila*³² involved a ship—Swedish property—found floating at sea. The vessel itself was restored to its owners, but the cargo remained unclaimed, both the king and the finders asserting ownership. The court decided for the crown:

It is certainly very true that property may be so acquired [i.e., by possession]: But the question is, to whom is it acquired? By the law of nature, to the individual finder or occupant: But in a state of civil society, although property may be acquired by occupancy, it is not necessarily acquired to the occupant himself; for the positive regulations of the State may have made alterations on the subject; and may, for reasons of public peace and policy, have appropriated it to the other persons, as, for instance, to the State, itself, or to its grantees.

It will depend, therefore, on the law of each country to determine, whether property so acquired by occupancy, shall accrue

29. *Id.* at 1384.

30. In spite of the emphasis laid upon the point by Blackstone, neither the English nor the American cases have ever considered it important to distinguish gold, silver, and the like from other species of property recovered from the sea. In addition to *Talbot v. Lewis*, 172 Eng. Rep. 1383, see *United States v. Tyndale*, 116 F. 820 (1st Cir. 1902); *United States v. Smiley*, 27 F. Cas. 1832 (No. 16317) (N.D. Cal. 1864) (per Field, J.); *HMS Thetis*, 166 Eng. Rep. 390 (Adm. 1835); *The King v. Property Derelict*, 166 Eng. Rep. 136 (Adm. 1825).

31. Unless the original owner has abandoned his property, his claim is preferred before that of either the sovereign or the finder. See, e.g., *HMS Thetis*, 166 Eng. Rep. 312 (Adm. 1833).

32. 165 Eng. Rep. 87 (Adm. 1798).

to the individual finder, or to the sovereign, and his representatives? And I consider it to be the general rule of civilized countries, that what is found derelict on the seas, is acquired beneficially for the sovereign, if no owner shall appear.³³

The whole tenor of the opinion indicates that the court feels it has the power to decide the case either way. The possible alternatives, and the reasons therefore, are carefully examined; and citations to prior authority are sparse.

But the strength of the *stare decisis* doctrine in England is well known; and after *The Aquila* this considered treatment of alternative rules is not apparent, the sovereign's ownership generally being taken as settled. Thus, in *The King v. Property Derelict*,³⁴ the crew of an English vessel divided among themselves a considerable quantity of gold coins, rings, watches, and the like found aboard another vessel, drifting waterlogged at sea. In a very short opinion, the court simply asserted that the law did not sanction a private distribution; derelicts, said the court, belonged to the original owner if he appeared in time, and if not, to the crown in admiralty.

In *The King v. Two Casks of Tallow*,³⁵ the two casks in question had allegedly washed up on shore, and the landowner claimed them as lord of the manor, apparently on a privilege with regard to wreck obtained from the crown. The crown asserted that the casks, when recovered, had not yet reached shore and hence belonged to the king. Deciding for the crown on the facts, the court states that "*Wreccum maris* is not such in legal acceptation, till it comes ashore, until it is within the land jurisdiction; whilst at sea it belongs to the king in his office of Admiralty, as derelict, flotsam, jetsam, or lagan."³⁶

By 1837, then, the finder no longer asserts his ownership against the crown on the basis of occupancy, as in *The Aquila*. Since 1798 the king's ownership of property found lost at sea has become firmly established; to establish his own allegedly superior right to the casks, the landowner could only deny that they were truly flotsam.

We shall conclude our discussion of the British law by considering *The Turbantia*,³⁷ a case which illustrates the important point that though the British rule does not recognize possession of the treasures

33. *Id.* at 89.

34. 166 Eng. Rep. 136 (Adm. 1825).

35. 166 Eng. Rep. 414 (Adm. 1837).

36. *Id.* at 416.

37. [1924] P. 78.

of the sea as giving ownership, nonetheless possession may give the possessor certain lesser rights in res. *The Turbantia*, a Dutch steamship, had sunk in 1916 in the North Sea. Throughout 1922 and 1923 plaintiffs worked at raising her; in July 1923, defendants anchored close to plaintiff's ship, interfered with their buoys and lines, and sent down divers. The court held that the plaintiffs had "the use and possession of which the subject matter was capable"³⁸ and had a possessory right sufficient to support injunctive relief.

Thus the court recognized that though property may not be abandoned from the point of view of ownership, it may be abandoned from the point of view of possession. That is, while completed possession will not give ownership, still a lesser degree of possession may be sufficient to give the right of being allowed to salvage the property and hold it for the owner—the crown or the original owner, as the case may be—subject to payment of a salvage fee. We shall see in the proper place that the American courts do not always make this distinction, tending rather to recognize no possessory rights less than the ownership which results from perfected possession.

We have observed earlier that there are relatively few English cases dealing with ownership of the treasures of the sea, and that the status of the British law is difficult to determine. But this law nonetheless furnishes the basic principles upon which the law of other nations, including our own, is based; and perhaps the status of the English law in this area is indicated by the fact that the American courts have had no difficulty in finding English authorities to justify the ownership of either the sovereign³⁹ or the finder.⁴⁰ However, on balance the American courts have, for a variety of reasons, quite consistently preferred the claim of the finder.

THE AMERICAN RULE

The English and American courts agree that the rights of the original owner of property recovered from the sea are preferred to those of either the sovereign or the finder. Thus, the purpose of the year-and-a-day provision of the Statute of Westminster is to give the original owner an opportunity to reassert his ownership;⁴¹ and the American

38. *Id.* at 90.

39. See *State ex rel. Ervin v. Massachusetts Co.*, 95 So. 2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957).

40. See, e.g., *Thompson v. United States*, 62 Ct. Cl. 516 (1926).

41. See 1 BLACKSTONE, *supra* note 3, 290-94.

courts have likewise established that the original owner does not forfeit his property unless it has been abandoned⁴²—that is, unless all reasonable hope and expectation of recovery have ceased.⁴³ And mere passage of time alone will not necessarily work an abandonment; the owner may reclaim his property even after several years have elapsed, if he has clearly shown a constant intent to salvage it.⁴⁴

But where the claims of the original owner are not in issue—where the contest is between sovereign and finder—it is not necessary that either party show an abandonment; all that is required is a showing that the original owner is not known.⁴⁵ In this situation, the central difference between the American and English rules appears; under the former the finder, and not the sovereign, is the owner of property recovered from the sea, absent a valid claim from the original owner.

The American courts have consistently acknowledged that the English common law favored the sovereign's ownership over that of the finder, but they have almost as consistently found reasons why the finder's claims should prevail. Thus, on the principle that it is not the pure English common law which prevails in the United States, but the common law as it existed, modified by local institutions, in the American colonies prior to 1776,⁴⁶ it has been held that the situation which prevailed in the American colonies was such as to significantly modify this aspect of the English common law.

It is worthwhile to notice that our colonial policy radically differed from the severe common-law rules as to wrecks and as to property floating on the high seas under such circumstances that it might well be regarded as an incident of some maritime misfortune, and that this difference is now accepted as part of our common law.⁴⁷

Or, if it is considered necessary, the confusion which attends the English common law rule makes it possible to postulate exceptions. In

42. See *United States v. Smiley*, 27 F. Cas. 1832 (No. 16317) (N.D. Cal. 1864) (per Field, J.); *Howard v. Sharlin*, 61 So. 2d 181 (Fla. 1952).

43. See *Eads v. Braselton*, 12 Ark. 499, 508-509 (1861); *Wyman v. Hurlburt*, 12 Ohio 82, 87 (1834).

44. *The Port Hunter*, 6 F. Supp. 1009 (D. Mass. 1934) (no abandonment though the vessel in question had remained sunk for fifteen years).

45. See *Eads v. Brazelton*, 12 Ark. 499, 509 (1861).

46. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845).

47. *United States v. Tyndale*, 116 F. 820, 823 (1st Cir. 1902).

Murphy v. Dunham,⁴⁸ ownership of a cargo of coal lying at the bottom of a lake was in issue. A federal court reasoned

This coal had never been cast upon the land or shore, and hence was not wreck proper. It was not flotsam, because it did not float upon the water. It was not jetsam, because it had never been cast into the sea to save the ship; nor was it ligan, because . . . it must be buoyed.⁴⁹

The court was thus enabled to conclude that the coal in question was "simply property lying at the bottom of the sea, which awaits its owner."⁵⁰ While the decision reaches a result compatible with the American majority rule, it depends upon treating the coal, which admittedly was lost in a shipwreck, as if it were the sort of property which never had an owner; whereas the later English common law seems to have regarded shipwrecked property generally as belonging to the king in preference to the finder.⁵¹

But the most frequent justification for the American rule is that while the American sovereign has the *inherent* power to assert ownership of property recovered from the sea, it—unlike the English crown—has never actually done so;⁵² and until the legislature shows an intention to appropriate such property to the sovereign, the courts will continue to favor the finder. The reasoning seems to be that under the common law the crown's ownership of property recovered from the sea rested upon the English revenue laws; and here, as is customary with regard to tax laws, it should be left to the American legislature to declare explicitly what sources should provide revenue for the American sovereign.

It seems well settled that when a vessel is derelict or abandoned in the navigable waters of the United States or anywhere else it

48. 38 F. 503 (E.D. Mich. 1889).

49. *Id.* at 509.

50. *Id.*

51. See *Constable's Case*, 77 Eng. Rep. 218 (K.B. 1601); 1 BLACKSTONE, *supra* note 3, 290-94.

52. The only federal statutes giving the United States any power over derelict merely allow the Secretary of the Army to remove any craft or sunken object which endangers or obstructs the navigable waters of the United States. These statutory provisions do not purport to award any ownership in the objects so removed to the federal government, though the costs of removal may be a charge against the owners of a craft obstructing navigable waters, and the United States is not liable for any damage inflicted on such a sunken object in removing it. 33 U.S.C. §§ 414-15 (1964).

belongs to that person who finds it and reduces it to possession. Congress could undoubtedly provide that the proceeds of derelict and abandoned vessels in the navigable waters of the United States be paid into the Treasury; but no such law has been passed, and until it is the principles of natural law must prevail.⁵³

In *United States v. Tyndale*,⁵⁴ certain moneys were found on a body floating on the high seas. Both the United States and the public administrator appointed by a Massachusetts probate court claimed this money. Affirming a decision against the government's claim, the United States Court of Appeals for the First Circuit explained:

The only propositions before us are: First, that the United States have a superior right to the possession of the fund . . . we are of the opinion that it would have been appropriate, and within its constitutional powers, for congress to have taken control of this fund; but it has not done so. There is neither any statute nor any settled practice which requires the treasurer of the United States to receive it, or authorizes us to direct that it shall be received by him.⁵⁵

While the American courts treat the finder more favorably than their British counterparts where it is his ownership which is at issue, there is one situation where a treasure hunter might prefer to be under the jurisdiction of a British court—i.e., where he has located treasure and, while attempting to reduce it to complete possession, he is interfered with by a rival. We observed in our treatment of *The Turbantia* that while the British courts will not recognize possession as giving ownership, still one who has a certain degree of possession, though as yet incomplete, will be granted an injunction to allow him to complete his work of salvage. On the other hand, the American courts do hold

53. *Thompson v. United States*, 62 Ct. Cl. 516, 524 (1926).

54. 116 F. 820 (1st Cir. 1902).

55. *Id.* at 821. To the same effect is *In re Moneys in Registry*, 170 F. 470, 475 (E.D. Pa. 1909):

Unquestionably . . . the weight of the American authorities supports the position that, unless the United States has somehow shown its intention to exercise whatever sovereign power it may possess over the proceeds of derelict property, the salvors are entitled to the whole of such proceeds against all the world except the original owners; and there is no serious contention on the part of the government that it has ever manifested any purpose to exercise such power.

Cf. 2 KENT, COMMENTARIES ON AMERICAN LAW, 357-58 (12th ed. 1873).

that completed possession may give ownership; and therefore they may tend to assume that either possession has been perfected, and gives ownership, or that it is imperfect; and anyone is free to make the property in question his own. There sometimes is, in other words, a failure to recognize the middle ground where some possession has been achieved, which needs protection.

In *Deklyn v. Davis*,⁵⁶ a British frigate which had sunk in New York's East River in 1781 was located some thirty years later, and raised about ten feet from the bottom of the river by means of chains attached to floating timbers. Complainants asserted that, having accomplished this much, they had ceased operations for the winter, whereupon defendants had anchored around the sunken ship, blocked off complainants' floating timbers, and cut complainants off from their work. Admitting this, defendants answered that they had leased the shore nearest to the wreck for use in their salvage operation and had entered upon their activity by arrangement with a third group, which had originally located the vessel in 1816-17 and had removed twenty-two guns from her. Confronted with a request for an injunction, the court in effect threw up its hands:

The first occupation in such cases, gives a title; but what is or is not an occupation, is here, as in other cases of possession . . . peculiarly fit for the investigation of the courts of law and the trial by jury; and more eminently is it so, when conflicting claims derived from adverse acts of occupancy, are opposed to each other.

* * * *

In this struggle to obtain actual possession of the derelict vessel . . . the effect of an injunction is or might be, to change the possession of the subject, without any certainty that the possession would pass to the party holding title.⁵⁷

Under the rule of *The Turbantia*, it would surely seem that the complainants had possession, and hence the right to continue their work unimpeded. But the New York court is clearly preoccupied with the question of title, to the exclusion of any lesser consideration; and the court's emphasis on the issue of possession as giving title leads it to ignore the more immediate issue of whether the complainants have any

56. 1 Hopkins 135 (N.Y. 1824).

57. *Id.* at 142-43.

possessory rights, though perhaps not amounting to ownership, which should be afforded injunctive protection.

A decade ago, we should have been able to conclude our treatment of the American rule here, with an observation that the American courts had uniformly favored the finder's ownership as against that of the sovereign. But in 1956 the Supreme Court of Florida, in *State ex rel. Ervin v. Massachusetts Co.*,⁵⁸ departed from this rule and awarded ownership of a sunken vessel to the sovereign, expressly invoking its version of the English common law as the basis for decision.

In that case the State of Florida sought to enjoin the Massachusetts Company, a joint venture salvage operation, from salvaging the *Massachusetts*, a battleship sunk in target practice by the United States Coast Artillery in 1922. The ship lay well within Florida's territorial waters, and had become a favorite fishing spot; also, since part of its turrets rose above the water, it was a navigational guide for small craft. Defendants obtained a navigational permit from the Corps of Engineers and marked the ship with lines and buoys; and the United States repudiated any claim it had to the ship. At this point the State intervened, asserting that it, as sovereign, had a proprietary interest in the ship under English common law. The court, after an extensive review of the English authorities, granted the requested injunction:

We conclude, therefore, that the wreck of the vessel is a "derelict" which, at common law, would belong to the Crown in its office of Admiralty at the end of a year and a day, under the authority of the English cases above cited; that since the property was resting in the territorial waters of the State of Florida . . . [i]t belongs to the State in its sovereign capacity.⁵⁹

There are several aspects of this decision that seem to us less than commendable. The court gives intense consideration to the Statute of Westminster, and speaks of the vessel in question as belonging to the sovereign at the end of a year and a day; but the *Massachusetts* is not wreck, since it never reached shore, and the provisions of the Statute of Westminster are thus inapplicable by any rule. Further, the court cites English derelict cases in support of its decision, but virtually ignores the long line of American derelict cases to the contrary. And there is no authority in the English common law for the court's state-

58. 95 So. 2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957).

59. *Id.* at 905.

ment that derelict belongs to the sovereign if or because it is resting in the sovereign's territorial waters.⁶⁰

However, the decision may be justified, though not perhaps on the rationale of the Florida court. The Massachusetts Company had merely started operations, and had not yet obtained any possession to speak of; for such actions as marking the location of the ship with buoys were merely indicative of an *intention* to salvage it,⁶¹ and could give no possession that the law would protect. On the other hand, the people of the state had long been using the ship as a fishing spot and for navigational purposes, and it would seem that they had thereby taken possession. The possession required to give ownership is not necessarily actual physical possession, but need only be such as the nature and situation of the property in question allow,⁶² and since the state wished the ship to remain where it was, it would be absurd to insist that it be raised and then restored to the same spot in order for the State to acquire possession and the ownership attendant thereon.

Thus it is somewhat difficult to assess the place of *State ex rel. Ervin v. Massachusetts Co.* in American law. In any event, in the federal courts it remains the settled rule that, after the original owner, the finder's claim is preferred to the sovereign's. And, if viewed as we have suggested—i.e., as giving ownership, or at least some proprietary rights, to the state on the basis of possession—*State ex rel. Ervin* is quite compatible with the American majority rule. If, however, this decision truly represents an adoption of the English rule of sovereign ownership by an American court, it could assume considerable significance should its reasoning be adopted by other state courts.

60. Cf. *HMS Thetis*, 166 Eng. Rep. 312 (Adm. 1833); 166 Eng. Rep. 390 (Adm. 1835). There is, of course, Lord Coke's statement in *Constable's Case*, 77 Eng. Rep. 218, 223 (K.B. 1601) that "the sea is of the King's allegiance, and parcel of his Crown of England." But Lord Coke was speaking in reference to wreck, flotsam, jetsam and ligan—the property resulting from shipwreck; and the *Massachusetts* was not a wreck, but was deliberately sunk. If the king owned abandoned property merely because it was within English territorial waters, he would also own all gold and silver found there; and Blackstone would be hopelessly inconsistent when he asserts that the king owns shipwrecked property, but not treasure trove, found at sea. See 1 BLACKSTONE, *supra* note 3, 290-94, 295-97.

61. See *Eads v. Brazelton*, 22 Ark. 299, 511-12 (1861): "Marking trees that extended across the wreck, affixing temporary buoys to it, were not acts of possession; they only indicated Brazelton's desire or intention to appropriate the property."

62. See, 22 Ark. 499, 511-12 (1861); *The Turbantia* [1924] P. 78.

INTERNATIONAL AGREEMENTS

We have indicated earlier that the nations of the earth have never been able to agree on a law to govern ownership of the treasures of the sea. True, there are multi-nation agreements on international waters, but these generally deal with the sea as a highway⁶³—i.e., as a means of transport, not as a source of property or a repository of valuables. However, in recent years leading maritime countries of the United Nations have shown interest in reaching some broader agreement concerning their respective rights in the sea.⁶⁴

While there is no accord among nations as to the extent to which any of them may exercise sovereignty over the sea, it seems generally agreed that none of them has any sovereignty over the high seas;⁶⁵ and that each of them has some rights of sovereignty in its own territorial sea—the portion of the sea adjacent to its shores. But there is disagreement as to the breadth of this territorial sea, and uncertainty regarding the precise nature of the rights of the coastal sovereign therein.⁶⁶

The traditional breadth of the territorial sea is one marine league—the “three mile limit.” However, this rule is based on the medieval estimate of the effective range of a cannon mounted on the shore; and in this age of increasing nationalism and better artillery, nations have begun claiming broader territorial seas. In 1956, the International Law Commission of the United Nations suggested that the territorial sea be regarded as extending from a minimum of three to a maximum of twelve miles, the exact distance to be decided by an international conference,⁶⁷ but the agreement finally reached in 1958 by the leading maritime nations mentions no specific dimensions for the territorial sea, failing to set even a minimum or a maximum limit.⁶⁸

It is noteworthy that the United States had proposed to the United

63. Thus the International Rules for Navigation at Sea are enacted in 33 U.S.C. §§ 143-47 (1964).

64. This is evidenced by the United Nations Conference on the Law of the Sea, which met at Geneva in 1958 and produced conventions on the high sea, the territorial sea, and the continental shelf, as well as on other subjects. For analysis of the work of this conference, see Jessup, *The United Nations Conference on the Law of the Sea*, 59 COLUM. L. REV. 234 (1959); Dean, *The Geneva Conference on the Law of the Sea*, 52 AM. J. INT'L. LAW 607 (1958).

65. *Convention on the High Sea*, Art. 2, reprinted in 52 AM. J. INT'L. LAW 842 (1958).

66. See Jessup, *supra* note 64, at 243-47.

67. *Report of the International Law Commission of the United Nations*, Art. 3, reprinted in 51 AM. J. INT'L LAW 154 (1957).

68. *Convention on the Territorial Sea and the Contiguous Zone*, Art. 6, reprinted in 52 AM. J. INT'L LAW 834 (1958).

Nations a compromise which would have restricted the territorial sea to a maximum of six miles, with special fishing and other privileges inhering in the coastal sovereign for another six miles into the contiguous zone. When this proposal was narrowly defeated, the chief American delegate to the convention asserted that the United States would continue to observe the three mile limit, absent general international agreement on some other definite boundary.⁶⁹ In other words, for purposes of American law the three mile limit is still the outer boundary of the territorial seas of all nations (with certain exceptions based on history).

It might be assumed that American courts would consequently regard property recovered more than three miles from any shore as recovered on the high seas, even though such property may have been taken from the claimed territorial sea of another nation. However, it is possible that a nation's sovereignty over the sea may extend more than three miles from shore, not because of any claim of an expanded territorial sea, but because of international agreement regarding the "continental shelf."

The continental shelf has been defined as the seabed adjacent to the coast but outside the limit 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. . . .⁷⁰

Under the United Nations Convention, the coastal national exercises sovereignty over the continental shelf for the purpose of exploring it and "exploiting its natural resources"—defined as, inter alia, "the mineral and other non-living resources of the sea-bed and subsoil."⁷¹ And this sovereignty exists independent of occupation or possession.⁷²

The United States has itself long asserted the right to exploit the continental shelf beyond the three mile limit⁷³—a right regarded as existing apart from international usage with respect to the boundaries of the

69. Statement of Mr. Arthur H. Dean before the United Nations Conference on the Law of the Sea, April 28, 1958, reprinted in 6 BENEDICT, *BENEDICT ON ADMIRALTY* 46 (Supp. 1965).

70. *Convention on the Continental Shelf*, reprinted in 52 AM. J. INT'L LAW 858 (1958). See generally Whiteman, *Conference on the Law of the Sea: Convention Shelf*, 52 AM. J. INT'L LAW 629 (1958).

71. *Id.*

72. *Id.*

73. See 43 U.S.C. §§ 1316-43 (1964); Presidential Proclamation No. 2667, 10 Fed. Reg. 12303 (1945).

territorial sea.⁷⁴ For purposes of American domestic law, it is fairly well settled that the states own the navigable waters within their boundaries, including perhaps even tidelands below the low-water mark;⁷⁵ and here the respective laws of the several states are determinative of property rights. However, the federal government owns the lands under the oceans within the three mile limit;⁷⁶ and no state has any sovereign rights in the sea more than three miles from shore—with some exceptions relating principally to the Gulf States.⁷⁷

The continental shelf—and hence national sovereignty—may thus extend a considerable distance from any shore; in the Gulf of Mexico, for example, the continental shelf may extend as far as two hundred miles.⁷⁸ And since the coastal sovereign's rights in such gently sloping shelves are recognized by both American law and the United Nations Convention, American courts are likely to enforce a claim of sovereign ownership here where they would not enforce such a claim based on a twelve-mile territorial sea. Thus, property recovered in areas far beyond the three mile limit may be regarded as within the sovereignty of the coastal power if they are withdrawn from its continental shelf.

CONCLUSION

Here we might note that our conclusions regarding the status of the English law, and to a lesser extent of American and international law, have frequently been rather tentative. But we have tried to show that for several reasons—notably the peculiar development of the common law in this area, the scarcity of reliable authority, and the newness of the applicable international agreements—this is necessarily so. It is the fatal pastime of the foolish to find certainty where none exists; and attempting to multiply authorities will add nothing further.

74. *United States v. Louisiana*, 363 U.S. 1, 30-31, 35 (1960). The Supreme Court's treatment of the issue of territorial waters is severely criticized by Jessup, *The Law of the Sea Around Us*, 55 AM. J. INT'L LAW 104, 106-107 (1961).

75. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

76. *United States v. California*, 332 U.S. 19 (1947).

77. *United States v. Louisiana*, 363 U.S. 1, 20-30 (1960). There are also certain statutory exceptions, notably the Submerged Lands Act, 43 U.S.C. §§ 1301-43 (1964).

78. Christopher, *The Outer Continental Shelf Lands Act*, 6 STAN. L. REV. 23, 24 (1963).