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Property Rights in Recovered Sea Treasure: The Salvor's Perspective

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PROPERTY RIGHTS IN RECOVERED SEA TREASURE: THE SALVOR'S PERSPECTIVE

> *Nerves frayed as physical exhaustion set in. Divers worked in a murky tangle of air and communication lines, hot water continuously pumping through their wetsuits for warmth. . . . 'This is the hardest [said one diver] bad currents, high seas, a rotting ship. The* [Andrea] Doria *was a weird wreck, very unforgiving.'*[1]

This passage, from a recent *Time* magazine article, illustrates not only the hazards of undersea salvage operations but also the growing public awareness of those operations. This interest has been sparked by impressive underwater finds such as the recovery of property from the *Andrea Doria*,[2] the recovery of Russian gold from the legendary *Edinburgh*,[3] the raising of the partially intact wooden hull of the *Mary Rose* from its resting place of 437 years,[4] the continuing recovery of gold by a Florida corporation from a sunken Spanish flagship[5] and an eccentric Japanese billionaire's efforts to salvage a czarist fleet.[6]

Modern treasure salvors' motivations are as varied as the treasure they recover. Weekend divers salvage for sport, adventure and primar-

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1. *Gimbel's Grail-Diving to the Andrea Doria*, TIME, Sept. 14, 1981, at 22.

2. *Id.* The *Andrea Doria* sank two hundred miles off the east coast of the United States some eleven hours after its historic collision with the *Stockholm* on July 26, 1956. In September 1981, Peter Gimbel and a crew of divers recovered one of two safes which were aboard the sunken vessel. *Id.*

3. N.Y. Times, Oct. 13, 1981, at A9, col. 1. Eight hundred feet below the surface of the sub-Arctic waters of the Barents Sea, the *Edinburgh*, a Royal Navy cruiser, had remained out of reach of salvors since its sinking by a Nazi U-boat in 1942. Improved technology, however, has allowed the recovery of $76 million in gold from the ship's bomb room. N.Y. Times, Sept. 14, 1981, at A1, col. 3.

4. N.Y. Times, Oct. 12, 1982, at A12, col. 3. In 1545, the *Mary Rose*, the pride of King Henry VIII's fleet, sank one mile off the coast of Portsmouth. The seventeen-year salvage operation involved 500 divers and cost an estimated seven million dollars. The 130 foot oak hull was successfully recovered together with almost 17,000 artifacts. Breech-loading and muzzle-loading guns, a barber-surgeon's amputation saw, sundials, utensils and a folding backgammon table were among the artifacts recovered. *Id.*

5. *See* Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) [hereinafter cited as *Treasure Salvors #2*].

6. N.Y. Times, Sept. 23, 1980, at A3, col. 3; N.Y. Times, Oct. 10, 1980, at A2, col. 3. Ryoichi Saskawa, an 81 year old Japanese businessman, has begun a salvage operation to recover $3.7 billion in sunken treasure from the czarist warship *Admiral Nakhimov* lost in Japanese waters in 1905. The cruiser sank in 310 feet of water in a sea battle during the Russo-Japanese War. *Id.*

ily for enjoyment.[7] Archaeologists and historians undertake salvage operations seeking artifacts and answers from the wrecks.[8] Other salvors, including corporations, work primarily for monetary gain.[9] This latter group invests millions of dollars and devotes substantial amounts of time to research, locate and salvage the cargo of sunken vessels.[10]

A modern salvage operation is not a glamorous adventure but an undertaking of frustrating and often life-threatening hazards.[11] Despite sophisticated equipment,[12] many of the obstacles which have hindered recovery of lost wrecks for hundreds of years continue to face the salvors. Weather remains a formidable opponent, demanding the salvor's constant attention. Storms and high winds create a dangerous environment for surface support vessels, and can cause dramatic changes in underwater currents with the potential to scatter the wreck over the sea floor or to cover it with sand and debris.[13] Not only do sharks, eels

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7. *See* N.Y. Times, Nov. 9, 1980, § 1, at 61, col. 1 (a maritime historian has determined that at least 633 vessels were sunk off the Maryland coast); *see also* N.Y. Times, July 14, 1981, at B1, col. 2 (a Nazi U-boat sunk during the last days of World War II and numerous other wrecks lie off Block Island attracting hundreds of sports divers each weekend).

8. N.Y. Times, Oct. 12, 1982, at A12, col. 3. The raising of the *Mary Rose,* along with an estimated 17,000 artifacts, was one of the most ambitious and successful underwater archaeological operations of our time. The quality and large number of artifacts recovered with the *Mary Rose* will give archaeologists and historians a rare opportunity to research aspects of life aboard a 16th century warship, which cannot be ascertained from ships logs and other records. *Id. See also* Boyd, *Raise The Monitor,* SKIN DIVER, August 1981, at 18 (a debate has emerged among archaeologists and divers as to whether an attempt should be made to raise the historic ironclad *Monitor*); N.Y. Times, Dec. 8, 1981, at C1, col. 1 (archaeologists fear that amateur treasure hunters may pillage a wrecked vessel believed to be one of Columbus' ships, the *Pinta*).

9. *See, e.g., Treasure Salvors #2,* 569 F.2d at 333. Treasure Salvors Inc. spent more than two million dollars locating the wreck of what is believed to be the *Nuestra Senora de Atocha.* The *Atocha* has surrendered well over six million dollars worth of treasure to date. *Id.*

10. *Id.*

11. *See, e.g., Treasure Salvors #2,* 569 F.2d at 333. During the salvage operation of the *Nuestra Senora de Atocha* four members of the crew were lost to the sea, including the son and daughter-in-law of Mel Fisher, leader of the operation. *Id.*

12. *See* N.Y. Times, Oct. 13, 1981, at A9, col. 1. *H.M.S. Edinburgh,* a British warship, sank in English waters in 1942 and settled to a depth of 800 feet. After four unsuccessful attempts were made, the wreck was thought beyond the reach of a salvage operation. Then, with new technology developed for the North Sea oil industry, the vessel was located and $76 million in gold was successfully salvaged. A computer located the vessel based upon historical data of past sightings of the ship. Divers were able to descend to the extreme depth of 800 feet with the aid of a one man spherical bell. *See also* Rogal, *Treasure of the Edinburgh,* NEWSWEEK, Oct. 5, 1981, at 58.

13. *See Gimbel's Grail-Diving to the Andrea Doria,* TIME, Sept. 14, 1981, at 22.

and other dangerous marine life[14] pose a threat, but the divers must constantly contend with frigid waters and severe depth pressure. The wreck itself can be a source of danger; the *Edinburgh*, for example, had live torpedoes and dynamite on board.[15] The physical deterioration of the sunken wreck may demand extreme caution from the divers when maneuvering through the vessel. Deterioration in the condition of the property recovered may also become an obstacle when it is brought to the surface, as antiquated cargo may disintegrate upon exposure to the atmosphere.[16]

Once sunken property is brought safely to the surface, the difficulties to be overcome by the salvors are no longer physical but legal. One Florida district judge has said: "As great as the perils of the sea are and were, the greatest perils to the treasure itself came not from the sea but from two unlikely sources. Agents of two governments [the United States and Florida] . . . claimed the treasure as belonging to" their respective governments.[17] In two recent cases[18] where salvage operations proved successful, the salvors had to face years of litigation in order to force state governments to return seized treasure.[19] Federal and state officials, who have recently begun to assert title to property salvaged in these and other cases, have challenged the finder's philoso-

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14. *See* N.Y. Times, Dec. 13, 1981, §1, at 28, col. 1 (eels and lobsters were in residence in the *Mary Rose* off England's southern coast prior to the recovery of the vessel); N.Y. Times, Oct. 10, 1980, at A2, col. 3 (giant deadly conger eels plague the recovery of the czarist cruiser *Admiral Nakhimov*).

15. N.Y. Times, Oct. 13, 1981, at A9, col. 1; N.Y. Times, Sept. 14, 1981, at A1, col. 5.

16. *See, e.g.*, N.Y. Times, Aug. 29, 1981, at 8, col. 3. When a bank safe was salvaged from the *Andrea Doria* it had to be kept in salt water to preserve any paper currency that might have remained inside. *Id.*

17. Treasure Salvors, Inc. v. Unidentified Wreck and Abandoned Vessel, 459 F. Supp. 507, 511 (S.D. Fla. 1978) [hereinafter cited as *Treasure Salvors #3*].

18. *Treasure Salvors #2*, 569 F.2d 330 (5th Cir. 1978); Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 518 F. Supp. 816 (W.D. Tex. 1981) [hereinafter cited as *Platoro*].

19. Each of these cases were filed a short time after the recovery of all or part of the resulting treasure. *See supra* note 18. Salvaging operations in the *Treasure Salvors Cases* began in 1971. *Treasure Salvors* #2, 569 F.2d at 333. Despite four lower court decisions favorable to the salvors, the state refused to return the seized property. *Id.* The enforcement of the district court judgment by a warrant of arrest which named certain state officials was finally affirmed by the United States Supreme Court in 1982. Fla. Dep't of State v. Treasure Salvors, Inc., 102 S. Ct. 3304 (1982). In *Platoro*, the find occurred in 1967 resulting in five court decisions attempting to free the salvaged goods. In May of 1981 an order directing the state to either return the property or its estimated market value, was handed down by the United States District Court for the Western District of Texas. *Platoro*, 518 F. Supp. at 823.

phy,[20] which has consistently been applied in this country for more than a century.[21] Under the guise of protecting cultural and historical property, these governmental declarations of sovereign title could radically affect the fundamental character of the law of salvage. This new hazard could prove to be the most formidable obstacle facing hopeful salvors. These assertions of title are evidence of the continuing struggle between private enterprise and government regulation over treasure recovered from the sea.

This note will consider two aspects of the law of salvage that affect the rights of parties who recover sunken property. The elements of salvage will be set out and considered in detail in order to understand the nature, policies and peculiarities of the law. An examination of the origins and evolution of the rights involved in the salvage award and title will follow. The present state of salvage law in the United States will then be considered, with a focus on two areas of the law that have been the center of recent litigation and continue to be topics of debate. The two aspects to be discussed are a government's assertion of title in salvaged property, and the use of the law of finds as a guiding principle in deciding salvage claims. A court's response to these issues in a salvage action will affect not only the amount of award set by the court, but also the decision as to rightful title to the recovered property. For the purpose of illustration, the facts of the *Andrea Doria* salvage operation will be presented to highlight the potential legal problems faced by the courts and by litigants under existing case law.

FUNDAMENTALS OF SALVAGE

Offering a reward for saving property from a distressed or wrecked ship has been an established part of maritime law since Roman times.[22] The term salvage has come to signify two distinct aspects of the salvage process: the actual service rendered by the salvors and the reward payable to them for such work.[23]

A salvage service, in its simplest form, can be defined as the voluntary giving of assistance to a vessel or cargo which relieves the prop-

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20. *See, e.g., Treasure Salvors #2,* 569 F.2d at 330; *Platoro,* 518 F. Supp. at 816; State *ex rel.* Ervin v. Massachusetts Co., 95 So. 2d 902 (Fla. 1956), *cert. denied,* 355 U.S. 881 (1957); Bruton v. Flying "W" Enterprises, Inc., 273 N.C. 399, 160 S.E.2d 482 (1968).

21. Admiralty courts have consistently awarded title to the finder of property abandoned at sea, in absence of the original owner. *See infra* notes 105-15 and accompanying text.

22. *See* 3A M. NORRIS, BENEDICT ON ADMIRALTY, THE LAW OF SALVAGE § 1 (7th ed. 1981).

23. *Id.*

erty from impending peril at sea.[24] To constitute a salvage service, the performance must be on navigable waters and the assistance must be rendered voluntarily, rather than be the result of a legal or official duty to give aid.[25] In *The Blackwall*,[26] the Supreme Court said that "useful service of any kind rendered to a vessel or her cargo, exposed to any impending danger and imminent peril of loss or damage, may entitle those who rendered such service to salvage reward."[27] The variety of services which may qualify an actor for a salvage claim runs the spectrum from the dramatic to the mundane.[28] Central to the idea of a salvage service, however, is that the salvor acts to overcome difficulties and deterrents.[29] The quality and extent of contributory service need only be slight to qualify for a salvage award; the degree of service may affect the final amount awarded, but not its validity.[30] Clearly, the raising of a sunken ship or its cargo comes within any definition of a salvage service.[31]

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24. *See, e.g.*, The Sabine, 101 U.S. 384, 384 (1880); The Blackwall, 77 U.S. (10 Wall.) 1, 11-12 (1870). Kent defined salvage as "compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger. . . ." 3 J. KENT, COMMENTARIES ON AMERICAN LAW *245.

25. 3A M. NORRIS, *supra* note 22, § 2, at 1-5.

26. 77 U.S. (10 Wall.) 1 (1870).

27. *Id.* at 11. In this case the Court approved an award to the owners of a tug boat which had helped firemen fight a blaze aboard another ship. *Id.* The decision did not consider the firemen's right to a reward for their services in the salvage operation. *Id.* at 15.

28. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 8-2, at 536 (2d ed. 1975). These commentators said:

> The act of salvage need not be so dramatic and need not even consist in rendering physical assistance: standing by or escorting a distressed ship in a position to give aid if it becomes necessary, giving information on the channel to follow . . . to avoid running aground, carrying a message as a result of which necessary aid and equipment are forthcoming have all qualified. So long as the ship is in peril, any voluntary act which contributes to her ultimate safety may rank as an act of salvage.

Id. at 537 (footnotes omitted).

29. C. SUTTON, THE ASSESSING OF SALVAGE AWARDS 5 (1949).

30. *See, e.g.*, Markakis v. S/S Volendam, 486 F. Supp. 1103, 1110 (S.D.N.Y. 1980). The court held valid a salvage claim made by the captain and crew of a vessel which merely towed a distressed ship away from the Cuban coast. The distressed vessel had lost power and was in danger of drifting too near the Cuban shore when the salvors made contact. The salvors did not tow the ship to safety because they were met by another ship which completed the towing service. *Id.* at 1105.

31. *See, e.g.*, Cope v. Vallette Dry Dock Co., 119 U.S. 625, 628-29 (1887). The raising of a sunken wreck or her cargo is considered within the realm of a salvage service because it is part of "those things which have been committed to, or lost in, the sea or its

It has been well settled in American courts since *The Sabine*[32] that to sustain a claim for salvage services three requisites must be present. They are: (a) marine peril; (b) service voluntarily rendered; and (c) success in whole or in part.[33] Often challenged in a salvage action is the element of marine peril. Typically, the challenger argues that the object could not be salvaged because it was in no danger of being lost.[34] The burden of proving the existence of the required danger is placed upon the salvor, for without proper proof there can be no valid claim.[35] Marine peril will be found if it is shown that there was a reasonable apprehension that without the action of the salvors the object would have been lost.[36] In *Treasure Salvors #2*,[37] responding to the argument that no peril existed in the salvage of an abandoned and wrecked ship that sank in a hurricane in the year 1622, the court said: "Marine peril includes more than the threat of storm, fire, or piracy to a vessel in navigation . . . [t]here is no dispute that the *Atocha* was lost. Even after discovering the vessel's location it is still in peril of being lost through the actions of the elements."[38]

The second element necessary for a court to find a valid claim for salvage services is the requirement that such services be voluntary. The importance of voluntariness in the law of salvage is apparent when one considers that no similar doctrine exists in the terrene common law which would reward a person who, at great risk, recovered property from a natural disaster or great peril upon the land.[39] This disparity is

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branches, or other public navigable waters, and have been found and rescued." *Id.* at 629.

32. 101 U.S. 384 (1880).

33. *Id.* at 384. Justice Clifford, the author of the opinion of the court, used somewhat different language five years earlier in The Clarita and The Clara, 90 U.S. (23 Wall.) 1, 16 (1875). For more recent cases using these elements, see Legnos v. M/V Olga Jacob, 498 F.2d 666, 669 (5th Cir. 1974); Markakis v. S/S Volendam, 486 F. Supp. 1103, 1106 (S.D.N.Y. 1980); Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F.Supp. 540, 557-560 (S.D. Fla. 1982).

34. *See, e.g., Treasure Salvors #2,* 569 F. 2d at 337.

35. 35 HALSBURY, THE LAWS OF ENGLAND § 1119, at 738 (V. Simonds 3d ed. 1961).

36. *See* Fort Myres Shell & Dredging Co. v. Barge NBC 512, 404 F.2d 137, 139 (5th Cir. 1968); Tidewater Salvage, Inc. v. Weyerhauser Co., 633 F.2d 1304, 1306 (9th Cir. 1980). *See also* 3A M. NORRIS, *supra* note 22, § 185, at 14-1. "The peril required in a salvage service need not necessarily be one of imminent and absolute danger. The property must be in danger, either presently or reasonably to be apprehended." *Id.* (footnote omitted).

37. 569 F.2d 330 (5th Cir. 1978).

38. *Id.* at 337.

39. This distinction in admiralty law was noted very early in our history by Chief Justice Marshall in The Blaireau, 6 U.S. (2 Cranch) 143 (1804). Chief Justice Marshall said:

explained by the fact that there is an historic and continuing public policy to promote spontaneous effort in the saving of property distressed at sea.[40]

The heart of the law of salvage, the award, is the direct result of this public policy encouraging swift maritime rescue.[41] Liberal awards are so characteristic of the law of salvage that awards have come to be termed salvage.[42] This "salvage" is the reward that the law allows for services deemed meritorious.[43] It is not limited to simple payment for services rendered.[44] The reward is not assessed by the court as merely compensation *pro opera et labore*,[45] nor under the principles of *quantum meruit*.[46] Instead, the amount of this award is a reflection of the

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> If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same . . . hazard, be (sic) rendered at sea, and a very ample reward will be bestowed in the courts of justice.

Id. at 158. *See also* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 8-1, at 532 (2d ed. 1975).

40. *See* 3A M. NORRIS, *supra* note 22, § 12, at 1-17. The polarity of results can be traced as far back as Roman law, which is considered to be the first system of law to compensate the volunteer who saved the property of another. *Id.* § 6. The importance of promoting maritime commerce is the major justification given for allowing such distinction of treatment. *See generally* The Blaireau, 6 U.S. (2 Cranch) 143 (1804).

41. *See* The Craster Hall, 213 F. 436 (5th Cir. 1914). One court has said that: "The amount awarded as salvage comprises two elements, viz., adequate *remuneration* . . . and a *bounty* given to . . . encourag[e] similar exertions in future cases. The relative amounts . . . depend on the special facts and merits of each case." *Id.* at 437 (quoting The Sandringham, 10 F. 556 (E.D. Va. 1882)). On this topic Sutton states that:

> The award is intended to encourage others to use the utmost exertion and the utmost promptness in saving such property . . . when exposed to perils of and on the sea, perils that can be of sudden and catastrophic kind and that usually occur in ways cutting off all but sea help, often all help but that of the vessel fortunately in the particular vicinity.

C. SUTTON, *supra* note 29, at 4.

42. *See* The Sandringham, 10 F. 556, 571 (E.D. Va. 1882).

43. The Blackwall, 77 U.S. (10 Wall.) 1, 12 (1869).

44. *See* The Sabine, 101 U.S. 384, 384 (1880); The Blackwall, 77 U.S. (10 Wall.) 1, 12 (1869).

45. For work and labor. BLACK'S LAW DICTIONARY 1094 (5th ed. 1979).

46. As much as he deserves. BLACK'S LAW DICTIONARY 1119 (5th ed. 1979). *See* The Blackwall, 77 U.S. (10 Wall.) 1, 12 (1869); The Sabine, 101 U.S. 384, 384 (1880).

nature, risk and value of the salvage service rendered.[47] Justice Story commented on the award in *The Henery Ewbank*[48] where it was stated:

> It rises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger consideration of the public good, of commercial liberality, and of international justice. It offers a premium, by way of honorary reward, for prompt and ready assistance to human suffering . . . .[49]

The importance of maritime commerce to the nations of the world has mandated this use of equitable principles for rewarding spontaneous service.[50] Thus, founded as it is upon the public policy to aid vessels in distress, the salvage award should be viewed as encouragement for others to act rather than compensation for those who acted.[51] The award is the most distinguishing part of the law of salvage as it is so variant to the terrene common law.[52] Liberal awards are essential to admiralty law in order to encourage even the most unwilling salvor.[53] As a result, it must be conceded that there is no announced system for weighing facts, and, though comparable cases may be considered,[54] there is no strict rule upon which the courts may

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47. *Id.* See *infra* notes 56-61 and accompanying text for a detailed discussion of the determination of the amount of the award.

48. 11 F. Cas. 1166 (C.C. Mass. 1833) (No. 6376).

49. *Id.* at 1170.

50. KENNEDY'S CIVIL SALVAGE 12 (K. McGuffin 4th ed. 1958). *See* The Charles Henry, 5 F. Cas. 509 (E.D.N.Y. 1865) (No. 2617). There is a shared interest among all nations to promote the safety of both property and human life at sea. *Id.* at 510.

51. In The Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869), the Court concluded that public policy must encourage mariners to engage in labors which may be both dangerous and costly; therefore, the law must allow liberal compensation for such efforts.

52. *See supra* notes 39-40.

53. The Missouri, 17 F. Cas. 484, 488 (D.C. Mass. 1854) (No. 9654).

> [P]ublic policy requires that such a promise of reward be held out, in case of success, that all those in a situation and competent to render relief, shall be eager to do so, from the mere hope of gain: for example, that the sailor, who alone sees from the mast-head a vessel in distress, or the master, who descries her at a distance with a telescope, shall not be tempted to pass her by, but shall have a prospect of pecuniary advantage, which may prompt his efforts.

Id. See also Lancaster v. Smith, 330 F. Supp. 65 (S.D. Ala. 1971).

54. *See, e.g.*, 3A M. NORRIS, *supra* note 22, § 239, at 20-5. Cases are not dependable authority because the facts of two salvage cases are seldom identical. When two cases are comparable as to the facts, the precedent is not used as a rigid yardstick. *See*

rely[55] when deciding upon the specific amount to be awarded. The award will usually be based on the overall circumstances of the particular case and the equitable demands of each party.[56]

The various factors that may influence the award are well-known, and yet they have never been precisely measured. In *The Blackwall*,[57] the ingredients were outlined as:

> A. The degree of danger from which the lives and property are rescued.
> B. The value of the property saved.
> C. The risk incurred by the salvors in securing the property from the impending peril.
> D. The promptitude, skill, and energy employed by the salvors.
> E. The value of the property employed to render the service.
> F. The time and labor expended by the salvors.[58]

When calculating the salvage award, the court must consider the possibility of excesses.[59] If the award is too liberal, it may encourage unnecessary services or discourage owners from finding help.[60] On the other

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Platoro, 518 F.Supp. 816, 821 (W.D. Tex. 1981).

55. *See Platoro*, 518 F. Supp. 816 (W.D. Tex. 1981). The court found that neither the common law rule of moiety nor a fixed percentage were applicable in this particular case. *Id.* at 821. In The Connemara, 108 U.S. 352 (1883), the Supreme Court said that the amount of award "is largely a matter of fact and discretion, which cannot be reduced to precise rules, but depends upon a consideration of all circumstances of each case." *Id.* at 359.

56. C. SUTTON, *supra* note 29, at 1. Sutton focuses on the lack of any mathematical relationship between the physical factors of a salvage incident, on the one hand, and the sum of money awarded, on the other. His work concentrates on analyzing the various individual factors that consistently influence the outcome of British salvage cases. *Id.* at 1-2.

57. 77 U.S. (10 Wall.) 1 (1869).

58. 3A M. NORRIS, *supra* note 22, § 237, at 20-3. According to Norris the list, as it appears herein, has the factors arranged in order of relative importance. *Id.* This list was, in fact, originally articulated in the reverse order by the Supreme Court in The Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869).

59. The Charles Henry, 5 F. Cas. 509 (E.D.N.Y. 1865) (No. 2617). "The spirit of the rule requires that salvage awards, while they should not be extravagant, should always be generous." *Id.* at 510. *See also* 3A M. NORRIS, *supra* note 22, § 241, at 20-8.

60. The possibility of reward will at times encourage the salvor to act when there is no need. The court must find that the salvage operation was necessary under the "marine peril" requirement for there to be a valid claim. Also, the court must determine whether or not the salvors acted against the will of the owners in giving assistance. *See, e.g.*, Consolidated Towing Co. v. Hannah, 509 F. Supp. 1031 (W.D. Miss. 1981).

hand, if the award is too conservative, the public policy of encouraging salvage services may be defeated, undermining the primary reason for the salvage award.[61]

The lack of a clear standard to apply in setting salvage awards has resulted in decisions that are understandably varied, and of little precedential value.[62] The equitable principles applied in this area have created a system that produces differing awards for similar work.[63] In early American history the vice-admiralty courts were inclined to award fifty percent of the value of the property salvaged.[64] This judgment was reserved for cases deemed to be extremely meritorious.[65] Today, such generous awards are given more sparingly,[66] usually only when a great amount of time and money has been spent salvaging property whose value is less than the costs of the operation.[67] Through the frequent use of finder's law in marine salvage cases, however, the courts have achieved a similar result and have given even more substantial awards in extreme cases.[68] The finder's rationale is appealing in that the question before the court is one of property title rather than the difficult task of deciding the exact amount of the salvage

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61. *See* The Blackwall, 77 U.S. (10 Wall.) 1 (1869). The Court said that the law should reward salvors sufficiently to withdraw all temptation to embezzle or conceal the salvaged property. *Id.* at 14. *See also* 1 M. NORRIS, THE LAW OF SEAMEN § 210 (2d ed. 1962).

62. The Caster Hall, 213 F. 436, 437 (5th Cir. 1914).

> To determine whether services rendered to a ship in peril are strictly salvage service, and whether salvors are entitled to be rewarded therefor in the admiralty, adjudged cases are of great help in reaching a correct decision, and the same may be said as to many other questions arising in salvage cases; but, where the amount of award is the only vital question, very little assistance is obtained by study and analysis of the facts in other salvage cases.

Id.

63. Chief Justice Marshall in The Sybil, 17 U.S. (4 Wheat.) 98, 99 (1836) said that "[i]n such cases, it is almost impossible that different minds, contemplating the same subject, should not form different conclusions as to the amount of salvage to be decreed." *See generally,* C. SUTTON, *supra* note 29.

64. *See, e.g.,* The Henry Ewbank, 11 F. Cas. 1166 (C.C. Mass. 1833) (No. 6376). The award of one-half of the value of the property is considered a moiety. *Id.* at 1174-75.

65. *See* 3A M. NORRIS, *supra* note 22, § 130, at 9-1; § 240, at 20-7.

66. *Id.* § 130, at 9-1.

67. *See, e.g.,* Brady v. The Steamship African Queen, 179 F. Supp. 321 (E.D. Vir. 1960). Here the salvors spent $112,000 in the recovery of a stern section of an abandoned and grounded vessel. This amount exceeded the value of the recovered stern, given its damaged condition. The court held that the salvors were entitled to receive the entire proceeds from the sale of the property. *Id.* at 324.

68. For an in-depth discussion of the law of finds in marine salvage cases, see *infra* notes 205-15 and accompanying text.

award.[69]

Even after a salvor has successfully shown the presence of all three elements necessary for a valid claim, the action may fail if the property recovered is not of salvageable character.[70] Public policy has dictated the need to protect only certain kinds or types of property on the high seas.[71] Therefore, the property saved must be the kind that entitles the salvor to a reward, or the law of salvage will not be applied.[72]

Primarily, the law of salvage and its underlying public policy focus on the distressed vessel and her cargo to determine the type of property to be protected.[73] A wreck,[74] or any property in such a state, may be the subject of a salvage claim.[75] Certain exceptions, however, have been carved out of the general rule making mail and bills of exchange ineligible for salvage awards.[76] Also, the personal property and wearing apparel of both passengers and crew have a similar policy-based exemption.[77] Money, bullion, precious metals and jewels are property against which salvage awards can be granted.[78] The salvageable character requirement, therefore, is no bar to treasure hunters, who are more interested in finding coins, artifacts and jewels than in raising the vessel itself for possible economic gain. Clearly, the law of

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69. Courts have recently been less inclined to use or discuss the factors involved in a salvage award, rather they are deciding claims based upon the "reasoned" conclusion as to property title. *See, e.g.*, Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F.Supp. 452, 456 (E.D. Va. 1960).

70. *See* 3A M. NORRIS, *supra* note 22, § 32, at 3-1.

71. *See, e.g., id.* § 43, at 3-17.

72. *See* Cope v. Vallete Dry Dock Co., 119 U.S. 625 (1887). Unless the service rendered is one that can be considered a salvage service, no valid claim will be found. Historically, the rescue of certain barges and rafts or docks has not been considered to be within the class of property deemed proper for salvaging. *Id.* at 629-30.

73. *See id.* at 629-31. It is unquestioned that cargo or property recovered from a ship is the proper subject of a salvage award. *See* Baker v. Hoag, 7 N.Y. 555 (1853).

74. A wreck is defined as any stranded or sunken vessel that has been abandoned by its owner. The term applies equally to any part or fragment of a ship or cargo. 3A M. NORRIS, *supra* note 22, § 42, at 3-16.

75. *See, e.g.*, The Burlington, 73 F. 258 (E.D. Mich. 1896). For a modern example, see *Treasure Salvors #2*, 569 F. 2d 330 (5th Cir. 1978).

76. *See, e.g.*, The Admiral Evans, 286 F. 442 (D. Wash. 1932); The Emblem, 8 F. Cas. 611 (D. Me. 1840) (No. 4434). Public policy has kept certain kinds of cargo, such as mail, from being considered proper for a salvage claim because retention or sale would not be in the public interest. *See* 3A M. NORRIS, *supra* note 22, § 43, at 3-17.

77. *See* 3A M. NORRIS, *supra* note 22, § 43, at 3-17. It has been pointed out that because of the labor and extreme peril involved with the recovery of sunken property these distinctions would not be made in the case of an ancient sunken wreck. *Id.* § 43, at 3-18 n.7.

78. *See* 1 M. NORRIS, THE LAW OF SEAMEN § 210 (2d ed. 1962).

salvage has accepted the raising of sunken treasure as amenable to the salvage award since the earliest maritime history.[79]

All awards arising from salvage operations on navigable waters are within the exclusive jurisdiction of federal admiralty courts.[80] District courts of the United States have enjoyed exclusive original jurisdiction over salvage awards since 1789.[81] State court jurisdiction has been limited to cases based upon contract damages and *quantum meruit* actions for compensation.[82] As a result of the federal courts' long-standing and continued experience with the peculiar equitable character of salvage cases, they have developed an expertise in salvage law that is not found in any other court.[83]

With this basic understanding of the fundamental policies of the

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79. The Rhodians were a naval power some nine hundred years before the Christian Era. Of the existing fragments of the Rhodian maritime code that have been found, one article indicates the application of their salvage law to sunken treasure. Article XLVII states that "[i]f gold, or silver, or any other thing be drawn up out of the sea eight cubits deep, he that draws it up shall have one third, and if fifteen cubits, he shall have one-half, because of depth." *See* 1 JUSTICE: SEA-LAWS 231 (3d ed. 1705), *reprinted in* 3A M. NORRIS, *supra* note 22, § 5, at 1-7.

80. Andrew v. Wall, 44 U.S. 567 (1844). *See* 28 U.S.C. § 1333(1) (1976). The statute gives original jurisdiction to admiralty courts and is the present successor to the original grant, which is contained in the Judiciary Act of 1789, § 9, 1 Stat. 73, 76-77 (1789). The admiralty court acquires in rem jurisdiction based upon the location of the find and continued presence of the property recovered. *See e.g.*, Fla. Dep't of State v. Treasure Salvors, Inc., 102 S. Ct. 3304 (1982); *Platoro*, 518 F. Supp. 816 (W.D. Tex. 1981). *See also infra* notes 81-83 and accompanying text.

81. 7A MOORE'S FEDERAL PRACTICE § 200[2] (2d ed. 1981). Pursuant to the grant of authority contained in article III, § 2 of the Constitution, Congress authorized district court jurisdiction in admiralty cases in the original Judiciary Act of September 24, 1789, 1 Stat. 73, 76-77 (1789).

82. *See, e.g.*, 3A M. NORRIS, *supra* note 22, § 14, at 1-19. Each of these actions is considered to lack the quality and character necessary to invoke the original jurisdiction of the federal courts. *Id.*

83. *See* Sturgis v. Law, 5 N.Y. Super. Ct. (3 Sandf.) 451 (1850). In this early state court decision, the court said with respect to the admiralty court:

> If there is a court of ancient and acknowledged jurisdiction in such cases, which is peculiarly adapted to apply those extraordinary and anamolous principles of justice which govern salvage cases . . . which has a system of practice and of equitable rules admirably adapted to such cases, and which have grown up from the constant, unquestioned, and long continued exercise of its jurisdiction; it deserves consideration whether the salvor should not be required to select such a court, rather than one which possesses none of the qualifications, and which can lay no other claim to the jurisdiction, than that in the course of the centuries it has once exercised it in a single case.

Id. at 457-58.

law of salvage, the focus of this inquiry may now shift to a more theoretical aspect of salvage law, the identification of the owner of the recovered property.

THE BRITISH RULE

Tracing the development of the law of property rights in treasure found at sea is made more difficult by the limited number of cases on the subject and by the disagreements that existed among the ancient commentators.[84] The historical development of the English law of salvage is valuable to the study of American salvage law in two respects. First, due to British maritime dominance during the period in which salvage law developed, the laws of many countries, including those of the United States, are rooted in the British rule.[85] Second, due to the special nature of the law, much of it has remained unchanged since its first development.[86] To the American practitioner, British law is perhaps most interesting as a study of divergent rules having common origins. With similar beginnings, the laws of England and the United States have developed diametrically opposite results.[87]

The British rule of salvage confers ownership of abandoned property found at sea upon the crown by virtue of a "sovereign prerogative." The earliest codification of this common law notion was in 1275 by the Statute of Westminster, which spoke of the sovereign's right to *wrecks* of the sea.[88]

> Concerning wrecks of the sea, it is agreed, that where a man, a dog, or a cat escape quick out of the ship, that such ship nor barge, nor any thing within them, shall be adjudged wreck; but the goods shall be saved and kept by view of the sheriff, coroner, or the king's baliff, and delivered into the hands of such as are of the town where the goods were found; so that *if any sue for these goods*, and after prove that they were his, or perished in his keeping, *within a year and a day*, they *shall be restored to him* without delay; *and*

84. Kenny & Hrusoff, *Ownership of the Treasure of the Sea*, 9 WM & MARY L. REV. 383, 384 (1967). There were major points of conflict between the writers Bracton, Coke and Blackstone; this article is a comprehensive and detailed study of these conflicts and the development of the laws of Great Britain and the United States.

85. *Id.* at 385.

86. *Id.* at 392.

87. *See infra* notes 105-15 and accompanying text.

88. Statute of Westminster, 1275, 3 Edw., ch. 4.

> *if not* they shall remain to the king and be seized by the sheriffs, coroners, and baliffs, and shall be delivered to them of the town, which shall answer before the justices of *the wreck belonging to the king.*[89]

The terms of this first codification limited the king's right to property at sea to "wrecks." Even with the Westminster Statute, the law remained vague and entirely subject to royal whim.[90] It was not until the 18th century that limitation took hold, and then it was only through the further classifications of property by Blackstone and his contemporaries.

Blackstone believed that the term "wreck" should be narrowly defined to confer upon the king the right only to that property lost at sea which had reached shore.[91] Blackstone classified goods lost at sea into four categories: (1) wreck, (2) flotsam, (3) jetsam and (4) lagan.[92] Flotsam was defined as goods lost at sea that were still afloat; jetsam were goods that had sunk as a result of being thrown overboard in an effort to lighten the load and save the ship; and lagan was simply jetsam that was still afloat and buoyed to facilitate recovery.[93] It is important to note that any of the latter three categories were potentially wreck, provided they reached the shore.[94]

In *The Constable's Case*,[95] the court extended the king's right to property found at sea by interpreting the Statute of Westminster to include flotsam, jetsam and lagan.[96] The British rule developed into its present form through a series of decisions handed down between 1798 and 1837.[97] After 1837, it was well-settled that, in the absence of the original owner, the English common law would decide ownership for all property lost at sea in favor of the crown by virtue of the sovereign prerogative.[98]

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89. *Id.* (emphasis added).

90. *See* Kenny & Hrusoff, *supra* note 84, at 387-89.

91. 1 W. BLACKSTONE, COMMENTARIES *282. Blackstone concluded that the purpose of the statute was to lessen the harshness of the existing common law by allowing the original owner one year and a day to reclaim his property before it went to the king's treasury. *Id.* *280-84.

92. *Id.*

93. *Id.* *290-94.

94. *See* Note, *Title to Treasure in Territorial Waters*, U. FLA. L. REV. 360, 361 (1969).

95. 77 Eng. Rep. 218 (K.B. 1601).

96. *Id.* at 221.

97. *See* Kenny & Hrusoff, *supra* note 84, at 390.

98. In The Aquila, 165 Eng. Rep. 87 (Adm. 1798), some years after the American Revolution, a British court said, "I consider it to be the general rule of civilized coun-

With regard to salvaged sea treasure, it is debatable whether the question of ownership would be settled in favor of the crown under the common law framework existing during the period of the American Revolution. The Blackstone classifications of goods lost at sea would exclude most sunken property recovered from the sea. Such property would, therefore, not come within any of the categories that would automatically revert to the king. Notwithstanding *The Constable's Case* extension of the sovereign prerogative, the property would not meet any of the Blackstone classifications.[99] Thus, title to recovered treasure could arguably be decided in favor of the finder solely on the basis of possession.

Another important consideration in the disposition of title to property recovered from the sea floor is the principle of treasure trover. Treasure trover is the term used by the early common law to describe any gold, silver, plate, bullion, jewelry or pottery found concealed in the earth, or in any private place that is not on or above the ground, which was placed there for safe-keeping by the owner who had the intent to return for it.[100] Originally, all treasure trover belonged to the first finder.[101] As the principle of treasure trover developed, however, it followed a course similar to that of salvage, in which ownership was decided in favor of the crown pursuant to the king's expanding prerogative under *The Constable's Case*. Blackstone concluded that the king's right of coinage could be adequately protected only by extending the royal prerogative to include any treasure trover found on the land.[102] He argued, however, that the royal prerogative never extended

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tries, that what is found derelict on the seas, is acquired beneficially for the sovereign, if no owner shall appear." *Id.* at 89. This case and a number of cases that followed made the right of the sovereign almost undisputed against all others in the world, except the original owners. *See* Kenny & Hrusoff, *supra* note 84, at 390.

99. *See* 1 W. BLACKSTONE, *supra* note 91, *280-84. Based upon the four categories of property recovered at sea, it is apparent that sunken treasure would be excluded.

100. *Treasure Salvors #3*, 459 F. Supp. at 525. *See also* 1 W. BLACKSTONE, *supra* note 91, *285.

101. 1 W. BLACKSTONE, *supra* note 91, *287.

102. *Id.* Blackstone wrote:

> So that it seems it is the *hiding*, not the *abandoning* of [treasure trover], that gives the king a property. . . . A man, that hides his treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again, when he sees occasion; and, if he dies and the secret also dies with him, the law gives it the king, in part of his royal revenue. . . .
>
> Formerly all treasure-trove belonged to the finder. . . . Afterwards it was judged expedient for the purposes of the

to treasure found at sea.[103] An explanation for this inconsistency is that the royal prerogative over sunken property at sea is incompatible with the existing property classifications of salvage. Sunken treasure is always "lost" and can rarely be considered to have been intentionally concealed by the original owner who intended to return.[104] Therefore, treasure found at sea is not treasure trover that can be claimed by the sovereign, and as a result, British law does not speak specifically to the property rights in recovered sea treasure. The general principle of the sovereign prerogative, however, would be used to guide a court in awarding title to such property. It is upon this foundation of British law that the American law of salvage evolved.

THE AMERICAN RULE

United States courts have consistently disagreed with the British rule and its use of the sovereign prerogative doctrine in the settlement of title disputes.[105] In the absence of the original owner, United States courts have given preference to the rights of the finder over those of the sovereign.[106] This polar result is the primary distinction between the two rules of salvage law.[107] If the original owner is known or reasserts his claim at the completion of the salvage operation, however, courts in the United States generally follow the English rule and will favor the owner's claim over all others.[108]

When the dispute over ownership is solely between the finder and the sovereign, and involves no claim by the original owner, the majority view in the United States is that the finder's claim should prevail.[109] In

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> state, and particularly for the coinage, to allow part of what was so found to the king . . . .

Id. *285-86 (emphasis added).

103. *See* Note, *Title to Treasure in Territorial Waters*, U. FLA. L. REV. 360, 362 (1969).

104. Essential to the character of treasure trover is the intentional concealment of the property by the original owner for safekeeping. Treasure trover would, therefore, have little application in the area of salvage law. In the past, however, the principle has caused some confusion in the courts and commentators despite the apparent limitation. *See Treasure Salvors #3*, 459 F. Supp. at 525 (citing 1 AM. JUR. 2D *Abandonment* § 6 (1964)).

105. *See infra* notes 116-18 and accompanying text.

106. *See, e.g.*, United States v. Tyndale, 116 F. 820, 823 (1st Cir. 1902). *See also infra* note 115.

107. Kenny & Hrusoff, *supra* note 84, at 393.

108. *Id.* at 392.

109. *See* Thompson v. United States, 62 Ct. Cl. 516 (1926). In this case the Government was required to render just compensation to the salvor of an abandoned vessel when the Government subsequently obtained possession. The court stated that: "It seems well settled that when a vessel is derelict and abandoned in the navigable waters of the United States or anywhere else it belongs to that person who finds it and reduces

this situation neither party is required to prove actual abandonment but only that the original owner is not known.[110] Courts in the United States normally acknowledge the British sovereign prerogative rule, but then go on to hold for the finder.[111] Two justifications are given for applying the American rule. First, courts have relied upon the principle that it is not *pure* English common law that is practiced in the United States, but rather the modified common law which existed and was adopted by the Colonies prior to 1776.[112] In *United States v. Tyndale*,[113] the court ruled that the *severe* British common law rule as to wrecked property did not find favor in the Colonies prior to 1776 because of radically different policy considerations.[114] The second, and perhaps more important justification, is that although the United States Government may have the inherent power to assert ownership in salvaged property, Congress has never actually done so.[115] The American rule then, gives title and ownership to the first party to take possession of salvaged property not claimed by the original owner.

For over a century, United States courts have consistently favored the rights of the finder over those of the sovereign.[116] In almost

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it to possession." *Id.* at 524.

110. *See* Eads v. Brazelton, 22 Ark. 499, 509 (1861). *But see* Weber Marine, Inc. v. One Large Cast Steel, 478 F. Supp. 973 (E.D. La. 1979) (The mere discovery of goods and the inability to locate the owner was not sufficient to constitute abandonment. The marine salvors are entitled only to a salvage award).

111. Kenny & Hrusoff, *supra* note 84, at 393.

112. This is the most obvious of the justifications for refusing to apply the British rule in America. Because the king's unchallenged right to title of salvaged property developed relatively late, a court could argue that the rule was not part of the law which the Colonies adopted at the time of the American Revolution. Commentators consider that Talbot v. Lewis, 172 Eng. Rep. 1383 (Ex. 1834) was the British case which finally crystallized the common law rule. It was not decided until 1834, well after the Declaration of Independence, and, consequently, is not binding upon United States courts. *See* Kenny & Hrusoff, *supra* note 84, at 390.

113. 116 F. 820 (1st Cir. 1902).

114. *Id.* at 823. The court points to the codification of ordinances and usages in The Body of Liberties, enacted in 1641 by the Massachusetts Bay Colony, as exemplifying this divergence in policy. *Id.*

115. *See* United States v. Tyndale, 116 F. 820, 823 (1st Cir. 1902); Thompson v. United States, 62 Ct. Cl. 516 (1926). Both cases acknowledged the inherent power of the United States to assert ownership over treasures recovered from the sea. Both point out, however, that Congress has never exercised this power. Because there was no statutory intent or consistent practice to award ownership to the United States the courts refused to find the United States Treasury able to assert an "American Prerogative." *See also infra* notes 158-70 and accompanying text.

116. In *Treasure Salvors #2*, 569 F.2d 330, the court spoke of the American rule:

> Other American cases are in accord with *Tyndale*. *See* Russell v. Proceeds of Forty Bales Cotton, 21 Fed. Cas. No. 12, 154, pp. 42, 45-50 (S.D. Fla. 1872), *aff'd* 21 F. Cas. p. 50; *In re*

every salvage case of that period, the courts were faced with salvaged goods of strictly commercial value.[117] This uniformity of decision has been broken in recent cases where courts were asked to decide ownership of property that not only had commercial but also cultural or historical value.[118] Three state courts upheld the validity of the sovereign ownership rule where they found strong public interest in the property.[119] In each case the courts relied on English common law and expressly acknowledged the applicability of the British rule in the United States courts.[120]

In 1922 the United States Coast Artillery sank the battleship *Massachusetts*, for target practice, off the Florida coast.[121] The ship remained in the waters, and the superstructure, which protruded from the water, became a favorite fishing spot.[122] In 1956 the Massachusetts Company made public their intention to salvage the ship.[123] The State of Florida filed suit to enjoin the salvage operation, asserting a sovereign interest in the ship under English common law.[124] In *State ex rel. Ervin v. Massachusetts Co.*,[125] the Florida Supreme Court found that the wreck was abandoned and awarded ownership to the sovereign under the authority of the British statutory and common law of 1775,

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> Moneys in Registry, 170 F. Cas. p. 470, 475 (E.D. Pa. 1909); Thompson v. United States, 62 Ct. Cl. 516, 524 (1926). Although at least one state court has invoked English common law to award ownership of a sunken vessel to the sovereign, the "American rule" vesting title in the finder has been widely recognized by courts and writers. . . . We accept the "American rule" as it has been uniformly pronounced in the courts of this nation for over a century.

Id. at 343.

117. *See* United States v. Tyndale, 116 F. 820 (1st Cir. 1902) (money found on a body floating in the sea); Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960) (cargo of marble); Murphy v. Dunham, 38 F. 503 (E.D. Mich. 1889) (cargo of coal lying at the bottom of a lake); Eads v. Brazelton, 22 Ark. 499 (1861) (cargo of lead). *See also infra* notes 121-37 and accompanying text.

118. For a detailed discussion of the consistency of this rule as it developed and how it was finally breached, see Kenny & Hrusoff, *supra* note 84, at 393-98.

119. *See infra* note 120.

120. State *ex rel.* Ervin v. Massachusetts Co., 95 So.2d 902, 906 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957); Bruton v. Flying "W" Enterprises, Inc., 273 N.C. 399, 401, 160 S.E.2d 482, 494 (1968); Platoro, Ltd. v. Unidentified Remains of a Vessel, 371 F. Supp. 356, 360 (S.D. Tex. 1973), *rev'd on other grounds*, 508 F.2d 1113 (5th Cir. 1975).

121. State *ex rel.* Ervin v. Massachusetts Co., 95 So. 2d 902, 903 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957).

122. *Id.*

123. *Id.*

124. *Id.* at 903-04.

125. 95 So. 2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957).

as adopted by Florida when it became a state.[126] The court expressly accepted the English common law and the British rule.[127] This rationale was relied upon by a North Carolina court in the case of *Bruton v. Flying "W" Enterprises, Inc.*,[128] when it awarded ownership of a number of ancient ships found off its coast to the state.[129] Again, the court relied upon early state acceptance of English common law.[130]

In a recent case, *Platoro, Ltd. v. Unidentified Remains of a Vessel*,[131] a federal district court awarded ownership of property recovered from a Spanish galleon to the State of Texas.[132] The artifacts recovered were considered to be of priceless historic value though their precise market value was difficult to ascertain.[133] After tracing the vessel's ownership back to the date of the wreck, the court applied the Spanish law in effect at that time, a law similar in form to the British rule, and held that the state retained title through a succession of governments.[134] Thus, Texas used the sovereign prerogative rationale to protect property that was considered to be historically significant.[135] On remand for determination of the proper salvage award, the district court awarded the entire value of the property to salvors.[136] Each of

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126. *Id.* at 907.

127. *Id.* The court said:

> We conclude, therefore, that the wreck of the vessel is a "derelict" which, at common law, would belong to the Crown in its office of Admiralty at the end of a year and a day, under the authority of the English cases above cited; that since the property was resting in territorial waters of the State of Florida . . . it is within the purview of the common law . . . and belongs to the State in its sovereign capacity.

Id. at 907.

128. 273 N.C. 399, 160 S.E.2d 482 (1968).

129. *Id.* at 414, 160 S.E.2d at 492.

130. *Id.*

131. 371 F. Supp. 356 (S.D. Tex. 1973), *rev'd on other grounds*, 508 F.2d 1113 (5th Cir. 1975).

132. 371 F. Supp. at 360.

133. *Id.* at 357. The court found that "[t]here is no question that the artifacts recovered are of great historical value, but unfortunately we cannot put a dollar sign on an historic work and we are relegated to the recognized rule of commercial or market value." *Id.*

134. *Id.* at 360. Finding no clear evidence as to the original owner's identity at the time the vessel was sunk in 1554, the court relied upon the Spanish "one year and a day" law to award title to the State of Texas. *Id.* The Spanish salvage law of 1554 was similar to the English Statute of Westminster of 1275. *See supra* notes 88-94 and accompanying text.

135. *Id.* at 357.

136. *Platoro*, 518 F. Supp. 816 (W.D. Tex. 1981). Trial on the merits of this case was heard by a different district court after the court of appeals reversed and remanded for rehearing. In dicta, the district court found the state ownership result to be clearly

these cases illustrates the valid application of the British sovereign prerogative rule; each recognized the inherent public interest in salvaged property and the presence of a relatively low commercial value.[137] The states in each case claimed title, not through statute, but through sovereignty traced back to the time of the wreck.[138]

A recent series of Fifth Circuit decisions has mounted a challenge, based on federal prerogative, to the salvor's ownership of property.[139] In these cases, the courts considered whether the federal government had asserted, through statute, its inherent right to title in property found at sea.[140] As in the *Platoro* case, the property involved was of great cultural and historical significance. In 1622, the Spanish vice-flagship *Nuestra Senora de Atocha* and twenty-eight sister ships were transporting gold and silver, freshly mined from the new world, to King Philip IV.[141] Two days after setting sail, a hurricane forced the fleet back onto coral reefs near the Florida Keys.[142] The Spanish treasure[143] remained on the ocean floor until 1971 when Mel Fisher of

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erroneous, for lack of merit, but conceded that the doctrine of res judicata bound the court to the first conclusion regardless of its accuracy. *Id.* at 820. In deciding the salvage award the court considered each element of a valid salvage service claim in detail, and awarded the *entire value* of the recovered artifacts to the salvors. The judge said:

> [T]he Court finds that Platoro's adequate and just salvage award is equal to or perhaps in excess of the sum which a sale would bring. Therefore, it will allow the State to satisfy judgment by relinquishing title of the res to Platoro . . . . Such an award is not excessive in view of the great historical and archaeological value the State's witnesses attribute to the find. The salvors should be amply rewarded.

Id. at 823. The court also awarded the salvors $63,800.00 in attorney's fees and court costs. *Id.* The salvors, after three district court and two court of appeals decisions, obtained right to the property which was recovered from the sea in 1967. The salvage operation only took a few months, while the salvage award took fourteen years.

137. In each of the above cases, the courts found the market values difficult to determine. Although the cultural and historical values were identifiable, they could not, however, be easily translated into a dollar amount. *See supra* note 133.

138. *See* Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 408 F. Supp. 907 (S.D. Fla. 1976) [hereinafter cited as *Treasure Salvors #1*]; *Treasure Salvors #2*, 569 F.2d 330 (5th Cir. 1978). *See also Platoro*, 518 F. Supp. 816 (W.D. Tex. 1981).

139. *See Treasure Salvors #1*, 408 F. Supp. at 909; *Treasure Salvors #2*, 569 F.2d at 340; *Treasure Salvors #3*, 459 F. Supp. at 511.

140. This question was answered negatively in United States v. Tyndale, 116 F. 820 (1st Cir. 1902). *See supra* note 115.

141. *Treasure Salvors #2*, 569 F.2d at 333.

142. *Id.*

143. The present value of the loss has been estimated to be one hundred million dollars. *See* Lyon, *The Trouble with Treasure*, 149 NATIONAL GEOGRAPHIC 787 (June, 1976).

Treasure Salvors, Inc. discovered a single lead musket ball from the lost fleet.[144] Since that time, Fisher has continued to salvage the remains of what is believed to be the *Atocha*.[145] Five important salvage decisions[146] resulted from litigation concerning his find; each questioning whose property rights should be favored: the finder's or the sovereign's. The five cases are *Treasure Salvors, Inc. v. The Unidentified Wreck and Abandoned Sailing Vessel #1*,[147], *#2*,[148] *#3*,[149] *#4*,[150] *#5*.[151]

In asserting ownership over the salvaged property the United States argued two alternative theories of title. The first theory argued that the Antiquities Act[152] and the Abandoned Property Act[153] applied to all objects on the outer continental shelf;[154] the second argued that the federal government, as successor to the British crown, derived title under a sovereign prerogative.[155] The court in *Treasure Salvor #2* summarily rejected the latter argument, stating: "We accept the 'American rule' as it has been uniformly pronounced in the courts of the nation for over a century."[156] The court went on to hold that neither the Abandoned Property Act nor any other legislation that was said to incorporate the British prerogative, had done so effectively.[157]

In considering the statutory basis for the government's assertion of title, the court first examined the Abandoned Property Act.[158] The opinion noted that the statute applied to property that had been wrecked, abandoned or became derelict[159] and that the Act referred

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144. *Id.* at 788.

145. *Treasure Salvors #2*, 569 F.2d at 333.

146. *See infra* notes 147-51.

147. *See Treasure Salvors #1*, 408 F. Supp. 907 (S.D. Fla. 1976), *modified*, 569 F.2d 330 (5th Cir. 1978).

148. *See Treasure Salvors #2*, 569 F.2d 330 (5th Cir. 1978).

149. *See Treasure Salvors #3*, 459 F. Supp. 507 (S.D. Fla. 1978).

150. *See* Fla. Dep't of State v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. 1980), *aff'd*, 102 S. Ct. 3304 (1982).

151. *See* Fla. Dep't of State v. Treasure Salvors, Inc., 102 S. Ct. 3304 (1982).

152. 16 U.S.C. §§ 431-433 (1976).

153. 40 U.S.C. § 310 (1976).

154. *See infra* note 161.

155. *See Treasure Salvors #1*, 408 F. Supp. at 909; *Treasure Salvors #2*, 569 F.2d at 340.

156. *Treasure Salvors #2*, 569 F.2d at 343. The court also said: "In spite of the arguments advanced by Chancellor Kent, the notion of sovereign prerogative never took root in America." *Id.* at 342.

157. *See Treasure Salvors #2*, 569 F.2d at 337-43. *See infra* notes 161-67 and accompanying text.

158. 40 U.S.C. § 310 (1976).

159. *Treasure Salvors #2*, 569 F.2d at 341. The district court on remand said: "It would amaze and surprise most citizens of this country, when their dream, at greatest of costs, was realized, that agents of respective governments would, on the most flimsy of

only to property "strewn about the country and its harbors during the Civil War."[160] This narrow interpretation of property controlled by the Act clearly excluded the *Atocha*.

In arguing for ownership under the Antiquities Act,[161] the United States based its claim of territorial jurisdiction and control over the salvage site on the Outer Continental Shelf Lands Act (OCSLA).[162] The OCSLA grants to the federal government jurisdiction and control over the "lands" constituting the outer continental shelf,[163] and reflects a congressional intent to assert control over the development of mineral resources on the outer continental shelf.[164] The court noted that the limited grant of jurisdiction in the OCSLA extended control to only those properties within the natural resource exploitation focus of the Act.[165] The court also discussed the applicability of the Convention of the Continental Shelf,[166] which became effective after the enactment of the OCSLA, stating that the Act superceded any incompatibility of terms.[167] In addition, the court considered the International Law Commission's statement that: "It is clearly understood that the rights in question *do not* cover objects such as wrecked ships and their cargo (including bullion) lying on the seabed or covered by sand of the seabed."[168] The court held that neither the OCSLA nor the Convention extended the necessary control for the purposes of ownership under the Antiquities Act to wrecks. Therefore, the OCSLA did not extend jurisdiction over wrecks for the purposes implied in the Antiquities Act.[169] The court concluded that: "Congress has not exercised its sovereign prerogative to the extent necessary to justify a claim for an abandoned vessel located on the outer continental shelf. Under the facts of

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grounds, lay claim to the treasure." *Treasure Salvors #3*, 459 F. Supp. at 511.

160. *Treasure Salvors #1*, 408 F. Supp. at 909.

161. 16 U.S.C. §§ 431-433 (1976). The Antiquities Act applies only to land which is owned or controlled by the government. *Treasure Salvors #1*, 408 F. Supp. at 910.

162. 43 U.S.C. §§ 1331-1343 (1976).

163. *See* United States v. Maine, 420 U.S. 515, 526 (1975).

164. *See* Guess v. Read, 290 F.2d 622 (5th Cir. 1961). The court said that: "The Continental Shelf Act was enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the continental shelf." *Id.* at 625.

165. *Treasure Salvors #2*, 569 F.2d at 339. "[A]n extension of jurisdiction for purposes of controlling the exploitation of the natural resources of the continental shelf is not necessarily an extension of sovereignty." *Id. See also supra* note 164.

166. *Treasure Salvors #2*, 569 F.2d at 339.

167. *Id.* at 339-40. *See* United States v. Ray, 423 F.2d 16, 21 (5th Cir. 1970).

168. *Treasure Salvors #2*, 569 F.2d at 340 (quoting 11 U.N. GAOR, Supp. (No. 9) at 42, U.N. Doc. A/3159 (1956)) (emphasis added).

169. *See supra* note 168.

this case, possession and title are rightfully conferred upon the finder . . . ."[170]

The *Treasure Salvors* and *Platoro* cases arose where a federal or a state government, respectively, asserted a right to property recovered from the depths of the sea.[171] In each of these actions the governments argued for the use of the British rule and the application of a sovereign prerogative.[172] The governments' attorneys knew at the outset that federal courts have consistently applied the opposite rule, title to the finder. The *modern* distinction, however, was made regarding recovered property that is of great cultural and historical value.[173] The *Treasure Salvors* decisions dismissed this argument as being irrelevant to the outcome of the title question.[174] The district court judge in *Platoro* followed this conclusion, in spirit, by awarding the entire value of the recovered property to the salvors.[175] The continued viability of the American rule has been clearly upheld.

SALVAGE LAW VERSUS FINDER'S LAW

Another major source of conflict in the law of salvage is encountered when the original owner is known and reasserts a claim to salvaged property. In such circumstances courts and commentators in the United States have been unable to agree upon a uniform rule for the proper disposition of title.[176] Conflict and confusion have arisen in regard to the applicable law in cases in which the original owner, having apparently abandoned property at sea, reasserts ownership after that property is salvaged.[177] American courts have been unable to agree upon which law, salvage law or finder's law, should be applied to decide ownership.[178] Under the law of salvage, the right and title to recovered property remains with the owner even after abandonment.[179]

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170. *Treasure Salvors #1*, 408 F. Supp. at 911.

171. *See Treasure Salvors #2*, 569 F.2d 330 (5th Cir. 1978); *Platoro*, 518 F. Supp. 816 (W.D. Tex. 1981).

172. *See Treasure Salvors #2*, 569 F.2d at 340-43; *Platoro*, 518 F. Supp. at 819-20.

173. Each of these cases involved property of significant historic value dating back to the 1600's.

174. *See, e.g., Treasure Salvors #2*, 569 F.2d 330 (5th Cir. 1978).

175. *Platoro*, 518 F. Supp. at 823; *see supra* note 136.

176. *See infra* note 178 and accompanying text.

177. *See infra* notes 181-201 and accompanying text.

178. *See, e.g.*, Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960). The opinion acknowledged the conflict of authority in this area of the admiralty law and examined the arguments of each view, holding the law of finds more persuasive. *Id.* at 456. *See also Treasure Salvors #2*, 569 F.2d at 336.

179. *See* 3A M. NORRIS, *supra* note 22, § 150.

This view is in opposition to the outcome under the law of finds, which would give title to the first party to reduce the property to possession.[180]

At the heart of many present-day salvage decisions is the concept of "abandonment."[181] Abandoned property, within the meaning of salvage law, is the discarding or deserting of property by its owner or holder, without the intention of reclaiming it.[182] A sunken wreck, a distressed vessel[183] and a lost cargo[184] can all be considered abandoned property allowing salvage by anyone who is first to reduce it to possession.[185]

Abandonment is considered to have two distinct elements:[186] the external relinquishment of possession or control,[187] and an intention to terminate ownership.[188] The question of abandonment is generally considered a factual one to be decided at trial.[189] The simplest form of abandonment comes into being when the owner establishes a public record announcing his intention to abandon.[190] In less overt cases the court must scrutinize all the circumstances involved in the event.[191]

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180. 1 W. BLACKSTONE, *supra* note 91, *295-97.

181. *See, e.g., Treasure Salvors #2*, 569 F.2d 330 (5th Cir. 1978); *Platoro*, 518 F. Supp. 816 (W.D. Tex. 1981).

182. 3A M. NORRIS, *supra* note 22, § 134, at 9-10.

183. A distressed vessel that is abandoned and deserted without hope of recovery will be considered a "derelict." If the crew leaves only to summon help from the shore then this term would not apply. *See* The Island City, 66 U.S. (1 Black) 121 (1861).

184. Abandoned cargo can also be considered derelict. Under Blackstone's categories of lost properties, cargo would be automatically wreck, but flotsam, jetsam and lagan could also be abandoned property under certain circumstances. *See* 3A M. NORRIS, *supra* note 22, § 131, at 9-3. *See also supra* notes 91-93 and accompanying text.

185. Derelict and abandoned property is perhaps the most ripe property for salvaging, in that the owner is not present to object to an excessive award. *See* The Anna, 1 F. Cas. 928 (E.D.N.Y. 1872) (No. 398), *aff'd*, 1 F. Cas. 931 (C.C.N.Y. 1873) (No. 401).

186. The Tubantia, 1924 Eng. L. Rep. 78 (Probate Division).

187. *Id.*

188. The element of intent is the more important of the two. The intent to return as an afterthought will not be considered valid; the court focuses on the intent of the crew or owners at the time the deserters left the vessel. *See* 3A M. NORRIS, *supra* note 22, § 134.

189. *See* Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960).

190. *See* Brady v. The Steamship African Queen, 179 F. Supp. 321 (E.D. Va. 1960) (a stranded tanker was publicly abandoned by its owners and the insurance underwriters). Public abandonment is often in response to possible liability resulting from damage caused by the vessel to other ships or to the environment. For an in depth discussion of the rights and mechanics of voluntary or public abandonment, see Roberts, *Sinking, Salvage and Abandonment*, 51 TUL. L. REV. 1196 (1977).

191. Abandonment is fundamentally a fact question in which the court considers the particular circumstances of the case and the inferences arising from them. *See* Wig-

Some of the factors considered include the physical condition of the property when deserted,[192] the amount of time that has elapsed[193] since the desertion and the steps taken by the owner towards recovering the property.[194] Courts that have held sunken wrecks to be abandoned have frequently focused on the length of time that has elapsed since the loss.[195]

Under the law of salvage, the act of abandonment does not divest original owners of their possessory rights of title.[196] When a vessel is successfully salvaged, the salvor secures the right of possession, but he is not automatically entitled to the entire value, title or proceeds of a sale.[197] Therefore:

> When property has been sunk at sea or lies wrecked near shore, the owner has not been divested of title by virtue of that fact. And neither does the salvor gain title by finding it. It is his obligation to bring the salved property

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gins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 456 (E.D. Va. 1960).

192. The condition of the wreck reflects upon the intent of the owners. If the abandonment occurs while the vessel is in good condition a common sense implication can be drawn that the desertion was to summon help. *Cf.* The Island City, 66 U.S. (1 Black) 121, 123 (1861) (a crew temporarily left their ship; no abandonment could be found without more proof that the abandonment was final and without hope of recovery or intention to return); Simon v. Taylor, Leishman, Bastian, Dickie, [1975] 2 Lloyd's L.R. 338 (Sing. Ct. 1974) (a German U-boat was torpedoed and sank with all hands on board; no abandonment was found as the crew did not form or have the intention to abandon the vessel).

193. *See* Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960). The court said: "While lapse of time and nonuser [sic] are not sufficient, in and of themselves, to constitute an abandonment, these factors may, under certain circumstances, give rise to an implication of intention to abandon." *Id.* at 456. In *Treasure Salvors #2*, the court held that: "Disposition of a wrecked vessel whose very location has been lost for centuries as though its owners were still in existence stretches a fiction to absurd lengths." 569 F.2d at 337.

194. The effort of the owners in conserving the condition of the wreck is vital to the finding of an intent to abandon. The physical elements such as removal of equipment, absence of markers or buoys, and general lack of concern over abuse of the property, will negate the spoken intention to continue ownership. *See* De Bardelben Coal Co. v. Cox, 16 Ala. App. 172, 76 So. 409 (1917).

195. *See supra* note 193. *Cf.* Simon v. Taylor, Leishman, Bastian, Dickie, [1975] 2 Lloyd's L.R. 338 (Sing. Ct. 1974) (a British court held that the crew of a torpedoed German U-boat lacked the intent necessary for a finding of abandonment).

196. This view is primarily endorsed by Martin J. Norris, a commentator and acknowledged expert in the United States on the law of salvage. *See* 3A M. NORRIS, *supra* note 22, § 150.

197. *See* Twenty-three Bales of Cotton, 24 F. Cas. 419 (E.D.N.Y. 1877) (No. 14,284).

> before an admiralty court where the owner shall be given an opportunity to come in and claim the property.[198]

Once the salvaged property is placed with a marshall or similar federal official for safe-keeping, the salvor's right of possession creates a maritime lien against the property salvaged.[199] A maritime lien is a privileged claim upon the property to assure award for the salvage service.[200] The maritime lien (specifically the salvage lien) is an acquired interest in the property which gives an admiralty court jurisdiction to enforce the salvor's claim.[201]

Although the salvor is not entitled to the "whole" value of the recovered property saved under salvage law, courts give considerable weight to abandonment in setting the proper amount for a salvage award.[202] During the eighteenth and early nineteenth centuries, courts viewed abandonment as the most important factor to be considered and generally awarded one-half the property value to the successful salvor.[203] Today, the finding of "abandonment" does not result in an automatic award of fifty percent, but it remains significant in two respects. First, abandoned property is usually more difficult to recover and implies a higher degree of danger to overcome as well as a higher skill necessary on the part of the salvors. Second, when the owner is not known or has publicly abandoned the property, there is a greater temptation to conceal the recovery and so a more liberal award is necessary to encourage disclosure.[204] Therefore, under salvage law, although abandonment does not give the first possessor title to the property, it does become an important factor in determining the amount of the salvage award.

If a court considers "abandonment" to be the total discarding of an owner's right and title to property, the outcome of a salvage claim can dramatically change. Under the law of finds, title to abandoned

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198. 3A M. NORRIS, *supra* note 22, § 150, at 11-2 (footnotes omitted).

199. *See, e.g.*, The Akaba, 54 F. 197 (4th Cir. 1893).

200. *Id.*

201. A maritime lien gives the admiralty court exclusive jurisdiction in the form of an in rem action against the property for the proper award. *See* 3A M. NORRIS, *supra* note 22, § 150. *See also supra* note 80.

202. Public abandonment commonly occurs after the original owner has been unsuccessful in an attempt to recover the lost property from the sea. A court should, therefore, give more weight to the salvage service factors of "risk incurred" and "skill employed" when there is a public abandonment. *See supra* notes 57-58 and accompanying text.

203. *See* 3A M. NORRIS, *supra* note 22, § 130, at 9-1; § 240, at 20-7.

204. 1 M. NORRIS, THE LAW OF SEAMEN § 210 (2d ed. 1962). *See also supra* note 61.

property vests in the first party to reduce it to possession.[205] The origins of finder's rights are in the Laws of Oleron[206] which spoke primarily to property "which has *never belonged to any man,*" and vested title in the "first finder."[207] Blackstone applied this idea to treasure found at sea rather than the sea's natural treasure, i.e. fish and precious stones.

> [A] man that scatters this treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into common stock, without any intention of reclaiming it, and therefore it belongs, as in a state of nature, to the first occupant, or finder . . . .[208]

The use of a finder's theory in cases where the original owner reasserts claim to recovered property has had a major impact on the law of salvage, adding to the confusion present in modern salvage law.[209]

The decision in a particular case will, then, depend upon the court's application of one of divergent theories as reflected in the interpretation of the term "abandonment." It is logical for the court to consider property that has been lost for many years as a proper subject for a "find," especially in cases where the salvor recovers sea treasures after expending a great amount of time and money. In cases of extreme inequity, courts have awarded the entire value of the property to the salvors, while deciding the case under the law of salvage.[210] Recently, however, courts in the United States have endorsed the use of the law

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205. When a court applies the finds rationale the parties are treated as if the original owner made no claim or is not known. The decision as to title, then, would be controlled by the American rule in deciding between the rights of the finder and the sovereign. *See supra* notes 109-10 and accompanying text. *See, e.g., Treasure Salvors #2,* 569 F.2d at 337; Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 456-57 (E.D. Va. 1960).

206. The Laws of Oleron, art. XXXIV, *reprinted in* 30 F. Cas. 1171-87. The article states:

> If any man happens to find any thing in the sea, or in the sand on the shore, in floods or in rivers, if it be precious stones, fish, or *any treasure of the sea,* which has never belonged to any man in point of property, it belongs to the first finder.

Id. at 1184 (emphasis added).

207. *Id.* (emphasis added).

208. 1 W. BLACKSTONE, *supra* note 91, *290-94.

209. *See supra* note 178.

210. *See* Brady v. The Steamship African Queen, 179 F. Supp. 321 (E.D. Va. 1960).

of finds as a guiding principle in the disposition of title resulting from a salvage claim.[211] In *Wiggins v. 1100 Tons, More or Less, of Italian Marble*,[212] the salvage operation began 66 years after the loss of the vessel.[213] The court held the wreck to be abandoned, ruling that the first party that had taken possession was to be considered the "first finder."[214] The salvors were found to have legal title to the vessel because of their right of possession.[215]

This recent endorsement by the courts of the "finds" rationale, and their interpretation of abandonment, is in conflict with the structure and conformity created by the law of salvage.[216] One expert warned against this break with the authority of the admiralty court's decisions on title. Martin Norris has written:

> In consonance with the established policy of the maritime law that salvors should look to the admiralty courts for reward, the settlement of disputes and the ultimate disposition of the rescued property, it is, in my opinion, far better and wiser not to recognize or regard publicly abandoned property as a "find."[217]

The Norris view of salvage "abandonment" has not found acceptance in the courts.[218] The "finds" interpretation of abandonment has enabled the courts to avoid the difficult and perhaps arduous task of determining the exact dollar amount for a specific salvage award. This endorsement and popular use of the principle of finds, however, threatens the delicate balance of public policy considerations that have been the historic justifications for salvage law. The structure, uniformity and expertise contributed to the law of admiralty by the federal courts

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211. *See, e.g., Treasure Salvors #2*, 569 F.2d 330 (5th Cir. 1978). The court applied the law of finds, saying: "Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths. The law of salvage does not contemplate a different result." *Id.* at 337. *See also Platoro*, 518 F. Supp. 816 (W.D. Tex. 1981).

212. 186 F. Supp. 452 (E.D. Va. 1960).

213. *Id.* at 456.

214. *Id.* "This Court is unable to perceive why cargo, remaining in the hull of a derelict vessel for 66 years with no claim of ownership, must now be sold by the Marshall to clear title to same." *Id.* at 457.

215. *Id.* at 456.

216. 3A M. NORRIS, *supra* note 22, § 158, at 11-15.

217. M. NORRIS, THE LAW OF SALVAGE § 158, at 138 (Supp. 1974).

218. *See, e.g.*, Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 456 (E.D. Va. 1960). The court found that the view argued by Norris was without case support or logical application in most cases of recovered sunken property. *Id.*

should not be limited by reducing a salvage claim and decision to a showing of possession with the automatic application of a "finder's-keepers" rationale.

A Factual Application of Modern Salvage Law

Modern treasure hunting is both a sport for the enthusiast and a business for the salvage corporation. Technological advancement has made the news of recovered sunken property a common occurrence. Public and private demand for lost "cultural" property has spurred an international debate as to the proper techniques for salvaging of archaeologically valuable property.[219] As discussed above, the right of title to the recovered property is also the focus of debate. In an attempt to clarify the problems created by the rationale of a number of modern salvage decisions,[220] the following discussion of a recent find in United States waters is presented.

On July 26, 1956, eleven hours after colliding with the Swedish liner *Stockholm*, the *Andrea Doria* sank two hundred miles off the east coast of the United States, settling on the continental shelf.[221] Along with forty-five lives, it was reported that one million dollars in cash and a vast amount of jewels and other durable goods were lost that morning.[222] Peter Gimbel has spent a great amount of time and money over the last twenty-six years attempting to salvage what was thought lost when the *Andrea Doria* sank.[223] In September, 1981, a crew of divers led by Gimbel located and recovered one of two safes which were aboard the vessel.[224] For the purposes of this illustration, existence and value of the recovered property is unimportant.

Claims to property salvaged from the *Andrea Doria* could come from four separate sources: (1) from the federal government asserting title based upon arguments similar to those made in the *Treasure Salvors* cases; (2) from the original property owners (passengers and crew);

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219. *See generally* Note, *Open Season on Ancient Shipwrecks: Implications of the Treasure Salvors Decisions in the Fields of Archeology, History and Property Law*, 4 Nova L.J. 213 (1980).

220. *See, e.g., Treasure Salvors #2*, 569 F.2d 330 (5th Cir. 1978); Platoro, Ltd. v. Unidentified Remains of a Vessel, 371 F. Supp. 356 (S.D. Tex. 1973), *rev'd on other grounds*, 508 F.2d 1113 (5th Cir. 1975).

221. *Gimbel's Grail-Diving to the Andrea Doria*, Time, Sept. 14, 1981, at 22.

222. N.Y. Times, Aug. 27, 1981, at A24, col. 4. Estimates of the lost valuables and currency vary between one and three million dollars. Beyond the cash believed to be in the purser's safe, other property lost included dozens of dishes ringed with gold leaf. *Id.*

223. *Gimbel's Grail-Diving to the Andrea Doria*, Time, Sept. 14, 1981, at 22.

224. *Id.*

(3) from the insurance underwriters who paid off the loss claims; and (4) from Gimbel as first finder and salvor.[225] The facts of the *Andrea Doria* pose a complex and perhaps unique question for the laws of salvage in that the span of time between loss and recovery was comparably short for sunken cargo.[226] Another novel factor is the existence of a party (the insurance underwriters) who can claim original rights to the "sea treasure" as the continuing owner of the wreck.

The United States government's claim of possession is by far the simplest to analyze. The court in *Treasure Salvors* rejected any application of the British sovereign prerogative rule in American law.[227] Furthermore, the OCSLA has been found to exclude property of this kind as its jurisdiction is limited to natural resources.[228] The federal government's inherent power to statutorily claim title has not been exercised. Ownership based upon possession and control could not be successfully argued because the United States took no steps to mark or salvage the vessel.[229] Thus, within this factual setting, the United States has no arguable claim to the recovered property.

The passengers and crew who lost the property recovered by Gimbel could argue a right to title based upon original ownership concepts present in the law of salvage. These original owners could argue that they did not abandon their property, focusing on the lack of intent and public action that is necessary for a finding of abandonment. Owners who received payment from the insurance underwriters, however, would have no claim to the salvaged property.[230] Others could file suit to recover either particular pieces of property or a percentage of the total sale.

The claims of the insurance underwriters and the salvors pose a more difficult question for the court. The trial court must decide whether to apply salvage law or finder's law. The underwriters would have a claim, under salvage law, based upon their payments to the original owners. No official statement of intent to abandon the vessel had been made by the underwriters in the twenty-six years since the loss. The insurance underwriter's claim, then, would ask the court to

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225. *Id.*

226. In *Treasure Salvors #2,* 569 F.2d 330 (5th Cir. 1978), for example, the vessel, which sank in 1622, was not located until 1971. *Id.* at 333.

227. *Id.* at 343.

228. *Id.* at 337-40. *See also supra* notes 161-69.

229. For a discussion of abandonment, see *supra* notes 181-95 and accompanying text.

230. The insurance companies would step into the shoes of the original owners and succeed to their rights and claims on the property recovered based upon the insurance company's right of subrogation.

apply salvage law which would not defeat their claim to title even with a factual finding of "abandonment." The underwriters' claim would be for the value of the property salvaged, with the court awarding a reasonable amount of the value to the salvors. Under a salvage law analysis, the insurance company, as original owners, would retain title to the salvaged property.

A claim of ownership in the recovered property by Gimbel, as the successful salvor, would be founded upon the alternative legal theory of finder's law. The salvors were the first to take physical possession of the property that had remained on the outer continental shelf for some twenty-six years. Therefore, Gimbel could make a legitimate claim as "first finder" to the recovered property. The strength of this claim would lie in the substantial amount of time, skill and money[231] expended on the recovery operation. Moreover, the recent endorsement of the finder's "rationale" in the *Treasure Salvors* cases indicates that a salvor could, in a case such as this involving recovered sunken property, expect similar favorable treatment.

The identities of the two claimants in this illustration, the insurance companies and the salvors, could also influence the court's analysis of the salvage claim. Unlike the *Treasure Salvors* cases, which arose out of a dispute between the finder and the sovereign, the present conflict is between the finder and the successors of the original owners. The court should, therefore, examine the case on two levels. First, the facts surrounding the salvage operation should be examined to determine whether the property should be considered "abandoned." Second, the court should determine whether to apply the law of salvage or the law of finds. In making the factual finding as to abandonment, and the legal decision as to choice of laws, the public policy foundation of each legal theory must be considered.

The factual question of abandonment is one aspect of the *Andrea Doria* case which makes this salvage operation unique. The *Andrea Doria* collided with the *Stockholm* in July of 1956, sinking eleven hours later.[232] The length of time it took the vessel to sink, added to the notoriety of the disaster, made the location of the wreck common knowledge. Prior to Gimbel's salvage operation, however, no salvage effort had been successful. The lack of success during this twenty-six year period was primarily due to the great depth and strong current of the ocean two hundred miles off shore.[233] It was only with the assis-

231. The estimated cost of the 35 day salvage operation is $1.5 million, with a daily cost of $35,000 for the rental of a 190 foot support vessel.

232. *Gimbel's Grail-Diving to the Andrea Doria*, TIME, Sept. 14, 1981, at 22.

233. N.Y. Times, Apr. 12, 1981, § N.J., at 2, col. 2.

tance of a sophisticated diving bell that some of the property of the *Andrea Doria* was finally recovered by the Gimbel expedition.[234]

Two essential factors that influence the abandonment finding in many modern salvage decisions are the time elapsed since the loss and the lack of any legitimate original owner.[235] Clearly, neither of these factors are present in the *Andrea Doria*. The insurance underwriters have continued in existence since the disaster and have not issued any public statement of an intent to abandon the wreck. The lapse of twenty-six years could be justified given the placement of the wreck in deep water and the recent development of the technology necessary for such a hazardous operation. Given these unique factors, the court would probably evaluate the relevant policy consideration of both salvage and finder's law before making a final decision on the question of abandonment.[236]

The law of finds provides the greatest possible encouragement for those with the opportunity and ability to take the risks involved in a salvage operation. Unrestricted ownership to any and all property recovered is the greatest monetary incentive a salvor could possibly have. Because encouragement of salvors is the traditional essence of salvage law, it would be difficult to argue in favor of a mere percentage return on a successful operation. Arguments have also been made that finder's law is more consistent with the fundamental principles of American society, which are to promote individualistic, self-sufficient and courageous citizens.[237]

Salvage law, on the other hand, provides authoritative and orderly results from salvage operations with a court-reasoned award of title and ownership. One important commentator has expressed a fear that passing of title under the finds rationale may promote desparate actions taken by fellow salvors between the discovery and the announcement of newly salvaged property.[238] Salvage law would also protect the interested owner who is either not in a position to salvage the property, or who was second to begin the salvage process. The application of salvage law thus yields an equitable result rather than one which bases ownership upon the ability to pay for expensive, state of the art technology or the willingness to accept the physical risks inher-

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234. *Gimbel's Grail-Diving to the Andrea Doria*, TIME, Sept. 14, 1981, at 22. The Gimbel expedition was also able to recover about 100 pieces of dinner service. N.Y. Times, Aug. 25, 1981, § 4, at 18, col. 5.

235. *See Treasure Salvors #2*, 569 F.2d at 337; *see also supra* note 193.

236. The factual finding of abandonment would, in all probability, be made only after the court had decided which claimant, the salvor or the owner, should prevail.

237. *See Treasure Salvors #1*, 408 F. Supp. at 909.

238. M. NORRIS, LAW OF SALVAGE § 158, at 138 (Supp. 1974).

ent in a salvage operation.

The award of title should, therefore, be based upon the policy consideration found most persuasive by the court. Traditionally the court awards either absolute title, under the law of finds, or awards less than fifty percent, under the salvage law to the salvors. An alternative solution which, in the final analysis, could strike a compromise between these two inequitable and extreme results is possible. The court has discretionary power to base its decision on salvage law and still award a substantial portion of the value to the salvors.[239] Before the rise of the finder's rationale in American courts, a judge could, in extreme cases, award over fifty percent of the value of the property to the salvors.[240] This result was popular primarily in cases which involved extreme danger or operations which took an extraordinary amount of time.[241] Clearly the *Andrea Doria* case involves both elements—extreme danger and a time-consuming salvage operation. Thus, a substantial award of fifty percent or more to the salvors would encourage swift maritime rescue, which is the explicit public policy foundation of salvage law, while eliminating the harshness of the all or nothing contest of finder's law and the unfair fifty percent limit of salvage law.

CONCLUSION

In determining specific salvage awards federal courts must attempt to strike a balance between the excessive encouragement of willing salvors and the undue burdening of salvage property owners. The task of setting such awards is made more difficult by the lack of reliable precedent or detailed guidelines for determining a specific dollar amount.[242] Despite these difficulties there is a continuing public need for legitimate and equitable court disposition of property in modern salvage cases. The two aspects of salvage law discussed above have the potential to produce extreme salvage awards thereby destroying the equitable balance necessary for the proper functioning of the law of salvage.

The incorporation of the British sovereign prerogative rule into state antiquities statutes[243] and the introduction of similar bills in

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239. *See, e.g.*, Brady v. The Steamship African Queen, 179 F. Supp. 321 (E.D. Va. 1960). *See also supra* notes 64-67 and accompanying text.

240. *See supra* note 203 and accompanying text.

241. Brady v. The Steamship African Queen, 179 F. Supp. 321 (E.D. Va. 1960).

242. *See supra* notes 62-63 and accompanying text.

243. *See, e.g.*, Fla. Archives and History Act, FLA. STAT. § 267.061 (West 1975); Antiquities Code, TEX. REV. CIV. STAT. ANN. art. 6145-9 (Vernon's 1970); Salvage of Abandoned Shipwrecks and Other Underwater Archeological Sites, N.C. ARCHIVES &

Congress[244] illustrate modern attempts to reduce the liberal awards which are fundamental to the salvage law's encouragement of salvors actions. This legislated sovereign prerogative could disadvantage salvors in three respects. First, the legislation would favor the government's claim to salvaged property over that of the salvor, a rejection of the American rule as it has been applied in the United States for over a century.[245] Second, such statutes commonly require salvage contracts that establish percentage distributions of any property recovered in government-controlled waters.[246] The government enjoys a markedly superior bargaining position due to the many salvors competing for exclusive rights to salvage a limited number of ancient wreck sites. As a result, these contracts are highly "coercive" in nature[247] and the salvor must rely on the good faith of the government to act equitably with treasure recovery windfall. Finally, a salvor may be disadvantaged by legislative prerogative in situations where no contract exists. After property is recovered in government-controlled waters, the state could make a valid claim to title based upon the statute. In recent cases,[248] states have argued that although the recovered treasure was of obvious cultural and historical value, the dollar value was impossible to determine.[249] Thus, the salvage award would be more difficult to decide and could possibly be reduced.

Judicial acceptance and use of the "finds" rationale in cases in which the original owner is identifiable create a potential for exces-

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HISTORY ACT, ch. 121, art. 3 (1974). State antiquities statutes purport to vest title to any salvage recovered from sites located on "sovereign lands of the State." These sites are strictly limited to the state's three-mile zone of territorial sea. FLA. STAT. § 267.061(1)(b).

244. Archaeological Resources Protection Act of 1979, 16 U.S.C. § 471 (1979). The protection of this act is restricted to cultural resources and property found on public lands. *See also* H.R. 1195, 96th Cong., 1st Sess. (1979). This bill would vest title in the United States to all abandoned historic shipwrecks located on the outer continental shelf.

245. *See supra* notes 109-10 and accompanying text.

246. *See, e.g.*, Fla. Archives and History Act, FLA. STAT. § 267.061 (West 1975). This Florida statute awards leases for salvage wreck sites to "archaeologists" in return for a 25% state share in the finds. The validity of this act was examined in *Treasure Salvors #3*, where the district court, in dicta, found the state regulation of salvors' rights to be in direct conflict with substantive maritime law and therefore unconstitutional. 459 F. Supp. at 523-24. *See also* Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186, 200-13 (S.D. Fla. 1981).

247. *See, e.g., Treasure Salvors #3*, 459 F. Supp. at 522. In this case the court held: "The coercive acts of the Division of Archives in threatening arrest and confiscation voids the contract under the general maritime law." *Id.*

248. *See, e.g.*, Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, 371 F. Supp. 356 (S.D. Tex. 1973), *rev'd on other grounds*, 508 F.2d 1113 (5th Cir. 1975).

249. .*See supra* note 133.

sively *liberal* awards. Rejection of the Norris view[250] (that apparent abandonment at sea does not divest the original owner of a possessory right to title) has had an impact on the law of salvage beyond adding to the uncertainty that exists in the field. The use of finds as a controlling principle in salvage cases creates an all or nothing contest between the owners and the salvors with the outcome depending largely on the factual finding of abandonment.[251] If, on the facts, the court concludes that original ownership and control was not divested, the award will be a percentage of the value, based upon the salvage service factors.[252] If, on the other hand, abandonment is found, the court will award the entire value of the property, or the property itself, to the salvors.[253] The courts have been able to avoid the most difficult aspects of a salvage claim mainly by deciding cases based upon title, thereby eschewing the difficult task of determining the specific salvage award.

Disproportionate awards, whether they are liberal or conservative in nature, could defeat the fundamental policy considerations which are the historic justifications for rewarding maritime salvors. The assertion of title to salvaged property by federal or state officials and the continuing use of the finds rationale in resolving salvage claims threaten the enduring viability of such policies. Sweeping changes, either judicial or legislative, that undermine the traditional, judge-determined salvage award would have a far reaching impact on the essential nature and continuing value of the law of salvage.

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250. *See supra* notes 196-204 and accompanying text.

251. *See supra* notes 210-18 and accompanying text. *See also* Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960).

252. *See, e.g.*, Weber Marine, Inc. v. One Large Cast Steel Stockless Anchor, 478 F. Supp. 973 (E.D. La. 1979).

253. *See, e.g.*, Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960).