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Treasure Salvors, Inc. v. Abandoned Sailing Vessel Believed To Be the Nuestra Señora De Atocha, 408 F. Supp. 907 (S.D. Fla. 1976)

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a party claiming privilege prove that he and his spouse did not speak in such a manner and place that there was a reasonable chance of being overheard, and that they did not know of any possibility of being overheard at that time.⁴³ *Proffitt*, however, indicates that if this burden is met, then further protection will be afforded the marital relationship by excluding from testimony interspousal communications which previously had been admissible. As a general rule the testimony of the eavesdropper is no longer admissible in Florida; the admissibility of such testimony now hinges on the protected spouses' knowledge or reason to know of the eavesdropper's presence.

ELAINE KAY FREEMYER

Admiralty—SALVAGE—THE UNITED STATES HAS NOT ASSERTED SOVEREIGN PREROGATIVE OVER ABANDONED PROPERTY ON OUTER CONTINENTAL SHELF.—*Treasure Salvors, Inc. v. Abandoned Sailing Vessel Believed To Be the Nuestra Señora De Atocha*, 408 F. Supp. 907 (S.D. Fla. 1976).

In July of 1975, after years of frustrating and expensive work, Treasure Salvors, Incorporated, and Armada Research Corporation succeeded in bringing to the surface of the ocean two bronze cannon from a sunken ship. The wreck was located approximately 45 miles west of Key West, Florida, on the continental shelf, but outside of the territorial waters¹ of the United States (on the so-called "outer shelf"). The wreck was thought to be that of the *Nuestra Señora de Atocha*, a Spanish galleon which sank with tons of silver in 1622.²

The two corporations brought an action in the United States District Court for the Southern District of Florida for possession and confirmation of title of the wreck. The plaintiffs claimed that general

43. *Id.*

1. The United States places a 3-mile limit on its territorial waters. For a discussion of efforts to settle upon an internationally known limit on territorial waters and reasons for the United States preference for the 3-mile limit, see Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L. L. 607, 610-13 (1958).

2. The Miami Herald, Feb. 5, 1976, § B, at 2, col. 5 (street ed.). While the silver treasure allegedly carried by the *Atocha* has not been found, nine bronze cannon have been raised by plaintiffs, some valued at \$40,000 each. *Id.*

maritime law and international law recognize finders-in-possession as being the owners of abandoned ships.³ The United States intervened as a party-defendant, asserting entitlement to ownership of the wreck under a "sovereign prerogative" inherited from British common law: the right of the sovereign to objects recovered from the sea by the subjects of the sovereign.⁴ The United States argued that no legislative assertion of this sovereign power was necessary.⁵ In the alternative, the United States argued that the Antiquities Act⁶ and the Abandoned Property Act⁷ sufficiently asserted the sovereign prerogative so as to constitute a claim to title, and that the Outer Continental Shelf Lands Act⁸ gave the United States the necessary jurisdiction to enforce that claim.⁹

In *Treasure Salvors, Inc. v. Atocha*,¹⁰ the district court held that title to the shipwreck belonged to the finders and not the United States. In so doing, the court determined that a governmental claim of title to derelict property must be specifically, legislatively asserted. The court found that the United States had not legislated to the extent necessary to claim either jurisdiction over or title to an

3. *Treasure Salvors, Inc. v. Abandoned Sailing Vessel Believed To Be the Nuestra Señora de Atocha*, 408 F. Supp. 907, 909 (S.D. Fla. 1976) [hereinafter cited as *Treasure Salvors, Inc. v. Atocha*]. See H. MILLER, *INTERNATIONAL LAW AND MARINE ARCHAEOLOGY* 18 (1973); Lohrey, *Sunken Vessels, Their Cargoes, and the Casual Salvor*, 20 JAG J. 25, 29 (1965).

4. 408 F. Supp. at 909. See also note 3 *supra*.

5. Pretrial Memorandum of Law of the United States, Intervenor-Defendant, at 9-19, *Treasure Salvors, Inc. v. Atocha*, 408 F. Supp. 907 (S.D. Fla. 1976).

6. 16 U.S.C. § 433 (1970). This section provides:

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 . . . or be imprisoned . . . or shall suffer both fine and imprisonment

7. 40 U.S.C. § 310 (1970). This section provides:

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

8. 43 U.S.C. § 1332 (1970). This section provides:

(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.

(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.

9. 408 F. Supp. at 909, 910.

10. *Id.* at 907.

abandoned vessel on the outer shelf.¹¹ The court stated that even if it had accepted the government's jurisdictional claim under the Outer Continental Shelf Lands Act, that statute was superseded and nullified by the Geneva Convention on the Continental Shelf. The court ruled that the Convention limited the sovereign rights of the United States over the outer shelf to natural resources.¹²

The key concept advanced by the United States in *Treasure Salvors*, namely, sovereign prerogative over abandoned property, has an origin in British law that is difficult to trace with precision, due to the different categories of such property, a paucity of cases, and disagreement among early commentators.¹³ The sovereign right to "wreck of the sea"—first codified in 1275 in the Statute of Westminster¹⁴—is thought likely to have been a power of the crown prior to legislative expression.¹⁵ However, "wreck of the sea" is property that, while lost at sea, has washed to shore.¹⁶ The sovereign right to "treasure trove,"¹⁷ which appears to be a more appropriate category for the *Atocha* artifacts than does "wreck of the sea," was not settled by the Statute of Westminster.¹⁸ Both Britton¹⁹ and Blackstone²⁰ disputed the right of the king to treasure recovered from the sea, and two modern commentators have found that the British sovereign's right to sea treasure was not finally determined until a series of cases decided between 1798 and 1837,²¹ well after American independence.

11. *Id.*

12. *Id.* at 910. See Convention on the Continental Shelf, April 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578 [hereinafter cited as GENEVA CONVENTION].

13. Kenny & Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383, 384 (1967).

14. 3 Edw. 1, c. 4 (1275). This statute provides:

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 . . . so that if any sue for those Goods, and after prove that they were his, or his Lord's, 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

15. See *Murphy v. Dunham*, 38 F. 503 (E.D. Mich. 1889); Note, *Abandoned Property: Title to Treasure Recovered in Florida's [sic] Territorial Waters*, 21 U. FLA. L. REV. 360, 361 (1969).

16. W. BLACKSTONE, COMMENTARIES 127 (B. Gavit ed. 1941).

17. *Id.* at 128.

18. See note 14 *supra*.

19. 1 NICHOLS, BRITTON 66-67 (1865), quoted in Kenny & Hrusoff, *supra* note 13, at 388.

20. BLACKSTONE, *supra* note 16, at 128.

21. See Kenny & Hrusoff, *supra* note 13, at 390; Note, *supra* note 15, at 363-64. See generally Talbot v. Lewis, 172 Eng. Rep. 1383 (Ex. 1834); *The King v. Property Derelict*, 166 Eng. Rep. 136 (Adm. 1825); *The Aquila*, 165 Eng. Rep. 87 (Adm. 1798).

Perhaps due in part to the nebulous origin of the "sovereign prerogative," American courts have split on the question of whether the United States Government inherited the British sovereign's right to claim abandoned property without legislative authorization. There appears to be judicial agreement that the United States could *statutorily* establish title to abandoned property within its jurisdiction. A few courts have held that the United States, upon independence, inherited the common law of Britain to an extent sufficient to assert this "sovereign prerogative" without legislation;²² but the weight of opinion and the holding in *Treasure Salvors* is that the United States did not assume this royal right to abandoned property, and therefore legislation is required.²³

To date, the United States has not passed legislation specifically conferring upon itself title to sunken ships, their cargoes, and other property on the outer shelf. The government argued in *Treasure Salvors* that certain general statutes protecting "objects of antiquity"²⁴ and "abandoned property"²⁵ were sufficiently broad to give it ownership of the wreck.²⁶ The government could point to no prior cases in which these statutes had been interpreted to cover the lands of the continental shelf located outside territorial waters.²⁷

The United Nations Conference on the Law of the Sea, convened in 1958, produced the Geneva Convention of the Continental Shelf,²⁸ accepted by the United States in 1961.²⁹ Primarily concerned with minerals and other natural resources of the shelf, the Convention did not directly address the issue before the *Treasure Salvors* court. Under the Convention, the United States owns exclusive rights to the shelf's "natural resources,"³⁰ which the United States conceded did

22. See *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 371 F. Supp. 356 (S.D. Tex. 1973); *Peabody v. Twenty-Eight Bags of Cotton*, 19 F. Cas. 39 (No. 10,869) (D. Mass. 1829); *State v. Massachusetts Co.*, 95 So. 2d 902 (Fla. 1956); *State v. Flying "W" Enterprises, Inc.*, 160 S.E.2d 482 (N.C. 1968).

23. 408 F. Supp. at 909. See, e.g., *United States v. Tyndale*, 116 F. 820 (1st Cir. 1902) (cited by the *Treasure Salvors* court, 408 F. Supp. 909); *In re Moneys in Registry of District Court*, 170 F. 470 (E.D. Pa. 1909); *Russell v. Forty Bales Cotton*, 21 F. Cas. 42 (No. 12,154) (S.D. Fla. 1872); *Thompson v. United States*, 62 Ct. Cl. 516 (1926) (cited by the *Treasure Salvors* court, 408 F. Supp. at 909). See H. MILLER, *supra* note 3, at 19; *Kenny & Hrusoff*, *supra* note 13, at 394; Note, *Marine Archaeology and International Law: Background and Some Suggestions*, 9 SAN DIEGO L. REV. 668 (1972).

24. 16 U.S.C. § 433 (1970). See note 6 *supra* for text of the statute.

25. 40 U.S.C. § 310 (1970). See note 7 *supra* for text of the statute.

26. 408 F. Supp. at 909.

27. Pretrial Memorandum of Law of the United States, Intervenor-Defendant, *Treasure Salvors, Inc. v. Atocha*, 408 F. Supp. 907 (S.D. Fla. 1976).

28. See note 12 *supra*.

29. GENEVA CONVENTION, *supra* note 12.

30. GENEVA CONVENTION, *supra* note 12, at art. 2, provides:

not include the wrecked ship.³¹ On the other hand, the seas above the shelf were to remain "high seas."³² There is no mention in the Geneva Convention of ships or other nonnatural objects on the shelf floor—the category of objects in dispute in *Treasure Salvors*.

Commentators since the Geneva Convention have taken different points of view regarding the question of title to these objects. Robert M. Perry, an attorney with the Land and Natural Resources Division of the Department of Justice, determined that present statutes do not give the United States sovereign prerogative over abandoned objects on the outer shelf and concluded that determination of title was unclear. Writing in 1969, he recommended that changes be made in the Geneva Convention, the Outer Continental Shelf Lands Act, and the Antiquities Act, so as to grant to the United States jurisdiction and control of derelict property on its outer shelf.³³ To date, none of these changes have been enacted. John J. Kenny and Ronald R. Hrusoff, on the other hand, have concluded that American courts could enforce a claim of sovereign ownership of objects on the outer shelf.³⁴ Assistant Professor David Lehman of Northwestern University agreed, stating: "It would be unreasonable to assume . . . that nations would not exercise the rights of full sovereignty in those areas where a significant extractive industry existed."³⁵

The court in *Treasure Salvors* rejected the government's claim that its sovereign rights extended beyond "natural resources" on the outer shelf to such objects as the *Atocha*.³⁶ The court seemed persuaded by two arguments in particular. The first was that the Abandoned Property Act was irrelevant to the *Atocha* situation: the court found that the Abandoned Property Act was intended to cover property abandoned during the Civil War and therefore could not be

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

....

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.

31. Pretrial Memorandum of Law of the United States, Intervenor-Defendant at 32, *Treasure Salvors, Inc. v. Atocha*, 408 F. Supp. 907 (S.D. Fla. 1976).

32. GENEVA CONVENTION, *supra* note 12, art. 3.

33. Perry, *Sovereign Rights in Sunken Treasures*, 7 LAND & NATURAL RESOURCES DIVISION J. 89, 111-12 (1969). The Perry article was cited by the *Treasure Salvors* court. 408 F. Supp. at 910 n.5.

34. Kenny & Hrusoff, *supra* note 13, at 401.

35. Lehman, *The Legal Status of the Continental Shelf*, 20 LA. L. REV. 646, 655 (1960).

36. 408 F. Supp. at 911.

used to assert sovereign prerogative over property abandoned during any other period.³⁷ The second was that the International Law Commission (ILC) report, which served as the draft of the Geneva Convention, clarified the Convention's intent on the "wrecked ship" question.³⁸ The ILC report provided, "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."³⁹ The *Treasure Salvors* court concluded 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 and other materials."⁴⁰

The *Treasure Salvors* court also rejected the argument that the Outer Continental Shelf Lands Act⁴¹ brought the site of the *Atocha* wreck within the jurisdiction of the United States,⁴² a prerequisite to application of either the Abandoned Property Act⁴³ or the Antiquities Act.⁴⁴ The court concluded that the Outer Continental Shelf Lands Act "merely asserts jurisdiction over the minerals in and under the continental shelf."⁴⁵ But this appears contrary to the intent of Congress in passing the Outer Continental Shelf Lands Act. The House and Senate versions of the legislation differed on the question of extending jurisdiction beyond the natural resources,⁴⁶ and the Conference Committee unambiguously resolved that difference:

In the matter inserted in the conference report, the jurisdiction and control of the United States is extended to the seabed and subsoil of the entire outer Continental Shelf adjacent to the shores of the United States instead of merely to the natural resources of the subsoil and seabed as in the original House version and also to the structures for their development⁴⁷

37. The *Treasure Salvors* court relied on an 1872 decision by that same court, *Russell v. Forty Bales Cotton*, 21 F. Cas. 42 (No. 12,154) (S.D. Fla. 1872), which had reached the same conclusion. 408 F. Supp. at 909.

38. 11 U.N. GAOR, Supp. 9, at 42, U.N. Doc. A/3159), quoted at 408 F. Supp. at 910.

39. 408 F. Supp. at 910.

40. *Id.*

41. 43 U.S.C. § 1332 (1970). See note 8 *supra* for text of statute.

42. 408 F. Supp. at 911.

43. 40 U.S.C. § 310 (1970). See note 7 *supra* for text of statute.

44. 16 U.S.C. § 433 (1970). See note 6 *supra* for text of statute.

45. 408 F. Supp. at 910, citing *Guess v. Read*, 290 F.2d 622 (5th Cir. 1961), cert. denied, 368 U.S. 957 (1962).

46. CONF. REP. NO. 1031, 83d Cong., 1st Sess. 1 (1953), reported at 2 U.S. CODE CONG. & AD. NEWS 2184 (1953).

47. *Id.*

Senate debate on the bills equally reflects a clear intent to extend full jurisdiction over the seabed in question and not merely rights to natural resources.⁴⁸

The district court in *Treasure Salvors* cited only *Guess v. Read*⁴⁹ in support of its restrictive interpretation of the Outer Continental Shelf Lands Act.⁵⁰ *Guess*, however, did not limit the jurisdiction of the United States to the shelf's natural resources; that court observed that the act "was enacted for the purpose, *primarily*, of asserting ownership of and jurisdiction over the minerals,"⁵¹ and "[t]his does not include the sea above the subsoil and seabed and does not include the air above the sea."⁵² The actual question in *Guess*, moreover, involved jurisdiction over the sea above the outer shelf, not over the lands of, or objects upon, the shelf itself.⁵³

Furthermore, the court in *Treasure Salvors* stated that, even if the Outer Continental Shelf Lands Act did provide the United States jurisdiction over the wreck *Atocha*, the Geneva Convention "supercedes any incompatible terminology."⁵⁴ Thus, the district court determined that the Geneva Convention "nullifies the jurisdictional effect of [the Outer Continental Shelf Lands Act], at least in the context of the facts of this case."⁵⁵

It should be noted that *Treasure Salvors* did not conclude that the United States could not assert its sovereign prerogative over sunken ships and other property on the shelf. The court found instead that the United States has not done so, thereby leaving in force the international law of salvage: title vests in the finder-in-possession. This conclusion in *Treasure Salvors* will possibly stimulate other private attempts to locate and recover valuable "sunken treasures" from the outer shelf. But it also raises several troublesome questions, especially for the United States.

First, since ownership will vest in the finders only after they have secured possession, the government of the United States, unlike Britain and other countries which have exercised their "sovereign prerogative," may not be able to protect the investment of parties

48. See, e.g., 99 CONG. REC. 6962-63 (1953) (remarks of Senator Cordon); 99 CONG. REC. 7223-24 (1953) (remarks of Senator Ellender); 99 CONG. REC. 7258 (1953) (remarks of Senator Daniel).

49. 290 F.2d 622 (5th Cir. 1961), *cert. denied*, 368 U.S. 997 (1962) (a wrongful death action resulting from a helicopter crash more than 3 miles off the coast of Louisiana).

50. 408 F. Supp. at 910.

51. 290 F.2d at 625 (emphasis added).

52. *Id.*

53. *Id.*

54. 408 F. Supp. at 910.

55. *Id.* But see notes 28-32 and accompanying text *supra*.

who have located and are attempting to remove valuable property from the outer shelf, until possession has been established—unless, perhaps, a breach of the peace is threatened. It is unclear what remedy or protection exists for those, such as the United States Government, who have done substantial work to survey abandoned property on the outer shelf but who have not established possession.⁵⁶

Second, under the *Treasure Salvors* interpretation of present legislation, the United States cannot protect "objects of antiquity" on the outer shelf except from persons using federal funds or operating under federal leases.⁵⁷ The United States claimed in *Treasure Salvors* that it had listed "several sites of historic and archaeological importance located on the outer continental shelf . . . on the National Register of Historic Places."⁵⁸ Among them are the wreck site of the Spanish galleon *Nao San Jose de Las Animas* and Mansfield Cut Underwater Archaeological District.⁵⁹ Presumably the United States could pass legislation to protect and preserve these sites from damage or loss by its own citizens. But the United States has not done so, except as a condition upon the use of federal funds or leases. *Treasure Salvors* raises the serious question of what the United States can do to protect these sites from noncitizens. *Treasure Salvors* found that the outer shelf "is neither within the jurisdiction of the United States nor owned or controlled by our government."⁶⁰ Since under international law title is vested in the "finder-in-possession," the United States, after the district court decision in *Treasure Salvors*, finds itself faced with the challenge of establishing internationally recognized 'possession' of the outer-shelf sites on the National Register if it wishes to keep or protect them.

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56. For example, the United States has expended considerable effort to survey the outer shelf for submerged cultural resources, under Exec. Order No. 11593, 3 C.F.R. 154 (Supp. 1971). Pretrial Memorandum of Law of the United States, Intervenor-Defendant, *Treasure Salvors, Inc. v. Atocha*, 408 F. Supp. 907 (S.D. Fla. 1976).

57. 16 U.S.C. § 470(f) (1970) provides in part:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register.

58. Pretrial Memorandum of Law of the United States, Intervenor-Defendant, at 39, *Treasure Salvors, Inc. v. Atocha*, 408 F. Supp. 907 (S.D. Fla. 1976).

59. *Id.*

60. 408 F. Supp. at 910.

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