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# Special Legislative Rights and Wreck Removal

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# Special Legislative Rights and Wreck Removal

*William Tetley\**

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## I. INTRODUCTION

In recent years, governments have become increasingly responsible to the public for the safe condition of navigable waterways. With this increase in responsibility, those same governments have granted themselves special legislative authority to recover certain of their expenses. Thus, wreck removal expenses have been secured, in many cases, by a special legislative right vested in the government against the wreck. This right often ranks ahead of *custodia legis* and court costs of seizure, and ahead of traditional maritime liens.

## II. 1926 LIENS AND MORTGAGES CONVENTION

The 1926 Liens and Mortgages Convention<sup>1</sup> does not specifically list wreck removal claims among those claims granted maritime lien status. Nevertheless, the protocol of signature reads in part:

I. It is understood that the legislation of each state remains free . . . (2) to confer on the authorities administering harbours, docks, lighthouses and navigable ways, who have caused a wreck or other obstruction to navigation to be removed, or who are creditors in respect of harbour dues, or for damage caused by the fault of a vessel, the right, in case of non-payment, to detain the vessel, wreck, or other property, to sell the same, and to indemnify themselves out of the proceeds in priority to other claimants . . . .

This, in effect, permits signatories to create, by national law, a special legislative right for wreck removal required to secure navigational safety; and most states have done so. The right ranks ahead of maritime liens because the wreck may be sold and the "authorities" indemnified from the proceeds "*in priority to other claimants.*" France, which is a signatory to the 1926 Liens Convention, chose, in virtue of the protocol to the convention, to declare that claims for removal expenses should have a privilege on the value of the wreck.

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1. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Apr. 10, 1926, 27 Am. J. Int'l L. 28-38 (Supp. 1933).

This privilege has the same rank as the privilege for expenses for the preservation of the thing (i.e., ranking with *custodia legis* after court costs).<sup>2</sup>

Belgium has adopted the 1926 Liens Convention; and, therefore, decisions of Belgian courts are useful. The *Court of Appeal of Antwerp*<sup>3</sup> would not allow wreck removal expenses as a privileged claim because such expenses did not come within the list of privileged claims set out in the law. Nor did such expenses fall under "damages caused to works forming part of harbours, docks and navigable ways" equivalent to Article 2(4) of the 1926 Liens Convention. Nevertheless, the court held the cost of removal of a vessel sunk in a collision, paid by the owner, or in default of him, by the public authority, gave rise to a maritime lien for "indemnities for collision," also to be found in Article 2(4) of the 1926 Convention. The Belgian *Cour de Cassation*<sup>4</sup> reversed the *Court of Appeal of Antwerp* on this second point and found that the public authority did not have such a lien because the removal costs were incurred in performing a legal duty and were not causally linked to the negligence involved in the collision.

### III. 1967 LIENS AND MORTGAGES CONVENTION

The 1967 Liens and Mortgages Convention<sup>5</sup> refuses special legislative rights, and Article 4(1)(v) specifically grants maritime lien status to wreck removal. Thus, wreck removal claims have dropped in status and ranking under the 1967 Liens Convention.

### IV. 1993 LIENS AND MORTGAGES CONVENTION

The 1993 Liens and Mortgages Convention<sup>6</sup> no longer lists wreck removal among maritime liens. Nevertheless, claims for wreck removal may still retain their maritime lien status under national law in virtue of Article 6 of the convention but, of course, now rank *after* liens and mortgages.

By Article 12(3), the convention also allows a state party to provide "in its law" that, in the event of the "forced sale" (i.e., judicial sale) of a stranded or sunken vessel, following its removal by a public authority in the interest of safe navigation or the protection of the marine environment, the costs of such removal shall be paid out of the proceeds of sale before all other claims secured by a maritime lien on the vessel (but not before *custodia legis*, as set out in Article

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2. Law No. 61-1262, 1961 J.O. 10810, *microformed on Editions Sur Microfiches des Journaux Officiels* No. 61-174, *amended by* Law No. 82-990, 1982 J.O. 3566.

3. 1979 E.T.L. 608 (1976).

4. 1979 E.T.L. 602 (1979).

5. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, May 27, 1967, 8 Neyendra Singh, *International Conventions of Merchant Shipping* 1397-1402 (1973).

6. International Convention on Maritime Liens and Mortgages, May 7, 1993, 6C Frank L. Wiswall, *Benedict on Admiralty* 15-24.3 to -24.10 (1994).

12(2)). While this provision permits a special legislative right for wreck removal to be created by national law, it is a right restricted to wreck removal effected to ensure safe navigation or the protection of the marine environment. It does not cover wreck removal generally. Moreover, the right secures only claims for those expenses directly related to the removal of the wreck and does not extend to any pure economic loss claims (e.g., loss of income) or to claims for environmental clean-up costs. Article 12(3) is the only special legislative right provided for under the 1993 Convention, as claims for port, canal and other waterways dues, and pilotage are granted a maritime lien by Article 4(1)(d) and not a special legislative right.

## V. WRECK REMOVAL—FRANCE

### A. Wrecks

France has also granted the State (i.e., the French government) the right to remove or destroy wrecks (ship or cargo) at the cost and risk of the owner and to sell them after certain delays fixed by regulation when the owner is unknown or fails to act after notification or within the time limits set by the State.<sup>7</sup> The State and individuals who remove wrecks have a lien (*privilège*) on the wreck, which has the same rank as the lien for the costs of the preservation of the thing.<sup>8</sup> This is a reference to Article 2(1) of the 1926 Liens Convention, which is Article 31(2) of Law No. 67-5 of January 3, 1967.

The minister in charge of the Merchant Marine may also declare the wrecked ship or cargo forfeited to the State where the owner is unknown or neglects or refuses to carry out the wreck removal or destruction following notification, or where the wreck occurred more than five years previously. The ship and cargo may be sold after the giving of notice (except that perishable goods may be sold immediately); and the net proceeds of sale<sup>9</sup> are then paid immediately into the treasury.<sup>10</sup> The right of the French government, therefore, takes priority over all other claims.

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7. Law No. 61-1262, 1961 J.O. 10810, *microformed on Editions Sur Microfiches des Journaux Officiels* No. 61-174, *amended by* Law No. 82-900, 1982 J.O. 3566. The regulations are found in Decree No. 61-1547, 1962 J.O. 374, *microformed on Editions Sur Microfiches des Journal Officiels* No. 62-013, *amended by* Decree No. 78-847, 1978 J.O. 3063; Decree No. 85-632, 1985 J.O. 6971.

8. *See supra* note 2. *See also* Decree No. 61-1547 of Dec. 26, 1961, at Article 21, cited *supra* note 7. By Article 59 of Law No. 67-5 of Jan. 3, 1967, *amended by* Law No. 84-1151, 1984 J.O. 3944, the shipowner may not invoke limitation of liability against claims of the State for wreck removal or destruction.

9. Net proceeds are those proceeds after the deduction of removal or destruction expenses, the costs of "management" (custody) and sale, any salvage remuneration, customs, duties, and taxes.

10. Law No. 61-1262 of Nov. 24, 1961, article 1, *amended by* Law No. 82-990 of Nov. 23, 1982, and Articles 9 and 12-14 of Decree No. 61-1547 of Dec. 26, 1961, 1962 J.O. 374, *microformed on Editions Sur Microfiches des Journaux Officiels* No. 62-013, *repealed and replaced by* Article 4 of Decree No. 85-632 of June 21, 1985.

### B. Dangerous Wrecks

Decree No. 85-632 of June 21, 1985<sup>11</sup> authorizes "competent authorities" (defined at Article 6) to recover, remove, and destroy dangerous ships and/or dangerous cargoes at the owner's risk and expense where the owner fails to act after being notified; where such wrecks threaten navigation, fishing, the environment, or access to ports (Article 8); or where the wrecks pose a "grave and imminent danger," in which case no notice to the owner is required (Article 9). Similar provisions exist for containers with dangerous contents (Article 10). Where the owner, following notification, neglects or refuses to perform operations required to eliminate the danger, the minister responsible for the Merchant Marine may declare the vessel or cargo forfeited to the State<sup>12</sup> and proceed to sale, the net proceeds falling immediately into the treasury.<sup>13</sup> The State, therefore, has a first right.

### C. Abandoned Ships

Law No. 85-662 of July 3, 1985<sup>14</sup> on abandoned ships<sup>15</sup> and abandoned mobile craft ("*engins flottants abandonnés*")<sup>16</sup> empowers "competent authorities" to put an end to the dangers such vessels and craft create, at the owner's risk and expense, if he neglects or refuses to do so after notification, or without delay in emergencies (Article 2).<sup>17</sup>

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11. Decree No. 85-632 of June 21, 1985. See also the "*Règlement général de police de la navigation intérieure*," Decree No. 73-912, 1973 J.O. 10417, microformed on Editions Sur Microfiches des Journaux Officiels No. 72-165, which, at Article 1.29, provides for the destruction by order of the prefect, without prior notice, of any dangerously located vessels or floating structures ("*établissements flottants*"), in case of imminent peril. See also Article R.322-1 of the *Code des ports maritimes*.

12. Law No. 82-990, amending Article 1 of Law No. 61-1262.

13. Decree No. 85-632, Article 4, amending Article 14 of Decree No. 61-1547.

14. Law No. 85-662, 1985 J.O. 7502.

15. See René Rodière & Emmanuel du Pontavice, *Droit Maritime* para. 65-1, at 57-58 (11th ed. 1991) (explaining that an "abandoned ship" is an intermediate category between a ship and a wreck because it is still capable of floating (like a ship), but like a wreck, it has been abandoned by its crew; usually a ship is abandoned because it is heavily burdened with legal encumbrances and thus is no longer of interest to its owner). See also Martine Remond-Gouilloud, *Droit Maritime* para. 50, at 55 (2d ed. 1993) (referring to this type of ship as a "*vaisseau-fantôme*" (phantom vessel)). Article 1, second paragraph, of Law No. 85-662 of July 3, 1985, cited *supra* note 14, specifies that the abandonment results from the absence of a crew aboard or the non-existence of measures of custody or maneuvering.

16. The law applies only to ships and mobile craft of 25 gross register tons or more, abandoned in the territorial or inland waters of France. See Article 1 of Law No. 85-662, cited *supra* note 14, completed by Article 1 of Decree No. 87-830, 1987 J.O. 11832.

17. An emergency exists if the abandoned ship or craft poses an imminent danger to the safety of persons or property, to navigation, or to the natural environment. See Article 6 of Decree No. 87-830, cited *supra* note 16. The measures may include removal or destruction of the ship or craft, and removal of products of the cargo posing an environmental risk. See Article 2 of Decree No. 87-830,

The law also provides for forfeiture and sale of the abandoned ship or craft by public auction for the benefit of the State if the abandonment persists and the owner fails to comply with relevant notification (Article 3).<sup>18</sup> Costs of the intervention measures have priority on the sale proceeds over all other claims.<sup>19</sup> The cargoes of abandoned ships may also be sold if not revendicated or removed in accordance with regulations.<sup>20</sup> The sale proceeds belong to the treasury if they remain unclaimed for five years.<sup>21</sup> Costs of preserving and selling such cargoes are privileged on the value of the cargo, the privilege ranking with costs of preservation (*custodia legis* expenses).<sup>22</sup>

#### D. Maritime Cultural Property

Wrecks, remains, and property generally found in France's maritime public domain or on the seabed within France's "contiguous zone," if of prehistoric, archaeological, or historic interest, constitute "maritime cultural property" under Law No. 89-874 of December 1, 1989.<sup>23</sup> Such property belongs to the State if its owner is untraceable or cannot be found within three years of the discovery of the property.<sup>24</sup> Even if the owner is known, the *Conseil d'État* may declare such property "of public utility" and purchase or expropriate it with compensation after giving the owner an opportunity to present his "observations."<sup>25</sup> Ownership, of course, is a first right.

### VI. WRECK REMOVAL—UNITED STATES

#### A. Introduction

Wreck removal in navigable waters is a federal responsibility.<sup>26</sup> Per 33 U.S.C. § 409, it is unlawful to obstruct passage in navigable waters. The owner,

cited *supra* note 16.

18. Article 10 of Decree No. 87-830, cited *supra* note 16.

19. Article 3 of Decree No. 87-830, cited *supra* note 16.

20. The time for revendication or removal of the cargo is three months from notification of the cargo owners. Article 12 of Decree No. 87-830, cited *supra* note 16.

21. In case of forfeiture of the ship, the net proceeds of the judicial sale are paid into the treasury immediately. Article 10 of Decree No. 87-830, cited *supra* note 16.

22. Article 4 of Decree No. 87-830, cited *supra* note 16.

23. Article 1 of Law No. 89-874, 1989 J.O. 15033.

24. Article 2 of Law No. 89-874, cited *supra* note 23.

25. Article 11 of Law No. 89-874, cited *supra* note 23.

26. River and Harbor Act of 1899, 33 U.S.C. §§ 409, 414-415 (1988), amended by the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4199. Sections 15, 16, 19 and 20 of the River and Harbor Act of 1899, 33 U.S.C. §§ 409, 411, 412, 414-415 (1988), are also commonly referred to in the United States as the Wreck Act. See generally Jerome C. Scowcroft, *Wreck Removal: An Overview and Recent Developments*, 16 J. Mar. L. & Com. 311-36 (1985); Carter Quinby & David R. Owen, *Recent Amendments to the United States Wreck Removal Act*, 1989 Lloyds Mar. & Com. L.Q. 15-20.

lessee, or operator of a sunken craft must commence its "immediate removal" and "prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States."

Sections 414 and 415 give the United States, through the Secretary of the Army, a specific right to destroy or remove the craft and to sell it, with *all* proceeds falling into the Treasury of the United States. Moreover, the amendment provides that any owner or operator of a vessel must reimburse the United States for expenses covering its salvage if wrecked. "The owner, lessee, or operator of such vessel . . . shall be liable to the United States for the cost of removal or destruction and disposal . . . which exceeds the costs recovered"<sup>27</sup> by the sale. The rights of the Secretary of the Army to either destroy or remove and sell the wreck exist whether or not the vessel owner was negligent or responsible for the sinking. The exercise of these rights does not preclude the United States from recovering removal expenses in an action in personam against those responsible for the negligent sinking of the vessel.<sup>28</sup>

Clearly the right to remove, sell, and retain all the proceeds is a special legislative right ranking ahead of any maritime lien.

### B. Abandonment

Wreck removal in the United States involves the principle of abandonment.<sup>29</sup> Notice of abandonment can be given by the vessel owner, or the Secretary of the Army may give notice to the owner to remove his craft and the cargo from a navigable waterway. If there is no removal within thirty days, there is a presumption of abandonment.<sup>30</sup> In this case, the owner's (operator's or lessee's) liability

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27. 33 U.S.C. § 414(b) (1988). *See also* 33 U.S.C. § 415(b) (1988).

28. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 205-09, 88 S. Ct. 379, 388-90 (1967). *See In re Plimsoll Marine, Inc.*, Nos. Civ. A. 90-2075, 90-2733, 1991 WL 332258 (E.D. La. 1991) (holding, under the River and Harbor Act of 1899, the costs of removing a sunken barge obstructing navigable waters are not subject to the Limitation of Liability Act, 46 U.S.C. app. §§ 183-185 (1988); therefore, the government is entitled to bring an independent action against the negligent owner responsible for the sinking). *But see Nova Comp. Nav., Lim. Procs.*, 1994 AMC 2398, 2403 (D. Alaska 1993) (deciding the Limitation of Liability Act does apply to the removal of a wreck which grounds in non-navigable waters).

29. The River and Harbor Act of 1899, 33 U.S.C. §§ 409, 414 (1988), recognizes and preserves the general maritime law right of abandonment. *See Humble Oil & Refining Co. v. Tug Crochet*, 422 F.2d 602, 608 (5th Cir. 1970) (stating this right only extends to innocent owners); *United States v. Cargill, Inc.*, 367 F.2d 971, 978 (5th Cir. 1966) (same), *aff'd sub nom. Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 88 S. Ct. 379 (1967). *See also United States v. Nassau Marine Corp.*, 778 F.2d 1111, 1114 (5th Cir. 1985) (deciding a vessel which sinks due to the negligence of her owner so as to obstruct navigable waters cannot be abandoned, and that in this case the government is entitled to recover any removal costs); *University of Tex. Medical Branch v. United States*, 557 F.2d 438, 452 (5th Cir. 1977) (same), *cert. denied*, 439 U.S. 820, 99 S. Ct. 84 (1978).

30. *Eastern Transp. Co. v. United States*, 272 U.S. 675, 687, 47 S. Ct. 289, 291-92 (1927); *Zubik v. United States*, 190 F.2d 278, 280 (3d Cir. 1951); *Nunley v. M/V Dauntless Colocotronis*, 661 F. Supp. 1096, 1106 (E.D. La. 1987); *Jones Towing Inc. v. United States*, 277 F. Supp. 839, 848



is not limited to the salvage value of the wreck, but the United States government may also recover the actual expense it incurred. What constitutes abandonment is a question of fact.<sup>31</sup>

### C. Responsibility for Wreck Removal

The ultimate responsibility for wreck removal and for its costs depends on whether the owner was negligent. Whether there has been abandonment affects the procedure and delays which follow. The various possible permutations may be summarized as follows:

(a) Where the vessel owner is *not* negligent for the sinking of the craft in the waterway, the United States government (Secretary of the Army), after abandonment or thirty-days notice, may destroy or remove the wreck, sell it, and place the proceeds of the sale in the United States Treasury, thus securing the Government's priority over all other claimants.<sup>32</sup> In an emergency, the Secretary of the Army may act immediately without giving the thirty-day notice.<sup>33</sup> Prior to the 1986 amendments, an owner who was not negligent was not responsible for wreck removal costs after abandonment.<sup>34</sup> The 1986 amendments, however, require even an innocent owner to pay the cost of removal.<sup>35</sup>

(b) Where the vessel owner is negligent for the sinking in the waterway, the United States government, after abandonment or thirty-days notice<sup>36</sup> or less, may remove the wreck and sell it, and the proceeds will fall into the treasury, thereby giving the Government a first right.<sup>37</sup> If the

(E.D. La. 1967).

31. *Nunley*, 661 F. Supp. at 1106; *Bunge Corp. v. Agri-Trans Corp.*, 542 F. Supp. 961, 969 (N.D. Miss. 1982), *aff'd in part and vacated in part on other grounds sub nom. Agri-Trans Corp. v. Gladders Barge Line, Inc.*, 721 F.2d 1005 (5th Cir. 1983).

32. 33 U.S.C. § 414(a) (1988).

33. *Id.* § 415(a). See also 33 C.F.R. § 245.50(b) (1994).

34. *United States v. Nassau Marine Corp.*, 778 F.2d 1111, 1114 (5th Cir. 1985); *United States v. Baycon Indus. Inc.*, 744 F.2d 1505, 1508 (11th Cir. 1984); *Agri-Trans Corp.*, 721 F.2d at 1009; *United States v. Ohio Barge Lines, Inc.*, 607 F.2d 624, 631 (3d Cir. 1979); *Lane v. United States*, 529 F.2d 175, 177 (4th Cir. 1975). In *Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 934 (5th Cir. 1979), it was held: "[I]f the non-negligent owner exercises his right to abandon, he is liable neither for the cost of removal nor for damages suffered by third parties as a result of the wreck." See also *St. Paul Fire & Marine Ins. Co. v. Vest Transp. Co.*, 666 F.2d 932, 940 (5th Cir. 1982); *United States v. Raven*, 500 F.2d 728, 733 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124, 95 S. Ct. 809 (1975); *In re Marine Leasing Servs., Inc.*, 471 F.2d 255, 257 (5th Cir. 1973).

35. 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 275 (2d ed. 1994). See also 33 C.F.R. § 245.3(c), .45(f) (1994). See also *Quinby & Owen*, *supra* note 26, at 16-17.

36. 33 U.S.C. § 414(a) (1988).

37. The decision of the United States authorities as to whether or not to mark or remove a sunken vessel abandoned by its owners is a discretionary one, not subject to judicial review. See *Williams v. United States*, 581 F. Supp. 847, 854 (S.D. Ga. 1983), *aff'd*, 747 F.2d 700 (11th Cir. 1984); *House v. United States*, Nos. 86-187-CIV-T-17, 86-1561-CIV-T-17, 1988 A.M.C. 1026, 1028

funds derived from the sale are insufficient to pay for the removal expenses, then the United States government may proceed against the negligent owner for the balance.<sup>38</sup>

(c) In the above cases, the United States government may also proceed against a third party who is negligent in whole or in part for that party's proportionate share of the removal expenses<sup>39</sup> and for an injunction or declaratory judgment ordering removal of the vessel and its marking until removal.<sup>40</sup>

(d) An individual shipowner who removes a wreck may recover from negligent third parties who are responsible for the sinking.<sup>41</sup>

(e) An innocent third party who removes a wreck which is a hazard to navigation may recover the removal expenses from the negligent shipowner whose vessel was wrecked.<sup>42</sup>

#### *D. St. Lawrence Seaway Development Corporation*

The St. Lawrence Seaway Development Corporation is empowered by federal regulations<sup>43</sup> to take action at the owner's expense to move any vessel, cargo, or thing that in its opinion obstructs or hinders transit on any part of the Seaway.

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(M.D. Fla. Jan. 15, 1988). The United States Coast Guard may also mark a wreck for the protection of navigation if, in its opinion, the wreck has not been suitably marked by its owner under 33 U.S.C. § 409 (1988). See 14 U.S.C. § 86 (1988). The government has no "mandatory duty" to remove every sunken wreck in navigable waters. See *Buffalo Bayou Transp. Co. v. United States*, 375 F.2d 675, 677 (5th Cir. 1967). But due care must be exercised where the government proceeds to do so. See *Canadian Pac. (Bermuda) Ltd. v. United States*, 534 F.2d 1165, 1168 (5th Cir. 1976); *Transorient Navigators Co., S.A. v. M/S Southwind*, 714 F.2d 1358, 1367 (5th Cir. 1983). Negligent marking of a wreck may also engage the government's liability. See also *Sheridan Transp. Co. v. United States*, 834 F.2d 467, 473-76 (5th Cir. 1987).

38. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 208-09, 88 S. Ct. 379, 389-90 (1967); *University of Tex. Medical Branch v. United States*, 557 F.2d 438, 451 (5th Cir. 1977), cert. denied, 439 U.S. 820, 99 S. Ct. 84 (1978); *In re Chinese Maritime Trust Ltd.*, 478 F.2d 1357, 1360-61 (2d Cir. 1973), cert. denied sub nom. *Chinese Maritime Trust, Ltd. v. Panama Canal Co.*, 414 U.S. 1143, 94 S. Ct. 894 (1974). See also 33 C.F.R. § 245.60 (1994), empowering the United States Army Corps of Engineers to seek reimbursement from the owner, operator, or lessee of the vessel or other obstruction for all removal and disposal costs in excess of the value of the recovered vessel (or other obstruction) and cargo.

39. *United States v. City of Redwood*, 640 F.2d 963, 968 (9th Cir. 1981).

40. *United States v. Baycon Indus., Inc.*, 804 F.2d 630, 633 (11th Cir. 1986); *House*, 1988 A.M.C. at 1028.

41. *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455, 460 (5th Cir. 1984) (en banc), cert. denied sub nom. *Dravo Mechling Inc. v. Combi Lines*, 469 U.S. 832, 105 S. Ct. 120 (mem.) (1984); *Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 934 (5th Cir. 1979).

42. *Continental Oil Co. v. Bonanza Corp.*, 511 F. Supp 62, 66 (S.D. Tex. 1980), rev'd on other grounds, 706 F.2d 1365, 1378 (5th Cir. 1983) (en banc).

43. 33 C.F.R. § 401.91 (1994).

It is doubtful, however, that such removal expenses would constitute part of "tolls and charges levied against the vessel" within the meaning of the regulations,<sup>44</sup> non-payment of which would authorize the Corporation to invoke its powers of detention<sup>45</sup> and sale<sup>46</sup> of the vessel and its first right to the proceeds<sup>47</sup> for "arrears of tolls and charges." There would be a power of detention, however, if the obstruction caused damages to the property of the Corporation.<sup>48</sup>

#### *E. Panama Canal—Wreck Removal*

Under the Panama Canal Regulations,<sup>49</sup> the Canal Operations Captain may supervise, direct, take charge of, and conduct operations to refloat vessels grounded in, or to clear wreckage from, the Canal. When necessary, he may act without awaiting the owner's permission. Unless the Panama Canal Commission is found responsible for the accident or condition, the necessary expenses in carrying out these operations "shall be a proper charge against such vessel, her owners and her operators," thus securing the Commission's claim by a lien enforceable in rem as well as by an action in personam. The Commission's claim would, therefore, be secured by a statutory maritime tort lien, ranking as a "preferred maritime lien," subordinate to court costs, costs of arrest, and *custodia legis* expenses, pursuant to the Federal Maritime Liens Act.<sup>50</sup> The Commission, however, has no special legislative right of seizure or sale.

#### *F. Outer Continental Shelf Lands Act*

The Outer Continental Shelf Lands Act<sup>51</sup> provides that the authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to the artificial islands, installations, and other devices on the Outer Continental Shelf.<sup>52</sup> This would presumably confer on the Secretary of the Army the same authority to remove wrecks from the Outer Continental Shelf and sell them as is conferred on him with respect to navigable waters of the United States by the Wreck Act.<sup>53</sup> As under the Wreck Act, the proceeds would, therefore, fall into the Treasury and the United States government would have a first right to them to cover the removal costs.

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44. *Id.* § 401.87(a)(1).

45. *Id.*

46. *Id.* § 401.88(a)-(b).

47. *Id.* § 401.88(c)(1).

48. *Id.* § 401.86(a).

49. 35 C.F.R. § 117.5 (1994).

50. 46 U.S.C. §§ 30301(5)(B) (1988), 31326(b)(1) (1988). This statute is also known as the Federal Maritime Commercial Instruments and Liens Act.

51. 43 U.S.C. §§ 1331-1356 (1988 & Supp. V 1993).

52. *Id.* § 1333(e) (1988).

53. 33 U.S.C. §§ 409, 411, 412, 414-415 (1988) (part of the Rivers and Harbors Appropriation Act).

### G. Abandoned Shipwreck Act of 1987

Under the Abandoned Shipwreck Act of 1987,<sup>54</sup> the United States asserts title to abandoned shipwrecks embedded in or on submerged lands<sup>55</sup> and then transfers such title to the state concerned,<sup>56</sup> thereby exercising a first right of ownership over such wrecks. The law of salvage and the law of finds do not apply to such an abandoned shipwreck,<sup>57</sup> and the wreck may be included in the National Register of Historic Places, as determined by the Secretary of the Interior.<sup>58</sup> These governmental rights serve to preserve historic wrecks for the benefit of the American public.

## VII. WRECK REMOVAL—UNITED KINGDOM

### A. Various Statutes

Various United Kingdom statutes give harbour, port, and local authorities a special legislative right against ships wrecked within the territory under their jurisdiction. Among these statutes are the following: (1) The Harbours, Docks, and Piers Clauses Act, 1847,<sup>59</sup> gives harbour masters a right to remove wrecks and other obstructions to navigation, as well as unseaworthy vessels (vessels laid by or neglected as unfit for sea service).<sup>60</sup> It also gives a right of detention and sale; (2) The Dockyard Ports Regulation Act, 1865,<sup>61</sup> permits dockyards to remove and sell a wreck obstructing a dockyard port and to reimburse themselves from the proceeds; (3) The Merchant Shipping Act, 1894,<sup>62</sup> gives the harbour or conservancy authority (and lighthouse authorities at Section 531) the right to raise, remove, destroy, and sell wrecks obstructing or endangering navigation (as well as to light or buoy wrecks), and to reimburse themselves from the proceeds.<sup>63</sup> See also The

54. 43 U.S.C. §§ 2101-2106 (1988). The constitutionality of the Act was upheld in *Zych v. Seabird*, 19 F.3d 1136 (7th Cir.), *cert. denied sub nom. Zych v. Illinois Historic Preservation Agency*, 115 S. Ct. 420 (1994).

55. 43 U.S.C. § 2105(a)(1)-(3) (1988).

56. *Id.* § 2105(c). Abandoned shipwrecks in or on United States public lands are the property of the United States and those on lands of an Indian tribe belong to that tribe. See *id.* § 2105(d).

57. *Id.* § 2106(a).

58. *Id.* § 2105(b).

59. 10 & 11 Vict., ch. 27, §§ 56-57.

60. See *Peterhead Harbours Trs. v. Chalmers*, 1984 S.L.T. 130, 132 (Sess.) (Eng.), where the harbour authorities destroyed the removed unseaworthy vessel and therefore were held liable in damages to the vessel owner. See also *The Crystal*, 1894 App. Cas. 508, 531-32 (H.L.) (Eng.) (per Lord Macnaghten).

61. 28 & 29 Vict., ch. 125, §§ 13, 15.

62. 57 & 58 Vict., ch. 60, § 530.

63. Section 531 was amended by the Merchant Shipping Act, 1988, ch. 12, § 48, sched. 5, § 2. The amendment gives the lighthouse authority the right to recover all its expenses (where they exceed the sale proceeds or where there is no sale) from the "relevant person" (the owner at the time of the sinking, stranding, or abandonment of the vessel). Even when there is no sale, the full amount

Thames Conservancy Act, 1894,<sup>64</sup> and The Port of London Act, 1968.<sup>65</sup> These special legislative rights effectively rank ahead of even maritime liens.<sup>66</sup>

### B. Interrelationship of Statutes

Section 534 of the Merchant Shipping Act, 1894,<sup>67</sup> provides that the powers of wreck removal granted under that statute are additional to, and not in derogation of, any similar powers, whether granted before or after that Act. In *The Ettrick*,<sup>68</sup> Jessel, M.R., decided that the Thames Conservancy Authority was entitled to exercise its wreck removal powers under the Thames Conservancy Act,<sup>69</sup> which were more advantageous to the Authority than its powers under the more general statute, the Removal of Wrecks Act, 1877.<sup>70</sup>

The 1847 Act permits the harbour master to act without obtaining authorization from the harbour authority, which is more advantageous than under the 1894 Act.<sup>71</sup> Nonetheless, the 1847 Act does not expressly authorize destruction of the wreck, which is permitted by the 1894 Act.<sup>72</sup>

### C. Abandonment

The non-negligent owner can escape personal liability for reimbursing the harbour authority for its wreck removal costs by abandoning the vessel before the removal expenses are incurred.<sup>73</sup> But the owner does not avoid such liability by

of the incurred expenses can be recovered from the shipowner. *See also* *The Solway Prince*, 31 T.L.R. 56 (1914) (Eng.).

64. 57 & 58 Vict., ch. clxxxvii. This act was replaced by The Port of London Act, 1968, ch. xxxii. *See, e.g.*, *The Sea Spray*, 1907 P. 133 (Eng.).

65. Ch. xxxii.

66. *The Sea Spray*, 1907 P. at 136.

67. 57 & 58 Vict., ch. 60.

68. 6 P.D. 127, 134 (C.A. 1881) (Eng.).

69. (1857) 20 & 21 Vict., ch. cxlvii, p. 652.

70. 40 & 41 Vict., ch. 16, re-enacted as part of the Merchant Shipping Act, 1894, 57 & 58 Vict., ch. 60.

71. *See* Kennedy's Law of Salvage ¶ 1403, at 566 (David W. Steele et al. eds., 5th ed. 1985). Section 56 of the 1847 Act also extends to obstructions other than wrecks, being "other obstructions" and floating timber.

72. *The Crystal*, 1894 App. Cas. 508, 533 (H.L.) (Eng.) (per Lord Macnaghten).

73. *Id.* at 519 (per Lord Herschell, L.C.), 522 (per Lord Watson), 527 (per Lord Ashbourne), 533 (per Lord Macnaghten), and 534 (per Lord Morris). The House of Lords held that the "owner" for the purposes of § 56 of the Harbours, Docks and Piers Clauses Act, 1847, meant the party who owned the vessel at the time the removal expenses were incurred rather than at the time it became an obstruction. In consequence, an owner who abandoned his ship after it sank, but before the harbour authority incurred expenses to remove it was not liable for such expenses because he was no longer the owner of the wreck when those costs were incurred. This difficulty is overcome, in respect of §§ 530 and 532 of the Merchant Shipping Act, 1894, by standard supplementary provisions in local acts that define "owner" as the person who owns the vessel at the time of the sinking, stranding, or abandonment. *See* R.P.A. Douglas & G.K. Geen, *The Law of Harbours and Pilotage*,

abandonment of the wreck where the obstruction is caused by negligence for which the owner is liable at common law.<sup>74</sup>

#### *D. No Personal Liability*

The harbour or lighthouse authority that exercises its wreck removal powers under Sections 530 or 531 of the Merchant Shipping Act, 1894, may not exercise any personal remedy against the owner to recover the removal expenses, but is limited to the proceeds of the judicial sale of the wreck.<sup>75</sup> The authority may, however, agree that the owner or other parties remove the wreck on certain terms set by the authority.<sup>76</sup> Where the authority authorizes such salvage efforts by private parties, it may require them to assume personal liability for their activities towards the authority.<sup>77</sup> The authority itself may not claim any salvage reward, however, because its salvage work is performed in execution of a statutory duty and thus is not undertaken voluntarily.<sup>78</sup>

#### *E. Authority Must Act Reasonably and Carefully*

The right of the harbour authority to remove the wreck under Sections 530 and 531 of the 1894 Act is conditional upon its forming an opinion that such action is necessary. Such an opinion must be reasonable and formed within a reasonable time following the wreck, with a view to taking action within a reasonable time.<sup>79</sup>

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3 Ed., Lloyd's, London, 1989, para. 113 at 35-36.

74. *Dee Conservancy Bd. v. McConnell*, 2 K.B. 159 (C.A. 1928) (Eng.). The statute concerned in this case was the *Dee Conservancy Act, 1889*, 52 & 53 Vict., ch. clvi, incorporating § 56 of the *Harbours, Docks and Piers Clauses Act, 1847*. See also *The Ella*, 1915 P. 111 (C.A.) (Eng.).

75. Note, however, the owner is personally liable for wreck removal expenses under § 56 of the *Harbours, Docks and Piers Clauses Act, 1847*. Moreover, the local statute giving effect to the wreck removal provisions of the *Merchant Shipping Act, 1894*, may provide expressly for the personal liability of the wreck owner for the balance of the expenses of removal if the sale proceeds are insufficient to cover such costs fully, subject to the shipowner's right to limit his liability in respect of that deficiency as provided for by the same Act. See, for example, the *Mersey Docks and Harbours Act, 1954*, 2 & 3 Eliz. 2, ch. xlv, § 3, considered in *The Liverpool* (No. 2), 1963 P. 64 (C.A.) (Eng.).

76. *The Corporation of Trinity House (London) v. Maritime Salvors Ltd., The Merkur and the Zelo*, 14 Lloyd's List L. Rep. 91, 95 (1923) (Eng.).

77. *Horlock v. Isachsen*, 32 Lloyd's List L. Rep. 239, 240 (1928) (Eng.); *The Corporation of Trinity House (London) v. Maritime Salvors Ltd., The Merkur and the Zelo*, 14 Lloyd's List L. Rep. 91 (1923) (Eng.).

78. *Greenock Port & Harbour Trustees v. British Oil & Cake Mills Ltd.*, 1944 Sess. Cas. 70, 76 (Sess.) (Eng.); *The Gregerso*, 1 Lloyd's Rep. 220, 227-28 (Q.B. 1971) (Eng.). See also *The Mars and Other Barges*, 81 Lloyd's List L. Rep. 452, 455 (1948) (Eng.). See, however, *The Citos*, 22 Lloyd's List L. Rep. 275, 276 (Sess. 1925) (Eng.), where it was suggested individual employees of the authority might be able to claim a salvage reward for wreck removal if their services were "outwith or in excess of a duty."

79. *Christie v. Corporation of Trinity House*, 35 T.L.R. 480, 483 (1919) (Eng.); *Jones v. Mersey Docks & Harbour Bd.*, 29 T.L.R. 468 (1913) (Eng.). The opinion may be formed by a duly

The authority will be liable in damages and precluded from recovering its removal expenses where it acts negligently in performing a wreck removal contract. In *The Oxbird*,<sup>80</sup> for example, the Ipswich Dock Commission contracted to raise a wreck at the owners' expense and restore it to them. After doing so, it removed a lighted buoy which marked the vessel. Thereafter, the ship was struck and sunk again by another vessel. After paying the costs of the first removal, the owners were not held responsible for paying for the second raising done by the Commission and were also awarded damages against the Commission for its negligence in removing the light.

Of course, if the harbour authority is itself at fault in creating the obstruction, it will be denied any removal expenses until its liability is determined.<sup>81</sup>

Harbour authorities have also been held liable for negligence where they have failed to show reasonable care in performing their duty to secure safe navigation free of obstructions in the waters under their jurisdiction.<sup>82</sup>

The authority may also be liable for failing to light or mark the wreck<sup>83</sup> or for failing to buoy it,<sup>84</sup> if the authority had taken possession and control of the wreck from the owner.

In addition, the authority may claim its wreck removal expenses as damages against a third party responsible for the collision. Even where it has recovered a portion of such expenses by exercising its statutory powers of sale of the

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delegated official of the authority or by a formal resolution. See *Christie*, 35 T.L.R. at 482.

80. *Ipswich Dock Comm'n v. Samuel West Ltd. (The Oxbird)*, 58 Lloyd's List L. Rep. 346 (1937) (Eng.). The court implied, however, that had it not been for the dock commission's contract with the owners, it would have been shielded from liability in performance of its statutory wreck removal duties by the Public Authorities Protection Act, 1893, 56 & 57 Vict. ch. 61. The Act did not, however, protect the commission from responsibility for its negligence in performing contractual wreck removal duties which it had assumed in this case.

81. *Greenock Port & Harbour Trustees*, 1944 Sess. Cas. at 76.

82. See *Neptun (Owners) v. Humber Conservancy Bd.*, 54 T.L.R. 195 (1937) (Eng.); *St. Just Steam Ship Co. Ltd. v. Hartlepool Port & Harbour Comm'rs*, 34 Lloyd's List L. Rep. 344 (1929) (Eng.); *Mersey Docks & Harbour Bd. v. Gibbs*, (1866) L.R. 1 H.L. 93 (Eng.). The duty owed, in some of these cases, was held analogous to the common law duty of an invitor towards an invitee. See also R.P.A. Douglas & G.K. Geen, *The Law of Harbours and Pilotage* ¶¶ 115-121, at 36-38 (3d ed. 1989).

83. *Utopia (Owners) v. Primula (Owners), The Utopia*, 1893 App. Cas. 492, 497-99 (P.C.) (Eng.). See also *The Manorbier Castle*, 16 Asp. M.L.C. 151, 154 (P. 1922) (Eng.); *The Douglas*, 7 P.D. 151, 161 (C.A. 1882) (Eng.). The authority may normally recover expenses of lighting where it has not been negligent. See *The Ella*, 1915 P. 111 (Eng.). But see *The Snark*, 1900 P. 105 (C.A.) (Eng.), where the owners of the wreck were held liable for improperly marking their sunken vessel where they had not abandoned possession and control of it to the harbour authority. See also *The Tramontana II*, 2 Lloyd's Rep. 94, 108 (1969) (Eng.) (involving the liability of a dockyard port for negligence in marking an obstruction). See also *Gilbert v. Corporation of Trinity House*, 17 Q.B.D. 795 (1886) (Eng.).

84. *Anchor Line (Henderson Bros.) Ltd. v. Dundee Harbour Trustees*, 38 T.L.R. 299 (1922) (Eng.); *Dormont v. Furness Rail Co.*, 11 Q.B.D. 496 (1883) (Eng.).

sunken vessel which it raised, the authority may recover any balance of such expenses from the vessel which caused the sinking.<sup>85</sup>

#### *F. Power of Sale*

Per Section 530(1) of the Merchant Shipping Act, 1894, the sale may not occur until at least seven days after a publication of a notice in a newspaper circulating in or near the district over which the authority has control, except in the case of perishable property or property which would deteriorate in value by delay. Per Section 530(2), the owner who pays the authority the fair market value of the property before it is sold is entitled to redelivery, the sum paid being deemed to be the proceeds of the sale of that property.

Under Sections 530(c) and 532, the authority is empowered to sell the vessel and cargo, as well as any other property recovered in the exercise of its powers, and to reimburse itself for the removal expenses which it has incurred, the surplus, if any, of such proceeds being held in trust for the persons entitled to them. The authority, therefore, has a clear first claim to those proceeds.

The sale to a bona fide purchaser of a registered vessel that has been raised by a harbour authority under its statutory powers has been held to confer a title free of encumbrances.<sup>86</sup> This further illustrates the preeminence of the harbour authority's right to the wreck which it has salvaged over all other claimants.

### VIII. WRECK REMOVAL—CANADA

#### *A. Introduction*

Certain claims of the federal government of Canada for the removal of wrecks give rise to special legislative rights which rank ahead of the traditional maritime liens.

#### *B. Jurisdiction*

The Federal Court Act<sup>87</sup> provides the court with jurisdiction for wreck removal claims under Section 22(2)(d), (i.e., damage caused by a ship) as well as under Section 17(4), (i.e., claims of the Crown).

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85. *The Liverpool* (No. 2), 1963 P. 64, 84 (C.A.) (Eng.). See also *S.S. Baron Venture v. S.S. Metagama*, 1928 Sess. Cas. 21 (Sess.) (Eng.).

86. *Manchester Ship Canal Co. v. Horlock*, 1 Ch. 453, 466 (1914) (Eng.), cited in *The Blitz*, 1 Lloyd's Rep. 441, 443-44 (1992) (Eng.) (per J. Sheen). See also *The Ousel*, 1 Lloyd's Rep. 151, 153 (1957) (Eng.).

87. R.S.C. ch. F-7 (1985).



### C. *Navigable Waters Protection Act*

The Navigable Waters Protection Act,<sup>88</sup> at Section 16, gives the Canadian government the right to remove (or destroy) any wreck, vessel, part of a vessel, or cargo obstructing any Canadian navigable waterway. Per Section 17(1), the vessel and cargo may be sold by the government at auction or otherwise to pay for the cost of maintaining signals or lights on the wreck and for the cost of its removal, destruction, or sale. Any surplus proceeds are then paid to the owner of the vessel or cargo or any other person entitled thereto (Section 17(2)). Clearly, therefore, the government has a first right to such proceeds. The government also has an in personam action against the owner, managing owner, master, or person in charge of the vessel at the time of the wreck, as well as any person whose fault caused the wreck (Section 18(2)).

### D. *Canada Shipping Act, Part XVI—Pollution*

Section 678 of Part XVI of the Canada Shipping Act<sup>89</sup> also gives the Canadian government authority to remove any ship and cargo and to sell or destroy it if it is sunk or is in distress and if it is polluting Canadian waters. The proceeds of the sale are used to pay the costs of the removal and the disposal of ship and cargo, with the balance being remitted to the owner of the ship or of its contents. Thus, the government again enjoys a first priority for its removal expenses. There is, however, no *special legislative right* of seizure and sale of the ship for the actual pollution damage.

### E. *Arctic Waters Pollution Prevention Act*

Similarly, the Arctic Waters Pollution Prevention Act,<sup>90</sup> at Section 13, authorizes the Canadian government to remove any "stranded, wrecked, sunk or abandoned" ship and cargo and sell it whenever Canadian waters north of 60° north latitude are, or are likely to be, polluted by the deposit of "waste." The proceeds of the sale are similarly used to pay the expense of removing and selling the ship and cargo. Again, there is no special legislative right of seizure and sale of the ship for the pollution damage, but there is a definite first claim by the government for removal costs.

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88. R.S.C. ch. N-22 (1985). The obligation of the owner to place signals and lights on the wreck and to remove it are provided for at § 15 of the Act.

89. R.S.C. ch. S-9 (1985), as amended by R.S.C. ch. 6, § 84 (1985 3d Supp.) and S.C. ch. 36, § 16 (1993). This act applies to "Convention ships" (basically, tankers carrying persistent oil in bulk) throughout Canadian waters and to other ships in Canadian waters and fishing zones south of 60° north latitude. See *id.* §§ 675(1)-(2).

90. R.S.C. ch. A-12 (1985).

*F. St. Lawrence Seaway Authority Act*

The St. Lawrence Seaway Authority Act,<sup>91</sup> at Section 20(1)(c), permits the Governor in Council to make regulations regarding "the seizure, detention or sale of vessels, goods or cargo" for unpaid tolls or for violations of the Act (e.g., damage to or obstruction of the Seaway). Regulations have, in effect, been made.<sup>92</sup> Under them, the St. Lawrence Seaway Authority may take action, at the owner's expense, to move any vessel, cargo, or thing that, in its opinion, obstructs or hinders transit on any part of the Seaway.<sup>93</sup>

Under its regulations, the Seaway Authority appears to be limited to suing the owner in personam for these expenses because they would probably not constitute "tolls or charges levied against the vessel" within the meaning of the regulations,<sup>94</sup> and so would not empower the Authority to exercise its powers of detention<sup>95</sup> and sale<sup>96</sup> for arrears of tolls and charges. If the obstruction caused damage to Seaway property, however, the power of detention of the guilty vessel for such damages<sup>97</sup> could probably be invoked.

There would also be the maritime tort lien enforceable in rem under Sections 22(2)(d) and 43(2) of the Federal Court Act<sup>98</sup> (damage caused by a ship) to secure the Crown's claim.

*G. Canada Ports Corporation Act*

The Canada Ports Corporation Act<sup>99</sup> (and its predecessor, the National Harbours Board Act<sup>100</sup>) permits the seizure, detention, and sale of a vessel by the Corporation to secure various claims (Sections 43(1), (2), (3) and (4)). Furthermore, the Corporation has a lien on the vessel which "has priority over all other rights, interests, claims and demands whatever, excepting only claims for wages of seamen under the *Canada Shipping Act*."<sup>101</sup>

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91. R.S.C. ch. S-2 (1985).

92. C.R.C. ch. 1397 (1978).

93. *Id.* § 91.

94. *Id.* § 87(1)(a).

95. *Id.* § 87(1)(a).

96. *Id.* § 88(a).

97. *Id.* § 86(a).

98. R.S.C. ch. F-7 (1985).

99. R.S.C., ch. C-9 (1985). See also the Canada Ports Corporation Operating By-Laws, C.R.C. ch. 1064 (1978), which include specific provisions on wreck removal at § 6(2)(b).

100. R.S.C. ch. N-8 (1970).

101. R.S.C. ch. C-9, § 43(5) (1985).

### H. Other Statutes

Special legislative rights of seizure, detention, and sale are also granted for removal of obstructions under the Public Harbours and Port Facilities Act<sup>102</sup> and its regulations, the Fishing and Recreational Harbours Act,<sup>103</sup> the Harbour Commission Act<sup>104</sup> and its by-laws and its regulations, and the Heritage Canal Regulations<sup>105</sup> under the Department of Transport Act.<sup>106</sup> These enactments also confer a first right over the proceeds to the harbour authority for removal costs or damages.

## IX. CONCLUSION

Wreck removal, in most jurisdictions, results in a first right, or special legislative right, in favor of the government against the wreck. It is a right that nations party to the 1926 Convention may grant to themselves to promote safe navigation. It is not permitted under the 1967 Convention, and is permitted under the 1993 Convention only for the removal of the wreck "in the interest of safe navigation or the protection of the marine environment." Such a right will rank before "all claims secured by a maritime lien," but after *custodia legis*, as defined in Article 12(2).

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102. R.S.C. ch. P-29, §§ 22, 24 (1985).

103. R.S.C. ch. F-24, §§ 14, 15, 17, 19 (1985).

104. R.S.C. ch. H-1, §§ 25, 26, 27 (1985).

105. SOR/84-116, Canada Gazette, Part II, vol. 118, No. 3, January 23, 1984, p. 647 *et seq.*, as amended, especially at §§ 15(1) & (2) and 16.

106. R.S.C. ch. T-18, § 17 (1985).