

Sailing On Uncharted Waters:
The U.S. law of historic wrecks, sunken treasure and
the protection of underwater cultural heritage

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This paper is intended to provide a cursory review of the current legal framework in the United States with respect to the protection of the Underwater Cultural Heritage, particularly as the law has developed with respect to historic wrecks and sunken treasure.

The purpose is not to provide exhaustive commentary¹, but to clarify the significant issues as developed in United States case law and statutes for maritime preservation, particularly in light of the expanding protection of underwater cultural heritage by the adoption on November 2, 2001 of the General Conference of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) of the Convention on the Protection of the Underwater Cultural Heritage (the “Convention”)².

¹ A number of symposia on the subject of the protection of underwater cultural heritage as well as legal commentary in the law reviews have produced comprehensive articles on national marine legislation (including the U.S.) and the international legal context. See generally Camarada, G. and Scovazzi, T. editors, *The Protection of the Underwater Cultural Heritage* (Milano – Guiffre Editore, 2002); Booth, F. “The Collision of Property Rights and Cultural Heritage; The Salvors’ and Insurers’ Viewpoints” IBA Conference, Durban, South Africa (Author’s files, 2002); Fletcher-Tomenuis, P., O’Keefe, P.J., Williams, M. “Salvor in Possession: Friend or Foe to Marine Archaeology?” *912 International Journal of Cultural Property* (Oxford Univ. Press, 2002); Peltz, Robert D. “Salvaging Historic Wrecks” *The Maritime Law I* (Winter 2000); Second Newport Symposium, *30 J. Mar. L. & Com.* 279 (Jefferson Book Company, April 1999); Bederman, David J., “Historic Salvage and the Law of the Sea” *30 U. Miami Inter. Am. L. Rev.* 99 (1998).

² Convention on the Protection of the Underwater Cultural Heritage, November 2, 2001 available at <http://www.unesco.org/culture/laws/underwater/html-eng/convention.shtml>. Underwater cultural heritage is defined broadly as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously for at least one hundred years.” For commentary on the Convention see Carducci, G. “New Developments in the Law of the Sea,” *96 A.J.L.* 419 (2002); Strati, Anastasia, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (1995); Scovazzi, T. “The Application of Salvage Law to the Underwater Cultural Heritage in Light of the Recent UNESCO Convention,” IBA Conference, Durban, South Africa (2002); “It sets forth a regime of cooperation among the states which have a verifiable link with the heritage found beyond the limit of the territorial sea. It puts an end to the freedom of Fishing,” or first come, first served approaches what are the practical result of the strange body of “salvage law and other rules of admiralty” to objects of an archaeological and historical nature.” Nafziger, J., “UNESCO Convention on Underwater Heritage,” *IFAR Journal* Vol. 4, Number 3.

I. INTRODUCTION

Admiralty and maritime jurisdiction in the United States is based on Article III, Section 2 of the U.S. Constitution which states, “The Judicial Power of the United States shall extend...to all cases of admiralty and maritime jurisdiction.” That jurisdiction encompasses proceedings in rem. Thus, states by virtue of the principle of federalism are for the most part without power to deal with admiralty and maritime matters. Similarly, the Eleventh Amendment to the United States Constitution’s grants states immunity from suit and under certain circumstances may deprive a federal court of the power to adjudicate such disputes.

Much of the litigation surrounding historic wrecks lying in state territorial waters has resulted from attempts by various states to lay claim to the treasures carried by the ships against salvors who located them. These efforts have attempted to utilize the Eleventh Amendment as well as a variety of different congressional acts, such as the Abandoned Shipwreck Act³, to be discussed infra, the Abandoned Property Act, the Antiquities Act⁴, and the Submerged Land Act⁵.

Under United States law, unlike the law of many other countries, the admiralty doctrines of salvage and finds are applied to sunken treasure and historical shipwrecks except if specifically exempted by act of Congress. During the last twenty years the contours of a body of law applied to historic wrecks has emerged. As observed by the Maritime Law Association in its 1999

Annual Report:

³ 43 U.S.C. 2101-2106

⁴ 16 U.S.C. 431-470 (1994)

⁵ 40 U.S.C. 310 (1994)

The greatest explosion of salvage cases in the United States over the last 15-20 years are those involving the location and excavation of long-lost shipwrecks with interesting historical overtones of treasure ships, expectations of great wealth and, to a great extent, a veritable alley fight over the issue of who owns the wreck and its booty and whether the owner of the vessel or its underwriters, some two or three centuries ago, have abandoned title to the wrecks. Some of the cases seem to be right out of the mold of some Hollywood movies...

Therefore, it is not surprising that the discovery of the shipwrecks which have had the most effect on the resulting development of the law governing the salvage of historic wrecks have been the Titanic—most famous—and the Atocha, S.S. Central America, and Brother Jonathan—the richest of the ships to have been found to date.⁶

In 1998, the United States participated in the UNESCO Draft Convention negotiations merely as an observer and expressed its unwillingness to join the Convention unless the rights of salvors were preserved, including the right to sell recovered artifacts. During the 2001 Convention, the United States strongly opposed the Convention's extension of coastal state sovereignty into international waters.

Article IV of the Convention is an effort at compromise. It provides:

Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

- (a) is authorized by the competent authorities, and
- (b) is in full conformity with this Convention, and
- (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

The provision is ambiguous. Query whether it can accommodate and reconcile two very different paradigms for the management of the underwater cultural heritage: the Convention's international bureaucratic/administrative model which purports to eliminate the undesirable effects of the law of salvage and finds as applied to underwater cultural heritage and discourages commercial salvage in favor of in situ preservation and a model which relies primarily on

⁶ See supra. Fn 1, Peltz, R.

admiralty courts and the law of salvage and finds to develop a comprehensive framework for preserving the historical and archaeological value of historical shipwrecks.

Can U.S. salvage law adapt to the demands of the new technology and through the guidance of the admiralty courts conform to the Convention, or is there a fundamental logical hiatus and futility in trying to retrofit a doctrine if the primary concern is preservation in situ, or as one legal scholar noted is it like buying new deck chairs for the Titanic? The inquiry begins with two of the important cases developing the trends in the law.

II. THE DEVELOPMENT OF A JURISPRUDENCE OF FINDS AND SALVAGE LAW FOR HISTORIC WRECKS

The development of a jurisprudence applied to historic wrecks in the United States commences for the purpose of this paper with the discovery of Nuestra Señora de Atocha.

The Nuestra Señora de Atocha

The wreck was located approximately forty miles west of Key West on the continental shelf. Ownership of the continental shelf was claimed by the State of Florida. Accordingly, Florida also claimed title to the Atocha itself by virtue of the Florida Archives and History Act which granted title to the State of all abandoned treasure trove and historic objects located on state-owned property or submerged lands.

Subsequently, however, in 1976 the United States Supreme Court rejected the State of Florida's claim to ownership of the portion of the continental shelf where the Atocha was found in an unrelated case. Immediately thereafter, Treasure Salvors, Inc. filed a *in rem* action in the United

States District Court for the Southern District of Florida seeking title to the vessel and its contents on the grounds that the wreck had been abandoned, thereby entitling it to ownership under the law of finds.⁷

Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel 569 F.2d 330, 337 (5th Cir. 1978)

The federal government's claim was based upon the old English principle of "sovereign prerogative," which provided the King of England with title to objects recovered from the seabed by his subjects. The United States argued that this principle had been carried forward as part of this nation's common law and adopted by Congress' passage of the Antiquities Act and the Abandoned Property Act. As a result, it claimed that it was entitled to ownership of any antiquity recovered by persons subject to its jurisdiction.

The district court rejected the government's argument, first holding that the Abandoned Property Act referred only to ships abandoned during the Civil War. The court next rejected the application of the Antiquities Act, finding that it only applied to property abandoned "within the jurisdiction of the United States," which it interpreted to mean property abandoned on land owned by the federal government and not merely property subject to the judicial jurisdiction of U.S. courts. Finally, the court concluded that ownership of the land on which the wreck lay was

⁷ The law of finds vests title to property that has been lost or abandoned in the first person who lawfully and fairly appropriates the property and reduces it to his or her possession with the intention to become its owner. Mere discovery of lost or abandoned property is not sufficient for title to be granted to a finder; the property must be reduced to actual or constructive possession. In Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Vessel, for example, the court stated that the law of finds applied to the Atocha because it was abandoned—as it had been "lost for centuries"—and because it was uncontested that plaintiffs "were in possession of the Atocha." In order to decide whether property is either lost or abandoned, courts consider several factors, including: (1) the condition of the property at the time it was abandoned; (2) the amount of time that has passed since the property was lost or abandoned; (3) any steps taken by the original owner to recover the property; and (4) whether the original owner has relinquished all hope of recovery.

not conferred by operation of the Outer Continental Shelf Act, because this statute only conveyed jurisdiction over the minerals located in the outer continental shelf and not title to the actual seabed itself.

After defeating both the United States and the State of Florida, the third round of litigation pitted Treasure Salvors, Inc. against several other groups of private salvors, who were alleged to be interfering with its right to salvage the Atocha. On appeal, the competing salvors initially attacked the jurisdiction of the court to grant an injunction preventing their salvage of a vessel located outside of the territorial waters of the United States. Unlike the Titanic, however, this suit was limited to a request for injunctive relief against specifically identified individuals. As a result the court concluded that it had personal jurisdiction over the defendants and therefore was not limited to relying upon principles of constructive in rem jurisdiction.

The court went on to note that a salvor may assert its right to a salvage award in either an in rem proceeding against the vessel or its cargo in an in personam action against those claiming title to the property. Therefore, it concluded that the fact the Atocha lay outside of U.S. territorial waters did not create any impediment to its exercise of in personam jurisdiction over those personally before it, regardless of whether it had authority to exercise in rem jurisdiction over the vessel itself.

The R.M.S. Titanic

In 1985, the wreck of the Titanic was discovered in international waters, approximately 400 miles off the coast of Newfoundland in 12,500 feet of water. Salvage efforts began in 1987. In

1994, the district court in the Eastern District of Virginia, exercising “constructive in rem jurisdiction” over the wreck and the wreck site of the Titanic, awarded exclusive salvage rights, as well as ownership of recovered artifacts, to R.M.S. Titanic Inc., (“RMST”), a Florida corporation. Two years later, the court rejected a challenge to the exclusive salvage rights of RMST⁸ and shortly thereafter, entered an injunction dated August 13, 1996, protecting the salvage rights of RMST against any person in the world “having notice of this Order,” prohibiting any such person from “conducting search, survey, or salvage operation, or obtaining any image, photographing or recovering any objects, entering or causing to enter” the area of the Atlantic Ocean surrounding the Titanic wreck site. On June 23, 1998, the court reaffirmed, “personalized and enforced” the 1996 injunction against new parties.⁹ In that order, the court enjoined the appellants, Christopher S. Haver, an Arizona resident, and Deep Ocean Expeditions, (“DOE”), a British Virgin Islands corporation, as well as other from (i) interfering with the rights of RMST, as salvor in possession of the wreck and wreck site of the R.M.S. Titanic, to exclusively exploit the wreck and wreck site, (ii) conducting search, survey or salvage operations of the wreck or wreck site, (iii) obtaining any image, video, or photograph of the wreck or wreck site, and (iv) entering or causing any one or anything to enter the wreck or wreck site with the intention of performing any of the foregoing enjoined acts. The court indicated that it considered the grant of exclusive photographic rights the best means to preserve the economic interest of the salvors, the historic interest in the wreck and the public’s interest in the ship.¹⁰

⁸ See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, (“Titanic I”), 924 F. Supp. 714 (E.D. Va. 1996)

⁹ See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, (“Titanic II”) 9 F. Supp. 2d 624, 626 (E.D. Va. 1998)

¹⁰ As an intellectual property lawyer, the author believes the court confuses copyright law with the right of access. Nevertheless, without question, the exploitation of a wide range of intellectual property rights often provides a significant revenue stream to finance an expedition.

The appellate court's modification of the district court's order is instructive.¹¹

In entering the injunction, the court reasoned that “allowing another ‘salvor’ to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves...”

On the challenge to its exercise of in rem jurisdiction over the Titanic, the district court observed that while “it is undisputed that the wreck lies on international water...and no state may exercise sovereignty over any part of the high seas...these rules must be harmonized with the internationally recognized rules of salvage.”¹² The court observed that “internationally recognized principles governing salvage on the high seas encourage the exercise of in rem jurisdiction over a wreck site to facilitate the salvage operation itself....”

...In this case, the district court recognized the limitation and rested its authority over the wreck of the Titanic on what it called “constructive in rem” jurisdiction. Obviously, any power exercised in international waters through “constructive in rem” jurisdiction could not be exclusive as to the whole world. For example, a French court could presumably have just as well issued a similar order at the same time with no less effect. But this non-exclusive control over the res would not defeat the district court's first purpose of declaring salvage rights to the wreck as against the world. In fact, we believe that the jus gentium authorized an admiralty court to do so, even though the exclusiveness of any such order could legitimately be questioned by any other court in admiralty. The ultimate resolution could only occur at such time as property is removed from the wreck and brought within the jurisdiction of an admiralty court, giving it exclusive in rem jurisdiction over the property or when the persons involved in any dispute over the property are before the court in personam....

...We believe that the district court has a “constructive”—to use the district court's term—in rem jurisdiction over the wreck of the Titanic by having a portion of it within its jurisdiction and that this constructive in rem jurisdiction continues as long as the salvage operation continues. We hasten to add that as we use the term “constructive,” we mean an “imperfect” or “inchoate” in rem jurisdiction which falls short of giving the court sovereignty over the wreck. It represents rather a “shared sovereignty,” shared with other nations enforcing the same jus gentium. Through this mechanism, internationally recognized rights may be legally declared but not finally enforced. Final enforcement requires the additional steps of bringing either property or persons involved before the district court or a court in admiralty of another nation...

When a nation seeks to exert sovereignty through exclusive judicial action in international waters, the effort prompts the obvious question of how the jurisdiction is to be enforced. But even beyond this pragmatic consideration lies the yet more significant consideration that asserting sovereignty through a claim of exclusive judicial action beyond the territorial limits of a nation would disrupt the relationship among nations that serves as the enforcement mechanism of international law and custom. What would occur if an English or French court were to exercise similar power? The necessary

¹¹ R.M.S. Titanic, Inc. v. Haver 171 F. 3d 943, 960 (4th Cir. 1999)

¹² Titanic II, 9 F. Supp. 2d at 634

response to probes such as these leads to the now well-established norm of international law that no nation has sovereignty over the high seas...

The assertion of exclusive judicial action over international waters does not leave the high seas without enforceable law. The law of salvage is shared by the nation as part of the jus gentium applied to the high seas, and we are satisfied that it will do no violence to the relationship among nations to enforce these rights to the extent generally recognized on a non-exclusive basis... We believe that these aspects of the district court's declaration and injunction would be recognized by all maritime nations and similarly be enforced by their courts...

While we affirm the district court's order enjoining Haver from interfering with the ongoing salvage operations of RMST, we must still address the additional terms to which he objects: (1) whether salvage rights include the right to exclude others from visiting, observing, and photographing the wreck; and (2) whether, in enjoining others from interfering with the ongoing salvage operations, the district court could exclude others from an areas within a 10-mile radius (the 3140square mile circular area protected by its August 1996 order), both of which lie entirely within international waters...

The district court's expansion of salvage rights to include the right exclusively to photograph or otherwise record images of the wreck for the purpose of compensating salvors for their effort is both creative and novel... The law does not include the notion that the salvor can use the property being salvaged for a commercial use to compensate the salvor when the property saved might have inadequate value...

To award in the name of salvage service, the exclusive right to photograph a shipwreck, would, we believe, also tend to convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors. The incentives would run counter to the purpose of salvage. Salvors would be less inclined to save property because they might be able to obtain more compensation by leaving the property in place and selling photographic images or charging the public admission to go view it...

...The principles of salvage law are intended to encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by assuring them compensation and reward for their salvage efforts....

To establish a salvage claim for compensation and award, a person must demonstrate (1) that he has rendered aid to a distressed ship or its cargo in navigable waters; (2) that the service was voluntarily rendered without any preexisting obligation arising from contract or otherwise to the distressed ship or property; and (3) that the service was useful by effecting salvage of the ship or its cargo, in whole or in part.¹³

While the law of salvage provides substantial protection to salvors to encourage their saving of life and property at sea, it also imposes duties of good faith, honesty and diligence in protecting the property in salvors' care. Thus, salvors have to exercise a trust

¹³ See The Sabine, 101 U.S. 384, 384, 25 L. Ed. 982 (1879); Brown v. Johansen, 881 F. 2d 107, 109 (4th Cir. 1989)

over the property for the benefit of the owner and subject to any orders of a courts. In this vein, salvors are not entitled to remove property from the wreck for their own use or to use the property for their own use. When a violation of this trust occurs, the salvage claim is forfeited.

In applying these principles to a wreck lying in international waters, obvious complexities emerge. In rem jurisdiction, which depends on sovereignty over property, cannot be given effect to property beyond a nation's boundaries of sovereignty. Where both persons and property are beyond a nation's zone of exclusive legal power, its ability to adjudicate rights as to them is limited, but not meaningless.

So it must be with the Titanic. The jus gentium, the law of all maritime nations, is easy to define and declare. But its enforcement must depend on persons or property involved in such a declaration coming into the zone of power of participating nations.

A court's extraterritorial jurisdiction over wrecks on the high seas and legal authority to exclude competing interests from sites outside territorial waters are likely to be raised as issues more frequently with the new technology.

R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 286 F. 3d 194; (U.S. App. 2002)

The salvor contended inter alia that in 1994 it was granted absolute title to all the artifacts it retrieved, that the district court could not restrict its right to sell the artifacts. The court of appeals found that the salvor fundamentally misunderstood its role as salvor-in-possession, and affirmed the orders of the district court. The salvor had never claimed the Titanic was abandoned.

Moreover, contemporaneously with the entry of the June 1994 order, the parties expressed their unequivocal intent that RMST's role be that of salvor, not finder. And RMST has never argued that the Titanic had been abandoned and that it was entitled to full title to the entire ship and the artifacts from it, as would be required if this case progressed under the law of finds. See Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel, 177 F. 3d 491, 498 (6th Cir. 1999) (explaining that under law of finds, claimant must show that the property has been abandoned and that courts apply a presumption against abandonment).

Accordingly, the court of appeals concluded that the salvor had not demonstrated that maintaining the artifacts as a collection was inappropriate or illegal and reasoned that the salvor's lien might become more readily satisfied by maintaining the artifacts as a collection.

III. U.S. STATUTES SPECIFICALLY ADDRESSING THE UNDERWATER CULTURAL HERITAGE AND RESTRICTING THE TRADITIONAL ADMIRALTY LAW OF SALVAGE AND FINDS

A. Abandoned Shipwreck Act of 1987 (“ASA”)

To deal with the salvage of historic shipwrecks, the United States Congress passed the ASA. The ASA is based on the notion that historic shipwrecks are not part of admiralty because abandoned historic shipwrecks are not related to marine commerce. From a policy perspective, the ASA recognizes that in situ preservation is not furthered by salvage and finds law. The ASA’s legislative history states that the laws of salvage and finds are “obviously inappropriate for underwater archaeological sites as it would be for ancient ruins on land.” Although there is a general preference for on-site protection, the ASA allows for appropriate public and private sector recovery of shipwrecks “consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.”¹⁴

The purpose of the ASA is to “vest title to certain abandoned historic shipwrecks that are buried in state lands to the respective states and to clarify the management authority of the states for these abandoned historic shipwrecks, thus, providing a consistent national approach for the management of historic shipwrecks in the U.S. In order to come within the ambit of the Act, a shipwreck must be (1) abandoned (2) located on a state’s submerged lands, and (3) either embedded in the sea floor or its coralline formations or be eligible for listing in the National Register of Historic Places. Where the ASA applies, it expressly preempts traditional maritime law of salvage and finds. In those cases where a wreck does not meet the requirements, the traditional maritime principles of salvage and finds continue to apply and exclusive jurisdiction

¹⁴ 43 U.S.C. § 2103(a)(2)(c)

remains in the federal courts.¹⁵ Anne G. Giesecke, Vice President, Environmental Activities, American Bankers Association (Washington D.C.) writes,

A review of the past ten years demonstrates that the ASA is responsible for a number of commendable accomplishments. Many states have either expanded their historic shipwreck programs or initiated such efforts. Because of the greater certainty over title which the ASA has fostered, public money that once would have gone to pay for shipwreck litigation has been redirected to shipwreck interpretation and protection projects. The emotional argument of opponents of the ASA—that states would go into the treasure hunting business to the detriment of both protection and free enterprise—has proven unfounded. Lastly, the ASA has helped to educate states and the public about the value of the resource base.¹⁶

B. R.M.S. Titanic Maritime Memorial Act of 1986¹⁷

This act provides the National Oceanic and Atmospheric (“NOAA”) and the Department of State with the authority to negotiate an international agreement designating the Titanic a maritime memorial and specifying how it should be protected and managed.

¹⁵ The ASA also directed the National Park service to prepare guidelines for the comprehensive management of historic shipwrecks that could be used by States to develop their programs. These guidelines were published in final form in 1990. These guidelines recognize the variety of interests and try to balance them. The guidelines provide advice and guidance on a wide range of topics including: the appropriate components of state and federal programs, possible sources of funding, how to survey for and document shipwreck sites, when and how it is appropriate to recover artifacts and objects from such sites, how to allow public access to such sites, interpretation and volunteer programs for such sites, and the establishment and management of underwater parks. The guidelines are advisory rather than regulatory.

¹⁶ Giesecke, Anne G., “Sunken Treasure: Law, Technology and Ethics” *30 J. Mar. L. & Com.* 167 (Jefferson Law Book Company 1999). For an opposite view see Sweeney, Joseph C. “An Overview of Commercial Salvage Principles in the Context of Marine Archaeology.” *30 J. Mar. L. & Com.* 185

The ASA was intended to settle disputes between treasure salvors and states and federal governments. Unhappily, the broad statutory language of ‘abandoned’ and ‘embedded’ does not resolve these controversies; instead, disputes have arisen concerning the definitions and the standard of proof to resolve recurring problems that have been removed from experienced admiralty courts and transferred to state administrative agencies...

After ten years it appears that the expectations of the ASA drafters were unrealistic: legal conflicts have not ceased and dialog between the various conflicting interests has not produced agreed solutions (other than a call for government funding). The 30 coastal states have responded to the treasure salvage problem in various non-uniform and haphazard ways, despite the expectation that the states would willingly adopt the solutions proposed in the National Park Service’s Abandoned Shipwreck Guidelines.

¹⁷ 16 U.S.C. § 450rr-5

Eleven years after Congress directed the NOAA to enter into consultations with the United Kingdom, France, Canada and other countries “to develop international guidelines for research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic,” NOAA began the process.

NOAA issued its proposed guidelines for public comment in early 2000, fourteen years after Congress’ original directive. During this fourteen year period of NOAA inactivity, over 5,000 artifacts were collected in more than a half dozen extensive salvage operations. During the last decade alone, there have been three decisions of the United States Court of Appeals for the Fourth Circuit affirming the right to salvage the Titanic.

Opposition to the proposed regulations focused on General Principal, which provides, “The preferred policy for the preservation of RMS Titanic and its artifacts is in situ preservation. Recovery or excavation aimed at RMS Titanic and/or its artifacts should be granted only when justified by educational, scientific or cultural interests....”

The proposed guidelines begin by noting that they do not constitute an attempt at “asserting jurisdiction over RMS Titanic.”

C. National Maritime Sanctuaries Act (“NMSA”)¹⁸

Under the NMSA, Congress has empowered the Secretary of Commerce with the authority to designate and manage “certain areas of the marine environment possessing conservation, recreational, ecological, historical, research, education or aesthetic qualities which give them special national...significance.” In fact, the very first sanctuary, designated in 1975, was established to protect the Civil War-era shipwreck Monitor from looting and unwanted salvage.

¹⁸ 16 U.S.C. §§ 1431-1445

IV. ABANDONMENT, THE LAW OF SALVAGE AND MARITIME ARCHAEOLOGY

Other than as set forth above under the ASA and the NMSA, maritime law has been applied to historic wrecks. The critical question is whether the law of finds or salvage applies. Further developments in the law of salvage have resulted from the salvage of the S.S. Central America and the Brother Jonathan, two paddle-wheel steamers that sank in the mid-1880's carrying rich cargo from California's gold rush.

A. Abandonment

There is substantial controversy in the United States as to the proper standard of abandonment to be applied to historic shipwrecks both under traditional maritime law and the ASA. The maritime law of salvage had traditionally treated abandonment simply as a factor going to the salvor's right to temporarily possess a ship or cargo. If a wreck is deemed not to be abandoned, it is subject to the maritime law of salvage and a salvage award may apply.

1. California and State Lands Commission v. Deep Sea Research 523 U.S. 491 (1998)

The United States Supreme Court has reviewed only one case interpreting the ASA. The case considered both the Eleventh Amendment and the abandonment issue. The former is beyond discussion in this paper.

With respect to abandonment, the Supreme Court decided not to make a decision. "We decline to resolve whether the Brother Jonathan is abandoned within the meaning of the ASA. We leave

that issue for reconsideration on remand, with the clarification that the meaning of “abandoned under the ASA conforms with its meaning under admiralty.”¹⁹

2. Sea Hunt Inc. v. Unidentified Shipwreck Vessel 221 F. 3d 634 4th Cir. (2002)

La Galga and Juno sank in what is now the three mile territorial waters of Virginia. Pursuant to the ASA, the Commonwealth of Virginia asserted ownership of the vessels upon their discovery by Sea Hunt Inc., a maritime salvage company. Sea Hunt had been granted permits by the Virginia Marine Resources Commission to conduct salvage operations, and subsequently expended nearly \$1 million in doing so.

Sea Hunt commenced an in rem admiralty action against the two vessels, hoping for a declaratory judgment that the Commonwealth of Virginia be determined the exclusive owner of the wrecks, or that, alternatively, Sea Hunt receive a salvage award from Spain. The district court granted Sea Hunt exclusive rights of salvage and ordered that Spain and the United States be notified of the action.

At issue were the sovereign rights of Spain in two of its naval vessels, La Galga and Juno, lost off the shores of present day Virginia in 1750 and 1802 respectively. Claimants, Virginia and salvage company, appealed from a district court order holding that Spain retained title to Juno and claimant, Spain, appealed from the district court’s ruling that it had expressly abandoned La Galga under Definitive Treaty of Peace, 1763, art. XX. The court reversed the district court’s

¹⁹ A strange reference since the ASA was to trump traditional admiralty law.

finding of abandonment as to La Galga and affirmed its ruling retaining title in the Juno with Spain. The court found that both ships were covered by Treaty of Friendship and General Relations, July 3, 1902, U.S.-Sp., 33 Stat. 2105, which, inter alia, established that sovereign vessels may only be abandoned by express acts. Accordingly, the court concluded that art. XX did not contain “clear and convincing” evidence of express abandonment and reversed the judgment of the district court finding Spain abandoned the La Galga.²⁰

Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts. See Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450 (4th Cir. 1992). “Should an owner appear in court and there be no evidence of an express abandonment,” title to the shipwreck remains with the owner. This principle reflects the long standing admiralty rule that when “articles are lost at sea the title of the owner in them remains.” The AKABA, 54 F. 197, 200 (4th Cir. 1893)

The First and Fifth Circuits have also never suggested that an implied abandonment standard would govern in a case involving a claim by an original owner to its property. See Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and abandoned Steam Vessel, 833 F. 2d 1059, 1065 (1st Cir. 1987)

²⁰ Sea Hunt Inc. v. Unidentified Shipwreck Vessel 221 F. 3d 634 4th Cir. (2002) See also, Fairport Int’l Exploration, Inc. v. Shipwrecked Vessel, 177 F. 3d 491, 499 (6th Cir. 1999).

What is interesting to note in this case, the effect of which was to make the ASA inapplicable was that Sea Hunt was operating under a permit from the state of Virginia. Under Virginia’s underwater cultural heritage statute, which specifically addresses preservation or recovery of underwater historic property, “underwater historic property” includes any item, including shipwrecks, on state-owned subaqueous lands that the DHR determines has historic value and that has remained unclaimed. Permits for recovery of underwater historic property are issued through the Marine Resources Commission but also through the concurrence of the DHR and through consultation with the Institute of Marine Science and any other interested state agency. The applicant successfully obtains the permit if the agencies find that granting the permit is in the best interest of the Commonwealth. The DHR retains general supervision over the recovery operations authorized by the permit.

Without providing detailed guidance, the Virginia Code charges a permittee with proceeding in his salvage activities “in such a manner that the maximum amount of historical, scientific, archaeological and educational information may be recovered and preserved in addition to the recovery of items.” Permits issued for conducting recovery operations that remove, destroy or disturb underwater historic property contain the terms of recovery. A permit reserves for the Commonwealth exclusive title over all objects recovered but gives the applicant title and ownership of a fair share of the objects recovered or a reasonable percentage of the cash value of the objects, to be paid by the DHR.

Courts have held that the ASA “did not affect the meaning of ‘abandoned,’ which serves as a precondition for the invocation of the ASA’s provisions.”

- B. Salvage and the Expanding Archaeological Duty of Care
 - 1. Columbus-America Discovery Group v. Atlantic Mutual Ins. Co. 974 F. 2d 450 (4th Cir. 1992), *ced. Denied* 501 U.S. 1000 (1993) and further proceedings at 56 F. 3d 556 (4th Cir. 1995)

In 1988, after years of searching, the Columbus-America Discovery Group, a group of scientists, engineers, ocean explorers and other experts led by scientist and ocean engineer Thomas G. Thompson, found the sunken ship at the bottom of the ocean 160 miles off the South Carolina coast.

After finding the Central America, Columbus-America Discovery Group (“CADG”) brought an in rem proceeding in admiralty seeking to establish ownership of and the right to salvage the defendant ship and its cargo of gold and other artifacts. The district court found that Columbus-America was a first salvor under substantive admiralty law and thereby entitled to salvage the ship without interference and to the exclusion of other salvors. In its order of August 18, 1989, the district court granted Columbus-America an injunction which permanently enjoined and restrained any other persons from conducting search, survey, or other salvage operations of the site.

The fixing of an award must take into consideration all the factors and circumstances “which surrounded the salvage service at the time it was rendered.” In short, the CADG must “be justly rewarded for its extensive efforts in salvaging the Central America”²¹

This is not an ordinary salvage case. The time, energy, worry, skill, the property employed, and the efforts to preserve the site and the artifacts have not been equaled in any other case. In addition to surveying more than 1,400 miles of ocean bottom, an area the size of the state of Rhode Island, hundred of runs were made to recheck objects and to photograph them. The salvors spent 487 days at sea working in shifts of twelve hours

²¹ Id. at 469

each. Personnel of CADG logged some 411,295 hours of labor from 1985 through 1992, at a cost for labor of \$8,421,733.66.

In determining a proper award for the salvors in Columbus-America, the Fourth Circuit set forth certain principles to be considered and rules to be followed in determining the amount of the award. Mr. Justice Clifford in The Blackwall, 77 U.S. at 8, recited by the Fourth Circuit in Columbus America, 974 F.2d at 468, set forth six things which admiralty courts usually consider in determining the amount of the reward to be decreed for salvage services: (1) the labor expended by the salvors in rendering the salvage service; (2) the promptitude, skill and energy displayed in rendering the service and saving the property; (3) the value of the property employed by the salvors rendering the service, and the danger to which such property was exposed; (4) the risk incurred by the salvors in securing the property from the impending peril; (5) the value of the property saved; and (6) the degree of danger from which the property was rescued.

To these the Fourth Circuit added a seventh, “the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salvaged,” and continuing it said, “salvors who seek to preserve and enhance the historical value of ancient shipwrecks should be justly rewarded.”²²

Courts have rarely questioned whether salvage law is appropriate at all for historic wrecks. To the consternation of many marine archaeologists, courts have uniformly found that shipwrecks and artifacts at the bottom of the ocean are as a matter of law in marine peril. In Columbus-America, the Fourth Circuit justified its finding of “marine peril,” noting:

²² Columbus America, 974 F.2d at 468

Whether property that is greatly endangered because it is about to sink becomes any less imperiled once it actually slips below the ocean's surface—with all possibility of an immediate recovery disappearing along with it—is an interesting question. The argument for an affirmative answer appears to be that property progresses from being endangered, as it is sinking, to some state of oblivion once it has sunk. The question of the degree of danger posed to the property would then be a matter of evaluating the conditions within the oblivion once the property is rediscovered.

The absence of clean hands is also a defense to salvage. The necessity for clean hands on the part of salvors plus the severe attitude of courts to looters of shipwrecks can cause serious problems for professional salvors and even for treasure seekers. Further, courts may require preservation of the artifacts as a condition of any award.

In Brother Jonathan, a discussed supra, the district court, in assessing an application for an injunction protecting salvage rights in the vessel, stated that the company had “attempted to preserve the archaeological value of the wreck by photographing the site.”

Archaeological considerations were also mentioned by the district court in RMS Titanic in considering whether RMS Titanic Inc. should continue as salvor in possession in light of its past activities on the wreck site. In considering whether due diligence had been exercised, the court stated:

Moreover, RMST has been dedicated to the preservation of the archaeological integrity of the wreck site as well as the preservation of the retrieved artifacts. RMST has worked with a number of organizations to establish an International Advisory Committee whose purpose is to develop a strategy for safeguarding the Titanic and the artifacts recovered from it. RMST has also hired a highly qualified conservation company to preserve the artifacts.

The authors of “Salvor in Possession: Friend or Foe to Marine Archaeology?”²³ conclude that the legal framework is itself flawed by uncertainty and that the deliberations of the court are hampered by procedural deficiencies:

In trying to assess the appropriateness of conduct without reference to the professionals, the courts have undertaken a difficult task with inadequate resources. Part of the problem may be alleviated by emerging internationally accepted standards to which courts could have recourse. It must be emphasized that these only provide general guidance and are not substitute for expert opinion.

If the full range of archaeological principles is taken into account, there seems to be little scope for salvage to operate...

...A study of the cases show that the courts have been heavily influenced by the preservation of artifacts and presentation of the work to the public as much as by careful archaeological principles...

V. PRIVATE LAW REMEDIES AND RESTITUTION UNDER ARTICLE 14 OF THE CONVENTION

Current U.S. law on restitution and replevin make implementation of Article 14—control of entry into the territory, dealing and possession, for the same reasons the U.S. art dealer and museum community has objected to the UNIDROIT Convention.²⁴

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property has been ratified or approved by 107 States as of December 2002. Despite this large number, the UNESCO Convention had done

²³ See fn. 1, *supra*.

²⁴ See generally, Hoffman, B., ed. *Legal and Other Issues in Protecting Cultural Heritage* (IBA London 2002) www.ibaculturalheritage.com

little to stop the trade in stolen and looted art since most of the ratifying countries are “source” nations. The substantive approach of UNESCO Convention has been criticized as ineffective. Three of the most common criticisms include complaints that each ratifying State retains and applies its own national laws relating to the protection of cultural property, that the text contains few substantive provision and enforcement mechanisms, and that the drafters utilized broad and ambiguous language.

On June 24, 1995, following several years of negotiations, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was opened for signature. The UNIDROIT Convention does not attempt to preempt the UNESCO Convention. Rather, the two conventions complement each other because the UNIDROIT Convention provides private parties seeking return of an object with direct access to the courts, whereas the UNESCO Convention focuses on administrative procedures and state action through public international law.

VI. CONCLUSION

What is required is a flexible regime to manage the underwater cultural heritage which provides incentives to salvors to act in concert with professional archaeologists in cooperation with cultural heritage management professionals. Adopting the Annex to the traditional law of salvage may provide the answer, but the task is daunting. Technological developments are making these issues more and more complex. But perhaps one development may make more coherent the current approach of the U.S. courts.

Dr. Robert Ballard’s goal for the future is to preserve these historic wrecks and their accompanying artifacts in underwater museums visibly accessible from land through on-site underwater video systems....

Some day in the not-too-distant future courts will also be faced with the even more fundamental questions going to the heart of salvage law itself—whether salvage requires a physical “rescue” of an object or whether it extends to the underwater preservation of a wreck intact for land-based viewing through modern fiber optic technology as envisioned by Dr. Ballard.²⁵

Reconciliation of the competing approaches to the management of the underwater cultural heritage will in part depend on the admiralty court’s receptiveness to development of evolving standards of international law in this area and a willingness to redefine such old concepts as “marine peril,” abandonment,” “salvage,” “clean hands,” and “possession” to reflect the new technological realities.

In addition, the establishment of a regime of private/public partnerships between government officials, salvors, marine lawyers, cultural heritage experts, underwater archaeologists, new technology specialists and others is essential to the success of this effort.

²⁵ Peltz, Robert D. “The Titanic’s Legacy: The History and Legal Developments Following the World’s Most Famous Maritime Disaster,” 12 U.S.F. Mar. L. J. 45, 88-89 (1999).