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Salvage at Your Own Peril: A Common Law Approach to Maritime Treasure Recovery

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STUDENT NOTES/COMMENTS

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2. Christopher A. Noel, B.B.A., M.B.A., is scheduled to graduate with his J.D. from the University of Miami School of Law in May 2015. The author would like to thank Professor Stephen K. Urice at the University of Miami School of Law for his support in writing this note and for his ongoing mentorship.

I. INTRODUCTION:

Sunken treasure has the ability to fascinate and draw to it all who dream of riches beyond belief. The popular press estimates that there are potentially hundreds of billions of dollars in salvageable cultural property and treasure currently residing on the bottom of the ocean floor.[3] Much of this lost property exists in the form of gold and jewels removed from the civilizations of the new world in the Western Hemisphere to meet the demand created by the burgeoning kingdom of Spain–a decidedly Inter-American issue. However, unlike the historical explorers of days past, today's treasure seekers are using sophisticated technological advancements to better map potential targets, and are funded by investors willing to bet big on finding the next lost treasure; therefore, it is not uncommon for individuals to establish well-organized corporations for the sole purpose of finding and salvaging purportedly abandoned ships carrying lost treasure.[4]

Moreover, technology once used by global corporations in deep-sea oil exploration and drilling now serves as an advanced tool to locate wrecks, including wrecks at depths not possible prior to these advances in technology.[5] The twenty-first century discovery of ships containing lost treasure has reignited the passion for discovery in major investors such as hedge funds and private equity firms,[6] but these modern treasure hunts also serve as a significant threat to cultural heritage and the sovereign rights of the countries who lost these valuable cargos.[7] Absent a core set of principles, salvors may become the next wave of cultural property

3. Rob Goodier, *What's the Total Value of the World's Sunken Treasure?*, POPULAR MECHANICS (Feb. 22, 2012, 12:00 PM), http://www.popularmechanics.com/technology/engineering/gonzo/whats-the-total-value-of-the-worlds-sunken-treasure; Eoghan Macguire, *Why Scouring Sea for Sunken Treasures is Big Business*, CNN MAINSAIL (Mar. 14, 2013, 7:47 AM), http://www.cnn.com/2012/03/13/business/sunken-treasure-business/.

4. Lawrence D. Stone, *Search for the SS Central America: Mathematical Treasure Hunting*, Interfaces 22, 32-54 (1992) (available at http://pubsonline.informs.org/doi/abs/10.1287/inte. 22.1.32).

5. Christopher R. Bryant, *The Archeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historically Significant Shipwrecks*, 65 ALB. L. REV. 97, 106 (2001).

6. *Id.*

7. See *id.*

looters without the world even recognizing that these culturally sensitive locations are being lost at an alarming rate.

This note will form a prescriptive guide for future disputes based on significant cases brought in American courts[8] regarding the salvage of wrecks containing cultural property and lost treasure. Because this area of law is thoroughly complex and uncertain, this common law analysis provides a basis from which a claim may be based and advanced in American courts—there is no "right" answer in this area of law, and more frequently than not, courts are reluctant to decide in a manner that would foreclose future development. Throughout this note's analysis of several significant cases, however, a model of the United States' treatment of the salvage of shipwrecks will emerge, allowing for the development of a working framework for future litigation involving similar circumstances. Part II presents an overview of the parties involved in maritime treasure salvage. Part III discusses the current structure of maritime salvage law as it relates to sunken treasure. Finally, Parts IV and V provide a basis of knowledge for future cases involving maritime treasure salvage through an analysis of the key principles of law and modern jurisprudence in the area.

II. STAKEHOLDERS:

While today's discoveries come from deeper and more remote areas of the globe's oceans, salvors of years past relied on the relatively shallow waters of Florida and the Caribbean to locate and salvage wrecks. Salvage is a labor-intensive process involving both the requisite intellect to discover lost shipwrecks and the physical strength to explore the depths of the ocean and bring lost treasure to surface. As will later be discussed, the common law principle of salvage was created to incentivize salvors to risk their lives to recover wrecked ships; however, today's incentive may have shifted beyond a reward system for those who put themselves in peril, to an incentive for a purely profit-seeking salvage system. At law, a salvor is defined as either "[a] person who saves a vessel and its cargo from danger or loss," or as a person who "without any particular relation to a ship in distress, proffers useful service . . . [and who] must have the intention and capacity to save the distressed property involved, but need not have an intent

8. This Note draws from cases brought in the United States Court of Appeals for the Fourth, Fifth, and Eleventh Circuit.

to acquire it."[9] This definition hardly fits many of today's salvage companies, which strategically target shipwrecks lost centuries ago. Even given this shift in salvor identity, today's salvors frequently argue that, should they be prohibited from working wrecks, both the treasure and history of the site will be forever lost.[10]

Opposite today's profit-seeking salvors are preservationists who aim to protect historically significant wrecks from exploitation and destructive recovery.[11] Many underwater archeologists think of wrecks as a combination of underwater museum and gravesite.[12] That is, all wrecks contain more than treasure–cultural artifacts and the ship itself serve as a frozen-in-time display of history.[13] Additionally, many wrecks still contain human remains of sailors in veritable "underwater cemeteries" of those who perished during the sinking.[14] The preservationist group is not limited to archeologists and academics–included is the United States federal government, which has a centuries-old tradition of protecting culturally significant sites for the American people.[15] The U.S., therefore, has the duty of balancing between allowing immediate exploitation of the discovery to recover lost treasure and protection of the wreck site for ongoing preservation and possible income from tourism.[16]

III. THE STRUCTURE OF THE LAW:

Multiple levels of international, federal, state, and common law control the law of salvage. Legislative responses to underwater treasure and cultural property have not developed the body of law that is needed when examining claims in federal court with increased frequency and complexity, so the only method to adequately prepare for future cases is a common law examination of past decisions. Today's claims often involve parties from insurance underwriters, successors in interest ranging from the Spanish and

9. BLACK'S LAW DICTIONARY 697 (9th ed. 2009) (citing 68 AM. JUR. 2d Salvage § 2, at 270 (1993)).

10. *See* Bryant, *supra* note 5, at 65.

11. Lawrence J. Khan, *Sunken Treasures: Conflicts Between Historic Preservation Law and the Maritime Law of Finds*, 7 TUL. ENVTL. L.J. 595, 597-600 (1994).

12. Bryant, *supra* note 5, at 99-100.

13. *Id.* at 99.

14. Bryant, *supra* note 5, at 97, 99-100.

15. Khan, *supra* note 11, at 597-600, 630-39 (comparing the United States' role in acquiring historically significant lands since its first purchase of battlefields following the Civil War).

16. *Id.* at 640.

United States' governments to the descendants of Napoleon and the Spanish royal family. Today, a salvor, his company, his financiers, and his counsel, are tasked with international and federal law from which American courts use to decide highly contested disputes. There is a variety of federal law, including admiralty regulation, which applies to claims; additionally, there are international conventions protecting cultural property. Finally, there are state law remedies for disputes involving the salvage of shipwrecks in state territorial waters or under the jurisdiction of a state court. The applicable law, therefore, is decided by factors such as location (e.g., within a state's or country's territorial waters) and whether there is customary international law that the United States is trying to protect to the detriment of a group of likely profit-motivated salvors.

The Underwater Cultural Heritage project at the United Nations Educational, Scientific and Cultural Organization ("UNESCO") bases its standards for maritime salvage of culturally sensitive sites on the estimate that there are over three million shipwrecks globally.[17] UNESCO's core assertion is that these sites "can provide precious historical information . . . function[ing] as a time capsule, [and] providing a complete snapshot of the life on board at the time of sinking."[18] Proper attention and preservation methods can provide sustainable recovery of cargo that is not culturally sensitive while still protecting both the archeological and socially important aspect of these wreck sites. UNESCO also recognizes that many of these wrecks contain valuable cargo of interest for the arts and other cultural organizations, to the sum of some three thousand individual wrecks.[19] The nexus between the valuable and recoverable goods located at these sites and the historical and archeological importance of intact wrecks is where the most fracturing disputes lay; however, and quite often, disputes emerge between the salvor and wrecked ship's owner for the bounty once the treasure is found.

In 1982, the United Nations ratified UNESCO's draft of the United Nations Convention on the Law of the Sea ("UNCLOS").[20]

17. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO), *Wrecks* (Oct. 15, 2013), http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/the-underwater-heritage/wrecks/.

18. *Id.*

19. *See id.*

20. *The UNESCO Convention on the Protection of the Underwater Cultural Heritage* (Oct. 15, 2013), http://www.unesco.org/culture/underwater/infokit_en/files/gb-2001convention-infokit%2007-2009.pdf.

UNCLOS has more than 160 state parties, and it contains, among other important areas of maritime law, provisions on sovereignty at sea.[21] However, the treaty has no explicit provision regarding sensitive shipwrecks other than a general call for parties to protect underwater cultural heritage.[22] Notably though, the Convention expressly left open more specific international agreement through Article 303(4).[23] This opening in Article 303(4) allows the 2001 international agreement on the Convention on the Protection of the Underwater Cultural Heritage ("UCH") to emerge as a source of international agreement for the protection of culturally sensitive shipwrecks.[24] This agreement is "specifically dedicated to 'guaranteeing . . . preservation through a specific protection and cooperation framework . . . .'"[25] The United States is not a ratifying party to either UNCLOS nor UCH, thus American courts are not bound by this international obligation when addressing cases involving salvors' claims on ships containing cultural property or treasure when brought under the American law.[26] Many American courts, as well as the United States government, recognize the often-sensitive nature of salvaging a sovereign lost ship, and the defense of the owner's rights often is more vigorous in response to these cases. Of note, other major seafaring nations have also opted out of ratifying UCH, indicating a general consensus against international agreement regarding salvage operations–largely because of the burdensome prohibition in these agreements of commercial exploration.[27]

Even with this unclear arena of international law, courts in the United States are not without guidance when examining cases

21. *Chronological Lists of Ratifications of, Accessions and Successions to the [United Nations] Convention [on the Law of the Sea] and the Related Agreements as at 29 October 2013* (Feb. 15, 2014) (available at https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm) (notably, the United States is not a ratifying party to UNCLOS, but Spain became a signatory on January 15, 1997).

22. *Id.* at 10.

23. *Id.*

24. *Id.*

25. *Id.*

26. *See generally*, John Kimball, *Living with the Convention on the Protection of the Underwater Cultural Heritage: New Jurisdictions*, ODYSSEY MARINE EXPLORATION PAPERS 13 (2010) (available at http://unescoscience.blogspot.com/2010/08/is-unesco-underwater-heritage.html).

27. John Daly, *Is the UNESCO Underwater Heritage Convention Well Considered?*, UNESCO IN THE SPOTLIGHT: SCIENCE AND COMMUNICATIONS BLOG (Aug. 16, 2010, 10:38 AM), http://unescoscience.blogspot.com/2010/08/is-unesco-under water-heritage.html (included in the list of other non-ratifying nations is France, Germany, Japan, Russia, Sweden, and the United Kingdom.).

involving maritime salvage and proper ownership of sunken cultural property and treasure. In 1988, the United States Congress passed the Abandoned Shipwrecks Act ("ASA") in order to regulate salvage rights involving salvors in American jurisdictions.[28] The Abandoned Shipwrecks Act defines a salvor's ability to profit from discovering a lost or wrecked ship. Upon enactment, the government of the state in which the wreck is located retained a property interest in any shipwreck that was "embedded" in a state's submerged land.[29] However, the wording of the statute has been criticized as ambiguous and there is ongoing dispute between states interested in maintaining control over wreck sites and salvors claiming that individual states are failing to prove ownership under the law's requirements.[30] This dispute mimics the ongoing dispute between salvor's rights involving a large percentage of recovered property even though the original owner retains the property right, and the law of finds where salvors retain the property right in full.

More importantly than the Abandoned Shipwrecks Act, however, is the post-1985 assertion of extra-territorial jurisdiction by American courts regarding foreign shipwrecks and interested parties from the United States. This extra-territorial application brings the world's oceans, including those parts located outside the United States' sovereign territory, within the jurisdiction of American federal courts. Generally though, even if a court were to grant *in rem* jurisdiction, that is to assert jurisdiction over the salvaged property, based on the salvor's proof that some part of a wreck is in the United States, the court's reach would be effectively limited to the jurisdictional authority granted to it by Article III of the United States Constitution, which extends no further than the territorial boundaries of the United States and its territories.[31] However, when applying the law of salvage, and its international applicability, American courts have sometimes craftily circumvented the limits of state sovereignty by asserting that international law allows extra-territorial enforcement through a sort of international common law originating in both Ancient Rome and the Law of the Sea.[32]

Overall, these options of law for the deciding court provide

28. Abandoned Shipwrecks Act. PUB. L. NO. 100-298; 43 U.S.C. §§ 2100-06 (1988).
29. *Id.*
30. *Id.*
31. U.S. CONST. art. III, § 2 (Federal jurisdiction extends to controversies "to which the United States shall be a party . . . .").
32. *See* Brooke Wright, *Keepers, Weepers, or No Finders at All: The Effect of*

great leeway for a trial judge, and as such, the opportunity for a common law analysis of the application of law rather than a statutory analysis of how each law should be applied, if chosen.

IV. COMMON LAW APPROACH TO SALVAGE CLAIMS:

While there is a great deal of legal groundwork already established for American courts to draw from in decision-making during maritime salvage disputes, the overwhelming trend is to continue allowing claimants the approach of disputing whether the law of finds or the law of salvage applies to each specific case.

The law preferred by salvors in recent disputes is one of "finds"—under which the finder acquires good title against the original owner—effectively depriving the original owner of the benefit of the property.[33] The law of finds is preferred to the law of salvage in the eyes of the recovering party because the standard is much lower for total control and ownership of the salvaged property.[34] The substantive requirement on the salvor is to prove that the original owner has abandoned the property.[35]

Another option for the court is under the law of salvage, where the salvor has three elements to prove a right to compensation for recovering the property: (1) a voluntary effort on the part of the salvor; (2) peril or danger from which the salvage occurs; (3) success in salvage.[36]

In the realm of international law from which American courts may draw core principles, the UNESCO framework focuses squarely on the recognition that most of today's disputes are over shipwreck salvage operations involving long-lost ships, often carrying valuable cargo. However, these "ships of gold" also carry a frozen-in-time historical record of what happened the day that they sank; thus, the value lost to society in terms of archeological study may be much greater than American courts realize when applying more antiquated legal principles in deciding these cases.

A particular court may adopt whichever application of law in modern salvage cases it sees fit, but there are several overarching themes to the applicable precedent. First, these cases almost inva-

International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks, 33 TUL. MAR. L.J. 285 (Winter 2008).

33. *Id.* at 302.

34. *Id.*

35. *Id.*

36. *Id.* at 303.

riably involve the Abandoned Shipwreck Act[37] and the friction between the law of salvage and the law of finds. Second, international relations and the Foreign Sovereign Immunities Act influence how courts decide in this area of law.

a. The Abandoned Shipwreck Act:

The Abandoned Shipwreck Act ("ASA") provides a basis for state claims of ownership as well as a springboard for salvors to claim a reward for their salvage operations.[38] While the Act textually favors the law of salvage, it is common for salvage operators to start anew with each case and claim property rights under the law of finds; thus, rehashing otherwise settled law in disputes that should be easily decided by the principle of *stare decisis*. Courts, including the Fourth Circuit in the cases discussed in this note, generally recognize the law of salvage as a time-honored tradition in maritime law, recognizing that the incentivization structure of a salvage model is preferable over a finders-keepers policy when addressing public policy. However, the Fourth Circuit also re-hashes otherwise established law with each new case to the detriment of modern jurisprudence. With the law of salvage, there is a reward system based on actual need in a time of emergency. Ownership of lost property at sea remains vested in the original owner barring specific and rare circumstances of abandonment proved by a substantial evidentiary showing by the salvor-claimant.

i. The Requirement for Abandonment:

It is these circumstances of abandonment that are most often disputed. More specifically, salvors frequently claim that the salvaged property has been abandoned and therefore, the law of finds applies. In *Columbus*, the insurance underwriters paid out a one million dollar loss policy on the gold cargo, but the record reflected that the underwriters continued attempts at recovery of the lost treasure for more than one hundred years.[39] The Fourth Circuit clarified that maritime abandonment must come from a scenario where the property is left with no intention of the original owner returning. Without such intent, the property is not abandoned to

37. The Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-06.

38. *See id.*

39. Columbus-America Discovery Grp. v. Atlantic Mut. Inc. Co., 974 F.2d 450, 455 (4th Cir. 1992).

allow the law of finds as a governing principle of the case.[40]

In *Sea Hunt*, the Fourth Circuit continued its analysis regarding the aspect of an original owner abandoning property lost at sea.[41] Although the ASA fails to specifically define "abandonment," the court examined the legislative history to establish a high standard, especially in cases involving ships belonging to sovereign states.[42] Absent express abandonment, that is, the express statement that a sovereign is abandoning the property, the Fourth Circuit will not recognize property as abandoned for purposes of maritime salvage claims.[43] This principle is reinforced when, at the time of litigation, the original owner asserts a claim of ownership because of the recent discovery, which is often the cause of the litigation anyway.

Having thoroughly resolved the issue of whether property need be expressly abandoned for the law of finds to apply, the Fourth Circuit turned again to the difference between salvor's rights and the law of finds in the dispute over the Titanic.[44] In *Titanic*, the salvor moved to shift its status from a salvor-in-possession under the law of salvage, to a holder of free title under the law of finds.[45] After a lengthy analysis of the historical record of application of the two legal schemes, the court resoundingly announced that the law of salvage is a time-honored tradition in maritime salvage law, and the only applicable alternative to further the legitimate goals of maritime salvage.[46]

b. The Influence of Federal Agreements and Treaties on American Salvage Jurisprudence:

While the UNESCO efforts have largely been ignored in recent United States maritime salvage cases, some federal agreements and international treaties do affect American courts' examination of maritime salvage disputes. These treaties and pacts of mutual understanding impact the global status of the United States and serve as reciprocal arrangements for the treatment of wrecked American vessels. Therefore, it is in the United States'

40. *Id.* at 464.

41. *See* Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000).

42. *Id.* at 640–41.

43. *Id.* at 642.

44. *See* R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 435 F.3d 521 (4th Cir. 2006).

45. *Id.* at 533.

46. *Id.* at 530–35, 537.

interest to maintain the *status quo* as these analyses often involve territorial or sovereign issues ranging from coastal boundaries to the treatment of sunken ships of war. From this application, there is a clear strain between the relationship of the federal government and the states, especially which the states attempt to assert rights under the ASA.

i. Coastal Territorial Boundaries:

Pursuant to the ASA, a state has immediate claim to wrecks found abandoned in state-owned lands or waters.[47] In *Treasure Salvors*, Florida immediately asserted its claim with regard to the newly discovered treasure of the Atocha, but the state erred in failing to recognize that the shipwreck was located in an area that the federal government disputed Florida's claim to—with the federal government eventually succeeding in stripping Florida of its property rights.[48] Because of this shift in the state's seaward boundary, the salvor's contract with the state became moot, and the court recognized that the federal courts may seize salvaged property once owned by the states through the federal government's *in rem* jurisdiction.[49] Thus, unless a wreck is located in an area that is indisputably a state's territory, the federal government may intervene in any salvage operation potentially invalidating a salvage contract under the ASA.

ii. International Goodwill Towards American Friends and Allies:

The *Sea Hunt* case demonstrates the federal government's policy of maintaining goodwill with allied nations, even to the detriment of states' rights.[50] Pursuant to a 1902 treaty, the United States recognized the sovereignty of shipwrecks and military gravesites of the two Spanish ships, thus dissolving state claims emanating from the ASA for states in which Spanish Royal Navy ships sunk.[51] Under the 1902 treaty, Spain must have expressly abandoned the ships for Virginia to assert property rights over them under the ASA.[52] Spain's intervening claim was defended fervently by the United States in federal court, indicating a clear

47. 43 U.S.C. § 2105(c).
48. Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982).
49. *Id.* at 671–72.
50. *Sea Hunt, Inc.,* 221 F.3d at 634.
51. *Id.* at 642.
52. *Id.*

preference for the protection of the United States' relationship with Spain over the protection of Virginia's right to assert salvage rights over ships wrecked in its territorial waters.[53]

iii. Comity in American Courts:

In *Titanic*, R.M.S. Titanic, Inc. ("RMST"), the salvor initially recovered almost two thousand artifacts in 1987 that were transported to France for preservation.[54] Once the artifacts were in France, RMST obtained title from an administrator of the French Office of Maritime Affairs of the Ministry of Equipment, Transportation, and Tourism.[55] During the litigation in the United States, RMST moved for an American court to recognize the French administrative ruling on title to the artifacts.[56] Both the district court and the Fourth Circuit refused to recognize the French declaration of title under the principle of comity because the courts found that the French declaration lacked a proper adjudicative base. In addition, there were insufficient findings by the French administrator for an American court to adopt the French decision.[57] This recognition of the insufficient nature of a foreign process potentially places many non-American decisions regarding title of maritime salvage in question unless the foreign process sufficiently and without conflict replicates the process in the United States.

iv. The Foreign Sovereign Immunities Act:

The Foreign Sovereign Immunities Act ("FSIA") provides that foreign ships of war are largely immune from, among other things, arrest by American courts even in times of salvage.[58] This protection is an indication of a reciprocal relationship aimed at protecting American assets abroad—the agreement at its core protects foreign assets in the United States barring certain specific, and unrelated conditions that waive the protection of the Act.[59] In determining whether the property is immune under the FSIA, a court must examine whether the property was that of a foreign

53. *Id.*
54. *R.M.S. Titanic, Inc.*, 435 F.3d at 524.
55. *Id.*
56. *Id.*
57. *Id.* at 524–25.
58. 28 U.S.C. §§ 1610–11 (providing exceptions allowing for arrest of sovereign property in the United States including times of war and governments classified as state sponsors of terror).
59. *Id.* at § 1610(d)(1).

state, and whether the FSIA exemptions grant federal courts authority over the property. Additionally, if the property is being used for commercial purposes, the FSIA protections may not apply.[60] However, unless there is a sufficient showing of evidentiary support that the foreign ship was operating as a commercial vessel, the FSIA will likely apply, thus shielding the ship from salvage claims in American courts.

V. CASES:

a. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982)

One of the first issues addressed in modern salvage jurisprudence is whether in a territorial dispute between the federal government and a U.S. state, the federal government may assert its admiralty *in rem* jurisdiction to seize and arrest salvaged treasure from the disputed territory. This issue arises when there is disagreement as to where the state's territorial limit ends and the federal government's begins.

In the spring of 1971, treasure hunter Mel Fisher and his company, Treasure Salvors, discovered the lost wreck of the *Nuestra Senora de Atocha* ("Atocha"), a three hundred year old Spanish galleon that sank in stormy weather in 1622.[61] The Atocha carried a cargo of gold and emeralds from the Americas *en route* to King Phillip IV of Spain.[6263] Based on Fisher's research, Treasure Salvors located the wreck some forty nautical miles west of Key West, which the state of Florida claimed was within its territorial jurisdiction.[64] Immediately after the wreck's discovery, Florida notified Fisher that the state owned the wreck and its contents pursuant to a state law[65] that grants the state property rights to treasure or artifacts "which have been abandoned on state-owned lands [or waters]."[66] Additionally, Florida asserted the notion that public policy dictates the state's ownership in culturally significant prop-

60. *Id.*

61. *Treasure Salvors, Inc.*, 458 U.S. at 673–74.

62. *Id.* at 673.

63. To this day treasures are still discovered from the Atocha wreck–including an emerald and gold ring found in 2011 worth an estimated $500,000. *See Aparece Tesoro en el fondo del mar en Florida,* EL NUEVO DIA, http://www.elnuevodia.com/aparecetesoroenelfondodelmarenflorida-1000106.html, June 24, 2011, 11:41 a.m.

64. *Treasure Salvors, Inc.*, 458 U.S. at 673.

65. *See* Fla. Stat. § 267.061(1)(b).

66. *Treasure Salvors, Inc.*, 458 U.S. at 673-74.

erty when abandoned within its territory.[67]

When Florida became aware that Treasure Salvors had discovered the Atocha wreck site, the State threatened to arrest Mel Fisher and his team if he did not execute a proper salvage contract granting title and partial value of the recovered treasure to the state.[68] In response, Fisher agreed to a one-year salvage and recovery contract.[69] Florida's position was that even if its state law claim failed, it was in the best position as a matter of public policy to control such a significant discovery.[70]

Contemporaneous to the dispute between Fisher and Florida, proceedings between Florida and the United States to determine the "seaward boundary of submerged lands in the Atlantic Ocean and the Gulf of Mexico in which the State had rights to natural resources," pursuant to applicable federal law were ongoing.[71] The federal government won a judgment granting it ownership of the seabed upon which the wreck of the Atocha was discovered,[72] and that decision successfully shifted the boundary where Florida could claim territorial ownership of the shipwreck under state law inward from its previous position.

When Treasure Salvors learned of the United States' victory regarding the jurisdiction of Florida and the state's seafloor, it immediately sought and received declaratory judgment from the Southern District of Florida, granting Treasure Salvors title *in rem* to the wreck and all remaining treasure contained within, with the decision based on the federal governments admiralty *in rem* jurisdiction.[73] Treasure Salvors then sought and received a warrant to seize all existing artifacts from Florida, which were stored in the state's capital of Tallahassee; however, in response, Florida challenged the government's issuance of the *in rem* warrant, but lost in both the trial and appellate phases of the federal proceeding.[74]

At the final stage of litigation, the Supreme Court granted *certiorari* to decide whether the district court's issuance of a seizure warrant against Florida violated the Eleventh Amend-

67. *Id.*

68. *Id.* at 675 (Fisher retained the right to 75% of the value of the recovered treasure while the State of Florida retained title to the salvaged property).

69. *Id.* at 674 (Similar contracts were renewed for three successive years).

70. *Id.* at 673–74.

71. *Id.* at 675.

72. *Treasure Salvors, Inc.*, 458 U.S. at 676.

73. *Id.*

74. *Id.* at 679–80.

ment regarding the federal government's authority.[7576] The Supreme Court held that while Florida enjoys limited immunity from federal process under the Eleventh Amendment, its officers do not.[7778] Additionally, because this case involved a warrant served against officers of the Florida Archives and not against the state itself, the federal government successfully pierced the veil of immunity.[79]

At its most basic, the Supreme Court resolved a question of whether a United States federal court could "seize artifacts held by [the] state . . . and bring the property within its admiralty *in rem* jurisdiction," ultimately finding that the federal court may, in fact, assert its jurisdiction in such a scenario.[80] Therefore, a state may not assert sovereign immunity under the Eleventh Amendment as a shield against the federal government's seizing treasure contained within a state's territorial waters if those waters are disputed territory between the state and the federal government, and if the federal government wins the territorial dispute.[81] At this point, because of this dispute, the State of Florida owns no treasure recovered from the wreck of the Atocha.[82]

b. Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., et al., 974 F.2d 450 (4th Cir. 1992)

In the summer of 1857, the S.S. Central America sank to a depth of almost eight thousand feet amid a hurricane some 160 miles off of the South Carolina coast.[83] Aboard the ship was a cargo of gold valued at more than two million dollars, which was insured by both American and British insurance companies.[84]

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75. *Id.* at 682.

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

77. *Treasure Salvors, Inc.*, 458 U.S. at 682.

78. U.S. CONST. amend. XI.

79. *Treasure Salvors, Inc.*, 458 U.S. at 682.

80. *Id.* at 683.

81. U.S. CONST. amend. XI.

82. There remains a separate inquiry, not addressed by this Note, as to Spain's involvement into the Atocha wreck as ship was a Spanish flag ship.

83. Columbus-America Discovery Grp. v. Atlantic Mut. Ins. Co., 974 F.2d 450, 455 (4th Cir. 1992).

84. The S.S. Central America traveled with 30,000 pounds of gold aboard. At a modern estimate price of two thousand dollars per ounce, this cargo would be worth $960,000,000 today. This tremendous loss is connected with the American economic Panic of 1857. *Id.*

Immediately following the S.S. Central America's sinking, its insurers began attempts to recover the lost gold.[85] As quickly as two weeks after the disaster, insurers began negotiating with salvage companies to find and retrieve the cargo.[86] Moreover, in 1858, Atlantic Mutual Insurance Company, a party-insurer, contracted with salvor Brutus de Villeroi to recover the gold in exchange for seventy-five percent of the recovery plus expenses.[87] In the 1970s, because the wreck remained undiscovered, several salvage companies began contacting the insurance underwriters to negotiate salvage contracts with them–among these salvage companies was Columbus.[88] No contract ever came from the negotiation.[89]

In 1988, the Columbus-America Discovery Group ("Columbus") discovered the wreck.[90] From the 1988 until 1991, Columbus recovered gold bullion from the site, but not until 1991 did it request preemptive declaratory judgment *in rem* that it was the rightful owner of the treasure to quiet any other claims of ownership.[91] However, once Columbus filed the initial request for judgment, the original insurance underwriters of the cargo intervened by asserting ownership of the gold.[92] The position of the insurers was that because they had paid claims on the loss, the recovered gold was their property.[93]

The trial court heard testimony on Columbus' claim that the insurers abandoned their interest in the gold, and ultimately found that the insurers had affirmatively abandoned any interests.[94] On appeal, the Fourth Circuit reversed in a proceeding that dealt primarily with error involving the abandonment of the pertinent claims by the intervening insurers.[95] The appeals court held that Columbus failed to meet its burden to show that the insurance underwriters indeed abandoned their claims.[96]

In its analysis, the Fourth Circuit recognized that the common law approach to salvage was that when ships or cargo were lost at sea, the salvors are entitled to liberal salvage awards

85. *Id.* at 456-57.
86. *Id.* at 457.
87. *Id.*
88. *Id.*
89. *Columbus-America Discovery,* 974 F.2d at 457.
90. *Id.* at 455.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 456.
95. *Columbus-America Discovery,* 974 F.2d at 456.
96. *Id.*

though the original owners still retain ownership interest in the property.[97] However, the Fourth Circuit also referenced the common law doctrine of finds; which, at its most basic, states that he who finds treasure may keep it.[98] This clear conflict of doctrine is what American courts are tasked with resolving in similar cases today. American federal courts sitting in admiralty jurisdiction favor the salvage law model over the law of finds because the latter model provides benefit to what the courts have described as "unsavory conduct," while discouraging those with legitimate interests in the discovery and salvage of lost property.[99] Furthering the courts discussion on its preference for the law of salvage, it asserted that the law of finds is almost exclusively "applied to previously owned sunken property only when that property has been abandoned by its previous owners . . . [a]bandonment in this sense means much more than merely leaving the property."[100]

Actual abandonment in the maritime sense requires more than an owner or agent leaving a sinking vessel at a time of disaster, for that would open the courts to frivolous claims in all waterborne jurisdictions. Here, the Fourth Circuit turns to a contemporary Fifth Circuit decision stating that "the act of deserting property without hope of recovery or intention of returning to it" is abandonment for application of the law of finds.[101] To meet such a rigid criterion, a wreck must either be expressly abandoned, or be so ancient for there to be no apparent successor in interest.[102] Therefore, aside from a salvor's showing of clear and convincing evidence that there was actual abandonment, the law of finds is an unsound principle on which to base a salvage claim to a wreck.

c. Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000)

In the eighteenth and nineteenth centuries, the Spanish Royal Navy lost several ships including La Galga and the Juno.[103]

97. *Id.* at 459.

98. *Id.* (citing M. NORRIS, BENEDICT ON ADMIRALTY: THE LAW OF SALVAGE (7th ed. Rev. 1991)).

99. *Id.* (quoting Sofaer, J. in Hener v. United States, 525 F.Supp. 350, 356 (S.D.N.Y. 1981)).

100. *Id.* at 459.

101. *Columbus-America Discovery,* 974 F.2d at 461 (citing Nunley v. M/V Dauntless Colocotronis, 863 F.2d 1190, 1198 (5th Cir. 1989)).

102. *Id.*

103. Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634, 638 (4th Cir. 2000).

La Galga was a fifty-gun frigate tasked with escorting merchant ships from the new world to Spain, and Juno was a thirty-four gun frigate tasked with carrying military servicemen and their families from Africa to the Americas.[104] The two ships sank in bad weather off the Virginia coast in 1750 and in 1802. In 1902, the United States and Spain signed a Treaty of Friendship and General Relations, which in pertinent part protects shipwrecks and military gravesites belonging to the two countries from salvage for profit.[105]

After recognition that these wrecks may be present, and to protect its interests, Virginia asserted ownership of the wrecks under the Abandoned Shipwreck Act of 1987[106] and issued salvage permits to Sea Hunt as the exclusive salvor, ignoring the Treaty of Friendship with Spain.[107] To ensure its right to salvage the wreck, Sea Hunt initiated a declaratory judgment[108] in federal court utilizing the court's maritime *in rem* jurisdiction.[109] However, Spain too asserted ownership of the wrecks using the Treaty of Friendship as support and asked the United States to intervene on Spain's behalf.[110] Spain claimed, via the United States' intervention, that under the Treaty of Friendship and General Relations, a sovereign must expressly abandon the ships in order for a salvor to win on its current claim of title.[111] The United States District Court for the Eastern District of Virginia, under the law of finds, found that Spain had expressly abandoned the 1750 shipwreck but retained title to the 1802 shipwreck, thereby denying claim to the wreck to Sea Hunt for the latter wreck but granting the award for the former wreck.[112] Both Spain and Sea Hunt appealed[113], and the Fourth Circuit held that Spain was required to expressly abandon a shipwreck in order for Virginia to acquire title to it under the ASA. Therefore, Sea Hunt retained no right to either shipwreck.[114]

104. *Id.* at 638-39.
105. *Id.* at 638.
106. Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-06 (1994).
107. *Sea Hunt, Inc.*, 221 F.3d at 639.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 640.
112. *Id.*
113. Because of the procedural complexity of this case involving interveners and multiple interested parties, it is suggested that the reader review *Sea Hunt, Inc.*, 221 F.3d at 634-641, for added clarity.
114. *See Sea Hunt, Inc.*, 221 F.3d at 634.

Under the Abandoned Shipwreck Act, title is presumptively transferred to a state of the United States for any abandoned shipwreck that "is on or embedded in the submerged lands of a [s]tate."[115] Additionally, "title is automatically transferred to the [s]tate in whose submerged lands the shipwreck is located."[116] Finally, the term "submerged lands" apples to "coastal waters three miles from shore."[117] Abandonment is the key element in this case because if Sea Hunt could have proven that Spain had indeed abandoned or waived its right to the ships, it would have retained title by grant from Virginia.

There is no statutory definition for "abandonment" in the Abandoned Shipwreck Act but an examination of the Act's legislative history establishes Congress' intent was for a separate standard for sovereign shipwrecks versus shipwrecks of privately owned vessels; thus, the lower standard of implied abandonment would not be appropriate when a sovereign nation asserts continued ownership of a shipwreck, military or otherwise.[118] Finally, as a general principle of admiralty law, when "an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts."[119] In its decision, the Fourth Circuit recognized that the overwhelming trend of law presented by the United States' strenuous defense of Spain's ownership of these wrecks overcomes any claim that express abandonment may have occurred based simply on the passage of time between the shipwreck itself and its subsequent discovery.[120]

Therefore, sovereign wrecks are vulnerable to the requirement that a foreign entity expressly abandon the vessel prior to salvage. Should a salvage operation file an admiralty *in rem* motion for declaratory judgment and be met with a sovereign claim that the ship was never abandoned, the salvor must establish abandonment by a clear and convincing standard.

d. R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 435 F.3d 521 (4th Cir. 2006)

Subsequent to Robert Ballard's twentieth century discovery of

115. *Id.* at 640 (citing 40 U.S.C. §2105(a)).
116. *Id.*
117. *Id.*
118. *Id.* at 641.
119. *Id.* at 634 (citing Columbus-America Discovery Group v. Atl. Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992)).
120. *Id.* at 640.

the wreckage of the R.M.S. Titanic ("Titanic"), litigation ensued regarding salvage rights and property interests involving the United States, France, and Ballard's company. The Titanic sank in April, 1912, to a depth of more than 12,000 feet in the north Atlantic.[121] The shipwreck was first discovered in 1985 by Ballard's group of American and French explorers, and the first access to the wreck occurred in 1987.[122] After 32 dives, approximately 1800 artifacts were recovered and taken to France for stabilization, conservation, and restoration; and, in 1993, the French government, through an administrator of the Office of Maritime Affairs of the Ministry of Equipment, Transportation, and Tourism, awarded the RMST salvage operation title to the artifacts.[123]

Successively, RMST filed an *in rem* action in the Eastern District of Virginia against the Titanic wreckage on August 26, 1993, which established that RMST was the salvor-in-possession[124] of the artifacts already retrieved from the Titanic as well as those not yet recovered.[125] Subsequent to this declaratory judgment there has been ongoing litigation surrounding the Titanic wreckage.[126]

The controversy most on point regarding the salvor's rights is the above-referenced from 2005 revolving around the Ballard's attempt to have a United States federal court recognize the French court's order granting title to salvaged property.[127] Since the discovery of the Titanic wreckage, RMST functioned as the sole salvage operator of the wreck.[128] However, not until February 12, 2004, did RMST file a motion for declaratory judgment asking for an American court to grant it title "'to all the artifacts (including portions of the hull) which are the subject of this action pursuant to *the law of finds*' (emphasis added) or, in the alternative, a salvage award in the amount of $225 million."[129] Additionally,

121. R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 435 F.3d 521, 524 (4th Cir. 2006).

122. *Id.*

123. *Id.* (RMST sought a French declaration of ownership because the artifacts were already located within French sovereign territory for restoration and preservation).

124. Salvor-in-possession is a term describing R.M.S. Titanic, Inc.'s status as the court-designated exclusive salvor for the wreck, but subject to extremely strict controls by the presiding judge.

125. *R.M.S. Titanic, Inc.*, 435 F.3d at 542.

126. *Id.*

127. *Id.*at 523.

128. The wreck of the R.M.S. Titanic is in international waters. *Id.* at 524.

129. *Id.*

excluded from this motion were some 1800 artifacts salvaged in 1987 and taken to France because the French government had already awarded RMST title to that property. RMST did, however, request that the American court declare the French action valid in that RMST held proper title to the 1987 artifacts.[130]

In 2004, the federal district court, "(1) refused to grant comity and recognize the decision of a French administrator awarding RMST title to the 1987 artifacts, and (2) rejected RMST's claim that it should be awarded title to the artifacts recovered since 1993 under the maritime law of finds."[131] The rationale of the district court was that it would be improper to allow RMST to become the owner of the property while it continued as the salvor-in-possession.[132] From this decision, RMST appealed the district court's order claiming that the lower court erred by failing to "grant comity" to the French decision and by failing to award title under the maritime law of finds.[133]

In its holding on RMST's claim of error regarding the district court's denial to apply the principle of comity to the French decision, the Fourth Circuit observed that the district court "implicitly concluded that it had in rem jurisdiction over the 1987 artifacts or jurisdiction to issue a declaratory judgment as to them."[134] However, as of August 1993, when this procedure was commenced, the 1987 artifacts had "already been separated from the Titanic and transported to France."[135] Thus, "[b]ecause the 1987 artifacts were not in the Eastern District of Virginia; because they were not named as the *in rem* defendant in this case; and because they were not otherwise voluntarily subjected to the jurisdiction of the district court, the district court did not have *in rem* jurisdiction over them. To exercise *in rem* jurisdiction over a *res*, the court must have the *res* within its jurisdiction."[136] The error below, according to the Fourth Circuit, was that the trial court failed to separate the 1987 artifacts from the wreck itself; therefore, the Eastern District of Virginia may not assert admiralty *in rem* jurisdiction over artifacts located outside of its territory and within a

130. *Id*.

131. *Id.* (citing R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel Believed to be the R.M.S. Titanic, 323 F. Supp. 2d 724, 744-45 (E.D. Va. 2004)).

132. *Id.* at 525.

133. *R.M.S. Titanic, Inc.*, 435 F.3d at 527-30.

134. *Id.* at 528.

135. *Id.*

136. *Id.* at 529.

sovereign state.[137]

In addressing the remaining artifacts that RMST moved for title under the law of finds, the Fourth Circuit contrasts the ten-year history of RMST serving as the salvor-in-possession under the law of salvage and RMST's new position that it is entitled to the property under the law of finds.[138] The court recognized that "the law of salvage and the law of finds "'serve different purposes and promote different behaviors.'"[139] In principle, the "law of salvage gives potential salvors incentives to render voluntary and effective aid to people and property in distress at sea . . . [and] without promise of some remuneration, salvors might understandably be reluctant to undertake the often dangerous and costly efforts necessary to provide others with assistance."[140]

However, the law of finds differs from the law of salvage. The law of finds is rooted in the principle that he who first finds the object obtains title over the "un-owned property that [he] has reduced to [his] possession."[141] This finders-keepers mentality has limited historical application; thus, "apply[ing] only to objects found in the state of nature . . . and could thus be reduced to possession by an original 'finder'."[142] Additionally, the Fourth Circuit recognized that "[c]ourts . . . have traditionally presumed that when property is lost at sea, title remains with the true owner, regardless of how much time has passed."[143] Finally, "under a regime where the law of finds were to be applied freely, one who would come upon a lost ship on the high seas would be encouraged to refrain from attempting to save it and to entertain the idea of taking the valuable cargo for himself as a finder . . . a free finders-keepers policy is but a short step from active piracy and pillaging . . . [therefore] the law of finds is applied sparingly–only when no private or public interest would be adversely affected by its application."[144]

Responding to this contrast between the law of salvage and the law of finds, the Fourth Circuit remanded the case with

137. *Id.* at 530.

138. *Id.*

139. *R.M.S. Titanic, Inc.*, 435 F.3d at 531 (quoting R.M.S. Titanic, Inc., 323 F. Supp. 2d at 736-37; *see also* Herner v. United States, 535 F. Supp. 350, 354-59 (S.D. N.Y. 1981)).

140. *R.M.S. Titanic*, 435 F.3d at 530.

141. *Id.* at 532.

142. *Id.* (quoting 3A *Benedict on Admiralty* § 158, at 11-16).

143. *Id.* (citing Columbus-America Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 461 (4th Cir. 1992)).

144. *Id.* at 533.

instructions for the district court to decide the matter under the law of salvage, noting that shifting RMST's role at such a late date in the salvage would go against the "chivalry" intended by the law of salvage itself, and would invalidate the trust that the original court put in RMST when it was established as the salvor-in-possession.[145]

In the end,[146] the Fourth Circuit declared that the district court lacked proper maritime *in rem* jurisdiction for property held extra-territorially by a sovereign, and continued its position that the law of salvage should be applied in maritime cases barring extreme circumstances indicating express abandonment by the wrecked ship's original owner.[147]

e. Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159 (11th Cir. 2011)

The final case in this line of American opinion involves a shipwreck discovered some one hundred miles off of the European coast; Odyssey Marine Exploration, Inc. ("Odyssey"), the salvor; the Republic of Peru; the Kingdom of Spain; and some twenty-five descendants of Spanish royalty or crewmembers of the wrecked frigate.[148] In March of 2007, Odyssey "discovered a shipwreck in international waters 100 miles west of the Straits of Gibraltar at a depth of 1,100 meters . . . ."[149] After surveying the wreck site, Odyssey began to recover objects from the site including some 594,000 coins.[150]

In 1804, the *Nuestra Senora de las Mercedes* ("Mercedes"), was a part of a group of ships traveling from Lima, Peru, to Cadiz, Spain, by way of Montevideo, Uruguay.[151] Aboard the Mercedes at the time of its sinking was some "900,000 silver pesos, 5,806 gold pesos, and almost 2000 copper and tin ingots . . . [as well as] two obsolete bronze cannons . . . being returned to Spain for reuse of the bronze . . . ."[152] Additionally, the Mercedes carried cargo for

145. *Id.* at 538.

146. Litigation arising out of the salvage of the R.M.S. Titanic is ongoing, with the most recent decision related to this Article coming as R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, Its Engines, Tackle, Apparel, Appurtenances, Cargo, Etc., 804 F. Supp. 2d 508 (E.D. Va. 2011).

147. *Id.*

148. Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 1166 (11th Cir. 2011).

149. *Id.*

150. *Id.*

151. Id. at 1167, 1173.

152. Id. at 1172-73.

private individuals transporting items from the Americas to Spain in a time of war.[153] Just after the Mercedes arrived in Peru, France and Great Britain, no longer delayed by treaty, returned to war[154] and the King of England ordered British naval vessels to detain and return any captured Spanish ships to English ports.[155] When the formation including the Mercedes encountered British warships in battle, the Mercedes quickly exploded and sank.[156]

Soon after Odyssey began to bring up salvage from the wrecked remains of this nineteenth-century vessel, it filed in the Middle District of Florida[157] both an *in rem* admiralty complaint against the ship, and for an arrest order covering any and all recovered artifacts from the wreck.[158] At the time of filing, Odyssey did not yet know, nor could it disclose the identity of the found vessel.[159] The Middle District granted Odyssey's motion for arrest and appointed Odyssey as the substitute custodian of the shipwrecked vessel, thus relieving the Office of the United States Marshall from duty in securing the salvaged items when they were recovered from the wreck site.[160]

In response to the Middle District's grant of Odyssey's arrest order, and because rumors began to emerge that the ship found may have been the Mercedes, Odyssey faced challenges from both Peru and Spain, as well as the descendants of the ship's crew and the Spanish royal family;[161] however, once the vessel was recognized as the Mercedes, Spain filed a motion to dismiss Odyssey's claims based on Spain's sovereign immunity given that the Mercedes was a frigate of war flying a Spanish Royal Navy flag when it sank.[162] Spain's claim was based on immunity from judicial arrest

153. *Id.* at 1172.

154. *Odyssey Marine Exploration, Inc.*, 657 F.3d at 1173.

155. *Id.*

156. *Id.*

157. Jurisdiction in the Middle District of Florida, according to Odyssey Marine's Opening Appellate Brief in this matter, is proper because "U.S. Courts sitting in admiralty have long exercised in rem jurisdiction over shipwrecks located in international waters, adjudicating both salvage claims and assertions of ownership." Appellant's Opening Brief at xiv, Odyssey Marine Exploration, Inc. v. The Kingdom of Spain, No. 10-10269J, 2010 WL 4279754, at *1 (11th Cir. 2010) (citing Mason v. The Blaireau, 6 U.S. (2 Cranch) 240, 240 (1804)); Houseman v. Schooner North Carolina, 40 U.S. (14 Pet.) 40, 48 (1841); R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 961 (4th Cir. 1999)).

158. *Odyssey Marine Exploration, Inc.*, 657 F.3d at 1166.

159. *Id*. at 1167.

160. *Id.*

161. *Id.* at 1168.

162. *Id.*

guaranteed under federal law in the Federal Sovereign Immunities Act ("FSIA").[163] Both at the district court and in the Eleventh Circuit, Spain prevailed because the Mercedes was a Spanish Royal Naval Frigate at the time of its sinking, and as such, the "*res* is 'immune from . . . arrest' in United States courts . . . ."[164] Thus, the Mercedes was, and is, the sovereign property of Spain.

Among several procedural points on appeal, Odyssey, Peru, and the twenty-five descendants, argued that the district court erred by "finding the *res* is the Spanish warship the *Mercedes* and holding the FSIA grants it sovereign immunity." (emphasis in original)[165]

In its analysis, the Eleventh Circuit addressed the argument regarding the *res* in two main points: (1) is the shipwreck that of the Mercedes; and if so, (2) is the Mercedes protected under the FSIA from American arrest.[166] For the first point, the Eleventh Circuit analyzed the history of the Mercedes and the "facts surrounding its final mission."[167]

The Eleventh Circuit used the historical accounts of the Mercedes from survivors of the sinking, as well as the estimated location from the Kingdom of Spain for the wreck, to determine that because no other similar vessel sank in that zone during that time period, the wreck discovered by Odyssey must be that of the Mercedes.[168] However, Odyssey argued, unsuccessfully, that because its recovery in salvage is not equal to the cargo of the Mercedes, and that the wreck was not a whole ship, there is no distinguishing characteristic to positively identify the ship.[169]

The second question examined by the Eleventh Circuit is that of whether the FSIA applies to the wreck of the Mercedes. This determination is based on a two-part test: (1) if the "*res* at issue is the property of a foreign state," and (2) whether the United States federal courts have jurisdiction over the *res* under the FSIA.[170] The relevant section of the FSIA is section 1609 which states: "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune

163. *Id.*; Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (2012).
164. *Odyssey Marine Exploration, Inc.*, 657 F.3d at 1166.
165. *Id.* at 1168.
166. *Id.* at 1171.
167. *Id.*
168. *Id.* at 1173-74.
169. *Id.* at 1174.
170. *Odyssey Marine Exploration, Inc.*, 657 F.3d at 1175.

from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this [C]hapter."[171] While the Mercedes does not lie in the territorial waters of the United States, a salvor may constructively avail himself of jurisdiction in the United States by bringing part of the *res* into the United States' sovereign territory.[172] Here, Odyssey brought portions of the recovered cargo from the Mercedes into Florida, thus availing itself of Florida's federal jurisdiction.[173] However, "[b]ecause this is an *in rem* action based on the arrest of sovereign property, section 1609 provides the Mercedes with presumptive immunity from arrest.[174]

For Odyssey to overcome this finding, it was tasked with applying an exception either from section 1610 or 1611 of the FSIA.[175][176] The appellate court plainly found that Odyssey failed to meet its burden to prove either exception, but further discussed the commercial activity exception to the FSIA because Odyssey asserted such an exception in response to the court's findings.[177]

The FSIA grant for immunity for ships on the high seas references other international agreements to which the United States is a party when discussing the relevant immunity.[178] Specifically, the 1958 Geneva Convention on the High Seas provides "complete immunity from the jurisdiction of any State other than the flag State . . . [for] government non-commercial service."[179] Included in the FSIA is a definition for commercial service that includes "[e]ither a regular course of commercial conduct or a particular commercial transaction or act."[180] Given that the Mercedes carried cargo for private individuals, Odyssey asserted that its activities, while still a warship of the Royal Spanish Navy, included private

171. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1609.

172. *Odyssey Marine Exploration, Inc.*, 657 F.3d at 1175 (citing California v. Deep Sea Research, Inc., 523 U.S. 491, 494 (1998)).

173. *Id.* (citing R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 967-69 (4th Cir. 1999) (concluding a shipwreck found in international waters can "constructively" be considered within the jurisdiction of the district court, although the district court's sovereignty over the wreck is a " 'shared sovereignty,' shared with other nations enforcing the same [law of all nations]")).

174. *Id.* (second emphasis omitted).

175. *Id.* at 1175-76.

176. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1610-11 (Section 1610 preserves a court's right to attach the property of a foreign sovereign in the United States if such property is used for commercial purposes and Section 1611 allows Presidential override of judicial arrest).

177. *Odyssey Marine Exploration, Inc.*, 657 F.3d at 1176.

178. *Id.* (citing Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1609).

179. *Id.* (citing Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11).

180. *Id.* (citing Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(d)).

and commercial activity totaling seventy-five percent of its lost cargo, thus coming within the exception of the FSIA.[181]

The Eleventh Circuit recognized that there was a trove of private material being transported aboard the Mercedes at the time that it sank, but found that such material was still sovereign in nature because citizens of Spain were transporting it aboard a sovereign vessel during a time of war.[182] Because Spain was acting in a sovereign manner in transporting the cargo, and because the Mercedes was a Spanish Royal Navy vessel, the FSIA preempted any claim by Odyssey that it should be granted ownership of the cargo of the Mercedes via an *in rem* action in an American court.[183]

VI. CONCLUSION:

Today's salvors have an increasingly complex maze to navigate given United States' courts routinely uncertain choice of doctrine to apply to disputes based on preference rather than established jurisprudence. No longer is there a system of finder's keepers, nor is there a clear law of salvage. A claimant must navigate an unsettled area of law that involves international, federal, state, and common law elements that frequently intertwine amongst themselves.

A common law analysis of how courts repeatedly tasked with addressing this issue is the principle way of developing a sound method to litigating future disputes. From the cases examined in this note, several key principles of law emerge for anyone moving forward in a similar case. Courts today require clear and convincing evidence of abandonment for the law of finds to apply in maritime salvage cases; the law of salvage is a time-tested method to both recover lost property and reward those who absorbed the risk during the salvage operation; and finally that the federal government is not always on the side of the states when international relationships are thrown into a salvage dispute. While some of these principles are more likely to emerge in future disputes, this note only draws from the Fourth, Fifth, and Eleventh Circuits, which all have already existing jurisprudence in the arena of maritime salvage law. There is no clear indication as to what an outcome may be should a case be brought in a less experienced Circuit. Additionally, the Fourth Circuit has been noticeably restrained in advancing its body of law beyond a basic analysis

181. *Id.* at 1177.
182. *Id.*
183. *Odyssey Marine Exploration, Inc.*, 657 F.3d at 1178.

comparing the law of finds and the law of salvage–opening the door for more complex disputes in areas of relative first impression before the court.

Thus, with increasing international involvement in both the realms of commerce and cultural preservation, American courts may well shift again to focus more on international norms rather than the established jurisprudence of the past thirty years; thus, a salvor must proceed at his own peril.