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CHAOS IN KENTUCKY: THE QUESTION OF STANDING TO RECOVER THE FAIR MARKET VALUE OF INDIAN RELICS FOUND UPON PRIVATE PROPERTY

*Steven R. Dowell**

Introduction

The memories of my childhood are filled with recollections of spring mornings. The sun was bright and warm, the air fresh, and the grass sparkling with morning dew. On these mornings, I enjoyed hunting Indian relics.

As I grew older, I realized that there was more to be gained from this pastime than a beautiful collection of prehistoric art. Like Thomas Jefferson,¹ I had a thirst for knowledge of the distant past. and so I joined one of the regional archaeological societies that catered to individuals such as myself. I began researching, writing and conversing with fellow amateurs in a quest to utilize my own thoughts and findings on prehistoric Kentucky.

However, my relic hunting almost came to an end with the introduction in 1987 of Senate Bill No. 178, which substantially toughened section 525 of the Kentucky Statutes.

The purpose of this article is to analyze the factors which instigated the introduction and passage of Senate Bill 178. Furthermore, I will examine and attempt to answer one question in particular: Does the Attorney General of the Commonwealth of Kentucky have standing to initiate and maintain a civil suit to recover the fair market value of Indian relics found

Due to the inability of the law review staff to obtain certain materials cited in this article, we have relied on the author's own research and expertise to verify those materials.—*Ed.*

* J.D., 1988, Salmon P. Chase College of Law, Northern Kentucky University. I would like to thank: Professor Nancy Firak, Art Gerber, Marty White, the Honorable Douglas Richards of the Kentucky Attorney General's Office, Zack Womack, and Judy Duff. This article is dedicated to my wife, Laurie.

1. Thomas Jefferson marked the advent of the specialization of the archaeological discipline by introducing the practice of carving a perpendicular line through a "barrow" (the eighteenth century term for an Indian burial mound) for the systematic study of its internal structure. He published his findings in his book *Notes on the State of Virginia*. See C.W. CERAM, *THE FIRST AMERICAN: A STORY OF NORTH AMERICAN ARCHAEOLOGY* 5-9 (1971).

upon or within private land? Finally, this article will suggest a course of action for future similar situations.

Current Kentucky Law and Property Rights of Landowners

In the 1929 case *Edwards v. Sims*,² a Kentucky appellate court relied on the ancient maxim "whomsoever the soil belongs, he owns also to the sky and to the depths," in determining rights of ownership to property within the ground. The specific problem facing the court in *Sims* involved ownership rights to a cavern which ran under the property of two neighboring landowners, Edwards and Lee.

The landowner-plaintiff (Edwards) discovered the entrance to a cavern. Over time, the plaintiff and several others explored, mapped, modernized and promoted the cavern, later called The Great Onyx Cave, as a tourist attraction. However, Lee filed suit in an attempt to recover a percentage of the realized profits.³ Lee claimed that the cave was partially located under his land and that the plaintiff was technically committing a trespass.

During the pretrial motions, the trial court issued an order directing surveyors to enter Edwards' land and survey the cave for the purpose of securing evidence on the issue as to "whether the Great Onyx Cave extends under and into the land of [Lee]."⁴ A suit was then filed by the landowner-plaintiff in an attempt to block the surveying.

In denying the writ of prohibition, the appellate court reasoned that Lee owned "whatever is in a direct line between the surface of the land and the center of the earth. . . ."⁵ This is the current state of property law in Kentucky.

However, the dissenting opinion posed an alternative rule:

The rule should be that he who owns the surface is the owner of everything that may be taken from the earth and used for his profit or happiness. Anything which he may take is thereby subjected to his dominion, and it may be well said that it belongs to him.⁶

It should be noted that even if the dissenting view had prevailed, any items that could be retrieved by the landowner and

2. 232 Ky. 791, 24 S.W.2d 619 (Ky. 1929), *aff'g*, *Edwards v. Lee*, 230 Ky. 375, 19 S.W.2d 992 (Ky. 1929).

3. *Lee*, 19 S.W.2d at 992.

4. *Id.* at 994.

5. *Sims*, 24 S.W.2d at 620.

6. *Id.* at 622.

used for his profit and/or benefit would still be his property to the exclusion of all.

*Events Leading to the Emergency Introduction
of Senate Bill 178*

The Lease

On October 13, 1987, William D. Lambert, Jr., owner of the Slack Farm,⁷ Henderson, Kentucky, executed a lease which would later become the focus of immense public ire. This instrument granted to Mike Sutton of Harrisburg, Illinois and Harris Tate of Uniontown, Kentucky the right to excavate and remove Indian relics from Mr. Lambert's farm and also provided for further division of the leasehold interest.⁸

The Subleasing

Since the lease had only a five-month duration,⁹ Tate and Sutton began to assemble participants for their dig. Before long, nine individuals joined the agreement as sublessees by tendering an undisclosed amount of money and executing a release of liability.¹⁰ This set the stage to reveal the omnipresent divisive line between amateur and professional archaeologists. The barrier between these two factions is founded on the fact that some amateurs, such as Tate, fail to utilize even a trace of scientific caution. Such people are referred to as "pot hunters" by professional archaeologists. However, there are amateur archaeologists that do employ scientific methods and

7. Affidavit for Search Warrant at 2, *Kentucky v. Harris Dale Tate, Jr.*, No. 88-007-17 (Union County Dist. Ct. Dec. 20, 1987).

8. The instrument reads in pertinent part:

1. Commencing October 13, 1987 and expiring April 1, 1988, lessor leases to lessee the right to excavate Indian relics from lessor's farm, known as The Slack Farm in Union County, Kentucky in the area of forty acres around the site of the former old Slack house on The Slack Farm (the "property"). The Slack Farm is the farm [of] William D. Lambert, Jr. bought in May, 1972.

2. All excavation is to be by hand tools only. The rights granted hereonto [sic] are to search and remove only for [sic] Indian relics. No more than twelve people shall be at the site at any one time and prior to any such person coming on the property, such person shall sign a copy of the attached released and forward it to the lessor. . . .

3. Lessee agrees that he and all of the people assisting him in the search and removal of relics shall comply with all laws, rules and regulations.

Lease Agreement between William D. Lambert, Jr., Mike Sutton and Harris Tate (Oct. 11, 1987).

9. *See id.* § 1.

10. Order at 1-2, *Tate*, No. 88-007-17 (Union County Dist. Ct. Dec. 12, 1987).

who publish descriptive writings. Without such efforts, the world would not be privy to many artifacts and ideas because there is not enough money to professionally fund all archaeological digs.

In addition, the public would face a new moral dilemma. Should we as a civilization respect the tombs of our ancestors or should we continue our quest to understand mankind through history?

The Excavation

After the lease and subleases were executed, the small self-supported group was confident that their project was within the confines of the law.¹¹ In order to locate the burials and artifacts, Tate and the others brought in experts to educate them on "probing." Probing is the use of long, round metal rods inserted into the ground by hand at a very slow rate. Upon hitting an obstruction, a slightly greater force is applied to the probe. If the rod breaks through and continues downward, it is likely that the barrier consisted of bone or pottery. The probe is then retracted, and a dig commenced.

Within several months, the Slack Farm was transformed from a rich, peaceful homestead situated in the Ohio River bottoms to one of the "top five instances of grave desecration in the United States."¹² According to C. Wesley Cowan, curator of archaeology at the Cincinnati Museum of Natural History, about 400 holes containing from 1,000 to 1,200 Indian graves had been dug up and left exposed, and a vast amount of bones and bits of pottery had been strewn about the holes,¹³ along with a sizable amount of recent garbage such as beer cans, soda bottles and sandwich wrappers.¹⁴

The Discovery and Subsequent Investigation

On Dec. 10, 1987, Lt. Col. James H. Evans of the Kentucky State Police received information from the Kentucky Historical Society and a member of the Kentucky Medical Examiner's Office that several unknown individuals were searching for and

11. Louisville Courier Journal, Jan. 4, 1988, at 1, col. 2. It is a common practice among amateur archaeologists to obtain a leasehold interest in property that is thought to contain prehistoric Indian relics before excavation is begun. This prevents the landowner from asserting ownership rights over any artifacts that may have monetary value.

12. *Id.*, Jan. 4, 1988, at 1, col. 1.

13. *Id.*

14. Affidavit for Search Warrant, *Tate*, No. 88-007-17 (Union County Dist. Ct. Dec. 20, 1987).

desecrating Indian grave sites on Slack Farm in violation of section 525 of the Kentucky Statutes.¹⁵ This information was relayed to Sgt. Miles Hart of the Kentucky State Police.¹⁶ Sgt. Hart and Lt. Avery McDonald traveled to the Slack Farm where they encountered a locked gate, and an individual who refused to allow the officers access.¹⁷ At that time, the officers observed people digging and stakes indicative of future or past diggings.¹⁸ Later that day the officers were shown a photograph taken by Paul Monsuer¹⁹ of a human bone found at the Slack Farm.

Based upon their observance, a search warrant was obtained and served at the dig site on Dec. 11, 1987.²⁰ At that time, the site covered a large area and consisted of numerous oddly-shaped holes from two to five feet deep.²¹ Ample evidence of fragmented human skulls was found as well as broken pottery vessels.²² The scene was photographed and several bone fragments were collected as evidence.²³

Later that day, Sgt. Hart contacted the lessor, William D. Lambert, Jr., by phone, and a meeting was arranged between the two individuals for that evening at the lessor's residence.²⁴ At this meeting, Sgt. Hart advised Mr. Lambert of his intention to petition Judge Drury of the Union County District Court to issue an order to cease and desist further excavation until the Kentucky State Police investigation was completed.²⁵ Mr. Lambert agreed, expressing his desirability to obtain a ruling on the law.²⁶

On Dec. 21, 1987, an order executed by Judge Drury was entered. The order reads in pertinent part:

The lease having been given by William D. Lambert, Jr. to Mike Sutton and Harris Tate, and sublet by them to others, concerning . . . The Slack Farm . . . for the purpose of

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* (Monsieur is editor of *The Union County Advocate*, a local newspaper).

20. Addendum to Search Warrant at 1-2, *Tate* No. 88-007-17 (Union County Dist. Ct. Dec. 11, 1987).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

excavating or digging for Indian relics, and certain complaints having been received by the Kentucky State Police as to the possibility of this activity being in violation of . . . K.R.S. 525.110 prohibiting the desecration of any place of burial and Sgt. Miles Hart of the Kentucky State Police having obtained a search warrant on December 11, 1987, after attempting to view the area and being refused and after reviewing a photograph taken by the Union County Advocate purportedly depicting a human leg bone, and in executing said search warrant discovered and observed several portions of what appeared to be human skeletal remains both in open graves and on top the surface in disarray and without any apparent respect for the remains or their place of internment, and Sgt. Miles Hart having been assured by the owner, William D. Lambert, Jr., that he had no objection to an Order preventing any further entry onto [the Slack Farm] and any further excavating or digging . . .

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. There exists probable cause for believing that violations of K.R.S. 525.110 prohibiting the desecration of places of burial, have occurred by reason of the excavating or digging on the [Slack Farm] . . .

2. That there is probable cause for believing that these violations were caused by those parties to the lease . . .

. . .

4. That during this period of investigation any further activities on [the Slack Farm], or any entry thereon by anyone except law enforcement officers, is now prohibited. . . .²⁷

The Indictment

Soon thereafter, the January term of the Union County Grand Jury returned an indictment against all ten lessees and sublessees. The indictment charged that the defendants "intentionally desecrated a place of burial against the peace and dignity of the Commonwealth of Kentucky."²⁸ Arrest warrants were issued, and eight of the ten defendants were taken into custody (two were out of state residents).

27. Order at 1-2, *Tate*, No. 88-007-17 (Union County Dist. Ct. Dec. 21, 1987).

28. Indictment, *Tate*, No. 88-007-17 (Union County Dist. Ct. Jan. 4, 1988).

*Public Outrage as the Impetus for the Emergency
Introduction of Senate Bill 178*

The violation of section 525, desecration of venerated objects, was a class A misdemeanor.²⁹ However, as a result of the Slack Farm incident, emergency legislation was introduced to reclassify section 525.5110 as a felony.

Soon after Judge Drury's order was entered, area newspapers heralded the onset of every phase of the investigation including the arrests and prosecution of the defendants. The natural (and perhaps intended) consequence of such extended exposure was the rallying of support for a group, the International Treaty Council, which opposes operations such as the Union County excavation. Dennis Banks, a self-proclaimed leader of the group, utilized the newspapers in his pleas for stricter penalties than those the existing desecration law allowed.³⁰ Banks, and others from the Council, explained their viewpoint:

It is a universal native American belief that once an individual passes away, he begins a journey to the spirit world. However, this journey is not complete until the mother earth has completely decomposed all bones. Thus, the intrusion of a grave disturbs the departed's progression into the spirit world. Further-more, it is believed that when the 'spirit walk' is interrupted, an imbalance in the spirit world is created. The result is a possible reprisal from God which is directed to all mankind.³¹

In addition to the press, the townspeople of Uniontown and other area cities climbed aboard the bandwagon. Before long, the majority of the Caucasian population responded to the actions of the defendants. Ironically, several Uniontown citizens capitalized on the event by printing and selling sweatshirts commemorating the eventual reburial of unearthed bones. It was claimed, "The fifteen dollar sweatshirts are only the beginning of a fundraising effort expected to last well past the spring ceremony."³² In addition, Dennis Banks urged that the

29. *Id.* A class A misdemeanor is punishable by up to one year in the county jail and up to a \$500 fine.

30. The Kentucky Post, Jan. 30, 1988, at 6K, col. 1.

31. The Cincinnati Enquirer, Feb. 21, 1988, at 1B, col. 2.

32. The Kentucky Post, Jan. 30, 1988, at 6K, col. 1. Soon after the discovery of the Slack Farm excavation, representatives of several Indian tribes and local townspeople organized a ceremonial reburial for the human remains unearthed during the dig. This ceremony was necessary if the deceased were to continue their journey to the spirit world.

wording on the shirts be changed so that they could become collector's items and that items such as souvenir tee-shirts, parkas, and pens be added.³³ The Mayor of Uniontown, Raymond L. Turner, even urged that the site be transformed into a memorial so as to draw tourists and jobs into the community.³⁴

While one may chuckle at the immediate commercialization of both the Union County dig and the planned reburial by the Council and the elders of several Indian tribes, it cannot be forgotten that it was this public outcry that resulted in the indictment of the defendants³⁵ and prompted the introduction of Senate Bill 178 by Senator John Hall, D-Henderson.³⁶

The Statute

On Tuesday, February 9, 1988, a Kentucky Senate committee reported the introduction of Senate Bill 178.³⁷ This was the first step towards splitting the existing statute on desecration of venerated objects into first and second degrees.³⁸ The Senate passed the bill on February 11, 1988, by a vote of 34 to 1.³⁹ Following a House of Representatives Committee's approval, the House also passed Bill 178 with a vote of 89 to 0.⁴⁰ Soon thereafter, Kentucky Governor Wallace Wilkinson signed the bill into law on March 30, 1988, while spectators such as John Hall, the Bill's sponsor, and members of various Indian tribes watched.⁴¹

Kentucky's statutes on desecration of venerated objects was split into first and second degrees. Desecration in the first degree is a felony punishable by one to five years in prison. An offense in the second degree remains a misdemeanor punishable by up to one year in jail.

The increased penalty is founded in part upon practical considerations. Now that a violation of section 525.110 is a felony, Kentucky may obtain the extradition of violators who seek refuge beyond its jurisdiction. However, increased penal-

33. *Id.*

34. *Id.*

35. The Cincinnati Enquirer, *supra* note 41.

36. The Kentucky Post, Mar. 24, 1988, at 2B, col. 1.

37. S. 178, 1988 Reg. Sess., 1988 Ky. Rev. Stat. & R. Serv. 343 (Baldwin).

38. *Id.* See also The Kentucky Post, Mar. 24, 1988, at 2B, col. 1.

39. The Kentucky Post, Mar. 17, 1988, at 1B, col. 1.

40. *Id.*, Mar. 24, 1988, at 2B, col. 1.

41. *Id.*, Mar. 31, 1988, at 2B, col. 1.

ties for criminal violations can be a two-edged sword: juries may be reluctant to convict an individual for taking part in a common hobby such as amateur archaeology. Reluctance to convict may result in reluctance to prosecute. Thus, section 525 could become a rarely enforced statute.

In addition, close attention should be given to the language in the new law which states that a person is guilty of desecration if "he *intentionally* excavates or disinters human remains for the purpose of *commercial sale or exploitation* of the remains themselves, or of any objects buried contemporaneously with the remains."⁴² The language gives the impression that the purpose of the statute is to halt commercial exploitation and not the activities of private collectors. The logical conclusion is that if this commercial intent is not present during the commission of the alleged crime, an individual cannot be guilty of its violation.

The Criminal Trial

Soon after the Union County grand jury handed down the indictments against the ten defendants based on the misdemeanor version of section 525.110, the resident defendants either were arrested or turned themselves over to the authorities, while out-of-state defendants remained at large.

The defense counsel asked the Union County District Court for permission to enter the Slack Farm. An Order was entered by Judge Drury on January 14, 1988, which permitted the defense counsel to "enter upon The Slack Farm and view the area involved therein and make photographs or videos of the scene."⁴³ However, the presence of the Kentucky State Police was required at all times, and the visit could only take place between specific hours on January 16, 1988.⁴⁴ Two days later, on January 18, 1988, the Kentucky State Police, the Commonwealth of Kentucky, the defendants, and the representatives of several Indian tribes agreed that the skeletal remains which were confiscated as evidence could be reburied without prejudicing the investigation, prosecution, or defense of the charges against the defendants.⁴⁵

Originally, the trial date was set for April 25, 1988 but a continuance was granted until June, 27, 1988. This date was

42. KY. REV. STAT. ANN. § 525.105(1) (Baldwin 1989) (emphasis added).

43. Order, *Tate*, No. 88-007-17 (Union County Dist. Ct. Jan. 14, 1988).

44. *Id.*

45. Order, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Jan. 18, 1988).

also continued. On March 22, 1990, the Commonwealth of Kentucky moved to dismiss all ten criminal cases. One can only speculate as to the reasoning behind this move.

The Civil Action

On March 8, 1988, the Commonwealth of Kentucky filed a civil suit in the Union County Circuit Court, Uniontown, Kentucky, seeking compensatory and punitive damages. The complaint alleged four distinct causes of action.⁴⁶

The first count alleged that the defendants caused damage to the environment of the Commonwealth of Kentucky by "injuring, destroying and defacing an archaeological site."⁴⁷ The Commonwealth also asserted that the "commercial exploitation of an important environmental and historical resource"⁴⁸ damaged its "potential ability to develop, protect and/or conserve"⁴⁹ those resources. The Commonwealth further reasoned that repair and salvage work was necessary to restore the dig site.⁵⁰ Finally, the complaint requested a permanent injunction prohibiting the defendants from further digging at the Union County dig site and elsewhere in the Commonwealth.⁵¹

The second count alleged eight different statutory violations which included requiring owners of cemeteries to maintain the property, prohibiting the abuse of a corpse, and requiring persons to report a finding of an archaeological site to professional anthropologists.⁵² The Commonwealth also claimed that civil damages may be recovered for injuries caused by the violation of the enumerated statutes in the second count pursuant to section 446.070 of the Kentucky Revised Statutes.⁵³

46. Complaint, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Mar. 8, 1988).

47. *Id.* at 5.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* The eight violations are found in KY. REV. STAT. ANN. §§ 72.020-.025(10) (requiring persons who discover human skeletonized remains to notify the local coroner and law enforcement agency); § 164.730 (requiring persons to report a finding of an archeological site to professional anthropologists); § 381.697 (requiring owners of cemeteries to maintain the property); § 381.755 (requiring owners of abandoned cemeteries to seek approval of the Fiscal Court to remove or relocate a grave); § 381.755(4) (requiring persons who remove graves to relocate them in a suitable place); § 512.020 (prohibiting abuse of a corpse); § 525.110 (prohibiting desecration of a place of burial); § 512.020 (relating to criminal mischief) (Baldwin 1988).

53. Complaint at 5, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Mar. 8, 1988). This is a civil remedy for the violation of criminal statutes.

The third count alleged that the artifacts were property of the Commonwealth by operation of law.⁵⁴ Because the defendants allegedly removed and exercised dominion and control in a manner inconsistent with the rights of the Commonwealth, the defendants had wrongfully converted the relics, thereby entitling the Commonwealth to replevin.⁵⁵ Also in the event that some or all of the converted items could not be located and returned to the Commonwealth, alternative damages equal to the fair market value were sought.⁵⁶

Finally, the fourth count alleged that the defendants had been unjustly enriched by their "unlawful commercial exploitation of the historical and archaeological resources of the Commonwealth."⁵⁷

On March 16, 1988, one of the civil defendants filed a motion to dismiss for failure to state a claim upon which relief may be granted and also that the plaintiff (the Commonwealth) was not the real party in interest.⁵⁸ Two days later, six other defendants moved to dismiss for the same reasons.⁵⁹ More importantly, the defendants further argued that the Commonwealth lacked standing to bring such an action.⁶⁰ In their supporting briefs, the defendants' reasoning is simple and can be summarized by the following excerpt:

The overwhelming weight of authority in this jurisdiction, requires that before an action can be prosecuted in the name of an individual, you must have a substantial interest in the subject matter of that action and a judicial determination as to a controversy, [sic] cannot be rendered unless the party has a direct interest in that cause of action. *Lexington Retail Beverage Dealers Ass'n v. Department of Alcoholic Control Board, Ky.* 303 S.W.2d 268 (1957) . . . In effect it is essential

54. In its complaint and subsequent memoranda, the Commonwealth does not elaborate on its claim that the prehistoric Indian relics found on the Slack Farm were its property by operation of law. However, a close reading of the argument reveals that it is based upon the reasoning that the burials were made pursuant to the Indians' right of occupancy and, as such, are property rights entitled to the police protection of the Commonwealth.

55. Complaint at 5, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Mar. 8, 1988).

56. *Id.*

57. *Id.*

58. Defendant's Motion to Dismiss, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Mar. 16, 1988).

59. Defendant's Motion to Dismiss, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Mar. 18, 1988).

60. *Id.*

that the individual bringing the cause of action have a personal stake in the outcome.⁶¹

Thus, the defendants argued, the Commonwealth lacked standing to initiate such actions because it has no property interest in the matter. In fact, the Commonwealth might have already weakened its case by admitting that ownership of the subject property was in William Lambert, Jr.⁶²

The Commonwealth's Argument

The Attorney General, whose task was to persuade the court to deny the motions to dismiss, advanced only one argument: that the Attorney General has standing to initiate civil actions to protect the archaeological resources of the State of Kentucky.⁶³

The argument was composed of three subparts. First, the Commonwealth relied upon the contention that the Attorney General had been given broad powers under common law to enforce the laws of Kentucky.⁶⁴ Indeed, it was claimed that the Attorney General was under a duty to exercise all common law authority pertaining to the Office of the Attorney General.⁶⁵ For example, "[a]t common law, [the Attorney General], had the power to institute, conduct and maintain suits and proceedings for the enforcement of the laws of the state, the preservation of order, and the protection of public rights."⁶⁶ It is in this context that the Attorney General argued that he had the authority to maintain the present civil action:

In short, the Attorney General seeks to limit damage to the state's archaeological resources and cultural heritage by enforcing Kentucky law and policy relating to the desecration of graves . . . and to assaults on the human environment by destruction by historic resources⁶⁷

61. Defendant's Memorandum in Support of Motion to Dismiss at 2-3, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Apr. 14, 1988).

62. *Id.* at 3.

63. The Commonwealth's Memorandum in Opposition to Motion to Dismiss at 2, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Apr. 27, 1988). See also *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 866, 867 (Ky. 1974).

64. The Commonwealth's Memorandum in Opposition to Motion to Dismiss at 3, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Apr. 27, 1988).

65. *Id.*

66. *Id.*

67. *Id.*

The Attorney General claimed that the allegations in the civil complaint were sufficient to withstand a motion to dismiss.⁶⁸ Further, the Commonwealth argued that it need not have an ownership interest in a parcel of land in order to have standing to challenge unlawful actions committed thereon.⁶⁹ In support of this reasoning, the Attorney General pointed out numerous instances when the Commonwealth may exert its police power regarding the use of private property.⁷⁰

In addition, the Commonwealth asserted that its police power had been extended by statute to both cemeteries and archaeological sites located on government property.⁷¹ For instance, it is a statutory violation for a landowner to move a cemetery located on his property without the consent of the county fiscal court.⁷² Also, the landowner must maintain such cemeteries in good order.⁷³ Furthermore, it is a criminal offense in Kentucky to desecrate a place of burial.⁷⁴ In fact, Kentucky courts, recognize a civil cause of action for the desecration of a grave of a next of kin.⁷⁵ In addition, surface coal mining is prohibited within 100 feet of a cemetery.⁷⁶ The Attorney General also noted that the importance of preserving archaeological sites has been recognized by both the Federal Government⁷⁷ and Kentucky.⁷⁸

The Commonwealth also asserted that the Slack Farm was a burial ground (not abandoned property, as the defense argued). The Attorney General referred to the overwhelmingly supportive evidence obtained during the investigatory phase, i.e., the human bones observed and collected by the police and the photographs taken of the burial sites. More importantly, the Commonwealth cited the statute which outlined what can be used as evidence for purposes of determining whether a tract of land was used for burial purposes:

The fact that any tract of land has been set apart for burial purposes and that a part or all of the grounds has been used

68. *Id.* at 2.

69. *Id.* at 3.

70. *Id.* at 4.

71. *Id.*

72. See KY. REV. STAT. ANN. § 381.755 (Baldwin 1988).

73. See *id.* § 381.697.

74. See *id.* § 525.110.

75. See *North East Coal Co. v. Pickelsimer*, 253 Ky. 11, 68 S.W.2d 760, 763 (Ky. 1934).

76. KY. REV. STAT. ANN. § 350.085(3) (Baldwin 1988).

77. See Archaeological Resources Protection Act, 16 U.S.C. 470aa (1979).

78. See Kentucky Antiquity Act, KY. REV. STAT. ANN. § 164.705 (Baldwin 1988).

for burial purposes shall be evidence that such grounds were set aside and used for burial purposes. The fact that graves are not visible on any part of the grounds shall not be construed as evidence that such grounds were not set aside and used for burial purposes.⁷⁹

As to the issue of the real party in interest, the Attorney General contended that direct ownership of real estate was not required or else “[m]any . . . laws would be toothless if the state could not enforce them through appropriate civil litigation.⁸⁰

The Attorney General contended that the statutes define an ‘owner’ as a person who possesses any interest in the real estate at issue.⁸¹ The argument continued that “[t]he defendants cannot simultaneously assert that the lease in question gave them a right to dig for artifacts while disclaiming any interest in the land which would require them to respect the duties and responsibilities of owning that interest.”⁸²

Finally, in support of its contention that the Commonwealth has standing to initiate and maintain a civil cause of action to protect archaeological resources, the Attorney General asserted that the State has a sovereign interest in protecting prehistoric Indian burial grounds.⁸³ The Attorney General utilized creative and deceptive legal reasoning: the ultimate fee in property (such as the Slack Farm) was held in the Crown prior to the American Revolution and, afterward, it was passed on to the States of the Union.⁸⁴ However, this fee was and always has been encumbered by the Indians’ right to occupancy,⁸⁵ a right respected by the state and federal courts as well as protected by the state.⁸⁶ Therefore, the ancient inhabitants of the Slack Farm

79. The Commonwealth’s Memorandum in Opposition to Motion to Dismiss at 2, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Apr. 27, 1988). See also *Ky. REV. STAT. ANN.* § 381.710 (Baldwin 1988).

80. The Commonwealth’s Memorandum in Opposition to Motion to Dismiss at 5, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Apr. 27, 1988).

81. Reply Memorandum of the Commonwealth in Opposition to the Motion to Dismiss at 3-4, *Tate*, No. 88-CI-43 (Union County Cir. Ct. May 19, 1988). See *Ky. REV. STAT. ANN.* § 381.231.

82. Reply Memorandum of the Commonwealth in Opposition to the Motion to Dismiss at 3-4, *Tate*, No. 88-CI-43 (Union County Cir. Ct. May 19, 1988).

83. The Commonwealth’s Memorandum in Opposition to Motion to Dismiss at 6, *Tate* (Civ. No. 88-CI-43) (Union County Cir. Ct. Apr. 27, 1988).

84. *Id.*

85. *Id.*

86. *Id.* See *Clark v. Smith*, 38 U.S. (13 Pet.) 195 (1839).

area had an inherent right to establish a cemetery.⁸⁷ Furthermore, a cemetery is viewed as an easement against the land,⁸⁸ rendering it subject to reasonable regulation and control by the state.

The Commonwealth concluded that the prehistoric burial site located on the Slack Farm is entitled to protection pursuant to its police powers. Its continued that the need for such protection exists even though the next of kin of the deceased could not longer be identified.⁸⁹ In closing, the Commonwealth claimed that the burial rights had escheated to the State by virtue of statutory mandate.⁹⁰ Thus, the Commonwealth has the duty to maintain the burial ground in accordance with public dignity and respect for the dead.⁹¹

The Defendants' Argument

The defendants noted first that all of the statutes relied upon by the Commonwealth regarding archaeological sites refer to areas located on "land owned or leased by the Commonwealth or any state agency or political subdivision or municipal corporation of the Commonwealth."⁹² Also, the federal act relied upon by the Commonwealth was directed at sites located on government property,⁹³ not private property. Therefore, because the Slack Farm was privately owned, the Commonwealth lacked standing to initiate and maintain the present cause of action. The defense continued that many of the cited examples used in support of the Commonwealth's position that common law authority may recover damages pertained to state environmental protection statutes.⁹⁴ These statutes dealt specifically with land and water owned and controlled by the state. The defendants pointed out that the Commonwealth must have a property interest in order to maintain the action under these statutes.

87. The Commonwealth's Memorandum in Opposition to Motion to Dismiss at 6, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Apr. 27, 1988).

88. *Id.* (citing *Haas v. Gahlinger*, 248 S.W.2d 349, 351 (Ky. 1952)).

89. *Id.* at 7.

90. *Id.* See also KY. REV. STAT. ANN. §§ 381.720-760 (Baldwin 1988).

91. Commonwealth's Memorandum in Opposition to Motion to Dismiss at 7, *Tate*, No. 88-CI-43 (Union County Cir. Ct. May 17, 1988).

92. Defendant's Reply Memorandum to Plaintiff's Opposition to Defendant's Motion to Dismiss at 2, *Tate*, No. 88-CI-43 (Union County Cir. Ct. May 17, 1988).

93. *Id.* See also Archaeological Resources Protection Act, 16 U.S.C. § 470aa (1979).

94. The Commonwealth's Memorandum in Opposition to Motion to Dismiss at 4, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Apr. 27, 1988).

As to the statutory requirements that landowners are required to notify the county fiscal court whenever a burial is disturbed,⁹⁵ the defendants' argued that the statute applied only to landowners. Therefore, because William Lambert, Jr., the owner of the Slack Farm, was not a party to the suit, the statute was inapplicable. In addition, the statute did not confer authority to the Commonwealth to initiate and maintain civil suits against non-landowner individuals (such as the present defendants) who enter the property and remove Indian relics.⁹⁶

The defense also contended that because the Slack Farm never had "the dignity or notoriety of designation as a public monument, cemetery or public place,"⁹⁷ and because the site contained evidence of habitation, such as the fire pits,⁹⁸ then the artifacts should be treated as abandoned property and the property of those who lawfully lease the premises.⁹⁹

Finally, the defense asserted that the Commonwealth could not identify a specific statute that would give it standing to maintain suits such as those that are the subject of this litigation. Before the Commonwealth could rely upon section 446.070 (which provides for a cause of action for one injured by the violation of a statute) there must be (a) a statutory violation, and (b) a *person* must be injured.[emphasis added]¹⁰⁰ The defendants maintained section 446.070 cannot be utilized by the Commonwealth because there have been no statutory violations and the Commonwealth cannot "reasonably assume the status of a person in this matter."¹⁰¹

The Judgment

Judge Will Tom Wathen of the Union County Circuit Court entered his judgment on August 2, 1988, which declared that the Commonwealth did not have standing to initiate the civil suit.¹⁰² In the opinion, Judge Wathen stated that the Slack Farm belonged to a private individual (William Lambert, Jr.), therefore, the Commonwealth had no interest in the property in dispute and was not a real party in interest.

95. *Id.* See also KY. REV. STAT. ANN. § 381.695-.755 (Baldwin 1988).

96. *Id.* at 5.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* See also KY. REV. STAT. ANN. § 447.070 (Baldwin 1988).

101. *Id.*

102. Order, *Tate*, No. 88-CI-43 (Union County Cir. Ct. Aug. 2, 1988).

In addition, Judge Wathen found that the environmental protection statutes did not grant the Attorney General the power to initiate lawsuits of the type involved here. The Judge stated that "environment" was not defined in the statutes, and there was no indication that the Legislature intended the language to empower the Commonwealth (via the Attorney General) with the ability to participate in litigation of a solely private nature.¹⁰³ Furthermore, Judge Wathen determined that the Commonwealth was under no statutory obligation to repair and salvage the historical and archaeological sites on the Slack Farm.¹⁰⁴

The decision also held that there was no authority to support the Commonwealth's arguments that the artifacts had escheated to the state¹⁰⁵ or that the state had a sovereign interest in protecting the Slack Farm burial grounds pursuant to the Indians' right of occupancy.¹⁰⁶ In closing, Judge Wathen concluded that the issue at hand was a problem for the legislature, not the judiciary.¹⁰⁷

Analysis

The Effect of Judge Wathen's Decision

Judge Wathen's decision contains two implications. First, he negates the reasoning behind the increased penalty of Kentucky's grave desecration statute, section 525.110. In holding that the Commonwealth does not have an interest in maintaining such civil suits, his decision told potential violators in effect to "do it right if you are going to do it at all"; in other words, make it worth the felony.

More importantly, it is obvious the Commonwealth of Kentucky does not possess an ownership interest in prehistoric Indian relics located on or within private property. According to Judge Wathen, such an interest is absent even if these objects are buried contemporaneously with human remains. The result is that the landowner must be made a party-defendant before

103. *Id.* at 2.

104. *Id.*

105. *Id.*

106. *Id.* at 4.

107. *Id.* at 5. In addition, Judge Wathen found that "unjust enrichment" was a contract theory inapplicable to the litigation because the Commonwealth was not in a contractual relationship with the defendants.

a suit to recover artifacts or their fair market value may be maintained.¹⁰⁸

This leads to an area of property law which should be dispositive of claims regarding prehistoric archaeological sites on private land. Historically, personal property law has zealously guarded the rights of landowners, and Kentucky is not an exception. Prehistoric Indian relics should be treated as property of the landowner. These relics are abandoned, accessible, and of beneficial use or potential profit.

Conclusion

Large scale amateur archaeological excavations, such as the Union County dig, often place amateur archaeologists in a bad light. It will be some time before western Kentucky and southern Indiana can put this tragedy in the past. However, state regulation of such activities should not affect privately owned lands.

Judge Wathen's decision adhered to Kentucky laws regarding the real party in interest rule. Furthermore, Kentucky property law mandated a decision favoring the defendants because the Commonwealth clearly does not have an interest in prehistoric Indian relics located upon or within private land. Also, it appears that the Wathen decision is evidence of a judicial reluctance to intrude upon private property rights.

As an amateur archaeologist, I do not condone large-scale destruction of ancient burial grounds. American society must respect the religious beliefs and the ancestors of Native Americans, while continuing our quest for knowledge. The answer is not increased state regulation of private property. Rather, it is up to each individual to be mindful of our moral and ethical obligations to one another.

108. In his Order dated Aug. 2, 1988, Judge Wathen pointed out that William Lambert, Jr., the owner of Slack Farm, was not made a party to the litigation.

Addendum: An Update

Since the writing of this article, several related developments have occurred in the Kentucky Legislature. During the January, 1990 session of the Kentucky General Assembly, Senator John Hall, the Senator who had introduced the Slack Farm legislation, attempted to introduce a similar bill.¹⁰⁹

This proposed legislation tried to make the unauthorized excavation and/or digging of any archeological site a criminal offense. The term "archeological site" was broadly defined to include "any place artifacts of value for the scientific study of historic or prehistoric human life and activities may be found, including but not limited to, historic and prehistoric structures, ruins, pictographs and petroglyphs, mounds, forts, mines, farmsteads, quarries, house sites and industrial or commercial sites."¹¹⁰

In order to be authorized, an archeological survey and/or plan would have had to be submitted to a newly-created panel at the University of Kentucky's Department of Anthropology. This board almost had the ultimate say as to whether or not a permit for such excavations will be issued.¹¹¹

The most important aspect of this proposed legislation was the fact that it contained a forfeiture clause. This clause would have required courts in the Commonwealth of Kentucky to seize any and all automobiles and/or other equipment used to the removal, and/or all items removed from any excavation.¹¹²

The passage of this bill promised to spawn litigation. The final version was wrought with irregularities. However, the fact that the general population of Kentucky seemed to back this legislation supplied further proof of general anger toward the "Slack Farm desecrators" as well as proof of the state's changing attitude towards the values and mores of Native Americans.

On March 16, 1990 the Senate Judiciary Committee tabled the legislation, effectively killing it for two years until the next meeting of the Kentucky General Assembly. This action was taken in large part due to a letter-writing campaign mounted by hundreds of avocational archeologists.

109. S. 354, 1990 Ky. Reg. Sess.

110. *Id.* at § 1(2).

111. *Id.* at § 2(2).

112. *Id.* at § 11(2).

