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An Overview of Commercial Salvage Principles in the Context of Marine Archaeology

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"[A]s part of the process of securing rights to a wreck, marine law requires that you file a lawsuit. Against whom—Neptune? Close; you sue the wreck itself. Just lower a lawyer in the submersible's claw, and *res gestae*, the loot is yours."[1]

I
INTRODUCTION

After sixteen years of certioraris denied, the United States Supreme Court returned briefly in April 1998 to the subject of marine salvage. The Court's principal interest, however, was not the application of salvage principles to historic shipwrecks, but rather the applicability of the Eleventh Amendment to the dispute. In *California v. Deep Sea Research, Inc.*,[2] Justice O'Connor, writing for a unanimous bench,[3] held that the Eleventh Amendment was inapplicable and said that abandonment under the Abandoned Shipwreck Act of 1987 ("ASA")[4] should be similar to the traditional admiralty concept of abandonment.

Because the Court limited itself to the issue of state sovereign immunity, its decision leaves unresolved numerous practical issues.[5] Here, however, I

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[1]Skow, Fantastic Voyage: A Shipwreck and the Hunt for Its Treasure 100 Years Later Make the Summer's Best Adventure Tale, Time, June 22, 1998, at 74 (reviewing G. Kinder, Ship of Gold in the Deep Blue Sea).

[2]118 S. Ct. 1464, 1998 AMC 1521 (1998).

[3]Justices Stevens and Kennedy penned concurrences. Justices Ginsburg and Breyer joined in Justice Kennedy's concurrence.

[4]43 U.S.C. §§ 2101–2106.

[5]These are profitably considered in Jones, The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan, 30 J. Mar. L. & Com. 205 (1999).

wish to focus on a more basic question, namely, whether the time has come to repeal the ASA's abrogation of the law of salvage and the law of finds.[6]

II
THE BROTHER JONATHAN: THEN AND NOW

The 220-foot-long paddle-wheel steamship *Brother Jonathan* sank in more than 200 feet of water in the Pacific Ocean off Crescent City, California (near Redwood National Park and the Oregon boundary) in July 1865 after striking a rock in a storm while on a voyage from San Francisco to Vancouver. The disaster took the lives of 230 of the 250 passengers and crew. The cargo, including a shipment of gold bullion and a federal government payroll (together worth possibly $2,250,000), was also lost. Within a month, five cargo insurers paid about $50,000 on insured claims. No insurer or government agency thereafter sought to locate the wreck or to recover the ship or cargo.

In 1991, Deep Sea Research, Inc. ("DSR") began an admiralty action *in rem* while preparing to search for the wreck. The State of California intervened, but the case was dismissed without prejudice; it was reinstated in 1994 after the wreck had been actually located by new technology. The wreck lies upright under water 4.5 miles from shore. Artifacts of the vessel and the cargo were recovered, with the artifacts becoming the basis of the *in rem* process. California moved to dismiss DSR's suit based on the Eleventh Amendment because DSR was asserting rights contravening California's title.

The federal Constitution originally permitted actions in the federal courts by citizens of one state against another state and its citizens.[7] The first substantive decision of the United States Supreme Court in 1793, *Chisholm v. Georgia*,[8] affirmed the right of South Carolina executors to recover revolutionary war debts from the state of Georgia. The uproar created by this decision imperilled the new and fragile union as well as the future viability of the Supreme Court when Georgia absolutely refused to comply. The Constitution was quickly amended in 1798 in a 43-word provision,[9]

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[6]See infra note 68.

[7]See U.S. Const. art. III, § 2, cl. 1 (authorizing federal courts to hear "Controversies . . . between a State and Citizens of another State").

[8]2 U.S. (2 Dall.) 419 (1793). The decision is discussed at length in J. Orth, The Judicial Power of the United States: The Eleventh Amendment in American History (1987), and Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983).

[9]See U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

allegedly drafted in 1794 by Vice President John Adams from several different proposals. The immediate crisis subsided and the Eleventh Amendment was forgotten for 90 years until the Supreme Court's bizarre and non-textual interpretation in *Hans v. Louisiana*.[10] Other recent decisions also depart from the textual meaning.[11] In the context of a case begun by traditional admiralty process *in rem*, it is at least interesting to note that the Eleventh Amendment refers only to "any suit in law or equity" and does not mention admiralty. Justice O'Connor's opinion alluded to Justice Story's *Commentaries on the Constitution*, contradicted by two 1921 decisions, but ignored that easy solution.[12] Professor David J. Bederman has argued persuasively that omission of admiralty process was necessary and intentional.[13]

The Eleventh Amendment issue was decided against California's claim by distinguishing the Court's 1982 decision in *Florida Department of State v. Treasure Salvors, Inc.*[14] In that case, the plurality opinion held that Florida could not invoke the Eleventh Amendment because its possession of the artifacts recovered by Mel Fisher's company was unauthorized.[15] In *Brother Jonathan* there was not even any state possession of the artifacts. That factual distinction from *Treasure Salvors* was reinforced by reference to older cases dealing with the sovereign immunity doctrine as applied to foreign sovereigns and states of the United States.[16] Accordingly, mere intervention in an *in rem* arrest based on a salvage lien does not establish state title under the ASA. Justice O'Connor concluded:

> Based on longstanding precedent respecting the federal courts' assumption of *in rem* admiralty jurisdiction over vessels that are not in the possession of a sovereign, we conclude that the Eleventh Amendment does not bar federal jurisdiction over the *Brother Jonathan* and, therefore, that the District Court may adjudicate DSR's and the State's claims to the shipwreck.[17]

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[10]134 U.S. 1 (1890) (holding that the Eleventh Amendment bars suits brought by a citizen against his or her own state unless the latter has waived its sovereign immunity). In Ex Parte Young, 209 U.S. 123 (1908), however, the Court approved suits against state officials to enjoin unlawful conduct under federal law.

[11]See, e.g., Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 1987 AMC 2113 (1987). See generally Marshall, Fighting the Words of the Eleventh Amendment, 102 Harv. L. Rev. 1342 (1989).

[12]See 118 S. Ct. at 1473.

[13]See Bederman, Admiralty and the Eleventh Amendment, 72 Notre Dame L. Rev. 935 (1997).

[14]458 U.S. 670, 1983 AMC 144 (1982).

[15]Id. at 689.

[16]See The Pesaro, 255 U.S. 216 (1921); The Davis, 77 U.S. (10 Wall.) 15 (1870); The Siren, 74 U.S. (7 Wall.) 152 (1869). See generally Bederman, supra note 13; Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983).

[17]118 S. Ct. at 1473.

The part of the decision dealing with substantive salvage law concerned the lower court's treatment of abandonment under the ASA. We still do not know when abandonment can be inferred; the case was remanded for reconsideration of the abandonment issue under admiralty principles, but the Court's "clarification" might become a forgotten dictum after reconsideration. Justice O'Connor wrote:

> [W]e 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 law.[18]

Thus, the Supreme Court has remanded the case to determine admiralty abandonment, a concept necessarily involving salvage law, which, according to § 2106 of the ASA, does not apply to abandoned shipwrecks.

III
TRADITIONAL SALVAGE LAW

The general maritime law of salvage is very ancient and also uniform throughout the maritime world. In fact, the first salvor might have been the Prophet Jonah, a passenger on a Mediterranean voyage overcome by a fierce storm. When the jettison of cargo failed to save the sinking ship, Jonah was thrown into the sea, the storm subsided, and the ship was saved, thereby making him the world's first salvor (probably about 750 B.C.).

There are two widely ratified international conventions dealing with the substantive law: the Brussels Convention of 1910 prepared for a diplomatic conference by the Comité Maritime International ("CMI"),[19] and the London Convention of 1989, prepared by the International Maritime Organization ("IMO") with the assistance of the CMI.[20] In the United States there are federal statutes enacting the 1910 convention and dealing with other aspects of salvage.[21]

The public policy behind salvage law is to reward the valiant for saving

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[18]Id.

[19]Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Brussels, Sept. 23, 1910, T.S. No. 576, 37 Stat. 1658. The essential purpose of this convention was to achieve a compromise between English and French salvage law traditions.

[20]International Convention on Salvage, London, Apr. 20, 1989, IMO Doc. LEG 60/12, reprinted at 20 J. Mar. L. & Com. 589 (1989). This new convention was necessary to deal with the disincentives to salvors in environmental disasters where salvage of the vessel was ultimately unsuccessful. See further Trico Marine Operators, Inc. v. Dow Chemical Co., 809 F. Supp. 440, 1993 AMC 1042 (E.D. La. 1992).

[21]See The Salvage Act, 46 U.S.C. §§ 727–731; Naval Vessels, 10 U.S.C. §§ 7361–7365; Duty Free status, 19 U.S.C. § 1310; Salvage Against the Government, 46 U.S.C. app. §§ 741–752 and 781–790; Crime of Plundering Distressed Vessel, 18 U.S.C. § 1658.

property and life at sea, and to discourage theft.[22] Its purpose is the return of the vessel and cargo to the stream of commerce. Salvage law goes beyond the reimbursement of out-of-pocket expenses to make a positive reward for courageous conduct in the face of perils of the seas.

Contract salvage was designed at the end of the 19th century to avoid problems of unconscionable and compelled bargains.[23] This article will not deal with contract salvage, and readers are instead referred to the Lloyd's Open Form Salvage Agreement ("LOF 1995")[24] and the U.S. Open Form Salvage Agreement ("MARSALV 1995").[25]

A. Elements of Pure Salvage

Traditional salvage law, as well as the international conventions, require four elements to support a finding of pure salvage: (1) there must be maritime property that was at risk of (2) a marine peril but that was (3) successfully preserved by the (4) voluntary conduct of salvors. Each of these requirements will be discussed in turn below.

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[22]See The Blackwall, 77 U.S. 1 (1869). In this case a British vessel loaded with sacks of grain caught fire while anchored at San Francisco. The city fire department, assisted by the plaintiff's tug carrying pumping engines and firemen, successfully extinguished the fire in an hour. The defendant (the owner of the salved vessel) resisted the plaintiff's claim, asserting that there was no salvage situation. The Supreme Court approved a salvage award, defining the concept of salvage thus:

> Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture. Success is essential to the claim. . . .

Id. at 12. Concerning the size of the award, the Court listed six factors to be considered: 1) the labor expended by the salvor; 2) the promptitude, skill, and energy of the salvor; 3) the value of the property employed by salvors; 4) the risk incurred by the salvor; 5) the value of the property salved; and, 6) the degree of danger to the salved property. Id. at 14. Cf. Art. 8, 1910 Salvage Convention, supra note 19; Art. 13, 1989 Salvage Convention, supra note 20.

In Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 56 F.3d 556, 1995 AMC 1985 (4th Cir.), cert. denied, 516 U.S. 938 (1995), the court also emphasized the importance of careful preservation of the historical archaeological and informational value of the shipwreck and cargo. See id. at 573. Based largely on this additional factor, a salvage award in excess of 90% was affirmed.

[23]See The Elfrida, 172 U.S. 186 (1898).

[24]LOF 1995 is part of a series of "No Cure-No Pay" forms dating back to 1892. See further Allen, The International Convention on Salvage and LOF 1990, 22 J. Mar. L. & Com. 119 (1991).

[25]MARSALV 1995 was developed in response to Jones v. Sea Tow Services Freeport NY Inc., 30 F.3d 360, 1994 AMC 2661 (2d Cir. 1994), which refused to apply the London arbitration provision of the LOF to salvage of a pleasure craft because all the parties were American. See further Cattell, Recreational Vessel Salvage Arbitration: An Interim Report, 29 J. Mar. L. & Com. 257 (1998).

1. Maritime Property

The jurisdiction of the admiralty court depends upon the property being maritime in nature.[26] The question of what is marine property for the purposes of admiralty jurisdiction occurs in many different contexts.[27] Arguments have been made that the property must have a commercial use or be involved in traditional maritime activity[28] (in order to eliminate cases from crowded federal dockets), but at the present time the trend of Supreme Court decisions is not to exclude pleasure craft from admiralty jurisdiction where there could be an impact on navigation.[29] Under earlier Supreme Court precedents, salvage law could be applied to any vessel, whether at sea or at a pier or even in drydock.[30]

2. Marine Peril

The action of natural elements such as the near presence of rocks, shoals, sands, surf, wind, current, fire, hurricane, or blizzard are among the many incidents that can put a vessel in peril, but the marine peril need not be solely caused by natural forces.[31] Human ignorance, stupidity, and violence, including the traditional crimes of piracy, barratry, and insurance fraud, may produce situations where the natural or artificial actions of the seas produce the appearance of danger.[32] Present existence of marine peril is often

[26]See Cope v. Vallete Dry-Dock Co., 119 U.S. 625 (1887); B.V. Bureau Wijsmuller v. United States, 702 F.2d 333, 1983 AMC 1471 (2d Cir. 1983); Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 1978 AMC 1404 (5th Cir. 1978); Flagship Marine Servs., Inc. v. Belcher Towing Co., 761 F. Supp. 792, 1992 AMC 2901 (S.D. Fla. 1991) (no award for pure salvage where parties had made salvage contract), rev'd, 966 F.2d 602, 1992 AMC 2901 (11th Cir. 1992), opinion reinstated, 23 F.3d 341, 1994 AMC 2624 (11th Cir. 1994); Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 691 F. Supp. 1377, 1988 AMC 2705 (S.D. Fla. 1988) (in pre-ASA case, no salvage of embedded wreck); Maltby v. Steam Derrick Boat, 16 F. Cas. 564 (E.D. Va. 1879) (No. 9,000).

[27]See, e.g., Broere v. Two Thousand One Hundred Thirty-Three Dollars, 72 F. Supp. 115, 1947 AMC 1523 (E.D.N.Y. 1947) (money on floating dead body). The Supreme Court has discussed traditional maritime activity as a prerequisite for admiralty jurisdiction in several non-salvage contexts: Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 1973 AMC 1 (1972) (air crash); Foremost Ins. Co. v. Richardson, 457 U.S. 668, 1982 AMC 2253 (1982) (collision of pleasure craft); Sisson v. Ruby, 497 U.S. 358, 1990 AMC 1801 (1990) (fire onboard yacht stored at marina); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 1995 AMC 913 (1995) (pile driver on river bottom pierces roof of railroad tunnel and causes flooding of basements in the Chicago Loop).

[28]See *Foremost Ins. Co.*, supra note 27.

[29]See *Sisson*, supra note 27.

[30]See Simmons v. The Steamship Jefferson, 215 U.S. 130 (1909).

[31]*Treasure Salvors*, supra note 26; Markakis v. S/S Volendam, 486 F. Supp. 1103, 1980 AMC 915 (S.D.N.Y. 1980).

[32]See The Clarita and The Clara, 90 U.S. (23 Wall.) 1 (1874); The Cape Race, 18 F.2d 79, 1927 AMC 628 (2d Cir. 1927).

challenged in cases of ancient shipwrecks that have been on the sea bottom in coastal waters, but salvage may be awarded even though the peril is never entirely realized.[33]

3. Success

Both traditional (or pure) salvage and contract salvage agree on the principle that success is essential—described in the LOF series as "No Cure-No Pay." That ancient requirement now has been amended by the 1989 Salvage Convention and LOF 1995 to provide a "safety net" to encourage efforts to prevent or minimize damage to the environment even though salvage of the polluting vessel is ultimately unsuccessful.[34]

The successful salvor does not acquire title to the salved property, but merely a maritime lien for services to be fixed by the court.[35] The owner retains title to the salved vessel until he or she has abandoned it. The maritime lien for the salvor enjoys a very high position on the ladder of priorities of distribution of proceeds if it becomes necessary to have a judicial sale of the vessel.[36] This maritime lien is available for all those whose work contributed to the successful salvage.[37]

This means that competing salvors might be required to share the salvage award where ultimate success resulted from parallel efforts. While the owner of the successful salving vessel usually will be awarded the largest share of the award, the members of the salving vessel crew as well as other assisting vessel owners and their crews also will be entitled to a reward.[38]

Salvage law requires success in the sense that no salvage lien can be imposed upon property that has not been brought within the jurisdiction of the court for the purpose of arrest *in rem.* Thus, retrieved artifacts from shipwrecks, even a lump of coal, have become the subject of salvage disputes when it is not yet possible to retrieve all parts of the wreck; salvage

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[33]*Treasure Salvors*, supra note 26. See also Tidewater Salvage, Inc. v. Weyerhaeuser Co., 633 F.2d 1304, 1982 AMC 719 (9th Cir. 1980); The Plymouth Rock, 9 F. 413 (S.D.N.Y. 1881); cf. Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked and Abandoned Vessel, 577 F. Supp. 597, 1984 AMC 913 (D. Md. 1983), aff'd mem., 765 F.2d 139 (4th Cir. 1985).

[34]See Art. 14, 1989 Convention, supra note 20; LOF 1995, supra note 24.

[35]The Sabine, 101 U.S. (11 Otto) 384 (1879).

[36]The William Leishear, 21 F.2d 862 (D. Md. 1927). Preservation of the res for all claimants is the rationale for preferring salvage liens over other liens except seamens' wages and custodial costs.

[37]*The Blackwall*, supra note 22.

[38]See Sobonis v. Steam Tanker National Defender, 298 F. Supp. 631, 1969 AMC 1219 (S.D.N.Y. 1969) (crew of vessel chartered to lighter cargo of stranded vessel entitled to salvage award); Squires v. The Ionian Leader, 100 F. Supp. 829, 1952 AMC 161 (D.N.J. 1951) (crew of salving vessel entitled to salvage award despite towage contract of salving vessel); Atlantic Transp. Co. v. United States, 42 F.2d 583, 1930 AMC 726 (Ct. Cl. 1930) (first salvor, who was unable to complete successful salvage, entitled to share in award).

liens can be imposed on pieces of the wreck and cargo as they become subject to the court's jurisdiction.[39]

Unsuccessful salvage efforts were not ordinarily penalized, but modern courts have recognized a tort cause of action in the vessel owner for negligent salvage that adds additional damage to the vessel or cargo. There is, however, debate as to the required nature of the defendant's conduct: gross negligence, wilful misconduct, or simple negligence.[40]

4. Voluntary Action

The claimant to a salvage award must have acted without a preexisting legal duty to perform the service. As a general rule, members of the crew of the salved vessel and passengers have been denied salvage awards because they could not be true volunteers.[41] The ideal volunteer is the Good Samaritan in the Bible story who aided the injured traveller who had been robbed, without expectation of praise or reward.[42]

Arguments have been made that even professional salvors cannot qualify as volunteers for pure salvage because of their ready availability to assist for a fee, and can instead only recover under contract. That view is not widely

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[39]See Admiralty Supplemental Rules C and E, Fed. R. Civ. P.; Platoro Ltd. v. Unidentified Remains of a Vessel, 695 F.2d 893, 1984 AMC 2288 (5th Cir.), cert. denied, 464 U.S. 818 (1983); *Treasure Salvors*, 569 F.2d at 334; Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 742 F. Supp. 1327, 1990 AMC 2409 (E.D. Va. 1990), rev'd on other grounds, 974 F.2d 450, 1992 AMC 2705 (4th Cir. 1992), cert. denied, 502 U.S. 1000 (1993); Brady v. The African Queen, 179 F. Supp. 321, 1960 AMC 69 (E.D. Va. 1960) (express abandonment).

A Canadian court has denied comity to the *in rem* arrest order of a California federal court where the wreck of the steamship *Atlantic* rested on the Canadian side of Lake Erie. See The Queen v. Mar-Dive Corp., 1997 AMC 1000 (Ontario Ct. Just. 1996).

[40]See Petition of Alva S.S. Co., 616 F.2d 605, 1980 AMC 857 (2d Cir. 1980); B.V. Bureau Wijsmuller v. The Tojo Maru, [1971] 1 Lloyd's Rep. 341, [1972] A.C. 242 (H.L.). Cf. The Noah's Ark v. Bentley & Felton Corp., 292 F.2d 437, 1961 AMC 1641 (5th Cir. 1961), later proceedings at 322 F.2d 3, 1964 AMC 59 (5th Cir. 1963) (negligent mooring of salved vessel caused further damage); P. Dougherty Co. v. United States, 207 F.2d 626, 1953 AMC 1541 (3d Cir. 1953), cert. denied, 347 U.S. 912 (1954). Cf. Sands v. One Unnamed 23' Seacraft, 959 F. Supp. 1488, 1997 AMC 1978 (M.D. Fla. 1997), aff'd mem., 144 F.3d 55 (11th Cir. 1998).

[41]See generally Mason v. The Blaireau, 6 U.S. (2 Cranch) 240 (1804); Nicholas E. Vernicos Shipping Co. v. United States, 349 F.2d 465, 1965 AMC 1673 (2d Cir. 1965) (salvage award to crew of professional salvor); Bertel v. Panama Transport Co., 202 F.2d 247, 1953 AMC 471 (2d Cir.), cert. denied, 346 U.S. 834 (1953) (no salvage to engine room crew who did not know of "abandon ship" order); Petition of Sun Oil Co., 342 F. Supp. 976, 1972 AMC 2258 (S.D.N.Y. 1972), aff'd, 474 F.2d 1048, 1973 AMC 572 (2d Cir. 1973) (no salvage for crew of stand-by vessel after collision); Drevas v. United States, 58 F. Supp. 1008, 1945 AMC 254 (D. Md. 1945) (no salvage for crew members returning to ship after temporary abandonment); Towle v. The Great Eastern, 24 F. Cas. 75 (S.D.N.Y. 1864) (No. 14,110) (salvage award to passenger who performed extraordinary service).

[42]Luke 10:23.

held today.[43] Obviously the treasure seeker could not be a volunteer under this narrow view of volunteering.

IV
ABSENCE OF CLEAN HANDS AS 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.

Just as human conduct can create the marine peril, so human conduct during the salvage effort can cause the total loss or diminution of the salvage award.[44] Criminal behavior by salvors such as looting the salved vessel or violence in preventing assistance by other salvors are classic situations for denial of a salvage award.[45] Even assuming the duty relationship owed by crew members has been severed by the master's order to abandon ship, there may remain lingering suspicion of barratry or looting—thus putting a very heavy burden of proof of clean hands on crew members seeking salvage awards in difficult situations.[46]

Fraud, compulsion, and unconscionable conduct may also contaminate a contract salvage claim where modern treasure seekers assert rights under successors in interest in abandoned vessels.[47] Fault in collision will normally cause the denial of a salvage claim to the colliding vessel that asserts a salvage claim against a collided vessel.[48] Lastly, as previously noted, reckless or grossly negligent conduct in salvage not only creates a cause of action in the salved vessel against the salvor but may also lead to a denial or diminution of a salvage award.[49]

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[43]See *Nicholas E. Vernicos Co.*, supra note 41.

[44]See, e.g., Jackson Marine Corp. v. Blue Fox, 845 F.2d 1307, 1988 AMC 2740 (5th Cir. 1988); Empacadora Del Norte, S.A. v. M/V Finnco Victoria, 1983 AMC 1235 (S.D. Tex. 1982) (looting by rival salvors); The Norseman, 1967 AMC 1531 (D.P.R. 1967) (perjury and looting); Danner v. United States, 99 F. Supp. 880, 1951 AMC 1495 (S.D.N.Y. 1951).

[45]*Danner*, supra note 44.

[46]See further The North Carolina, 40 U.S. (15 Pet.) 40, 46–48 (1841); Higgins, Inc. v. The Tri-State, 99 F. Supp. 694, 1951 AMC 862 (S.D. Fla. 1951); Church v. Seventeen Hundred and Twelve Dollars, 5 F. Cas. 669 (S.D. Fla. 1853) (No. 2,713).

[47]Black Gold Marine, Inc. v. Jackson Marine Co., 759 F.2d 466, 1986 AMC 137 (5th Cir. 1985); *Blue Fox*, supra note 44.

[48]*The Clarita and The Clara*, supra note 32.

[49]The Bello Corrunes, 19 U.S. (6 Wheat.) 152, 173–75 (1821); *The Cape Race*, supra note 32.

V
ABANDONMENT AND PROPERTY RIGHTS IN THE VESSEL

The purpose of salvage law is to protect the property rights of the owner of the salved vessel while at the same time protecting the right of the successful salvor to a fair reward by means of a maritime lien imposed on the salved property. Owners in control of their vessels have a right to refuse salvage even at the risk of further damage to the vessel. This is not, however, an absolute right to risk the entire venture, but is qualified by the presence of the rights of other participants in the common venture of the voyage, such as passengers, crew members, cargo owners, and ship mortgage holders.[50] Salvage nearly always occurs in desperate circumstances, but salvage cannot be forced on the vessel owner until there are perils to human life and safety and risks to property other than the vessel owner's. Accordingly, the ancient maritime custom that the master should be the last person to leave a foundering vessel is based on the vessel owner's rights to refuse salvage offers in order to seek more favorable towage or contract salvage terms. Thus, as long as the shipowner is in actual or constructive possession of the vessel through his master, officers, and crew, the owner can control salvage efforts.[51] Only when the vessel is abandoned in fact may any salvor attempt to rescue the vessel from peril.[52]

Under the circumstances of extreme peril, abandonment for the purpose of non-consensual salvage occurs when no reasonably prudent person would refuse salvage. This abandonment, however, is of two types: 1) temporary abandonment ordered by the master (or other officer in charge of the vessel) for the safety of life, as in a fire at sea that appears to be out of control;[53] and, 2) permanent abandonment of all ownership interest and title to the wrecked

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[50]See Merritt & Chapman Derrick & Wrecking Co. v. United States, 274 U.S. 611, 1927 AMC 953 (1927); The Odenwald, 71 F. Supp. 314, 1947 AMC 666 (D.P.R. 1947), aff'd, 168 F.2d 47, 1948 AMC 888 (1st Cir. 1948) (Nazi commerce-raider intercepted by U.S. Navy "Neutrality Patrol" before outbreak of World War II; ship scuttled by crew but preserved by U.S. Navy).

[51]Complaint of Ta Chi Nav. Co. (Panama) Corp. S.A., 583 F. Supp. 1322, 1985 AMC 1367 (S.D.N.Y. 1984) (no peril to sailing vessel that lost its "top hamper" of sails and rigging but had come 200 miles with spinnaker, jibs, and foresails in calm weather); F.E. Grauwiller Transp. Co. v. King, 131 F. Supp. 630, 1955 AMC 1236 (E.D.N.Y. 1955), aff'd, 229 F.2d 153, 1956 AMC 319 (2d Cir. 1956) (no salvage award to repairman on grounded vessel repeatedly told to desist by owner); The J.C. Pfluger, 109 F. 93 (N.D. Cal. 1901).

[52]See Art. 3, 1910 Convention, supra note 19 ("Persons who have taken part in salvage operations, notwithstanding the express and reasonable prohibition on the part of the vessel . . . have no right to any renumeration."); Art. 19, 1989 Convention, supra note 20. See also Bunge Corp. v. Agri-Trans Corp., 542 F. Supp. 961, 1983 AMC 1931 (N.D. Miss. 1982), aff'd in part, 721 F.2d 1005 (5th Cir. 1983); Bonifay v. The Paraporti, 145 F. Supp. 879, 1956 AMC 1898 (E.D. Va. 1956) (no award for salvor's services rendered without express or implied consent of owner).

[53]*Bertel*, supra note 41.

vessel.[54] This may be expressed by a declaration surrendering the wreck to the hull underwriters or to a government. It may also be implied from the long passage of time without any efforts to locate or raise the wreck. Some authorities have said these are alternative inferences.[55]

Implied abandonment did not begin to produce legal disputes until the present time because the technology to locate deep ocean wrecks and bring all or parts of them to the surface did not exist. Undersea warfare in World War II and its refinements during the Cold War account for this technological advance. The new problem for policy makers is that some of the current techniques for finding treasure wrecks damage the environment, undersea plants, and animals, and also destroy the archaeological value of the treasures uncovered.

The temporary abandonment of a vessel can lead to disputes between potential salvors that may become violent at sea. The old view that equitable remedies were not available in admiralty resulted in the use of state court remedies such as an injunction to forbid competing salvors from interfering with a salvage that had begun. State courts, however, are not competent to award salvage.[56] Due to the 1966 unification of the Supreme Court's Admiralty Rules and the Federal Rules of Civil Procedure, a federal court may now use its equitable remedies to effect a temporary resolution of disputes between competing salvors until success has been achieved.[57]

Temporary abandonment does not terminate the right of the owner to seek

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[54]Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1988 AMC 1109 (1st Cir. 1987).

[55]See infra note 58.

[56]*The North Carolina*, supra note 46.

[57]The use of equity to undo fraudulent conveyances, however, antedated the 1966 unification. See, e.g., Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 1950 AMC 1089 (1950). See also Rule 65, Fed. R. Civ. P.; Pino v. Protection Mar. Ins. Co., 599 F.2d 10, 1979 AMC 2459 (1st Cir.), cert. denied, 444 U.S. 900 (1979); Lewis v. S.S. Baune, 534 F.2d 1115, 1976 AMC 1275 (5th Cir. 1976).

For examples of an admiralty court using its equitable powers to resolve disputes between competing salvors, see, e.g., Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, 895 F.2d 116, 1990 AMC 305 (3d Cir. 1990); Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel, 640 F.2d 560, 567, 1981 AMC 1857 (5th Cir. 1981); Marex Titanic, Inc. v. Wrecked and Abandoned Vessel, 805 F. Supp. 375, 1993 AMC 1258 (E.D. Va. 1992), rev'd on other grounds, 2 F.3d 544, 1993 AMC 2799 (4th Cir. 1993); Indian River Recovery Co. v. The China, 645 F. Supp. 141, 1989 AMC 50 (D. Del. 1986); Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186, 1983 AMC 966 (S.D. Fla. 1981).

It should be noted that some competing American salvors will be affected by The R.M.S. Titanic Maritime Memorial Act of 1986, Pub. L. No. 99–513, 100 Stat. 2082, codified at 16 U.S.C. §§ 450rr to 450rr-6. See further Moyer v. Wrecked and Abandoned Vessel, 836 F. Supp. 1099, 1994 AMC 1021 (D.N.J. 1993); Bemis v. RMS Lusitania, 884 F. Supp. 1042, 1995 AMC 1665 (E.D. Va. 1995), aff'd mem., 99 F.3d 1129 (4th Cir. 1996) (per curiam), cert. denied, 118 S. Ct. 1558 (1998) (this decision was rendered before the Irish government extended its territorial jurisdiction and entered an Underwater Heritage Preservation order). See also The Santa Maria de la Rosa, 114 I.L.T.R. 37 (1969).

contract salvage or towage, but other salvors may have intervened during the abandonment to produce a successful salvage before the owner's contractor can begin work. If the owner cannot find a contract salvor, possibly because the cost of salvage and repairs would exceed the vessel's reasonable value after repairs, the owner may tender the title of the vessel to the hull underwriters under the usual hull policy forms as a "constructive total loss."[58] Thus, the owner's problems become those of the hull underwriter who is, of course, subrogated to the rights of the owner, and this subrogation right may continue long after the shipwreck.

Abandonment of the vessel by the owner in the navigable waters of the United States does not terminate the obligations of owners and underwriters under the Wreck Act.[59] By that statute the owner is obligated to mark the wreck with a buoy or beacon during the day and a lantern at night until the wreck is removed by the owner or by the United States government at the expense of the owner.[60]

VI
CONSEQUENCES OF ABANDONMENT

A. The Law of Finds

The first finder of property without an owner on the high seas who takes physical possession of it acquires title under the law of finds.[61] This ancient

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[58]See American Institute Hull Clauses (June 2, 1977), Total Loss Clause. In *Columbus-America Discovery Group*, supra note 39, the Fourth Circuit reversed Judge Kellam's application of the law of finds based on abandonment where the insurers had not attempted to recover the wreck or cargo. The court then applied salvage law because 39 insurers of cargo (or their successors) claimed ownership by subrogation in the gold cargo of the *S.S. Central America*. Evidence supporting these claims came principally from contemporaneous newspaper accounts in the absence of documentary evidence from the insurers' files. Inference of abandonment by lapse of time or failure to attempt salvage is also discussed in Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel, 105 F.3d 1078, 1998 AMC 1520 (6th Cir. 1997), vacated and remanded, 118 S. Ct. 1558 (1998), and Zych v. Unidentified, Wrecked and Abandoned Vessel, 755 F. Supp. 213, 1991 AMC 1254 (N.D. Ill. 1991), rev'd on other grounds, 960 F.2d 665, 1992 AMC 1817 (7th Cir. 1992).

[59]33 U.S.C. §§ 409, 411–16, 418, 502.

[60]Wyandotte Transp. Co. v. United States, 389 U.S. 191, 1967 AMC 2553 (1967). See also In re Chinese Maritime Trust, Ltd., 478 F.2d 1357, 1973 AMC 1110 (2d Cir. 1973); In re Sincere Nav. Corp., 327 F. Supp. 1024, 1971 AMC 2270 (E.D. La. 1971).

[61]*Martha's Vineyard*, supra note 54; Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511, 1985 AMC 2970 (11th Cir. 1985); Hener v. United States, 525 F. Supp. 350, 1982 AMC 847 (S.D.N.Y. 1981); Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 1960 AMC 1774 (E.D. Va. 1960).

It is arguable that the law of finds was never part of the traditional jurisdiction of the English Admiralty Court, whose only process for obtaining jurisdiction was the arrest *in rem* of the vessel or cargo. In American practice there must be a maritime lien for an arrest *in rem*. There are few law of finds cases in the maritime context, and no ancient ones. There is, however, a common law doctrine of finds with ancient cases. See Armory v. Delamirie, 93 Eng. Rep. 664 (K.B. 1722) (chimney sweep could

rule may have been effective in territorial waters prior to the passage of the ASA for those states which made no claim of ownership of wrecked and abandoned property. Under English law, property such as vessels and cargoes abandoned to the sea become Crown property and are outside the law of salvage.[62] Some American states made claims on this property by statute; thus, any discussion of the law of finds requires determination of the location of the property: high seas or territorial waters.[63] Vessels may become subject to the law of finds where the owner and the underwriter have abandoned title and ownership in the vessel. Neither Spain nor Mexico (as Spain's successor), for example, have expressed any interest in asserting ownership in the wrecked treasure ships lying in the Gulf of Mexico.

Discovery of abandoned property does not create title under the law of finds. Reduction of the property to effective possession has always been a requirement.[64] Technological change has been at work here and the use of unmanned deep-sea submersible craft has altered our understanding of the mechanical means of reducing objects on the ocean bottom to effective possession.[65]

B. The Abandoned Shipwreck Act of 1987

The ASA was intended to settle disputes between treasure salvors and state and federal governments.[66] Unhappily, the broad statutory language of

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maintain trover against all the world but the rightful owner). See generally *Columbus-America Discovery Group*, 974 F.2d at 461; Chance v. Certain Artifacts Found and Salvaged from The Nashville, 606 F. Supp. 801, 1985 AMC 609 (S.D. Ga. 1984), aff'd, 775 F.2d 302, 1986 AMC 1216 (11th Cir. 1985) (finds doctrine not applied to Confederate raider embedded in seabed since 1863); Owen, The Abandoned Shipwreck Act of 1987: Good-bye to Salvage in the Territorial Sea, 19 J. Mar. L. & Com. 499, 510 (1988).

[62]2 A. Browne, A Compendious View of the Civil Law and of the Law of the Admiralty 46–54 (1802). Crown prerogative under American federal law without Congressional action was rejected in United States v. Tyndale, 116 F. 820 (1st Cir. 1902).

[63]The high seas is no longer an area without law. See infra text following note 78. See generally *Treasure Salvors*, supra note 31; *Indian River Recovery Co.*, supra note 57; Oxman, Marine Archaeology and the International Law of the Sea, 12 Colum.-VLA J.L. & Arts 353 (1988).

[64]*Treasure Salvors*, supra note 31.

[65]Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 1989 AMC 1955 (E.D. Va. 1989). Concepts of telepossession and telepresence with real-time imaging by the use of a robotic, unmanned submersible vehicle were introduced by Judge Kellam in this case. See Comment, Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule, 38 UCLA L. Rev. 1659 (1991); Note, Telepossession is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery, 3 Pace Y.B. Int'l L. 309 (1991).

[66]See generally Symposium, 12 Colum.-VLA J.L. & Arts 335 (1988), especially Giesecke, The Abandoned Shipwreck Act: Affirming the Role of the States in Historic Preservation, id. at 379. See also Note, The Treasure Below: Jurisdiction Over Salving Operations in International Waters, 88 Colum. L. Rev. 863 (1988); Note, Underwater Recovery Operations in Offshore Waters: Vying for Rights to Treasure, 5 B.U. Int'l L.J. 153 (1987). Congressional interest in the subject was aroused by estimates 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.

Under the Act the federal government asserted its rights under international law to abandoned shipwrecks in its territorial sea and then immediately conveyed those wrecks embedded in the territorial extension of a coastal state to such state. The obvious precedent followed by Congress was the 1953 conveyance to the states of the federal government's interest in continental shelf oil deposits.[67] It was the belief of Congress that the coastal states were best equipped to protect these historical and archaeological resources under principles of land management so that site development would proceed under careful and scientific archaeology and environmental integrity for the protection of the historic value of any discoveries. Congress obviously never intended to fund marine archaeological research.

The most controversial aspect of the statute is that the law of salvage and the law of finds are not to be applicable to discovered artifacts in the area to which the statute applies.[68] Accordingly, an open question remains about the constitutional validity of this part of the statute.[69] It can be argued that salvage law and the law of finds are themselves embedded in the federal courts, so that removal of such jurisdiction requires a constitutional amendment.[70]

50,000 shipwrecked vessels in United States territorial waters, five to ten percent of which are believed to be of historical significance. See H.R. No. 100–514 (I) (1988), reprinted at 1988 U.S.C.C.A.N. 365. See generally Owen, supra note 61.

[67]See The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301–1315. See also The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a).

[68]See 43 U.S.C. § 2106 ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 applies.").

[69]See Zych v. Unidentified, Wrecked and Abandoned Vessel, 746 F. Supp. 1334, 1991 AMC 359 (N.D. Ill. 1990), rev'd and remanded for a finding on the issue of "embeddedness," 941 F.2d 525, 1992 AMC 532 (7th Cir. 1991), on remand, 811 F. Supp. 1300, 1993 AMC 2201 (N.D. Ill. 1992) (holding that the ASA did not oust traditional admiralty law or the law of finds and that finds may not have been a traditional admiralty remedy), aff'd, 19 F.3d 1136, 1994 AMC 2672 (7th Cir.), cert. denied, 513 U.S. 961 (1994). The weakness in the remand opinion and its affirmance is the assumption (now discredited) that the Eleventh Amendment automatically forbids ownership claims against the states. See supra text accompanying note 17. See also Sunken Treasure, Inc. v. Unidentified, Wrecked and Abandoned Vessel, 857 F. Supp. 1129, 1995 AMC 1515 (D.V.I. 1994).

[70]See generally Note, The Abandoned Shipwreck Act of 1987: Navigating Turbulent Constitutional Waters?, 10 U. Bridgeport L. Rev. 361 (1990); Comment, Sunken Treasures: Conflicts Between Historic Preservation Law and the Maritime Law of Finds, 7 Tul. Envtl. L.J. 595 (1994).

At this stage it is too early to assess the possible impact on the ASA of the Supreme Court's 5–4 decision in Printz v. United States, 117 S. Ct. 2365 (1997), which held that Congress had unconstitutionally imposed background check requirements for purchases of handguns on state officers under the Brady Handgun Violence Prevention Act. Justice Scalia's broad language stated: "The Federal Government may neither issue directives requiring the States to address particular problems, nor

VII
INAPPROPRIATENESS OF COMMERCIAL SALVAGE PRINCIPLES IN TREASURE SALVAGE

Because the purpose of salvage law is essentially commercial, it presupposes the retention of title in an identifiable owner who has not abandoned title. Indeed, an award of title to a salvor is unusual. Commercial salvage principles thus become inappropriate in cases of marine archaeology where an ancient shipwreck, without an identifiable owner, has been located and artifacts from the wreck have been brought to shore. Salvage law will give way to the law of finds where abandoned shipwrecks are involved.

It may be appropriate to borrow the concept of statutes of repose (rather than statutes of limitation) from the tort law of product liability to put time limits to the use of commercial salvage law by treasure seekers.[71] It has been suggested, for example, that commercial salvage law should not be applied to shipwrecks that occurred more than 100 years ago.[72]

While traditional salvage law (without an equitable remedy) prefers to

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command the States' officers, or those of their political subdivisions to administer or enforce a federal regulatory program." Id. at 2384.

[71]Statutes of limitation cut off an individual claimant's right to sue because of the passage of time from the damage or injury (or in some cases, discovery of the injury). Statutes of repose cut off the rights of all possible claimants because of the passage of time from the creation of the product. Both treaties and federal law impose a two-year statute of limitations from the date of the salvage service. Art. 10, supra note 19; Art. 23, supra note 20; Salvage Act, § 730, supra note 21.

Congress imposed an 18-year statute of repose to protect manufacturers of general-aviation aircraft from tort claims for personal injury or death. See § 3(3) of the General Aviation Revitalization Act, Aug. 17, 1994, Pub. L. No. 103–298, 108 Stat. 1552, as amended by Pub. L. No. 105–102, § 3(e), Nov. 20, 1997, 111 Stat. 2216, to be codified under 49 U.S.C. § 40101. See further Alter v. Bell Helicopter Textron, Inc., 944 F. Supp. 531 (S.D. Tex. 1996). An example of both types can be seen in the 1969 International Convention on Civil Liability for Oil Pollution Damage, 973 U.N.T.S. 3, 9 I.L.M. 45 (1970), where Article VIII provides a three year statute of limitations from the date of damage and a six year statute of repose from the pollution incident.

[72]See King & Chapman v. "La Lavia," "Juliana" and "Santa Maria de la Vision" (Rep. of Ireland, High Court, in Admiralty, July 26, 1994) (unreported; available on LEXIS, Intlaw Library, Irecas File). The extensive opinion of Mr. Justice Barr dealt with claims of salvage on three vessels of the 1588 Spanish Armada wrecked off Streedagh Strand, County Sligo. Rejecting salvage law, Justice Barr wrote:

> It seems to me that when so much time has elapsed since the original loss of a vessel that the question of ownership, and attendant acolytes such as indemnification, lose their practical significance and merge into history, then the wreck should be regarded as having passed from the commercial realm of maritime salvage law into the domain of archaeological law.

Slip op. at 92.

Authority for the view that salvage law is concerned with recent casualties involving commercial values rather than historical wrecks was found in Geoffrey Brice's Maritime Law of Salvage §§ 82–85 (1993). The court also referred to a 1930 statute of the Irish Parliament—the National Monuments Act, as amended—whereby surveying, diving, salving, or tampering with a wreck that is more than 100 years old is forbidden.

The court concluded that the "salvors" were entitled to a substantial reward from the state, in part because of the unreasonable failure of state officials to grant a license for salvaging activities, in violation

reward the first salvor on the scene because of the policy of encouraging disinterested courage from brave mariners,[73] it is at least questionable whether priority on the scene should carry great weight in cases of treasure salvage.

In the new industry of treasure salvage, courts are still developing the criteria to resolve disputes between competing salvors; thus, priority in locating the wreck,[74] priority on the scene,[75] scientific capabilities to preserve the site,[76] actual retrieval of valuable artifacts, and surrender of them for scientific and historical research[77] are all factors that may be considered. The existence of multiple factors as well as the different kinds of conflicting claimants will lead to stalemate in legislatures. This is an ideal situation, however, for the development of the law on a case-by-case basis by courts and lawyers accustomed to dealing with the sea and the marine environment. It is, of course, the federal admiralty court, guided by the appellate courts, that can best sculpt correct solutions under the nationalized federal admiralty law. That court already has the power to prohibit American salvors (and others subject to American jurisdiction) from interfering with an on-site salvor who has successfully retrieved an artifact from a shipwreck.

VIII
NEW FACTORS IN INTERNATIONAL LAW

Most of the case law on salvage was decided when the only question was whether the salvor was operating in a coastal state's territorial waters or on the high seas. Today, however, salvors must also consider the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"),[78] in force as of November 16, 1994 and now ratified by more than 120 nations. After the required sixtieth ratification was achieved, a special session of the United Nations General Assembly in July 1994 prepared a protocol of provisional application whereby features of the seabed regime that had been labelled

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of fundamental rights under the Irish Constitution. This latter provision has been reversed by the Supreme Court of Ireland. See [1996] I.L.R.M. 194.

[73]*Treasure Salvors*, supra note 57; The John Gilpin, 13 F. Cas. 675 (S.D.N.Y. 1845) (No. 7,345).

[74]Cf. Dominguez v. Schooner Brindicate, 204 F. Supp. 817, 1962 AMC 1659 (D.P.R. 1962) (no priority for first discoverer).

[75]Cf. Rickard v. Pringle, 293 F. Supp. 981, 1968 AMC 1008 (E.D.N.Y. 1968) (no priority to first salvor).

[76]MDM Salvage Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 631 F. Supp. 308, 1987 AMC 537 (S.D. Fla. 1986).

[77]See Alexander, Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations, 20 J. Mar. L. & Com. 1 (1989).

[78]United Nations Convention on the Law of the Sea, Montego Bay, Dec. 10, 1982, U.N. A/CONF. 62/122, reprinted at 21 I.L.M. 1261 (1982).

"Marxist" and "utopian" were altered, after which developed nations in Western Europe and the United States signed the convention. (UNCLOS has not yet been ratified by the United States, although the Department of State regards much of it as customary international law.)

Under Article 3 of UNCLOS, the coastal state has a territorial sea of twelve miles seaward from the baseline (or low water mark), applicable to both the seabed and the water column. Article 33 provides that the coastal state has a contiguous zone of twenty-four miles from the baseline for the enforcement of its customs, fiscal, immigration, and sanitation laws. Pursuant to Articles 56–59, in the water column there is an exclusive economic zone of 200 miles from the baseline to explore and exploit natural resources whether living (fisheries) or non-living.

There is simultaneously the continental shelf, whose breadth under Article 76 varies from 200 to 350 miles from the baseline, depending on the nature of the continental margin and the continental slope; the coastal state has sovereign rights to explore and exploit the natural resources of this shelf. Beyond these regions of coastal state authority is the water area described in Articles 86–90 as the "high seas" and the deep seabed designated by Articles 134–135 as the "area."

Possibly overriding each of these exclusive rights of coastal states is the obligation set forth in Articles 149 and 303 to preserve and protect objects of an archaeological and historic nature from shipwrecks for scientific study for the benefit of mankind as a whole.

IX
CONCLUSION

The presence of complaints from conflicting interests with divergent goals brought the federal government into the treasure salvage debate. But the solution—to turn the problems over to state administrative agencies—can hardly produce the uniformity needed by the industry.[79] The admiralty courts are accustomed to balancing conflicting interests at sea, yet these courts have been discouraged and even prevented from resolving these treasure salvage disputes in state territorial waters by § 2106, which declares that the law of salvage and the law of finds shall not apply to abandoned and embedded shipwrecks. Treasure salvors and their investors perform a service

[79]In 43 U.S.C. § 2104, Congress authorized the National Park Service to prepare and publish "Abandoned Shipwreck Guidelines" (54 F.R. 13642, issued Apr. 4, 1989). Thirteen topics are addressed, including: an "adequately staffed, trained and equipped historic preservation agency;" dialog among interest groups; shipwreck advisory boards; private and public funding possibilities; evaluating shipwrecks; research and documentation; and restriction of public access unless the wreck is non-historical.

that the federal government is unwilling to undertake, yet that costly service must be paid for somehow. Now it is paid indirectly by profits from the sale of valuable artifacts to the highest bidders in order to provide a return for the investors in the treasure search. Such dispersal of artifacts, however, will surely inhibit historical inquiry, even if correct archaeological methods of recovery are followed at the site. Today, Heinrich Schliemann,[80] father of modern archaeology and discoverer of the walls of Troy and the Mycenean gold, is regarded as a vandal because of careless digging, false reports, and dispersal of artifacts in violation of local laws. Similar opprobrium awaits the treasure salvor who disregards the needs of scientific historical research and disperses artifacts to private collectors.

The other competing interests, besides treasure salvors, are: the sport diving industry, the tourist industry, the commercial fishing industry, the environmentalists (including marine biologists and conservationists), the insurance industry, the commercial salvage industry (not the same as the treasure salvors), the historians and archaeologists with a need to know the secrets of ancient shipwrecks, possibly the mining industry, and, lastly, the harried and under-funded state officials hoping to preserve the status quo until someone comes up with the money to develop an underwater treasure site for public education or recreation.

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.[81]

Non-uniformity in the treatment of treasure salvage is, of course, ideal for

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[80]Born in Mecklenburg, Germany in 1822, Schliemann came to California to work in the Gold Rush and later obtained American citizenship. He acquired substantial fortunes in various enterprises which he later devoted to extensive excavations at Troy, Mycenae, and Tiryns. He died in 1890 before his falsification of data and distortions of the truth were appreciated. See D. Traill, Schliemann of Troy: Treasure and Deceit (1995).

[81]See supra note 79. In 43 U.S.C. § 2103(a)(2), Congress expressed its sense that the states, pursuant to the ASA, should develop appropriate and consistent policies to protect natural resources and habitat areas, guarantee recreational exploration of sites, and allow for public and private sector recovery of shipwrecks consistent with the protection of historical values and the environmental integrity of shipwrecks and sites. See H.R. Rep. No. 100–514, supra note 66. See also the policies expressed in the 1966 National Historic Preservation Act, Pub. L. No. 89–665, 80 Stat. 915, codified as amended at 16 U.S.C. §§ 470–470t, and the Archaeological Resources Protection Act of 1979, Pub. L. No. 96–95, 93 Stat. 721, codified as amended at 16 U.S.C. §§ 470aa-470mm. See generally McLaughlin, Roots, Relics and Recovery: What Went Wrong with The Abandoned Shipwreck Act of 1987, 19 Colum.-VLA J.L. & Arts 149 (1995). See also Commentary, Salvaging Sunken Shipwrecks: Whose Treasure Is It? A Look at the Competing Interests for Florida's Underwater Riches, 9 J. Land Use & Envtl. L. 347 (1994).

aggressive lawyers. But the kind of chaos and confusion they may cause is not socially desirable. Treasure salvage has a low profile among the problems confronting Congress, so it is unlikely that it will revisit the entire topic and impose uniform national solutions. But Congress could do one thing which over time would lead to the necessary uniformity of treatment: repeal § 2106 and return to the nationalized admiralty courts and admiralty lawyers those conflicts of maritime usages that they have the competence to balance and resolve. Otherwise, it may fall to the Supreme Court to rescue admiralty jurisdiction for treasure salvage.