

# Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries

*Modern technology has made the location and retrieval of shipwrecks possible, but with the rise of statist attitudes in the United Nations, that may change*

By Mark A. Wilder

IN THE 1977 motion picture, *The Deep*, a young couple, while scuba diving in the Bahamas, discover an ampoule of morphine lying near an old World War II freighter. After befriending a local treasure salvor, the group endeavors to remove all the morphine ampoules from the wreck and destroy the drugs before they fall into the hands of a local bad guy. But the adventure deepens when an old grenade explodes, causing the “floor” of the wreck to collapse, revealing an 18th century Spanish vessel loaded with treasure. In the happy ending, which only Hollywood could create, the team recovers a booty of gold jewelry, the morphine is destroyed and the bad guys get their just comeuppance.

For the adventuresome, this film had a little bit of everything: beautiful scuba diving, treasure, danger, sharks and even voodoo. What it did not have was the probable litigation over ownership rights in the treasure.

## LAW OF SALVAGE

Salvage has been defined as “service voluntarily rendered in relieving property from an impending peril at sea or other navigable waters by those under no legal obligation to do so.”<sup>1</sup> The law of marine

*Mark A. Wilder, a 1999 graduate of the University of Cincinnati Law School and member of the Ohio bar, is a clerk for Judge Robert S. Kraft in the Hamilton County (Ohio) Common Pleas Court judge. He received his B.A. degree in 1987 from the University of Cincinnati.*

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salvage has as its origins the sea laws of Byzantium and the Mediterranean seaport cities,<sup>2</sup> and its earliest roots can be traced to the Rhodian era, 900 years before the Christian era. Rhodian laws were the first to allow a salvor to claim a reward based on a percentage of the cargo or ship recovered and the danger involved in the operation. Awards varied from 10 percent for cargo washed ashore to between 33 and 50 percent for recovered cargo, based on the depth of a shipwreck.

The law of salvage has three areas: property salvage, life salvage, and treasure salvage, the last being the focus of this article. In 1869 in *The Blackwall*,<sup>3</sup> the U.S. Supreme Court set forth the basic principles of maritime salvage, including the principle that a salvor’s efforts need to be successful in order to recover a reward, which is known as the “no cure, no pay” principle in contract salvage. The Court stated:

Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part,

1. 3A MARTIN J. NORRIS, BENEDICT ON ADMIRALTY: THE LAW OF SALVAGE § 2, at 1-4 (7th ed. 1991). This is the source of several statements in this article.

2. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 14-1, at 782 (1994).

3. 77 U.S. 1 (1869).

from impending peril on the sea, or in recovering such property from actual loss, as in the cases of shipwreck, derelict, or recapture. *Success is essential* to the claim; as if the property is not saved, or if it perish, or in case of capture if it is not retaken, no compensation can be allowed.<sup>4</sup>

The Court stated that providing compensation in the maritime context is consonant with the public policy of encouraging rescues at sea:

Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a quantum meruit, . . . but as a reward for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property. Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation.<sup>5</sup>

*The Blackwall* is often cited for the factors relevant in determining the amount of a salvage award, echoing the factors first established during the Rhodian period:

(1.) [t]he labor expended by the salvors in rendering the salvage service; (2.) [t]he promptitude, skill, and energy displayed in rendering the service and saving the property; (3.) [t]he value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed; (4.) [t]he risk incurred by the salvors in securing the property from the impending peril; (5.) [t]he value of the property saved; (6.) [t]he degree of danger from which the property was rescued.<sup>6</sup>

### LAW OF FINDS

The focus of salvage law is on the right to compensation for one's successful efforts, not title to the property. Title is presumed to still exist in the original owner. In contrast, the object of the law of finds is to vest title in the person who reduces abandoned property to his possession.

The law of finds has its root in the common law in cases such as *Armory v. Delamire*<sup>7</sup> and *Pierson v. Post*.<sup>8</sup> In *Armory*, a 12th century case, a chimney sweep who found an apparently lost jewel was held by the English court to have title superior to all others except the true owner. In 1805 in *Pierson*, a New York court denied a hunter's claimed right to a fox, holding that mere pursuit of the animal did not vest title to it. Title was given to a second hunter who intervened and actually reduced the fox to his possession.

Application of the law of finds "necessarily assumes that the property involved was never owned or was abandoned,"<sup>9</sup> and therefore the "ancient and honorable principle of 'finders, keepers' applies."<sup>10</sup>

The common law doctrine of finds law is available to a plaintiff in admiralty court under the "savings to suitors" clause of the Judiciary Act of 1789, which preserves the common law remedy. Thus, a plaintiff is permitted to plead both salvage law and the law of finds, so that if the court denies finds, salvage law can serve as a backup.<sup>11</sup>

### LAW OF SALVAGE V. LAW OF FINDS

Once an admiralty court establishes jurisdiction, the next step is to decide whether the law of salvage or the law of finds applies. This inquiry ultimately requires examination of the particular facts and circumstances of each case. The key issue is whether the owner of the vessel—

4. *Id.* at 12 (emphasis supplied).

5. *Id.* at 14.

6. *Id.* at 13-14. For factors during the Rhodian period, see NORRIS, *supra* note 1.

7. 1 Strange 505 (K.B. 1172).

8. 3 Cai. R. 175 (Sup.Ct. N.Y. 1805).

9. *Hener v. United States*, 525 F.Supp 350, 356 (S.D. N.Y. 1981).

10. *Martha's Vineyard Scuba Headquarters Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987).

11. See Barlow Burke, Jr., *A Reprise of the Case of Eads v. Brazelton*, 44 ARK. L. REV. 425, 456 & n.129 (1991). See also SCHOENBAUM, *supra* note 2, § 2-2, at 79.

or an insurer that asserts ownership through subrogation—has abandoned the wreck and its cargo. Plaintiffs seeking title to a wreck or a preliminary injunction for sole exploration rights usually describe the vessel as “wrecked and abandoned.”<sup>12</sup>

Abandonment in the maritime salvage context has been defined as the “act of leaving or deserting such property by those who were in charge of it, without hope on their part of recovering it and without the intention of returning to it.”<sup>13</sup> However, the mere fact that property is lost at sea does not divest the owner of title.<sup>14</sup>

As a general principle, an admiralty court will favor salvage law over the law of finds because salvage law is more supportive of the public policy issues of preservation of maritime property and return of distressed property to a use beneficial to society. As a result, the law of finds applies in only two situations: “(1) where the owners have expressly and publicly abandoned their property; and (2) where items are recovered from an ancient shipwreck and no one comes forward to claim them.”<sup>15</sup>

### A. Cases Applying Law of Finds

According to one writer,<sup>16</sup> *Eads v. Brazelton*<sup>17</sup> was the first U.S. maritime case in which the law of finds was applied to a sunken shipwreck. *Eads* involved the steamboat *America*, which sank in the Mississippi River between Tennessee and Arkansas in 1827 with a load of approximately 3,000 lead “pigs,” shot and bars. In the two weeks after the sinking, the owners of the *America* salvaged animal furs, U.S.

property, the ship’s boilers and machinery, and a portion of the lead. However, the majority of the lead pigs and bars were left.

Two years later, an island formed over the wreck large enough to support a stand of trees 30 to 40 feet tall. The island lasted for about 20 years before being washed away by the river.

In 1855, Brazelton attempted to salvage the remaining lead, but he was drawn away from the wreck site on other business and mechanical problems. Before he left the site, however, he placed a buoy marking the sunken vessel and also marked trees along the shoreline to enable him to find the wreck in the event the buoy was washed away. About eight months later, Eads, a rival salvor, began salvaging operations and recovered a load of lead.

Despite a preliminary injunction awarded to Brazelton preventing Eads from further salvaging operations, Eads returned to the wreck site alongside Brazelton and continued his recovery efforts. The trial court fined Eads \$1,000, which was paid to Brazelton as compensatory damages, and Eads appealed.

The Supreme Court of Arkansas was faced with two issues—had the *America* been abandoned and did Brazelton’s marking of the wreck constitute possession of the wreck. The court held that the vessel had been abandoned, but that possession was lacking. Possession, the court held, requires an actual taking with the “intent to reduce it to possession.” The court stated that constructive possession would have been found had Brazelton placed his boat over the wreck with the intent and ability to raise the cargo, as this would give rival salvors notice of possession and intent to salvage.

*Brady v. Steamship African Queen* dealt with which of two rival salvors were to be granted title to shipwrecked property.<sup>18</sup> In 1958, the *African Queen* ran aground off the coast of Maryland. The ship split in two, the stern section exposed on a shoal, while the bow floated some distance away.

12. See Craig N. McLean, *Law of Salvage Reclaimed: Columbus-America Discovery v. Atlantic Mutual*, 13 BRIDGEPORT L. REV. 477, 499 (1993).

13. See NORRIS, *supra* note 1, § 134, at 9-10.

14. See *The Akaba*, 54 F. 197, 200 (4th Cir. 1893).

15. SCHOENBAUM, *supra* note 2, § 14-7, at 800; *Columbus-America Discovery*, 974 F.2d at 460-61.

16. McLean, *supra* note 12, at 480.

17. 22 Ark. 499 (1861).

18. 179 F.Supp. 321 (E.D. Va. 1960).

One salvor named Warner claimed title to the stern section, alleging that he boarded this portion of the vessel, posted notice of his claim on the vessel, and published notice in a newspaper asserting his legal rights.

However, a rival salvor, collectively named Brady, was found by the court to have performed all the incidents necessary for a successful salvage claim. Brady had boarded the stern section and remained aboard for more than six months before eventually successfully towing the stern section to port. Abandonment was not an issue because the owner and its underwriters had affirmatively abandoned the vessel. In addition, the salvage services far outweighed the value of the stern section recovered.

Considering these facts, the federal district court found it unnecessary to resolve the competing claims through a salvage or finds law application. Rather, it focused on the elements of possession and intent to salvage and found title in the stern section in Brady, basing its decision on the physical actions in recovering the property rather than Warner's assertion of legal rights through publication.

All in all, with abandonment found to exist, the court nonetheless could be considered to have applied the law of finds.

In *Wiggins v. 1,100 Tons, More or Less, of Italian Marble*, salvors were awarded title to the 123 tons of marble they raised from a Norwegian barkentine, the *Cynthia*, which ran aground off the coast of Virginia in 1894.<sup>19</sup> The vessel laid in shallow water with its main mast above water for 66 years before successful salvage efforts were attempted.

The controversy was whether the Virginia Commissioner of Wrecks had authority to grant exclusive salvage rights to one salvor over another. The federal district court found that he did not possess such power under a Virginia statute because the statute merely allowed the commissioner to act as a bailee of the property for the true owner.

While not deciding the constitutionality of the Virginia statute, which permitted the state to lay claim to shipwrecked property, the court held that since the commissioner was fully aware of the ship's whereabouts and cargo, his inaction over the 66-year time frame precluded him from granting any exclusive salvage rights to a single party. So, the salvors who had recovered 123 tons of the marble were awarded title over the salvors who were subsequently granted the exclusive salvage rights by the commissioner. While the lapse of time and nonuser are not sufficient in and of themselves to constitute an abandonment, the court stated, they are factors that may, under certain circumstances, give rise to an implication of intent to abandon.

Although not involving an ancient vessel, *Moyer v. Wrecked and Abandoned Vessel, Known as the Andrea Doria* dealt with the famous *Andrea Doria* wreck and illustrates use of the inference of abandonment to award title to a salvor.<sup>20</sup> *Andrea Doria*, an Italian vessel, collided with the Swedish liner *Stockholm* and sank on July 26, 1956, off the coast of New Jersey in international waters. Societa D'Assicurazione (Societa), an Italian insurer, paid the claims for the loss of the vessel and was assigned ownership rights through subrogation.

John Moyer sought a preliminary injunction allowing him the exclusive right to find and salvage the ship's bell and any remaining Italian mosaic friezes that may be discovered. He previously had salvaged two Italian mosaic friezes and had them in his possession at the time the case was heard.

The federal district court found abandonment and awarded title to Moyer of the two friezes already recovered. It also granted him a preliminary injunction for the exclusive right to search and salvage the ship's bell and any remaining friezes that he might discover.

19. 186 F.Supp. 452 (E.D. Va. 1960).

20. 836 F.Supp. 1099 (D. N.J. 1993).

Relying on *Wiggins*, the court stated that an intent to abandon may be inferred from circumstantial evidence including lapse of time and nonuse by the owner. Although Societa never actually waived its ownership interest, the court inferred abandonment because of its inaction in the face of open salvage efforts on the *Andrea Doria* by amateur and professional salvors. Societa had not mounted any salvage efforts of its own after it had rejected over a hundred salvage contract offers, had failed to assert its title rights in items recovered ranging from a bronze statue to the purser's safe, and failed to take any measures to assert title during an internationally televised program featuring the recovery and opening of the safe.

Perhaps one of the most famous and richest of wrecks to be discovered is recounted in *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Vessel Believed to be the Nuestra Senora de Atocha*.<sup>21</sup> In 1622, the *Atocha*, as a member of a fleet of Spanish galleons loaded with gold, sank during a hurricane near the Florida keys. The loss of the fleet included 550 dead and treasure estimated at the time of the case to be worth \$250 million. In 1971, an expedition team led by treasure hunter Mel Fisher located the *Atocha* and sued for possession and title to the wreck and its cargo. The only other party to the litigation was the United States, which also claimed title.

The Fifth Circuit affirmed the district court's decision applying the law of finds and holding for Fisher's team. However, the court declined to find exclusive title in the salvors, despite a stipulation by the parties that the vessel had been abandoned. In doing so, the court left open claims by others, if any, who were not parties to the case.

In addition to the abandonment issue, the court's decision fostered the growth of modern treasure hunting through its treatment of the definition of marine peril and the government's sovereign prerogative claim. The court determined that the United States had misunderstood salvage law when the United States asserted that a salvage claim did not exist. The United States had argued that the plaintiff was not entitled to a salvage award because the necessary element of marine peril was lacking. The court responded by expanding the definition of marine peril to include the risk of loss pertinent to a sunken vessel. Marine peril is not limited to the usual threats of fire, piracy and storms, it stated, but also includes the risk of loss due to "actions of the elements."

The court also rejected the government's argument that American law had adopted the British common law doctrine under which abandoned property recovered by private citizens goes to the state. It adopted an "American Rule" vesting title in the finder.

In other cases, although a finding of abandonment and the subsequent application of the law of finds would lead one to assume title in the finder, the 11th Circuit in *Chance v. Certain Artifacts Found and Salvaged From the Nashville*<sup>22</sup> and *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*<sup>23</sup> held otherwise, relying on an exception to the law of finds: where abandoned property is found embedded in the soil, the property belongs to the landowner. In both cases, the courts awarded title to both shipwrecks and their cargoes to the respective governments where the wrecks were found.

*Chance* involved the Civil War era steamship, *The Nashville*, which was captured by the Confederates and used to destroy Union shipping. Rechristened *The Rattlesnake*, it ran aground and was subsequently destroyed and sunk by a Union vessel while on the Ogeechee River in Georgia in 1863. The vessel became partially imbedded in the riverbed during its

21. 569 F.2d 330 (5th Cir. 1978) (Treasure Salvors I).

22. 606 F.Supp. 801 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985).

23. 758 F.2d 1511 (11th Cir. 1985).

slumber encompassing more than a century.

In 1979, salvors applied for permission from Georgia to recover *The Nashville*, but that was denied. Nevertheless, they commenced salvaging, recovered numerous items and filed an action to ascertain title or a possible salvage award.

The federal district court concluded that the law of finds applied because an inference of abandonment arose from the circumstance that *The Nashville* had remained unclaimed since its sinking in 1863. Instead of awarding title to the salvors as finders, however, the court ruled that since the vessel was embedded on state property, even though partially, Georgia was the owner, thereby falling within an exception to the law of finds. The court also denied any salvage claim because of Georgia's 11th Amendment defense and its finding that the salvors had not fulfilled the required elements of a successful salvage claim. The court concluded that by not making the necessary conservation efforts, the artifacts recovered from *The Nashville* were subject to a much greater rate of deterioration than if they had remained on the river bottom, and thus rescue from marine peril had not occurred.

The court's emphasis on conservation efforts reflects the modern-day concern over preservation of historical wrecks and artifacts. However, the court could have just as easily denied a salvage award based on bad faith on the part of the salvors. They had engaged in salvage operations despite the refusal of a salvage permit by Georgia. Therefore, the court stated, they were trespassers.

In *Klein*, a sport diver spearfishing in 1978 in Biscayne National Park, Florida, owned by the United States, discovered an 18th century English war vessel. He commenced recovery efforts and filed an action claiming ownership of the vessel or, in the alternative, a salvage award from the government.

The 11th Circuit affirmed the district court's denial of the claim of ownership

and any salvage award. While the application of the law of finds was correct, given the abandonment inferred from the passage of time, the exception whereby title is given to the landowner was found to apply since the vessel was embedded on national park soil.

A dissent relied on the Antiquities Act of 1906 instead of the exceptions to the law of finds to deny the plaintiff title in the recovered property. The dissent reasoned that the plaintiff was entitled to a salvage award, however, because his efforts actually located the vessel, whereas the United States was only generally aware of the vessel's existence, not its precise location.

## B. Cases Applying Salvage Law

In *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin,"*<sup>24</sup> the side-wheel steamer *Lady Elgin* was found not to have been abandoned by the insurer, which had been assigned ownership rights through subrogation. The *Lady Elgin* sank in Lake Michigan off Highland Park, Illinois, in early September of 1860 after a collision with the schooner *Augusta*. The vessel had been chartered by the Union Guards of Milwaukee's Irish, Democratic "Blood Third" Ward for transportation of them and their families from Milwaukee to Chicago to a political rally for Stephen Douglas, then a candidate for President of the United States. On the return trip, it was rammed by the *Augusta* and sank in a tragedy claiming the lives of 297 of the 393 aboard. The Aetna Insurance Co. paid the claims on the *Lady Elgin* and became owner of the vessel through subrogation.

Salvor Harry Zych located the *Lady Elgin* in 1989 and filed an action seeking title to the vessel under the law of finds. The State of Illinois intervened, moving to dismiss any finding of ownership against the state and claiming immunity from suit

24. 755 F.Supp 213 (N.D. Ill. 1990), vacated in part, 960 F.2d 665 (7th Cir. 1992).

via the 11th Amendment. In the meantime, Zych and other individuals formed with the Lady Elgin Foundation, which had entered an agreement with CIGNA, the successor of Aetna. In exchange for 20 percent of proceeds from the sale of items recovered from the *Lady Elgin*, the agreement gave the foundation ownership of the wreck. All was looking well for Zych until a disagreement occurred between him and the foundation over the ownership of the wreck, which resulted in litigation.

While conceding the validity of the agreement between CIGNA and the foundation, Zych nevertheless claimed ownership on the ground that the wreck had been abandoned. Zych alleged that abandonment had occurred because of the lapse of 129 years and CIGNA's failure to make any efforts during this period to recover the vessel. The foundation defended on the ground that failure to make recovery efforts was owing to the lack of technology to locate the wreck until Zych was able to locate it in 1989 through the use of new technology. The foundation also filed Aetna documents from the 1860s negating any inference of abandonment.

The federal district court agreed with the foundation, stating that Aetna was not required to engage in salvage efforts to avoid abandoning its interest when those efforts would have had minimal chances for success. The court supported its finding on its view that admiralty is reluctant to find abandonment when not proven with "strong and convincing evidence." The court held that the foundation had sole ownership rights as against the State of Illinois because of the state's waiver of its opportunity to respond. This part of the decision was vacated and remanded by the Seventh Circuit.<sup>25</sup>

In addition to the application of salvage law to determine rights in an individual wreck, courts sometimes are asked to de-

termine rights to salvage in a specific geographical area where a wreck has been scattered and where the location of the vessel remains only an approximation. This is was the situation in *MDM Salvage Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*<sup>26</sup> and *Hener v. United States*.<sup>27</sup>

In *MDM Salvage Inc.*, rival salvors sought exclusive salvage rights and salvage awards over certain geographical areas believed to contain the remains of two ancient shipwrecks. The geographical areas requested overlapped in an area known as "Coffins Patch" near Marathon, Florida. The vessels believed to have been located in the area included the *San Fernando* and the *San Ingacio*, which were part of a 1733 Spanish Fleet. However, neither vessel had been located and up until the time of the litigation only a limited amount of artifacts had been recovered by each salvor. A third salvor intervened, requesting that neither salvor be granted exclusive salvage rights.

The court refused to grant injunctive relief constituting exclusive salvage rights to either salvor, citing insufficient efforts to preserve the wreck sites for historical and archeological research. Neither party was found to have made any significant commitments of time, capital or effort to have established notorious dominion and control over the sites at issue to warrant exclusive salvage rights. However, the court did grant salvage awards to each party for the items each had recovered from Coffins Patch.

In *Hener*, three competing groups sought rights to salvage the cargo of the barge *Harold*, which sank in the waters of Arthur Kill near Staten Island in 1903. It was carrying 400 tons of lead and silver bullion and lost most of the 7,678 ingots of silver during rough seas.

Salvage efforts in 1903 recovered an estimated 85 percent of the silver from an area between New Jersey and Staten Island known as Story Flats. At the time of this litigation, the value of the remaining 15

25. 960 F.2d at 665.

26. 631 F.Supp. 308 (S.D. Fla. 1986).

27. 525 F.Supp. 359 (S.D. N.Y. 1981).

percent of the silver was estimated to have been between \$10 and \$20 million, but in 1980 valued at between \$80 and \$100 million. Prior to the litigation, none of the three salvors had located any of the remaining silver.

Faced with the decision of awarding salvage rights, the federal district court began with the threshold question of which of the competing rules applied: salvage law or the law of finds. In a lengthy discussion of the policies behind each rule, the court came to the conclusion that salvage law was the correct principle for this particular case even if the remaining silver was found to have been abandoned. The court stated the reasons to be first, that admiralty favors salvage law over the law of finds; second, that salvage law fosters cooperation because a salvor can be confident that an admiralty court will exercise its equitable power to award his contribution to a shared salvage effort, whereas finds law is an all or nothing awarding of title with no consideration of shared efforts; and third, that salvage law encourages open and lawful behavior because a salvor is encouraged to disclose his recoveries. These principles were amplified by the case at bar, the court concluded, because ownership of the silver had not yet been determined, although possible claimants existed, and no silver had been recovered, although multiple salvors were asserting rights.

Applying these considerations, the court awarded two of the groups the right to salvage the area known as Story Flats based on their expenditure of time, effort and money. Thus, the court awarded salvage rights based on the parties' demonstrated intent and ability to recover the silver, similar to the court's analysis in *Eads v. Brazelton*. To assure cooperation, the court ordered that a buffer zone of 300 feet be observed between salvage operations, and it limited the right to salvage to 30 days, after which if either of the groups was unsuccessful in their salvaging efforts, the third salvor's claim to conduct operations would be reconsidered.

The *Hener* court's preference for the application of salvage law over the law of finds was adopted by the Fourth Circuit in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*,<sup>28</sup> which involving the recovery of gold from the *S.S. Central America*. A coal burning sidewheeler, it sank in a hurricane off of the coast of South Carolina in 1857 with a loss of 425 lives and \$1.2 million in gold valued in 1857 dollars, as well as hundreds of thousands of dollars of gold belonging to passengers returning to New York after striking it rich in California. The commercial portion of the gold was insured by New York and London insurers, who paid most of the claims.

Contractual salvage attempts were made to raise the vessel, but the attempts were fruitless because it had sunk in more than 8,000 feet of water and its exact location was unknown.

The *Central America* and its gold cargo remained undisturbed from 1857 until 1988 when its location was identified by the Columbus-America Discovery Group, which began salvage operations in 1989, recovering millions of dollars of gold with estimations at the time of a total cargo worth up to one billion dollars. As a result, litigation arose to determine the ownership rights in the recovered gold. The parties claiming ownership were Columbus-America, which asserted abandonment of the vessel, the original underwriters of the lost gold, the New York superintendent of insurance, who represented defunct insurance companies and other intervenors, including another salvor who alleged Columbus-America had used his data to locate the vessel.

The federal district court held that the *Central America* had been abandoned because, first, the underwriters had made no

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28. 974 F.2d 450, 460 (4th Cir. 1992). See Todd B. Siegler, "Finders Keepers" Revised for the High Seas: *Columbus-America Discovery Group v. Atlantic Mutual Insurance*, 17 TUL. MAR. L.J. 353, 354 (1993).



effort to locate it since 1858 and, second, the underwriters had destroyed all documentary evidence supporting claims of ownership that otherwise would not have been destroyed had they hoped to preserve their ownership interests. Columbus-America was held to be the sole owner through the application of the law of finds. The claims of the rival salvor were dismissed for lack of proof.

On appeal, the Fourth Circuit reversed, concluding that salvage law should be applied, that the *Central America* had not been abandoned, and that Columbus-America was entitled only to a salvage award. The court stated that the law of finds may be applied in only two types of cases: (1) those where the owners have expressly and publicly abandoned their interest and (2) those involving ancient shipwrecks where no owner appears to claim items recovered from the vessel. The court added that in such cases an inference of abandonment may arise. But if an owner appears to claim ownership and no evidence of express abandonment exists, then the law of salvage must be applied. Finally, the court held that evidence of abandonment must be shown by clear and convincing evidence, such as an express declaration of abandonment.

Applying these rules, the court ruled that abandonment existed as to the passenger gold and possessions, the vessel itself and any cargo other than the commercial gold, so that Columbus-America was entitled to ownership as finder. However, the district court's holding of abandonment of the insured gold was held not to have been shown by clear and convincing evidence for four reasons. First, the evidence was insufficient to establish that the underwriters had intentionally destroyed documents

concerning the *Central America*. Second, some original documents from the underwriter's files were presented in evidence, and they that tended to negate an inference of abandonment. Third, the primary underwriter, Atlantic Mutual Insurance Co., included the story of the *Central America* and the salvage contract executed to recover the vessel in its 1967 book about maritime disasters and the history of the company. Fourth, advances in deep water recovery in the late 1970s fostered renewed interest in salvaging the *Central America*, and during discussions between the salvors and the insurers, the insurers did not abandon their interests.

Thus, having found that abandonment did not exist, the court remanded the case for determination of Columbus-America's salvage award.

A dissenting opinion took the majority to task for reversing the finding of abandonment, which was said not to be clearly erroneous. The dissent also disagreed with the majority's holding that salvage law was preferred over the law of finds, especially when dealing with ancient shipwrecks, arguing that nearly every circuit applies the law of finds to wrecks of ancient heritage.

On remand, the district court held that Columbus-America was entitled to a 90 percent salvage award for the recovery of the gold.<sup>29</sup> However, this was a Pyrrhic victory for Columbus-America since its projected costs as of the date of the award were \$30 million and the amount of gold recovered was only \$21 million, resulting in a final salvage award of roughly \$19 million. This was a far cry from the \$1 billion of gold cargo thought to have existed at the beginning of the case.

In a similar case, *Ocean Mar Inc. v. Cargo of the S.S. Islander*,<sup>30</sup> the court held that the mere destruction of insurance documents did not automatically support a finding of intentional abandonment. The case involved the steamship *Islander*, owned and operated by the Canadian Pacific Navigational Co. to transport gold

29. 1993 WL 580900, at 32 (E.D. Va. Nov. 18, 1993) (not reported in F.Supp.). See also 742 F.Supp. 1327 (E.D. Va. 1990).

30. 1998 WL 965905 (D. Alaska 1998), also *sub nom.* Yukon Recovery LLC v. Certain Abandoned Property.

recovered from the Klondike River in the Yukon Territory, Canada, to smelting facilities in the Pacific Northwest.

After departing Skagway, Alaska, in August of 1901, the vessel made a brief stop at Juneau before departing for Vancouver, British Columbia, with a large shipment of gold. It hit either a submerged object or an iceberg and sank in 365 feet of water in the Gastineau Channel of Stephens Passage. Soon after the sinking, salvage efforts were attempted by the underwriters of the insured gold to recover the cargo, but they were fruitless because of the limited technology available at the time.

In 1934, salvage efforts by other individuals were successful in raising the stern section of the *Islander*, but no gold was recovered because it had been stored in the unrecovered 60-foot bow portion of the vessel. Interest in the recovery of the gold did not resurface until the mid-1980s when the rival salvors involved in the litigation learned of the *Islander's* story.

One of the salvors, Ocean Mar Inc., located the bow of the *Islander* in June 1993 and viewed a partially buried gold bar in 1994 through the use of high-tech submersible video equipment. In August of 1995, Ocean Mar entered into a no salvage-no pay contract to recover the gold cargo with the Marine Insurance Co., a British insurer. Rival salvor, Yukon Recovery, learned of Ocean Mar's salvage operations and began salvaging efforts of its own in 1996, which resulted in the recovery of a whiskey bottle and light fixture from the wreck site of the *Islander*. Yukon had these items arrested by the a U.S. marshal. This resulted in a temporary restraining order suspending operations by Ocean Mar.

Ocean Mar then filed an action seeking title to the *Islander* cargo, subject to its salvage contract with Marine Insurance. The competing actions seeking salvage rights were consolidated, and the court issued a preliminary injunction prohibiting salvage operations by either salvor but

allowing "reconnaissance operations." Yukon Recovery claimed title on the ground of abandonment, citing Marine Insurance's failure to make a any further salvage efforts. Ocean Mar countered, claiming exclusive salvage rights pursuant to its salvage contract with Marine Insurance.

In holding that Ocean Mar was the exclusive salvor, the court found that abandonment had not taken place and that more probably than not Marine Insurance had paid the claims for loss despite the lack of records. The court based its conclusion on evidence that Marine Insurance at the time of the sinking specialized in insuring valuable cargo like gold and that it was authorized by the Canadian government to insure registered mail, which was the manner in which the gold in question was transported. The court also pointed out that Marine Insurance had continued business dealings with the shipper bank in years subsequent to the *Islander* sinking, suggesting that any cargo claims by the shipper bank had been paid by Marine Insurance. The court added that further salvaging efforts after the 1901 attempts were technologically infeasible and thus could not be construed as abandonment.

Thus, Ocean Mar was deemed the exclusive salvor of the *Islander* cargo because it had located remains of the *Islander* first and had contracted with Marine Insurance as the subrogated owner of the wreck.

#### LEGISLATION RESTRICTING SALVAGE LAW AND LAW OF FINDS

Although the application of salvage law appears to hold a comfortable position of strength over the law of finds in the discovery of sunken shipwrecks, Congressional action has affected the application of both doctrines. In addition, the United Nations has proposed a convention that would all but eliminate private discovery efforts.

### A. Abandoned Shipwreck Act of 1987

In response to the competing interests of sport divers, professional salvors and preservationists, advances in technology, and confusion over the states' role in applying their laws to the ownership of abandoned shipwrecks lying in their territorial waters, Congress enacted the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106, effective April 28, 1988.<sup>31</sup> Under the act, the United States "asserts title to any abandoned shipwreck that is—(1) embedded in submerged lands of a state; (2) embedded in coralline formations protected by a state on submerged lands of a state; or (3) on submerged lands of a state and is included in or determined eligible for inclusion in the National Register."

Noteworthy of the act's operation is its relationship with other law. This is addressed in Section 2106(a), which states that "the law of salvage and the law of finds shall not apply to abandoned shipwrecks to which Section 2105 of this title applies." However, salvage law does not apply to abandoned vessels in any event.<sup>32</sup> Therefore, in operation, only the law of finds is limited by the act. Otherwise, if abandonment can be shown not to have occurred, a salvor may still be entitled to a salvage award for a vessel found in state territorial waters.

Litigation involving salvor Zych has addressed the constitutionality of the act, its effect on admiralty's need for uniformity in the application of maritime law, and its effect on due process of law.<sup>33</sup> All in all, the act has survived these challenges and

remains a potential factor in any vessel recovery.<sup>34</sup>

### B. R.M.S. Titanic Maritime Memorial Act of 1986

That of the *R.M.S. Titanic* is probably the best known shipwreck in nautical history. It sank on April 14, 1912, after colliding with an iceberg in the North Atlantic, with the loss of approximately 1,500 passengers and crew. The *Titanic* was discovered lying 2.5 miles below the surface of the North Atlantic on September 1, 1985, by a French-American team of scientists and explorers.<sup>35</sup>

Following the discovery, interest in salvaging the *Titanic* grew to a fever pitch. In response, Congress enacted the R.M.S. Titanic Maritime Memorial Act of 1986, 16 U.S.C. §§ 450rr-6, effective October 21, 1986. The stated purpose of the act was to encourage international agreement on the preservation of the wreck site and prohibit salvage of the *Titanic* pending international agreement. The act directed the U.S. executive branch to enter into discussions with Great Britain, France, Canada and other interested nations concerning the development of international guidelines on the exploration and possible salvage of the *Titanic*.

However, to this day no international agreement has been enacted despite efforts by the executive branch to do so, and no country, including the United States, has exclusive ownership or jurisdiction over the *Titanic*. As a result, courts hearing claims to explore and recover artifacts

31. See Timothy T. Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States*, 37 VILL. L. REV. 573, 574-80 (1992).

32. See *Sunken Treasure Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 857 F.Supp. 1129, 1134 (D. V.I. 1994).

33. *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the Seabird*, 941 F.2d 525 (7th Cir. 1991), *on remand*, 811 F.Supp. 1300 (N.D. Ill. 1992) (act constitutional); *Lady Elgin*, 746 F.Supp. 1334 (N.D. Ill. 1990) (act does not destroy uniformity), *reconsideration denied, rev'd*

*on other grounds*, 941 F.2d 525 (7th Cir. 1991), *on remand*, 811 F.Supp. 1300 (N.D. Ill. 1992); *Seabird*, 811 F.Supp. 1300 (N.D. Ill. 1992) ("embeddedness" element rationally related), *aff'd*, 19 F.3d 1136 (7th Cir. 1993), *reh'g and suggestion for reh'g en banc denied, cert. denied*, 513 U.S. 961 (1994).

34. See *Illinois ex rel. Illinois Historical Preservation Agency v. Zych*, 710 N.E.2d 820 (Ill. 1999).

35. See Mary S. Timpany, *Ownership Rights in the Titanic*, 37 CASE W. RES. L. REV. 72, 73 (1987).

from the *Titanic* must rely on international maritime law, including salvage law, for governing principles.

An example of litigation involving the Titanic Act, salvage law and the *Titanic* is *R.M.S. Titanic Inc. v. Wrecked and Abandoned Vessel*,<sup>36</sup> which involved the salvage and exploration company R.M.S. Titanic Inc. It sought a preliminary injunction to prevent Deep Ocean Expeditions and others from conducting \$32,500 per-person expeditions to the wreck site of the *Titanic*.

Having declared R.M.S. Titanic Inc. the sole salvor in possession in 1994, the U.S. District Court for the Eastern District of Virginia issued a preliminary injunction preventing Deep Ocean Expeditions (DOE) and others from conducting dives to the wreck site. The court based its holding on its findings that R.M.S. Titanic Inc. had been making satisfactory progress on the salvaging of the *Titanic*, considering the expense and difficulty of exploration, and as the appointed sole salvor, R.M.S. Titanic Inc. was entitled to freedom from interference by third parties, which would occur if tourist access to the site was permitted. The court further concluded that its holding was not in contravention of the Titanic act. Since no further action on the part of the world's nations has precluded exploration and salvage of the *Titanic*, the only applicable governing law was the internationally recognized law of salvage. Finally, the court supported its decision by findings that R.M.S. Titanic Inc.'s efforts furthered the public interest in the preservation of the *Titanic*.

DOE and a U.S. resident, Christopher S. Haver, appealed the district court's decision to the Fourth Circuit. Haver had filed a separate in personam action in the district court against R.M.S. Titanic Inc. seeking a declaratory judgment that he had a right to enter the wreck site and photograph the wreck. He had agreed to pay the \$32,500 for transportation and alleged that he intended to photograph the wreck for his own personal use and that he did not

intend to recover any part of the wreck.

DOE and Haver argued that the district court (1) lacked jurisdiction over the wreck and the wreck site, (2) lacked jurisdiction over them, and (3) that the injunction was too broad. In sum, they stated that the district court's theory of "constructive in rem jurisdiction" did not permit the court "to adjudicate the rights of persons over which it lacks personal jurisdiction with respect to a vessel [in international waters] that have never been within the court's territory."

After a lengthy discussion of in personam and in rem jurisdiction, the Fourth Circuit held that although the district court had in rem jurisdiction over the *Titanic* to adjudicate salvage rights, it did not have the requisite personal jurisdiction over DOE to enforce the injunction.<sup>37</sup> Injunctive relief, unlike in rem proceedings, was determined to be limited to actions in which personal jurisdiction exists over the person, entity or one in legal privity with that person or entity. DOE, a British Virgin Islands corporation headquartered in Great Britain, was found not to have been served with process that would render it subject to jurisdiction.

As for Haver, the court concluded that he had consented to the district court's personal jurisdiction over him when he instituted the prior declaratory judgment action in the district court. Therefore, the preliminary injunction was affirmed as against him.

Next, the Fourth Circuit addressed the complex issue of whether a court can exert in rem jurisdiction over wrecks lying in international waters far beyond the limits of the court's territorial jurisdiction. It interpreted the district court's use of the term "constructive in rem jurisdiction" as "imperfect in rem jurisdiction" that entitled the court to a "shared sovereignty" over

36. 9 F.Supp.2d 624 (E.D. Va. 1998).

37. *R.M.S. Titanic Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999), cert. denied, 120 S.Ct. 74 (1999).

the wreck with other nations' admiralty tribunals. Only after property or persons involved are brought before the district court is a district court able to enforce final salvage rights, the Fourth Circuit stated.

Finally, after discussing the history and policies surrounding salvage law, the law of finds and their interplay with international law, the Fourth Circuit held that in order to maintain the principles underlying salvage law it was reluctant to award R.M.S. Titanic Inc. the exclusive right to photograph and record images of the *Titanic's* remains. Likening the wreck to a publicly visible building and a salvor to an architect holding a copyright in the design of that building, the court held that a salvor did not have the right to exclude others from photographing a wreck when the property was yet to be saved. To extend to the exclusive right to photograph a wreck in the name of salvage, the court noted, would be to "convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors," running counter to the purpose of salvage. Thus, DOE is now permitted to visit and photograph the *Titanic* wreck site as long as it does not interfere with the salvaging efforts of R.M.S. Titanic Inc.

Although Congress intended to preserve the *Titanic* wreck site from the efforts of private salvage companies pending international agreement, inaction on the part of the world's nations has proved the act to be irrelevant. However, recent efforts on the part of the United Nations may alter this situation.

### C. UNESCO

Recent action by the United Nations poses the greatest threat to the status of salvage law and the law of finds in the area of sunken shipwreck discovery. The United Nations Educational, Scientific and Cultural Organization issued a draft of its International Convention on the Protection of the Underwater Cultural Heritage in April 1998. The stated purpose of the convention is to protect the world's underwater cultural heritage encompassing shipwrecks and archeological sites from destruction by treasure hunters.<sup>38</sup> The United States, as the only observer nation, joined 53 other nations in Paris in July 1998 to discuss the proposed UNESCO draft.<sup>39</sup>

The convention in essence abolishes private salvage of shipwrecks by awarding title to all abandoned shipwrecks to coastal nations where the wreck lies on the country's continental shelf or 200 miles offshore, whichever greater. As an additional measure to discourage private salvage, member nations are precluded from lawfully receiving in their ports any wrecks that are found further offshore. Abandonment is presumed to exist 25 years after sinking and becomes absolute after 50 years. The only exceptions to these rules are military vessels and aircraft, which are to remain the property of the sovereign nation forever.<sup>40</sup>

The effect of the convention would make state-sponsored salvage the only legal salvage, with recovered property belonging to the member state. The United States has indicated that it would not approve the convention unless terms were included allowing private commercial efforts and the sale of recovered property. Should the United States not adopt the convention, it would become the sole market for sale of recovered property.<sup>41</sup>

In April 1999, UNESCO held another meeting as a follow-up to its April 1998 conference. According to one writer, although progress on an agreed draft by UNESCO's General Assembly is far from

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38. See Michael Heyworth, *Underwater Cultural Heritage Meeting*, <<http://www.mailbase.ac.uk/lists-a-e/britarch/1998-06/0205.html>> (visited November 24, 1998).

39. See Rex Cowan, *Wreck Divers Face a Worldwide Threat*, <<http://www.divemet.co.uk/wrecks/unesco1098.html>> (visited November 24, 1998).

40. See Peter Hess, *UNESCO—Legalized Plunder?* <<http://www.imacdigest.com/unesco.html>> (visited November 22, 1998).

41. See Cowan, *supra* note 39.

complete, the future of salvage law and the law of finds is in peril of becoming extinct due to international political action.<sup>42</sup> Momentum to ban private enterprise in favor of government-sponsored exploration of the underwater world is growing. The next UNESCO convention was set for October/November of 1999. Interested readers can log on to the website of the Institute of Marine Archeological Conservation at [www.imacdigest.com](http://www.imacdigest.com) for extensive coverage of UNESCO developments and the future of salvage law and the law of finds.

### CONCLUSION

The answer to title rights in sunken shipwrecks requires the application of maritime salvage law or the law of finds. Advances in new technology for the discovery and exploration of long-lost shipwrecks ironically has resulted in the courts' application of centuries-old common law principles to answer the seemingly simple question of owner abandonment.

Admiralty courts seem to favor salvage law over the law of finds because of the underlying societal policies salvage law promotes. Despite the solid position salvage law enjoys in the shipwreck and treasure context, modern concerns for archeological preservation of shipwreck

sites has led to legislation that has weakened this position. Further international action threatens to abolish private enterprise, salvage law and the law of finds as applied to the discoveries of shipwrecks. The results of such measures may theoretically preserve the archeological purity of wrecks sites at the cost of discovering and preserving any such wrecks at all. In addition, these measures promise to promote clandestine behavior on the part of salvors on a greater scale than that lamented by courts as a result of the application of finds law.

What is needed is the proverbial "compromise" whereby salvors are given an incentive to preserve historical shipwreck sites. Factoring efforts to preserve the archeological character of wreck sites into the salvage award equation is one method courts are using to achieve this compromise. Total elimination of salvage law and the law of finds to preserve our cultural heritage is an extreme measure that warrants caution.

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42. See Peter Hess, *Special Report on UNESCO's International Convention on Underwater Cultural Heritage held in Paris, France, April 19-24, 1999* <<http://www.imacdigest.com/intervue.html>> (visited November 15, 1999).