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THE TEXAS ANTIQUITIES CODE: AN HISTORICAL COMMENTARY IN A CONTEMPORARY CONTEXT

by R. Randall Bridwell

For years man's imagination has been aroused and excited by the prospects of lost or hidden treasure. Robert Louis Stevenson's literary visions of pirated wealth resting in some hidden spot amply illustrate the timeless appeal of this subject to man's sense of exoticism.¹ Since an occurrence such as the discovery of buried or lost treasure usually entails the acquisition of some degree of wealth, oftentimes avarice as well as fancy is stimulated in those concerned with the discovery or possession of the goods recovered. Naturally, the law is forced to share the burden of resolving the difficulties generated by a find of hidden or sunken treasure, and the legal resolutions are sometimes complex. Amidst a controversy generated by the finding of a large quantity of sunken Spanish treasure, Texas has attempted to fill the void in its prior law relevant to ancient treasures with the passage of the Texas Antiquities Code.²

I. A PRESENT CONTROVERSY

In September 1967, the Attorney General of the state of Texas was informed that a group of men employed by an Indiana corporation, Platoro, Ltd., was removing artifacts from the hulks of sunken vessels³ near Corpus Christi, Texas.⁴ Alleging the illegality of the removal of the artifacts, the Attorney General filed suit in Kennedy County, Texas,⁵ to enjoin exploration by Platoro, Ltd. on the grounds that they had failed to obtain the requisite permit from the Secretary of State according to the mandate of article 147(b) of the Texas Penal Code.⁶ In addition, the Attorney General alleged that Platoro had violated article 8.10 of the Texas Business Corporation Act⁷ by doing business in Texas without a license. Article 8.18⁸ of that Act prescribes a one hundred to five thousand dollar fine for such activities. It was also contended that under the Miscellaneous Corporation Laws Texas had a lien on all property belonging to Platoro which had become situated within the state. The lien would date from the institution of the suit, and the filing of the suit constitutes

¹ R. STEVENSON, *TREASURE ISLAND*.

² TEX. REV. CIV. STAT. ANN. art. 6145-9 (Supp. 1969).

³ The vessels were thought to be those listed in the Spanish National Archives in Seville, Spain, as part of a convoy which set sail from Mexico in 1554. The convoy was laden with gold and other wealth which was to be delivered to Charles V of Spain. Relevant figures indicate that the amount of wealth imported into Spain from the New World was at an unprecedented high during the period of years surrounding the time when these galleons sank. See J. ELLIOT, *IMPERIAL SPAIN* 175 (1963). Herein the author cites tables covering the importation of treasure during the years 1503-1660. The figure for the years in question (1551-1555) is 4,354,208 ducats, or almost three times the amount brought in in any previous five-year period dating from 1503, and not exceeded in any substantial sense until some twenty years later. *Id.* at 175.

⁴ 13 NEWSLETTER OF THE TEXAS ARCHAEOLOGICAL SOCIETY, Aug. 1969, at 3.

⁵ *Texas v. Platoro, Ltd.*, Civil No. 81 (S.D. Tex., filed Dec. 13, 1967).

⁶ TEX. PEN. CODE ANN. art. 147(b) (1952).

⁷ TEX. BUS. CORP. ACT ANN. art. 8.18 (1956).

⁸ *Id.*

notice of the lien.⁹ The suit was filed partially at the insistence of the Texas Land Commissioner, who had asserted that the General Land Office had jurisdiction over the sunken ships and their contents.¹⁰ On January 15, 1968, an injunction was issued.

Platoro had in the meantime transported the artifacts found on the ships to its home office in Indiana. Following the granting of the injunction, the goods were returned to Texas and placed in the vault of the General Land Office in the Texas Memorial Museum of Austin.¹¹ After the return of the artifacts, Platoro filed suit in federal district court in Galveston to establish title to them. The corporation asserted that Texas had no legal foundation for a claim to the merchandise.¹² The corporation claimed that the initial discovery and removal of the artifacts by Platoro gave them title under prevailing law.

Finally, the entire situation was complicated by the intervention of two totally unexpected claimants. The United States Government asserted a right to the treasure based on a federal statute governing the importation of merchandise recovered from sunken vessels.¹³ Also, petitions to intervene were filed on behalf of the Texas Historical Society, and on behalf

⁹ TEX. REV. CIV. STAT. ANN. arts. 1302-5.07, 1302-5.08 (1962). Art. 1302-5.10 of this Act allows a receiver to be appointed for such assets where the illegal activity complained of has become evident. This raises interesting possibilities for the final disposition of the claim of Texas against Platoro, Ltd. The relevant law prescribes a maximum penalty of five thousand dollars. Does this mean that the goods recovered by Platoro or their value would still be the property of Platoro once the fine was paid, the only other sanction being the prohibition of continued exploration without a permit? Or would the entirety of the merchandise recovered without the legal prerequisites be forfeitable in addition to the fine?

¹⁰ The Land Commissioner's claim was based on TEX. REV. CIV. STAT. ANN. art. 5421(c) (1962). The jurisdiction of the suit was founded upon *id.* art. 2031(b) (1964). The statutory law supplied provisions dealing with property located within the state and the requirement that deported goods be returned rested with the general equity powers of the court operative once jurisdiction had attached. The defendant made a special appearance to contest jurisdiction and contended that there was no personal or subject matter jurisdiction, the jurisdiction properly being vested in the United States to settle salvage matters. The defendants also contended that the common law of England, which would give Texas title to offshore sunken vessels and their contents, does not apply to this or any situation, as it was abrogated by Acts of April 30, 1846, codified into TEX. REV. CIV. STAT. ANN. arts. 8310-24 (1961). Furthermore, Texas has no title, as the legal history of the state reveals no subsequent exercise of jurisdiction in such matters, according to the defendant's allegations.

¹¹ The Land Commissioner had by this time assumed complete control of the artifacts and maintained them under security in the vault. NEWSLETTER OF THE TEXAS ARCHAEOLOGICAL SOCIETY, Aug. 1969, at 3.

¹² See the discussion of this unreported case in Houston Post, Aug. 20, 1969, at 1, col. 1.

¹³ Tariff Act of 1930 provides in part that: "[A]ny person who may raise such vessel shall be permitted to bring any merchandise recovered therefrom into the port nearest the place where such vessel was so raised free from the payment of any duty thereupon, but under such regulations as the Secretary of the Treasury may prescribe." 19 U.S.C. § 1310 (1965).

The customs regulations issued pursuant to the Act include the provision that "if it is not entered by the person entitled to make entry, or not disposed of pursuant to court order, it shall be subject to sale as unclaimed merchandise." 5 C.F.R. § 2.22 (1948).

The Regional Customs Commissioner asserts a claim to the treasure until these stipulations are met. This raises several questions incident to the present litigation: No one knows who is entitled to make entry into the port under this law, that is, whether it is Texas or Platoro, Ltd. The one entitled is the only one who can lawfully bring in the goods, which have *already* been brought in; how long can the properly entitled party wait to comply with the law and still avoid the forced sale provisions? This relevant regulation apparently gives the United States Government a claim to possession of the goods. The customs regulations further stipulate that all such merchandise shall be taken into possession by the collector of the port in which it shall first arrive and be retained in his custody pending entry. 5 C.F.R. § 2.22 (1948); 19 C.F.R. § 15 (1939); 19 C.F.R. §§ 8, 8.3 (1939).

of Kennedy County, in which some of the artifacts were located prior to removal by Platoro.¹⁴

A large quantity of artifacts of significant historical, as well as monetary, value to the state of Texas had become overnight the subject of seemingly irreconcilable claims. The question of title to sunken treasure has never before been litigated in Texas. Since claim to the treasure on behalf of Texas rests, in part, on a statute which is applicable to operations designed to recover historical or archaeological artifacts generally,¹⁵ much attention has been given to the laws of other states in this area.

Due partially to the controversy stimulated by these events, a bill was introduced to the legislature of Texas, at that time in session, which would deal with this and like situations. The bill was assigned to a committee in the House after it had passed in the Senate, but the committee declined to force the bill through to approval and it temporarily died with the termination of the First Session of the 61st Legislature.¹⁶ Following much speculation about the propriety of the Land Commissioner's conduct in the matter, a subcommittee of the House Committee on Governmental Affairs was directed to probe into the entire case.¹⁷ The House Subcommittee on Governmental Affairs was at the time studying the proposed Antiquities Code and asked the Commissioner to appear before the committee to explain his involvement in the situation. The Commissioner appeared voluntarily but was reticent about answering any questions.¹⁸ He stated that he had made a contract with Platoro for the recovery of the artifacts and that this was, without question, within his authority as Land Commissioner of Texas.¹⁹ However, he refused to produce the original of the contract. He instead submitted an unsigned, undated copy and asked the legislature to ratify it. The Committee refused to act unless a signed

¹⁴ A petition for intervention in the state court suit against Platoro, Ltd. was filed in the 28th District Court by the District Attorney of Kennedy County, Texas, upon the relation of the County Attorney of Wallace County and the specially appointed County Attorney in Kennedy County. The suit was also upon the relation of parties who sought intervention as representatives of the Texas Historical Society, to protect the historical value of the artifacts in question. The District Attorney of Kennedy County also sought to represent Kennedy County, from which some of the artifacts were taken. According to the relevant statute, the County Attorney of any county from which artifacts were taken would, on behalf of the county, be entitled to a fee for the artifacts appropriated unless the appropriation were properly authorized by the Land Office, which is as yet not known. TEX. REV. CIV. STAT. ANN. art. 5421 (1962).

¹⁵ TEX. PEN. CODE ANN. art. 147(b) (1952), repealed and replaced by TEX. REV. CIV. STAT. ANN. art. 6145-9 (Supp. 1969).

¹⁶ The Speaker of the Texas House of Representatives was expected to forward the bill to the House Subcommittee on Governmental Affairs. Instead the bill was sent to a committee headed by an old friend of the Land Commissioner, who was also from the Land Commissioner's home town. These facts, according to an Austin Bureau of News reporter, gave rise to much speculation about the complicity of the House Speaker and the Land Commissioner in killing the bill. NEWSLETTER OF THE TEXAS ARCHAEOLOGICAL SOCIETY, Aug. 1969, at 4, 5.

¹⁷ *Id.* at 3. A Representative of Austin, Texas, was chairman of the committee. The Subcommittee on Governmental Affairs also became interested in the Land Commissioner's conduct in conjunction with their activities concerning the Antiquities Code. The Assistant Attorney General of Texas, a committee member therein, was removed from his duties at the insistence of the Land Commissioner after he had expressed the legal opinion that the Land Commissioner had no real authority in the area. He had so stated after learning of the Land Commissioner's purported contract with Platoro, Ltd. Corpus Christi Caller-Times, May 25, 1969, at 16A, cols. 1-3.

¹⁸ The chairman of the committee merely issued the Land Commissioner an invitation to appear, rather than using the committee's subpoena powers. Houston Post, June 16, 1969, at 20, cols. 1-3.

¹⁹ *Id.*

copy or the original of the contract was produced, and a stalemate thus developed.²⁰ The Commissioner's continued refusal to cooperate, and his unusual behavior,²¹ served to catapult the entire treasure issue before state-wide scrutiny. Though the Antiquities Code and the motion pending before the House to censure the Land Commissioner were both unresolved at the close of the 61st Legislature, the subsequent public interest and investigation conducted by members of the legislature culminated in the passage of both the Antiquities Code and the censure motion in the First Special Session which met during the summer of 1969.²² However, since the events involving Platoro occurred prior to the passage of the now effective Antiquities Code,²³ the law applicable to the controversy is, at best, difficult to ascertain.

II. TEXAS STATUTORY LAW PRIOR TO THE ANTIQUITIES CODE AND THE OSTENSIBLE CONTRACT WITH PLATORO, LTD.

The search for extraterritorial precedent applicable to the currently litigated galleon incident has not proved to be very helpful. Moreover, the situation has not only never been litigated in Texas courts, but apparently only once in any other state, specifically in a 1922 Florida case wherein sunken vessels and their contents were ruled to be the property of the state of Florida.²⁴ Due to the lack of any absolute authority for determining title to the contents of the vessels contested in the Texas galleon situation, there has been a wide diversity of opinion as to whether or not Texas has any statutory provisions which could resolve the problem. There appear to be a number of potential statutory bases on which the court could act. However, under these statutes the decision could as easily resolve the title dispute in favor of Platoro as Texas, although certain sanctions could be

²⁰ The Land Commissioner reportedly became irate with the committee's resistance. He claimed that the proposed antiquities bill was much too broad and referred to his congressional critics who were behind the bill as "fuddyduddies, pirates, and peckerwoods." NEWSLETTER OF THE TEXAS ARCHAEOLOGICAL SOCIETY, Aug. 1969, at 5.

The Land Commissioner expressed a less than cautious estimate of the contract by referring to it as "the best contract anyone ever wrote in the world." Houston Post, June 16, 1969, at 20, cols. 1-3. He also said that those who introduced the bill were "tools of a lot of unscrupulous peckerwoods who got them to introduce the bill." *Id.*

The Land Commissioner's actions attracted the attention of two members of the legislative committee investigating the case, the representatives from Victoria and Corpus Christi, Texas. The Corpus Christi representative drafted a motion to censure the Land Commissioner for his unusual and irresponsible activities, primarily his refusal to cooperate on the contract question.

²¹ Two representatives of the investigating committee attempted to view the artifacts in their basement vault location in Austin. Thereupon the Land Commissioner allegedly lunged at one of them and grabbed him around the throat before he could gain access to the vault. He then lunged at a newsman who accompanied the pair of representatives. Houston Post, July 30, 1969, at p. 12, cols. 1-2.

²² After the end of the first legislative session, the Land Commissioner had proclaimed that congressional inaction on the censure motion vindicated his acts and that the legislature was fully in accord with his conduct. This proclamation supposedly aroused the ire of a good many legislators who had refrained from acting only because of fear of depriving the Land Commissioner of the due process safeguard of a formal hearing. *Id.*

²³ The bill, entitled an Antiquities Code, was introduced before the 61st Legislature of the State of Texas in the Senate by the senator from Fort Worth, and in the House of Representatives by the representative from Angleton, Texas.

²⁴ Florida *ex rel.* Ervin v. Massachusetts Co., 95 So. 2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957). For case law on this subject generally, including a discussion of this case, see Kenny & Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383 (1967).

imposed on the corporation because of its actions in recovering the bounty in violation of Texas law.

Before the passage of the Antiquities Code, and at the time the treasure controversy arose, Texas had four criminal statutes which attempted to proscribe certain activities relating to archaeological undertakings: articles 147(a),²⁵ 147(b),²⁶ 147(b)(1),²⁷ and 147(b)(2)²⁸ of the Texas Penal Code. These statutes had varying applications regarding geographic area and subject matter. Article 147(a) applied to the entire state and dealt specifically with non-residents; article 147(b) also applied state-wide but while article 147(b)(1) applied only to property owned or controlled by a state agency, article 147(b)(2) applied to all property. According to these laws, Texas residents appeared to be favored over non-residents of the state, for they could conduct archaeological activities on privately owned land with the permission of the landowner.²⁹ If the state resident desired to conduct these activities on public land, however, it would have been necessary for him to have obtained permission from the local county commissioner's court.³⁰ The situation was different for non-residents. According to a statute still in force, any non-resident who desires to conduct archaeological activities within the state must first obtain a permit from the Secretary of State.³¹ It is not spelled out whether or not the non-resident would still have to get permission from private landowners before conducting archaeological explorations pursuant to a permit.³² Only two activities were proscribed completely, the others being merely forbidden absent the required permit. The two activities forbidden were the forging of artifacts, or the passing of artifacts which had been forged, and the intentional defacement of Indian paintings and hieroglyphs.³³

In addition to penal statutes concerning archaeological activities, there is a statute pertaining to exertion of authority by the state over offshore lands, article 5415(a), which could be critical to the determination of the question of the authority of the Texas Land Commissioner to make a contract such as the one allegedly made with Platoro.³⁴ This statute states in part:

The State of Texas owns, in full and complete ownership, the waters of the Gulf of Mexico and the arms of said Gulf, and the beach beds and shores of the Gulf of Mexico, and the arms of the Gulf of Mexico, including all

²⁵ TEX. PEN. CODE ANN. art. 147(a) (1961).

²⁶ *Id.* art. 147(b).

²⁷ *Id.* art. 147(b)(1).

²⁸ *Id.* art. 147(b)(2). The Antiquities Code repealed Articles 147(a), 147(b), 147(b)(1), and 147(b)(2). TEX. REV. CIV. STAT. ANN. art. 6145-9, § 22 (Supp. 1969). These laws were in force when litigation in the treasure controversy commenced. See footnote 5 *supra*.

²⁹ TEX. PEN. CODE ANN. art. 147(a)(2) (1961).

³⁰ *Id.*

³¹ *Id.* art. 147(b)(3). The permit costs fifty dollars and is issued only after the Secretary of State or his duly designated representative is satisfied that the applicant is scientifically fit to conduct archaeological investigation. The failure to comply with the article results, on conviction, of a maximum fine of two hundred dollars, or thirty days' imprisonment, or both. Of course a non-resident need not obtain a permit if he owns the land.

³² It is assumed that this would be necessary.

³³ TEX. PEN. CODE ANN. art. 147(b)(1)(2) (1961).

³⁴ TEX. REV. CIV. STAT. ANN. art. 5415(a) (1962).

lands that are covered by the waters of said Gulf and its arms, either at low tide or high tide, within the boundaries of Texas, as herein fixed; and that all of said lands are set apart and granted to the Permanent Public Free School Fund of the State, and shall be held for the benefit of the Public Free School Fund of the State *according to the provisions of law governing the same.*³⁵

The provisions of law governing the subject of the Spanish galleon dispute do not appear to be favorable to Texas' claim to the bounty through the purported contract between the Land Commissioner and Platoro. Although the area of land within the tide water limits is expressly excluded from provisions allowing sale of public lands,³⁶ there are statutory provisions regarding the lease of such land.³⁷ The lease provisions contain language that appears to pose some difficulty to the state of Texas regarding the supposed authority of the Land Office to make a contract of lease as was allegedly done. The statute states that such lands are subject to lease by the Land Commissioner for the purpose of producing a prescribed number of minerals, and that such production shall be the exclusive purpose for such a lease.³⁸ The list does not include gold or any other item connected with the bounty aboard the sunken vessels,³⁹ hence drawing into question the validity of any contract made by the state of Texas through the Land Office with Platoro, even if the contract was drafted in the form of a lease.⁴⁰

³⁵ *Id.* (emphasis added).

³⁶ *Id.* art. 5421(c), § 1.

³⁷ *Id.* § 8.

³⁸ The statute, giving effect to the constitutional mandate of TEX. CONST. art. VII, §§ 4, 12, states in part:

All islands, salt water lakes, bays, inlets, marshes and reefs owned by the state, within tidewater limits and that portion of the Gulf of Mexico within the jurisdiction of Texas, . . . shall be subject to lease by the Commissioner of the General Land Office to any person, firm or corporation for the production of oil, gas, coal, lignite, sulphur, salt and potash that may be therein or thereunder, in accordance with the provisions of all existing laws pertaining to the leasing of such areas for oil and gas; *provided that the leasing of minerals other than oil and gas shall not be subject to the provisions of Article 5359.*

TEX. REV. CIV. STAT. ANN. art. 5421(c), § 8 (1962) (emphasis added). Art. 5359 referred to here is the provision for leasing of such lands as are described in art. 5421(c).

³⁹ This was supposedly the basis for the Assistant Attorney General's expressed opinion that the Land Commissioner had no authority to make a contract for the recovery of the artifacts. The Land Commissioner's ire was felt by most to be the reason for the dismissal of the Assistant Attorney General from the House committee investigating the proposed Antiquities Code. *Corpus Christi Caller-Times*, May 25, 1969, at 16A, cols. 1, 2, 3.

⁴⁰ This was in fact the very way the contract was drafted. The language of the contract reads: "The following agreement is entered into between the State of Texas, acting by and through the Commissioner of the General Land Office of the State of Texas, hereinafter referred to as *Lessor*, and Platoro, Limited, Inc., an Indiana Corporation, . . . hereinafter referred to as *Lessee*." (Emphasis added.)

The area covered by the lease was described as the tracts upon which the sunken vessels were located, referred to by number. The purpose of the lease was described as: "[I]nvestigating, exploring, prospecting, and engaging in other reasonably necessary operations for the purpose of removing from the above described premises, all personal property, artifacts and other cargo of value that were deposited as a result of the sinking of sailing ships prior to the year 1850."

The lease was to run for one year. The lessee agreed to "fully develop" the leasehold by attaining the sum of \$100,000 from it, the figure to be determined by adding exploration and recovery costs to the value of the artifacts recovered. The lessor was given the right to suspend the lease if the provisions of the lease were not complied with, and consequently the lessor could cancel the agreement if the lease were not used within thirty days. The lessee agreed to transfer any property recovered to the General Land Office in Austin. The financial portion of the lease stipulated that

The fact that the purported contract between the Land Office and Platoro and the relevant statutes dealing with the power of the Land Commissioner to make such contracts are so closely related, in that the interpretation of one is necessarily dependent upon the meaning ascribed to the other, raises some interesting legal possibilities. First, there is the fact that a principal section of the contract requiring the use of accepted archaeological practice, including the photographing of all recovered items, might prevent the contract from ever becoming effective.⁴¹ It is generally conceded that accepted archaeological practices were not used by Platoro;⁴² this may give rise to a claim of non-performance which could serve to vitiate the contract. It is possible that if the contract was initially effective, acts constituting substantial non-compliance with its terms could supply grounds for vitiating the agreement. Of course, for the contract ever to be declared valid and binding, the relevant Texas statute authorizing leases of offshore lands to be made by the Land Commissioner⁴³ would have to be interpreted to include the power to lease for the purposes set out in the purported lease contract. Then a properly executed copy of such agreement would have to be produced. The absence of clearly applicable law makes the Platoro claim difficult to resolve, but the incident does serve to em-

the lessor's share of the value of the items recovered should be 50% thereof. The lessor was given the option of retaining all the artifacts or any part thereof in specie, provided that any part retained in specie which exceeded the lessor's royalty would be paid for by the lessor in cash. The state was given 180 days in which to exercise its option to retain the items recovered in specie, and thereafter the lessee was free to sell the items at a price agreeable to both lessor and lessee, such agreement to be in writing in advance of the sale. The lessee agreed to follow "accepted archaeological practices" in recovering artifacts and relatedly to plot the location of all items recovered and photograph and log all items and maintain an accurate log of all operations.

The lease itself contains a provision requiring the dismissal of any suits against the lessee or any shareholder thereof by the state of Texas before the effective date of the contract. Thus, if the contract were within the statutory grant of authority and were executed with proper formalities before the commencement of the present suit against Platoro by Texas, then it could be presently binding. If it were executed after such commencement, then the litigation would have to be terminated before the contract could take effect. So, in this instance, it is logically conceivable that the contract, though ordinarily proper, will not now be effective because of its own terms. The answer to these questions about the power of the Land Commissioner to contract in this regard, or about the date when the contract became formally complete, having all the requisite signatures, is not clear. The efficacy of the contract is conceivably, then, dependent upon the interpretation of the authorizing statute and, this question being resolved in favor of the permissibility of the contract, upon the timing of the execution of the contract. Lastly, the purported contract could be prevented from ever taking effect by the passage of the Antiquities Code. This result appears likely in every case except that in which the contract could be found by the court to be, first, statutorily proper, and, secondly, formally completed before the initiation of the present litigation.

A copy of the contract submitted by the Land Commissioner to the House Committee investigating the Antiquities Code was made available through the courtesy of Joseph Webb McKnight, Professor of Law at Southern Methodist University, who has actively participated in the drafting of the Code through his work with the Texas Archaeological Society, which has worked on the Antiquities Code since 1967.

⁴¹ *Id.*

⁴² The inventory filed January 15, 1968, with the Kennedy County Court revealed a good number of less than helpful classifications of goods recovered, to wit: "one lot odd stuff," "one brass thing." Though this itself would not be sufficient to establish the inadequacy of the procedures used, a tumult of accusations are presently levelled against Platoro, Ltd., in this regard. They are said to have freed the items from the hulks of the sunken vessels by blasting the vessels apart with the backwash from the propellers of the salvage craft, and then merely rounding up the scattered items. Corpus Christi Caller-Times, May 25, 1969, at 1, cols. 1-4; at 16A, cols. 1-3. Also, a diver who worked for Platoro during the recovery operations swore that Platoro had not revealed on the written inventory all of the items recovered. *Id.*

⁴³ TEX. REV. CIV. STAT. ANN. art. 5421(c) (1962).

phasize the necessity for supplying comprehensive statutes to deal with the antiquities topic.

III. ARTIFACTS OF ARCHAEOLOGICAL OR HISTORICAL SIGNIFICANCE: THE LAWS OF THE FEDERAL GOVERNMENT AND OTHER STATES AS GUIDELINES

It is difficult to arrive at a definition of antiquities which will suffice for the purpose of discerning the subject of all laws which supposedly pertain to the subject. This may be due to the fact that the term is generally taken to have such an obvious meaning that exact definition is evasive. However, the meaning ascribed by the *Oxford English Dictionary*,⁴⁴ "remains or monuments of antiquity; ancient relics," is probably as thorough as any available.

Federal Legislation. The first noteworthy law on the subject of antiquities arose not in any particular state, but rather with the federal government. On June 8, 1906, the United States Congress passed Public Law 209, an Act for the Preservation of American Antiquities.⁴⁵ This Act states in part:

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 five hundred dollars 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.⁴⁶

The Act further provides for permits to be issued by the Secretaries of the Interior, Agriculture, and War Departments for the purpose of excavating for or recovering items covered by the Act in specified instances.⁴⁷ This Act was supplemented by later federal legislation.⁴⁸

State Legislation. There is considerable variety in the treatment given to the subject of antiquities by the various states. The first category concerns states which have antiquities acts, or strong codes specifically dealing with the subject of antiquities, which usually contain rules and regulations requiring the services of an archaeologist. There are presently seventeen

⁴⁴ 1 OXFORD ENGLISH DICTIONARY 374 (1933).

⁴⁵ Act of June 8, 1906, Pub. L. No. 209, ch. 3060, § 1, 34 Stat. 225. The citations referring to federal and state antiquities laws in Section III of this Comment were mainly taken from an excellent article by McNeil, *Legal Safeguards for Preserving the Past*, BULLETIN OF THE TEXAS ARCHAEOLOGICAL SOCIETY, Sept. 1969, at 267.

⁴⁶ 16 U.S.C. § 433 (1965).

⁴⁷ *Id.* § 432. The rules and regulations governing the issuance and use of the permits are found in 34 Stat. 225 (1906).

⁴⁸ Later legislation was enacted by the 74th and 86th Congresses. The 74th Congress passed Public Law No. 74-272, known as the Historic Sites Act, 16 U.S.C. §§ 461-468e (1965). The 86th Congress passed Public Law No. 86-523, 16 U.S.C. §§ 469-469c (1965), dealing with the preservation of historical and archaeological data that might otherwise be lost as a result of dam construction.

states in this category.⁴⁹ There are seven states which have specific legislation on the subject of antiquities, but no actual antiquities code.⁵⁰ These laws do not entail the use of an archaeologist, as do most of those with specific codes. Seven other states have only official regulations which seek to prevent the destruction of historical artifacts, though, save for one exception, they do not provide for any particular mode of recovery under state auspices and supervision, as do most antiquities codes.⁵¹ There are thirteen states which provide government aid for the conduct of various archaeological programs without the comparatively rigorous state supervision characteristic of the purely code states.⁵²

⁴⁹ The states and the relevant statutory sections are as follows: (1) DEL. CODE ANN. tit. 7, §§ 5301-06 (1953), §§ 5401-05 (Supp. 1969); (2) FLA. STAT. ANN. §§ 376.01-.05 (1960); (3) IOWA CODE ANN. §§ 305A.1-.6 (Supp. 1970); (4) In Kansas the 1967 legislative session promulgated an act similar to the federal Antiquities Act of 1906. For a discussion, see McNeil, *supra* note 45, at 267; (5) KY. REV. STAT. ANN. § 171.311 (1969); (6) MD. ANN. CODE art. 78a, § 14(B) (1957); (7) MINN. STAT. ANN. §§ 138.08-.09 (1960), §§ 138.31-.42 (Supp. 1970); (8) NEV. REV. STAT. §§ 382.010-.050 (1967); (9) N.M. STAT. ANN. § 7-13-1 (1953); (10) N.Y. EDUC. LAW § 233 (McKinney 1969); N.Y. PEN. LAW § 170.45 (McKinney 1967); (11) N.C. GEN. STAT. § 70-1 to -4 (1965); (12) OKLA. STAT. tit. 70, § 3309 (1966); (13) ORE. REV. STAT. §§ 273.705, .711, .715 (1969); (14) TEX. REV. CIV. STAT. ANN. art. 6145-9 (Supp. 1969); (15) UTAH CODE ANN. §§ 63-18-2.1 to -6, -7.5 (Supp. 1970); (16) W. VA. CODE ANN. §§ 5-12-1 to -3 (Supp. 1969), 5-12-4 to -5 (1966); (17) WIS. STAT. ANN. § 20.150 (1957).

⁵⁰ The states and the relevant statutory provisions are as follows: (1) ALASKA STAT. §§ 38.12.010-.050 (1968); (2) ARK. STAT. ANN. §§ 8-901 to -903, 9-1001 to -1017 (Supp. 1969); (3) MICH. COMP. LAWS §§ 299.51-.55 (1967); (4) MO. REV. STAT. § 560.473 (Supp. 1969); (5) N.D. CENT. CODE §§ 38-09-01.1 to -01.2 (1960), 55-03-01 to -07 (Supp. 1969); (6) S.D. CODE §§ 1-20-1 to -16 (1967); (7) WYO. STAT. ANN. § 36-44.6 (Supp. 1969).

⁵¹ The states and the relevant statutory provisions are as follows: (1) ALA. CODE tit. 8, § 173, tit. 55, §§ 255-56, 272-77 (1958); (2) ARIZ. REV. STAT. ANN. §§ 41-771 to -776 (Supp. 1969); (3) CAL. GEN. LAWS ANN. art. 1136, § 5097 (Deering 1965); CAL. PEN. CODE § 622 (West 1955); CAL. WATER CODE § 234 (West Supp. 1970); (4) HAWAII REV. LAWS § 6-14 (1968); (5) MONT. REV. CODES ANN. §§ 75-1202 to -1206 (1962); (6) Nebraska had a Resolution in 1935 which was not enacted as positive law. The Conservation and Survey Division of the University of Nebraska is authorized thereunder to regulate collections of archaeological artifacts. Also, the Nebraska State Historical Society funds a full-time archaeologist and coordinates the Highway Salvage Program. See McNeil, *supra* note 45, at 274. (7) WASH. REV. CODE § 27.48.010 (1964).

⁵² The states and the relevant activities or statutes are in the following list. References to state programs were found in McNeil, *supra* note 45, at 267. (1) Connecticut: The trustees of the University of Connecticut appoint an archaeologist to serve as State Archaeologist and as such he serves in a supervisory capacity over field research records. The State Archaeologist serves as Anthropological Collection Curator and assistant professor in the University Museum Department of Anthropology of the University of Connecticut. (2) Colorado: The state has a program carried out by the Director of the University of Colorado Archaeological Research Center and the State Highway Department employs a salvage archaeologist. (3) IDAHO CODE ANN. §§ 67-4114 to -4122 (Supp. 1969). Chapter 41 provides that the State Historical Society is authorized to designate and preserve sites of historical interest. The Society has the power to issue permits for excavation to those persons with professional qualifications or merit. Also, the Department of Social Sciences at the University of Idaho does field research and the University Museum pays half the salary of the State Archaeologist, the state paying the other half. (4) ILL. ANN. STAT. ch. 81, §§ 70-71 (Smith-Hurd 1966), ch. 105, § 466 (Smith-Hurd 1952), ch. 116, § 43.10 (Smith-Hurd Supp. 1970). Herein are contained no real provisions for preserving antiquities other than in the acquisition of state parks and the encouragement of such activity in state political sub-units with provisions for publication of findings of historical or archaeological research at reasonable public expense. (5) Indiana: The state sponsors part of the salaries of archaeologists in research positions at Indiana University and in the Indiana Historical Society. (6) Maine: A consultant for archaeological problems is employed by the Division of Historic Sites of the Maine State Park and Recreation Commission. There apparently is no state archaeologist. (7) MASS. CONST. § 181. There is no antiquities act or state archaeologist in Massachusetts. The Massachusetts Constitution provides for the preservation and maintenance of ancient landmarks and other historically significant properties, but there is only a general reference to the topic without specific procedures or regulations for enforcing the policy declared. (8) New Jersey: The New Jersey Museum employs a curator of archaeology and

Constituting a somewhat lesser degree of regimentation in the field of archaeology, two states have organized concerns which carry on programs without official sanction.⁵³ Relatedly, there are two states wherein archaeological activities are carried on informally, without any actual organized concerns exerting a concerted effort in archaeological programs.⁵⁴ Finally, there appears to be one state which has no antiquity law or program whatever.⁵⁵

These categorizations represent extremes ranging from a thorough code pertaining specifically to the subject of antiquities, such as Texas now has, to the complete absence of any laws on antiquities, as in Rhode Island. In between these extremes are states with random laws which serve individually or collectively to deal with problems related to antiquities, such as was the case in Texas prior to the passage of the Antiquities Code. Due to the great variation of the legal treatment of antiquities in the various states, and the wide array of informal programs operated by historical societies, it would be difficult if not impossible to pick a "typical" state law on the subject. This is to be expected since the nature of subjects historically relevant to the individual states differs with their immense varieties of geography and historical backgrounds. The complexity of a thorough and modern code serves to illustrate the problems which Texas faced in drafting an antiquities law.

IV. THE TEXAS ANTIQUITIES CODE

Though no one has asserted that the passage of the Texas Antiquities Code⁵⁶ would provide a solution for the existing dispute over the tidelands treasure, the bill has a future application of considerable significance in this area. The scope of the bill is broad and it contains what is apparently the first definitive and thorough statement of the general policy of the state

a state archaeologist. (9) OHIO STATE CHARTER art. 97.49, §§ 1, 2; OHIO REV. CODE ANN. §§ 149.30-.31 (1969). Ohio has had an Historical Society since 1885 operated under the auspices of state law. Federal subsidies and private construction are combined with state monies used to fund the activities of the Historical Society. (10) PA. STAT. ANN. tit. 71, § 716 (1962). Hereunder the Pennsylvania Historical Commission is responsible for the archaeological research program in the state. (11) South Carolina: A State Archaeologist heads the State Department of Archaeology which is state-funded through the University of South Carolina. Apparently the system has achieved no great notoriety or effectuated widespread archaeological operations. (12) Tennessee: The University of Tennessee Department of Anthropology seems to be the center of activity there. There is no official State Archaeologist but the Chairman of the aforementioned department holds the honorary equivalent of that position. (13) Virginia: The Historian-Archaeologist of the staff of the state library coordinates archaeological activity in the state. The State also has a newly created Historical Landmarks Commission, but still most activities in the area of archaeology are carried on by voluntary supporters.

⁵³ These states and their programs are as follows: (1) Georgia: The Laboratory of Archaeology of the Department of Anthropology carries on limited archaeological programs. (2) Louisiana: The State Museum and Commission of Parks and Recreation cooperate in archaeological efforts in an informal fashion.

⁵⁴ These states are New Hampshire and Vermont which both have archaeological societies in which voluntary members carry on without state support.

⁵⁵ The state is Rhode Island wherein it has been reported that many important archaeological sites are vandalized yearly.

⁵⁶ TEX. REV. CIV. STAT. ANN. art. 6145-9 (Supp. 1969).

of Texas regarding objects of historical significance.⁵⁷ The body of the Code contains the statement:

It is hereby declared to be the public policy and in the public interest of the State of Texas to locate, protect, and preserve all sites, objects, buildings, pre-twentieth century shipwrecks, and locations of historical, archaeological, educational, or scientific interest . . . treasures bedded in the earth, sunken or abandoned ships and wrecks of the sea or any part or the contents thereof, . . . on or under any of the lands in the State of Texas, including the tidelands, submerged lands, and the bed of the sea within the jurisdiction of the State of Texas.⁵⁸

This policy is primarily effectuated through an organ created by the bill itself, the Antiquities Committee.⁵⁹ The committee is composed of seven members and is vested with the duty of designating and dealing generally with archaeological landmarks, and supervising operations related to their discovery and excavation.⁶⁰ The Act expressly designates pre-twentieth century shipwrecks as archaeological landmarks, thus, by definition, bringing them under the protection and authority of the Commission.⁶¹

The committee is given the power, previously claimed by the Land

⁵⁷ The preface to the bill contains a very thorough resume of the contents and purposes of the law, many of the substantive elements of which supersede prior applicable law on the subject to the extent that this law becomes by its terms the sole vehicle for dealing with problems of this nature. For instance, the preface states that among the purposes of the bill is the object of empowering the relevant committee, established by the bill itself, with authority to issue permits to excavate for historically significant artifacts. This was previously an exclusive function of the Secretary of State in the case of nonresidents (TEX. REV. CIV. STAT. ANN. art. 147(b)(3) (1952)), and a function of a justice in the commissioner's court in the case of state lands desired to be explored by a native. Various other licensing requirements involved the consent of the landowner. *Id.* art. 147(a)(2). Also, the bill attaches criminal sanctions to activities covered in *id.* art. 147(a)(1), such as the mutilation or forging of artifacts. At any rate, these and other laws are repealed by § 22 of the Antiquities Code, *id.* art. 6145-9, § 22 (Supp. 1969).

⁵⁸ Several references contained herein are worthy of note. First, there is the specific mention of the subject of the controversy that skyrocketed this bill to a successful passage—the pre-twentieth century shipwrecks. The bill is not confined to these but goes much further in exerting state authority over all items of historical or archaeological significance, wherever situated. Secondly, the bill mentions both tidelands and submerged lands over which the state has jurisdiction, these including the marginal seas, to the maximum possible extent, within Texas' authority, and not confining state power to the lands covered by the ebb and flow of the tides alone. Lastly, the law includes lost vessels. This subject has been the point of some speculation in the present treasure controversy as to whether the artifacts aboard the lost galleons, being lost, could somehow be "claimed" in a case simply because they were on state property. That is, did their location there simply *make them state property* because of some theoretical, though undefined, principle of law. Authority to support this contention would have to locate a source of state power to, in a sense, "requisition" such lost goods in a constructive fashion. The point of whether the location of the vessels vests the state of Texas with some element of title is, of course, relevant to the salvage claim asserted by the Indiana corporation. The closest thing to relevant authority on this point appears to be such cases as the noted Florida decision, *Florida ex rel. Ervin v. Massachusetts Co.*, 95 So. 2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957), and such cases as *The Meandros*, 16 Mar. L. Cas. (n.s.) 476 (1924), wherein it was held that there was a salvage lien which attached to a foundered vessel even though it had been requisitioned by the Greek Government. Contrary, then, is the case of the *Sylvan Arrow*, 16 Mar. L. Cas. (n.s.) 115 (1923), wherein no lien was found to arise even though the vessel was owned by a private corporation, since it was at the time requisitioned by the government. This relates also to another question—whether the fact that these vessels belonged to another and were subject to some "requisitioning" power by the state prevents either the requisitioning power from being recognized or, if it is recognized, will this fact prevent a salvage lien from attaching? As can be seen from examining these cases in particular, the potential application of their inferences is without bounds.

⁵⁹ TEX. REV. CIV. STAT. ANN. art. 6145-9, § 3 (Supp. 1969).

⁶⁰ *Id.* art. 6145-9, § 4.

⁶¹ *Id.* art. 6145-9, § 5. The same is true in matters pertaining to the dwellings of prehistoric and historical American Indians and the artifacts produced by them,

Commissioner in the Platoro litigation, to enter into contracts for the purpose of discovering and dealing with historically significant artifacts named in the bill.⁶² The committee is empowered to negotiate compensation to be given to the one recovering the artifacts, either in the form of a share of the objects recovered in specie, or in monetary amounts considered by the committee to be reasonable in light of the circumstances of recovery.⁶³ A superior title to the actual items recovered is at all times reserved to the state unless the committee acting as the representative of the state decides that the items should be released.⁶⁴ The committee also is empowered to issue permits for excavation and recovery work, and the committee supervises the work done pursuant to such permit.⁶⁵ The committee decides whether or not any item recovered by permitted archaeological operations shall be retained in specie by the state, and determines a reasonable amount to be paid for artifacts so retained.⁶⁶ The Code goes on to define certain activities which are proscribed entirely, such as forging an antiquity with the intent to deceive, or offering it for sale or exchange.⁶⁷ Also, the Code bans the defacement of various antiquities.⁶⁸ In addition, the Code forbids entering onto the land of another to conduct archaeological or exploratory activities without the consent of the owner or lessee.⁶⁹ The Code attaches both criminal and civil sanctions to violations of its stipulations.⁷⁰

V. CONCLUSION

The recent controversy in Texas over the Spanish treasure found in the

⁶² "The Antiquities Committee shall be authorized to enter into contracts with other state agencies or institutions and with qualified private institutions, corporations, or individuals for the discovery and salvage of treasure embedded in the earth, sunken or abandoned ships or wrecks of the sea, parts thereof, and their contents." *Id.* art. 6145-9, § 9. The Code also provides for approval of such contracts by the Secretary of State.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* art. 6145-9, §§ 10, 11. The committee becomes custodian of any antiquity recovered. It is interesting to note that the Code specifically requires the permit to be kept on hand at the site of the excavation or exploratory operations.

⁶⁶ *Id.* art. 6145-9, § 12. The funds used to purchase such items can come from sources other than official funds. This section provides that the committee may accept any gift, grant, or, seemingly, any property given as a gratuity, and use it for the purpose of paying for property specifically retained. Also, the committee may enter into a contract with anyone (person, firm, corporation, or institution) who desires to advance money to purchase an item in order to obtain possession of it. The state may thereafter take possession of the item by repayment to the one so advancing the money. So this provision will not make the committee a conduit for purely private purchases, the items retained through the advancement procedure are required to be kept on public display, with a nominal fee as the maximum prerequisite to public viewing.

⁶⁷ *Id.* art. 6145-9, § 14. The Code proscribes such activity when done to deceive or for the purposes of a sale or exchange, hence indicating that the motivation for monetary gain need not be present before the Code is violated.

⁶⁸ *Id.* art. 6145-9, § 15. This section pertains to American Indian or aboriginal art or writing. *Id.* art. 6145-9, § 20, has similar provisions for any historically significant item.

⁶⁹ *Id.* art. 6145-9, § 16. This section refers only to "enclosed lands of another." Whether this means enclosed in fact, as by a fence, or merely defined by some recognizable indications of possession, such as landmarks, or markers, is not clear. If the state means actually enclosed land, then a technical trespass could be committed without a violation of the statute.

⁷⁰ As a penalty for violation of the Code, section 17 provides for a fine of not less than fifty nor more than one thousand dollars, or confinement in jail for not more than thirty days, or both fine and imprisonment. Section 18 allows the Attorney General to bring actions on behalf of the state of Texas to seek injunctive relief against current or threatened violation of the Code. *Id.* art. 6145-9, §§ 17, 18.

tidelands amply illustrates the pitfalls that may await a state without sufficient law dealing with the subject of antiquities. The potential loss to Texas resulting from the inadequacy of law in this area may well be more than merely economic, and may entail the dispossession of irreplaceable historical treasures. At any rate, the fate of the artifacts involved is at best unpredictable due to this void in the law.

Moreover, the considerable diversity of laws on this subject among other states indicates that events similar to the recent Texas incident may be repeated in those states. An in-depth look at the provisions of the new Texas Antiquities Act accentuates the inadequacy of most relevant state law on antiquities. Though many of the legislators in the various states may regard the subject of antiquities as exceedingly uninteresting, unimportant from the standpoint of desirable legislation, and largely academic, the potential loss to the state of Texas of the Spanish galleon treasure, and the thoroughness of the Texas Antiquities Code, should logically change their approach.

The historical value of antiquities is concededly no more than the degree to which they are appreciated apart from their monetary worth. Yet such an occurrence as the recent Texas controversy at least raises the suspicion and stimulates a realization that the elements of value with which a mature lawmaking body should be concerned are not always defined in monetary terms. Worthwhile objects of legislation are not always measured by the monetary metes and bounds of a standard which we ourselves have created. The subject of antiquities would be a logical area of consideration for state legislatures which have thus far ignored the problem, not only from the standpoint of avoiding economic loss, but also to secure a measure of protection for the only remaining primary source of historical information: the heretofore undiscovered treasures and artifacts whose type and number have as many potential variations as our historical past itself.